



International Commission for Labor Rights
Critical Assistance for Working People and Trade Unions Worldwide

**Report from the ICLR Roundtable on Legal Issues
in Global Research and Advocacy Campaigns with Multinational Corporations
February 24, 2011**

Introduction:

On February 24th, the International Commission for Labor Rights held a roundtable discussion on ethical and legal issues in global research and advocacy for union campaigns with multinational corporations. The meeting was chaired by ICLR Board President, Jeanne Mirer.

The presenters were:

- **Lance Compa**, Senior Lecturer at Cornell University Institute of Industrial Relations. Lance has done consulting for Human Rights Watch and the Solidarity Center and has done investigation reports on workplaces in Mexico, Sri Lanka and China.
- **Corinna Gilfillan**, U.S. head of Global Witness, a global advocacy organization, working particularly in conflict and post conflict zones, which is focused on naming and shaming MNCs, dictators and corrupt politicians, was formerly Associate Program Officer United Nations Environment Program.
- **Benjamin Hensler**, General Counsel and Deputy Director of the Workers Rights Consortium, an organization which investigates labor violations in the global apparel industry with a focus on factories that produce college logo sweatshirts and t-shirts.
- **Arvind Ganesan**, Director of the Business and Human Rights Program of Human Rights Watch, currently focusing on human rights issues related to the extractive industries, labor rights, trade, and the economic interests of militaries.
- **Gregory Regaignon**, Research Director of Business and Human Rights Resource Center, which monitors the social and environmental impacts of over 5000 companies, operating in over 180 countries, formerly worked at Human Rights, the National Endowment for Democracy and the Legal Aid Institute of Indonesia.

The roundtable was organized to assist unions conducting international campaigns to organize workers which utilize investigations of conditions faced by non-union workers in multinational corporations to develop protocols for publication of reports about violations of core international labor standards and other human rights designed to promote organizing.

ICLR has worked with various global union federations and national unions in the past assisting them in gathering information from workers, using researchers who have been trained in fact-finding. Fact-finding in these campaigns can be very sensitive, and, in the interest of the credibility of the campaigns, it is crucial that the public reports be accurate. The Roundtable was motivated by the need to respond to these challenges and to concerns related to retaliation

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against workers who have spoken out, potential liability for defamation, and reputational harm to the union and its allies when mistakes do occur.

Another reason for the Roundtable was to accommodate the essential tension between the work of union organizers, who are responsible for winning campaigns to build worker rights, and union legal departments, which are responsible for protecting the union from liability through ensuring reports are well sourced and documented.

ICLR believes that the presentations and the feedback provided by the union representatives suggest a step by step approach to conducting credible and effective investigations of international labor rights.

While the presentations and discussion were *off the record*, ICLR has distilled the key points of the presenters' remarks and the discussion. We look forward to receiving any feedback and suggestions about the subjects raised in this roundtable.

This report is divided into the following sections:

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1. Preparation

a. Research

Good investigations require significant early foundational research which is best to occur before entering the field. It is important to invest human resources in doing detailed research at an early stage to focus efforts and avoid wasting resources. Unions should develop a common

approach among campaign staff members so that researchers do not spend time looking for things the campaign is not able to use.

Early research is also necessary to identify local partners and allies. Unions should identify all of the relevant interests and constraints of their partner organizations in the campaign as soon as possible.

b. Gain an understanding of local conditions

Understanding the economic, political and social situation in the country where the investigation will take place is as important as information about the company under investigation. Desk research, i.e., internet research, relevant legal and scholarly research should be conducted and relevant newspaper articles should be consulted. Both primary and secondary sources should be researched. Uncovering a company's subsidiaries, vendors and supply chain often can be done before entering the field. However, some documentation can only be obtained in hard copy when in country, since many materials in developing countries are not available on the internet.

c. Timelines

If investigating abusive incidents that have become known developing a timeline of events should be done before going to the site of the investigation.

d. Local laws and their enforcement

Becoming familiar with local laws and the reality on the ground regarding their enforcement can help to avoid problems when on site. Some laws that are on the books may be enforced differently *on the ground*.

2. Partnerships and Consultation

a. Local organizations

It is important to contact relevant international organizations where you will be conducting investigations. These include the ILO office with jurisdiction over the region, the nearest solidarity center office, international NGOs as well as trade unions and university based experts. Consulting with local labor and other experts in the area of the investigation should be done before the interview team arrives.

b. Staffing levels

It may be advisable to use least two investigators in the country where the investigation will take place. If translation is necessary, make sure translators are familiarized with the subject matter of the investigation, and where possible and to allow for consistency it is best to use the same translators throughout the investigation.

c. Allies

It is important to choose alliances on the ground carefully. That is, competing unions may seek to use the organizing campaign in ways that will not best serve the interests of the organizing campaigns or the persons who are interviewed may have agendas which impact negatively on their credibility.

3. Safety and security protocols

Depending on the country of the investigation, it is advisable to do advance preparation to assess the risk to researchers, partners and allies, and develop security protocols for working with them. Assessment of risks allows for decisions on whether to take specific actions. If something will put people at serious risk, do not do it unless you can sufficiently mitigate the risk!

It is crucial, as noted above, to know what the country's laws are to inadvertently avoid violating them and risking arrest or violence. For example, some countries forbid taking photos of public buildings or oil facilities.

Where security is necessary, everyone who goes into the field should have security and first aid training. Consider hiring security consultants to train your staff and provide other assistance. Such companies include AKE and Centurion companies. Insurance policies should be procured when possible. In tense situations, develop security protocols that specify how many times a day staff members working overseas should check in with the central office. If staff members are not heard from, consider it a sign that something is wrong and take action. Research should also be done before going to the field to identify hospitals, medical centers, relevant embassy and other contacts in the country that would be important to contact if an emergency situation arises.

It is critical to have a pre-investigation strategy for dealing with adversity. This includes having lawyers and others allies available to activate in the country where the problem is, and if necessary be ready to get people out of the country.

Researchers should be careful not to talk with third parties about confidential information.

Also receipt of sensitive documents or company information could expose the union to potential legal claims or arrest for violations of RICO, receiving trade secrets or other confidential information. Knowing the law of the country you are in is necessary to address these matters.

Thorough preparation is required to assure the safety and security of both witnesses and other allies. Coordinating with local groups and finding reliable partners on the ground, who can be trusted, is crucial to security.

There are a number of ways to minimize risks to witnesses and allies. Limiting access to confidential sources and contacts can lower the risk of exposure. Developing plans for getting sensitive information out of the country as soon as possible will limit the danger to people being found with it in their possession.

Have local lawyers on call to assist in the case of repression against your allies and witnesses. In cases of extreme threats, you may want to have plans to evacuate local partners.

There may also be legal action if companies try to block usage of videos/photos taken in workplaces, or other materials, by getting an injunction in local courts. While some campaigns have used the materials without prosecution, prosecution can be a risk.

Investigations may trigger company fears of negative reports, and this and/or the report itself, may lead to retaliation against workers who were interviewed. Sometimes this takes the form of factory closures. Consumer pressure on brands in the past often led to factory closures, but with organizing, the brands are now instead putting pressure on their suppliers to fix conditions. A grass roots organizing campaign targeting the brand may help to discourage retaliation against interviewed workers.

4. The Interview Process

a. Overview

There are differing views on the importance of interviews to an overall investigation. In some cases, interviews will be secondary to other evidence, and used to corroborate other research. In other cases the only appropriate evidence may come from worker interviews. Most investigations will involve a balance of research and interviews.

Developing a detailed questionnaire before interviews start will help frame the scope of the interviews and elicit suggestions from in-country contacts.

b. Where to conduct the interview

The location of the interview is key. Interviewing in the factory or workplace has serious risks because the atmosphere in the workplace can be intimidating for the workers. Workplace interviews occur most often where so called *independent* auditors paid for by a corporation or brand, are monitoring a plant. Such auditors usually interview workers inside the factory in groups, where workers are scared. This renders the information from the interviews unreliable.

Workers should be interviewed at a place where they feel comfortable such as a union office, women's center, workers center, or the worker's home.

c. Who to interview

Finding workers to interview can be difficult, particularly when access to the workplace is restricted. In this case contacts can be made through local people, particularly trade unions and other local experts.

Consider interviewing members of the government and company representatives as well as workers.

d. How to interview

A pre-interview briefing or discussion before the formal interview may help focus the investigation as well as assist the investigator in finding out before the interview: (1) who the person is; (2) what they know, (3) how credible they are; (4) their vested interests or agenda.

There are differences of opinion about whether it is better to have two people conduct the interviews or whether a single interviewer is preferable.

Whether people are interviewed in groups or individually depends on the circumstances. Some favor individual interviews. Others prefer individual interviews in combination with small group interviews believing that, in group settings, people will feed off each other's information and perhaps inspire each other.

A detailed questionnaire for interviews can be helpful. But it may be best to use a more open-ended approach – getting workers to tell their stories “fresh” without leading. This approach helps to avoid pre-judging interviewees. A questionnaire could also be complemented with open ended questions.

Whichever approach to the interview is used, allow the workers to tell their story in their own way. Interviewers will need patience to talk to rank and file workers and should listen to information that's important to the workers even if the information is not necessarily important to the campaign.

Take care to design the questioning so as to seek corroboration of information obtained in previous interviews. Multiple witnesses are necessary to corroborate key allegations.

Interviews may be tape recorded. But be aware that recordings may be discoverable and taping may inhibit witnesses or make them nervous. The logistics of tape recording may also be difficult in some conditions. Whether to tape depends on the circumstances. If taping is not done it may be helpful to use two interviewers and have them take detailed notes. New light scribe pens are gaining popularity and may be useful as well.

Having a good relationship with the interpreter/translator is crucial to obtaining clear interviews. You may wish to ensure the reliability of the translation by hiring two translators to check each other.

e. Assuring interviewees' confidentiality

Investigators must guarantee strict confidentiality to workers and other interviewees/witnesses and protect their sources. To assure confidentiality, it is important to coordinate with local groups who understand the local customs and conditions.

Opinions vary about whether to obtain and record the names of the workers providing information where the worker requests that their interviews be confidential. Some workers will not be asked (or will refuse) to give their names. For those that do reveal their names and request confidentiality, it is necessary to keep records of their names but this record could raise

risks to confidentiality. Another approach is to restrict knowledge of the names of workers to the principle interviewer and with extremely limited access to others.

Even if workers do not give their names or if their names cannot be released, workers have been allowed to give confidential testimony and labor groups were able to use *John Doe* affidavits. Testimony can also be used in reports, without names, especially if there are multiple people who corroborate the testimony. However, note that confidential and written statements may not be admissible in all courts or other fora.

Even when a worker's name is not used in a report, care should be taken to avoid releasing details which might identify the worker. Unions should review reports and consider redacting any details which might identify informants.

The final decision about whether workers' names should be made public should be made by the workers themselves. Investigators should tell them the report will be published and ask if their names can be included. More often than not, workers will allow their names to be used.

5. Preparation and distribution of reports

a. Assessing and analyzing the results

In utilizing social science research methods, sampling methods for conducting interviews and reporting cannot be strictly applied. Because of limitations in sample selection, often a quantitative pattern will be sufficient. When the information gained in interviews becomes cumulative enough and there is sufficient factual backup the data can be considered reliable enough. How many interviews are sufficient depends on what claims you want to make. Some suggest a range of 12-15, some say 20-25 interviews as a good sample. If there is only a very small sample available, it will be necessary to combine the information from interviews with additional documentary evidence to show a pattern of conduct. If the investigation concerns a global claim then the size of the sample and the level of corroboration will be greater. In any case, it must pass the *smell test*!

b. Reliability/evidentiary standards

In order to accomplish the goals of labor campaigns and survive public scrutiny, reports of investigations need to be reliable and credible. While labor investigations often do not need to meet the evidentiary standards that apply in U.S. courts, it is important to present the most credible evidence possible. When there are serious doubts about testimony or evidence, it may be safer to avoid making certain allegations. Information should be corroborated by multiple persons at a workplace, if at all possible. For every claim made, it is best to have at least two verifiable sources.

In judging reliability as in planning the interview, it is necessary to consider the relative merits of using personal testimony from interviews and non-interview sources. In factory-level labor investigations, worker interviews are often the most reliable source of evidence since factory managers lie, factory records are faked and state agencies often ignore complaints of labor violations. Though other evidence may be desirable, testimony is often the only way for low-wage workers to establish the validity of their complaints – workers cannot be expected to obtain

accurate documentary evidence of violations from their employers (even workers' own paystubs are often inaccurate). Requiring workers to produce such evidence to validate their allegations actually protects employers at workers' expense. Furthermore, leading national and international bodies that investigate worker rights violations, e.g., NLRB and the ILO CFA, recognize the sufficiency of worker testimony for reaching findings of fact.

On the other hand, some downplay the primacy of interviews, saying that it's preferable to develop non-interview sources. They believe that relying mainly on interviews may lead to companies discounting findings because they believe that uneducated workers are not reliable reporters. Others believe that interviews are of limited value in proving factory/workplace wide violations of laws, but are more useful for establishing individual violations of human rights. To address such concerns, use interviews to illustrate points rather than be the sole support for them. That is, let the facts speak for themselves and use the interviews back them up.

It is important to stress that, whatever caveats may apply, worker interviews are a crucial part of labor campaigns and can be very persuasive and credible. Personal testimonies are often very powerful, as long as they are *fact driven*. But even if independent corroborating facts are lacking, unions can still go to the factory with whatever they have gained from interviews and say "we have evidence, *disprove it.*" And in situations in which there are no signed statements from workers, use the information recorded by two people doing simultaneous note-taking.

Workers can give second hand testimony without invoking hearsay issues. If workers directly saw something being done to other workers it is fine to use their testimony about what the other workers said as well. But if workers heard something from another department at their workplace or something another worker heard about a third worker, then more direct testimony should be obtained if at all possible.

Another pitfall to watch out for is getting in the middle of disputes or divides where factionalism can impair the credibility of information given.

Community relations are also important for assuring credibility. One of the greatest validators of investigation is grass roots engagement of the participants. Obtaining information from well respected members of indigenous communities leads to greater social acceptance of the claims you are making.

c. Liability protocols

One serious concern for those conducting interviews is how to avoid lawsuits brought by owners or third parties, arising out of labor investigations and reporting. Confronting this threat leads some to assume the worst will happen and think in advance about whether the campaign could be sued for some action taken.

To avoid liability for libel actions, any time there is legally conclusory allegation, such as *the company violated the law*, that allegation should be well documented. Investigators and reporters should let the facts determine the conclusion rather than relying on presumptions and assumptions. Research should be able to stand on its own.

Avoid including extraneous information in reports. Some believe it is better to keep editorializing to a minimum and to modify language and change formulations to accomplish this.

Careful sourcing is crucial. Using the standards of the *Reynolds v Times Newspapers* is a good test for responsible journalism

To avoid legal liability for libel, it is important to look at the broader context in presenting information. Even if someone is not accused of anything directly, just having their name in a report on corruption may be problematic.

Some groups may wish to meet the most stringent libel standards of countries like the UK and France, but this may be too restrictive for others. But even if you adopt the more stringent standards, be aware that even if a reporter is not in the UK, internet traffic through the UK could invoke liability under British law.

Legal liability is not limited to libel and unions must be conscious of avoiding slander, as well. For oral statements, it is important to distinguish between raising a fact or an opinion and raising opinions should be scrutinized to avoid allegations of slander.

There are other possible areas of legal liability to look out for as well, such as suits for breach of privacy. For example, publishing financial information about someone could result in a suit for breach of privacy, even in the case of a public figure.

Some organizations report that one way to avoid liability is to go to companies, tell them about the investigation and ask them for their side of the story. Pushing companies to respond before a report is publicized may (or may not) insulate a report from libel actions.

Many human rights groups legal departments review everything they release, to avoid significant loss of resources from litigation. Unions may decide to vet every document in every language with their lawyers.

However, there is a delicate balance between being prepared and careful and having the flexibility and pro-activity necessary to do investigations related to union organizing drives. This has implications for the relations between union organizing and legal departments. In the end, many organizers believe that it is the lawyer's job is to define risks and but it is up to the client to decide what to do.

Develop protocols for sharing information, printing or reprinting reports or using names, as well as protocols for doing sign-on letters. Also there is some concern about allowing consultants to speak for an organization. Consider implementing clear guidelines and a review process as to who can speak for the union.

Unions should be careful about the use of their name or logo by local partners since this might subject the organization to liability.

As new technology develops, new concerns for investigators accompany them – it has been suggested that the Wikileaks issue could be used to discredit the labor movement in an investigative context, exposing the original source of the information being reported.

6. Strategies for advocacy and use of report

There are a wide range of opinions as to with whom and when a report of an investigation should be shared. Contacting a company early on in the investigation may result in management action to correct conditions OR it may expose the worker interviewees to retaliation. Another option is sharing reports with the factory or corporation just before publication, asking them for a response and giving them an opportunity to fix the problem. Others believe that it is the better practice not to show the company a report before publication. The surprise value of waiting for publication of the report as opposed to showing the report to the company must rest on a full understanding and balancing of the consequences of each action. Coordination with local groups will help you decide which course to follow.

If the report is to be sent to the company before release, it should be sent in a way that can be documented and delivery proven such as UPS or FedEx.

You may wish to highlight the more responsible companies' practice in your report (or their participation, if possible, in your campaign) to persuade local governments to crack down on companies which violate national and international labor and human rights laws.

There are other issues you may wish to consider in reporting.

Legal expertise on human rights is often weak and ILO standards vague. This makes it difficult to enforce local laws in campaign situations. Increasing our capacity to analyze national laws will strengthen our reporting, which often now details abuses but doesn't talk about how national (or international) laws are being violated.

One outcome of reporting may be settlement offers from companies on global claims. An ethical issue to consider is whether settling class claims involves waiving individual claims that on their own may have great merit. For labor lawyers, the main duty is to the client but in labor campaigns there may be overlapping representation, requiring full disclosure and vetting.

Conclusion

The report of this Roundtable is being circulated to participants and presenters to seek further input and suggestions. It is ICLR's intention to provide to unions engaging in international campaigns the information from the Roundtable. ICLR requests unions engaging in these international campaigns to supplement this report with concrete examples of work being done and to give feedback on which of the suggestions in this report were or were not helpful.