REPORTS OF TWO EXPERT MEETINGS UNIVERSITY OF AMSTEDAM AMSTERDAM CENTER FOR INTERNATIONAL LAW 2003

1ST REPORT

Remedies for victims of violations of international humanitarian law

9 & 10 May 2003

Background

The objective of the Expert Meeting was to discuss whether existing mechanisms can provide victims of violations of international humanitarian with a remedy and provide reparation. It was intended to provide the basis for a second meeting in October 2003 to examine different options for filling gaps in existing procedures, or for developing new procedures.

The seminar was attended by 25 experts in the field of international humanitarian law and international human rights law.

Follow-up

As was originally envisaged, a second meeting will be held in Utrecht in October 2003 to examine different options for filling gaps in existing procedures, and/ or for developing new procedures. Currently it is being discussed in what form the theme of the seminar can be introduced in a workshop at the International Red Cross Conference at the end of 2003.

Output

The papers presented at the seminar will be published, together with the papers of the follow-up meeting of October will be published in a book.

Application for research funds

The Netherlands Institute of Human Rights is preparing, in cooperation with five other human rights institutes (from Northern-Ireland, Ireland, United Kingdom, Norway and Finland), a proposal for the 6th Framework Programme on Security and Conflic Resolution. The conclusions of the meeting will be integrated in the application.

Report

To allow for in depth consideration of the questions whether existing mechanisms can provide victims of violations of international humanitarian with a remedy and provide reparation, five experts were invited to prepare a short background report for the meeting on 9 and 10 May. These concern the following topics: the International Fact Finding Commission established by the First Additional Protocol to the Geneva Conventions (Prof. Dr. F. Kalshoven); UN

procedures for the protection of human rights (Dr. B. Ramcharan); regional human rights bodies (Dr. L. Zegveld); Ad-Hoc claims commissions (Dr. N. Wühler); and international criminal tribunals (Judge F. Pocar).

The rapporteurs were asked to address in particular the following questions:

- Does the procedure allow for a determination of whether international humanitarian law is violated, either expressly (because its constitutive instruments refers directly to international humanitarian law) or implicitly, for instance because it allows for the application of human rights law in times of armed conflict?
- Does the procedure grant individuals with the right to initiate proceedings?
- Does the procedure grant victims a role to participate in the proceedings?
- Does the procedure supply individuals with the possibility to claim reparations?
- Does the procedure have a judicial character and are their outcomes legally binding and enforceable?
- Are there other specific characteristics of the procedures that either support or weaken their role in providing individual victims of violations of international humanitarian law with redress?

The papers and discussions are summarized below.

The International Humanitarian Law Fact-Finding Commission

Presented by Prof. Frits Kalshoven

As to the possibility of the Commission to make determinations on the violation of international humanitarian law, Prof. Kalshoven had concluded that, although the ICRC has noted that the Commission "is competent to enquire into facts and not to judge," in the report on the results of its enquiry into an alleged violation of IHL, and depending on the specificities of the case, the Commission may be deemed competent to state its view that IHL has, or has not, been violated. During the discussion there was widespread support for this conclusion. It was noted, though, that a distinction should be made between the alleged violation and responsibility.

As to the possibility of individuals to trigger a role of the Commission, Prof. Kalshoven concluded that both the text of Article 90 as well as its context and drafting history leave no room for doubt that the Commission was designed as an instrument at the disposal of states. The most the Commission can do in the event of a non-party request is to try and establish contact with the authorities of all the parties concerned, transmit the request and ask for their permission to undertake the enquiry. However, in the course of an enquiry undertaken by the Commission pursuant to a request by a party to the conflict and with the express consent of all the parties concerned, individuals might lodge with the Commission complaints about violations of IHL of which they or their relatives have suffered the consequences. In particular in a situation where the Commission is engaged in a longer-term activity in a country and has set up office in the territory, its role in the handling of individual complaints might be regarded by the authorities as a useful addition to the existing instruments.

The question of whether procedures of the Commission have a "judicial character" and the outcomes of these procedures are "legally binding and enforceable", was answered by Prof. Kalshoven with an unqualified no. Any activity of the Commission in relation to individual complaints too, would be non-judicial or, at most, pre-judicial, and its findings and recommendations would be neither binding nor enforceable (save for the hypothetic assumption that parties were to attribute such overwhelming force to the Commission's report). He added, however, that this need not detract from the practical value such activity on behalf of individual claimants might have.

On other points relevant to the topic of the seminar, Prof. Kalshoven noted that in stark contrast with the formal procedure set forth in Article 90 of the First Additional Protocol for the event of an enquiry, it neglects the procedural aspects of good offices. This is all for the best: when the time comes for the Commission to carry out that function, it will have its hands free to act efficiently, in accordance with the needs of the situation – and, once again, with the consent of the parties concerned. Given the potential flexibility of the Commission's enquiry procedure and the total liberty to set up a good offices procedure in accordance with the parties' wishes, some sort of individual complaints mechanism may be built into either procedure.

Finally, Prof. Kalshoven noted the Commission will encounter other agencies and institutions carrying out functions more or less comparable to its own. The ICRC aims to extend its protection to the victims of armed conflict everywhere. Its example shows that uninterrupted presence in a theatre of war may result in increased effectiveness of an agency's operations. The same may be said of other agencies, such as the Office of the UN High Commissioner for Human Rights in Colombia or the field officers of the UNHCR. In contrast, judicial measures by competent courts may lack all effectiveness.

In the discussion, it was noted that that the competence of the Commission is not limited strictly to international humanitarian law, it could include human rights as well. When it comes to central norms, this does not make much difference. On the potential future role of the International Humanitarian Law Fact-Finding Commission, it was noted that it is useful for states, international organizations and armed opposition groups, and that it could open up further possibilities for dealing with individual complaints.

UN Human Rights Mechanisms

Presented by Dr. Bertrand Ramcharan

In his background report, Dr. Ramcharan referred to several points that must be taken into consideration in order to strengthen the universal culture of human rights. He further stressed the fact that victims understand best how crucial protection activities are.

The discussion at the Expert Meeting was structured around treaty and Charter based bodies. As to treaty based bodies, it was noted that the examination of reports provides a good opportunity to look into internal conflict and to establish a dialogue with government representatives who are present when the Human Rights Committee discusses these reports. The Human Rights Committee has not based many of its findings on international humanitarian law, but one could look at e.g. the lawfulness of killing in reference to the right to life. Also in regard to Article 6 of the International Covenant on Civil and Political Rights (ICCPR), one may have to resort to

international humanitarian law. Proportionality should be looked at with regard to the specific right in question: e.g. the proportional amount of victims vs. the right to life. A question arose with respect to the example of the right to life and the conceptual problem of the mandate and the relation between human rights and humanitarian law. If a mandate exists to apply the highest standard, is there, by implication, a mandate to apply the lower standard as well?

It was noted that human rights law and international humanitarian law are two very different bodies of law and people on monitoring bodies are not always equipped to apply both human rights and humanitarian laws. It was stressed that human rights apply at all times. Human rights has used both human rights and humanitarian standards, whereas practitioners of international humanitarian law tend to be more conservative and do not want to think in human rights terms. Human rights bodies should not be discouraged to apply international humanitarian law.

In response to the question of the extent to which the mandate allows for the application of violations of international humanitarian law, it was submitted that the Human Rights Committee can report violations of the ICCPR, but not of international humanitarian law. It can, however, also rely on international humanitarian law in applying breaches of the ICCPR. If rules are not found in the ICCPR, one has to rely on international humanitarian law. It was further noted that, even if bodies do not sentence on the ground of international humanitarian law, they must be aware of the rules, even if they do not come out saying that they are applying it.

Whilst human rights bodies can apply international humanitarian law in finding a breach of human rights law, the overlap between the two bodies of law tends to be limited to the areas falling within the mandate of the human rights monitoring bodies. Contemporary debate focuses specifically on the protection of civilians. Are we only concerned with the four Geneva Conventions or are we to include the other three conventions and the elements of land- and warfare as well? A danger exists that human rights law overrules *lex specialis* in one case but not in the other: forum shopping could occur.

On the issue of individual responsibility it was stated that, in its reports, the Human Rights Committee refers to individual cases and mentions e.g. “widespread torture in prisons” but it does not mention specific cases.

With regard to the behavior or adaptation of the Human Rights Committee in a situation of armed conflict, it was stated that the Committee no longer chooses to delay tactics based on conflict situations, but this varies between different treaty bodies. There is no uniform procedure: some bodies examine this kind of situation, others do not.

Charter based bodies increasingly invoke human rights and international humanitarian law. In 2002, the Security Council encouraged the High Commissioner for Human Rights to send a mission to the Ivory Coast. The Office reported to the Security Council but did not address the issue of responsibility. A growing number of Security Council missions are sent to countries such as the Democratic Republic of Congo. The Security Council requests the High Commissioner to be involved in these missions and to write reports on the situation.

Rapporteurs and/or Working Groups are entitled to draw upon human rights and international humanitarian law: this was done in the example in the case of El Salvador. The Sub-Commission

is not allowed to deal with cases, but it can study applications of the law in particular areas. On the whole it can be concluded that protection in terms of human rights, international humanitarian law and refugee law is in crisis. Security Council terminology is often vague; there is significant jurisprudence and the High Commissioner has a role in issuing statements and drawing attention to relevant problems.

It was also noted that an advantage of the charter based bodies, in contrast to treaty based bodies, is that they can also address non-state parties. On the other hand, the scope of the mandate must often be developed further. In the example of the Fact-Finding Commission, potential targets were often countries with internal wars, and, without being contested, one could rely on Common Article 3 of the Geneva Conventions and non-derogable rights in the ICCPR. After collecting information under the mandate of the Working Group from NGOs, governments, IGOs, sometimes relatives of victims, one could refuse to give the sources. Even though the effect was not a remedy as the mandate was merely protective, the Working Group in fact acted upon evidence received by individuals.

It is often unclear what comes out of reports, as they do not receive a follow-up by the Commission on Human Rights. Further, if too many Rapporteurs are posted on the same issue, under different mechanisms, it complicates matters. This could give states an argument to back off, based on the mandate of a different Rapporteur already on the case. Even though it is not general practice, nothing prohibits a Special Rapporteur to discuss or refer to individual cases.

With regard to the possible reference to international humanitarian law under the Resolution 1503-procedure of the Economic and Social Council, it appears that this is not a useful procedure. Reference was made to the political difficulties in the example of Colombia where disagreement existed between the Office of the High Commissioner for Human Rights and the ICRC with regard to interpretations of international humanitarian law in the Commissioner's reports.

It was pointed out that national offices of the Office of the High Commissioner for Human Rights can function as a medium for individual complaints. For example, in the example of Colombia, an office of the High Commissioner would receive a claim of a violation of human rights or humanitarian law of an individual, but merely to pass it on to the government and to ask for a response from that government. In the past, Officers have spoken out on individual cases, but this is not recommended as problems occurred accordingly.

The ICRC, in the example of Democratic Republic of Congo, as well as in Colombia, was able to collect communications and to intervene. The ICRC and the Office of the High Commissioner could have an impact together. In Colombia it should be ensured that reports are not submitted to rebels. There should be potential for the ICRC or the Office of the High Commissioner for Human Rights to cooperate in Colombia as the local population appears active and positive. Rapporteurs and Working Groups could be a voice for breaches of international humanitarian law as well.

Regional Human Rights Bodies
Presented by Dr. Liesbeth Zegveld

This report examined the practice of the European Commission and Court of Human Rights; the Inter-American Commission on and Court of Human Rights; and the African Commission on Human and Peoples' Rights.

As to the Inter-American Commission, Dr. Zegveld concluded that the Commission has evaluated the conduct of State parties to the American Convention *directly* on the basis of international humanitarian law. However, since the *Las Palmeras* case, it is highly unlikely that the Inter-American Commission or Court will directly apply international humanitarian law.

Although the European Court is still reluctant to involve explicitly the law of armed conflict it appears to use it – implicitly - as a tool for analysis. The ever-increasing number of states party to the European Convention on Human Rights means that many cases involve issues which call for consideration of international humanitarian law. It was noted that although the Court is not used to dealing with "grave violations," it seems to be moving that way. Even though cases from Ireland and Turkey were not called "torture" by the Court, cases from Chechnya might change this, and more cases are to come.

The African Commission has taken a somewhat different, more flexible, approach. It has seen a close relationship between humanitarian and human rights law and the consequences that violation of the one have on the other. The African Commission has appeared to combine considerations of humanitarian and human rights law in a number of ways. It sees a need for promoting both together. It was noted that in the African Commission violations of international humanitarian law were claimed in a case of the Democratic Republic of Congo versus Burundi, Uganda and Rwanda. The Commission stated that the particular rights in the African Charter are non-derogable: it is the responsibility of the state to ensure that these rights are protected. Based on Article 45 of the African Charter, a number of resolutions were issued that emphasize international humanitarian law in general, and there are a few resolutions on individual countries as well. The Commission should have applied international humanitarian law in cases concerning Rwanda, Malawi and Chad, but a deadlock in the Commission prevents this. Reference was made to the broad mandate of the envisaged Court under the new protocol. This may extend the application international humanitarian law.

As far as indirect application of international humanitarian law is concerned, all regional human rights bodies have become adapt at examining issues in a humanitarian law context. Christopher Greenwood has suggested this approach, by posing that: "The monitoring mechanisms of human rights conventions could be used in an indirect way to assist in insuring compliance with the law applicable in internal conflicts".

An indirect way of applying humanitarian law standards to armed groups may be through the positive obligations of the state under the human rights treaties. It should be noted that the occurrence of an internal armed conflict does not remove the state's positive obligations under human rights treaties to protect civilians from armed opposition groups in its territory. The territorial states may be held responsible for failure to prevent or repress acts of armed opposition groups. Thus, state responsibility may exist when the state fails to investigate and prosecute members of armed opposition groups for abuses committed by them.

It was agreed that a strict reference to international humanitarian law is not a requirement, and that reference to violations of human rights could be acceptable. However, it would be useful if bodies do refer to international humanitarian rules, since that would be *lex specialis* and it would improve transparency of the work of human rights bodies. On the other hand, some cases (such as northern Cyprus) do not know an equivalent article in international humanitarian law: in such instances the use of *lex specialis*, and an explicit reasoning, would be of help indeed. What should be kept in mind is that a problem could appear when the application of international humanitarian law leads to the characterization of a particular (otherwise undefined) situation.

As to the question who can bring a complaint, it was noted that the Inter-American and African human rights systems are interesting as *actio popularis* is allowed, and interested parties (and in the African system even third parties) can bring a claim on behalf of an individual.

Dr. Zegveld concluded that, although human rights mechanisms are worth considering, they are not the most appropriate answer to the problem of lack of supervision of compliance with humanitarian law. An important reason is lack of an appropriate mandate to apply directly substantive humanitarian law.

Ad Hoc Claims Commissions

Presented by Dr. Norbert Wühler

In his background report, Dr. Wühler examined in particular current Claims Commissions such as the commission established after the Eritrea-Ethiopia (EECC) conflict, the United Nations Compensation Commission for Iraq (UNCC) and the less known Commission for Real Property Claims in Bosnia-Herzegovina (CRPC), set up under the Dayton Agreement and the Housing and Property Claims Commission (HPCC) which has a similar purpose in Kosovo.

As to the question whether the procedures allow for a determination of whether international humanitarian law is violated, Dr Wühler noted that the most direct reference to international humanitarian law is contained in the constituting instrument of the EECC. Under the Peace Agreement, the EECC is to decide claims for loss, damage or injury that "result from violations of international humanitarian law, including the 1949 Geneva Conventions", or other violations of international law.

In one of its jurisdictional delimitations, the UNCC's Governing Council referred specifically to international humanitarian law when it determined that members of the Allied Coalition Armed Forces are not eligible for compensation, except if they were prisoners of war and their loss or injury "resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949)". No such claims were, however, filed with the Commission. It has also been argued, however, that Iraq owed compensation because it violated its obligations under the Geneva Conventions. It was also noted that the UNCC does not make any reference to international humanitarian law specifically: it is damage based, not violation based.

The CRPC, that is settling claims for real property by displaced persons or refugees that these persons lost during the war in Bosnia between 1992 and 1995, has jurisdiction over such claims

where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant has not returned into the property. The reality of the displacement of the civilian population was such that it violated the prohibition of forced movement of civilians set out in Article 17 of the Second Protocol Additional to the Geneva Conventions which reflects the current law applicable in internal armed conflicts.

A similar situation exists for those claims before the HPCC that concern property lost after 24 March 1999 in the context of the hostilities in Kosovo. Another example pointed to by Dr. Wühler was the so-called GFLCP program set up within the International Organization for Migration (IOM), to resolve slave and forced labor, personal injury and property claims of former Nazi victims under the German Foundation Act. This act provides for claims by former slave laborers who were held in concentration camps, ghettos or other places of confinement, as well as claims by former forced laborers who were deported to Germany or German-occupied areas and were held in prisons or similar extremely harsh living conditions. In many cases, the circumstances underlying these claims were of a nature that would have given rise to liability for compensation for violation of provisions of the Hague Convention Respecting the Laws and Customs of War on Land of 1907. The same applies to a number of the property claims under the German Foundation Act.

As to the question whether the procedure grants individuals the right to initiate proceedings, Dr. Wühler pointed out that individual claimants have the right to initiate proceedings in all the programs covered in the present report. On the other hand, the role of the victims in the proceedings is limited in all the programs covered in the present report – as is the role of the claimants in all mass claims systems. They submit the claims, either to the respective institution in the case of the CRPC, HPCC and the GFLCP, or to their Government for transmittal to the Commission in the case of the UNCC and the EECC. Any further involvement in the proceedings only takes place if so requested by the institution.

As to remedies, Dr. Wühler observed that before the UNCC, the EECC and the GFLCP, the only remedy available is monetary compensation. The principal remedy in the CRPC is return (restitution) of the property. The HPCC can order either restitution or repossession of the property.

Dr. Wühler noted that procedures used by international (mass) claims facilities typically do not have a judicial character. While in some cases the procedure may be akin to arbitration, the large number of claims normally requires that an administrative process is established in which the adjudication or arbitration of each claim is not feasible. The individual claims in all the programs covered in the present report are resolved by administrative procedures, often using the same or similar techniques and methodologies of mass claims processing.

In all the systems covered in the present report the decisions are enforceable, but the manner of enforcement differs. As is typical for the enforcement of monetary compensation in mass claims systems, the self-contained regime of the institution itself is relied upon in the cases of the UNCC, the EECC and the GFLCP. On the other hand, for the enforcement of the return or repossession of property, the CRPC needs the cooperation of the local authorities (mostly municipalities), whereas the HPCC requires the assistance of the UNMIK police. It was noted, however, that the enforcement of the Commission's outcomes is one of the main problems of the

system: it mainly depends on local authorities such as municipalities or country authorities. In Kosovo, the international community was involved with enforcing the return of property. On a national scale, the National Truth or Reconciliation Commission is known to have done good work, especially concerning the fact that they face similar issues as other bodies in terms of implementation.

Dr. Wühler noted that the principal feature that appears to "weaken" the role of the individual victim/ claimant in mass claims systems is the limitation of his/her participation in the process to the submission of the claim (and possibly supplements). Typically, any other participation is restricted to that requested by the institution, which is the exception and is normally geared to remedying deficiencies in the initial claims submission. This limitation would, however, only be perceived as a weakness if compared to the individualized resolution of a case in a judicial or arbitral process, which is not feasible in mass claims processing given the large numbers of claims to be resolved and the usually limited time and resources available.

In conclusion, Dr. Wühler noted that the increase in the use of international claims mechanisms to deal with the consequences of international or internal conflicts can be expected to continue.

In the discussion, doubts were raised as to the preventive effect of the Claims Commission. Will it be able to prevent human rights violations, or just punish afterwards? The question was raised whether it is a requirement to have a peaceful situation in order to get compensation. It was further noted that a distinction should be made between internal and international armed conflict: international conflicts are always more problematic to address in terms of compensation.

Many agreed that, even if no claims could be established, in a case like Eritrea, where many violations of international humanitarian law occurred, it would be worthy to achieve that people are heard. There is also much national practice where states compensated individuals such as in Argentina. There, the state took the position that for each day a prisoner was held illegally, he would receive a certain amount, equivalent to the daily pay of the highest civil servant. If an individual would opt for this, no national case followed. Mere recognition is important.

International Criminal Tribunals

Prepared by Judge Pocar

In his background report, Judge Pocar concluded that, even though their Statutes contain a mechanism, which provides a remedy for minor crimes, The ICTY and the ICTR do not provide a real remedy for more serious forms of damage (harm to life or person). Articles 75 and 79 of the Rome Statute of the International Criminal Court (ICC) show that this instrument incorporates more avenues of redress for victims: damages are specifically determined and a trust fund to channel money to victims will be established. However, these mechanisms may not be adequate for victims of mass crimes that are committed in settings where it is difficult to identify the perpetrator(s) and victims, and it is therefore difficult to establish the appropriate funds for victims or their next of kin.

At the Expert Meeting it was discussed whether all norms of international humanitarian law falls within the competence of the tribunal. The identification of a humanitarian scope must be

assessed on a case-by-case basis. While the ICTY Statute only refers to grave breaches of the Geneva Conventions without expressly mentioning their Protocols, the ICTR Statute contains specific reference to Protocol II of the Geneva Conventions. The International Criminal Tribunals are competent to apply international humanitarian law in as far as the individual responsibility of the perpetrator is concerned.

On a procedural note, the Statutes of the Tribunals focus mainly on criminal responsibility. They obtain very limited avenues for restitution for the individual and issues of reparation are left to national courts. The option for remedies is to exhaust procedures of other bodies or bring a claim against the state for not providing remedies, but this is not easy.

The ICC Statute is more precise than the other Statutes. The exact role of the proposed trust funds is not clear yet. It was noted, though, that it is of little use to only lay responsibility on the perpetrator, except e.g. in cases where a Head of State (who still has access to funds) may be able to pay after being convicted. In conclusion it was noted that at the moment no rules exist that could grant the victim authority or for claiming a remedy. This issue needs to be developed in the ICC. With regard to mass claims it should be noted that the case can end when a certain amount of victims or witnesses has been heard: it is never possible to identify and hear all victims and a certain amount of evidence should be sufficient to be certain beyond reasonable doubt that responsibility exists and to convict an individual of a mass crime.

It was asked whether a Truth and Reconciliation Commission might be more victim oriented, and whether gaps exist within these procedures. Reference was made to the customary international law guidelines in Bassiouni's report.

On the applicable law, it was noted that, even though Article 8 of the ICC Statute contains quite a list of crimes, a huge gap still exists. During the drafting of these types of statutes, many cases were left out (as a result of "trading"), thereby especially affecting provisions concerning non-international armed conflict. So far, judgments have often filled up these gaps. It was noted that not every violation of international humanitarian law constitutes a war crime, as a result of which many violations will never be dealt with by international criminal tribunals.

Even though the lists in the ICC Statute are incomplete, it was asked whether there really are major gaps. If so, what are these major lacunas? It was noted that individuals keep finding new ways to inflict harm upon each other and that there will always be implications of international humanitarian law that were not foreseen. It was further noted that one should ask whether it is relevant to find these gaps, as they have been discussed extensively and nothing in the ICC, ICTY or ICTR Statutes excludes compensation in other forums.

It was asked to what extent Article 21 of the ICTY Statute could be applied to fill the gaps, as it refers, amongst others, to applicable treaties; principles and rules of international law including the established principles of international law in armed conflict. Another problem concerns the inter-relatedness of international crimes and international law. In the future, it could be useful to look at the practice of the Special Court for Sierra Leone, since that Court takes up national and international law simultaneously. Thus, gaps and violations of international humanitarian law beyond the Statutes exist, and it should be examined how far these gaps go.

On the issue of a compensation mechanism, reference was made to the ICC Statute in particular. Individuals must have a possibility to use the judgment concerning state responsibility before their national courts, as this is the only basis for civil action. This would mean that Article 75(1) should be interpreted in a way that grants binding effect to the judgment in a criminal and civil sense. Article 75(6) expressly recognizes further rights of victims, but what are these rights exactly? A loop should be made back to national law, e.g. class action instruments in national law. If the conditions of a class action are fulfilled, remedies apply to the class as a whole.

The question was raised whether it would it be possible, for example, that the ICC condemns or determines that FARC has to pay millions of compensation to victims. FARC could be argued to have such an amount of money, but in most cases convicted war criminals do not. Could the ICTY sit to administer assets in order to distribute the amounts fairly? One could look at established procedures, for example the compensation or reparation mechanisms used by the Inter-American Commission and Court of Human Rights. On the other hand, the administering of assets in a case where a state must pay compensation for violations of human rights is easier than a case where an individual is responsible. Another example could be the Bosnia-Herzegovina Human Rights Chamber, which deals with many property cases and individual claims in the context of the Republica Srpska. It was noted that the example of the ICC is quite theoretical, and that the majority of cases, which will be mass violations, will be handled through the trust fund.

It was concluded that it is a new development that the criminal responsibility of the ICTY is binding for civil suits at a domestic level. The Tribunal's decisions are enforceable in states, which could be far reaching. Further, it is true that dictators often possess funds abroad and the problem is to locate them. Another problem arises when stolen money is to be adjudicated, as these funds cannot always be assumed to be state money.

Plenary Discussion
Final conclusions

In the concluding discussion, the chairpersons drew distinctions between a remedy as means for an individual to have access to a procedure, to have a role in that procedure and finally the granting of remedies in terms of reparation.

As far as the assessment of practice at the seminar was concerned, it was clear that this practice is incremental, ad hoc and somewhat unorganized. The best prospects seem to exist where there is an overlap of human rights law and international humanitarian law. The ICC and its trust fund could provide prospects, but they are limited in terms of substantive crimes. National UN offices like the one in Colombia appear to offer prospect but they are again quite ad hoc which makes their outcome, which is already limited, uncertain. The Commission dealing with Ethiopia and Eritrea appears to be the best example for explicit violations of international humanitarian law. Again, all these institutions are on an ad hoc basis.

Gaps exist in regions, applicable law, remedies against non-state actors, armed opposition groups and types of remedies. In view of that practice we should ask whether the practice is of such a nature that we consider the need to improve this? If so, two options occur:

- we could strengthen some parts of the existing organizational scheme, create more ad hoc institutions, make sure that bodies monitor each other better, set up a Trust Fund and so on, or
- In order to fill the existing gaps, we could try to think of a new procedure, a flexible one that would allow for individual remedies. In that case we need to discuss the types of remedies available.

The chairperson noted that there remains a need to address four issues. First, what is it that we look for in remedies? Second, how do we assess current practice? Third, if improvement is necessary, do we use current practice or do we wish to establish something new? Finally, what is the role of the Van Boven/ Bassiouni principles of restitution? Are they applicable in cases of violations of international humanitarian law as well?

As to coverage of practice, it was noted that the practice of the UN High Commissioner for Refugees might be interesting as well, as UNHCR receives money and deals with restitution and compensation for victims that repatriate on a voluntary basis.

With regard to the Bassiouni principles, it was noted that these do not easily provide for legal possibilities, as there are many obstacles on the national level. Do we wish to examine national remedies or international law only?

Some agreed that one can question whether violations of international humanitarian law lead to individual rights in the first place. This might be a development but one cannot equate. Whereas some individual claims could be filed, other violations of international humanitarian law concern typical inter-state law. States could see this as “targeting” and might not be willing to extract individual rights and remedies from this. Others stated that this is not a realistic approach and history is moving in a contrary direction.

It was noted that customary international law on this issue is not firm but there is a slow trend in favor of granting individuals relief. Besides this, the concept of treaty law should not be out of the question. Some agreed that it would be best to look at and try to largely adopt the Van Boven / Bassiouni principles, both for violations of human rights and international humanitarian law. Others were of the opinion that the Van Boven/ Bassiouni principles are too perfectionist and thus not very worthy at the moment. It also was noted that one must be careful not to impose upon nations what they should do in the aftermath of a disaster. It is not possible to suggest one model scheme that fits all situations.

A new mechanism should look at what already exists, but should focus on the important perspective of protection: how can violations of international humanitarian law be prevented during armed conflict? The article 90 procedures should not be left aside either, and armed conflict and post-conflict situations should both be considered. There was much support for the suggestion that domestic areas need to be examined further as well.

In conclusion, it was noted that the meeting provided a most useful overview of gaps in the remedies for victims of violations of international humanitarian. It provided a proper basis for the second meeting in October 2003 to examine different options for filling gaps in existing procedures, and/or for developing new procedures.

REPORT OF SECOND EXPERT MEETING

Remedies for victims of violations of international humanitarian law

24 & 25 October 2003

Background

The second expert meeting on remedies for victims of violations of international humanitarian took place at Utrecht University on 24 – 25 October 2003. This meeting was a follow-up to the meeting held on 9 and 10 May 2003, which discussed the question of whether existing mechanisms can provide victims of violations of international humanitarian law with a remedy and provide reparation. On the basis of the outcomes of the meeting of the 9 and 10 May, this meeting examined different options for filling gaps in existing procedures and developing new procedures. The primary aim of the meeting of 24 and 25 October 2003 was to formulate ideas and suggestions to strengthen remedies for victims of international humanitarian law violations.

Two position papers were presented at the meeting. The first, **"Potentials of existing mechanisms for victims of violations of international humanitarian law"** was presented by Dr Avril McDonald and the second, **"Towards new mechanisms for victims of violations of international humanitarian law"** was presented by Professor Menno Kamminga. Each paper was followed by a discussion. It was agreed that the definitions for victims and remedies as set out in the Bassiouni/van Boven principles would be used as the basis for discussions, however these principles are now under heavy attack due to recent amendments to the principles.

The papers and discussions are summarized below.

Potential of existing mechanisms to provide remedies to victims of international humanitarian law violations

Presented by Avril McDonald

Avril McDonald's presentation analyzed the effectiveness of varying existing mechanism to provide a remedy for victims of international humanitarian law (IHL) violations. In presenting this paper, Avril McDonald noted that the chief point of importance when analyzing the effectiveness of existing mechanisms is to firstly evaluate the needs of the victim.

Based on research done, the reparations considered most important to victims of IHL included the following: the desire to be taken seriously and to have their status as a victim recognized; the right to be heard and to participate in the complaints procedure; cessation of the violation; attribution of responsibility whether achieved through a court or a truth commission; criminal justice where achievable; monetary compensation; and access to services such as free medical assistance. The potential of existing mechanisms to provide effective remedies to victims of international humanitarian law violations were assessed according to the above criteria.

The following mechanisms were highlighted for discussion: (a complete list of existing mechanisms and their drawbacks/limitations can be found in the full text of Avril McDonald's paper).

The International Humanitarian Law Fact-Finding Commission: The major drawback of the IHL fact-finding commission is the voluntary nature of the system and its dependence on states agreeing to recognize the commission's competence. Furthermore, the competence of the IHL fact-finding commission officially relates only to international armed conflicts and does not cover internal armed conflicts. A positive feature of this type of commission is the potential for non-state actors to be held responsible where they explicitly recognize the commission's competence.

Human Rights Committee: The major limitation of the Human Rights Committee is that a victim of a violation of IHL can only have access to this mechanism if the IHL violation is in concurrence with a human rights violation. It was noted that until the Human Rights Committee changes its mandate to specifically allow victims of IHL violations to access this mechanism, it can not be classified as an effective mechanism in providing relief for victims of war crimes. It was further noted that expanding the mandate of the Human Rights Committee would not provide a workable solution, as the Committee would become bogged down with mass claims and procedures. The Human Rights Committee would need to adjust its procedures to cope with the additional case load.

High Commissioner on Human Rights: The main benefit of the Office of the High Commissioner in providing relief to victims of IHL violations is its ability to identify IHL violations and shame parties into cessation. The most important function of The High Commissioner is his/her role in standard setting and his/her mandate to draw attention to violations in particular cases. Potentially there is also scope for the High Commissioner on Human Rights to recommend that certain services be provided for victims of war crimes and for the mandate to be expanded to specifically include IHL. It would be difficult to characterize this possibility as a 'remedy'.

UN Compensation Commission (UNCC): The significance of the UNCC for Iraq, which was established to deal with claims of loss due to the unlawful invasion of Iraq into Kuwait, is that it provides a model on how to process mass claims based on international humanitarian law violations. The UNCC for Iraq is also significant as it implicitly recognizes the right to claim a remedy under IHL and provides an important building block for the premise that victims of IHL violations do have primary rights. A draw back of such a commission is that its jurisdiction is highly restricted and it does not offer any opportunities to victims other than those who suffered violations in the context of Iraq's invasion of Kuwait.

International Criminal Court (ICC): A major drawback of the International Criminal Court is its scope relating to the prosecution of war crimes. Art 8(1) of the Rome Statute indicates that the Court will have jurisdiction over these crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. This implies that isolated war crimes will not be investigated. The strain on the resources of the Trust Fund is also a limitation of the ICC. The most significant role of the ICC relates to the capacity of states to implement

ICC legislation at the national level. Standards set at the international and regional level can be applied at the national level to strengthen existing national systems.

After outlining some of the major limitations and opportunities relating to existing international mechanisms, Avril McDonald concluded that the potential for maximizing remedies through existing mechanisms is greatest at the national level. This is because in both civil and common law countries, there has been a trend towards the improvement of the position of crime victims, for example, by enhancing their procedural position and providing them with access to compensation. There is a shift at the state level towards a more victim-centered approach, allowing victims greater involvement in the criminal justice process.

The best route to realizing remedies at the national level is to implement the UN Victims' Declaration within States and to implement regional standards and the ICC Statute within States, including the provisions concerning victims. The UN Victims Declaration provides that victims of crime are entitled access to the available mechanisms of justice and prompt redress for harm caused. While it does not directly refer to victims of IHL, victims of IHL violations are indirectly covered by the declaration. At the regional level, there are several initiatives that could be adopted at the national level to strengthen the position of victims of violations of IHL. For example, Recommendation 85 (11) of the Council of Europe deals with the position of victims in the framework of criminal law and procedure. If adopted by states it could offer the prospect for concrete remedies for victims of war crimes under national law. Implementing the ICC Statute in national legislation also has the potential to improve the legal position of war crime victims at a national level by serving as a guiding light to states vis-à-vis victims of the ICC Crimes.

The Bassiouni/van Boven principles also play an important role in setting out principles and guidelines for victims to claim remedies and reparation under IHL, however it is unclear to what extent the principles will be undermined by the removal of the reference to 'humanitarian law" in the most recent version of the principles under discussion.

Accessibility of procedures also becomes important when discussing strengthening the national system. Most victims will not even know that they can claim compensation at the national level.

Avril McDonald concluded her presentation by stressing the importance of harmonization and complimentarity between international and national procedures. She also noted that NGO's such as the International Committee for the Red Cross (ICRC) have an important role in providing information to victims about their rights and about services and mechanisms available.

Plenary Discussion

Following the presentation of Avril McDonald's paper, a discussion was conducted among the panel members on how to strengthen existing mechanisms to provide more effective remedies for victims of international humanitarian law violations. Some of the main points of discussion and suggestions for improvements are set out below.

General consensus was reached that the potential for providing effective remedies for victims of IHL violations was greatest at the national level. Among the topics discussed was the type of

remedy to be afforded at a national level and how to implement a right of compensation at the national level. With regard to this it was suggested to make the right to a remedy non derogable. The link between criminal and civil proceedings and between national and international mechanisms was also examined. For example, can a victim who has procured a criminal conviction in a national court enforce this order through a civil court? Furthermore, can a conviction gained through a national court open the doors for a victim to access compensation through the ICC trust fund?

It was agreed that the right or duty to provide reparation for victims of IHL violations needs to be put into national law. The suggestion for a brand new treaty/protocol for providing domestic remedies under the Geneva Conventions was discussed. The purpose of such a treaty/protocol would not be to create rights for victims of IHL violations, but to acknowledge that these rights exist in other instruments and to regulate remedies and procedures under national law. This instrument would give states the opportunity to clarify remedies available under national law and to implement legislation in their national law. The preamble to such a treaty should include the obligation for states to provide a remedy and should be similar to Article 13 of the European Convention of Human Rights and Fundamental Freedoms (1950). It should make reference to the Geneva Convention and clearly cover internal armed conflict. The body of the treaty should be confined to administration and procedures necessary to obtain a remedy.

The importance of the International Criminal Court as a mechanism to strengthen national systems was also discussed in some detail. The ICC can be used as a model which sets an example to national courts on how to structure a national system. Article 75 of the ICC is an important provision as it gives the court the right to establish principles for making reparations to victims. Under Article 75 there is scope for the ICC to give national courts access to the ICC Trust Fund. Allowing States to draw on the ICC's Trust Fund would create an incentive for States to deal effectively with cases in accordance with ICC regulations. It was suggested that a specific paper be written and sent to the court and the prosecutor outlining these suggestions. The court is now accepting proposals and suggestions regarding the implementation of Article 75 and a general forum will be held next spring.

A separate suggestion regarding the ICC Trust Fund was to broaden its jurisdiction under Article 75 to incorporate crimes not covered by ICC law. Such claims would be adjudicated before the Trust Fund directly and not before the ICC. A separate treaty enlarging the jurisdiction of the Trust Fund would need to be created. This treaty would be open to all states to ratify, even those states which are not parties of the ICC.

It was further suggested that the UN treaty bodies be called upon to adopt a joint general comment (or consecutive general comment) regarding the role and significance of human rights treaties in times of internal or international conflicts. This joint general comment could also lay the basis for strengthening the reporting role of NGO's. The effect of such a general comment may be limited but would be useful in clarifying how human rights treaties apply in international and national armed conflicts and in relation to IHL. It would make clear to the outside world that states have obligations under IHL as well as human rights treaties. It could also have the effect of opening up human rights remedies to victims of IHL violations.

The ability of the relevant human right treaty bodies to start an independent inquiry into alleged violations of IHL was also looked in to. It was concluded that human rights bodies expanding into fact finding does not provide the full answer to the development and strengthening of remedies for victims of violations of international humanitarian law.

On a regional level, it was suggested that to strengthen regional human rights systems the role of the Commissioner for Human Rights in Europe could be expanded. This could be achieved by giving the European Commissioner for Human Rights a wider mandate than currently set. This approach could also be relevant to other regional systems.

Towards a Permanent Claims Commission

Presented by Menno T. Kamminga

In Menno Kamminga's presentation, the value of using the UN Compensation Commission for Iraq as a model for the establishment of a new claims compensation commission was discussed. He highlighted some of the strengths of the UNCC and how it could be used as a model to set up a new claims commissions to provide compensation for victims of armed conflict.

The UNCC provides compensation to victims of armed conflict based on need rather than on a legal right. Claimants under the UNCC do not have to demonstrate that they are victims of a breach of IHL, only that they have suffered loss as a direct result of Iraq's invasion of Kuwait. The commission does not have a judicial nature and is explicitly administrative in nature. If loss is established then automatic compensation is awarded for a set amount. Claims are tested and verified using a computer sampling method. The prior establishment of liability has the advantage of enabling the UNCC to dispose of over 2.6 millions claims in a relatively short span of time.

The UNCC could provide the basis for the establishment of a Permanent International Claims Commission (PICC). Similar to the Permanent Court of Arbitration, the PICC would not be in permanent session but would consist of a list of commissioners and staff who would be called upon when needed. States or the Security Council would be the two bodies having the power to refer cases to the commission. Compensation would be awarded based on a prior finding that aggression or serious violations of ius in bello had been committed by one or more states. Unlike the UNCC, the prior finding of aggression or serious violation would be made by the International Court of Justice and not the Security Council. This would make the PICC less susceptible to the criticism of 'victors justice'. The PICC would be guided by humanitarian considerations and cover damages for harm caused by states and also armed opposition groups. Contrasting the UNCC, the respondent states would be afforded due process. It was suggested that a website providing basic information on remedies available to victims and enabling them to file claims directly should accompany the establishment of such a body.

Menno Kamminga commented that when looking at creating a new mechanism to provide victims of IHL with a remedy, the basic choice which needs to be determined is on what basis victims can claim compensation from such a permanent body. Should it be based on individual rights or should it be an administrative procedure as suggested above? The advantage of a rights based approach is that a body is created which provides case law and will interpret rights of

victims under IHL. This would have a profound effect. If on the other hand the first priority of the victim is to receive quick compensation after the violation, the latter option might be the best model. A limitation however of a purely administrative model is that the victim plays no role in the procedure.

A major challenge in setting up a new mechanism such as the PICC is the procurement of finance to cover the PICC's awards and operating expenses. It is unrealistic to suppose that the states will be willing to voluntarily pay for victims of armed conflicts, especially in addition to providing funds under the ICC Trust Fund. The most realistic option is to have the respondent state responsible for the violation to pay the compensation. This however is only possible if the respondent state has the means or natural resources. This point needs to be examined further.

Plenary Discussion

In the first part of the discussion strengths and weaknesses of the PICC were discussed at length. In the second part of the discussion an alternative new mechanism similar to the Human Rights Committee was proposed to deal with IHL violations. The discussions relating to each proposal will be looked at in turn.

PICC

The concept that the PICC process can only be triggered by States or by the Security Council was commented upon, as it suggests that the PICC can only deal with collective claims. The individual victim will have no standing to bring a claim before the commission. One of the main successes of the human rights models is that the individual has the ability to decide that they want to bring a matter before the commission. The inability of an individual victim to be the trigger mechanism in this proposed model is a drawback.

In response to this limitation it was suggested that the PICC could principally remain an administrative mechanism but could also have power to act in a judicial capacity in cases of individual complaints. In the case of an individual bringing a case before the PICC, the complainant would need to prove that the respondent state had breached an obligation under international humanitarian law.

Another difficulty arising from the creation of a PICC relates to remedies available and enforcement of PICC decisions. Can the PICC only provide monetary compensation or is there scope for the PICC to broaden its remedies to cater for other needs, i.e. the needs of rape victims? How will decisions of the PICC be enforced? If states agree to the creation of such a claims commission then enforcement can be secured through a bilateral treaty between the states that are a party to the conflict. However, the question of enforcement if the states in question do not agree to the competence of the commission still needs to be addressed.

It was agreed that the proposed establishment of the PICC needs to be discussed further. It was suggested that a second draft of the proposal for the creation of the PICC be made, incorporating some of the suggestions brought forward in the discussion.

IHL COMMISSION

It was proposed by Jann Kleffner that an alternative to the PICC is to create an IHL commission. Such a commission would operate similarly to human rights treaty bodies with the exception that it will deal exclusively with violations of IHL. A key benefit of an IHL commission is that the victim is central to the procedure and the victim's right to compensation is violation based.

Formation of an IHL Commission could be accomplished through the creation of a new treaty or protocol. The definitions of acts classified as violations of IHL should be kept general and also cover customary norms relating to individual complaint procedures. Under the IHL commission, claims could be brought against a state or an armed opposition group. The remedies available for victims of war crimes would not only be confined to monetary compensation but would also include other types of reparations such as rehabilitation.

It was suggested that the IHL Commission should be linked to existing mechanisms. Decisions from the ICC and national courts should be recognized by the IHL commission and vice versa. It was further suggested that for this mechanism to be most effective, a judgment made by the IHL Commission should be enforceable in any state.

Two issues were raised regarding the proposal of an IHL Commission. The first question related to how the commission would take into account the criminal liability of violators, especially in the case of individuals and armed groups. The second question concerned the financial basis of the commission. It was concluded that both points needed further examination.

Follow up

The last session of the expert meeting focused on future directions and areas needing further development.

I. Publications/further research

The objective of the organizers is to develop a publication reflecting the outcome of the two expert-seminars. The publication should be based on elaborated versions of the papers presented during both meetings. The Netherlands Ministry of Foreign Affairs, the main financial sponsor of this project will be consulted on this.

It was agreed that the two concrete proposals relating to the establishment of a new mechanism dealing with IHL, namely the PICC and an IHL Commission dealing with individual complaints merits further examination.

It was also concluded that the need for further in-depth study into possible remedies for victims of IHL violations is required. The study of effective remedies should be looked at from a variety of perspectives and involve a range of different experts, including IHL and human rights lawyers, social scientists, sociologists and service providers. Related to this it was suggested to expand the opinions of the expert panel by organizing discussion meetings with members of relevant bodies like the UN Human Rights Committee and IHL lawyers from other parts of the world, for example, the United States.

Specific issues mentioned for further exploration ranged from gaps in national procedures to thresholds for liability of armed opposition groups. Specific attention was given to further examination and clarification of the issue relating to whether victims of IHL violations have primary rights. Most provisions related to IHL are stated in terms of obligations and not in terms of the rights of the victim.

Lastly, it was suggested that in order to increase the knowledge in the field of remedies for victims of IHL violations, the participating institutes/universities to this seminar should encourage their master students to write papers and theses on issues related to this topic.

II. ICRC Conference December 2003

In December of this year an ICRC conference will be organized at the ICRC headquarters in Geneva. The conference will focus on improving existing complaint mechanisms for victims of IHL violations and rights of victims under customary law. It will also discuss issues relating to internal conflict and how to encourage armed forces to comply with IHL regulations more effectively. It was agreed that it was too premature to participate in the conference and that the ICRC-initiative came too early to allow the expert panel to present a solid presentation of its findings so far.

III. Substantive Proposals

(i) Short term

It was concluded that conceptual ideas relating to individual complaint procedures should be elaborated and built upon. The current political climate will not allow for concrete proposals concerning the creation of new mechanisms dealing with IHL violations. Therefore more could be achieved by focusing on strengthening remedies for victims of IHL violations in already existing mechanisms. A follow-up meeting was proposed to further develop and clarify ways in which existing mechanisms can be used to strengthen remedies for victims of IHL violations. It was suggested that the group of experts to be included in the discussions be enlarged. A short and general paper outlining the conclusions of this meeting could be prepared.

Another important short-term objective is to ensure that the Bassiouni/van Boven principles are not further eroded. The change in title of the basic principles and guidelines from "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of Humanitarian Law", to **"Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Law"**, is a step backwards for IHL. It is now unclear as to the importance of these principles in strengthening the proposition that individual victims of violations of IHL have a right to reparation.

Additional elaboration and input should be conducted into Article 75 of the ICC Statute and the principles guiding the operation of the ICC Trust Fund. The possibility of utilizing Article 75 to broaden remedies currently available to victims of war crimes is an achievable proposal meriting further development. The judges of the ICC are now engaged in preparing

Regulations of the Court and have commenced an online Public Hearing where suggestions can be submitted. This opportunity should be utilized and a submission relating to Article 75 should be put forward.

(ii) Long term proposals

It was concluded that the proposal for the creation of the PICC or IHL Commission should be further elaborated and worked on. Taking into account the establishment of one commission need not exclude the creation of the other.

It was also suggested that round tables should be held to explore specific issues. Smaller working groups should be assigned to work on each specific suggestion in order to isolate and evaluate all relevant issues and potential concerns.

Lastly, it was suggested that a Plan of Action outlining the long term objectives relating to strengthening individual complaint procedures and remedies for victims of violations of IHL be prepared.