

## Bearing Witness: The Art and Science of Human Rights Fact-Finding

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*As the prestige and influence of human rights organizations have grown worldwide, the fact-finding methods employed by these organizations warrant increased scrutiny. In this Article, Diane Orentlicher offers a comprehensive analysis of the professional standards and institutional imperatives of international nongovernmental organizations ("NGOs"). Part I discusses the importance of human rights fact-finding, with a focus on the Reagan Administrations' policies. Part II addresses the manner in which an NGO must confront official skepticism and shifting standards of credibility. Part III describes the means employed in obtaining evidence, interviewing witnesses, and establishing responsibility for human rights violations.*

The field of international human rights has come of age. No longer the exclusive province of theorists and idealists, human rights has become a prominent subject of international diplomacy. In regions as diverse as Asia, Eastern Europe, Latin America, and Africa, human rights concerns have been a central factor in some of the most dramatic political developments of the past decade.

Throughout this process, the prestige of nongovernmental organizations ("NGOs") that work to promote respect for human rights has also grown. Representatives of such leading NGOs as Amnesty International ("AI") routinely meet with heads of state and other top officials of the governments they monitor,<sup>1</sup> and their work receives prominent play in the international press.

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1. Even governments that refuse to meet with NGO representatives take some human rights organizations seriously enough to publicly denounce their work. For example, the government of the People's Republic of Kampuchea ("PRK"), which had failed to respond to repeated requests by the New York-based Lawyers Committee for Human Rights to visit the PRK and meet with government officials, later denounced the Committee's report as "an insane slander." *U.S. Lawyers' Report on Human Rights Criticized*, Phnom Penh Domestic Service, Aug. 7, 1985, reported in Foreign Broadcast Info. Service, Aug. 9, 1985, at H1.

A variety of factors account for the growing influence of the leading human rights NGOs, but their achievements rest, above all, on the quality of their work. And while NGOs undertake a range of activities to promote their concerns, perhaps none has been more influential than their efforts to document and publicize human rights violations. The premise of these efforts is straightforward: human rights professionals believe that no action is more effective in prompting governments to curb human rights violations than aiming the spotlight of public scrutiny on the depredations themselves.<sup>2</sup>

The strategy—promoting change by reporting facts—is almost elegant in its simplicity. And there is growing evidence that it works. Governments frequently have adopted reforms in response to critical reports by NGOs,<sup>3</sup> and former political prisoners who had been subjects of AI letter writing campaigns have often attributed their release from detention to AI.<sup>4</sup> Country reports prepared by the more prominent NGOs often receive front page news coverage abroad,<sup>5</sup> and in the United States, such reports have prompted Congress to adopt legislation suspending foreign aid or conditioning future aid on a country's compliance with international human rights standards.<sup>6</sup>

2. See Satchell, *The Greatest Evil is Indifference*, *PARADE*, May 12, 1985, at 6. ("By publicizing abuses, Amnesty [International] hopes that the leaders of repressive regimes will be shamed or pressured into curbing torture in the glare of world public opinion and, perhaps, the censure of other nations.") Aryeh Neier, Executive Director of Human Rights Watch, believes that publicizing human rights violations is "not only the most powerful weapon [against abuses]; it is the only weapon." Address by Aryeh Neier, Harvard University (Oct. 9, 1985) [hereinafter Neier Address].

That many governments continue to commit or tolerate serious abuses despite international criticism does not necessarily detract from the view expressed by Neier and other human rights advocates. The desire to avoid public condemnation may be outweighed by countervailing domestic concerns. Also, governments sometimes calculate that criticism of their human rights records will dissipate over time.

In contrast to most human rights organizations, the Geneva-based International Committee of the Red Cross ("ICRC"), a humanitarian organization, observes a general, but not unqualified, policy of reporting its concerns to government officials on a confidential basis.

3. When, for example, the Lagos-based Civil Liberties Organization publicized abuses of detainees held in a prison colony that had been established secretly one decade earlier, the Nigerian government "reacted almost immediately to the reports by removing all the prisoners and shutting down the colony." *N.Y. Times*, June 29, 1989, at A4, col. 4. See also LAWYERS COMMITTEE FOR HUMAN RIGHTS, *SEEKING SHELTER: CAMBODIANS IN THAILAND* (1987) (report revised to reflect changes made by Thai officials in response to a draft report).

4. See Satchell, *supra* note 2, at 6.

5. See, e.g., *Stability in R.I. Higher Priority Than Human Rights: Report*, *Indonesia Observer* (AP), Nov. 22, 1988, at 1 (account of report on human rights in Indonesia prepared by New York-based Asia Watch).

6. For example, a publication listing torture victims and torturers prepared by AI in 1976 played an important role in prompting Congress to suspend aid to Uruguay for fiscal year 1977. See L. SCHULTZ, *HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA* 41 (1981). The staffs of human rights NGOs also have played a major role in drafting and securing passage of key human rights laws adopted by Congress over the years. See *id.* at 105-7.

As the influence of NGO human rights reporting has grown, NGOs' underlying research methodology has come under heightened scrutiny and, at times, pointed attack. In an age when acquiring the status of "human rights pariah" carries unprecedented costs internationally, governments whose rights violations are publicized frequently respond by challenging the credibility of the fact-finding methodology.<sup>7</sup> United States officials, too, have publicly attacked the credibility of organizations that released reports chronicling abuses committed by strategic allies of the United States government.<sup>8</sup>

In this setting, perhaps no asset is more important to a human rights NGO than the credibility of its fact-finding and, in particular, its reputation for meticulous methodology.<sup>9</sup> Despite the unprecedented attention to issues of human rights methodology, however, the leading NGOs have not adopted uniform methodological standards; most have not even adopted comprehensive, formal standards for use by their own staffs. And while NGO reporting has drawn the close scrutiny of various parties, critiques of NGO methodology do not reflect a coherent set of commonly accepted standards.

This Article examines the reasons underlying these seeming anomalies. Part I reviews the historical developments that have lent prominence to fact-finding methodology. Part II analyzes emerging standards used to judge the credibility of the reporting activities<sup>10</sup> of international NGOs.<sup>11</sup> Part III examines methodological techniques

7. For example, when AI released a report in August 1985 on abuses in Zimbabwe, President Robert Mugabe denied the chief allegations, and underscored his challenge to AI's credibility by referring to the organization as "Amnesty Lies International." See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *ZIMBABWE: WAGES OF WAR: A REPORT ON HUMAN RIGHTS* 9 (1986). Such denials increasingly have eclipsed in importance the standard charge that foreign criticism of a government's human rights record constitutes "interference in domestic affairs." Although the latter response is still heard, many governments who assert it nonetheless feel obliged to respond to the substantive allegations.

8. See Part IB, *infra* at text accompanying notes 34-39 (discussing Administration efforts to discredit NGO reports).

9. The most influential human rights NGOs have earned wide respect because of their staffs' highly sophisticated fact-finding skills. See generally Uhlig, *As Colombian Terror Grows, the Press Becomes the Prey*, *N.Y. Times*, May 24, 1989, at A1, col. 6 (noting that the New York-based Committee to Protect Journalists "records only the most rigorously documented cases"); Satchell, *supra* note 2, at 6 (Amnesty International "enjoys a reputation for scrupulous research and strict impartiality as it catalogues abuses . . .").

10. This Article focuses on the preparation of substantial reports on human rights conditions in particular countries. It should be noted, however, that fact-finding activities underlie other NGO efforts, such as casework on behalf of individuals. The latter raise somewhat different methodological issues than the former.

11. "International NGOs," in this Article, refers to organizations concerned with human rights conditions in various countries. These organizations contrast with "domestic NGOs," which are concerned solely with the human rights conditions in the country in which the organization operates. Some international NGOs, such as the Washington Office on Latin America and Americas Watch, have a regional focus. Others, including the International League for Human Rights, the Lawyers Committee for Human Rights, and the International Human Rights Law Group, monitor a limited group of countries in various regions.

used by experienced NGOs in the preparation of country reports. The goals of this Article are modest: to identify some general guideposts (and potential hazards) for human rights fact-finding methodology and to set forth the collective wisdom of the NGOs that have developed recognized competence in human rights fact-finding.

## I. THE PROMINENCE OF HUMAN RIGHTS FACT-FINDING

Although debate over issues of human rights fact-finding is international in scope, developments in United States foreign policy during the Carter and Reagan Administrations played an especially important role in elevating the prominence of human rights fact-finding activities and in focusing public attention on issues of methodology. The prominence of these issues was to some extent a natural consequence of the increased status of human rights concerns in international diplomacy in the past decade. As argued below, moreover, the particular manner in which the public debate over the Reagan Administration's human rights policy unfolded lent further prominence to human rights fact-finding issues and played a significant role in shaping the public debate over methodology.<sup>12</sup>

### A. The Congressional Initiative

During the 1970s and early 1980s, human rights received unprecedented attention in public debates about United States foreign policy. The first substantial efforts to elevate the prominence of human rights concerns in United States foreign policy were made by Congress, acting with the support of a then small but effective community of NGOs.<sup>13</sup> In 1973 and 1974, Congress launched a sweeping study of the relationship between human rights and United States foreign policy, holding more than a dozen public hearings.<sup>14</sup> In the mid to late 1970s Congress enacted a series of laws animated by a common purpose: to

12. See *infra* notes 23-39 and accompanying text.

13. See generally SCHULTZ, *supra* note 6, at 74-88.

14. In 1973, under the leadership of Rep. Donald Fraser (D-Minn.), the Subcommittee on International Organizations and Movements of the House Foreign Affairs Committee began a series of hearings on United States human rights policy. See *International Protection of Human Rights. The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93rd Cong., 1st Sess. (1974). In early 1974, the Fraser Committee issued a 54-page report, which concluded that a higher priority for human rights in United States foreign policy "is both morally imperative and practically necessary . . ." SUBCOMM. ON INTERNATIONAL ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 93RD CONG., 2D SESS., HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP (Comm. Print 1974).

elevate the status of human rights in United States foreign policy.<sup>15</sup> Congress found general support for its concerns in the Carter Administration, the first to give human rights a prominent place in its foreign policy.<sup>16</sup> But the lasting impact of the human rights initiatives launched by Congress—and the Carter Administration—did not become apparent until after President Ronald Reagan assumed office.

### B. The Reagan Administration

At the outset of its first term, the Reagan Administration rejected the view, endorsed by its predecessor, that human rights had a proper place in United States foreign policy. Believing that the Carter Administration's human rights initiatives had been harmful to United

15. Perhaps the most comprehensive congressional initiatives revolved around a series of laws that conditioned the availability of various forms of United States aid and trade benefits on a country's observance of fundamental human rights. See, e.g., Foreign Assistance Act of 1961 § 502B(a)(2), as amended (current version at 22 U.S.C. § 2304(a)) Pub. L. No. 87-195, pt. 2, § 502B, as added Pub. L. No. 93-559, § 46, 88 Stat. 1815 (1974), as amended Pub. L. No. 94-329, tit. 3, § 301(a), 90 Stat. 748 (1976); Pub. L. No. 95-105, tit. 1, § 109(a)(3), 91 Stat. 846; Pub. L. No. 95-384, §§ 6(a)-(d)(1), (e), 10(b)(1), 12(b), 92 Stat. 731, 732, 735, 737 (1978), as amended Pub. L. No. 96-53, tit. 5, § 511, 93 Stat. 380 (1979); Pub. L. No. 96-92 § 4, 93 Stat. 702 (1979); Pub. L. No. 96-533, tit. 7, §§ 701(b), 704, 94 Stat. 3156, 3157 (1980); Pub. L. No. 98-151, § 101(b)(2), 97 Stat. 972 (1983); Pub. L. No. 99-64, tit. 1, § 124, 99 Stat. 156 (1985); Pub. L. No. 99-83, tit. 12, § 1201, 99 Stat. 276 (1985) (codified as amended at 22 U.S.C. § 2304 (1982 & Supp. 1986)) (proscribing security assistance to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights"); Foreign Assistance Act of 1961, § 116(e), 22 U.S.C. § 2151 note (1982 & Supp. 1986) (original version at Pub. L. No. 87-105, pt. 1, § 116, as added Pub. L. No. 94-161, tit. 1, § 301, 89 Stat. 855 (1975)) (prohibiting development assistance on similar grounds); International Financial Institutions Act of 1977, Pub. L. No. 95-118, tit. 7, § 701, 91 Stat. 1069 (1977) (codified at 22 U.S.C. § 262g (1982 & Supp. 1986)) (directing United States representatives to several multilateral development banks to oppose loans on human rights grounds).

Some laws were country specific, conditioning aid to certain governments on their compliance with specific human rights conditions. See, e.g., International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555 (1981) (codified at 22 U.S.C. § 2370 note (1982 & Supp. 1986)) (requiring President to certify every six months, as condition of continued aid to El Salvador, that specified human rights conditions had been satisfied); *id.* § 726 (prohibiting security assistance to Chile unless the President certifies that Chile has made "significant progress in respecting internationally recognized human rights").

Other congressional initiatives included the enactment of laws designed to ensure that human rights conditions were considered by the executive branch in its foreign policy decision making and legislation that barred foreign aid and training to law enforcement agencies of foreign countries. See Foreign Assistance Act of 1961, *supra* § 660.

16. Although the Carter Administration was committed to a general policy of promoting human rights abroad, it frequently concluded that human rights concerns with respect to particular countries should be subordinated to national security considerations. See J. MURAVCHIK, THE UNCERTAIN CRUSADE: JIMMY CARTER AND THE DILEMMAS OF HUMAN RIGHTS POLICY 136-37, 139-49 (1986).

States security interests,<sup>17</sup> the Reagan team came into office determined to dismantle the Carter policy.<sup>18</sup>

The Reagan Administration signaled its intentions in several ways. In Alexander Haig's first public statement as Secretary of State for the Administration, he announced that "international terrorism" would replace human rights as the overriding United States foreign policy concern.<sup>19</sup> To underscore the repudiation of its predecessor's human rights policy, the Administration nominated to the post of Assistant Secretary of State for Human Rights and Humanitarian Affairs Ernest Lefever, who publicly had opposed the view that human rights were a proper concern of United States foreign policy.<sup>20</sup>

The congressional response to Lefever's nomination was a sharp rebuke to the effort to reverse Carter's policy. The Senate Foreign Relations Committee rejected Lefever's appointment by a 13-4 vote.<sup>21</sup> The Administration had lost more than a battle for a nominee's appointment. The Lefever vote firmly established the principle that human rights concerns had a proper place in United States foreign policy. The Administration was forced to change course. An internal State Department memorandum dated October 27, 1981, several months after the Senate vote, began with the assertion, "*Human rights is at the core of our foreign policy . . . 'Human rights' is not something we tack on to our foreign policy, but is its very purpose . . .*"<sup>22</sup>

But public controversy over United States human rights policy did not subside; the issues simply changed. Human rights advocates in

17. For an influential expression of this view, published during the presidential campaign preceding Reagan's first term, see Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34.

18. But see Schifter, *United States Human Rights Policy and the Reagan Administration*, 2 HARV. HUM. RTS. Y.B. 3 (1989).

19. Haig News Conference January 28, 1981, in AMERICAN FOREIGN POLICY CURRENT DOCUMENTS SUPPLEMENT 12 (1981) (doc. 1298).

20. Even before Reagan's inauguration, a group of advisors on Latin America known as the "Committee of Santa Fe" stated in its policy blueprint that President Carter's human rights policy "must be abandoned." Then, in its first few months in office, the Reagan Administration asked Congress to reinstate aid to several countries that had been denied aid under the Carter Administration because of their poor human rights records, including Argentina, Chile, Guatemala, and Uruguay. See Jacoby, *The Reagan Turnaround on Human Rights*, 64 FOREIGN AFF. 1066, 1069 (1986).

21. Describing the significance of the Lefever affair, Tamar Jacoby wrote: "The hearings were bitter and highly publicized, and it was evident that what was under review was not so much Lefever as the Administration's decision to dismantle the Carter policy on human rights." *Id.* at 1069-70.

22. E. Abrams, U.S. Dep't of State Memorandum: Reinvigoration of Human Rights Policy 1 (Oct. 26, 1981) (submitted by Deputy Secretary Clark to Secretary Haig) (available through the Bureau of Human Rights and Humanitarian Affairs) (emphasis in original). Elliott Abrams was nominated and confirmed for the position of Assistant Secretary of State for Human Rights and Humanitarian Affairs shortly thereafter. See Schifter, *supra* note 18, at 18.

Congress and in the NGO community soon were locked in battle with the Reagan Administration over implementation of its professed human rights policy. In particular, for much of its first term, the Reagan Administration was criticized for applying its policy in a distorted fashion:<sup>23</sup> invoking accusations of human rights violations against countries with which the United States government had hostile relations, while disregarding or tolerating abuses committed by United States allies.<sup>24</sup>

While the underlying point of contention involved the evenhandedness—and, more importantly, the integrity—of the Reagan Administration's efforts to promote compliance with human rights standards, public disputes between the NGO community and the Administration increasingly focused on their respective characterizations of factual conditions. Critics accused the Administration of exaggerating the extent of abuses in countries like Nicaragua and Cuba to serve perceived geopolitical interests while understating the extent and severity of abuses committed by such strategic allies as Turkey and El Salvador.<sup>25</sup> Administration officials responded in kind, charging that the Administration's most vocal critics distorted the facts in the opposite direction.<sup>26</sup>

In the early years of President Reagan's first term, these battles focused primarily on the Administration's policy toward El Salvador. In the view of the Reagan Administration, the situation prevailing in El Salvador involved substantial foreign policy stakes. A Marxist insurgency that received support from the Nicaraguan government had made significant gains in the period shortly before President Reagan assumed office, and the new Administration was determined to "draw the line" in El Salvador against what it viewed as further Soviet expansionism in Central America.<sup>27</sup>

23. By the time President Reagan left office in 1989, even his harshest critics in the human rights community believed that his Administration's implementation of its human rights policy had become more evenhanded. See Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy* 2 HARV. HUM. RTS. Y.B. 25 (1989). For an analysis of the evolution of the Reagan Administration's human rights policy, see Jacoby, *supra* note 20.

24. See, e.g., AMERICAS WATCH, HELSINKI WATCH & LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, THE REAGAN ADMINISTRATION'S HUMAN RIGHTS POLICY: A MID-TERM REVIEW 1 (1982) (charging that Reagan Administration "has cheapened the currency of human rights by invoking its principles to criticize governments it perceives as hostile to the United States and by denying or justifying abuses by governments it perceives as friendly to the United States").

25. See, e.g., Neier, *Flimflam on Central America*, N.Y. Times, Dec. 14, 1985, at 27, col. 1.

26. See Wash. Post, Aug. 24, 1984, at A3, col. 1 (U.S. official charged that "apologists" were ignoring Cuba's human rights abuses); Abrams, *The Myopia of Human Rights Advocates*, N.Y. Times, Aug. 10, 1984, at A25, col. 1.

27. The Administration's first Secretary of State, Alexander Haig, was an especially vocal proponent of this view. See D. FORSYTHE, HUMAN RIGHTS AND U.S. FOREIGN POLICY: CONGRESS RECONSIDERED 84 (1988).

This determination translated into a commitment to support the Salvadoran armed forces in their fight against the insurgents. But the Salvadoran military's responsibility for massive human rights violations, including the murder of several United States citizens, generated intense public opposition to increased military aid for El Salvador.

Concern about the human rights situation in El Salvador ran high in Congress. Nevertheless, most members of Congress were reluctant to impose a blanket ban on aid to El Salvador, perhaps because many of them sought to avoid taking responsibility for "losing El Salvador" in the event that the Salvadoran military was overpowered by Marxist insurgents.<sup>28</sup> Congress resolved this dilemma by enacting legislation that required the President to provide, as a condition of continued United States aid to El Salvador, a biannual certification that certain human rights conditions had been met in the previous six-month period.<sup>29</sup> This approach enabled Congress to take a stand in support of human rights, while shifting to the Administration ultimate responsibility for continuing or ending military aid to El Salvador.

Although this legislation purported to set forth specific preconditions for the continuation of aid to El Salvador, the terms of the conditions allowed wide latitude for interpretation.<sup>30</sup> During a period of staggering human rights abuses by Salvadoran forces, the Administration certified every six months that the conditions had been satisfied. The certifications were disingenuous; privately, even Reagan Administration officials complained that the certification law, by posing an "all-or-nothing" choice with respect to Salvadoran aid,<sup>31</sup> forced the Administration to mislead Congress.

Throughout this process, NGOs produced extensively documented reports of ongoing abuses to counter the Administration's certifications<sup>32</sup> and provided testimony contradicting the Administra-

28. See *id.* at 86-87.

29. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519 (1981).

30. To continue the flow of aid to El Salvador, the Administration had to certify, *inter alia*, that the Salvadoran government was:

- making a concerted and significant effort to comply with internationally recognized human rights; and
- achieving substantial control over all elements of its own armed forces, so as to bring to an end the indiscriminate torture and murder of Salvadoran citizens by these forces.

*Id.* at § 728(d).

31. Under the certification law, if even one condition was not satisfied, all of the military aid to El Salvador would be terminated. *Id.* at § 728(c).

32. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, JUSTICE IN EL SALVADOR: A CASE STUDY: A REPORT ON THE INVESTIGATION INTO THE KILLING OF FOUR U.S. CHURCHWOMEN IN EL SALVADOR (1982).

tion's findings at semiannual congressional hearings convened to review the presidential certifications.<sup>33</sup> The Administration, in turn, made a high priority of attempting to discredit NGOs' work. When, for example, Americas Watch and the American Civil Liberties Union ("ACLU") copublished a 312-page report on human rights violations by the Salvadoran government,<sup>34</sup> Assistant Secretary of State for Human Rights and Humanitarian Affairs Elliott Abrams had his staff prepare a critique of the report. The resulting analysis made clear that the object of the critique was to discredit the report, and that the assignment was rather formidable in light of the high quality of the work. The memorandum began:

The ACLU-Americas Watch report is an extremely well prepared, effective documentation of human rights violations in El Salvador by government forces. Its moderate and clinical tone contribute to its effectiveness and credibility. The report's careful preparation and general tendency to stick to either what is credible or what cannot be effectively disproved make it a tough document to attack. It is, nevertheless, a document prepared with political objectives and is obviously slanted and totally one-sided in all its presentation.<sup>35</sup>

Others took the lead from the Administration, publishing harsh critiques of NGO reporting on El Salvador.<sup>36</sup> The NGOs that were criticized responded in print, and the exchanges helped to keep issues relating to NGO methodology in prominent public view.

The battles over El Salvador set in place a pattern that endured after public attention drifted to other countries and regions. When, for example, the focal point of the Reagan Administration's foreign policy shifted from El Salvador to Nicaragua, and the Administration sought congressional support for armed insurgents opposing the Sandinista government—known as *contras*—human rights NGOs produced reports documenting grave abuses committed by the rebels. The Administration, in turn, charged that the reports lacked credi-

33. See D. FORSYTHE, *supra* note 27, at 86.

34. AMERICAS WATCH COMMITTEE AND THE AMERICAN CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS IN EL SALVADOR (1982) [hereinafter AMERICAS WATCH COMMITTEE-ACLU REPORT].

35. D. Shaffer, Declassified Memorandum: The ACLU-Americas Watch Committee Report on Human Rights in El Salvador: A Preliminary Analysis 1 (Feb. 4, 1982) (submitted by Peter Sarros to Elliott Abrams).

36. See, e.g., Asman, *Behind the Human-Rights Tallies*, Wall Street J., Feb. 10, 1984, at 26, col. 4.

bility, and publicly attacked one of the most prominent reports<sup>37</sup> of *contra* violations.<sup>38</sup>

During the first term of the Reagan Administration, in particular, the public battles over facts between the Administration and the human rights community were heated, harsh, and at times downright nasty. Their very intensity was a measure of the profound shift in importance of human rights considerations as a distinct factor in United States foreign policy during the decade. The intensive scrutiny of human rights fact-finding—however disingenuous itself—helped produce improvements in the human rights reporting of NGOs and the United States government.<sup>39</sup>

## II. EVALUATING CREDIBILITY

As the costs of being labeled a gross violator of human rights increased, governments acquired a strong incentive to discredit reports that placed them (or their allies) in this category. Angry denials by governments whose rights records were reported and critiques of NGO fact-finding by the Reagan Administration attracted media attention, and the press, too, began to scrutinize the credibility of NGO reporting.

For NGOs, the stakes in surviving such scrutiny could not be higher. The credibility of their fact-finding is their stock-in-trade. Broadly stated, the chief objective of human rights NGOs is to promote compliance with international human rights standards.<sup>40</sup> As

37. R. BRODY, *CONTRA TERROR IN NICARAGUA: REPORT OF A FACT-FINDING MISSION: SEPTEMBER 1984 - JANUARY 1985* (1985).

38. Elliott Abrams dismissed the Brody report as "bought and paid for by the Sandinistas," *id.* at 8 (in Introduction by Reed Norton), and President Reagan attacked it in a speech delivered on April 15, 1985:

Just a few weeks ago, the whole world was treated to a so-called "independent investigation" of charges that the freedom fighters have committed atrocities. . . . The report ignored communist brutality, the murder of the Indians and the arrest, torture and murder of political dissidents. But we really shouldn't be surprised by that, because, as our State Department discovered and Time Magazine reported, this so-called independent investigation was the work of one of dictator Ortega's supporters, a sympathizer who has openly embraced Sandinismo and who was shepherd through Nicaragua by Sandinista operatives.

*Id.* Brody disputed the Administration's charges, and several other human rights organizations corroborated Brody's findings. See, e.g., Report of Donald T. Fox, Esq. & Prof. Michael J. Glennon to the International Human Rights Law Group and the Washington Office on Latin America Concerning Abuses Against Civilians by Counterrevolutionaries Operating in Nicaragua (Mar. 1985); AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA (1985) [hereinafter AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR].

39. See Neier Address, *supra* note 2.

40. The standards most commonly cited in NGO reports are those embodied in customary law: the *Universal Declaration of Human Rights*, G.A. Res. 217A, (III), U.N. GAOR Res. 71, U.N. Doc. A/810 (1948), which was adopted by the United Nations without dissent and

self-appointed watchdogs, NGOs have no "authority" to compel governments to bring their practices into compliance with those standards; NGOs can aspire only to *persuade* governments to respect the rights of individuals subject to the governments' jurisdictions. To this end, NGOs appeal to governments believed to be responsible for abuses to cease the violations. NGOs also frequently marshal external sources of pressure, such as the intervention of other governments or inter-governmental bodies. Fact-finding lies at the heart of these efforts, and the fact-finding "works" when it convinces the target audience<sup>41</sup> that the published allegations are well founded.

Although critiques of NGO reporting do not reflect a coherent set of commonly acknowledged standards, it is possible to identify factors that figure prominently in public assessments of NGO fact-finding. The most frequently cited criteria fall into two categories. One relates to the integrity of an NGO's fact-finding methodology; the other takes account of various factors that are thought to indicate whether the NGO has an institutional bias—other than a bias in favor of human

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purports to have universal application; and human rights conventions which the relevant state has ratified. Conventions frequently cited on this basis include the *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976); such regional treaties as the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, OEA/ser. A/16 (English 1975) (entered into force, July 18, 1975); specialized treaties such as the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, G.A. Res. 46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984). NGOs that monitor compliance with the laws of war generally cite applicable provisions of the four Geneva Conventions of 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, and the two Protocols to the Conventions: Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391, U.N. Doc. A/32/144; and Protocol II Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1442, U.N. Doc. A/32/144; as well as relevant provisions of Hague Convention No. IV, Respecting the Laws and Customs of War on Land; Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; and Hague Convention No. V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540, and customary international law.

41. In addition to the government that is the subject of a report, the target audience may include foreign governments that can exert influence on the offending government through sanctions or diplomatic pressure; intergovernmental bodies concerned with human rights; and the informed "public," whose concern about human rights abuses in a particular country may trigger policy initiatives. Each of these audiences is influenced by media coverage, and thus the press also has become an important target audience of human rights NGOs.

rights<sup>42</sup>—that may taint the credibility of its conclusions.<sup>43</sup> This section examines the operative content of both types of criteria and analyzes the appropriateness of the emerging standards for assessing credibility. As the following discussion suggests, those standards present substantial opportunities for NGOs to founder on the “credibility question.”

### A. Fact-Finding Methodology

Several aspects of the methodology underlying country reports tend to make even the most meticulous NGOs vulnerable to credibility challenges.

#### 1. The Effects of Government Secrecy and Intimidation

First, the fact-finding activities of the most prominent human rights NGOs tend to focus on violations of physical integrity, such as torture, extrajudicial executions, “disappearances,” and arbitrary detention.<sup>44</sup> The facts surrounding reported violations of this sort are rarely beyond dispute, in large part because the violations themselves are often deliberately shrouded in secrecy: military forces organize anonymous “death squads” to kill political opponents under cover of darkness; agents of the state seize suspected political opponents without judicial warrant and torture their victims in unauthorized, secret detention centers.<sup>45</sup>

42. See INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 6–7 (B. Ramcharan ed. 1981) [hereinafter INTERNATIONAL LAW AND FACT-FINDING].

43. In practice, the two types of criteria often converge. Public critiques of NGO reports often charge that a report's conclusions rest upon information provided by politically-biased activists in the country under scrutiny. When this criticism is framed to suggest that the NGO shares its sources' political agenda, it impugns both the NGO's impartiality and the credibility of its factual conclusions. For an example of this type of critique, see discussion of the Reagan Administration's efforts to undermine a report on *contra* violations in Nicaragua, R. BRODY, *supra* note 37.

44. There are exceptions. A few NGOs, such as the Geneva-based International Commission of Jurists, have included analyses of states' compliance with internationally recognized economic, social, and cultural rights—as well as their compliance with civil and political rights—in their country reports. See, e.g., INTERNATIONAL COMMISSION OF JURISTS, INDONESIA AND THE RULE OF LAW: TWENTY YEARS OF 'NEW ORDER' GOVERNMENT (H. Thoolen ed. 1987). In recent years, some international NGOs traditionally concerned with violations of physical integrity have broadened their work to encompass such rights as the right of political participation and freedom of expression. For example, the Washington, D.C.-based International Human Rights Law Group has developed an election-monitoring project.

Most international NGOs focus on a narrow range of civil and political rights in part because they believe that international standards relating to economic, social, and cultural rights are not sufficiently concrete to enable NGOs to determine whether states' practices satisfy the relevant standards. See Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 35–38 (1988).

45. See *The 'Greek' Case*, 1969 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Human Rights) [para. 31] [hereinafter *The 'Greek' Case*]; see also INTERNATIONAL LAW AND FACT-FINDING, *supra* note 42, at 68.

The obstacles to fact-finding posed by the state's nearly exclusive control of essential information are often compounded by other, related circumstances. In a context of widespread state lawlessness, for example, witnesses and victims often are afraid to provide testimony to human rights investigators, fearing retaliation by government forces. Moreover, a substantial number of countries in which gross violations are practiced on a systematic basis are closed to foreign investigators. In many countries, political repression is so severe that independent human rights monitors either cannot operate internally or do so under enormous constraints and at great personal risk. And in countries with serious systematic abuses, a bridled press often does not—because it cannot—provide independent accounts of human rights violations.<sup>46</sup>

Thus, the circumstances in which human rights investigation is undertaken typically place substantial limitations on fact-finding. Though such constraints may be unavoidable, their effect on NGO methodology can invite challenge from a critical audience.

#### 2. The Role of Interpretation

Second, the role of interpretation in the preparation of country reports contributes to their vulnerability to challenge. While it may be a truism that there are no “pure facts” and that any attempt to describe factual conditions entails substantial interpretation, the role of interpretation is particularly large in the context of human rights country reports. Because country reports aspire to describe broad patterns, the finder of fact must attempt not only to verify individual incidents of abuse, but also to reach more sweeping judgments about the extent of the violations, the nature of government (and, where relevant, insurgent) responsibility for the abuses, and the significance of apparent trends.

Consider, for example, a situation in which data show that a government, which in recent years has been responsible for several thousand political killings each year, now annually executes “only” several hundred victims. To be meaningful, an account of this trend must include an analysis of its underlying causes and significance. Otherwise the NGO's audience cannot assess whether the statistical decline reflects a genuine change in official policy, a decrease in opposition activity caused by governmental repression, or a shift in the geograph-

46. For analyses of the impact of systematic human rights violations in El Salvador on press reporting of violations, see AMERICAS WATCH, PROTECTION OF THE WEAK AND UNARMED: THE DISPUTE OVER COUNTING HUMAN RIGHTS VIOLATIONS IN EL SALVADOR 8–10 (1984); AMERICAS WATCH, U.S. REPORTING ON HUMAN RIGHTS IN EL SALVADOR: METHODOLOGY AT ODDS WITH KNOWLEDGE 20–24 (1982) [hereinafter AMERICAS WATCH, METHODOLOGY AT ODDS WITH KNOWLEDGE].

ical concentration of abuses to areas relatively inaccessible to human rights monitors. Similarly, a comparatively small number of political prisoners in a country may signify a low degree of official repression, or it may reflect a degree of governmental intimidation substantial enough to preclude citizens from attempting dissident activity.<sup>47</sup>

The point is that, however objective an NGO's methodology in ascertaining the "facts" about alleged human rights violations, its final conclusions draw upon qualitative interpretation of the data.<sup>48</sup> While unavoidable, the substantial role of interpretation in human rights fact-finding leaves room for observers to reach different conclusions about the significance of even agreed upon facts.

Divergent conclusions about the "same" facts may also reflect differing judgments about a government's degree of moral culpability, or about the relative efficacy of alternative characterizations in promoting the institutional objectives of the fact-finding organization. Suppose, for example, that an NGO investigates conditions in a country that experienced staggering violations in the recent past. The fact-finder almost surely will find that the worst abuses have abated; the type of wholesale slaughter associated with Idi Amin's Uganda, Pol Pot's Cambodia, and East Timor in the years following Indonesia's invasion does not persist indefinitely. In reporting recent trends in such countries, the NGO might credit the government for improvement, while urging it to exert still greater efforts to end current violations. Or, the NGO could condemn the government for continuing abuses, perhaps recognizing that state violence has abated because the political opposition has been crushed, and that the government has undertaken earlier positive reforms only when prompted by international condemnation. Though different in tone, both approaches are consistent with the same "raw facts," and the choice between them

47. See Scoble & Wiseberg, *Problems of Comparative Research in Human Rights*, in GLOBAL HUMAN RIGHTS: PUBLIC POLICIES, COMPARATIVE MEASURES AND NGO STRATEGIES 152 (Nanda, Scarritt & Shepherd, Jr., eds. 1981) (noting that the degree of repression "necessary" to achieve a generally intimidating effect varies from one country to the next, depending in part upon the efficiency of a country's system of communications).

48. In part for this reason, some NGOs have eschewed the recommendation of several scholars that greater efforts be made to develop quantifiable data relating to human rights conditions and to apply statistical analyses to the data. A discussion of the relative value and limits of quantitative analysis in human rights fact-finding is beyond the scope of this Article. For discussion of this subject, see Bollen, *Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984*, 8 HUM. RTS. Q. 567 (1986); Claude & Jabine, *Editors Introduction. Symposium: Statistical Issues in the Field of Human Rights*, 8 HUM. RTS. Q. at 551; Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, 8 HUM. RTS. Q. 607; Stohl, Carleton, Lopez & Samuels, *State Violation of Human Rights: Issues and Problems of Measurement*, 8 HUM. RTS. Q. at 592; see also Rubin & Newberg, *Statistical Analysis for Implementing Human Rights Policy*, in THE POLITICS OF HUMAN RIGHTS 270 (P. Newberg ed. 1980).

may be determined, at least in part, by a calculation of their relative efficacy in promoting improvement.

### 3. Applying Abstract Human Rights Standards

A third aspect of human rights fact-finding further increases the potential for different conclusions to emerge from the same facts: the investigator must measure facts against an abstract standard. Most NGOs evaluate states' compliance with internationally recognized human rights standards.<sup>49</sup> Some NGOs also assess state practices in light of protections embodied in domestic law.<sup>50</sup> Thus, in seeking to verify a reported violation, NGOs must attempt to determine both what actually happened, and whether the facts, under all the attendant circumstances, constitute a violation of relevant standards.<sup>51</sup> These determinations often require difficult judgment calls, and it is scarcely surprising that different analysts sometimes reach different judgments about the legality of particular conduct.<sup>52</sup>

49. See INTERNATIONAL LAW AND FACT-FINDING, *supra* note 42 at 6-7. If a state claims the right to derogate from international human rights standards because of a public emergency, an NGO's determination must include an assessment of whether the government's action comports with applicable international standards governing the validity of such derogations, such as those set forth in the International Covenant on Civil and Political Rights:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

*International Covenant on Civil and Political Rights*, *supra* note 40, art. 4.

50. International NGOs make reference to domestic law for several reasons. A government may be more responsive to appeals based on its own national laws than to those based solely on international standards. Moreover, the laws themselves are an indication of official policy. Finally, when government officials pervasively and blatantly disregard protections embodied in the laws of their own state, the pattern itself may reflect official tolerance of human rights abuses.

51. An NGO must also assess whether a particular incident falls within its institutional mandate. For example, AI seeks the release of "prisoners of conscience," defined as "people detained for their beliefs, colour, sex, ethnic origin, language or religion who have not used or advocated violence," and "works for fair and prompt trials for all political prisoners." *AI Mandate* in AMNESTY INTERNATIONAL USA, AMNESTY INTERNATIONAL INTERNATIONAL REPORT 1989 at inside front cover. Accordingly, when it considers whether to take action on a particular political prisoner's case, AI must ascertain not only whether the person is detained, but also whether the detention was based solely on one of the grounds listed above, and whether the detainee had used or advocated violence.

52. Some of the most impassioned debates over the "facts" of human rights violations between the Reagan Administration and the human rights community revolved around differing interpretations of relevant international standards. For example, in the early 1980s Americas Watch criticized the United States government's position that unarmed civilians supporting Salvadoran guerrillas ("masas") were legitimate military targets (the United States subsequently changed its position). Americas Watch argued that, pursuant to relevant standards of international humanitarian law, such civilians were not legitimate targets. One effect of this dispute was that Americas Watch and the United States government reached different conclusions respecting the



### B. Institutional Credibility

Recent critiques of NGO fact-finding have focused as much on indicia of institutional credibility as on methodology. Challenges to the institutional credibility of NGOs have focused on two charges in particular.

#### 1. Political "Balance"

The first charge is that a survey of an NGO's work betrays a high degree of selectivity in the countries that are monitored, and that the selection is driven by a decided political slant. When applying this measure, critics often make reference to both the range of countries which an NGO has scrutinized<sup>53</sup> and the evenhandedness of the organization's application of international standards to different countries' human rights records. Thus, even NGOs that attempt to monitor countries of every political orientation have been criticized for "going easier" on countries of one political shading than another.<sup>54</sup> Sometimes the apparent disparity has been largely a matter of tone—a difference in the moral fervor of an NGO's respective condemnations of similar violations by different governments. But in human rights reporting, in which shadings of language convey varying levels of opprobrium, tone is substance.

#### 2. Anti-Government Bias

The second charge is that an NGO's work on a particular country betrays a political bias against the government and in favor of its opponents. The criticism often arises with respect to reports that examine countries in which the most serious abuses occur in a context of civil war. In these circumstances, government officials have frequently charged that an NGO report is biased if it criticizes only abuses by government forces, and not those of their armed adversaries.<sup>55</sup>

number of Salvadoran civilians killed in violation of international law; the United States government's earlier position enabled it to exclude the killings of "masas" from its tally of human rights victims. See AMERICAS WATCH COMMITTEE & THE AMERICAN CIVIL LIBERTIES UNION, THIRD SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (1983).

53. NGOs have often been criticized for focusing greater attention on right-wing authoritarian governments than on communist regimes. See, e.g., Ratliff, *Call It Amnesia International*, N.Y. Times, Mar. 20, 1989, at A19, col. 2.

54. See, e.g., Peretz, *Special Dispensations*, THE NEW REPUBLIC, May 20, 1986, at 43 (accusing Americas Watch of evaluating practices of the Nicaraguan government with a "less critical eye" than used to evaluate comparable practices of right-wing governments).

55. While ostensibly citing evidence of an NGO's bias, governments accused of human rights violations frequently make such charges disingenuously to discredit damaging reports.

This charge played a prominent role in the Reagan Administration's efforts to discredit human rights reports that documented gross violations by several strategic allies of the United States. Early in its first term, the Administration began to press the view that, to be credible, NGOs that report on violations in a country in a state of armed conflict must monitor the practices of the rebels as well as the government forces.<sup>56</sup>

There are, however, principled reasons for NGOs to monitor violations attributable only to government forces, and most domestic NGOs, as well as many international NGOs, follow this practice. These organizations base their work on international human rights law, which establishes international responsibility for violations only on the part of governments,<sup>57</sup> in contrast to the laws of war (also known as humanitarian law), which generate international responsibility for violations by all sides to an armed conflict. Thus an NGO that bases its mandate exclusively on international human rights law is faithful to the law by focusing on government conduct.<sup>58</sup> Nevertheless, vigorous efforts by the Reagan Administration to press its view left a strong imprint on public perceptions. As a result, the credibility of human rights NGOs is often measured by their "evenhandedness" in monitoring all sides to an armed conflict.

#### 3. Acknowledgment of Contextual Factors

Beyond such considerations as whether NGOs monitor both sides to an armed conflict or whether they monitor governments of the right and left with equal vigor, more subtle factors affect public perceptions of NGOs' credibility. Governments that are the subject of scrutiny as well as other audiences often evaluate NGO reporting according to its "fairness" in a particular sense: whether it acknowledges contextual factors that place violations "in perspective." Thus, for example, the

56. As United States Ambassador to the UN, Jeane Kirkpatrick expressed the Administration's position when criticizing a UN resolution that condemned the Salvadoran government's human rights record: "Because human rights can be violated by individuals and groups as well as by governments, the protection of human rights should necessarily have a double focus. It should take account of all major sources of abuse: violations by government and violations by private violence, including organized private violence . . ." Press Release, USUN 130 (81), at 2, reprinted in AMERICAS WATCH, *METHODOLOGY AT ODDS WITH KNOWLEDGE* (1982), *supra* note 46, at 10. Ambassador Kirkpatrick's view was misleading to the extent that it implied that violations of human rights law by any party, public or private, generates the same responsibility under international law. See T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 170-71 (1989).

57. Although some international human rights conventions contain provisions that address private conduct, international legal responsibility for violations of the conventions devolves upon the state parties. See T. MERON, *supra* note 56, at 170-71.

58. If an NGO invokes the laws of war to evaluate government conduct, however, it should also evaluate the conduct of the government's armed adversaries.

Israeli government is more likely to credit a report describing its violations in the West Bank and Gaza if the report acknowledges that human rights conditions are deplorable in other areas of the Middle East.<sup>59</sup> Similarly, even if a human rights NGO's mandate does not extend to monitoring abuses committed by armed rebels, its account of a government's violations is likely to seem more credible to that government if the report acknowledges in a more-than-perfunctory fashion the threat posed by the insurgents.<sup>60</sup> Indeed, human rights reports that criticize abuses committed by governments responding to an armed insurgency now routinely acknowledge not only the government's right to respond militarily and, under certain circumstances, to derogate from some human rights, but also express opprobrium of violations committed by the insurgents.

While signalling that the NGOs' motive in publicizing government abuses is not political, these types of "contextual" observations serve a separate function as well: they anticipate and address the target government's (or other target audiences') possible inclination to dismiss the NGO's reports as politically motivated, naive, inappropriate, or irrelevant. By addressing the government's dilemma head on, NGOs recognize its predicament without accepting the abuses of its armed opponents as justification for state-sponsored violations of fundamental rights.<sup>61</sup>

59. Many NGOs adhere to the principle that each government's practices must be measured only against international standards, and eschew comparisons among countries. Nevertheless, NGOs sometimes respond to pressures to "put in perspective" their criticism of certain governments by acknowledging the egregiousness of other governments' records. This sort of pressure tends to be acute with respect to countries that have been the subject of sustained, politically motivated criticism. However principled an NGO's general refusal to engage in comparisons, its failure to do so in these situations may be thought to have the ironic effect of actually encouraging distortions.

60. See Healey & Hoffman, *Amnesty Looks First at Victims, Not Ideologies*, N.Y. Times, Apr. 6, 1989, at A30, col. 3 (letter responding to Ratliff, *supra* note 53, asserting that AI has condemned practices of guerrilla and nongovernmental forces in a number of countries, even though its mandate extends only to governmental practices).

61. Similar considerations underlie the increasingly common discussion in human rights reports of the special pressures faced by new governments in transition from prolonged military rule to civilian democracy. Governments in this situation frequently inherit a daunting legacy and face continued military pressure—sometimes in the form of threatened or attempted coups—against enforcing a strong human rights policy. Military elements in some countries have thwarted government efforts to restore the rule of law by obstructing prosecutions of human rights violators.

By acknowledging these constraints, many human rights reports seek to apportion varying degrees of moral condemnation to responsible parties, while making clear that the present government ultimately is responsible for deviations from its obligations under international law. See, e.g., AMNESTY INTERNATIONAL, PHILIPPINES: UNLAWFUL KILLINGS BY MILITARY AND PARAMILITARY FORCES 5–10 (ASA 35/02/88, 1988); AMERICAS WATCH, HUMAN RIGHTS IN PERU AFTER PRESIDENT GARCIA'S FIRST YEAR (1986) [hereinafter AMERICAS WATCH, HUMAN RIGHTS IN PERU]; LAWYERS COMMITTEE FOR HUMAN RIGHTS, VIGILANTES IN THE PHILIPPINES ix–x (1988).

Inclusion of textual information to this end reflects a peculiar aspect of NGO reports: they form part of an ongoing dialogue with the target government and, often, with other audiences.<sup>62</sup> By acknowledging that the government has committed human rights violations as a response to circumstances that help explain its behavior, the NGO has anticipated the next stage in the dialogue—the government's response—and answered it.

A key point to be made here is that human rights reports are not merely abstract factual accounts. The reports are advocacy tools, designed to promote change in government practices. As such, their presentation of facts is designed to respond to factors likely to affect the report's impact.

Emerging standards used to judge institutional credibility place somewhat conflicting demands on NGOs concerned with maximizing the persuasive impact of their reports. In principle, the public judges NGO reporting as "fair" and "balanced" if the organization measures every government's record against the same, universal standards; in practice, however, the perceived fairness or balance of particular reports often depends upon the extent to which the report takes account of contextual factors that are peculiar to the country concerned. Thus public perceptions of "fair" and "balanced" reporting is often a relative matter, and even NGOs that are genuinely committed to the principle that human rights fact-finding must be politically neutral face substantial challenges in their efforts to appear so.

To the extent that an NGO's reports explicitly address a current policy debate, there are even more substantial risks that the report will be discredited as politically motivated. This dynamic came into play when United States-based NGOs began to report on human rights conditions in El Salvador in the early 1980s. As noted earlier,<sup>63</sup> NGOs tended to gear their presentation of facts to the presidential certifications required by Congress, and took a forthright position opposing aid. Some of the organizations insisted that their opposition was based solely on human rights principles, and that they would oppose aid to any country whose government engaged in systematic violations of fundamental rights. Still, the very fact that NGOs used their reporting to support a position that had sweeping political consequences made them vulnerable to charges of political bias, in part because their efforts had the effect of bolstering the position of lobbyists who opposed aid for unabashedly political reasons.

Some NGOs have made deliberate efforts to correct distortions that have formed part of and been exacerbated by public debate about

62. Interview with Anne Nelson, Executive Director of Committee to Protect Journalists, in New York City (May 11, 1989).

63. See *supra* text accompanying notes 32–34.

controversial policies. In doing so, they have become even more vulnerable to accusations that they, too, were partisans to the debate.

This phenomenon was especially pronounced during debate over the Reagan Administration's policy toward Nicaragua. By many accounts, the Reagan Administration repeatedly, willfully, and grossly exaggerated the human rights violations of the Nicaraguan government to justify its support of the *contras*, while understating the extent of *contra* violations.<sup>64</sup> Some United States-based NGOs responded by not only setting forth conclusions of fact that contradicted the Administration's account, but also directly challenging the Administration's characterizations.<sup>65</sup>

At times, this put NGOs in the position of saying in so many words that however blameworthy the Nicaraguan government's actual human rights record, it was not as bad as the Reagan Administration said it was. These statements struck some observers as an apology for the Nicaraguan government and brought on charges of political bias.<sup>66</sup> The fact that some NGO reports on Nicaragua addressed matters of United States foreign policy—specifically, the issue whether violations by the *contras* were so egregious that United States funding should be prohibited—provided further ammunition to those who charged that the reporting itself was biased.<sup>67</sup>

### C. Appropriateness of Emerging Norms

Although implicit in public critiques of NGO methodology, the criteria used to evaluate NGO reporting do not reflect a generally recognized or widely accepted set of professional standards. It is appropriate, therefore, to ask whether NGOs should accept and aspire to satisfy the de facto standards that have emerged.

64. See Farer, *Looking at Nicaragua: The Problematic of Impartiality in Human Rights Inquiries*, 10 HUM. RTS. Q. 141, 147 (1988); Kondracke, *Broken Watch: Human Rights or Politics?*, THE NEW REPUBLIC, Aug. 22, 1988, at 9.

65. See, e.g., AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: REAGAN, RHETORIC AND REALITY (1985) [hereinafter AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA].

66. See Barnes, *The Sandinista Lobby: 'Human rights' groups with a double standard*, THE NEW REPUBLIC, Jan. 20, 1986, at 11; Kondracke, *supra* note 64; *Nicaragua and Human Rights: A double standard?*, NEWSWEEK, Aug. 18, 1986, at 19 [hereinafter *Nicaragua and Human Rights*].

67. See Barnes, *supra* note 66.

While some partisan organizations and individuals did enter the debate over Nicaragua policy in the guise of human rights monitors, many charges of bias were lodged against NGOs based on misunderstandings about the international standards that the organizations applied. For example, some critics of Americas Watch, charging that the organization displayed a "left-wing bias," apparently believed that its conclusions about several countries' human rights records reflected different levels of moral outrage about similar violations. But a good deal of the evidence presented by these critics reflected a failure to appreciate distinctions drawn by Americas Watch on the basis of international law. See Peretz, *supra* note 54; Mendez, THE NEW REPUBLIC, June 9, 1986, at 6 (letter to editor by director of Americas Watch responding to Peretz article); see also, *Nicaragua and Human Rights*, *supra* note 66.

The appropriateness of at least some of these standards is questionable. An organization that "fails" certain tests of institutional credibility, perhaps because its work is directed only toward right wing governments, may nonetheless employ meticulous methodology in establishing the facts it reports.

The question whether emerging standards of institutional credibility have any bearing on the reliability of NGO reporting, however, may be largely beside the point. If NGOs hope to be effective, they can ill afford to flout the standards applied by their target audiences. More to the point, criticisms of NGO reporting based on charges of institutional bias have had largely beneficial effects. Such criticisms have, for example, helped prompt many NGOs to monitor serious violations in countries they previously had ignored.<sup>68</sup> With this development, the human rights norms embodied in international law have become more genuinely universal.

There may be, however, some exceptions to the pragmatic view that NGOs in general should accept, and seek to satisfy, the emerging standards for assessing institutional credibility. In particular, there are sound reasons to challenge the view that all NGOs must monitor guerrilla abuses if they monitor government practices in a country wracked by internal armed conflict.<sup>69</sup> For reasons suggested earlier,<sup>70</sup> the decision to monitor only government practices can be a principled one, and it has been applied by such respected organizations as AI.<sup>71</sup> Nevertheless, governments confronted with an insurgency have frequently charged that a domestic NGO's failure to monitor guerrilla abuses reflects political bias or even collaboration with the insurgents. Because such allegations have placed domestic human rights activists at grave risk, some international NGOs that monitor all sides to

68. The reporting activities of many international NGOs formerly betrayed a stronger geographical or geopolitical slant than they do today. While the reasons for the earlier pattern vary—some NGOs undoubtedly are biased—several factors have been especially important. In deciding how to allocate limited resources, NGOs have sometimes focused disproportionately on countries where they believed they could have the greatest impact. Also, NGOs have failed to monitor many "closed" countries, believing that information necessary to prepare a credible report is not available.

In recent years many international NGOs have taken deliberate steps to correct the earlier imbalance in their reporting. For example, as noted in Part III, NGOs have made increasing attempts to monitor "closed" countries by relying on credible refugee testimony. See *infra* text accompanying notes 96, 127. Perhaps, too, as the influence of the human rights movement has become more apparent, some NGOs have readjusted their estimation of which governments are likely to be responsive to their work.

For an excellent analysis of the factors that have accounted for NGO "blind spots," see Cohen, *People's Republic of China: The Human Rights Exception*, 9 HUM. RTS. Q. 447 (1987).

69. As noted earlier, however, an NGO that monitors government forces' violations of the laws of war should monitor violations of insurgents as well.

70. See Part IIB2, *supra*.

71. AI is considering expanding its mandate to include monitoring of guerrilla practices.

armed conflicts have vigorously defended the integrity of domestic NGOs' decision to monitor only government abuses.<sup>72</sup>

#### D. Improving Credibility

If it is desirable to accept most of the criteria that have been invoked to judge institutional credibility, NGOs will continue to face substantial challenges in their efforts to satisfy those "standards." As the preceding discussion suggests, NGOs may risk diminishing their credibility if they combine their reporting activities with an activist stance on a current policy debate or address the political context surrounding the abuses they chronicle. Yet both approaches serve important institutional goals of human rights organizations.

To the extent that NGO reporting is influenced by advocacy concerns, the organizations would be well advised to take measures to minimize the potential threat to their credibility. They should, for example, ensure that their reporting reflects consistent application of international standards. This means that NGOs should be able to explain any apparent variation in their conclusions about different governments' violations—including differences in tone—by reference to variations in factual conditions.

Most suggestions for how NGOs can improve the credibility of their reporting have focused on methodological considerations. Some observers have advocated the development of uniform methodological standards, arguing that adherence to such standards would increase the reliability and credibility of NGO reporting.<sup>73</sup> The most influential NGOs generally have not acted upon these suggestions, and the fact-finding activities of local human rights NGOs vary considerably from one country to another and even among NGOs within a country. Many international NGOs have not even prescribed formal, detailed, standardized fact-finding methodologies for use within their own organizations.<sup>74</sup>

72. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 61, at 6–7 n.19. While publicly defending the methodology of such domestic monitors, international NGOs often privately urge their endangered colleagues to consider monitoring guerrilla abuses, suggesting that it will increase the monitor's credibility and therefore reduce the risks they face. International NGOs increasingly feel obliged to monitor guerrilla abuses themselves.

73. See, e.g., Claude, *supra* note 48; THOOLEN & VERSTAPPEN, HUMAN RIGHTS MISSIONS: A STUDY OF THE FACT-FINDING PRACTICE OF NON-GOVERNMENTAL ORGANIZATIONS, (1986); Zeiter, Zunzunegui & Quiroga, *Guidelines for Field Reporting of Basic Human Rights Violations*, 8 HUM. RTS. Q. 628 (1986).

74. Some limited exceptions exist. The International Human Rights Law Group has, for example, published guidelines for election-monitoring delegations. See L. GABER, GUIDELINES FOR INTERNATIONAL ELECTION OBSERVING (1984). Prison Watch, a project of Human Rights Watch, has developed a standard "checklist" for use by delegates investigating prison conditions

A variety of factors account for NGOs' general reluctance to develop standardized methodologies. Most importantly, many human rights professionals believe that the nature of the human rights violations they monitor requires broad flexibility in fact-finding strategies.<sup>75</sup> As noted earlier, NGO fact-finding has focused on abuses which governments deliberately cloak in secrecy.<sup>76</sup> Many human rights professionals believe that adopting rigid methodological standards would limit their ability to adapt their fact-finding efforts to the particular constraints of particular circumstances,<sup>77</sup> and could preclude them from undertaking effective advocacy with respect to countries that engage in the most severe and systematic abuses.<sup>78</sup>

In addition, some human rights professionals believe that the articulation of general fact-finding standards inadvertently could increase the risks faced by domestic human rights monitors. Such monitors frequently work under conditions of extreme danger, and government

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in foreign countries on behalf of the project. AI has developed a standard questionnaire for use in interviewing former detainees; however, AI's research staff are not required to use it.

Some organizations that have not prescribed uniform methodological standards have nonetheless made substantial efforts to train and/or supervise their research staff in fact-finding techniques. For example, Human Rights Watch has sponsored in-house training sessions on fact-finding techniques.

AI seeks to ensure rigorous standards mainly through a multilevel review process. A regional supervisor presses the principal researcher to substantiate and defend her or his conclusions. Higher levels of review help ensure consistency from one AI report to another. In practice, the high-level review process fosters the sort of cross-fertilization among AI's different regional departments that promotes uniform standards within the organization. Research staff say that, beyond their immediate effect with respect to specific reports, these institutional checks inculcate the researchers with a "habitual caution," and a sense of "prudence as to the likely factualness of evidence." Interviews with research staff of Amnesty International, in London (May 31–June 1, 1989) [hereinafter AI Staff Interview].

75. INTERNATIONAL LAW AND FACT-FINDING, *supra* note 42, at vii–ix, 2; Weissbrodt & McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1 (1981) [hereinafter Weissbrodt].

76. See Part IIA1, *supra*.

77. NGOs often rely upon variations in language characterizing alleged human rights violations to signal the level of certainty surrounding each account included in a report. An NGO, for example, would apply more rigorous evidentiary standards to a report which it publicly characterized as "credible" or "reliable" than to one described as "unconfirmed," or simply "a report." It would apply its most rigorous standards of proof to accounts which it presented as fact.

Widely-respected NGOs such as AI, Human Rights Watch, and the Lawyers Committee for Human Rights typically do not even cite an alleged violation as a "report" unless their staff, on the basis of their own research, have concluded that the report is probably true. According to one AI researcher, an allegation that is publicly characterized as a "report" has been judged by AI research staff to be a "probable fact." AI Staff Interview, *supra* note 74.

78. Some analysts have observed that there is an inverse relationship between the severity of abuses in a country and access to information about the violations. One writer expresses the point this way: "[I]t is virtually an axiom that the more repressive the regime, the more difficult it makes access to information about its human rights atrocities to researchers (or anyone else)." Goldstein, *supra* note 48, at 617.

attacks on the credibility of their methodology often heighten those risks, serving in effect as a public "death warrant." In this setting, some human rights professionals fear that governments might cite, with dangerous consequences, a domestic NGO's failure to adhere to established uniform standards to harm the organization's credibility.<sup>79</sup>

Any such effect would not only be dangerous, it would be unwarranted. Circumstances surrounding human rights violations vary considerably from one country to the next, and possibilities for investigating reported violations vary accordingly. This extreme variation makes it impossible for domestic monitors everywhere to aspire to the same methodological standards.

### E. Threshold Standards of Credibility

While there are valid reasons for eschewing narrow methodological standards, NGOs should nonetheless aspire to the highest standards possible under prevailing circumstances. Indeed, their institutional objectives would be defeated if their reports failed to persuade their target audiences that the factual conclusions were well-founded. To meet this "burden of persuasion," each report must satisfy a threshold standard of credibility.

A paradigm for evaluating whether NGO methodology strikes a proper balance between the need for flexibility and appropriate expectations of rigor is suggested by the evidentiary rules applied by international tribunals. Recognizing the peculiar difficulties surrounding fact-finding in transnational settings, international judicial tribunals have generally judged it necessary to use flexible evidentiary standards,<sup>80</sup> and have permitted liberal recourse to inferential and circumstantial evidence.<sup>81</sup> Nevertheless, international tribunals have also rec-

79. But see Zeiter, *supra* note 73 (arguing that adherence to uniform methodological standards would help insulate domestic monitors from attack).

80. See, e.g., Pinson Case (France v. United Mexican States French/Mexican Claims Commission) 5 R. Int'l Arb. Awards 327, 414 (1952). International tribunals have eschewed rigid evidentiary standards in part because the territorial control a state exercises within its borders may leave another state "unable to furnish direct proof" that a violation has been committed in the territory of the first state. Corfu Channel Reports (Merits), 1949 I.C.J. 4, 18; see also Ireland v. United Kingdom, 23-1 Eur. Ct. H.R. (ser. B) (1976), reprinted in 58 I.L.R. 188, at 264 (1980) [hereinafter Ireland v. UK].

81. In a 1988 case involving allegations that the government of Honduras was responsible for an involuntary disappearance, the Inter-American Court of Human Rights found that "[c]ircumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt [by the responsible governmental authorities] to suppress all information about the kidnapping or the whereabouts and fate of the victim." Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at para. 131

ognized that, notwithstanding the special evidentiary problems which claimants before them face, petitioners alleging violations of international law bear an initial burden of persuasion.<sup>82</sup>

Once the claimant makes out a *prima facie* case, however, tribunals often shift the burden of proof to the respondent.<sup>83</sup> If the respondent fails to produce evidence rebutting the claimant's allegations, the tribunal may draw inferences that are adverse to the respondent's case.<sup>84</sup> International tribunals have recognized that the justification for applying this rule is especially compelling when the respondent fails to produce evidence exclusively within its control.<sup>85</sup>

Although NGOs sometimes draw certain inferences from a government's response to their reports,<sup>86</sup> they generally have not pressed the position that a government's failure to produce evidence rebutting a "*prima facie* case" established by the organization should be taken, its itself, as evidence of the truth of the alleged facts.<sup>87</sup> More typically, NGOs have acknowledged that they lack the capacity to verify every detail of accounts included in their reports, but have asserted that they have developed sufficient evidence of serious abuses to require the government to

(July 29) [hereinafter *Velasquez Rodriguez Case*]. The Court made clear that its analysis had application to human rights cases generally. See *id.*, paras. 133-35.

As the discussion in Part IIIC makes clear, human rights professionals make substantial use of inferential and circumstantial evidence in reaching findings of fact in general country reports. See *infra* text accompanying notes 116, 153-160. Such evidence, which is often compelling in itself, is used to supplement the direct evidence that is the foundation of country reports.

82. Wittenberg, *La theorie des preuves devant les juridictions internationales*, 56 (II) RECUEIL DES COURS 5, 48 (1936).

83. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 324 (1953).

84. See U.S. on behalf of Parker, Claimant v. The United Mexican States (Docket #127), (United States-Mexico General Claims Commission, Mar. 31, 1926), reprinted in 21 AM. J. INT'L L. 174, 177 (1927) [hereinafter *Parker*].

85. *Id.* at 178-79; *Ultrasystems Inc. v. Iran* concurring opinion of Richard M. Mosk, (Iran-United States Claims Tribunal, Mar. 4, 1983), reprinted in 71 I.L.R. 663, 678-79 (1986).

86. As elaborated in Part IIIB, a government's response to violations is itself an important part of its human rights record. See *infra* text accompanying notes 131-135. In this respect, the nature of a government's response to information about violations presented to it by an NGO would be relevant to the organization's assessment of the government's human rights record.

87. The analogy to international tribunals should not be overdrawn. International tribunals have judged it appropriate to draw adverse inferences from a respondent state's failure to adduce evidence rebutting a petitioner's allegations in part because states bear a responsibility to cooperate in the production of evidence when they are parties to litigation before international tribunals. See *Parker*, *supra* note 84, at 174, 177. This rationale would not, of course, be present with respect to NGO fact-finding activities. But see LAWYERS COMMITTEE FOR HUMAN RIGHTS, *AN EXAMINATION OF THE DETENTION OF HUMAN RIGHTS WORKERS AND LAWYERS FROM THE WEST BANK AND GAZA AND CONDITIONS OF DETENTION AT KETZIO 18* (1988) (in the absence of public charges of illegal activity, Lawyers Committee concludes that Israeli military authorities have exceeded permissible standards in cases involving detention of human rights workers and lawyers).

take appropriate action,<sup>88</sup> including the institution of an impartial investigation.<sup>89</sup>

This approach seems fundamentally sound. While flexible evidentiary standards are appropriate to NGO human rights fact-finding methodology, NGO reports should make out a *prima facie* case for their factual allegations by developing highly probative—if inconclusive—evidence. If the NGO's methodology is persuasive, the government responsible for alleged violations is likely to face substantial pressure to "answer for itself," while the concerned public is unlikely to accept a bald denial as an adequate response.

### III. FACT-FINDING METHODOLOGY: COUNTRY REPORTS

Although variations in fact-finding circumstances make it impossible to identify uniformly applicable methodological standards, the leading NGOs have developed considerable expertise in overcoming commonly encountered challenges to ensure the reliability of their fact-finding. This section examines the methodological strategies that these NGOs have adopted to develop at least *prima facie* evidence of human rights violations and, where possible, virtually conclusive corroboration.

For purposes of analysis, the discussion is limited to fact-finding inquiries that (1) focus on a narrow band of human rights violations—torture, extrajudicial execution, disappearances and arbitrary arrest, and detention; (2) involve an on-site investigation—known in NGO parlance as a fact-finding "mission;"<sup>90</sup> and (3) culminate in the publication of a country report. Although considerations relating to the composition of a fact-finding delegation, the length of its investigation, and other logistical matters may have important implications for the credibility of a human rights report, they are beyond the scope of this Article.<sup>91</sup> The following discussion focuses, instead, on the nature of evidence gathered by NGO fact-finders. It evaluates the relative

88. NGOs sometimes take a similar approach in presenting information about apparently widespread abuses to a government on a confidential basis. An AI research staff member described the logic behind one such communication this way: "We're saying, in effect, we've collected information [about alleged violations]; *prima facie* it's substantial; we don't believe every word of it; we think it's your obligation to do something." AI Staff Interview, *supra* note 74. In the communication, Amnesty International had sought clarification of reported facts from the government, and had requested the government to conduct an impartial investigation.

89. See, e.g., LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, *THE PHILIPPINES: A COUNTRY IN CRISIS* ii–iii (1983).

90. Information gathered during an on-site investigation, however critical to the ultimate findings of fact set forth in a country report, typically represents a fraction of the total research effort. The mission itself is preceded by substantial preparatory research. Moreover, once a delegation has completed an on-site inquiry, it generally continues to monitor conditions from afar so that it can update its information until publication of the final report.

91. For a discussion of these and related considerations, see Weissbrodt, *supra* note 75.

probative value of different types of evidence, and assesses the impact of various fact-finding techniques on the credibility of an NGO's factual conclusions.

#### A. Direct Evidence

The leading international NGOs generally regard direct evidence—testimony of victims or eyewitnesses—as highly probative; such evidence forms the bedrock of the prototypical NGO report on human rights conditions in a country. Some human rights professionals will not, as a matter of principle, use hearsay accounts of human rights violations.<sup>92</sup> Eyewitness and victim testimony is not, however, persuasive in itself; the probative value of direct testimony turns largely upon the circumstances and manner in which it is obtained, including the process used to "select" witnesses, the conditions under which they are interviewed, and the corroboration obtained.

##### 1. Identifying Potential Witnesses

Several overarching goals, each designed to maximize the evidentiary value of direct testimony, guide human rights investigators in identifying interviewees who can furnish direct evidence of violations.

##### a. Avoiding Politically-Biased Selection Criteria

First, NGOs seek to ensure that the selection process does not produce testimony that is politically motivated or otherwise biased. This risk may be present, for example, if NGOs seek assistance in identifying potential witnesses from persons or entities politically opposed to the government or the rebel group whose practices are under scrutiny.<sup>93</sup>

92. Aryeh Neier, Executive Director of Human Rights Watch, describes an experience he had on a fact-finding mission in Cuba to illustrate why he adopts this position. Neier had been told by six prisoners in the punishment wing of one Cuban prison that a particular prisoner had been hanged in that wing. Each one described the hanging as having occurred in a manner inconsistent with the possibility of suicide. Neier eventually spoke with a prisoner who had been in the punishment wing for a long time and who had actually shared a cell with the deceased prisoner. When asked why he had been in the punishment wing so long, the prisoner explained that he was being punished for murder because he had not intervened when his cellmate hanged himself. Several factors lent his account credibility. First, Neier was able to corroborate that the prisoner had been in the punishment wing since the date of the deceased prisoner's death. Second, the prisoner was visibly angry that he was being punished for not intervening in his cellmate's suicide. Transcript of Human Rights Watch Training Session, Jan. 4, 1989 [hereinafter Training Session Transcript].

93. As discussed above, the controversy surrounding a 1985 report on abuses committed by the insurgents opposing the Nicaraguan government, *Contra Terror in Nicaragua*, highlights the importance of this issue. See R. BRODY, *supra* note 37. The Reagan Administration sought to discredit the report by charging that the Nicaraguan government selected supposed victims

Sometimes, however, the richest sources of information about potential witnesses and the best witnesses themselves may be—or may appear to be—politically biased. Because repressive governments persecute in particular their perceived or actual opponents, human rights organizations would lose the benefit of much victim testimony if they excluded as interview subjects persons who appeared to be politically biased against their government. When interviewing such witnesses, the finder of fact can attempt to ensure that she is not “taken in” by fabricated or exaggerated allegations of abuse—as she would with any witness—by seeking persuasive corroboration.<sup>94</sup>

### b. Obtaining Representative Testimony

Second, human rights investigators seek to avoid selection procedures that produce a skewed picture of overall patterns of violations in a country. When possible, NGOs draw upon a broad range of sources to help identify potential witnesses.<sup>95</sup> Input from multiple sources helps minimize distortions that might be built into any particular source’s contribution.

If circumstances do not permit access to witnesses whose testimony, taken as a whole, can present a comprehensive picture of relevant patterns, the fact-finder must assess the limitations of various witnesses’ testimony, and convey the effect of those limitations on the conclusions reached in a final report. When, for example, Africa Watch undertook its first investigation of violations of the laws of war in Angola and was unable to enter the country itself, it sent an investigator to refugee sites in two neighboring countries. This enabled the investigator to reach broader conclusions than would have been possible had she visited only one of the sites, since the refugees in the two countries had fled different border regions of Angola. She was

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interviewed by the report’s author, and that the Nicaraguan government furnished the investigator’s transportation to interview sites. The author of the report asserted in response that he had financed the investigation himself; that on the few occasions when he had relied on government-furnished transportation, he was taken to sites that he had selected, and that he was not accompanied when he sought out witnesses. *See id.*

94. One potential advantage of interviewing clearly partisan sources is the possibility of eliciting “admissions against interest.” This and other techniques for establishing the credibility of witness testimony are examined below.

95. Sources used to identify potential witnesses often include domestic organizations that monitor human rights conditions; church organizations that receive reports of human rights violations; lawyers who represent victims of abuse and lawyers’ groups that organize legal services for human rights victims; academic research centers that monitor human rights; international relief organizations whose staff have frequent contact with victims of abuse; organizations, such as trade unions, whose members are special targets of persecution; and press accounts reporting instances of alleged violations. Introductions to victims from persons in the first three categories may enable NGO researchers to interview persons who would not trust a foreign investigator without assurances from a trusted local monitor.

careful, nonetheless, to confine her conclusions to the regions of Angola with respect to which she had obtained substantial direct testimony.<sup>96</sup>

An NGO’s ability to gauge the representativeness of witness testimony is also a function of the type of witnesses it seeks out. A delegation investigating reports of the routine torture of political detainees would, for example, be better able to assess the extent of torture if it sought out former detainees recently released from detention than if it sought out only persons who claimed to have been tortured when detained. Using this approach, an AI delegation that visited the Philippines in 1973 interviewed 103 former political detainees; of these, seventy-one provided credible testimony that they had been abused. Had the delegates interviewed only former detainees who claimed to have been tortured, they would have lost a valuable means of gauging the representativeness of the reported allegations.

### c. Time Period Covered

Third, NGOs generally seek witnesses who can provide testimony about recent practices. Otherwise, the responsible government or insurgent force might dismiss the report’s allegations as outdated.

How recent should witness testimony be? Generally, NGOs tend to focus on the year preceding publication of their reports, concentrating on the latter half of the year. Because, however, it is relatively difficult to obtain and corroborate recent direct testimony about abuses in a closed country, reports on such countries often cover a longer period, perhaps reaching back several years. Also, NGOs often cover a longer period in their first major report on a country—or on the record of the current government of a country—than they do in subsequent reports. In these reports, NGOs often seek to present a broad overview of long-term trends in a country,<sup>97</sup> while in subsequent reports they are more likely to update the earlier reports.

Both the nature and degree of public controversy surrounding a country’s human rights record may affect the period covered in a report. For example, the considerable controversy surrounding the Reagan Administration’s policy toward El Salvador in the early 1980s—as well as the Administration’s claims that recent human rights initiatives were reducing levels of state-sponsored violence in El Salvador—prompted NGOs to provide highly “current” information

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96. *See* AFRICA WATCH, *ANGOLA: VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES* 3–4 (1989) [hereinafter *AFRICA WATCH, ANGOLA*].

97. For examples of such reports, see AMNESTY INTERNATIONAL, *SOMALIA: A LONG-TERM HUMAN RIGHTS CRISIS* (AFR 52/27/88, 1988) [hereinafter *AI, SOMALIA*]; AMNESTY INTERNATIONAL, *UGANDA: THE HUMAN RIGHTS RECORD 1986–1989* (1989); ASIA WATCH, *HUMAN RIGHTS IN INDONESIA AND EAST TIMOR* (1988) [hereinafter *ASIA WATCH, HUMAN RIGHTS IN INDONESIA*].

to avoid having their conclusions dismissed as irrelevant in light of recent developments. Also, because some NGOs produced reports on conditions in El Salvador to counter the Administration's semiannual certifications to Congress on this subject,<sup>98</sup> the NGOs' reports were geared to six-month intervals.

In many contexts, "watershed" developments—a change in government, the lifting of martial law, the beginning of a ceasefire coupled with implementation of a political amnesty—are presumed or thought likely to affect the state of human rights observance in a country. In these situations a country report released after the benchmark event has occurred may be discounted if it purports to describe current conditions but does not cover developments following the critical event.

#### d. Size of Sample Group

Fourth, human rights investigators seek to obtain a large enough sample of direct testimony on the subject of their inquiry to enable them to reach judgments about overall patterns of abuse<sup>99</sup> and to support their final conclusions.<sup>100</sup> In practice, human rights investigators often have to balance this objective against that of guarding against skewed conclusions. It is important for NGOs to obtain as much direct testimony as possible about particular abuses addressed in their final reports, and this may require researchers to make concerted efforts to locate persons capable of providing such testimony. But efforts to avoid reaching skewed conclusions often involve the use of random selection criteria, which may yield an inadequate data base for conclusions about a particular form of abuse.

An investigation of conditions in Cambodia undertaken by the Lawyers Committee for Human Rights in November 1984, illustrates how one delegation attempted to resolve these competing objectives. The Committee was unable to secure permission to enter Cambodia,

98. See *supra* notes 29–35 and accompanying text.

99. When, for example, Jemera Rone conducted interviews of Angolan refugees in a study undertaken for Africa Watch, she was able to interview a sufficiently large pool of refugees to determine that patterns of abuse varied from one area to another, suggesting that the violations, while widespread, did not reflect a centrally-directed plan. Training Session Transcript, *supra* note 92.

100. For examples of numbers of witnesses interviewed for country reports, see AFRICA WATCH, ANGOLA, *supra* note 96 (over 80 refugees interviewed); LAWYERS COMMITTEE FOR HUMAN RIGHTS, SEEKING SHELTER: CAMBODIANS IN THAILAND (1987) (approximately 90 displaced persons interviewed).

Considerations addressed in Part IIIA1, *supra*, help explain why NGOs have not developed "rules of thumb" about the appropriate number of interviews for an on-site investigation. A rule on the appropriate number of interviews based upon an "open" country in which identification and location of alleged victims is relatively easy, could effectively preclude NGOs from producing reports about "closed" countries.

and its on-site investigations were conducted along areas of the Thai-Cambodian border where some quarter-of-a-million Cambodian exiles were settled. Each settlement was administered by civilian leaders of armed factions opposing the Cambodian government, then called the People's Republic of Kampuchea ("PRK"). In identifying exiles who could provide testimony on PRK violations,<sup>101</sup> the delegation avoided working through the civilian administrators, who could not be considered disinterested parties with respect to a study of PRK practices. Instead, the delegates began the selection process by interviewing new Cambodian arrivals as they were registered in the administrative headquarters of the camps, before they could be influenced by any collective form of indoctrination.

New arrivals were asked about the reasons for their flight to the border and where they had lived before their journey. Answers to these questions helped the delegation gauge the relative extent of political persecution as a cause of flight.<sup>102</sup> Further inquiries about the witnesses' personal experiences helped the delegates assess the extent and geographical patterns of practices such as political imprisonment.<sup>103</sup> Once the delegates had interviewed large numbers of recent arrivals, they made concerted efforts to identify people who could provide testimony about particular abuses which, on the basis of the random interviews, appeared to be common.

#### 2. Circumstances of Interviews

Like the witness-selection process, circumstances surrounding an interview can play an important role in ensuring the reliability of direct testimony. Many human rights professionals conduct all interviews of victims and eyewitnesses outside the presence of third persons to ensure that the witness' testimony is not inhibited or otherwise influenced by others.<sup>104</sup> This approach also enables the interviewer to attempt to corroborate a witness' allegations by separately interviewing other witnesses to the same incident.

Despite the general benefits associated with private interviews, many NGOs have avoided adopting an inflexible rule in this regard.

101. The Lawyers Committee delegation, of which the author was a member, also investigated abuses committed by two armed factions opposing the PRK.

102. The approach had obvious, but unavoidable, limitations; persons fleeing Cambodia are themselves a self-selected subgroup of the Cambodian population, and the delegates took account of this in evaluating the testimony they obtained.

103. Although the screening method provided a crude means of gauging the extent of certain patterns of abuse in Cambodia, few alternatives were available. No human rights NGOs operated in Cambodia, nor, at the time, were there other reliable sources who were in a position to place individual allegations of abuse in a broader perspective.

104. For example, interviewing witnesses in a group setting may encourage witnesses to "grandstand" for the "audience." Training Session Transcript, *supra* note 92.



At times, the presence of a third person during an interview can be helpful; a traumatized victim of torture may, for example, be more comfortable speaking to a stranger if a familiar, trusted intermediary is present.

Even if conducted in private, an interview can be compromised by the nearby presence of others. This risk often arises when a fact-finding delegation seeks to interview residents of refugee settlements. Sometimes the host-country government attempts to impose the requirement that its security forces accompany the delegation as a condition of access to the camps. NGOs generally try to avoid this condition. The security forces of the host country are sometimes responsible for abuse of refugees,<sup>105</sup> and their presence in the vicinity of an NGO's interviews can be intimidating.<sup>106</sup> Even the appearance of a delegation arriving at refugee camps with an official escort may lead camp residents to believe that the delegation is affiliated with the host country's government, and this perception may affect witnesses' willingness to speak candidly.<sup>107</sup>

### 3. The Interview

Testimony of eyewitnesses and victims is more valuable than hearsay allegations because the finder of fact has an opportunity to test and, through direct observation, to assess the credibility of persons who purport to have direct knowledge of critical facts. Also, the interviewer is able to elicit, through highly specific questions, the sort of detailed information necessary to a credible inquiry. The value of a witness' testimony, then, turns in large measure on the role and skills of the interviewer.

At the outset, the way an interviewer presents himself and the nature of the organization he represents<sup>108</sup> can affect a witness' inclination to be forthcoming and honest. Witnesses are under no obligation to speak to NGO investigators at all or, if they do, to speak

105. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *REFUGEE DENIED: PROBLEMS IN THE PROTECTION OF VIETNAMESE AND CAMBODIANS IN THAILAND AND THE ADMISSION OF INDOCHINESE REFUGEES INTO THE UNITED STATES* (1989); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *SEEKING SHELTER: CAMBODIANS IN THAILAND* (1987).

106. Training Session Transcript, *supra* note 92, at 13–14.

107. *Id.*

108. This introduction often includes a statement making clear the fact that the NGO is non-partisan; that it is concerned solely with human rights and is not affiliated with any political organization, party or other entity, or with any government. See *id.* at 12; AI Staff Interview, *supra* note 74. Even when asked their views on political issues, NGO researchers should make clear that their organization does not take a position on such issues, and is solely concerned with human rights. See Training Session Transcript, *supra* note 92. In some situations, it may be important for an interviewer to make clear that the witness should expect no "reward"—such as admission to the United States as a refugee—for providing information or particular answers to questions.

the truth. Thus, information presented by an interviewer respecting his purpose in speaking to the witness, the use that will be made of the testimony, and conditions of confidentiality may have a significant effect on the witness' disposition to cooperate.

Early on, the interviewer should make clear that the final product of the interview will be a public report. At some point, the interviewer must ask the witness if she is willing to allow her testimony to be used and, if so, whether she is willing to be identified by name in the report.<sup>109</sup>

Detailed biographical questions are best left until rather late in an interview.<sup>110</sup> Discomfort about providing personal information to a total stranger is a universal phenomenon, and is likely to be especially pronounced when the witness has been a victim of, or eyewitness to, abuses committed under circumstances that prevail at the time of the interview.

More generally, it is not desirable to begin an interview by asking a witness especially sensitive questions. It would, for example, be unproductive—as well as insensitive—to begin an interview by saying, "I'd like to find out about the reasons for your son's death. Was he a guerrilla?" A more seasoned interviewer would begin the interview with relatively unstressful questions, and would raise the subject of the son's death at an appropriate point in the subsequent discussion. Then, she might ask the witness, "How many children do you have?" and then, "Are they all still alive?"<sup>111</sup>

The interviewer's questions should generally be open-ended, and in other respects (including the use of a nonjudgmental tone of voice) should avoid suggesting that a particular answer to a question is the "right" one. Still, an interviewer must at times ask highly specific questions to elicit detailed information about alleged violations. If, for example, the scope of her inquiry includes arbitrary detention, the interviewer must, when interviewing former detainees, ask whether the interviewees ever saw or requested to see a lawyer while detained. If not, why not? If a detainee had a lawyer, did the lawyer ever attempt to see her in detention?

Each of these questions must be answered before the interviewer can determine whether the detainee was actually denied the opportu-

109. NGOs sometimes omit a witness' name and/or identifying details from a report even when the witness authorizes their publication; the interviewer may realize that, even though she has explained to the witness how the testimony will be used, the latter may not be in a position to appreciate the implications and possible risks of being cited in a publicly released human rights report that officials of the witness' government will read.

110. NGO researchers seek biographical data in part because such information enables the researcher to analyze demographic patterns of victimization.

111. Interview with Jemera Rone, Counsel to Americas Watch, in New York City (May 11, 1989) [hereinafter Rone Interview].

nity to meet with counsel while detained. Still other questions must be answered before the interviewer can determine whether such a denial constituted a violation of international standards respecting the right to counsel.

Experienced interviewers make substantial use of open-ended follow-up questions to elicit critical information. An especially useful question is, "How do you know?" Answers to this are often invaluable indices of a witness' credibility.<sup>112</sup> For example, when responding to this question, a witness who asserted that a particular military unit was responsible for murdering a civilian might establish his credibility by making clear that (1) he was an eyewitness and was standing close enough to the incident to have been able to observe key details; and (2) he recognized the perpetrators because they were stationed in the witness' community and had regular contact with local residents.<sup>113</sup> In contrast, the testimony should be discredited as hearsay if the witness replies to the interviewer's question, "My mother told me."

"How do you know?" and other follow-up questions can also help a researcher determine whether an alleged abuse includes all of the elements of a human rights violation. For example, the question, "How do you know he was killed?" may elicit the response, "I saw his corpse at the funeral." This answer helps establish an essential fact: the death of the alleged victim. Similarly, the question, "How do you know she was abducted by government troops?" might elicit the response, "I saw some soldiers seize her and force her into a jeep, and then they drove away in the direction of the local military detachment." This answer would help establish a key element of a forced disappearance—abduction by agents of the state.

This form of questioning can also elicit information that is susceptible to corroboration. If, for example, a witness to an extrajudicial execution asserts that the victim was killed by members of a particular military unit, her answer to the follow-up question, "How do you

know the perpetrators belonged to that unit?" might include a description of the uniforms and weapons of the perpetrators. The investigator would be able to corroborate whether the description matched the uniforms and weapons of the unit identified as responsible, and she might also be able to ascertain whether that unit was operating in the vicinity of the alleged incident at the relevant time.

Relentless follow-up questions also help a researcher bridge cultural or other gaps in communication. Human rights investigators travel throughout the world, and interview people whose concepts of time, space, and other factors may differ from those of the investigators. While these differences cannot be overcome entirely, their potentially distorting effects can be substantially minimized through extensive, detailed questioning.<sup>114</sup>

Professional human rights investigators constantly draw upon their expertise to help them fashion questions that are likely to elicit critical information. A person investigating violations of the laws of war in a country wracked by civil conflict might, for example, ask witnesses who were displaced by combat, "Where were you born?" rather than, "Where are you from?" In response to the latter question, the witness might tell the interviewer the name of the town where she was born, or she might answer by naming the last town in which she lived. In contrast, once the witness answered the former question, the interviewer could then ask follow-up questions to ascertain the witness' subsequent patterns of movement and dislocation, and, importantly, the reasons for each move. The witness' replies may include descriptions of war-related incidents, such as bomb attacks on civilian communities by government forces or deprivation of food by insurgents, that help the interviewer to assess the geographical patterns of violations of the laws of war.<sup>115</sup>

NGO interviewers draw upon their knowledge of country conditions to fashion questions likely to elicit information that witnesses may be

112. One delegation described how it used this type of questioning to determine the rate of political detention in a country on the basis of former detainees' testimony:

In many cases, witnesses were able to offer credible bases for their estimates of the extent of certain practices. For example, our estimates of the extent of detention on political grounds are based in part on estimates of populations at specific prisons by former political prisoners. A number of these prisoners had a persuasive basis for their estimates, such as prison lists posted in the jail kitchens or daily roll calls. Additionally, when we were able to (separately) interview a number of persons who had been detained at the same facility, their various estimates tended to be in the same range.

LAWYERS COMMITTEE FOR HUMAN RIGHTS, KAMPUCHEA: AFTER THE WORST vii (1985) [hereinafter KAMPUCHEA: AFTER THE WORST].

113. While the witness in this example would have established his credibility in the sense that he persuasively demonstrated that he was in a position to know what he claimed to know, a researcher still should attempt to corroborate the witness' allegations. Techniques for this sort of effort are examined below. See Part IIIA4, *infra* text accompanying notes 120–125.

114. One delegation interviewing displaced Cambodians in Thailand used this technique when its members were repeatedly told by witnesses that, when Cambodians living in a certain area controlled by the Khmer Rouge try to escape, Khmer Rouge soldiers shoot them. Invariably, the assertion was made as a generalization. Each time this assertion was made, the delegation followed up with the question, "Do you know of any particular instances in which this happened?" Invariably, the witness described the same incident that had taken place several years earlier. Although the basis of the witnesses' assertion apparently was this sole incident, camp residents tended to convey the impression that the practice was routine, either because of cultural differences in expression or because the episode had been so traumatic that the community had collectively interpreted it as a general principle. See KAMPUCHEA: AFTER THE WORST, *supra* note 112, at 205–6.

115. See Rone Interview, *supra* note 111. The degree to which witnesses are willing to provide such information varies from one country and context to another. It is important, therefore, for interviewers to know what information is considered sensitive in the context of the particular interviews. See Training Session Transcript, *supra* note 92, at 14–15.

hesitant to provide in response to a direct question. In many situations of armed conflict, for example, civilians are reluctant to attribute responsibility for land mines placed in or near their community, even if they know which party was responsible. But they may be willing to answer such questions as: "Does the military patrol here?" "Do the guerrillas patrol here?" "Were the guerrillas here in the last three months [when the key incident occurred]?" "Was the military here in the last three months?" The answers to such questions may provide the investigator strong circumstantial evidence of which side was responsible for the violation.<sup>116</sup>

Particularly when an investigator is conducting his first inquiry in a country, it is useful to ask questions relating to general living conditions or the local political context before seeking detailed information about particular violations.<sup>117</sup> Without this background, the interviewer may fail to appreciate the significance of some aspects of the witness' testimony.<sup>118</sup> More generally, good interviewers pick up on subtle cues in the witnesses' language—or in their omissions—that may flag an important issue.<sup>119</sup>

#### 4. Corroborating Direct Testimony

Human rights investigators use a broad range of techniques to corroborate testimony of victims and eyewitnesses. Highly persuasive forms of corroboration, such as autopsy reports concluding that torture inflicted during detention was the cause of death, are simply unavailable in many situations investigated by NGOs. In these circumstances, investigators turn to other means of corroboration that, while not conclusive standing alone, contribute to a broader process of verification.

Under any circumstances a skilled interviewer can test a witness' testimony during the interview itself. One important test is the in-

116. *Id.*

117. See Rone Interview, *supra* note 111.

118. For example, when Rone undertook a fact-finding inquiry into violations of the laws of war in Angola, she learned that the staple crop for Angolans, *manioc*, is left in the ground until it is ready for consumption, and thus can readily be stolen. Rone later learned that rebel soldiers regularly stole *manioc* from the civilian fields in eastern Angola both for their own sustenance and as part of a deliberate war strategy based on starvation of villagers living in government-controlled areas. See *id.*; see also AFRICA WATCH, ANGOLA, *supra* note 96, at 83–87.

119. When, for example, Rone was conducting an inquiry into human rights violations in El Salvador, a woman whose son had been killed several years earlier asserted that she had not recognized the assailants, who had burst into the family home. The witness, Rone recalls, "mumbled something about agrarian reform." Following up on this cue, Rone learned that the victim had been working on agrarian reform during a period when such people were systematically being killed. The witness apparently did not want to speak directly about this because some of the people responsible for her son's murder were still in the vicinity. See Rone Interview, *supra* note 111.

ternal consistency and coherence of the testimony. When an interviewer doubts a particular aspect of the witness' testimony, it may be useful for the interviewer to return to the subject several times during the interview, using different questions to "get at" the troublesome part of the witness' account. This approach would enable the interviewer to observe whether the account remains consistent through each rendering.

Sometimes, however, apparent inconsistencies arise from gaps in communication between the interviewer and the witness. Interviewers should be aware of this possibility and attempt to phrase questions in a manner that will minimize this basis of seeming inconsistency. Often, when an interviewer reviews a confusing part of the testimony with a witness, the witness is able to supply persuasive clarifying information.

Another important index of the credibility of a witness' testimony is the extent to which her allegations conform with general human rights patterns in the country. While this may not conclusively establish the witness' credibility, her account's consistency with known patterns at least establishes that her allegations are plausible.<sup>120</sup>

An interviewer who has special expertise on a country can draw upon his knowledge to devise "tests" of a witness' credibility. For example, when Stephen Heder interviewed Cambodian exiles in Thailand,<sup>121</sup> he drew upon his encyclopedic knowledge of Cambodia to assess the credibility of testimony. When, for example, a witness claimed that in a certain year he had lived in a particular town where he had held a position that gave him access to the information he claimed to possess, Heder would ask such questions as who was the head of the local administrative committee during the relevant period.

Sometimes, physical evidence that corroborates portions of a witness' testimony can be obtained during the interview. If a witness claims he was tortured in a manner that ordinarily would leave a scar, the interviewer should try to corroborate the allegations through visual inspection. The presence of scars that appear to a lay observer to be consistent with the allegations may not be conclusive corroboration,<sup>122</sup>

120. When an NGO investigates a closed country about which limited information is available, its delegates may have little basis for assessing whether the allegations made by the first few witnesses they interview fit a general pattern; by the time they have interviewed scores of witnesses, however, patterns begin to emerge which provide a measuring rod against which all of the testimonies—including the earlier ones—can be assessed.

121. Heder participated in a 1984 fact-finding inquiry on behalf of the Lawyers Committee for Human Rights.

122. In some contexts, reliable observers have found that former detainees at times inflict wounds upon themselves to support fabricated allegations of abuse, either to discredit the detaining authority for political reasons, or to justify to friends why they "broke down" during an interrogation in which they provided important information to the interrogator. Some

but either their presence or absence is a useful indication of the truth of the witness' claim.

In evaluating credibility, it is always relevant to assess the personal motivations of witnesses. Testimony is, of course, most persuasive when the witness has no apparent personal interest in the allegations, or when her statements actually run counter to her personal interest. Sometimes, however, the most direct evidence available comes from unquestionably partisan sources. While partisan interest does not render witnesses incapable of being truthful, it does signal the need to obtain corroborating evidence strong enough to rebut presumptions that the witnesses' testimony is unreliable.<sup>123</sup>

In many cases, elements of a witness' testimony can be corroborated from sources external to the interview. It may be possible, for example, to corroborate some aspects of testimony through a visual inspection of the site of an alleged incident. Sometimes, portions of a witness' testimony can be corroborated by reference to court records, police logs, medical, or inquest records. Even when these and other sources address only some details of a witness' account, the corroboration helps establish general credibility.

The testimony of other witnesses to the same alleged incident can provide strong corroboration. It is, in fact, desirable to interview several witnesses to a disputed incident whenever possible. The sheer repetitiveness of allegations of various witnesses lends each account credibility, provided the witnesses were interviewed under circumstances minimizing the risk of coordination. Also, since various witnesses are likely to have observed and recalled different aspects of an event, the researcher will obtain a more complete picture of what actually happened if she interviews as many witnesses as possible.<sup>124</sup>

In these circumstances, skilled interviewers often attempt to elicit seemingly irrelevant details, like the weather conditions at the time of an alleged military attack, as well as the central facts of the reported violations. This information can be a useful basis for assessing the credibility of accounts, since witnesses are unlikely to coordinate a fabricated account to the extent of agreeing on such details.<sup>125</sup>

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allegations of abuse can only be corroborated reliably by a medical inspection. For an example of such corroboration, see AMNESTY INTERNATIONAL, THAILAND: TORTURE OF THREE KAMPUCHEAN NATIONALS (ASA 39/06/86, 1986) [hereinafter AMNESTY INTERNATIONAL, THAILAND].

123. See AI, SOMALIA, *supra* note 97 ("Information from political sources, such as opposition organizations, has been carefully scrutinized in order to ensure that Amnesty International's reporting on Somalia and appeals to the government of Somalia are based on reliable and impartial evidence which has been corroborated by independent sources.").

124. Training Session Transcript, *supra* note 92.

125. *Id.*

A human rights investigator should not, however, expect to find perfect concordance with respect to every detail from one account to the next. Human perceptions and memory are imperfect at best, and the most reliable accounts of eyewitnesses may vary with respect to such details as the estimated time of an event. Experienced fact-finders develop the ability to detect which discrepancies cast doubt upon witnesses' allegations, and which ones merely reflect the level of ambiguity that surrounds any recalled event.

Finally, as elaborated in Part IIIB1, some allegations can be confirmed through admissions by the responsible authorities, while the credibility of others can be tested by the government's response even when the allegations are disputed.

### 5. Refugee Testimony

As much of the preceding discussion has suggested, NGOs repeatedly have undertaken on-site visits to refugee settlements to investigate human rights conditions in countries that deny direct access. Such inquiries raise special questions about witness credibility. Traditionally, refugees have been regarded as relatively unreliable witnesses, principally because they have been thought to be inherently biased, and also because, having left their country of origin, they have been thought incapable of providing sufficiently direct testimony to be persuasive witnesses.<sup>126</sup>

In recent years various human rights organizations have reconsidered these assumptions. Because some of the most repressive governments deny entry to outside investigators, NGOs' failure to use refugee testimony could preclude scrutiny of serious offenders. Moreover, modern history is replete with instances in which refugee reports were among the most important early indicators of large-scale tragedies.<sup>127</sup> In many contexts, refugees *are* capable of providing eyewitness testimony of recent violations; the fact that they are interviewed outside their country's national borders does not change this.

While an investigator's inability to visit the refugee's country of origin forecloses some avenues of corroboration, others, such as medical examination of wounds or comparison with other refugees' accounts, remain available. As with any interview situation, investigators can take precautions to enhance the reliability of refugee testimony, such

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126. See generally REFUGEE POLICY GROUP, REFUGEES AND HUMAN RIGHTS: A RESEARCH AND POLICY AGENDA 4-6 (1989); ASIA WATCH & MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 6 (1988).

127. See SHAWCROSS, THE QUALITY OF MERCY: CAMBODIA, HOLOCAUST AND MODERN CONSCIENCE 45-69 (1984).

as interviewing new arrivals who have not been exposed to collective pressures, and interviewing all refugees privately.

The increasingly sophisticated fact-finding skills of many human rights professionals has made it possible to overcome, at least in substantial part, many of the problems relating to refugee testimony previously thought insurmountable. Although use of refugee testimony still poses special challenges to the finder of fact, it is now clear that refugee testimony, when properly obtained and tested, can yield reliable information.

### B. Admissions Against Interest and Other Official Statements of Policy

Official statements of government (or guerrilla) policy are a key source of information about human rights conditions in a country. Such statements include formally-adopted policies; informal articulations of policy by authoritative officials, including public statements; and laws, presidential decrees, and administrative regulations.<sup>128</sup>

#### 1. Admissions Against Interest

Official statements that are "admissions against interest" have strong probative value. When a high-level official publicly admits that her government is responsible for certain practices that violate international law, the acknowledged practice is taken out of the realm of controverted allegations.

This happened when the head of Nicaragua's Penitentiary Service acknowledged to a human rights delegation in June 1984 that the Nicaraguan government had, in several instances, deliberately kept prisoners in detention after their criminal sentences had been served.<sup>129</sup> Similarly, a Helsinki Watch/Asia Watch representative was able to conclude that certain *mujahedin* groups opposing the Soviet-backed government in Kabul practiced a policy of killing prisoners of war after summary trials after numerous *mujahedin* commanders described the practice to her.<sup>130</sup>

128. NGOs typically undertake substantial research of the laws of countries which they monitor, as well as press accounts of official statements of relevant policy, in advance of human rights missions. Delegates on a human rights mission also generally seek meetings with appropriate government officials during their visit to a country; in part so they can solicit the government's views and positions with respect to the subjects under investigation.

129. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, NICARAGUA: REVOLUTIONARY JUSTICE 127-28 (1985).

130. See HELSINKI WATCH & ASIA WATCH, BY ALL PARTIES TO THE CONFLICT: VIOLATIONS OF THE LAWS OF WAR IN AFGHANISTAN 63 (1988).

#### 2. Other Statements of Policy

Admissions against interest are made with greater frequency than might be imagined, but more often, statements of official policy proclaim respect for human rights even when systematic patterns of abuse have been reliably documented. Also, government officials frequently deny that state actors are responsible for reported abuses, or insist that violations happen only occasionally and do not reflect official policy.

The evidentiary significance of such statements must, of course, be evaluated in light of relevant circumstances. If there is truly overwhelming evidence of pervasive human rights violations, official denials may be evidence of government complicity. Similarly, when the official account of an incident is patently inconsistent with other evidence, the government's version may lend weight to allegations of official responsibility, and signify that the government is attempting a "cover-up."<sup>131</sup>

Some government statements fairly can be interpreted, in light of prevailing conditions, as condoning or even encouraging human rights violations. A striking instance of such a statement was made by Argentina's Minister of Foreign Affairs in August 1976:

My idea of subversion is that of the left wing terrorist organizations. Subversion or terrorism of the right is not the same thing. When the social body of the country has been contaminated by a disease that corrodes its entrails, it forms antibodies. These antibodies cannot be considered in the same way as the microbes. As the government controls and destroys the guerrilla, the action of the antibody will disappear, as is already happening. It is only a natural reaction to a sick body.<sup>132</sup>

Spoken at a time when, according to AI, "right-wing terrorism ha[d] clearly been responsible for many brutal assassinations,"<sup>133</sup> the state-

131. An incident cited in a 1977 report on Argentina by AI exemplifies the point. A young woman was abducted by government forces and detained in a federal police station in Buenos Aires. Two weeks after her abduction, her family was told by the military police that the young woman had been transferred to Mar del Plata. When relatives filed a writ of habeas corpus several weeks later, local police informed them that the victim had been "killed in combat" in Mar del Plata. AI observed:

At no time was the girl's family given official notification of a release . . . . Her sudden and violent death, in a town more than 400 kilometres from her home, when she was known to be in the custody of the army, makes the official account of her death improbable in the extreme.

AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO ARGENTINA 6-15 NOVEMBER 1976, at 34 (ASA 68/00/77, 1977) [hereinafter AI MISSION TO ARGENTINA].

132. *Id.* at 35.

133. *Id.* at 34.

ment was not only a barely-disguised apologia for the violence, it was virtually an invitation for the violence to continue. Encouragement of violence sometimes takes the form of official statements identifying categories of people as "enemies" of the state. In El Salvador, the Philippines, and numerous other countries, statements to this effect by military or civilian officials have been followed by targeted persecution—including extrajudicial executions—of persons identified as "enemies." Human rights monitors, lawyers handling human rights cases, trade unionists, and church workers have frequently fallen victim to government persecution in these circumstances.<sup>134</sup>

In some circumstances, a government's silence in the face of a pattern of serious violations may signify toleration. Similarly, a civilian leader's failure to speak (or act) forcefully enough may make her complicit in abuses committed by her subordinates, even if she may not actually approve of the tactics. In this respect, a government's implementation of a human rights policy turns on tone as much as substance. The effect is most evident in countries where the tone and vigor of a proclaimed human rights policy has changed in a short period, even though the policy has not been renounced as such.<sup>135</sup>

### 3. National Laws

Laws, official decrees, and regulations are also important evidence of government policy. The laws themselves may violate international human rights standards. Or they may stand as a virtual invitation to abuse because they accord government authorities unbridled powers of arrest and detention, while failing to provide adequate safeguards against—or remedies for—abuses.<sup>136</sup> Emergency legislation and martial law decrees often fall into this category. If national legal safeguards against abuses are flagrantly violated, the gap between law and practice

134. See generally AMERICAS WATCH, *METHODOLOGY AT ODDS WITH KNOWLEDGE*, *supra* note 46; AMNESTY INTERNATIONAL, *POLITICAL KILLINGS BY GOVERNMENTS* 103 (1983); AMNESTY INTERNATIONAL, *URGENT ACTION*, UA 209/89 (June 29, 1989) (25 people named on "hit list" in the Philippines).

135. When, for example, Americas Watch evaluated human rights in Peru after President Alan Garcia Perez's first year in office, it expressed concern about ominous developments, but praised the government's efforts to improve human rights. AMERICAS WATCH, *HUMAN RIGHTS IN PERU*, *supra* note 61. Two years later, Americas Watch placed substantial blame on President Garcia for a serious deterioration in human rights conditions. Although Garcia had not retreated from his earlier human rights policy in so many words, Americas Watch concluded that, by late 1988, the government's "passivity [had] given way to apparent acquiescence, reflecting what seems to be a perception that abuses are inevitable." AMERICAS WATCH, *TOLERATING ABUSES: VIOLATIONS OF HUMAN RIGHTS IN PERU* 8 (1988).

136. See INTERNATIONAL LAW AND FACT-FINDING, *supra* note 42, at 72 ("Laws and proclamations by which human rights are suspended or infringed may safely be regarded as conclusive, the presumption being justified that laws and official policies are implemented in practice.")

may justify the conclusion that the government does not respect the rule of law.<sup>137</sup>

Authoritative interpretations and applications of national laws are also relevant evidence of a government's human rights record, often signifying wholesale complicity in abuses by the judiciary. In many countries that have experienced prolonged periods of martial law, for example, the nations' courts have legitimized extraordinary measures taken by the executive,<sup>138</sup> sometimes abdicating responsibility for maintaining the rule of law and even condoning official torture.<sup>139</sup>

### C. Secondary Sources

While direct evidence and official policy statements are the foundations of most human rights reports, NGOs also consult a broad range of secondary sources. These include domestic NGOs that monitor human rights conditions and/or provide legal defense to victims of human rights abuses; lawyers or lawyers' organizations that handle human rights cases; university research centers that monitor human rights conditions; journalists; press accounts; relevant literature on the country that is the subject of inquiry; and various informed observers, such as academic analysts, foreign diplomats, the staff of international relief or private voluntary organizations, and local political, religious, and business leaders.

137. Similarly, a pattern of disregard by government agents of court orders, such as orders directing prison officials to release particular detainees, is an important index of the extent to which a government respects the rule of law.

The impact of laws and the conduct of courts on general human rights conditions is so substantial that many NGO reports are devoted exclusively, or in large part, to analyses of these subjects. See, e.g. AMNESTY INTERNATIONAL, *EGYPT: ARBITRARY DETENTION AND TORTURE UNDER EMERGENCY POWERS* (1989); AMNESTY INTERNATIONAL, *GERMAN DEMOCRATIC REPUBLIC: SWEEPING LAWS—SECRET JUSTICE* (1989); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *UNDERWRITING INJUSTICE: AID AND EL SALVADOR'S JUDICIAL REFORM PROGRAM* (1989).

138. See *AI MISSION TO ARGENTINA*, *supra* note 131, at 12–13 (concluding that Argentina's Federal Court, by upholding extraordinary legislation authorizing Executive to exercise certain powers, had "broken with one of the most fundamental tenets of the Constitution, for the Executive Power is now engaged in the exercise of judicial functions."); LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, *THE PHILIPPINES: A COUNTRY IN CRISIS* 58–59 (ASA 608/00/77, 1983).

139. A striking instance in which court proceedings were used as evidence of both state-sponsored torture and court complicity is *Brasil: Nunca Mais* ("Brazil: Never Again"), a report prepared by the Archdiocese of Brazil on the use of torture by military authorities. Working secretly, the "Brasil: Nunca Mais" project examined the records of virtually all political cases prosecuted in Brazilian military courts between April 1964 and March 1979. The court records established "that torture was an essential part of the military justice system in Brazil," and that military courts "were fully aware of the routine use of torture during preliminary inquests, and that evidence produced under torture was considered valid in the courtroom, even when defendants revealed how their confessions had been extracted." *TORTURE IN BRAZIL: A REPORT BY THE ARCHDIOCESE OF SAO PAULO* x (J. Dassin ed. 1986) [hereinafter *TORTURE IN BRAZIL*].

Such secondary sources are consulted for several reasons. First, many of these sources can contribute to the researcher's understanding of the context in which particular developments occur. This sort of contextual framework helps the researcher interpret the significance of discrete events and discern their relationship to broader trends. Second, many of the sources noted above can direct NGOs to eyewitnesses and victims.<sup>140</sup>

Third, in some instances NGOs use substantive information provided by secondary sources as part of the body of evidence presented in their published reports.<sup>141</sup> In countries where they can and do operate, domestic human rights monitors have often been particularly important sources of such information. Although a full discussion of this subject is beyond the scope of this Article, issues bearing on the reliability and value of information generated by domestic NGOs merits special note.

### 1. Domestic Human Rights Monitors

If a domestic NGO's methodology is sound, it can provide international NGOs with invaluable information, such as comprehensive statistical data reflecting overall patterns and trends.<sup>142</sup> This sort of data, which is difficult for an international NGO to assemble from afar, helps researchers assess the overall extent of abuses reported by individual victims and eyewitnesses, and the extent to which individual accounts fit into discernible patterns: geographical, temporal, or otherwise.

Although most NGOs prefer to use accounts which their own staff have investigated, an NGO may include in its reports some information obtained by domestic NGOs to help present a more comprehensive picture of human rights conditions than would be possible if it used only accounts which its staff had documented.<sup>143</sup> If an international NGO relies upon the reporting of a domestic NGO in this fashion, it must be prepared to defend the reliability of the domestic NGO.<sup>144</sup>

140. For discussion of issues relating to the identification of persons who can provide direct evidence, see Part IIIA1.

141. Policies respecting the use of secondary sources for this purpose vary significantly among international NGOs.

142. An analysis of the limitations of statistical data in human rights research is beyond the scope of this Article.

143. Even if a foreign NGO conducted its own investigation of an incident, it might publish information gathered by another investigator if the latter were able to establish details that did not emerge in the foreign NGO's investigation. This situation might arise, for example, if a domestic monitor was able to visit the site of an alleged incident in the immediate aftermath, before witnesses dispersed or physical evidence was destroyed.

144. Precisely because of the important role that some domestic NGOs have assumed as

In evaluating the methodology of domestic monitors, international NGOs recognize that relevant standards must be flexible enough to reflect the extreme variations in circumstances—including the physical risks—in which local staff operate. Even within a country, the degree of verification that is possible often varies considerably from one region to the next—violations committed in large urban centers may be more susceptible to investigation than those committed in remote rural regions—and from one type of abuse to another.<sup>145</sup>

Whatever the prevailing circumstances, international NGOs must, in attempting to evaluate the reliability of a domestic monitor's information, familiarize themselves in detail with the local organization's methodology. They must, for example, ascertain what standards of verification the domestic organization applies to determine whether to include an alleged incident in its published reports. Does its staff personally investigate each incident? If so, what methodology does it use to verify allegations or reports? Does it obtain eyewitness testimony in every instance? Does it send an investigator to examine the site of an incident if a visual inspection would help establish the facts? Are any of its statistical data based upon presumptions of fact?

An essential part of evaluating a domestic NGO's methodology is becoming thoroughly familiar with the definitions it employs, including all of the elements that it believes must be established before it will categorize an incident as a particular type of abuse and include the incident in its published reports. If a domestic NGO's reports include a category of violations called "massacres," what does that mean? How many victims must there be in an incident before it will be considered a "massacre"? Does the NGO include incidents in this

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sources of information publicized by prominent international NGOs, in recent years the methodology of the former has been subjected to heightened international and national scrutiny. For example, when the Reagan Administration sought to defend its support for the Salvadoran military during a period of staggering rights violations, it went to considerable lengths to discredit the methodology of the leading human rights monitoring organization in El Salvador.

Such efforts threaten more than the credibility of the NGO's data; they can significantly increase the risks faced by domestic monitors, who in many countries face targeted persecution because of their work. For this reason, international NGOs have publicly defended the right of domestic monitors to pursue their work free of harassment, even when the former do not rely upon the latter's data.

145. For example, when the incidence of mutilation of victims of death squad violence in El Salvador reached extreme proportions in the early 1980s, it became increasingly difficult for domestic monitors to obtain positive identification of victims. The leading Salvadoran monitoring group at that time, *Socorro Jurídico del Arzobispado* (Legal Aid Office of the Archdiocese of San Salvador), adapted its methodology accordingly, and included these killings in its statistical data when there was strong circumstantial evidence of government responsibility. The work of *Socorro Jurídico*, which was founded in 1975 and given official status within the Archdiocese in 1977, was taken over and expanded by *Tutela Legal del Arzobispado* (Legal Trusteeship Office of the Archdiocese) in May 1982. See AMERICAS WATCH, METHODOLOGY AT ODDS WITH KNOWLEDGE, *supra* note 46, at 17, 40.

category regardless of whether it has determined that the victims were civilians killed in violation of applicable international standards, or might the statistics also include attacks against guerrillas or civilians caught in the crossfire of a military operation? If an NGO reports both "massacres" and "political killings," does it make a determination to place an incident in only one category, or might "political killings" include cases separately reported as "massacres"?

In assessing the significance of a domestic monitor's statistics, it is important to ascertain what is necessary to trigger its investigation. An organization that initiates investigations based upon a broad range of sources of information, including press reports as well as victims' denunciations, is likely to produce a more representative picture of the human rights situation than one that records only incidents reported to its office by victims or their relatives, particularly if the monitor is based in a nation's capital and many serious human rights violations occur in other cities or in remote rural areas.

If it relies on information provided by a domestic monitor, an international NGO must attempt to identify all sources of distortion in the local monitor's methodology, and make clear in its own reports what those distortions are and how they can be expected to skew the data. If, for example, the domestic monitor uses press accounts to trigger its investigations, the international NGO must be thoroughly acquainted with the reporting standards of the local press. Distortions built into its coverage of human rights violations would be reflected in the monitor's data as well.

The most common distortion in domestic NGOs' statistical data is underreporting. In countries where serious human rights violations occur on a wide scale, no organization is capable of investigating—or even learning of—every incident of abuse. Another common distortion in data used to evaluate longitudinal trends arises from improvements over time in an NGO's investigative resources and/or its methodology.

Evaluation of a domestic monitor's data does not necessarily end when an international NGO is satisfied that the underlying methodology satisfies standards that are appropriate to the circumstances. The leading international NGOs rely upon a domestic source's information only after their own staff has had numerous opportunities over a long period to investigate incidents reported by the local monitor and has found that the reports of the latter "hold up."

The foregoing discussion of domestic NGOs' reliability has focused on their fact-finding methodology. But like international NGOs, domestic monitors are also subject to criticism on the basis of charges that they are politically biased.<sup>146</sup> The charge frequently emanates

from officials of the government whose abuses are publicized by a domestic monitor.

The charge is often unfounded, frequently disingenuous, and should be regarded with extreme caution. Sometimes, however, charges of political bias include an element of truth. Especially difficult questions are raised when the staff of a domestic NGO that monitors abuses committed in a context of internal armed conflict includes people who support the insurgents.

Is this a fair basis for discrediting the reporting of the NGO? The fact is that the presence of persons who support an illegal insurgency on an NGO's staff *will* affect the organization's credibility internationally. Whether it *ought* to is another question. Bearing in mind that the staff of domestic NGOs often represent a political cross-section of the nation, if an NGO does not institutionally endorse the views of individual staff members, it may be unfair to discredit the organization's work on this basis, particularly if its methodology is sound in every respect that can be measured objectively.<sup>147</sup>

Nor should the fact that local insurgents seek to exploit the work of a domestic NGO taint the credibility of the organization. The fact that insurgents exploit reports of government violations does not in itself render the accounts untrue, any more than an insurgent group's decision to exploit a government's failure to deliver basic services would make the failure itself illusory. If, however, an organization purporting to be a human rights group is linked institutionally to a party to armed conflict, the information generated by the entity simply will not be credible<sup>148</sup> without corroboration by a reliable source.<sup>149</sup>

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*New Khmer Rouge*, COMMENTARY, Dec. 1985, at 19; Branigin, *Philippine Rebels Targeting Rights Groups, Churches*, Wash. Post, Oct. 18, 1986, at A13, col. 1 (charging infiltration of Philippine human rights groups by communist insurgents).

147. How international NGOs address this issue is affected, inevitably, by the risks that often attend public charges by government officials that a domestic monitor's staff is "infiltrated" by insurgents or sympathizers. As noted earlier, in many countries the charge itself serves as a virtual death warrant, and such charges frequently have been followed by targeted persecution of human rights monitors. See Part IID, *supra* text accompanying note 79.

For this reason, when international NGOs protest government officials' accusations that a particular domestic NGOs' staff includes persons who sympathize with armed rebels, the former are not necessarily disputing the factual allegation; more likely they are saying that the allegations, even if true, would not make the staff legitimate targets of execution, torture or other human rights violations, and that the public accusations, under prevailing circumstances that cannot be disregarded, are irresponsible because they endanger the staff.

148. See Neier, *Not All Human Rights Groups Are Equal*, N.Y. Times, May 27, 1989, at 22, col. 5.

149. As noted in Part IIIA1, even clearly partisan sources are sometimes useful in directing NGOs to reports that bear investigation. The quality of information furnished by partisan sources varies enormously. NGOs that continuously monitor a country generally are able to gauge the relative reliability of each source's information, and learn which sources—partisan or not—generate "leads" that tend to bear out upon investigation.

146. Such charges have often been reported in the international press. See, e.g., Munro, *The*



## 2. Press Sources

International NGOs sometimes cite press accounts as sources of information included in country reports. Typically, however, careful NGOs do not cite press accounts unless their research staff have reason to credit the report.

The staff of the most prominent NGOs make a point of learning about the relative reliability of various press sources in and around the countries they monitor. Also, NGOs frequently corroborate specific accounts of incidents reported in the press before citing the latter in their own reports.<sup>150</sup>

## D. Establishing Responsibility

One of the most important findings of fact which a human rights investigator must attempt is a determination of responsibility (or probable responsibility) for alleged violations. Because international human rights law establishes obligations binding upon states and humanitarian law establishes obligations of parties to armed conflicts, whether certain actions generate international responsibility depends upon the identity of the perpetrator. In the context of human rights/humanitarian law fact-finding, the determination of responsibility entails several levels.

## 1. Individual Responsibility

The finder of fact must, in the first instance, attempt to determine individual responsibility for particular instances of abuse. Although conceptually straightforward, this determination can be methodologically challenging since governments frequently go to great lengths to obfuscate evidence of involvement in abuses.

Nevertheless, in many instances human rights investigators can breach the wall of secrecy through direct evidence.<sup>151</sup> For example, relatives or neighbors of a person who has "disappeared" sometimes witness the abduction and can positively identify the abductors as police or military agents.<sup>152</sup> But in the absence of direct evidence, circumstantial and inferential evidence play a key role in NGO efforts to establish probable responsibility.<sup>153</sup> In some instances, circumstan-

tial evidence can be quite compelling, establishing a *prima facie* case of government or insurgent responsibility.<sup>154</sup>

Even when circumstantial evidence of government responsibility is virtually conclusive, NGOs may not be able to identify the individuals who actually carried out or ordered the violations without the cooperation of responsible authorities or other forms of direct evidence. In these instances, the concept of establishing a *prima facie* case of government responsibility becomes especially important. If an NGO can make out a strong *prima facie* case that a state agent or organ was responsible for a human rights violation, the NGO's fact-finding can be a persuasive basis for urging that the government undertake a thorough investigation and bring to justice those responsible for the abuse.

## 2. Systematic Violations

The effort to attribute responsibility does not end with a determination of who probably carried out individual acts of abuse. In preparing country reports, NGOs also attempt to ascertain the extent to which individual violations reflect official policy.

Even when a government is unequivocally committed to human rights, isolated lapses from policy occur; individual agents of the state commit aberrant abuses. At the other extreme, human rights violations sometimes are a result of deliberate government policy. And between these two extremes, various levels of government responsibility for human rights violations shade into each other.

Although internationally-protected rights can be violated by an isolated lapse from government policy, the degree of state responsibility for abuses has significant bearing on the appropriate international response. International law looks, in the first instance, to the state to provide redress for violations of human rights committed in territory subject to its jurisdiction. Indeed, the state's provision of a remedy for rights violations is a *sine qua non* element of its general obligation to ensure enjoyment of particular rights by persons subject to its jurisdiction.<sup>155</sup>

154. For example, a report on Indonesia by Asia Watch describes the death-in-detention of a young man who appeared to be in good health when his mother visited him in jail the day before he died. When the family saw the victim's corpse, they observed that both of his legs and wrists appeared to be broken, and that "[h]is mouth was very swollen and some of the teeth were loose." See ASIA WATCH, HUMAN RIGHTS IN INDONESIA, *supra* note 97, at 187. In this case, other evidence reinforced the inference of police responsibility. Other witnesses had seen the victim return to his cell in a weak state and with a bloodied face after being interrogated in the early morning hours of the same day he died. *Id.*

155. See generally Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS (Henkin ed. 1981).

150. Thus, citations in NGO country reports to particular press items may obscure the fact that the NGO has in fact undertaken its own research into the event or developments described.

151. See AI MISSION TO ARGENTINA, *supra* note 131.

152. See *id.* at 27. In the majority of cases where someone was reported as missing in Argentina at the time of Amnesty International's investigation, the abduction was witnessed by friends or relatives.

153. For discussion of the role of circumstantial and inferential testimony in international adjudication, see Part IIE, *supra* text accompanying notes 80-85.

If, then, a particular instance of abuse truly reflects an isolated lapse, the victim should be able to find a remedy in the domestic legal system. If, however, the violation reflects a systematic practice, resort to domestic remedies may be futile. Even if an individual victim is able to secure redress from national courts, international intervention would still be appropriate if similar violations persisted on a wide scale.

This logic underlies the general practice of international tribunals of requiring petitioners to exhaust domestic remedies as a condition of admissibility of human rights complaints. Significantly, international tribunals have recognized an exception to the general exhaustion requirement in cases where alleged human rights violations exemplify an "administrative practice," defined as a practice that "consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system."<sup>156</sup>

As with individual instances of abuse, circumstantial and inferential evidence play a key role in determining higher levels of government responsibility for abuses. When, for example, death-squad violence in El Salvador surged in the early 1980s, human rights groups used such evidence to conclude that, in many instances, the perpetrators operated with government complicity. The victims' bodies were found in areas where the military, but not the guerrillas, could operate and where curfews were in effect, suggesting that the perpetrators could only have acted with the approval of military forces that enforced the curfews.<sup>157</sup>

The scale of violations can be an important indication of the nature—as well as the fact—of government responsibility. Thus, in its report, *Nunca Mas*, Argentina's National Commission on the Disappeared concluded that "the sheer number of similar and interrelated cases [of disappearances] . . . makes us absolutely convinced that a concerted plan of repression existed and was carried out."<sup>158</sup>

Even without overwhelming evidence of deliberate policy at the highest levels of government, the repetition of particular types of official abuse on a wide scale justifies a finding that the government has failed to satisfy its obligations under international human rights law.<sup>159</sup> International tribunals have found that, when such a pattern

is established, the state is ipso facto in breach of its international obligations.<sup>160</sup> While no state can be expected to erect unbreachable safeguards against any human rights violations occurring,<sup>161</sup> it can be—and, under international law, is—expected to respond appropriately to violations.

The major human rights conventions require state parties not only to refrain from interfering with individuals' enjoyment of the enumerated rights, but affirmatively to "secure" or "ensure" the enjoyment of those rights; thus public authorities are held responsible for abuses by subordinates. Interpreting this language in the American Convention on Human Rights, the Inter-American Court of Human Rights has held that state parties are obligated to "prevent, investigate, and punish" violations of certain rights enumerated in the Convention.<sup>162</sup> Accordingly, a government's wholesale failure to investigate and prosecute human rights violations is a strong basis for concluding that it tolerates the abuses.<sup>163</sup>

When a government's response to widespread violations is less stark, as when it rarely—but nonetheless occasionally—undertakes investigations, or when it initiates prosecutions that rarely culminate in convictions, NGO fact-finders must attempt to evaluate government culpability in light of all available evidence—which may include

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staff had personally investigated scores of cases in which Sandinista forces appeared to have been responsible for extrajudicial executions in a northern region of the country, Americas Watch concluded that the violations "constitute a pattern of abuses by Government forces," noting that the executions "are too numerous to be isolated cases." *Statement by Americas Watch Executive Director, Juan Mendez*, N.Y. Times, Apr. 16, 1989 at A1, col. 6.

160. Applying logic that would have equal force with respect to states' obligations under other comprehensive human rights conventions, the European Court of Human Rights reasoned in *Ireland v. U.K.* that, under the European Convention for Human Rights, "[public] authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected." *See supra* *Ireland v. U.K.* note 80, para. 263.

161. States are, however, generally required to take measures to prevent human rights violations. In *Ireland v. U.K.*, the European Court of Human Rights considered the type of training provided to the Royal Ulster Constabulary ("RUC") as relevant evidence of the British government's responsibility for interrogation practices of the RUC that violated the European Convention's prohibition of "inhuman or degrading treatment or punishment." *See id.*, at para. 265 *et seq* (citing European Convention on Human Rights, art. 3).

162. *See Velasquez Rodriguez Case*, *supra* note 81, para. 166.

163. Writing of the pattern of disappearances committed by Argentine military authorities during the 1970s, Argentina's National Commission on the Disappeared concluded:

It has repeatedly been claimed that those members of the security forces who committed any kind of 'excess' during the anti-subversion campaign were properly brought to justice on the initiative of their commanders. This Commission wishes to deny strongly any such assertion. From the information we have collected, there is not a single instance of any member of the security forces being charged with involvement either in the forced abduction of a person, with the use of torture, or with causing the death of anyone held in the secret detention centres.

*See TORTURE IN BRAZIL*, *supra* note 139, at 10.

156. *Ireland v. U.K.*, *supra* note 80, at 262; *see also The 'Greek' Case*, *supra* note 45, at 194–96.

157. *See AMERICAS WATCH, METHODOLOGY AT ODDS WITH KNOWLEDGE*, *supra* note 46, at 33.

158. ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED, *NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED* 10 (1986) (emphasis added).

159. Americas Watch applied this type of analysis in a 1989 report on Nicaragua. After its

contradictory evidence or may add up to a "mixed" record. Relevant considerations include the integrity of the investigative process and the ostensible credibility of the result. Was the inquiry public, or, at least, was its *modus operandi* made public? Were knowledgeable sources encouraged to present testimony? If witnesses did not come forward, what were their reasons? Were they given appropriate assurances of their physical security? Did the investigative body's conclusions comport with available evidence? Or did it simply repeat denials of responsibility made by the accused? If a judicial body established responsibility of military personnel, were the guilty parties actually arrested? Did they serve a sentence?

A striking characteristic of recent country reports by the most sophisticated NGOs is their specificity in pinpointing government responsibility. The reports often identify with particularity the units or entities responsible for abuses, the apparent level of official authority for their acts, the geographic reach of the violations, and the intensity and temporal extent of the abuses.<sup>164</sup> This degree of specificity is desirable for several reasons. To the extent that a country report forms part of a dialogue between an NGO and the government whose practices are scrutinized,<sup>165</sup> the report's persuasive effect will be diminished if it unfairly characterizes the extent of government responsibility for abuses.<sup>166</sup> Also, a high degree of specificity about responsibility for particular abuses better enables the government to conduct an effective investigation (and creates greater pressure for it to do so than would a vague allegation of abuse). At the same time, an NGO that pinpoints responsibility is more likely to appear persuasive to its audience; the detail it is able to furnish provides evidence of careful and thorough research.

### CONCLUSION

Throughout the 1980s the influence of human rights NGOs has grown, and it has grown in direct relation to the persuasiveness of their factual reporting. With this development, the underlying methodology of NGO fact-finding has come under heightened scrutiny, and at times attack, by government officials, political commentators, the press, and others. Much of the criticism, while charging NGOs with political bias, has itself been partisan; often, it has been unfair.

Still, the overall effect of the scrutiny has been beneficial, prompting NGOs to aspire to high standards in their recording of facts.

Wide variations in fact-finding circumstances and other constraints inherent in human rights fact-finding efforts have, nonetheless, prevented NGOs from developing uniformly-applicable methodological standards. While it is appropriate to preserve flexibility in NGO fact-finding methodology, it is possible to identify several general considerations that should guide any substantial fact-finding endeavor, such as the need to guard against distortions produced by unrepresentative sampling procedures, the importance of using interview techniques that enhance the reliability of witness testimony, and the need to obtain such corroboration as is possible under prevailing conditions.

To be effective, NGOs must also satisfy emerging standards—discernible in public critiques of human rights reports—bearing on institutional credibility. In particular, NGOs must appear to hold all governments to the same international standards.

Emerging criteria for judging institutional credibility present especially difficult challenges for NGOs. Their concerns as advocacy organizations may prompt NGOs to take some actions, such as addressing essentially political contextual factors peculiar to a country or pressing for a ban on foreign aid to a government that violates human rights, that might jeopardize the organizations' appearance of political evenhandedness and disinterestedness. While such dilemmas cannot be eliminated—they are inherent in the advocacy nature of human rights organizations—NGOs should be mindful of the trade-offs entailed in some forms of advocacy, and take whatever measures they can to minimize the risks.

164. A 1989 report by Americas Watch on human rights in Colombia reflects state-of-the-art reporting in this regard. AMERICAS WATCH, *THE KILLINGS IN COLOMBIA* (1989).

165. See Part IIB3, *supra*.

166. See Neier, *supra* note 148 (suggesting that one indication of whether an NGO is a "genuine" human rights organization rather than a group that uses human rights for partisan ends is whether it avoids "sweeping comments, except to the degree that these are sustained by its detailed findings through field research").