

# THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY

## Review Meeting

Universal Jurisdiction

Geneva, 6-8 May 1999

### UNIVERSAL JURISDICTION - FIGHTING IMPUNITY: DEVELOPING AN NGO AGENDA

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#### INTRODUCTION

1. The paper which follows was prepared in June 1995 for a discussion by the International Executive Committee of Amnesty International (AI).
2. It had been commissioned in response to an initiative by Menno Kamminga, then a member of the International Executive Committee, calling upon AI to consider how it would be possible to increase the likelihood that perpetrators of crimes against humanity would be brought to justice. In particular, the question was raised as to whether it would be “wise and feasible” for AI to play a role in creating an international agency to investigate human rights violations with the aim of ensuring that perpetrators are brought to justice.
3. There have been a number of positive developments in this area since the paper was prepared. In particular, the concept of universal jurisdiction has been boosted importantly by developments relating to the ICC and, on the domestic front, by the Pinochet case.
4. Hopefully many of the issues raised in the paper remain relevant today. The paper is by no means meant to be a comprehensive survey of such issues but it may provoke some creative reactions from those working in this field.
5. A variety of sources was consulted in the preparation of this paper, including representatives of a number of human rights organisations and officials of the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and officials of the *ad hoc* International Tribunals. Despite the input from a variety of sources, the conclusions and analysis which follow are very much a limited and subjective response to the issues raised.
6. There is no pretence that these conclusions provide in every case “the right answer” to the questions raised. At the very least, however, one hopes that these answers, such as they are, can

serve as a provocative catalyst to discussions which in turn will assist in the taking of positive steps to ensuring that the perpetrators of human rights violations are brought to justice.

## SUMMARY OF CONCLUSIONS

7. A practical decision concerning the wisdom and feasibility of setting up a new human rights organisation seeking to bring to justice perpetrators of human rights violations need not, and probably ought not, to be impeded by the sorts of philosophical discussions which sometimes predominate in this area. In particular, provided that those setting up such an organisation are convinced that there will be a significant element of deterrence of human rights violations as a result of such initiative, it does not seem crucial to weigh the relative importance of 'deterrence' and 'retribution' as operational factors in the work of the organisation. Questions relating to *effective* deterrence, however, will certainly be relevant in determining the working methods of such an organisation, the venues in which prosecutions may be sought, the seniority of perpetrators to be investigated, etc.
8. Further, in order to reach a decision that the institution of such an organisation is a good thing, there is probably no need to re-open the philosophical discussion as to whether under any circumstances a new government might be justified in citing political constraints when confronting past human rights violations. It should be possible to develop a principled approach on this subject. Even assuming that it were to be accepted that under some circumstances prosecutions were not feasible, there would, unfortunately, never be the slightest danger of a lack of cases world-wide for the proposed organisation to pursue.
9. A fundamental question for any such organisation would be the choice of jurisdiction before which it would be seeking that perpetrators be brought to justice. Three main possibilities exist: 1) the domestic courts of the country in which the violations occur, 2) the courts of another country exercising "universal jurisdiction" or 3) an international tribunal. Logically, one would assume that the best solution would be for all three options to be available to be used as and when appropriate. But the role which the organisation might play would vary significantly depending on the choice of jurisdiction.
10. In the context of prosecutions brought in the domestic context, it is less often the evidence of abuses that is lacking than the political will and/or the requisite institutions and skills to investigate and bring to justice those who have committed violations and to protect those who must come forward as witnesses for the prosecution. Thus, while some with whom I spoke saw these domestic prosecutions as the main arena for the work of the proposed new organisation, I am left somewhat unconvinced that the most effective contribution it might make in this area would be significantly different from those which other human rights organisations could already be making.
11. With respect to prosecutions brought before other national courts under universal jurisdiction or before international tribunals, the situation is different. Here the role of a separate organisation assisting in the evidence collection procedure is more obvious since the prosecutorial authorities are going to have much less knowledge of and immediate access to evidentiary sources. Similarly, potential witnesses and other sources of evidence are themselves likely to be geographically distant and unfamiliar with the working methods and procedures of the prosecutorial institutions involved. Those who will want to work for and support a prosecution in these distant fora will need help. The role for a facilitating intermediary is more clear.
12. A related issue which probably ought not to be ignored in this context is the possibility of civil actions brought against perpetrators in countries outside of the country where the violation

occurred. Inadequate in some ways compared to the criminal process, nonetheless there are obvious benefits in terms of how such actions are instituted and the applicable standards of proof. National and international initiatives have been undertaken to promote this approach.

13. To the extent that the contemplated new organisation would be co-operating with the prosecuting authorities in any jurisdiction, there would need to be a very clear concept of the exact role of the organisation. From a number of perspectives it would not make sense for it to duplicate the work of a prosecutor's office. The resources required to undertake such a full prosecutorial-style investigation would be enormous. From the point of view of the actual prosecutor, there would be a real risk of such an approach tainting the evidence and actually creating materials which could play into the hands of defence counsel in casting doubt on the guilt of a defendant. When there has been co-operation between such an organisation and a prosecutor's office, the real possibility will exist that defence counsel will seek to call relevant officers of the organisation as witnesses. Dilemmas might well arise between the perceived need to protect the organisation's working methods and the confidentiality of its contacts on the one hand and the right to a fair trial for the defendant on the other.
14. In other cases more fundamental questions will arise as to whether the organisation should be co-operating at all with a particular prosecutor/tribunal, and clear guidelines should be available. These questions could arise, for example, in the context of a tribunal known not to apply fair trial standards or which had as an option the imposition of the death penalty on the defendant. Even in cases where such fundamental flaws were not in evidence, there would still be a strong danger of the organisation being perceived as an adjunct of the particular tribunal/prosecutor. Questions would also arise regarding the appropriate severity of punishment which should be sought by prosecutors and meted out by tribunals -- short of the death penalty -- and the organisation would need to develop a policy on such questions.
15. Problems of balance would need to be addressed seriously in the work of such an organisation. There could well be perception problems, for example, if the only domestic fora with which it was co-operating for 'universal jurisdiction' prosecutions were North American or European.. This sort of 'jurisdictional imperialism' would be detrimental to its reputation as an international body. Similarly, while one would envisage that the organisation would necessarily co-operate with any eventual international criminal court, it would then face being tainted with any of the perceived political biases or other weaknesses which that court was seen to encompass.
16. Also on the issue of balance, the organisation would need to ensure that its own agenda of country interests was geographically and politically broad from the beginning. This would mean that the resources needed for the organisation to pursue its work would be very high from the very beginning. It would need to work hard to set its agenda of interests strategically, not being driven primarily by media interest, political concerns or the fact that some fora were seeking to prosecute certain categories of perpetrators.
17. Given the great sensitivity of the issues with which it would be concerned, the organisation would require great clarity with respect to its objects and working methods. In particular, how it was going to use the names of alleged perpetrators it collected would need to be very clearly spelled out. Since its main aim should be that these alleged perpetrators be brought to justice in a fair trial proceeding, the main use of the names and evidence collected should be in providing the relevant prosecutorial authorities with the raw materials to launch such prosecutions. Very clear guidelines would need to exist as to when, if ever, names could be named publicly by the organisation prior to a prosecution. In this connection, important factors would include the possible prejudice to a fair trial if a respected human rights organisation were to give publicity to its belief that someone should be prosecuted. Further, from a practical point of view, the potentially disastrous prospect of a successful libel action would need to be considered.

18. Security guidelines for the work of any such organisation would be equally essential. The protection of contacts would need to be a priority -- both in terms of the risks that they would be taking in having contact with the organisation at all and with respect to the use of any information which they provide and their potential role as witnesses in any eventual prosecutions. There would be obvious security concerns for those working for the organisation as well which would need to be addressed.
19. The collection of evidence is only one of many prerequisites for the effective prosecution of alleged perpetrators of human rights violations which have not been met and any such organisation should be addressing a broad spectrum of other issues. National authorities continue to lack the will to prosecute human rights violators within their own countries and, even if they have the will or otherwise feel compelled to act, they may lack the necessary prosecutorial, judicial and other resources to carry out trials conforming to international fair trial standards. Questions of political will and practical resources, as well perhaps as an undeveloped jurisprudence, have also made the exercise of universal jurisdiction a virtual 'dead letter' in some countries of potential prosecution. The possibility of civil actions for compensation of victims and their families also remains highly underused although this is a technique which other organisations are seeking to develop. The important steps towards international criminal jurisdiction being taken by the *ad hoc* Tribunals and by the International Criminal Court are important initiatives requiring support. Of course these are all issues which could be taken up by the proposed new organisation as part of its early agenda. But they are as well for the most part issues where existing human rights organisations can act and have in many contexts already played an important role and should continue to do so.

### **Philosophical Justifications and Guiding Principles**

20. While many of the most interesting and challenging questions regarding the impunity of human rights violators are philosophical ones, a pragmatic approach seeking to combat human rights violations effectively would seem an effective guiding principle.
21. In particular such an approach should assist in clarifying the basic philosophical justification which an organisation should be applying in deciding whether to prosecute alleged perpetrators of human rights violations. Its main aim should be to prevent further violations from taking place. This seems inherent in Menno Kamminga's statement in his paper:

Needless to say, the purpose of the exercise would be deterrence, not retribution. The underlying assumption would be that a handful of highly publicised trials every year might already have some deterrent effect.

22. At the same time, it seems perfectly clear that other individuals and other organisations might with perfect legitimacy see such an exercise as having value whether or not deterrence is achieved. Thus, in responding to Menno's paper, Aryeh Neier has written:

I agree with much - but not all - of what is said in the memorandum of Menno Kamminga that accompanied your letter. One area of disagreement is his assertion that "the purpose of the exercise would be deterrence, not retribution." In my view, upholding principles of justice - pejoratively labelled "retribution" - is the most important rationale for bringing the perpetrators of crimes against humanity to justice. As to deterrence, this seems to me speculative. It may be an effect of ending impunity, but should not be the underlying rationale.

23. Of course, Aryeh Neier is correct that presumptions about deterrence are "speculative". Menno in essence acknowledges this in accepting that he is operating on the "underlying assumption" that a few trials "might already have some deterrent effect". At the same time, such an

assumption seems based on common sense. Although the perpetrators of human rights violations, like all other criminals, doubtless think or at least hope they "will get away with it", the greater the chance of the apprehension, the more likely they are to reflect before acting.

24. It makes sense that an organisation should seek to maximise those aspects of its work which will tend towards effective deterrence. As an example, I would suggest -- although some with whom I have spoken clearly disagree -- that from the point of view of deterrence the development of universal jurisdiction either in the courts of other countries or in an international tribunal may be a more effective deterrent technique than prosecutions at home after a change in government. Human rights violators who feels safely in control in their own country may find it difficult to envisage falling out of power and facing prosecution before their own courts. But to the extent that these individuals travel internationally either as "statesmen" or for their personal business or pleasure, the possibility of facing arrest and prosecution before a foreign or international tribunal could have some real impact on their behaviour. It has to be faced, however, that in some cases this behavioural change may be no more than the taking of greater efforts to hide their responsibility for abuses or, alternatively, portraying themselves in their own countries as martyr figures misunderstood by the international community. The concept of "international arrest warrants" pioneered by the *ad hoc* Tribunal for the Former Yugoslavia represents an important and interesting experiment in this area.
25. A decision as to seniority of perpetrators to be targeted by any such organisation should also reflect issues of effective deterrence. While Menno has suggested concentrating upon "big fish", this may be too exclusive a policy which might suggest to middle level perpetrators that they might hide behind a defence of "obedience to superior orders".

### **Choice of Jurisdiction**

26. A fundamental question for any such organisation would be the choice of jurisdiction before which it would be seeking that perpetrators be brought to justice. Three main possibilities can be identified: 1) the domestic courts of the country in which the violations occur, 2) the courts of another country exercising universal jurisdiction, or 3) an international tribunal. Clearly, in order to maximise the effectiveness of a deterrence policy, the availability of all three options should be encouraged for use as and when appropriate. But the role which the organisation might play would vary significantly depending on the choice of jurisdiction.
27. From many points of view, prosecution in the domestic courts is the ideal which should be striven for. Defendants, witnesses and other evidence are likely to be close to hand. Those in charge of bringing the prosecution will already understand well the context in which the case has arisen and, therefore, can concentrate on the particular facts of the case. Complicated questions relating to international jurisdiction and the applicability of international legal standards are not likely to side-track the proceedings since the violations alleged will probably fall within domestic jurisdiction and the locally applicable penal law well known to the prosecution, the defence and the court. Domestic prosecution, if seriously pursued, also has the benefit of demonstrating to the population of a country their own government's commitment to the protection of human rights.
28. All of this presupposes, however, that the political will exists in the home country for the prosecutions in question to be brought, a situation which is usually not likely to exist until after there has been a change in government. Related to this are questions regarding so-called "transitional societies" and the reluctance to prosecute in this context. Also, it assumes the existence of the requisite institutions with adequate resources and skills to investigate and bring

to justice those who have committed violations and to protect those who must come forward as witnesses for the prosecution.

29. Thus, many of the potential impediments to the bringing of prosecutions in these jurisdictions do not arise from the lack of availability of evidence but rather from problems of motivation and institutional weaknesses. Existing human rights organisations have traditionally played a very strong role in addressing the issue of political will, as presumably would the proposed new organisation. Such an organisation would have the benefit of having in its possession concrete information about individuals alleged to have committed human rights violations which it could present to a government in its attempts to bring about prosecutions. It is not clear, however, that this by itself would bring about a significant change in a government's will to prosecute.
30. Existing human rights organisations have not very successfully thus far addressed the problem of institutional weakness, one which continues to be very starkly illustrated by the situation in Rwanda where tens of thousands of individuals allegedly implicated in serious human rights violations continue to be detained with no immediate prospect of charge or trial. The problem in that and similar situations is not the lack of evidence on the ground but rather the lack of the requisite expertise to assist a government in constructing or rebuilding deficient legal and judicial institutions to collect and process such evidence. The development of a strategy in this area -- which might, for example, encompass the establishment of an international pool of consultants which could be drawn upon in such urgent situations -- should be seen as a priority by any organisation seeking to address the problem of bringing perpetrators of human rights violations to justice.
31. On the other hand, an organisation specialising in the collection of information about alleged perpetrators would have a potentially far more important role to play with respect to prosecutions brought before other national courts under universal jurisdiction or before international tribunals. The prosecutorial authorities working to bring cases before such fora are going to have much less background knowledge of the context in which offences are alleged to have taken place and much less immediate access to evidentiary sources. Similarly, potential witnesses and other sources of evidence, such as those holding relevant documentary evidence, are likely to be geographically distant and unfamiliar with the working methods and procedures of the prosecutorial institutions involved. The role for a facilitating intermediary, such as the proposed organisation, is far more clear in this context.

### **Making Universal Jurisdiction Work**

32. One priority must be an analysis of how, and indeed whether, universal jurisdiction can be effectively implemented. Again, it is not only a question of producing evidence of abuses by perpetrators that is required. Questions of law, resources and, again, political will necessarily will figure prominently with respect to any national jurisdiction contemplating the use of universal jurisdiction to bring such perpetrators to justice.
33. With respect to the legal position, the emphasis should be on attempting to achieve in the context of each national jurisdiction the clearest and the broadest possible interpretation of the concept of 'universal jurisdiction'. Clarity is important so that national prosecutors, used to operating in a system they know and understand -- and which perhaps is precisely codified -- can more easily be convinced to take up the challenge of seeking to exercise a new and unfamiliar jurisdiction.
34. The approach taken should be result-oriented, employing as necessary international human rights treaties and standards, customary international law, international humanitarian law and

international criminal law. Legal arguments should be developed to resolve the numerous ambiguities and unclarity which exist in favour of the broader coverage needed.

35. The purpose of this paper is not to set out in detail the areas of ambiguity which exist in the law relating to jurisdiction but it must be recognised that they exist and would need to be confronted by any organisation seeking to bring about prosecutions. Some clear guidance exists. The Convention against Torture, in Articles 5(2) and 7, makes clear that states party to it must either extradite alleged torturers or try them on the basis of universality of jurisdiction. In the context of humanitarian law, the Geneva Conventions make similar provision for the perpetrators of "grave breaches" of their provisions (i.e., "war crimes"), which include acts such as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement..." The ICC Statute offers new guidance on "crimes against humanity" and war crimes in internal conflict, as do the statutes of the *ad-hoc* Tribunals.
36. While daunting, the resolution of legal issues relating to the exercise of universal jurisdiction is probably far less of a pragmatic hurdle towards the bringing of prosecutions than issues related to financial and human resources and political will. Even well-intentioned governments surely find it easier to pay lip service to high human rights principles by developing acceptable theoretical legal standards than to make the substantial resource commitments required for effective and fair prosecutions.
37. The example of Canada, which has made a real effort in this area, is instructive. (Note that the information included in the following paragraphs was as of 1995, the year of this paper's preparation in its original form. It has no doubt been superseded) In 1987 Canada amended its Criminal Code specifically to permit the prosecution of those responsible for "war crimes" or "crimes against humanity". While other common law countries, such as the United Kingdom, the United States and Australia, have taken similar initiatives with respect to those responsible for World War II-related abuses, the Canadian law did not have this historical limitation.
38. A separate Crimes Against Humanity and War Crimes Section was established in the Canadian Department of Justice to consider such prosecutions and a corresponding unit of the Royal Canadian Mounted Police was dedicated to this purpose. A tactical decision was taken that, despite the broad mandate provided by law, the initial work of these bodies would be directed at investigating those Canadian citizens and residents alleged to have been implicated in crimes against humanity and war crimes committed during the course of World War II.
39. The work of the Crimes Against Humanity and War Crimes Section began in 1987 and at, at its peak, had 35 full time staff members based in Ottawa, including 12 lawyers, 7-8 historians, 6 historical support staff, together with other administrative and support staff. In addition, they had at their disposal 15 "contract historians" employed on a consultancy basis in the field, various linguists and the services of Royal Canadian Mounted Police who were used exclusively for interviewing witnesses (generally on their own in Canada, unless interpretation was required, but accompanied by historians and linguists abroad). The Chief Historian explained to me that their research efforts were greatly facilitated by the vast amounts of reasonably accessible archive materials previously collected in Germany, Poland and other countries in the region and, after the opening up of the former USSR, the access afforded to KGB files.
40. Much of their work involved the investigation of allegations made by individuals and organisations against people who had been living in Canada for decades. Roughly 1,000 such allegations were investigated. Some were judged to be patently groundless to begin with and not pursued. Of those investigated, several hundred could be "proven" to be false. In one case, an individual was successfully extradited to the Netherlands where he had been convicted *in absentia*.

Ultimately five criminal prosecutions had been brought in Canada as of 1995 on the basis of the work of the Section, none of which was successful. One defendant was acquitted and wrote his memoirs. Two cases were stopped for procedural reasons (in one of which the judge refused to admit evidence from KGB records). A fourth trial was suspended because of the ill-health of the defendant.

41. In the fifth case, which has probably been the Section's greatest disappointment, not only was the defendant, Imre Finta, a legally trained captain in the Royal Hungarian Gendarmerie, acquitted, but a Supreme Court decision on appeal has set a difficult and controversial subjective test regarding the requisite state of mind for someone to be convicted of committing a crime against humanity or a war crime:

The requisite mental element of a war crime or a crime against humanity should be based on a subjective test. I reach this conclusion for a number of reasons. First, the crime itself must be considered in context. Such crimes are usually committed during a time of war. Wars are concerned with death and destruction. Sweet reason is often among the first victims. The manipulation of emotions, often by the dissemination of false information and propaganda, is part and parcel of the terrible tapestry of war. False information and slanted reporting is so predominant that it cannot be automatically assumed that persons in units such as the Gendarmeries would really know that they were part of a plot to exterminate an entire race of people.

It cannot be forgotten that the Hungarian people were loyal to the axis cause. There was strong pro-German sentiment throughout the country. This was a time of great stress and anxiety as the Russian advance pushed back the German armies towards the borders of Hungary. A newspaper report of the time presented at the trial may give some indication of the feelings of the Hungarian people:

With the war, the front line nearing our borders, the Jewish problem is becoming more and more acute.... this country, girding itself for self-defence, possibly with German help, the internal situation of eight to nine hundred thousands Jews of basically hostile attitude to our military objectives demands new and effective measures...

In his policy-making speech, the Prime Minister expressively stated that the only way open to us in solving the Jewish problem is the deportation.

(Szegedi uj Nemzedek, April 9, 1944.)

Section 7(3.71) cannot be aimed at those who killed in the heat of battle or in the defence of their country. It is aimed at those who inflicted immense suffering with foresight and calculated malevolence

42. The Supreme Court went on to apply such reasoning to accept that the Defendant under such circumstances could invoke the defence of "obedience to superior orders" and that it had been appropriate for the jury to be instructed on this. The reasoning provided by the court was that "The evidence from the newspapers of public approval for the deportation, and the open manner in which the confiscations took place could have supported the defence of mistaken belief that the orders to undertake the actions which gave rise to the charges against the respondent were lawful."
43. Such a standard, if maintained, would make convictions for crimes against humanity and war crimes very difficult to obtain under most situations where they arise. Legislative initiatives are being considered to clarify the legal position in this regard in Canada. But to add to the demoralising impact which this decision had on the Crimes Against Humanity and War Crimes Section, budgetary cuts in Canada which were meant to reduce the number of federal civil servants by 45,000 were particularly toughly applied to the Section decreasing its staff to eleven.
44. This example is illustrative of many of the problems inherent in the application of universal jurisdiction. First of all, it illustrates the resource intensive nature of the work necessary to bring

a prosecution. A staff of 35, operating for some eight years, while investigating 1000 potential cases, was able to launch only five prosecutions, none of them successful and one of them potentially devastating in its legal effects. The fact that the work had been concentrated on alleged offences relating to World War II can probably be said to have had both positive and negative impacts on their work. On the positive side, since the work was so concentrated, it was possible to establish a team with the specialist historical, linguistic and legal expertise to deal efficiently with the particular issues raised. Further, because of the extensive propensity for record keeping of the Third Reich, the KGB and others, and the subsequent efforts of interested individuals and organisations to collect and guard such information, much documentary evidence was relatively easily accessible. On the other hand, the fact that events of half a century ago were being investigated necessarily meant that it was harder to locate witnesses, if indeed they survived, and memories were necessarily dimmed. Also, not unimportantly, one must take into account that some, both amongst the public and amongst officials, were less likely to be supportive of prosecutions of elderly defendants for acts which, while horrific, occurred decades ago and where the passing of time might make the fairness of trials seem less certain.

45. While Canadian law and the mandate of the Section set up in the Department of Justice permit the prosecution of other individuals for war crimes and crimes against humanity arising outside the context of World War II, it seems difficult to see how this can effectively be done under the present circumstances. The Chief Historian of the Section said that information has been received regarding alleged human rights violators currently in Canada and that they would like to act but simply lacked the resources.
46. More than anyone with whom I spoke throughout my preparations for this paper, she welcomed the proposed establishment of a new human rights organisation collecting information about alleged perpetrators and saw this as a potential valuable resource for her Section. Indeed, she seemed to see it almost as a sort of panacea for their own depletion of resources. As will be discussed below, however, any such organisation is never likely to be in a position to replace the prosecutorial function of collecting evidence widely and meticulously in order to bring a prosecution. The Canadian example offers some illustration as to how resource-intensive and specialist such work is likely to be.

### **Civil Actions in National Courts**

47. Before leaving the subject of the exercise of national jurisdiction against alleged perpetrators of human rights violations, it is appropriate to touch upon a related subject -- the possibility of bringing civil actions against such perpetrators in national fora. Such actions do not fall strictly within the purview of this paper and obviously they can never be a substitute for criminal prosecutions in terms of seeing justice to be done. At the same time, from a procedural point of view, they have much to recommend them. Once a legal framework is in place in a country allowing such actions, there is no need for the government involved to expend the same level of resources or demonstrate the same sort of political will as is required to bring a criminal prosecution. Everything depends on the victims and those supporting them to institute the actions and to provide the supporting proof. Generally speaking, the standards of proof will be much lower than in a criminal prosecution (e.g., "balance of probabilities" vs. "beyond a reasonable doubt"). Nonetheless, there will be the same opportunity to make public in a high profile forum the reality of the violations which have occurred.

## Co-operating with International Tribunals

48. It is interesting to note that those responsible for bringing prosecutions before the *ad hoc* Tribunals voiced considerable scepticism about the feasibility and ultimate usefulness of a new human rights organisation concentrating specifically on the collection of information about perpetrators of human rights violations. In order to understand the point of view of their reservations, it is necessary to quote extensively from two UN documents. The first of these is the address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly on 14 November 1994. In his address, he offers an explanation of the different working methods of the Prosecutor's Office and other international organisations collecting information about abuses:

Let me now move on to a comparison of the criminal investigation and prosecution processes of our Tribunal with the way in which other international bodies collect information about egregious violations of international standards. This comparison is also necessary because many commentators have been wondering why, given the wealth of documentation existing on alleged crimes in the former Yugoslavia -- press reports, reports of Governments and NGOs as well as the impressive work accomplished by the Commission of Experts created by the Security Council -- why, given all this material, the Prosecutor did not issue indictments immediately after taking office. The problem, Mister President, is that those reports are a far cry from evidentiary material capable of standing up to judicial scrutiny. The task of our Prosecutor is to produce "credible evidence to provide incredible events". This is a task which is fundamentally different from that of other bodies which are simply called upon to collect information. Those bodies frequently do not attach great importance to the distinction between eye-witness evidence and evidence at third- or fourth-hand; if they interview witnesses, they normally do not have the time or the resources to double-check such interviews in order to verify their reliability; furthermore, in most cases they do not try to identify, let alone trace, the possible authors of the crimes, simply because this is not part of their brief or because they lack the necessary resources.

Needless to say, the methods and standards of our Prosecutor must of necessity be different. Let me give you an example. Let us assume that the representative of an NGO finds that there are fifty bodies in the mortuary of a village inhabited by a certain ethnic group; he notes that all of them have been killed by shelling; in addition he is told by an inhabitant of the same village that on the previous day a military group belonging to an enemy army, located in the vicinity, attacked the village. In this case, the NGO representative may be warranted in concluding that a massacre of civilians was perpetrated by that particular army. Our Prosecutor needs to undertake much more extensive and complex investigations. He needs to prove that the deaths of those people were indeed caused by the shelling and not by any other explosion or firing; he needs to ascertain whether or not all those in the mortuary were killed by the same shelling, whether they all died as a result of the one incident, whether before dying they were themselves fighters or peaceful civilians, whether any military objective was located close to the place where they were killed. Furthermore, our Prosecutor needs to identify those who carried out the shelling, the chain of command, whether or not orders were given to fire on the village and so on. The Prosecutor also has the onus of establishing the guilt of the suspect beyond any reasonable doubt. For all these purposes he needs to locate and interview all the relevant witnesses, not only those implicating the suspects in the commission of the alleged crime but also those witnesses who may be able to exculpate the suspects. Let me add that in undertaking all these actions, our Prosecutor has to comply strictly with a set of rules (our Rule of Procedure and Evidence); in particular, he is bound fully to respect stringent rules on the rights of victims, witnesses and suspects. As you see, the task of our Prosecutor is more demanding than, and indeed different from, that of bodies and organisations responsible solely for collecting information and preparing reports.

49. Several reservations can be expressed about this statement. First of all, it is perhaps unduly defensive, framed as it is as an *apologia* for the slow pace of prosecutions. Perhaps related to this is its somewhat critical tone regarding the work of other organisations collecting information about abuses. There should be no suggestion that human rights organisations should require anything like a prosecutorial standard of proof before they take steps to alert the international

community about the existence of human rights violations. While, obviously, in order to maintain their credibility and effectiveness, such organisations need to have high standards in their work, nothing like "proof beyond a reasonable doubt" is required with respect to the allegations they are making.

50. These reservations aside, however, President Cassese's address gives a fair indication of the very high level of resources required by a Prosecutor's office collecting information with a view to prosecution. This in turn offers some guidance as to the costs of establishing an NGO which would seek to play a quasi-prosecutorial role in its information gathering. (It also shows the astronomical costs which would be required for a properly functioning International Criminal Court with world coverage.) The 1995 year's annual budget for the *ad hoc* Tribunal on the Former Yugoslavia was some \$30 million, of which a substantial portion went towards the Prosecutor's office which included nine separate investigation teams, a strategy team, and mission offices in Sarajevo and Zagreb (with some form of presence being negotiated in Belgrade). The investigation teams, each comprising seven or more individuals with a range of high level police, intelligence, legal and other investigative skills, had different focuses to achieve some balance in the work of the Prosecutor's office. In order to prepare the indictments relating to one incident - the killing of Bosnian Muslims and Bosnian Croats at Omarska camp -- investigators travelled to 12 countries.
51. Even if an NGO were to have resources allowing it to operate at such a level, those running the Prosecutor's Office of the *ad hoc* Tribunals made clear to me that they would find it potentially dangerously counterproductive to have such an NGO mirroring their investigative approach. Some of their reasoning was reflected in a document entitled ***Cooperation Between Non-Governmental Organisations and the International Criminal Tribunal for the Former Yugoslavia***, an undated document produced by the Prosecutor's Office as a response to NGOs' offers to assist. That document in particular warns about the danger of in-depth investigative interviews conducted by NGO researchers with potential witnesses:

Some NGOs have been engaged in interviewing the victims of atrocities, including those who have fled from the war zones as refugees. While recognising the important work of NGOs in this area, the time has now come for the Tribunal to take over responsibility for future in-depth interviewing of the victims, witnesses, and refugees for the purpose of extracting information from those persons regarding war crimes or crimes against humanity. All of these persons are potential witnesses in future prosecutions before the Tribunal and, accordingly, great care needs to be taken not to contaminate the evidence that these witnesses may give.

The Prosecutor's Office cannot rely on the assessment of others regarding the reliability and credibility of the persons it intends to call as witnesses and must undertake its own assessments. This will mean that the Prosecutor's Office must interview all potential witnesses to enable such assessments to be carried out.

Accordingly, any further interviewing of potential witnesses by persons not in the Prosecutor's Office, could jeopardise, hinder, or interfere with investigations being carried out by the Prosecutor's Office. Such interviewing could contaminate witnesses or evidence and thus may prejudice the chances of mounting a successful prosecution. Although the Prosecutor's Office will now assume the responsibility of undertaking in depth interviews with potential witnesses, the Prosecutor's Office also seeks the assistance of NGOs in the identification of all potential witnesses.

[The document then goes on to outline, in the section "Screening Guidelines", the specific information which would be useful to receive from NGOs regarding potential witnesses: their names and particulars, where they come from, whether they witnessed any particular crimes or offences (but without details being taken), whether they were prepared to be interviewed and how they might be reached.]

52. One of the main risks perceived by the Prosecutor's Office in this regard was the danger that successive interviews of a potential witness by different interviewers might result in different versions of events. This could result because of different interview techniques, imperfect recording of what is said, changed recollection on the part of the witness or any one of a number of other reasons. Once, however, such contradictory evidence comes into the hands of the Prosecutor, he would be bound under fair trial standards, as reflected in Rule 68 of the Tribunal's Rules on "Disclosure of Exculpatory Evidence", to provide such conflicting evidence to the defence. Rule 68 states:

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused of a crime charged in the indictment.

53. Conflicting interview records, with the doubt which they would cast on the credibility of the potential witness, would clearly fall within this rule. An NGO might also under such circumstances find its representative under pressure to become a witness at a trial where a statement taken by such representative has become an issue. Difficult conflicts could arise between the perceived need to protect the organisation's working methods and the confidentiality of its contacts on the one hand and the right to a fair trial for the defendant on the other.

### **Guidelines for the Proposed New Organisation**

54. If such an organisation is indeed going to be established, various areas of concern should be flagged where guidelines will need to be formulated as to its operation and working methods. Set out below is a brief summary of some of the main areas of concern.
55. Degree of Co-operation with Prosecuting Authorities. In discussion above, it has been rather assumed that co-operation by the proposed new organisation with prosecutorial authorities such as those attached to the Canadian Justice Department and the *ad hoc* Tribunals would be a good and positive thing for the deterrence of human rights violations. Even in such cases, however, it would be potentially disastrous for such an organisation's reputation and independence if it any way came to be seen as an adjunct of any prosecutor, regardless of that prosecutor's integrity.
56. The situation would become immeasurably more difficult in situations where questions arose as to whether the organisation should be co-operating *at all* with a particular prosecutor or tribunal. Co-operation would certainly seem inappropriate with respect to a tribunal known to apply unfair trial standards or which had the option of imposing the death penalty on the defendant. Questions would also arise regarding the appropriate severity of punishment which should be sought by prosecutors and meted out by tribunals -- short of the death penalty.
57. Issues of Balance. Problems of balance would need to be addressed seriously in the work of such an organisation on a couple of levels. First of all, it would be problematic if the only domestic fora with which it was co-operating for "universal jurisdiction" prosecutions were North American and/or European. This sort of "jurisdictional imperialism" would diminish its reputation in other parts of the world as a truly international body. To the extent that it was working mostly with an international criminal court, it would conceivably see itself tainted with the perceived political biases or other weaknesses which that court was seen to encompass. Obviously it should seek to work with as many potential jurisdictions as possible.
58. From its inception, the organisation would need to ensure that its own agenda of country interests was geographically and politically broad and balanced. Given the examples cited above of the high levels of resources which prosecution teams need to devote to relatively limited

situations, this would mean that the resources needed for the proposed organisation to pursue its work would be very high from the very beginning.

59. It would need to give much thought as to how its agenda of priority concerns would be formulated. This would need to be a strategic decision based on the seriousness of the concerns raised in particular situations, the possibility of making a difference and the need for balance. The organisation should not allow itself to be driven in its priorities primarily by media interest, political concerns or the fact that, for whatever other reasons, certain fora were seeking to bring particular categories of prosecutions.
60. Naming Names. A clear policy would be required as to how such an organisation was going to use the names of alleged perpetrators it collected. Presumably, since its main aim should be that these alleged perpetrators be brought to justice in a fair trial proceeding, the main use of names and other evidence collected would be in providing the relevant prosecutorial authorities with the raw materials to launch such prosecutions.
61. Very clear guidelines would be required as to when, if ever, names could be named publicly by the organisation prior to a prosecution. In this connection, important factors would include the possible prejudice to a fair trial if a respected human rights organisation were to give publicity to its belief that someone should be prosecuted. Further, from a practical point of view, the potentially disastrous prospect of a successful libel action would need to be considered. In the United Kingdom, for example, the largest libel award ever was made in such a context. In 1989, Lord Aldington, a former Deputy Chairman of the Conservative Party, was awarded £1.5 million damages against County Nikolai Tolstoy who had written a pamphlet accusing Lord Aldington of being a "major war criminal" for his alleged role, while a senior British officer in Austria in 1945, in handing back across the border thousands of Cossacks and anti-Communist Yugoslavs, with the supposed knowledge that they would be killed or sent to labour camps.
62. Security. There would be a serious security threat to staff members of any such organisation. They would be seeking out information about named individuals who would have a very personal interest in stopping them. Security issues relating to the organisation's contacts would be of long duration. Not only would they be at risk at the time of making contact with the organisation's investigators. Risks would increase as the organisation shared the information obtained with potential prosecutors and contacts faced the prospect of becoming witnesses in a judicial setting. The *ad hoc* Tribunal has sought to create a witness protection program to address this issue, and it would be interesting to know how it has functioned.

## **An Agenda**

63. This paper was originally commissioned to examine the question of how AI might usefully address the issue of impunity of those who violate human rights. Its basic premise is that if human rights violators can be brought to justice, this will represent progress in terms of deterring future violations. In particular, it has been meant to consider the positive contribution which might be made in this process if a new organisation were to be established to collect evidence specifically about the perpetrators of human rights violations.
64. One of its fundamental conclusions has been that the collection of evidence about perpetrators is only one of many prerequisites which have not been met relating to the effective prosecution of perpetrators of human rights violations. A number of other major agenda items have been identified which are equally relevant to tackling the question of impunity:

65. \*National authorities continue to lack the will to prosecute human rights violators within their own countries.
66. \*Even if they have the will or otherwise feel compelled to act, they may lack the necessary prosecutorial, judicial and other resources to carry out trials conforming to international fair trial standards.
67. \*Similar questions of political will and practical resources, as well perhaps as an undeveloped jurisprudence, have also made the exercise of universal jurisdiction a virtual 'dead letter' in some countries of potential prosecution.
68. \*In both contexts, the possibility of civil actions for compensation of victims and their families remains highly underdeveloped and underused.
69. \*While important steps towards international criminal jurisdiction are being taken, both by the *ad hoc* Tribunals and by the ICC, these are initiatives which require maximum support now if they are going to flourish.
70. All of these agenda points should usefully be addressed in the work plan of any proposed organisation.