Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure

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Keywords: compliance; convergence; human rights law; individual complaints of victims of violations; international humanitarian law; supervision.

Abstract. This article discusses some of the legal issues that arise in the context of the possible establishment of an individual complaints procedure for violations of international humanitarian law, a proposal launched at the Hague Appeal for Peace in 1999. It examines such a proposal in the light of recent practice of human rights bodies, which suggests that the latter are not the most adequate means to improve supervision of compliance with international humanitarian law. The article argues that a separate body should be established and concentrates on the competence *ratione materiae* of such a body, the conceptualisation of the legal basis for individual complaints, non-state actors as respondents of complaints and applicable reparations for violations of international humanitarian law.

1. INTRODUCTION

The most important contemporary challenge facing international humanitarian law ('IHL') is to strengthen and develop means which can improve compliance with the law.[1] Over recent years, criminal prosecutions of individual perpetrators have gathered much attention as such a means. However, while it is undoubtedly crucial to hold individual perpetrators criminally responsible for violations of international humanitarian law, the framework of individual responsibility remains limited. It addresses the responsibility of the individual rather than the collective responsibility of parties to the conflict, namely states, armed opposition groups and inter-

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This article is a shortened version of J.K. Kleffner & L. Zegveld, *Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law*, 3 Yearbook of International Humanitarian Law 384–401 (2000). Thanks to André Nollkaemper for comments on an earlier draft.

1. *See* amongst many others, G.H. Aldrich, *Compliance with International Humanitarian Law*, 31 IRRC 294–306 (1991); European Commission, Law in Humanitarian Crises: How Can International Humanitarian Law be Made More Effective in Armed Conflicts (1995); C. Greenwood, *International Humanitarian Law*, *in* F. Kalshoven (Ed.), The Centennial of the First International Peace Conference 161–259, at 240–241, paras. 5.31–5.33 (The Hague: Kluwer Law International, 2000).

15 Leiden Journal of International Law 237–250 (2002)

national organisations. Violations of international humanitarian law, however, find their basis in these collective entities, as they are committed in the context of protracted armed violence between them. Furthermore, criminal prosecutions usually give the individual victim only a marginal role in the process. The right to initiate and conduct proceedings lies with the prosecutor[2] and even if individual victims are entitled to participate in criminal proceedings, they do not stand central therein.

The negation of concern for collective responsibility and the minor role of the victim in criminal proceedings raise the question whether there are additional means which can improve compliance with international humanitarian law. It is submitted that one such means would be to provide individuals with the possibility to submit complaints to an international judicial or quasi-judicial mechanism, which could determine their claims to be victims of violations of IHL committed by parties to an armed conflict.

Under current international law, individuals do not seem to have that possibility. That lack of individual complaints procedures in the field of IHL distinguishes the latter from human rights law, where the relevant treaties commonly provide for committees, commissions or courts that are competent to receive complaints from individuals, determine independently whether a violation occurred and, if so, award reparation. The relative success of these individual complaints procedures in the human rights context raises the question whether supervising compliance with IHL can be improved in a similar way.[3] After all, the purpose of IHL is to go "beyond the interstate levels and [… to reach] for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e., individuals and groups of individuals."[4] International humanitarian and human rights law thus share a common objective, that is, protection of individual and human dignity, and there is a substantial material overlap between the two systems.[5]

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2. Or, in the case of proceedings before the International Criminal Court ('ICC'), additionally states and the Security Council, *cf.* Art. 13 of the 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998).
3. The mainspring of this idea is recent practice of human rights bodies applying international humanitarian law in the context of individual complaints procedures (*see* below, Section 2). *See also* the suggestion of Christopher Greenwood that human rights instruments may remedy the lack of implementation mechanisms for humanitarian law because "the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with the law applicable in internal conflicts." Greenwood, *supra* note 1, at 240–241 and 251–252.
4. G. Abi-Saab, *The Specificities of Humanitarian Law*, *in* C. Swinarski (Ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet 265–280, at 269 (Geneva/The Hague: ICRC, 1984); T. Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, at 246–247 and 251–253 (2000).
5. *See* on this subject, amongst many others, R.E. Vinuesa, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, 1 Yearbook of International Humanitarian Law 69–110, at 70–76 (1998); T. Meron, C*onvergence of International Humanitarian Law and Human Rights Law*, *in* D. Warner (Ed.), Human Rights

The idea of an individual complaints procedure for violations of IHL was launched at the Hague Appeal for Peace and Justice for the 21st Century. Recommendation 13 of the Hague Appeal for Peace and Justice for the 21st Century states: "The Hague Appeal will advocate changes in the development and implementation of the laws in both these fields [IHL and human rights law], in order to close critical gaps in protection and to harmonize these vital areas in international law."[6] Together with other items of The Hague Agenda for Peace and Justice, recommendation 13 forms the overriding theme for the Hague Appeal for Peace to replace the law of force with the force of law. In order to provide a framework for debate, a treaty has been drafted by a group of international lawyers. The Draft is a work in progress and readers are invited to join the debate.[7]

This article will argue in a first step that human rights mechanisms are not the most appropriate answer to the problem of lack of supervision of compliance with humanitarian law (Section 2). Consequently, the possibility of the establishment of an individual complaints procedure for violations of international humanitarian law and some of the questions that arise in this context will be analysed (Section 3). Space does not permit to address all questions which arise in connection with the establishment of such an individual complaints procedure[8] nor to analyse the questions in depth. Rather, this article is meant as a succinct over-view of some of the issues involved in the establishment of such an organ.[9]

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and Humanitarian Law 97–105 (1997); L. Doswald-Beck & S. Vité, *International Humanitarian Law and Human Rights Law*, 33 IRRC 94–119 (1993); C. Swinarski, *On the Relations of International Humanitarian Law and the International Law of Human Rights*, XLV–XLVI Boletim da Sociedade brasileira de direito internacional 179–194 (1993). *See also* T. Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589–605 (1983).

6. The Hague Agenda for Peace and Justice for the 21st Century, available at: http://www.haguepeace.org/appeals/english.html (visited February 2001). The Agenda was subsequently adopted by the General Assembly as UN Doc. A/54/98 (20 May 1999) (Letter dated 99/05/17 from the Permanent Representative of Bangladesh to the United Nations addressed to the Secretary-General).
7. An online version of the Draft Instrument Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law can be consulted at the website of the Hague Appeal for Peace at http://www.haguepeace.org. Any feedback is welcome and can be submitted to Cecilia Nilsson, Director of the Hague Office, hap@ialana.org.
8. For instance, the relation of the supervisory organ to national procedures that could provide redress and the relationship with existing international monitoring and enforcement bodies, such as the International Fact-Finding Commission and the International Criminal Court, will not be addressed here.
9. For a more detailed discussion, *see* Kleffner & Zegveld, *supra* note *, and the Draft Instrument Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law, *supra* note 7.

2. Practice of Human Rights Bodies

The application of IHL by human rights is marginal. Only the Inter-American Commission on Human Rights ('IACHR') has directly applied IHL in the context of the individual complaints procedure. In the *Tablada* case the Commission applied international humanitarian law because it would enhance the Commission's ability to respond to situations of armed conflict, which the 1969 American Convention on Human Rights, although formally applicable, is not designed to regulate. The consequent gaps could only be filled by reference to international humanitarian law.[10]

However, the approach of the Commission gives rise to various difficulties, which also apply to other human rights bodies, such as the Human Rights Committee or the European Court of Human Rights, should they decide to follow the Inter-American Commission's example.

The first problem relates to the mandate of these bodies to apply substantive humanitarian norms. The "indirect mandate,"[11] that the Inter-American Commission had derived from the American Convention, is highly questionable as a legal basis to apply humanitarian law. It is therefore not surprising that the practice of the Commission was challenged by the Colombian Government in the *Las Palmeras* case. The case concerned a complaint lodged on 27 January 1994 with the Commission against Colombia. The complaint led to the adoption by the Commission of a report on the case on 20 February 1998, in which it confirmed its approach in earlier cases to directly apply international humanitarian law. Colombia was held to have violated the right to life in Article 4 of the American Convention and Article 3 common to the 1949 Geneva Conventions. After the Commission submitted the case to the Court, the Colombian Government entered five preliminary objections in September 1998. With the second and third preliminary objections, Colombia challenged

10. Juan Carlos Abella and others *v.* Argentina (La Tablada case) (1997), IACHR Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, 30 October 1997, at 44, para. 161. *See also* L. Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 38 IRRC 505–511 (1998). Humanitarian law has also surfaced in the practice of other human rights bodies, albeit not in the context of individual complaints procedures, *e.g.*, Cyprus *v.* Turkey, European Commission on Human Rights (4 EHRR 482, at 552 and 553 (1976) Commission Report). On this subject *see* C.M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies*, *in* F. Kalshoven & Y. Sandoz (Eds.), Implementation of International Humanitarian Law 31–67 (Dordrecht: Martinus Nijhoff, 1989); for application of humanitarian law by the United Nations *see* H.-P. Gasser, *Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations*, *in* H. Fox & M.A. Meyer (Eds.), Effecting Compliance 15–49 (London: British Institute of International and Comparative Law, 1993); and D. O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 38 IRRC 481–503 (1998).
11. The IACHR recognised that an explicit legal basis in the American Convention is absent, but it interpreted several articles as indirectly mandating the Commission to apply international humanitarian law, Tablada case, *id.*

the competence of the Commission and the Court to hold a state responsible for a violation of the right to life under Common Article 3. By its Judgement of 4 February 2000,[12] the Court accepted these objections of the Colombian Government.[13] While the Court therefore left the possibility open that the Commission or itself may refer to humanitarian law as a source of authoritative guidance when applying human rights treaties in time of armed conflict, it rejected the approach of the Commission to directly apply humanitarian law.[14] On this ground, it is highly unlikely that the Inter-American Commission on Human Rights will directly apply IHL in the future. In addition, the decision also has the potential of affecting the approach of other human rights bodies, in as much as these might be even less willing to follow the approach of the Inter-American Commission. What remains is that human rights bodies can use IHL as a means of interpretation. However, this does not go far enough if the aim is to improve the supervision of compliance with humanitarian law rather than human rights law. Using humanitarian law as a means of interpretation of human rights law is only an indirect and ultimately inadequate way to achieve this aim, because questions arising specifically out of the context of an armed conflict can only be decided by reference to the law applicable in armed conflict, and the answers cannot be deduced from the terms of human rights treaties.[15] That inadequacy is further reflected in the fact that humanitarian law includes guarantees to the benefit of the individual which go beyond what is protected by non-derogable human rights. The prohibition of imposing and carrying out the death penalty may serve as an example. Article 6(5) of the International Covenant on Civil and Political Rights ('ICCPR') only protects persons below the age of 18 and pregnant women from the carrying out of the death penalty. In contrast, several Geneva rules extend such protection to other persons or restrict the right to impose or carry out the death penalty.[16] To rely on human rights

12. Caso Las Palmeras, Exepciones Preliminares, Sentencia de 04 de Febrero de 2000, Serie C, No. 66, available at http://www.nu.or.cr/ci/PUBLICAC/SERIE_C/C_66_ESP.HTM.
13. *Id.*, at para. 43.
14. *Id.*, at paras. 32–33.
15. *See* the Nuclear Weapons Advisory Opinion of the International Court of Justice ('ICJ'), in which the ICJ held that

> whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the [1966 International] Covenant [on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, 1996 ICJ Rep. 226, at para. 25, reprinted *in* 35 ILM 809 (1996).

16. *Cf.* Arts. 100–101 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 ('Geneva Convention III'); Arts. 68 and 75 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 ('Geneva Convention IV'); Arts. 76(3) and 77(5) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 ('Additional Protocol I'); and Art. 6(4) of

complaints procedures while using humanitarian law as a means of interpretation would thus mean excluding an important set of rules of international humanitarian law.

The second problem with the implementation of humanitarian law through human rights bodies concerns the fact that their scarce practice suggests that they only consider alleged violations of states. The result is an incomplete application *ratione personae* because violations of humanitarian law by other parties to conflicts, most notably armed opposition groups, are excluded from scrutiny.[17] Besides thereby denying protection of victims in all cases where non-state actors are responsible for violations of international humanitarian law, application of humanitarian law only to states has the ability of affecting the system of humanitarian law as a whole. The one-sided implementation of humanitarian law through human rights bodies entails the risk of transforming humanitarian law into a law applicable exclusively to states. Humanitarian law could thereby lose its character as a law that presumes the existence of at least two parties to the conflict, placing rights and duties on each of them.

The foregoing reveals that human rights mechanisms are not the most appropriate answer to the problem of lack of supervision of compliance with humanitarian law. The application of humanitarian law, rather than human rights law, to situations of armed conflict should imply the application of humanitarian law in all its aspects, which cannot be achieved before human rights bodies.

3. An Individual Complaints Procedure for Violations of IHL

There is a need for fora which are available to victims of violations of IHL and to which they can submit complaints with a view to obtain redress. The possibility of establishing an individual complaints procedure specifically concerned with supervision of compliance with humanitarian law should therefore be considered. The mandate and procedures of an indi-

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the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ('Additional Protocol II').

17. Again, the practice of the Inter-American Commission is revealing in that respect: *see*, *e.g.*, the Commission's Third Report on the Situation of Human Rights in Colombia, in which it held that it would not investigate or hear individual complaints concerning acts by armed opposition groups, for which the Colombian state is not responsible, Third Report on the Situation on Human Rights in Colombia, OEA/ser.L/V/II.102, Doc. 9 rev. 1, at 72, para. 5 (26 February 1999). It should also be mentioned that the Commission did apply international humanitarian law to armed opposition groups in its country reports, *id.*, at 72, para. 6 but that these reports do not provide individuals with remedies against violations of humanitarian rules *vis-à-vis* these actors.

vidual complaints procedure should be regulated in a treaty.[18] As a model for such a treaty could serve the various individual complaints procedures under human rights treaties. However, the procedure before a supervisory body competent to consider individual complaints of violations of IHL needs to be adjusted to the special circumstances of armed conflicts. A few areas are of particular concern, namely the competence *ratione materiae* of a supervisory body (Section 3.1), the conceptualisation of the legal basis for individual complaints (Section 3.2), of armed opposition groups as respondents of complaints (Section 3.3), and the matter of reparations (Section 3.4).

3.1. Competence *ratione materiae*

As far as the competence *ratione materiae* of a supervisory body is concerned, generally speaking, it should be the aim that the body of rules of IHL over which the supervisory body would have jurisdiction is as complete as possible. Not only the core codifications of the law applicable during armed conflict, namely the four Geneva Conventions and their two Additional Protocols, should thus be included, but also rules of customary law.[19] This is particularly important in relation to IHL applicable during non-international armed conflicts. The protection of individuals during non-international armed conflicts codified in Common Article 3 and Additional Protocol II is rudimentary and rules on international armed conflicts have been expanded over the years to apply as customary law in non-international armed conflicts.[20] Given that today's conflicts are predominantly of a non-international character, it is vital to ensure that those norms are also within the competence of the supervisory body which deals with individual complaints. In addition to customary IHL and the four Geneva Conventions and their two Additional Protocols, there is also a body of other treaty rules of IHL.[21] In order to provide the broadest possible protection to individuals, the applicable law should also include such treaty rules. This would entail that the full spectrum of IHL could be applied by the supervisory body, including those rules which are not embodied in quasi-universally accepted treaties, such as the Geneva Conventions. Such a broad competence *ratione materiae* of the supervi-

18. As to the form of such a treaty, several options are available, such as to adopt an additional protocol to the Geneva Conventions or to adopt a free-standing instrument.
19. T. Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238–249 (1996).
20. S. Boelaert-Suominen, *The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to all Armed Conflicts*, 13 LJIL 619–653 (2000).
21. *See*, *e.g.*, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the two protocols of 1954 and 1999; the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be deemed to be Excessively Injurious or to Have Indiscriminate Effects and its Protocols; and the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

sory organ is, however, based on the assumption that it is limited to the rules binding on the state(s) and parties in question. Thus, for example, if a state party to the treaty establishing the individual complaints procedure is not a party to the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999), any potential individual right derived from the 1999 Protocol could not be invoked before the supervisory organ against that state. This is notwithstanding any invocation of the rules embodied in the respective treaty as part of customary law.

3.2. The conceptualisation of the legal basis for individual complaints

A central issue for the establishment of a supervisory body competent to deal with individual complaints is the question of the conceptualisation of the legal basis for individual complaints.

One possibility would be to include in the competence of the supervisory body competent to deal with individual complaints only those rules that confer rights to individuals. This presupposes that IHL actually endows individuals with justiciable rights comparable to individual rights conferred by international human rights treaties.

It has to be acknowledged that, in contrast to human rights law, the obligations under humanitarian law treaties generally apply to states *vis-à-vis* each other and are commonly worded in terms of prohibitions applicable to the parties to the conflict.[22] On the other hand, humanitarian law contains several rules which refer explicitly to concepts such as 'rights,' 'entitlements' or 'benefits.'[23] These and other provisions create rights of individuals or presuppose the existence of rights.[24] Apart from clear-cut examples of rules that can be conceptualised as 'individual humanitarian rights', and with the purpose of IHL in mind, one can in fact identify many

22. *Cf.* Common Art. 3, which formulates obligations "each Party to the conflict shall be bound to apply," rather than rights of individuals.
23. *Cf.* Art. 4 of Additional Protocol II, which stipulates that "all persons who do not take a direct part in the hostilities are entitled to respect for their person." Art. 78 of Geneva Convention III gives prisoners of war the right to make known their requests regarding the conditions of captivity to which they are subjected and to complain about such conditions. Similarly, Art. 30 of Geneva Convention IV provides all protected persons with the right to file a complaint with the Protecting Powers, the International Committee of the Red Cross ('ICRC') and the National Red Cross about an infringement of the Convention.
24. Other examples of such (often indirect) references are Art. 7 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 ('Geneva Convention I'); Arts. 6 and 7 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85 ('Geneva Convention II'); Arts. 7, 14, 84, 105 and 130 of Geneva Convention III; Arts. 5, 7, 8, 27, 38, 80 and 146 of Geneva Convention IV; Arts. 44(5), 45(3), 75 and 85(4) of Additional Protocol I; Art. 6(2) of Additional Protocol II.

rules of IHL that contain elements of individual benefits.[25] Such rules suggest that individuals do have rights under at least some provisions of international humanitarian law, a supposition that finds support in the growing cross-fertilization of humanitarian law and human rights law.[26]

A question different from albeit related to the notion of 'rights' is, however, whether these rights can also provide the basis for individual claims brought by victims of humanitarian law violations. Support for such an assertion could arguably be found in Article 3 of the 1907 Hague Convention IV Concerning the Laws and Customs of War, the corresponding norm of customary international law,[27] and Article 91 of Additional Protocol I.[28] The liability of parties to the conflict to pay compensation for violations of IHL committed by persons forming part of their armed forces could provide for an obligation to compensate not only states but also *individuals*.[29] Obligations of parties to the conflict could thus be construed as being mirrored by rights of individuals for which IHL envisages a cause of action in case they are violated.[30]

It is to be noted, however, that despite indications in the drafting history of Article 3 of the 1907 Hague Convention to the contrary,[31] national courts have thus far regularly rejected individual claims for compensation based on that provision.[32] Victims of humanitarian law violations are conse-

25. The grave breaches provisions, for example, could be construed as conferring individual humanitarian rights against acts such as wilful killing, torture or inhuman treatment wilfully causing great suffering or serious injury to body and health. The same holds true for norms applicable in non-international armed conflicts, such as the prohibition of violence to life, outrages upon personal dignity, humiliating and degrading treatment, stipulated in Common Art. 3 and Art. 4 of Additional Protocol II.
26. Meron, *supra* note 4, at 247–256 and 266–273.
27. *Commentary on Art. 91*, *in* Y. Sandoz, C. Swinarski & B. Zimmermann (Eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1053, para. 3645 (Geneva: ICRC, 1987).
28. Note should also be taken of Arts. 51, 52, 131 and 148 respectively of the Four Geneva Conventions which provide:

    > No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article [enumerating the grave breaches].

29. Sandoz, Swinarski & Zimmermann, *supra* note 27, at 1056–1057, paras. 3656–3657. Further analysis would be required to determine whether such an obligation is confined to states and to what extent non-state parties to armed conflicts are also bound by such an obligation to compensate.
30. F. Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond*, 40 ICLQ 827–858 (1991).
31. *Id.*, at 830–833.
32. *Id.*, at 835–837. As to US courts, *see* Leo Handel *et al. v.* Andrija Artukovic on behalf of himself and as representative of the Independent Government of the State of Croatia, US District Court for the Central District of California, 601 F. Supp. 1421 (1985), Judgment of 31 January 1985, reproduced *in* M. Sassoli & A. Bouvier, *et al.* (Eds.), How Does Law Protect in War 713–719 (Geneva: ICRC, 1999). The non-self-executing character of the Hague Convention was also rejected in more recent case-law, such as Fishel *v.* BASF Group, *et al.*, Civil No. 4-96-CV-10449, LEXIS 21230 (S.D.Iowa 1998), in which the court held

quently hardly able to exercise whatever rights they may have under IHL treaties, as the latter, like most inter-state treaties, do not envisage express causes of action of individuals in national or international law.[33] It is, however, submitted that individual humanitarian rights *should* be justiciable and subjected to the scrutiny of a supervisory organ. The need to do so was realised as early as in 1949, when it was underlined during the Diplomatic Conference, which led to the adoption of the Geneva Conventions, that

> [i]t is not enough to grant rights to protected persons and to lay responsibilities on the States; protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view in relation to the Power in whose hands they are.[34]

More recently, the possibility to conceptualise international humanitarian rules as conferring justiciable rights to individuals has been affirmed by the practice of the Inter-American Commission and some national courts.[35]

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that the cases are "unanimous […] in holding that nothing in the Hague Convention even impliedly grants individuals the right to seek damages for violations of [its] provisions." *See also* R.D. Neubauer, 2 Yearbook of International Humanitarian Law 427–428 (1999). Likewise, Japanese courts have continuously dismissed such individual claims in cases relating to violations of international humanitarian law during World War II. These cases include the so-called 'comfort-women' cases and those of English and Dutch Prisoners of War; *see Correspondents' Reports*: Japanese Report of Hideyuki Kasutani & Seigo Iwamoto, 3 Yearbook of International Humanitarian Law 543–544 (2000), and Japanese Report of Hideyuki Kasutani, 2 Yearbook of International Humanitarian Law 389–390 (1999).

33. D. Fleck, *The Role of Individuals in International Humanitarian Law and Challenges for States in Its Development*, *in* M.N. Schmitt & L.C. Green (Eds.), The Law of Armed Conflict: Into the Next Millennium, Naval War College, Vol. 71, International Law Studies, Newport 119–139, at 125 (1998), supporting George Aldrich's view that IHL only confers "imperfect rights." *See also* G. Aldrich, *Individuals as Subjects of International Humanitarian Law*, *in* J. Makarczyk (Ed.), Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski 851–858 (1996).
34. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Commentary Part Two, at 77 (Geneva: ICRC, 1972).
35. Prefecture of Voiotia *v.* Federal Republic of Germany ('Distomo case'), Court of First Instance of Leivadia, Greece, 30 October 1997, 92 AJIL 765, at paras. 16–17 (1998). The approach of the Court of First Instance was confirmed by the *Areios Pagos* (Greek Court of Cassation), Case No. 11/2000, in its judgment in the case of 4 May 2000, *Correspondents' Reports*: Greek Report of Eleni Micha, 3 Yearbook of International Humanitarian Law 511–516 (2000). *See also* the Judgment of the Amsterdam District Court, Gerechtshof Amsterdam, Vierde meervoudige burgerlijke kamer, Dedovic *v.* Kok *et al.*, Judgment of 6 July 2000. Here, the court implicitly recognized the notion of individual humanitarian rights. The appellants sought to invoke alleged violations of Art. 52 Additional Protocol I on the protection of civilian objects, during NATO's bombing of the Federal Republic of Yugoslavia as a basis for compensatory claims against members of the Dutch Government. The court rejected this claim and clarified that rules of IHL do not protect persons against stresses and tensions that are consequences of the air strikes as such and do not protect persons with regard to whom the rules and norms have not been violated *in concreto*. However, while confining the right to invoke the rules of those who personally were the victims of violations of IHL (direct victims), the court recognized the possibility of deriving individual rights from IHL rules (Judgment, at para. 5.3.23).

Besides from individual and justiciable humanitarian rights, another option would be to derive a basis for individual complaints from any injury that an individual alleges to have incurred as the consequence of a violation of a rule of IHL committed by a party to an armed conflict. In that scenario, the central question would thus not be whether a given rule of IHL confers individual justiciable rights but whether the violation of a given rule caused injury to an individual. That injury would then give rise to responsibility and a corresponding right to reparation. The individual complaints procedure for violations of IHL could then incorporate elements of bodies such as the United Nations Compensation Commission ('UNCC').[36]

While there are thus different possibilities of conceptualising the legal basis for individual complaints, these possibilities reflect that the establishment of an individual complaints procedure is very well feasible.

3.3. Armed opposition groups as respondents of complaints

Another question that must be answered when examining the establishment of a supervisory body competent to deal with individual complaints is *against whom* a complaint could be brought. Humanitarian law is addressed to the parties to the conflict, which – depending on the nature of the conflict – may be state and non-state actors. Indeed, as today's armed conflicts are predominantly of an internal character, not only states but also non-state actors commit violations of international humanitarian law. Yet, while individual complaints against a state and its agents (including non-state entities acting on behalf or with the acquiescence of a state) fit into the traditional scheme of individual complaints procedures, such complaints on the international level against non-state actors acting on their own behalf are a novelty and give rise to a number of legal issues.[37]

In the first place, in order to be held accountable for violations of humanitarian law, armed opposition groups must fulfil certain criteria, namely that they be 'organized' and capable of carrying out 'protracted

36. *Cf.* para. 8 of Security Council Res. 674, UN Doc. S/RES/674 (29 October 1990), and para. 16 of Security Council Res. 687, UN Doc. S/RES/687 (8 April 1991), and the decisions of the Commission's Governing Council implementing the jurisdiction conferred by Res. 687, *see also* J.R. Crook, *Current development: The United Nations Compensation Commission – A New Structure to Enforce State Responsibility*, 87 AJIL 144–154 (1993). With respect to violations of international humanitarian law, it is noteworthy that the UN Compensation Commission is regarded as implementing parallel responsibility deriving not only from damage caused by Iraq's illegal invasion and occupation of Kuwait, but also from Iraq's responsibilities as a belligerent as embodied in Art. 3 of the 1907 Hague Convention IV Concerning the Laws and Customs of War, Art. 91 of Additional Protocol I and the corresponding norm of customary international law; *see* Crook, *supra*, at 147–148.

37. *See*, *generally*, on the international accountability of armed opposition groups, L. Zegveld, *Armed Opposition Groups in International Law: The Quest for Accountability*, Doctoral thesis, Rotterdam, 304 p. (2000).

armed violence.'[38] These requirements suggest that groups not fulfilling these requirements could not be the subject of a complaint. Instead, the state on whose territory the alleged violations of IHL are committed, or possibly individual leaders and members of these smaller non-state entities, could be regarded as the sole bearers of responsibility.

Another, more practical, complication relating to the inclusion of acts of armed opposition groups as an object of individual complaints concerns the temporary nature of these entities. It would seem that individuals should be able to file complaints with the supervisory body during and after a conflict. When an armed opposition group has become the new government or when it has formed a new state, it can be held responsible in that capacity for acts committed during the conflict.[39] However, when such a group has lost the conflict, and, in consequence, has totally ceased to exist as an entity, it will be difficult to hold it responsible for violations of humanitarian law.

The question also arises as to the representation of armed opposition groups. How could it be ascertained that the agents representing a group in a claim were really authorised to do so? Again, larger armed opposition groups, exercising territorial control, and with a clear organizational structure could easily be imagined to be able to provide a person with appropriate full powers to represent the group in legal proceedings, but the problem is pertinent when it concerns smaller groups, lacking a clear organizational structure. In these cases, the authority of persons to represent these groups will depend on the actual command and control of the group over these persons. Such a scenario would also involve the possible risk that the group might dispute that the agents who conducted the case were in fact authorized to represent it if the group lost the case.

In sum, while the international responsibility of armed opposition groups is still primitive and will have to be developed further, these groups should fall within the competence of a supervisory body competent to deal with individual complaints, and this is also feasible.

3.4. Reparations

An individual complaints procedure would raise the question what reparatory measures the supervisory organ should be competent to take if it finds that a violation occurred. Reparatory measures seek to relieve the suffering of and afford justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, and by preventing and

38. Prosecutor *v.* Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 70.
39. International Law Commission, ILC Draft Articles on State Responsibility, A/51/10 (1996) (Draft Articles provisionally adopted by the Commission on first reading). Text available at http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm, Art. 15 (visited October 2001).

deterring them. These measures could take the form of restitution, compensation, rehabilitation and satisfaction.[40]

In light of the particularities of humanitarian law, difficulties are likely to occur with respect to some reparatory measures. By individualizing claims of reparation for violations of IHL that occur in the midst of armed conflict, and sometimes as part of a plan or policy or as part of a large-scale commission, one may overwhelm the capacities of an international supervisory body.[41] The larger the scale of violations of humanitarian law and the greater the number of potential complainants, the more likely it is that the supervisory body will be confronted with a situation of a breakdown of law and order within the state concerned. While in such situations, the supervisory body competent to deal with individual complaints will be most needed as domestic remedies are not effective,[42] it would entail serious practical problems, for example as regards monetary compensation. It is therefore crucial to guarantee the effectiveness of an individual complaints procedure by adopting credible reparatory measures rather than undermining its authority by foreseeing illusory ones. A complementary possibility to achieve that aim would be to learn from the experiences of truth commissions, with their focus on providing a forum for victims to tell their stories and establish the truth rather than strict legal proceedings.

This is not to suggest, however, that decisions of the supervisory body competent to deal with individual complaints should be merely declara-

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40. Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report submitted by T. van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8 (2 July 1993), para. 137, Proposed Basic Principles 3, 8–11.

41. *See* for corresponding considerations in the context of grave human rights violations, C. Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, *in* A. Randelzhofer & C. Tomuschat (Eds.), State Responsibility and the Individual – Reparation in Instances of Grave Violations of Human Rights 1–25, at 18–25 (The Hague: Martinus Nijhoff Publishers, 1999). *See also* the considerations of the US District Court for the Central District of California, in Leo Handel *v.* Andrija Artukovic, *supra* note 32, where the Court addressed the immediate and long-range social consequences of granting individuals an individual right to compensation. In the view of the court, this would create a number of practical and political problems. The relevant passage reads:

> […] The code of behavior the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by the many individuals, including prisoners of war, who might think their rights under the Hague Convention violated in the course of large-scale war. Those lawsuits might go far beyond the capacity of any legal system to resolve at all, much less accurately and fairly; and the courts of a victorious nation might well be less hospitable to such suits against that nation of the members of its armed forces than the courts of a defeated nation might, perforce, have to be. Finally, the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations. […].

42. The Committee would in fact become a forum of first resort, as opposed to a last resort.

tory judgments, which only state that a violation occurred without attaching any further consequences.[43]

4. CONCLUSION

The establishment of an individual complaints procedure for violations of IHL raises many intriguing questions. While answers to all of them might not be found easily, none of the problems is of such a nature as to suggest that the establishment of a supervisory body competent to receive complaints of individuals is inconceivable. In fact, there are many good reasons to establish such a body. It would close the gap in protection between humanitarian and human rights law, recognizing the similarities between the two fields of law, both of which aim at the protection of individuals. At the same time, by establishing a separate mechanism for monitoring compliance with international humanitarian law, the special nature of this law is acknowledged and its own field of application is left intact.

As already mentioned, the idea of an individual complaints procedure for violations of IHL was launched at the Hague Appeal for Peace and Justice for the 21st Century as part of the overriding theme to replace the law of force with the force of law.[44] It is hoped that the present article contributes to the furtherance of this objective by stimulating a debate about the establishment of an individual complaints procedure for violations of IHL aimed at recognizing and compensating victims.

43. The supervisory body could, for instance, have the power to order a state or entity responsible for the violation to allow for rehabilitation measures by giving access to relevant aid organizations that provide medical and psychological care and services aimed at restoring the dignity and reputation of the victims. The same holds true for many measures of satisfaction, since all states and entities are capable of measures such as apologizing for violations of international humanitarian law or allowing organizations such as the ICRC to train the members of their armed forces with a view to avoiding the recurrence of violations of international humanitarian law in the future.
44. *Supra* notes 6 and 7.