

CONSIDERATIONS FOR HUMAN RIGHTS FACT FINDING BY NGOs^[1]

By Julie Mertus

Selection of Fact-finders

- “ Fact-finders should be independent, objective and impartial in the sense that they have not taken a political stance or exhibited a bias against the government or issue being investigated – except for a bias in favor of human rights.
- “ Fact-finders should have had training in interviewing and data collection, as well as relevant expertise on the geographic and subject matter to be investigated (and/or additional training should be offered.)
- “ While language skills maybe an important consideration, the neutrality and fact-finding expertise of the mission should not be sacrificed in order to find someone who speaks the language of the country to be investigated.
- “ Interviewers and translators should be culturally appropriate; where a translator or interviewer of a certain background would be unlikely to elicit a full and honest answer, others should be assigned.
- “ Where evidence of physical abuse is to be collected, the NGO may wish to consider including a health care professional on the mission.
- “ Where women are to be interviewed and their responses may contain information about rape and other acts of violence against women, the NGO should consider sending an all-woman mission (translators and interviewers) that is specifically trained in listening to women victims/survivors of violence and that is culturally appropriate.
- “ Big name experts may lend prestige and enhance the credibility of a mission, but they are less necessary where the sending NGO has already established its own credibility on human rights fact-finding in general and on the particular crisis.
- “ Any person appointed a member of the fact finding mission should not be replaced during the term of the mission except for reasons of incapacity or gross misbehavior. Replacements for other reasons may undercut the mission’s perceived legitimacy.

Collection of Evidence

- § The investigating NGO should define the scope of their study and the authority of their mission (i.e., set the *terms of reference*)^[2]; the *terms of reference* should not be subject to later negotiation by the receiving government.
- § Within the *terms of reference* of the mission, fact-finders should be free to collect evidence from diverse sources, including interviews with: victims and their families; witnesses; human rights, religious, and social activists; scholars; journalists; community leaders; police officers and prison guards; and government officials. Documentary evidence collected may include; trial records; police and prison records; newspaper

accounts; video tapes made by activists and journalists; photographs; medical certificates; relevant laws; and government documents. In addition, the fact-finder should use their own eyes and ears to observe the general human rights conditions. (Are there tanks on the streets? Do police all wear bullet proof vests and carry machine guns? Are police stopping and harassing people on the streets?)

§ Fact-finders should seek out direct sources of evidence and not rely solely on hearsay (someone saying what someone else said) except as background information, leads to other evidence, and/or corroboration for other evidence.

§ *All evidence should be corroborated.* Questions that get at corroboration include: “Who else did you see there?” (and then check to see if those people saw the witness); and “How do you know this?” (and then check on the witness; source of information.¹³¹) Sources of corroboration may include: credible reports of other governmental and nongovernmental organizations; interviews with other witnesses; complaints by others about similar forms of abuse (thus demonstrating the substantial likelihood of a pattern and practice of abuse); and physical evidence, such as documentation of physical abuse (photographs, video tapes, direct examination of bruises, etc.), an on-site inspections of a building, and the digging up of a grave site.

§ Where the state concerned will provide adequate guarantees of non-retaliation against individual petitioners, witnesses and their relatives, evidence may be gathered in public sessions, such as open tribunals; where possible, the state may be given an opportunity for questioning and/or response.

§ Fact-finders may use pseudonyms for witnesses or withhold information which, in their judgement, may jeopardize the safety or well being of those giving testimony or of third parties, or which in its opinion is likely to reveal sources.

On-Site Interviews and Inspections

§ The sending organization should draw up guidelines on collection of evidence and goal of mission, and prepare members of the mission with background information and any specialized training that may be necessary, including training in the ethics of interviewing.

§ The fact-finding mission should draw up its own a program of work, including witnesses it wishes to interview at the site of the investigation, places it wishes to visit, and the sequence, timing and location of its activities on the site; although the program should remain flexible, it should operate as a guiding force for on-site inspections.

§ Where possible, the sending NGO should inform the country of the mission; however, the NGO may wish to avoid disclosing all information about the mission, in order to prevent state officials from "preparing" certain witnesses or sites to be investigated.

§ The fact-finding mission should insist on interviewing any persons it deems necessary, even if incarcerated. When interviewing prisoners, the fact-finder should be careful to respect their rights as a prisoner. Conversations between human rights fact-finders and prisoners generally are not considered privileged and, thus, the interviewer could be

called to testify about any conversation with a prisoner. Accordingly, fact-finders should avoid asking questions about any specific pending case involving the detainee.

- § The fact finding mission may operate as a whole or in smaller groups designed to conduct specific parts of the investigation; where the nature of the information being gathered is personal and intimate, the mission should consider sending only a single person (and possibly an accompanying translator).
- § Witnesses should be interviewed separately and without an audience, to avoid any chance of witnesses "performing" for each other and learning the facts about the case from one another.
- § Interviewees should be told in advance the nature and purpose of the mission, including information about the sending NGO, whether and when a report will be written and how it will be available, and to whom their interview may be made public.
- § Interviewees should be asked in advance whether they have any questions about the investigation and whether they wish to remain anonymous. (Government officials acting in their official capacity, however, should not have this option).
- § In discussing any risks associated with testifying, the interviewer should be open and honest. The interviewer should not make any promises he/she cannot keep. "The key to your success...is your honesty. Be certain that everything you tell a witness is truthful....Do not promise a witness that you will relocate him or her if threatened unless that if something you can do..."^[4]
- § Interviews generally should be conducted through a series of open, *nonleading questions* (questions that don't suggest an answer). For example, instead of saying "where were you beaten?", say "what happened?" and "what happened next?" and "describe that..." *Leading questions* are generally only appropriate when dealing with *hostile* interviewees (i.e. people on "the other side", such as government officials). For example, after a government official refuses to tell you anything about a case, you may begin with "Isn't it true that...?" or "Are you denying that...?"
- § When a cooperating witness has difficulty speaking (because of fear, lack of verbal skills, reluctance to remember, etc.), more pointed questions may be needed to discover what happened. However, *do not put words in an interviewees' mouth*.
- § Avoid suggesting answers or feeding information about the case to the witnesses.^[5] Do not divulge what other witnesses have said unless there is compelling reason to do so and witness identity can be protected. Similarly, do not suggest answers through showing the witness physical evidence (although in some cases, it would be appropriate for the witness to identify physical evidence).
- § Props may be used to help the witness provide a more detailed description; photographs of military uniforms, types of weapons, and maps and drawings of the area may be particularly helpful.
- § Interviewers should ask questions that help them determine the credibility (whether the witness is honest and truthful) and reliability (whether they are mistaken) of witnesses.

Credibility questions relate to the witnesses' bias, self-interest and other factors that may prevent them from telling the truth. Reliability questions relate to the physical and mental condition of the witness, the conditions under which they made the observation, and other factors that could lead to mistake.

- § Where it is clear in advance that questioning a witness/victim/family member would cause grave injury (psychologically or physically), and that protection, social services, or other needed care would not be available, that person should not be questioned.
- § Victims of torture, sexual violence and other forms of gross human rights violations should not be interviewed unless support mechanisms exist and are available (such as the presence of a supportive relative). Women who may talk about rape or other forms of violence against women should not be interviewed unless appropriate social services are available; where an interviewer finds that her questioning has (re-) traumatized the interviewee, she should ask the interviewee's permission to refer her to social services.
- § Fact-finders are under an ethical obligation to end their questioning should the witness break down under the stress or otherwise become unwilling or unable to continue with informed consent.
- § Fact-finders should make careful notes of all interviewees, including general impressions of demeanor and credibility of witnesses and the circumstances in which the interview was conducted (which they may not remember late); unless safety considerations dictate otherwise, a careful list of sources and contact information should be maintained.
- § Fact-finders should consider carefully whether photography, a tape recorder or other recording device may intimidate witnesses, violate their privacy or cultural norms, or cause them to "perform."
- § Where the fact-finders discover information and issues outside their mandate (which happens frequently), they should refer such information to another organization that could take action. For example, a human rights mission focused solely on children may discover violations against women, or a mission focused on civil and political rights may discover gross violations of economic and social rights.
- § Where the on-site investigation includes *trial observation* for the purpose of enhancing the fairness of a trial (and not just for gathering information), the observer should maintain a visible and independent presence. Trial observations can be useful for collecting evidence about whether courts apply with international norms, including whether duress, intimidation or torture are applied to the accused. At the same time, by her very presence, the monitor can help enhance fairness.
- § Where safety concerns (of either the interviewers or interviewees) rule out an on-site visit or where the government denies entry, testimony may still be gathered from refugees and others who have left the country concerned, though telephone calls (although this is less reliable because the interviewer has less ability to judge the credibility of the speaker), and from signed statements of witnesses and victims (again, although much less reliable than direct testimony). In addition, provided that their neutrality and expertise can be properly established, people within the country may conduct interviews for

outsider NGOs. (All aspects of the arrangement with local NGOs should be made transparent in the report).

Writing the Report

- § After the on-site investigation, members of the fact finding mission may draw up a set of preliminary findings and submit these, together with the supplementary questions where appropriate, within a reasonable time, to the government concerned for comments.^[6]
- § Members of the mission should prepare a final report. If the members are split on the issues, this should be noted.
- § The report should detail the evidence collected; where possible direct quotes from witnesses should be used and the demeanor of the witness should be noted.
- § The report should vary sources of evidence if possible, and specify each source (unless the source is protected on the grounds of secrecy and, if so, this should be noted openly).
- § NGOs should provide details regarding the goal of the mission, the methodology and circumstances under which facts were collected, and the sources and methods of checking information, which were used.
- § The report should state openly when information was omitted on the grounds of secrecy and explain any measures used to protect identity of witnesses.
- § The report should include conclusions and recommendations, including, where possible, recommendations to the responsible government(s) and the international community.
- § The evidence collected should be evaluated according to international and domestic laws and other international instruments (i.e., U.N. Security Council Resolutions); when possible, the report should link its conclusions to specific international provisions.
- § If a preliminary report had been sent to the government of comment before publication of the final report, the government's response (or failure to respond) should be included.

Follow-Up

- § The report should be sent to the government concerned, cooperating human rights groups within the country (if doing so does not place them in danger), relevant national, regional and international governmental, intergovernmental and nongovernmental organizations, and, where greater publicity is part of the overall strategy, the media.
- § The organization establishing the fact finding mission should keep under review the compliance of state with their undertaking regarding nonreprisal against petitioners, witnesses, their relatives and associates.
- § The organization establishing the fact-finding mission should monitor whether the country has responded to the recommendations of the report and whether human rights conditions have improved.
- § The organization should consider what other follow-up is required, such as: writing letters to responsible officials about noncompliance with international norms; sending "action alerts" to private individuals and NGOs, encouraging them to write letters to specific individuals; monitoring trials and/or elections; visiting prisons; providing technical assistance in implementing recommendations for improving human rights conditions; and/or enforcing human rights through national, regional and international systems and mechanisms (such as bringing individual complaints before commissions and court-like bodies and triggering monitoring mechanisms).
- § In choosing future missions, the organization should guard against unfair selectivity in monitoring countries and issues; to promote its objectivity, the organization should consider taking on human rights issues in its own country as well as unpopular issues.
- § Sending organizations should be responsive to the psychological, physical and emotional needs of their fact-finders, providing counseling and allowing them time and space to deal with what they have heard.

^[1] This section is drawn from the author's own observations and practices in the field, as well as from: D. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact Finding*, 3 Harv. Hum. Rts. J. (1990); H. Thoolen and B. Verstappen, Human Rights Missions: A Study of Fact Finding Practices of Non-Governmental Organizations (1986); Weissenbrodt and McCarthy, *Fact Finding by International Nongovernmental Human Rights Organizations*, 22 Va. J. Int'l L. 7, 42-84 (1981). For rules applicable to inter-governmental investigations (IGOs), see *Belgrade Minimum Rules for Procedures for International Fact-Finding Mission* (by the International Law Association), 75 Am. J. Int. L. 163-165 (1981); United Nations Bodies Dealing with Violations of Human Rights, U.N. Doc E/CN.4/1021/Rev.1 (1970).

^[2] With respect to investigation by IGOs (Inter-governmental organizations such as the International Labor Organization), the terms of reference are set by prior negotiation between two or more states (and included in the terms of the treaty or other relevant instruments)

^[3] Dermot Groome, *The Handbook of Human Rights Investigations* (Northborough, MA: Human Rights Press, 2001), 190.

^[4] Dermot Groome, *The Handbook of Human Rights Investigations* (Northborough, MA: Human Rights Press, 2001), 178.

^[5] Dermot Groome observes: "it is very easy for an investigator to teach a witness a great deal about a case during the course of the interview. Investigators can unwittingly reveal facts previously unknown to them, which are then repeated back to the same or different investigators. This creates the false impression that the witness knows more than he or she actually does and creates a serious flaw in the investigation." Dermot Groome, *The Handbook of Human Rights Investigations* (Northborough, MA: Human Rights Press, 2001), 177.

^[6] Weissbrodt and McCarthy warn that an "NGO should never make a commitment to withhold publications of a report until it receives a government's comment. A time limit should be set at the time the report is submitted to the government, with the proviso that the full report will be published immediately upon any public release or public comment by the government..." Weissbrodt and McCarthy, *Fact Finding by International Nongovernmental Human Rights Organizations*. 22 Va. J. Int'l L. 42-84 (1981).