Human Rights Fact-Finding: Some Legal and Ethical Dilemmas[1]

Human rights fact-finding missions are of increasing importance, especially to the array of war crimes courts that have been established in the last decade. Their prosecutors draw on the reports of such missions as a basis for initiating investigations, and often seek to call evidence from the fact-finders as part of the prosecution case. A prosecution summons to go into the witness box can cause serious problems for human rights monitors, who must protect their sources and avoid being perceived as partisan. And because the reports of fact-finding missions can now lead to the prosecution of political and military leaders (or at least affect their post retirement travel plans) some leaders have devised new ways of attacking such reports, by threatening legal actions, usually in England, for libel or breach of confidence.

Academics have generally overlooked the importance of this subject - the most impressive exception being a study by Diane Orentlicher[2] back in 1990. It is time to take a more contemporary look at the ethical and legal dimensions of human rights fact-finding, and to applaud the launch of the **Guidelines for International Human Rights Fact-Finding Visits and Missions** prepared by the Raoul Wallenberg Institute.[3]

---

1 Mr Robertson has conducted many human rights fact finding missions for Amnesty International, the Bar Council and other organisations. He served as the first President of the UN war crimes court in Sierra Leone and is currently a distinguished jurist member of the Internal Justice Council of the United Nations. He is the author of *Crimes Against Humanity: The Struggle for Global Justice* (3rd ed. Penguin and New Press). This is an edited version of his keynote address at the conference which inaugurated the *Lund-London Guidelines on International Human Rights Fact-Finding Visits and Reports*, prepared by the Raoul Wallenberg Institute.

2 See Diane F Orentlicher: *Bearing Witness: the art and science of human rights fact-finding*, Harvard Human Rights Journal, Vol 3 1990 (p.83)

3 Raoul Wallenberg Institute, Lund University. *Guidelines on International Human Rights Fact-Finding Visits and Report* Inaugurated 1 June 2009.

There are different kinds of fact-finding excercises. At one level there is the Commission of Inquiry, with statutory powers to summon witnesses and obtain documents. It usually has a counsel to assist, and interested parties are entitled to be represented. Corruption Commissions in the Caribbean, conducted by Sir Louis Blom-Cooper and Sir Robin Auld are good examples, whilst the current "Bloody Sunday" inquiry, into deaths caused by a demonstration in Belfast in 1971 by British paratroopers, which has already taken eight years and cost many millions, provides a particularly dreadful example. Statutory into human rights abuses are rare, if only because it usually takes international pressure for a government to set up a Commission with the power to examine the misconduct of its own members. The Blom-Cooper Inquiry into the trafficking of arms to the Medallin Cartel, for example, was set up as the result of an international outcry, after guns imported from Israel by an Antiguan government minister on behalf of the medallin cocaine cartel were used to assassinate presidential candidate in Columbia.[4]

A more common form is an official inquiry by a distinguished personage who lacks legal power, but will obtain some co-operation from the state under scrutiny because of his or her standing. A UN rapporteur falls into this category – for example, Philip Alston's inquiry into the riots in Kenya and Richard Goldstone's inquiry for the Human Rights Council into the Israeli incursion in Gaza. These missions come with the moral force of the United Nations, although that does not always make them welcome: the Israeli government refused to co-operate with the Goldstone enquiry and the Kenyan government condemned the report of the Alston enquiry.

4 See Louis Blom-Cooper, *Guns to Antigua* (Duckworths 1990).

A third kind of inquiry is one set up by an NGO, conducted by an independent person (usually a jurist), who is invited to investigate and then write a report for publication. The IBA tends to send a number of prominent lawyers – most recently to Fiji. Sometimes they are not allowed in, and have to conduct witness interviews outside the country. Even though they can be handicapped by lack of investigative power, the legal conclusions of such an enquiry about facts that are in the public domain, can be of great significance – especially if the conclusion is that such facts give rise to a *prima facie* case of genocide or a crime against humanity.

Another kind of inquiry is an independent expert mission which conducts confidential fact-finding for an NGO which will not publish any report directly but will filter its findings into their campaigns and country assessments. Amnesty International missions provide examples. The Commonwealth Secretariat, too, holds inquiries of these kinds. Their advantage is that the fact-finder may obtain important information, and valuable perspective, by speaking confidentially to important government figures - to judges, prosecutors and prison officers who would not be prepared to speak openly. The disadvantage, of course, is that these reports cannot be published and the fact-finder enters into an obligation of confidentiality towards officials who may later become the subject of prosecution. In the case of the Red Cross, confidentiality is absolute and may be enforced under international law.

A fifth kind of human rights fact-finding goes on all the time as a result of the work of human rights monitors (I would prefer to call them human rights reporters) working in country, gathering information from local sources. Human Rights Watch calls them “country representatives” and often gives them awards or asks them to make presentations and certainly makes no secret of their

presence within a troubled state. Other NGOs require their reporters to be more low profile. These "monitors" are on a permanent fact-finding mission and their organisation will from time to time issue reports based on their work. There is a thin line dividing human rights reporters from newspaper reporters and there is no obvious reason, as a matter of law, why they should not have the same legal protection.

There are other models of human rights fact-finding but all present similar problems of ensuring accuracy and impartiality, protecting sources, and avoiding being sued for libel, especially in London, the libel capital of the world, if the report makes accusations against identifiable persons. Although a statutory inquiry will generally have absolute privilege from libel action, reports of other inquiries will not have this protection, and this vulnerability is anxious-making for cash-strapped NGOs. Even UN rapporteurs have been sued, although the International Court of Justice in the case of *Cumerswami* has now ruled that rapporteurs have UN immunity. This was a case where the UN's rapporteur on the judiciary made some remarks about judicial corruption in his own country, Malaysia, and was sued by the lawyer widely accused of corrupting the judges. The Malaysian courts refused to acknowledge his UN immunity, until the ICJ ruled that he was entitled to it.[5]

******

The cause of human rights has progressed a long way in a very short time. I remember joining Amnesty at university in the early 70s, when my first task was to compose grovelling letters to General Pinochet, requesting him to abandon the torture of political prisoners. A mere quarter of a century later, I had the pleasure of acting for Human Rights Watch in the House of Lords case that approved his extradition on torture charges. In the intervening period, before international criminal law delivered on the legacy of Nuremberg and before the internet revolution and satellite television,

5 Cumeraswani v Malaysia

human rights fact-finding missions were the only way to prise information out of repressive regimes. Today there is more information available, but separating it from rumour and propaganda and blogging fantasies and analysing its legal significance, is more important than ever.

Trial observation by international monitors is an important aspect of human rights fact-finding. It is usually conducted by lawyers of some distinction who sit in court for as long as they or their supporting NGO afford. They speak to the judge and the prosecutors as well as to the defence counsel, and provide their organisation with some insight into the fairness of the trial. In the case of Amnesty, which conducted many such observations from its inception in the 1960s, the interviewees would be offered a letter from its Secretary-General assuring them that their comments would be treated in utter confidence. The information provided would be factored into the observer's confidential report, which would never see the light of day: it would be considered along with information from other sources by office researchers and editors and find its filtered way into the next Amnesty annual report. The report itself would often be disputed by the government, but Amnesty reports in this period were recognised as fairly accurate and the organisation had a much higher reputation for getting at the truth than the government in question. This was largely as a result of the ability of its observers to speak confidentially to officials of that government. There was no doubt that a binding offer of confidentiality was essential to the success of fact-finding missions.

Ethical problems were apt to arise. I remember conducting a mission for Amnesty to South Africa in relation to the "Sharpeville Six" appeal – a half dozen protestors sentenced to death under a vague "common purpose" doctrine for participating in a demonstration, in the course of which a "necklacing" had occurred. I thought it would be useful to meet the trial judge who had convicted them (there was no jury) and sentenced them to death – a judge somewhat inappropriately named

Human. I showed him the Secretary-General's letter and promised him confidentiality, and he took me to his club – the Pretoria Club – which he boasted was very progressive, having recently agreed to admit Jews (although it still banned blacks and women). He was a lonely old racist, dying of alcohol poisoning, and after a few drinks made a number of admissions to me that might have founded a further appeal. If the men had not been reprieved, would I have broken my undertaking of confidentiality in order to save their necks? I would obviously have had to discuss this course with Amnesty, but ultimately my conscience would probably have made me speak out: after all, as every equity lawyer knows, there can be no confidence in iniquity.

History

Early twentieth-century fact-finding on subjects we would now associate with "human rights"[6] often had a propagandistic purpose, especially if appointed or backed by governments. At the outset of the First World War, the British government supported "fact-finding" about the German invasion of Belgium: Wellington House produced stories from unidentified witnesses about German soldiers bayoneting pregnant women and cold bloodedly murdering children that were later exposed as fraudulent. Lord James Bryce, formerly Oxford Regius Professor of Civil Law, oversaw this blatant propaganda exercise: its subsequent exposure has tainted the excellent work done by Arnold Toynbee on the Armenian Massacre (*The Blue Book*) to which Bryce wrote the introduction.[7] The most satisfactory human rights fact-finding mission in this period was that of Major General Harbord, conducted for the US government in Turkey in September/October 1919: its work was fast and efficient and its report eloquently described the horrors of what would later, and rightly, be termed "genocide". [8]

6 The term was not much used until 1939: see Robertson, *Crimes Against Humanity* (Penguin 2006, Chapter I "The Human Rights Story").

7 See Phillip Knightly *The First Casualty* (Andre Deutsch, 1975) p.83-84.

Fact-finding missions loomed large in the history of the League of Nations. In fact, it was the very failure of its fact-finding missions which contributed to bringing down the League, an organisation based on the notion of "collective security" – the principle that if one member state was attacked the others would declare war on the attacker. This illusion sustained the League's supporters throughout the 1920s. But in September 1931, Japan (a leading member of the league), invaded Manchuria after an incident in which it claimed that its railway there had been sabotaged by Chinese soldiers. China denied playing any part in this provocation and complained to the League about Japanese aggression. What was the League to do? A fact-finding mission was its first response and it sent Lord Lytton- an English notable who apparently disliked air or train travel, as he went by sea. It took him several months to get to Manchuria and several months to sail back and produce his report in September 1932 – a full year since the incident. By this time Japan had already appointed "the last Emperor" to be puppet governor of Manchukuo, its new name for the conquered territory. Lord Lytton's report – to the effect that the incident did not constitute provocation and Japan had acted unlawfully and should return the province to China - was too late to have any effect other than to undermine the League's credibility. By this time, aggression was a *fait accompli*.

Did the League learn the lesson that fact-finding missions upon which collective security might depend should find their facts quickly? Not at all. In December 1934 Mussolini contrived an incident at Wal-Wal oasis in Abyssinia, as a pretext for his invasion of that country. Emperor Haile Selassi was highly outraged, and complained to the League, which sent a fact-finding committee to investigate. But it still took them nine months to report that the Abyssinians were blameless. By this

8 Major General James G. Harbord *Conditions in the Near East. Report of the American Military Mission to Armenia.* 66th Congress, 2nd Session, Dec No 266, April 13 1920. See Peter Balakian *The Burning Tigris* (Heinemann 2003).

time, Mussolini had his canisters of poison gas in place on the border and had secured the silence of Britain and France (which wanted to appease Mussolini - so he would not strike-up an alliance with Hitler!) Once again, delay was fatal to the League's pretentions about collective security: Haile Selassi was highly deserted.

This early history emphasises that fact-finding investigations of recent human rights disasters must report as soon as possible after they have set up: the more they delay, the less their impact. This can also apply to inquiries into events long past: judicial fact-finding in the UK has been severely damaged by the incredible delays in the Saville Inquiry into "Bloody Sunday": it has taken eight years, and will probably end up taking ten, to investigate the events of one day in the life of Belfast, and the cost has already mounted to over $150 million for what has turned out to be a lawyer's banquet. In 2009 an Iraq War Inquiry was set up by the UK government, run by civil servants and not by judges – a mistaken decision which it justified by reference to the disastrous "Bloody Sunday" enquiry.

Funding

NGO fact-finding began in earnest with the launch of Amnesty International in 1959. Early fact-finding missions to Africa, notably conducted by Louis Blom-Cooper QC, were impressive. However, one such mission to Rhodesia was discredited when it leaked out that the money to fund the inquiry had come in secret from the UK Foreign and Commonwealth Office. This taught Amnesty's founder, Peter Berenson, the lesson that he should never again take money from governments, a rule that has been adopted by Human Rights Watch. I am not sure that this need be a universal rule, but there is one fundamental principle here for NGOs and Foundations, namely that the funding for fact-finding missions must always be disclosed. The general belief that "he who pays the piper calls the tune" makes it all too easy to discredit mission reports, even if none of the participants is personally

remunerated, if the costs of the hearings or of travel or of printing the report have been secretly paid by an interested party or a government. Fact-finding missions should be entirely transparent about their funding.

Composition of Delegation

The Lund-London guidelines correctly state:

"The mission's delegation must comprise individuals who are and are seen to be unbiased. The NGO should be confident that the delegation members have the competence, experience and expertise relevant to the matters pertaining to the terms of reference."[9]

Compliance with this principle will be crucial to the success of the mission. When the stakes are high, governments and their unscrupulous propagandists will not hesitate to defame the authors of critical reports and the NGOs which have tasked them. Pro-Israeli sources have recently attempted to discredit a Human Rights Watch fact-finder, who is an historian of Nazi (and American) war time medals and uniforms. They have even accused Richard Goldstone of bias, after his investigation for the Human Rights Council concluded that Israeli commanders committed war crimes in their attack on Gaza. Although the Council itself has displayed prejudice against Israel, its choice of Goldstone as a fact-finder meant that his report could not sensibly be assailed for partisanship. There have been outrageous cases in the past where trial observers have masqueraded as impartial – most notably the fellow travelling English barristers who white-washed Stalin's show trials (with dishonest reports entitled "The Moscow Trials Were Fair").

Expertise in the subject matter of the mission should be carefully evaluated, because some undoubted experts will already have committed themselves to an opinion, and could therefore be criticised for pre-judgment. Very often it will be most appropriate to choose individuals who have no connection at all with the country or the persons involved in the mission, but who have a reputation

9 Article 8.

for independence and for good judgment. For trial observers, some familiarity with the system of law under which trial is held will avoid the ignorance sometimes displayed by continental observers of adversary trials and by Anglo-American observers of inquisitorial proceedings. The UN Secretary General appointed, as one of five Lockerbie trial observers, an obscure Austrian philosopher who has been condemning the verdict and everyone associated with it ever since, in a way that appears to reveal a lack of understanding of adversary trial procedure and evidence, and a propensity to impugn the integrity of defence lawyers, prosecutors and judges. The case for re-opening a trial verdict is not helped by unsupported allegations of this kind.[10]

Even-Handedness

American NGOs have learnt to look at life from both sides now. **America's Watch** and the **Lawyer's Committee** were precursors of **Human Rights Watch**: they grew out of the civil disobedience movement of the 60s and produced tough lawyer journalists like Michael Posner, Ray Bonner and Reed Brody. They exposed the US government's behaviour in places like El Salvador (where the CIA was secretly supporting army death squads) and Nicaragua (where the CIA was secretly supporting the Contras). The Reagan administration, most notably through the work of Elliot Abrams, an Assistant Secretary of State (ironically for Humanitarian Affairs), went for the jugular and tried to discredit Ray Bonner over his exposure of the El Mazote massacre and Reed Brody over his report about Contra funding, which Reagan personally condemned as "bought and paid for by the Sandinistas". The White House, in McCarthyite mode, enlisted all its tamed media connections: the *New York Times* dispensed with Bonner's services, and *Time* magazine attacked Brody. To their credit,

10 See the Independent, August 21st 2009 Hans Kochler: *I Saw The Trial – And the Verdict Made No Sense.* This, coques Kochler was because it was "based on circumstantial evidence" (which lawyers know is often the best evidence) because the co-defendant was acquitted (an indication of the fairness of the court) because one witness had been taken fishing by the Scottish police (what else is there to do in Scotland?) and because information about a break-in at Heathrow was withheld (it was fully available to the Appeal Court, where the five judges analysed it carefully and concluded that it gave no possible support to the defence) and because only one person was convicted (which does not mean that the person they did convict was innocent!).

calumny did not stop them and both were in time vindicated – Brody's reports proved accurate and years later, Bonner's claims about the existence of a mass grave, derided by the Reagan administration, was proved true when the grave, with the bodies of hundreds of women and children, was discovered.

Nonetheless, the criticism served to teach the lesson that human rights reports should be even handed, should examine and, if appropriate, criticise both sides. Many fact-finding missions will focus upon the government over its oppression of insurgent groups, but the behaviour of these groups should be judged as severely and by the same criteria as government conduct. This has become a counsel not only of fairness but of prudence: it was much in evidence in those commentaries in 2009 on the Sri Lankan army's butchery of Tamils, balanced by references to the terrorist behaviour of the Tamil Tigers.

Amnesty, taking a purist position, has pointed out that its remit is to investigate the conduct of the state rather than the conduct of those opposed to the state. Thus it made no criticism of ANC guerilla actions when condemning the apartheid policies of the South African government. However, the legitimacy of state counter-insurgency policies may depend upon the reasonableness of response to the conduct of insurgents. So it was right to condemn the Tamil Tigers for using their own people as human shields and virtual hostages, whilst criticising the conduct of the Sri Lankan army in putting civilians at risk during the final stages of the war.

One important example of the need for fact-finding missions to assess the behaviour of insurgents as well as governments is provided by Richard Goldstone's investigation into the Israeli-Palestinian conflict in Gaza. He had to lobby hard in order to obtain the Human Rights Council's approval to

investigate the behaviour of Hamas as well as that of Israel. In such tit-for-tat conflicts, passing judgment on the conduct of both sides is inevitable: the whole question of proportionality justification for Israeli conduct is bound up with the degree of provocation constituted by Hamas rocket attacks on Israel. Despite Goldstone's attempt to avoid becoming one-eyed in Gaza, it is regrettable that the Israeli government refused to co-operate with his mission and condemned his report as soon as it was published. His insistence on investigating Hamas underlines the principle of even handedness: examine the conduct of insurgents as well as the response to that conduct by the government.

Obeying Local Laws

Another issue that can bedevil fact-finding missions is the question of whether they should obey the law in countries where nobody else seems to do so. This can be difficult in repressive regimes, where the official exchange rate, for example, bears no relationship to reality and the "Black Market" rate is that at which money in almost all circumstances changes hands. I'm afraid that fact-finding mission members must remain in the minority, and scrupulously obey the local law. The importance of this principle was brought home to me on a pre-velvet revolution mission to Stalinist Czechoslovakia, when I invited Vaclav Havel to lunch. He was understandably nervous, because he was on bail and the authorities could return him to prison at any moment. When I did not have sufficient local currency to pay for our meal, I assumed I could pay the rest in US dollars, accepted with alacrity everywhere in the city. But Havel was horrified, and explained that he would immediately be arrested by the secret police watching us from the far table, as an accomplice in "black-marketering". "This is the first rule of being a dissident" said Kafka's successor: "You must scrupulously obey the law".

Sometimes, it is difficult to obey the local law, for practical reasons. When I was observing trials for Amnesty in the puppet homeland of Venda, I would arrive at Johannesburg airport from London at about 5am, hire a car and drive up an almost continually straight road for several hours before turning off to the court room. Inevitably, on one occasion I fell into a speed trap where an apologetic policeman issued me a ticket which I duly paid. When I mentioned this to Amnesty, they took it very seriously and a top-level meeting was convened on the question of whether they should repay my speeding ticket. They decided to do so – but I would not rely upon the case as a precedent.

Suppose, however, that you are the **victim** of breaches of the law. There is not much point in complaining if the perpetrator is the President. I recall one mission, which I led on behalf of the British Bar and Law Society, to Hasting Banda's Malawi, to investigate cases where he had ordered opponents to be killed without compunction. We obtained a meeting with the President-For-Life, who expressed himself as delighted that one of our number was female – she was a north London solicitor renowned for bringing cases of sexual harassment "Ah, you have bought with you a Mbumba!" (a woman, in the Chichewa language) he chortled as he greeted our delegation. "I am so pleased you have brought Mbumba. I am a powerful man and I like Mbumba! All Mbumba's in Malawi love me and I love them. They sing and dance for me!" At this point he began to paw our solicitor delegate, in a manner which would have him arrested for indecent assault in Britain but would have us all arrested for an attack on the President if our delegate reacted as she would doubtless have done in North London. We would then have had an unrivalled opportunity to find facts about Malawi's prison system, from the inside.

Surveillance

A more common problem for members of fact-finding missions is to find themselves followed by secret (and not so secret) police. Here, in such cases, it is important not to lead them to witnesses,

and interviews should be cancelled rather than reliance placed upon “giving them the slip” which may be more difficult than it seems in an unknown or hostile city. In Prague in Stalinist times, I was always followed rather clumsily by ill-paid surveillance operatives; I would head to the city’s Jewish cemetery, with its towering forests of tall tombs, and try to lose them: if I failed I would take them behind me to the Terezin Museum, requiring them to pretend an interest in pictures painted by children of the ghetto en route to Auschwitz. But I would always avoid leading them to my contacts, unless they were well known dissidents whose meetings were monitored in any event.

Interviewing

The same principle of prudence should apply when interviewing people in prison or in any monitored space where guards are nearby or hidden microphones are possibly present. It is not fair to the prisoner, who either will not tell the truth if aware that his custodians are listening or will be punished if he does tell it. On an Amnesty mission to Vietnamese prisoners in re-education camps, it was very tempting to ask questions of prisoners during an organised visit, but we decided to avoid questioning because guards were invariably within earshot. The prisoners, of course, could volunteer whatever comments they wished, but their opinions were tempered by their fear of reprisals.

Refugees

Special problems are encountered in refugee camps. There is always a power structure within such camps – they are usually run by a political faction, whose representatives insist on escorting and introducing you to refugees who tend to say the same thing about the conditions from which they have escaped and about their treatment in the camp. The ideal on such missions is to interview new arrivals as they arrive or are being registered and before they come under the sway of local camp leaders who will indoctrinate them with the approved “line” about political events back home, and will in certain cases coach them as to what to say. It may or may not be the truth – but because it is

designed e.g. to support the political line of the faction, or to support a case for asylum rather than economic migration, such coached stories must be discounted.

Victims

Ideally, prisoners and refugees and all persons who may be subject to pressure from custodians or others, should be interviewed alone. This is a counsel of perfection, because investigators will often need a translator present and the choice may be problematic, especially if there is no choice and the translator is officially imposed. Interviewing prisoners alone does insulate their testimony from influence, although it is important to remember that some victims – especially of sexual crime – are inhibited by the subject matter and do need support before they can bring themselves to speak freely. Many traumatised victims of rape or torture simply will not divulge their excruciating experience to a stranger. In these circumstances, there can be no hard and fast rules about interviewing witnesses without anyone else present: a friend or counsellor may be a necessary companion.

Conduct of Interviews

As with other interviews which can have serious consequences, the interviewer has a duty to conduct the discussion as fairly as possible. Leading questions must not put words into the interviewee's mouth. The questions asked must not suggest the answer that is sought or that others have given. (A good reality check in the event of an important allegation is the question "how do you know?"). The way to conduct an interview is to ask "what happened then?" and not to say e.g. "That is when they pulled your fingernails out, didn't they?" Always look for corroboration of serious allegations – ask if there is another prisoner who saw the victim immediately before and after; whether there is an autopsy report that confirms an eye witness account of a lethal beating; check

whether there are newspaper reports that confirm dates and events. Wherever a “story” is told there will usually be elements that can be checked with others or with public records.

There is much at stake in how witnesses can be brainwashed, or persuaded (often by money or by threats to relatives) to give false evidence. Human rights fact-finders must develop a degree of cynicism and street wisdom in relation to those who voluntarily testify to them, and be conscious of governments (who may lose aid donors in the event of adverse NGO reports). The more distinguished the fact-finding mission, the more vested interests will try to pull wool over the eyes of its members. Every fact-finder should have well in mind the saga of “witness L” in the ICTY. He was a witness who was very credible and utterly believed by the prosecutors in the *Tadic* case and he certainly told them what they wanted to hear. He said that he had been an eye witness at Omarska camp, who had seen Tadic kill no less than 30 prisoners including Witness L’s own father. I suppose it’s a wise witness who knows his own father and “L” was confounded when confronted by his, produced in the courtroom by the defence, alive and well. The trial was halted and the court abandoned all its previous efforts at keeping “L’s” identity a secret. He had been coached, and probably paid, by authorities in Bosnia Herzegovina in order to dishonestly demonise the Serbian defendant.

It is important for NGO fact-finders, and for prosecutors who rely on the facts, to keep in mind the *debacle* that occurred in the very first trial at the ICC, with its very first witness.[11] This child witness not only recanted his testimony, but accused an NGO of fabricating it. It later turned out that he was too terrified by the sight of the defendant to testify against him in his presences (he should have been screened) but the incident showed how vulnerable NGOs are to this sort of allegation. Where witness’ evidence is likely to go further – especially to court – the record should be signed, anjd preferably tape or video recorded.

11 See http://newx.bbc.co.uk/l/hi/7857230.stm

The fact-finder must be astute to detect any personal or political motivations for lying or exaggerating or for blind partisanship. Many witnesses will have an axe to grind: they have undoubtedly suffered and will be anxious to emphasise the guilt of those they believe (or have been made to believe) are to blame. Fact finders must also factor in the motive that many witnesses have to exaggerate or to emphasise their own innocence: when claiming refugee status, or hoping to claim such status, they will have a motive to exaggerate the extent of their persecution, especially if they think the fact-finders report may subsequently assist their asylum claim. Always ask: *cui bono?* (who benefits?).

Admissions against interest.

In law as in life, an admission by a state can be held against it, and it will be important to examine closely any justification or excuses offered by the regime for attacking its own citizens. One example derives from Singapore in 1988, where Catholics, lawyers and playwrights concerned with the problems of the poor were rounded up and tortured. The government, of course, denied torture, but its relevant minister (and now Prime Minister) Lee Hsien Loong admitted that the secret police used “psychological pressure”. This was an “admission against interest” i.e. the interest of maintaining the pretence that no pressure at all was used. (The “psychological pressure” consisted of blasting sub-zero temperature air conditioning at naked detainees in order to force them to confess - without laying a mark upon them.)

Should Fact Finders Have Prior Knowledge?

Amnesty International has a rule that no national of a state under investigation can be part of a fact finding mission to that state. This is appropriate, since those connected with a nation may have strong feelings for or against its government. But sometimes the alternative of parachuting in an investigator or members of a group who have no experience of a country can be made the butt of state criticism. This was suffered recently by the UN rapporteur who condemned Kenya after

spending ten days in the country. The government asked how anyone who has been in Kenya for just over a week could begin to understand its complex society. This argument sounds impressive, although there is no reason why an objective and expert observer like Philip Alston could not decide issues relating to public order and policing by extensive reading of source materials and then visiting Kenya and hearing testimony as to how the authorities had behaved. Human rights fact finding does not require intimate knowledge of local society.

Nonetheless, it does help if fact-finders have experienced guides to the country under investigation. There are some countries where things are seldom what they seem. On my first mission to communist Czechoslovakia, I attended trials of executives of the jazz society. After its leaders were sentenced to prison, I stood on the steps of the court house with Vaclev Havel while a group of young people in the square in front of us began singing "We shall overcome". I was heartened by the size of the chorus, until Havel turned to me and said "On these occasions you can always tell who are the secret police. They are the ones who know all the words". I conducted a number of human rights missions to apartheid-era South Africa, but I never knew that beneath the polite veneer of the trials I was observing, there was a sinister sub-culture of state assassination without trial. A friend who was one of the founders of the Black Sash movement was killed in what seemed to be a typical life-wasting South African car accident and it was only many years later, when the evidence emerged at a Truth and Reconciliation Commission hearing, that I discovered that the brakes of her car had been tampered with in a secret police operation.

Should human rights monitors be obliged to testify in international courts?

It is important to distinguish between three separate issues:

1. The **competence** (or capacity) of a human rights reporter to be a witness;
2. The **compellability** of human rights monitors – i.e. whether the court has power to order them to give evidence; and

3. Their **right to protect sources** once in the witness box.

Competence

All human rights monitors are competent to give evidence, except employees or former employees of the Red Cross. They have a special position under the Geneva Convention and the ICTY has held, albeit by a majority, that their duty of confidentiality is absolute and that they cannot give evidence, even if they want to and even if they have long left the organisation. An ICTY trial chamber decided in *Simic* that the ICRC was entitled in customary international law to an absolute privilege, which could be exerted to prevent employees from giving evidence of observations made whilst on Red Cross work. This was a ruling that in law, Red Cross employees and ex-employee lacked the **capacity** to testify.

Justice Hunt, who dissented, found no warrant in customary international law for such a sweeping and absolute exemption from those dictates of conscience and humanity which will sometimes impel witnesses of crimes against humanity to offer court testimony, irrespective of confidentiality obligations. Of course the ICRC has a duty to remain neutral, but that does not mean that customary international law should treat its ex-employees as incompetent to testify, certainly if their evidence is indispensible to the determination of guilt or innocence.

A preferable rule would be that the evidence should be excluded unless it is indispensible to prove or disprove a crime of the upmost gravity.[12] The Red Cross has long been criticised for choosing to say nothing about the Holocaust, in order that its work in prisoner of war camps in Nazi Germany might not suffer[13]. Should an ex-employee offer eye witness evidence that a defendant ordered torture or

12 This was the ICRC fallback position in argument in *Simic*. See Prosecutor v Simic et al. Case number IT-95-9 *ex parte confidential decisions on the prosecution motion under rule 73 for a ruling concerning the testimony of the witness*, 27th July 1999, para 19.

13 See David Rieff, *A Bed For A Night: Humanitarianism in Crisis* (Vintage 2002) p. 76-7, 148

(even more pointedly) offer conclusive evidence that a defendant was *not* involved in the acts of torture with which he is charged, the majority decision in *Simic* should not be followed so as to debar the court from hearing such crucial evidence. The approach of Justice Hunt (the minority judge in *Simic*) was to balance the competing interests. His test was "whether the harm which would be done by the allowance of the evidence outweighs the harm done by the frustration or impairment to justice if the evidence is not available".[14] While it would only be in a rare case that a Red Cross employee would be ordered to testify, he identified two such situations: "where the evidence of an official or an employee of the ICRC is vital to establish the innocence of the accused person" and "where the evidence of an official or an employee of the ICRC is vital to establish the guilt of the particular accused in a trial of transcendental importance"[15]. He concluded that

"The correct test is whether the evidence to be given by the witness in breach of the obligations of confidentiality owed by the ICRC is so essential to the case of the relevant party (here the prosecution) as to outweigh the risk of serious consequence of the breach of confidence in the particular case. Both the gravity of the charges and the availability of means to avoid disclosure of the fact that the evidence has been given would be relevant to that determination[16].

Another court may prefer Judge Hunt's dissent – I certainly do. Red Cross confidentiality can be a faustian bargain: the organisation kept silent about the torture at Abu Ghraib, for example, and the truth only emerged when a copy of one of its confidential reports, which had gathered dust on the desks of US generals and British bureaucrats, was leaked to the *Wall Street Journal*. And it was

14 Separate opinion of Judge David Hunt, 27th July 1999, para 27.

15 Ibid. Paras 29-31.

16 Ibid. Para 35.

infuriating to watch Donald Rumsfeld at press conferences rejecting as ludicrous the idea that torture techniques were being used at Guantanamo; "we have the Red Cross here every day: if there was any torture, they would be the first to complain". But of course they could not complain publicly, by virtue of their vow of confidentiality. They are in danger of becoming complicit in the torture and ill-treatment that they observe if they can never divulge it to the public. The Red Cross justifies its privilege by pointing out that states would not permit its observers to enter prisoner of war camps if they were able to make their findings public. In the recent conflict in Sri Lanka, for example, all NGOs except the Red Cross were prevented from witnessing the army operation. The Sri Lankan military thinking, undoubtedly, was that they would be safe with the Red Cross as its employees could never testify.

One way forward would be for the UK or the US to take the lead in disclaiming any right of confidentiality in Red Cross reports, and to promise to disclose them six or nine months after they have been received. This waiver arrangement would ensure that the right to have Red Cross visits would become a meaningful safeguard against torture and abuse in prisoner of war camps run by states that were prepared for his degree of transparency.

Compellability of Human Rights Monitors.

Some human rights reporters are only too pleased to give evidence to international courts. But others, especially those still in the field, are horrified at the prospect of losing their perceived neutrality by appearing to endorse the prosecution (if the prosecution asks them to give evidence) or else by appearing to support the defence. Neutrality is vital to war correspondents and to human rights reporters working in war zones and their own and their colleague's safety may be put at risk if they are perceived to be spies for the prosecutor of an international criminal court.

This was the dilemma that faced Jonathan Randall, a *Washington Post* correspondent who had interviewed a local Serb official named Brdanin, subsequently charged in the ICTY with complicity in war crimes. Randall was still actively engaged in reporting on terrorism, and did not want to be perceived by potential sources as a journalist who co-operated with prosecutors. He and his newspaper believed that his neutrality would be compromised. The ICTY Trial Chamber insisted that he had no testamentary privilege and had to give evidence against Brdanin, even though the quotations in his article had been obtained through the services of a translator. The ICTY Appeals Chamber decided, however, that war correspondents could not be compelled to testify in war crimes courts unless the party which subpoenaed them could establish that their evidence would be "really significant" i.e. of direct and important value in determining a core issue in the case, and that in any event the evidence could not reasonably be obtained elsewhere. It said:

"In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death... there is the public interest in the work of war correspondents, which requires that the news gathering function be performed without unnecessary constraints so that the international community can receive adequate information on issues of public concern."[17]

The court concluded that compelling war correspondents to testify on a routine basis "may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern"[18]. In this context there can be no meaningful distinction between the

17 *Prosecutor v Brdranin* and *Tadic* Case number IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11th December 2002, paras 36 and 46.

18 Ibid. Para 44.

war correspondent and the human rights reporter or investigator, in terms of the importance of the information they gather or the public interest that its publication will serve. In both cases there is the danger that information will dry up if the court routinely orders them to identify their sources. *Brdanin* was a case on compellability rather than privilege, but it assumes that on the limited occasions when war correspondents are compelled to testify on core issues, they will be accorded a privilege to withhold the names of their sources.

The appeal court decision that the reporter was only compellable where his information was important and could not be obtained elsewhere was a compromise between the claims of news organisations and human rights NGOs – the latter were initially sceptical about journalists who refused to help war crimes prosecutors. I acted for the *Washington Post* ,and recall some anxious discussions with Ken Roth about whether journalists had a duty to their source or to the new war crimes tribunals. Richard Goldstone provided expert evidence about the importance of neutrality to those who have a duty objectively to report a war, and the appeals chamber decision, largely written by the US judge Theodore Meron, more or less satisfied both sides.

Source Protection.

In the important European Human Rights Convention case of *Goodwin v UK,* the court decided that a qualified privilege to protect journalistic sources followed from the right to freedom of expression. The public right to newsworthy information entails that those who supply information to journalists, frequently in breach of the confidence of their employers or colleagues, should nonetheless be protected because otherwise these sources would “dry up” i.e. stay silent, and much newsworthy material would not be imparted and would not in consequence be published. The European Court of Human Rights held:

"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press and informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the convention (the freedom of expression guarantee) unless it is justified by an overriding requirement in the public interest".[19]

Can this reasoning be applied to protect the sources of human rights reporters and fact finders, who are tasked with collecting information for public purposes – to inform the reports of the UN Secretary General or to research for reports issued to the public by NGOs like Amnesty and Human Rights Watch? The issue arose in the UN Special Court for Sierra Leone. The prosecution called a staff member of the United Nations, who was a human rights monitor, as a witness. The UN waived its immunity rights so that he might testify freely, on condition that he be permitted to do so in closed court and that, when giving his evidence, the witness should not be compelled under cross-examination to name any human source from which he had received information. The witness' statement had been disclosed to the defence and consisted both of his direct observations of the war and of what others had told him of the "widespread and systematic" commission of war crimes in some areas. This was relevant but secondary evidence: it was directed to establish an element of the crime charged (namely the widespread and systematic nature of the attacks) but did not directly connect any defendants with an offence. Nonetheless, one trial chamber decided that the witness

19 *Goodwin* v UK (1996) ECHR 16 para 39.

could be compelled to name his sources, and this was the major issue for decision by the Appeal Chamber. We decided it in favour of the witness, primarily on the wording of the Special Court Rules of Procedure. My concurring judgment considered the broader issue of whether "human rights reporters" are entitled, in the course of their testimony, to decline to answer questions directed to identifying the source of the information.

The court had *amici* briefs submitted by the UN's Human Rights Commissioner, as well as from Amnesty International and Human Rights Watch, which urged that the public interest requires human rights reporters to possess such a testamentary privilege, either in absolute terms or at least on a qualified basis. But the defence lawyers argued that any such entitlement to resist source disclosure would improperly undermine a defendant's right to challenge the evidence given against him. The competence and compellibity of human rights reporters was not in issue: the UN official was perfectly willing to testify and the UN was agreeable so long as he did so without being subjected to cross-examination, in which questions might be asked the honest answer to which would identify a source who had been promised anonymity and who might well be in danger of harsh or even lethal reprisals if publicly named. It was my view that the principle set out in *Goodwin* was equally applicable to human rights monitors giving evidence in war crimes courts:

"There is in my judgment, little meaningful difference in this respect between an investigative journalist tracking a story in a war torn country, a war correspondent reporting on the ebb and flow of the conflict, and a researcher for a human rights organisation filing information for an "in-depth" report or for filtered use in an annual report, or for a UN monitor gathering information for the Secretary General to report to the Security Council. All are exercising a right to freedom of expression (and, more importantly, assisting their source's right of free speech) by extracting information for publication from people who would not give it without an assurance that their names will remain anonymous. The reprisal they often face in such circumstances, unlike the risk run by Mr *Goodwin*'s source of being sacked or sued for breach of confidence, is of being killed as an "informer" – a traitor

to the organisation or community on whom they are silently squealing. To identify them in court would betray a promise and open them to such reprisals: more importantly if courts routinely ordered witnesses to name their sources, then information about human rights abuses would diminish because reporters could not in good conscience elicit it by promises to protect their sources. For these reasons, I consider that "human rights monitors," like journalists, have a privilege to refuse to name those sources to whom they have promised anonymity and who are in danger of reprisal if that promise is broken. In practical terms, that means that they must not be compelled to do so by threats to invoke the court's power to hold them in contempt and to fine or imprison them. It does not mean, of course, that the evidence that they give, based on information from sources they decline to name, will be accorded normal weight. Their entitlement to protect their source has this downside for the party that calls them: it may lose some and perhaps all of the weight that might otherwise have been placed on the evidence that is given based on the anonymous source material."[20]

There is an overriding international public interest in UN human rights reporters being able to give an assurance of confidentiality to those who put their necks on the line to inform on the murderous activities of powerful supporters or figures within their community - two witnesses who gave evidence to Phillip Alston in Kenya suffered lethal reprisals. The public interest in protecting UN sources applies with the same force to fact finders engaged by Amnesty and Human Rights Watch who collect and expertly analyse information about human rights abuses, later published in annual or special reports which serve to inform governments and international institutions, as well as the interested public, about such abuses and are used as a basis for campaigns to end them. The public interest in the free flow of information to such publications is at least as great as to other news

20 See Prosecutor v Brima and others Case number SCSL-2004-16-AR73, Appeals Chamber judgment 26th May 2006, separate and concurring opinion of Justice Geoffrey Robertson QC para 28.

media. Moreover, the consequences of exposure of sources of this kind can be calamitous. It is apt to recall that the protective rule in *Goodwin* was fashioned in the context of the genteel environment of the city of London, where a business journalist was fined for refusing to name an "insider" source of information about a company's finances – a source who would face only disciplinary action if exposed. In repressive countries, sources for fact-finding missions who tell of torture, death squads and arbitrary imprisonment, may, if exposed, face these very consequences. Not only may they be brutally treated as punishment for embarrassing the government or other power brokers, but their family and friends may also face reprisals. This fact underlines the need for the protective rule, usually identified as a "privilege" belonging to the witness, although that "privilege" is a reflection of the rather more weighty "right" of the source. The privilege is qualified, not absolute, because it must yield in cases where the identification of the source is necessary either to prove guilt or to establish a reasonable doubt about guilt.

There is a problem in the proliferation of "human rights NGOs," several thousand at last count, with "monitors" or "fact finders" of varying calibre and experience. Some have been accused of sensationalising reports in order to gain support for campaigns or membership subscriptions, whilst others might have a bias derived from political connections or state funding. Certain NGOs with "human rights" in their title have been credibly accused of undermining human rights causes. [21] Are all these monitors to be accorded a qualified privilege to withhold the names of sources? I do not see how a meaningful distinction can be made, any more than the *Goodwin* privilege can be denied to journalists who have a propaganda agenda or report on wars where they support one side or the other. The reporter's privilege is, after all, the obverse of the right possessed by the source, who may speak low, in fear and trembling, to the first fact finder who appears in his burnt out village completely unaware of any bias and concerned only that their identity be protected if they tell what they know. The prospect that what they say will be "spun" or exaggerated by partisan journalists or

21 See the Economist, 4th December 2004 "Yanukovich's Friends – A Human Rights Group that Defends Dictators".

monitors does not lose the source his or her right to be protected from exposure: but what it does mean is that the court must give the party which cross-examines the reporting witness every opportunity to explore any bias or hidden agenda or other motive for distortion or exaggeration. This is after all, a set of human rights which belong to defendants and must be upheld to ensure fairness of trial.

Courts must always guard against allowing prosecutors to present evidence which amounts to no more than hearsay demonization of defendants by human rights groups or by the media. The right of sources to protection is not a charter for lazy prosecutors to make a case based on second hand reports or investigations. Unchecked hearsay has an inevitable place in the factual matrix upon which expert opinion is based: for example, in *Prosecutor v Bizimungu*, the late Dr Alison Des Forges was called as an expert: she based her opinion upon two accounts of a meeting with the ex-president given by confidential sources. Her right to withhold their names was upheld, although the court pointed out that this would be an important factor to consider in evaluating her evidence.[22] Defendants must never be convicted solely on evidence from anonymous accusers: the court effectuates that principle by excluding or else de-valuing hearsay accusations, rather than by compelling a witness who reports them to divulge the identity of the confidential source who made them.

Summary

Fact finding missions to repressive or post conflict societies must respect the undertakings they give to sources and must refuse to answer questions that might expose informants when summoned to testify in a war crimes court. Courts should respect that refusal, and decline to make any finding of contempt against a fact finder, unless the source is crucial to establishing the defendant's guilt or innocence. This approach should be applied pragmatically, by judges who recognise the danger that

22 *Prosecutor v Bizimungu,* Case number ICTR-99-50-T, decision on defence motion for exclusion of portions of testimony of expert witness Dr Alison Des Forges, 2nd September 2005.

sources embroiled in armed conflict may be partisan and in some cases malicious, even to the extent of inventing or fabricating the information they give to fact-finders. Fabrication may, without identification or cross-examination of its source, fool even the most experienced human rights monitor (it was, after all, an experience ex-Amnesty researcher who passed on the notoriously false story about the Kuwaiti babies being thrown out of hospital incubators by Iraqi troops during the first Gulf War). On the other hand, there must be an equal recognition that score settling will continue for long after the conflict and that sources may be assaulted, killed or driven out of their communities as the result of exposure. But testimony based on information from anonymous sources should never to the sole basis for findings of guilt.

Reprisals Against Fact Finders.

It is a sad fact of life that those involved in law enforcement in unstable societies will sometimes be the victim of lethal reprisals. A number of prosecutors and journalists have been assassinated for finding out too much, whilst others have been taken hostage and held to ransom. An organisation which sends fact finders on a mission to a dangerous country will always bear responsibility for their safety and well-being. International law offers no special protection to a member of a fact finding mission over and above that which the member is entitled by virtue of his or her status as a civilian. Attempts have been made by journalist organisations to encourage the addition to article 8 of the Rome Treaty (which contains an exhaustive definition of war crimes) a new international crime of killing journalists, to which might be added the intentional killing of human rights monitors and fact-finders. The Red Cross has opposed any extension, on the basis that they are already protected as "civilians," but obviously armies locked in a civil war do not perceive journalists as civilians, which is why they kill them. The forces of the state (and sometimes insurgents), will threaten human rights investigators precisely because they do not perceive them as civilians, but as persons who are likely to expose their misdeeds to the world.

It is, of course, a war crime to direct attacks against “Personnel using the distinctive emblems of the Geneva Convention in conformity with international law”[23] (so Red Cross personnel are safe) and to attack persons “involved in a humanitarian assistance or peace keeping mission in accordance with the charter of the UN”[24] - which would cover UN rapporteurs on fact-finding missions, but would not protect members of human rights missions dispatched by NGOs. There is a powerful case to be made for giving them specific protection.

War correspondents have the inconsequential assistance of Article 79 of the First Protocol to the Geneva Conventions 1977, which provides that

“journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians... [and] shall be protected as such under the conventions in this protocol, provided they take no action adversely affecting their status as civilians...[25]

This gives journalists, like all civilians, immunity from military discipline and they must not be made specific targets for attack or become the victims of reprisals by any party to the conflict, although their entitlement to civilian status will be jeopardised if they take any action which indicates support for a belligerent – e.g. carrying a gun or rendering special assistance to one side or the other. This vague civilian status is unsatisfactory and there needs to be a specific crime to deter attacks on journalists and human rights monitors or fact-finders, for the simple reason that in conflict zones they are not perceived as innocent civilians but as enemies, real or potential, of those whose criminal acts they may expose.

23 ICC Statute Article (2)(b) XXIV

24 ICC Statute, Article 8(2)(b) III

25 Protocol Additional to the Geneva Conventions 1949 and relating to the protection of victims of international conflict, 1977.

Publication of the Report.

The fact-finding mission that finds its facts and writes its report may find that its problems are not over. They may be just beginning. English common law regards any slighting criticism liable to lower a person's reputation in the minds of right thinking people as a defamation which can require recompense of up to £200,000 and – much more crippling – millions of pounds in legal costs. The burden of proving the truth of serious allegations rests on the defendant publisher, and this is virtually impossible when sources must be protected or else refuse to come forward. London is the libel capital of the world because its law is so plaintiff-friendly, and its courts are the favoured forum for the wealthy of the world to harry their critics. An NGO will not escape by the device of publishing a fact-finding mission's report in America: First Amendment protection does not cover internet down-loadings in the UK. Every human rights report will be accessible in England, either via the internet or obtainable from Amazon, and English courts welcome forum shoppers.[26]

Newspapers are sued in London all the time by foreign claimants – most notably Russian oligarchs, and Arab billionaires accused of supporting terrorism. Human rights reporting has so far benefited from the practical consideration that its targets – political and military leaders accused of genocide and torture – are usually reluctant to travel to the UK for fear of a Pinochet style arrest, certainly if their libel action fails. This fear has been reduced by the House of Lords in a recent libel action brought by Roman Polanski: he was permitted to testify by video-link, safe in a Paris hotel room from the arrest and extradition warrant awaiting him from US law enforcers in London.[27] Some violators are prepared to come to London: the Head of the Ghanaian Secret Police sued *The Independent* when it informed its readers that he had been accused by a judicial inquiry some years before of

26 See *Berezovsky v Forbes.*

27 See *Polanski* (2000) 1 WLR 1004; *Conde Nast Publications*, (2005) UKHL 10. The film director had jumped bail in California years before, when on trial for child molestation.

masterminding the murder of three of that country's judges. This is the kind of allegation which is important for the public to know about but is virtually impossible to prove, without the massive expense of gathering the evidence of the long disbanded enquiry in a far-off country.[28]

In recent years the House of Lords has developed a public interest defence for the media against libel actions, which should cover the publication of most human rights reports. It applies whenever the subject matter is of high public interest and the allegation is made by reputable professionals who honestly and reasonably believe in its truth and who publish it with professional responsibility. This case – *Jameel v Wall Street Journal* – allowed the newspaper to report what it could not prove, but reasonably and responsibly believed, about Saudi co-operation with the CIA in monitoring a prominent businessman.[29] The *Jameel* case provides a valuable defence, but will not relieve an NGO from having to spend a considerable amount of money before its defence is upheld, and to cover such costs it may be wise to take out libel insurance, especially where the report criticises powerful officials or wealthy leaders.

Breach of confidence is another legal snare that NGOs must avoid in publishing investigations that have managed to obtain secret documents. **Global Witness** struck an important blow for human rights reporting recently when it successfully fought off an injunction from the son of the President of the Republic of Congo: his credit card statements had been obtained and placed on the Global Witness website to show that the President's son had secretly been stealing the profits of the state owned oil company. The court held that the seriousness of the offence justified the breach of confidentiality, as there could be no confidence in iniquity: "the profits of oil sales should go to the people of the Congo, not to those who rule it or their families"[30].

28 See *Tsikata v Newspaper Publishing Plc,* 1997 1 All ER 655. The newspaper succeeded in showing that it had qualified privilege to report the inquiry finding, even though it had not led to a prosecution.

29 *Jameel v Wall Street Journal* (No 3) 2006 UKHL 44.

But the anxiety and risk attendant on any such legal action should not be underestimated: Global Witness would have been forced to pay tens of thousands of pounds in legal costs had it lost, and it was fortunate to have *pro bono* representation. The sad fact is that the United Kingdom does not have free speech, it has expensive speech.

Conclusion

The final rule for a human rights report is to make it readable. It will often be written by lawyers, who must remember that it will not be read only by lawyers: to achieve its objective, it must be comprehensible to a wide range of people involved in civil society programmes, to journalists and politicians and diplomats, to victims and even to perpetrators. Some readers will not have English as a first language, and will not have the benefit of translation. The art is to be simple without becoming simplistic: let the facts speak for themselves, and confine legislation or technical details to appendices. Few reports become bestsellers (one exception is *"Nunca Mas"* – Ernesto Sabato's Report that alerted the world to the work of death squads in South American dictatorships[31]). Remember that good human rights reporting must stand the test of time and increasingly in war crimes courts, the test of cross-examination.

GEOFFREY ROBERTSON QC

30 *LongBeach Ltd and Denis Chrystel Sassou Nguessou v Global Witness Ltd* (2007) EWHC 1980 (QB).

31 Report of the National Commission on the Disappearance of People (Faber, 1986)