



**ESTABLISHING AN INDIVIDUAL COMPLAINTS
PROCEDURE AGAINST VIOLATIONS OF
INTERNATIONAL HUMANITARIAN LAW**

14. JULY 2000

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AMSTERDAM INTERNATIONAL LAW CLINIC



EXECUTIVE SUMMARY

Currently a gap exists in the enforcement and supervision of international humanitarian law, which, unlike international human rights law, has no judicial or quasi-judicial mechanisms at its disposal competent to receive individual complaints against violations. Consequently, the idea of establishing such a supervisory organ was launched at the Hague Appeal for Peace and was brought up again at the Centennial Commemoration of the First Hague Peace Conference.

The present advise explores different options available and analyses some of the questions likely to arise in the context of the establishment of such a supervisory organ. These questions include the method of establishment, its organisation, its procedure and its competence. The latter aspect is of central importance. The question whether international humanitarian law in fact confers individual “humanitarian rights” and – if the question is answered in the affirmative - what kind of violations can be invoked before the supervisory organ, are as crucial as the notion of international humanitarian law within the competence of the organ. Another subject of analysis is the question of who can bring complaints against whom before the supervisory organ. Besides its competence, the procedure of the supervisory organ is of great significance. What cases shall be admissible before the organ and how facts shall be established are issues which have to be examined, taking into consideration the particularities of international humanitarian law and the context in which violations occur. The execution of the judgments or decisions of the supervisory organ and ensuring compliance with reparatory measures as well as potential competences beyond contentious cases are also included.

The advise should be understood not so much as providing definite answers to the said problems but instead as pointing at relevant issues and stimulating further discussion. However, it is generally inspired by the urgent need to fill the current enforcement gap with a supervisory organ which will be as effective as possible in the light of the context in which violations of international humanitarian rights occur. It therefore contains proposals which, in the light of current international affairs, would constitute a combination of those elements of supervisory organs which have proved to be the most effective and useful while taking into consideration both similarities and differences between international humanitarian and human rights law.

Since the ultimate aim of the present project is the drafting of a treaty establishing the supervisory organ, I have chosen the form of such a treaty. Different options are indicated by bracketing the pertinent parts of the instrument. Each provision is explained by commentaries. A clean version of the draft treaty is attached.

Time did not permit to include every single potential aspect and, consequently, provision. For example, a preamble, detailed regulations for the proposed sub-division of the supervisory organ into smaller panels, and relating to reservations are left for future versions of the draft, which is understood as a continuous project.



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DRAFT INSTRUMENT ESTABLISHING AN INDIVIDUAL COMPLAINTS PROCEDURE FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (IHL)*

PART I - ESTABLISHMENT OF THE SUPERVISORY ORGAN

Article 1 Establishment of the supervisory organ

Article 1 deals with the establishment of the supervisory organ. Several options are available.

As regards the method of establishment, two possibilities exist. The organ could be established by a treaty or by a resolution of the United Nations, be it the Security Council, the General Assembly, or ECOSOC. Yet, the latter options of General Assembly- or ECOSOC-based organ bear the problem that they would remain political organs. Moreover, General Assembly and ECOSOC Resolutions are non-binding. The same holds true for Security Council resolutions other than those adopted under Chapter VII of the UN Charter. The latter requires a threat to or breach of the peace (Article 39 UN Charter). Violations of international humanitarian law could be characterised as such a threat or breach, and a (quasi-) judicial organ could be established as exemplified by the establishment of the two ad hoc tribunals for the former Yugoslavia and Rwanda. However, a general characterisation of these violations as constituting a threat to or breach, independent of a specific situation, incident, conflict, region or period of time would be somewhat of an innovation and is rather unlikely to succeed.

A treaty would thus be the preferable option and is more likely to achieve the intended result.¹ Such a treaty also could take different forms. It could be envisaged as a Protocol to the Geneva Conventions or another already existing treaty or as a freestanding agreement detached from any specific treaty. However, the first approach would be inconsistent with the intention to bring into the ambit of the supervisory organ violations of international humanitarian law not covered by the respective treaties and violations of customary international humanitarian law, (see below, commentaries on Article 12, competence *ratione materiae*). A freestanding agreement would accommodate the mentioned difficulties and allow for the required broadness. Even though the organ would thus not be established as a resolution-/Charter-based organ, the negotiating process and the organ itself should nevertheless be embedded into the UN system. As the main international organisation with responsibilities in matters of peace and security, including international humanitarian law, and as the most universal organisation, the UN represents the adequate forum for negotiations. The UN General Assembly could then adopt the final treaty text before being opened for signature.

As regards the organ itself, first, the organ could be established as a Committee.

“Committees” competent to receive complaints of individuals are also set up under the following Human Rights Treaties:

- the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (Committee on the Elimination of Racial Discrimination)
- the First Optional Protocol to the 1966 International Covenant on Civil and Political Rights (Human Rights Committee, HRC)
- the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture, CAT)
- the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families)

* Jann K. Kleffner, July 2000.

¹ This is without prejudice to the difficulties arising with the attempt to reaching consensus on an international agreement.



- Optional Protocol to the Convention on the Elimination of Discrimination against Women, adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, Human Rights Day (not yet in force)

Depending on the powers and functions of the organ(s), it could also be envisaged as a singular “Court”, such as the European Court for Human Rights after the entry into force of the 11th or a singular “Commission”, such as the African Commission until the entry into force of the Protocol to the Charter adopted on June 1998.

Another possibility would be a two-tier system of both a Commission and a Court, as in the case of the Inter-American Convention of Human Rights, the European Convention before the entry into force of the 11th Protocol abolishing the Commission, or the African Charter on Human and Peoples’ Rights (Banjul Charter) after the entry into force of the Protocol to the Charter adopted on June 1998, adding a court to the commission. In the case of a two-tier system, the experience of the mentioned instruments suggests that the Commission would serve to preliminarily screen the complaints, consider their admissibility and make a finding on whether the complaint should be transmitted to the Court, which then is competent to take the final decision on the merits.

Given the fact that violations of international humanitarian law do regularly involve a large number of potential complainants, a preliminary screening process is useful in order not to overburden the organ. Whether that takes the form of a two-tier system or a singular body operating in smaller committees/chambers for the preliminary admissibility assessment is of secondary importance.

Article 1 could read as follows:

ARTICLE 1

“There shall be established a [Committee against violations of international humanitarian law (hereafter referred to as the Committee)] [Commission against violations of international humanitarian law (hereafter referred to as the Commission)][Court against violations of international humanitarian law (hereafter referred to as the (Court))][Commission and a Court against violations of international humanitarian law (hereafter referred to as the Commission and the Court)] which shall carry out the functions hereinafter provided.”

PART II - ORGANISATION

Article 2 Number of Members of the Supervisory Organs

The number of members of existing supervisory organs varies greatly. The Inter-American Commission of Human Rights consists of seven members, the Committee against Torture of 10, the African Commission of 11, the Committee on the Elimination of Racial Discrimination and Human Rights Committee of 18 and the European Court of Human Rights comprises a number of judges equal to that of the High Contracting Parties. However, the European Court is subdivided into Committees (3 members), Chambers (7) and Grand Chambers (17) with different functions and roles.

The number of members of the supervisory organ depends on the organisation of work. If one considers an option similar to the European Court, in which the supervisory organ is sub-divided into different bodies having different tasks, the number required must be much higher than if the organ would be a singular body dealing with all the cases.

A sub-division appears to be desirable. The experience of the existing human rights complaints procedures also shows that they are increasingly used and they receive a disproportionately large number of individual complaints so that the Human Rights Committee, for example, is years behind in processing them. At least a year and normally two or three years elapse before the Committee is in a position to review the case and it can usually not consider more than 15 at any session which leads to



giving priority to capital cases.² As has been shown in the course of reforming the European individual complaints procedure, a division of labour between different bodies within the supervisory organ would enhance its efficiency and prevent a huge backload of cases. The relative success of the reformed European system has also triggered calls for similar reforms of the UN treaty bodies, namely to have them large enough to enable them to work in panels.³

As already indicated, the need for a sub-division of labour is even more urgent in the context of violations of international humanitarian law, given the fact that they occur in an environment which involves many potential complainants. The issue of workload could best be addressed through an organisational structure dividing up the tasks between small bodies dealing exclusively with the admissibility of cases (like the Committees of the ECtHR), medium-sized bodies dealing with the admissibility and merits of individual applications (like the Chambers of the ECtHR), a large body acting as appeals and advisory organ and the plenary body for organisational matters, such as establishing the aforementioned bodies, electing the president(s) for them, adopting rules of procedure etc.

Another advantage of such an approach would be that every State is automatically represented by a member in the supervisory organ, which will enhance the universal character and authority of the organ, notwithstanding that members serve in their individual capacity and are not to be considered a State representative.

With every State Party sending one member of the supervisory organ and the intention to have the treaty ratified by as many States as possible, the supervisory organ could ultimately consist of some 190 members. This might seem somewhat unmanageable. Yet, given the fact that the workload will increase with a growing number of States, such a large number of members does not seem unreasonable, as it would also allow for the necessary room in order to select members who are not nationals of the State(s) / parties concerned and nevertheless have a sufficient degree of expertise with regard to specific regions or State(s).

Article 2 could therefore read as follows:

ARTICLE 2

“The [supervisory organ] shall consist of a number of members equal to that of the High Contracting Parties.”

Article 3 Criteria for office

The criteria for office are depending on the powers and functions of the supervisory organ(s) (see above, Article 1). Thus, if the organ is envisaged as a Court, its members should either possess the qualifications required for appointment to high judicial office or be law professors of recognised competence in the field of international humanitarian law. On the other hand, as a Commission the supervisory organ may be composed of members who have recognized competence in the field of international humanitarian law, although particular consideration should be given to persons having legal experience.

Independently of the powers and functions, safeguards need to be inserted into the instrument to guarantee the independence and impartiality of the organ’s members. They should be of high moral character, sit in their individual capacity and shall not engage in any activity which is incompatible with such independence and impartiality. The determination of whether a violation of these duties has occurred should be left to the supervisory organ. If such a determination were left to the High Contracting Parties, the risk of abuse would be imminent as defendant States could disrupt the process

² American Bar Association, Recommendations towards consolidating into two committees the existing six UN committees currently monitoring UN human rights treaties (CCPR, CESR, CERD, CEDAW, CAT, CRC), in: 20 Human Rights Law Journal (1999), pp. 272-275, p. 274.

³ Ibid, p. 275.



of dealing with a complaint by determining that a member of the organ behaved in a way which is incompatible with his/her independence or impartiality. (See also below: Article 7)

Article 3 could therefore read as follows:

ARTICLE 3

“1. The members of the supervisory organ shall be of high moral character and [either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence] [possess recognized competence in the field of international humanitarian law particular consideration being given to persons having legal experience].
2. They shall sit on the supervisory organ in their individual capacity.
3. During their term of office members shall not engage in any activity which is incompatible with their independence or impartiality; all questions arising from the application of this paragraph shall be decided by the supervisory organ.”

Article 4 Election

The process of electing the members of the supervisory organ raises several questions, such as by whom and how candidates can be nominated, members elected and replaced, how long their term of office is going to be etc.

Members should be elected from a list of nominees. Each State should be able to nominate up to three but no less than two persons, at least one of which must possess the nationality of the nominating State. In that way, adequate geographical representation can be assured, while allowing for the necessary flexibility of States which may be dependent on nominating non-nationals due to the lack of experts amongst their own nationals.

Members should be elected by an Assembly of States Parties to the instrument (see below, Article 23). As with other supervisory organs, the Assembly also could take on additional responsibilities, such as the overall administrative supervision of the organ, to ensure that the findings of the organ are complied with, etc.

The members shall be elected by secret ballot by the Assembly of States with respect to each High Contracting Party by a majority of votes cast. In order to ensure that an adequate number of States Parties can participate in the election, two thirds of them have to be present in order for the election to be valid. In case of a two-tier system, the procedure of electing members should remain the same for both organs (Commission and Court).

Article 4 could therefore read as follows:

ARTICLE 4

“The members of the [supervisory organ] shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate up to three but no less than two persons, at least one of who must possess the nationality of the nominating State. Two thirds of the Assembly of States shall constitute a quorum and the persons elected are those who obtain the largest number of votes of the States parties present and voting.”

Articles 5-8: Terms of Office, Solemn Declaration, Dismissal, and Vacancy

The draft instrument also needs to contain provisions on the terms of office, solemn declaration and dismissal of members of the supervisory organ. The same holds true for the case a place of a member becomes vacant. The pertinent provisions (Articles 5-9) could read as follows:



ARTICLE 5

- “1. The members of the Committee shall be elected for a term of [four][six] years. They shall be eligible for re-election if renominated. However, the term of half of the members elected at the first election shall expire at the end of [two][three] years; immediately after the first election the names of these members shall be chosen by lot.
2. A member elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.
3. The terms of office of members shall expire when they reach the age of 70.

ARTICLE 6

After their election, the members of the [supervisory organ] shall make a solemn declaration to discharge their duties impartially and faithfully.

ARTICLE 7

No member may be dismissed from his office unless the other members decide by a majority of two-thirds that he/she has ceased to fulfil the required conditions.

ARTICLE 8

1. In case of death, resignation or dismissal of a member of the [supervisory organ] the [supervisory organ] shall immediately inform the Assembly of States, which shall declare the seat vacant from the date of death or from the date on which the resignation or dismissal takes effect.
2. The Assembly of States shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.”

Article 9 Privileges and Immunities

As a further guarantee for their independence, members of the supervisory organs should be entitled to privileges and immunities, such as immunity from arrest and detention, inviolability of all papers and documents and immunity from legal process of every kind in respect of words spoken or written and other acts done by them in the discharge of their duties. These guarantees are set forth in sections of the Convention on the Privileges and Immunities of the United Nations relevant to experts on mission for the United Nations. Accordingly, the provision could read as follows.

ARTICLE 9

“The members of the supervisory organ shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.”

Article 10 Registry

In order to facilitate the process of dealing with administrative and related matters, the supervisory organ should also include a registry. The supervisory organ should be given the competence to decide on more detailed rules as regards the functions and organisation of such a registry. In that way, it could have the necessary degree of flexibility to adapt the registry to the needs of the effective functioning of



the organ without going through a lengthy process of treaty revision in case problems with regard to administrative matters arise. The provision could read as follows:

ARTICLE 10

“The supervisory organ shall have a registry, the functions and organisation of which shall be laid down in the rules of the organ.”

ARTICLE 11 EXPENSES

A reliable system of financing the supervisory organ will be crucial for its effective functioning. The supervisory organ could be financed entirely by the regular budget of the United Nations or the States Parties. Another option would be to distribute the financial burdens between the UN and States Parties. Given the financial constraints of the UN, which chronically suffers from non-compliance with financial obligations by its member States, a combination appears to be recommendable. This should not prevent the supervisory organ to accept voluntary contributions, provided they are unconditional. Further consideration should be given to link the amount of States Parties' contributions to their bruto national product so as not to overburden developing States.

The provision could read:

ARTICLE 11

“1. The expenditure on the supervisory organ shall be borne [by States Parties to the present instrument][the United Nations][jointly by the United Nations and States Parties to the present instrument]. This shall be without prejudice to voluntary contributions of international governmental or non-governmental organisations, States and legal or natural persons provided such contributions are not subject to any condition.

2. In allocating the financial burden of each State Party, due consideration shall be given to its bruto national product. Each State Party shall pay no more than [...] % of its bruto national product.”

Part III - Competence

Article 12 Competence *ratione materiae, personae and loci*

One of the central questions for the establishment of the supervisory organs is its competence *ratione materiae*. In that context, a number of issues appear to be particularly relevant.

First, the procedure envisaged is intended to give individuals a remedy in case a violation of their **rights** under international humanitarian law has occurred. This presupposes that international humanitarian law endows individuals with rights. Yet, in contrast to human rights conventions, international humanitarian law instruments, such as the Geneva Conventions and the two Additional Protocols, only exceptionally refer to “rights”, “entitlements” or “benefits”.⁴ Instead, they are commonly worded in a way which indicates that States (and exceptionally non-State entities) are the bearers of the rights and obligations. An example is Common Article 3 of the Four Geneva Conventions, which formulates rules “*each Party to the conflict shall be bound to apply*” as a

⁴ Examples of such (often indirect) references are Articles 7, Geneva (I) 6, 7 Geneva (II), 7, 14, 84, 105, 130 (Geneva III), 5, 7, 8, 27, 38, 80, 146, (Geneva IV), 44 (5), 45 (3), 75, 85 (4) Additional Prot. I (1977), 6 (2) Additional Protocol II (1977).



minimum rather than rights of individuals during armed conflicts of a non-international character. Yet, international humanitarian law goes “beyond the interstate levels and [... reaches] for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e. individuals and groups of individuals.”⁵ Even the titles of the four Geneva Conventions and the two Additional Protocols affirm that international humanitarian law aims first and foremost at the protection of individuals and groups of individuals. They clarify their purpose to be the “amelioration of the condition of the wounded and sick” (Conventions I and II), the “treatment of prisoners of war” (Convention III), the “protection of civilian persons” (Convention IV) and the “protection of victims” of international (Prot. I) and of Non-International Armed Conflicts (Prot. II).

International humanitarian law thus consists of both individual and State’s rights and it is necessary to identify the rules which are suitable for a conceptualisation as “humanitarian rights” to be invoked before the supervisory organ.

There are certainly some rather clear-cut examples, such as the mentioned provisions referring to entitlements, rights or benefits of protected persons.⁶ Other provisions, such as those containing the enumeration of grave breaches, can also easily 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 rights applicable in non-international armed conflicts, such as the right against violence to life, outrages upon personal dignity, humiliating and degrading treatment etc. derived from common Article 3 (1).

Some other rules of international humanitarian law give rise to more doubts. Article 58 of Additional Protocol I, for example, deals with precautions against the effects of attacks that States are obliged to take, such as to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. The provision could be construed as conferring individual rights to civilians not only to be removed from the vicinity of military objectives during an attack but also against military objectives being located within or near densely populated areas. The latter right would primarily have to be secured by taking measures during peacetime.⁷ The supervision of such rights should nevertheless equally fall into the competence of the supervisory organ. Rules of international humanitarian law applicable during armed conflict and those measures which States are obliged to take during peacetime are intrinsically linked. Taking the latter are the preconditions for the effective implementation of the former. Accordingly, if a State does not comply with such peacetime measures, individuals should be in a position to invoke such a breach before the supervisory organ, provided the rule could be construed as conferring individual humanitarian rights.

Article 15 of the First Geneva Convention is another provision which exemplifies possible difficulties in the determination whether a particular rule confers individual rights.⁸ The provision raises the question whether it not only confers individual rights to wounded and sick persons (and their relatives

⁵ Georges Abi-Saab, *The Specificities of Humanitarian Law*, in: Ch. Swinarski, ed.) *Studies and Essays of International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 265, 269; Theodor Meron, *The Humanization of Humanitarian Law*, *AJIL* (2000), 239, 246-247, 251-253.

⁶ *Supra*, note 4; Article 105 (1) Geneva III may serve as an example: “The prisoner of war shall be *entitled* to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these *rights* by the Detaining Power in due time before the trial.” (Emphasis added).

⁷ On implementation measures to be taken in peacetime, see Sassoli/Bouvier (eds.), *How Does Law Protect in War*, ICRC, Geneva (1999), pp. 222-223, with further references.

⁸ The provision reads: “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield. Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.”



in case of death) to have all measures be taken to search for and collect them, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled but *also* a further right to have armistices or a suspension of fire arranged or local arrangements made, whenever circumstances allow, with a view to permit their removal, exchange and transport.

Each particular rule must thus be analysed carefully when answering the question of whether it contains a humanitarian right. If the answer is in the affirmative, an individual complaint can arise. Yet, instead of incorporating an exclusive list of humanitarian rights into the draft instrument, their identification should be left to the supervisory organ. International humanitarian law develops at a considerable pace, as exemplified by the emergence of rules applicable in internal armed conflicts. Moreover, rules traditionally conceived as addressing exclusively States may expand to also confer rights to individuals. Such a process is also identifiable as a result of a growing cross-fertilisation between international humanitarian and human rights law.⁹ In order to allow for the necessary degree of flexibility and to enable the supervisory organ to take developments in international humanitarian law into account, the reference to the competence *ratione materiae* should therefore be worded in an open-ended manner.

Second, the question arises what **kind of violations** the supervisory organ should be competent to deal with. International humanitarian law differentiates between “serious” violations, such as grave breaches of the Geneva Conventions, and “non-serious” violations. Both sets of rights currently share the lack of the enforcement mechanisms which, in the human rights context, have proved to be the most efficiently and frequently used, namely individual complaints procedures. One exception is the use of such human rights enforcement mechanisms for corresponding human rights violations, such as violations of non-derogable human rights, e.g. torture, which then are investigated by the respective organs as human rights violations even though the tortured individual was the victim of a corresponding violations of international humanitarian law. However, humanitarian law includes guarantees to the benefit of the individual which, in the human rights context, are derogable rights¹⁰ or go beyond what is protected under human rights law. An example is the prohibition of imposing and carrying out the death penalty. While Article 6 (5) of the ICCPR only protects persons below the age of eighteen from imposing and pregnant women from the carrying out of the death penalty, Articles 100-101 (Geneva III), 68 and 75 (Geneva IV), 76(3) and 77(5) (AP I) and 6 (4) (APII) extend these protections to other persons. To rely on human rights complaints procedures would thus mean to exclude an important set of rights afforded under international humanitarian law.

A further exception is the application of international humanitarian law by human rights supervisory organs as was done for the first time by the Inter-American Commission in the Tablada-case despite the absence of an express competence to that effect.¹¹ Yet, even those bodies who consider themselves competent to apply international humanitarian law do so only in a limited way. The Inter-American Commission, for example, does not consider itself competent to assess the behaviour of armed opposition groups.¹²

The different legal regimes and fields of application of international humanitarian law and human rights law are a strong argument for the establishment of a separate complaints procedure. (See also

⁹ Theodor Meron, *The Humanization of Humanitarian Law*, supra note 5, pp. 247-256, 266-273.

¹⁰ See generally for the parallelism and divergence of norms of non-derogable human rights and international humanitarian law: Theodor Meron, *Human Rights in Internal Strife: Their International Protection*, Grotius Publ. (1987), pp. 23-26.

¹¹ *IACHR Report No. 55/97*, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997, and subsequent decisions; Liesbeth Zegveld, *The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case*, IRRC 324 (1 September 1998), pp. 505-511.

¹² Liesbeth Zegveld, *Armed Opposition Groups in International Law: The Quest for Accountability*, p. 100. para. 2, fn. 2 and accompanying text.



below: Article 14 Admissibility - submission to another procedure of international investigation or settlement)

Another problem is to invoke breaches of positive obligations, i.e. rules which oblige States to take steps necessary for the implementation. An example is the cornerstone of the Geneva Conventions and Additional Protocol I: the grave breaches regime. In order to prosecute grave breaches, States are under an obligation “to enact any legislation necessary to provide effective penal sanctions”. As the grave breaches system aims at the protection of individuals by penalising certain grave violations whereby it seeks to deter violations, non-implementation of “legislation necessary to provide effective penal sanctions” opens the way for perpetrators to commit grave breaches with impunity and consequently undermines the protection of potential victims. The question thus arises whether failure to enact legislation within a reasonable period of time or failure to enact *effective* penal sanctions (e.g. by providing for sentences which do not have a deterrent effect) should also be allowed to be invoked before the supervisory organ, for example while leaving the determination of what a reasonable period of time is to the supervisory organ, taking into consideration all circumstances, such as the process of enacting legislation (Does the State have a complicated and time-consuming procedure for the adoption of new legislation?); the political situation (A legislative body may have been suspended in preparation for new elections.); etc.

Third, the **notion of international humanitarian law** has to be identified. Traditionally, international humanitarian law is defined as the law applicable during armed conflict. However, developments since the Second World War have widened that notion to cover norms which are equally applicable during peacetime, such as the prohibition of genocide and crimes against humanity. In order to avoid a gap in protection where the threshold of traditional humanitarian norms (i.e. an armed conflict) is not reached or is disputed, international humanitarian law should be understood in a broader sense, including the mentioned prohibitions and also humanitarian minimum standards, such as those embodied in the Turku Declaration.¹³ This is one of the reasons why the proposed instrument should not be conceptualised as a (Third) Additional Protocol to the Geneva Conventions but instead as a free-standing treaty detached from any specific pre-existing instrument.

Moreover, it is crucial that the competence *ratione materiae* should extend to violations of international humanitarian law committed in conflicts of a non-international character. Present conflicts predominantly fall into this category and to confine the competence of the supervisory organ to international armed conflicts would thus deprive the majority of today’s victims of violations of international humanitarian law of an effective remedy.

Lastly, it has to be noted that other instruments also may provide for rights of individuals. For example, certain conventions relating to disarmament and arms control also may contain provisions which can equally be conceptualised as conferring rights to individuals. An example may be the prohibition of the use of chemical weapons as prohibited under the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction.¹⁴ Including these instruments into the non-exhaustive list of the supervisory organ’s competence *ratione materiae* would thus clarify matters.

Evidently, the supervisory organ’s competence *ratione materiae* with respect to individual States will be limited to the rules binding on the State(s) in question. Thus, for example, if a State Party to the instrument establishing the individual complaints procedure is not a party to Additional Protocol I, any potential individual rights derived from that convention could not be invoked before the supervisory organ against that State. This is notwithstanding any invocation of the rules embodied in the respective treaty which also represent customary law. However, the victim would then have to allege a violation of the customary norm. Such violations should be considered to be included in a general reference to “violations of the laws and customs of war”.

¹³ For minimum humanitarian standards see: Theodor Meron, *The Humanization of Humanitarian Law*, supra, note 5, pp. 273-275.

¹⁴ Article 1 (1)(b).



As to the competence *ratione personae*, it has to be determined **who has standing** before the supervisory organ. Clearly, individuals who claim to be victims of a violation of international humanitarian law (**direct victims**) should have standing and, in case the alleged violation leads to the death of the victim or to permanent incapacity to represent him/herself, the right to bring a complaint should automatically be transferred to the relatives and other dependants of the victim. Moreover, the notion of victims should be extended to cover any person who indirectly suffers prejudice as a result of a violation or who has a valid interest (**indirect victims**), as developed in the jurisprudence of existing human rights complaints mechanisms.¹⁵ Accordingly, dependants of deceased victims could bring a complaint both on behalf of the deceased for the latter's violated rights under international humanitarian law, as well as on their own behalf for their own injury resulting from the violation leading to the death.

In order to avoid gaps in the protection afforded under the complaints procedure, standing should not be confined to nationals or residents of States parties to the treaty establishing the complaints procedure. Instead, all individuals subject to a States Party's jurisdiction should be given standing, in line with existing human rights complaints instruments. (See also below: competence *ratione loci*)

Violations of international humanitarian law often involve a large number of potential complainants. Individuals should therefore also be allowed to **join** their **complaints** with respect to violations which occurred during a particular incident or in connection to a specific situation. For example, if the alleged violation is the bombardment of civilian objects during a particular attack, it should be possible that all complaints with respect to that bombardment can be joined and dealt with together. A problem in this respect is the question of what can be understood as "an incident". The bombardment could last several days or longer and could cease in between or the same undefended town could be attacked several times by different military units. Another example would be the unlawful confinement of civilians which, if committed over a long period of time, would raise the question of whether all civilians should be allowed to bring a joined complaint. In order to allow for the necessary degree of flexibility in the organisation of such proceedings, the determination as to what constitutes "an incident" or "a situation" should be left to the supervisory organ in order to render proceedings more effective and to avoid duplication of dealing with complaints.

A joined complaint must be distinguished from **complaints brought by groups** on their own behalf. For example, victims of genocide by definition belong to a national, ethnical, racial or religious group. Consequently, the question arises whether and how such a group should also be given standing before the supervisory organ in addition to the first three possibilities (direct and indirect individual complaints, joined complaints) which are also open for individual members of such groups. A group complaint has the advantage of allowing for the representation of the group as such. In that way, a broader picture could be drawn and, in the case of finding a violation, the victimisation of the group *qua* group is recognised. However, there are considerable problems with respect to the question of who is competent to represent the group in question. If, for example, an ethnic group in State A constitute the target of genocidal acts, there can be several organisations or individuals claiming to represent the interests of that group. A determination of whether that is actually the case would mean to ask the supervisory organ to perform a very sensitive task, namely legitimising certain group representatives and deligitimising others.

Another problem relates to affording just satisfaction in the context of group-complaints. If just satisfaction would be afforded to the group as such, instead of individual victims, it cannot be assured that those who suffered also benefit from the satisfaction. Moreover, if violations were not directed against the entire group but only against group members in a certain confined area, affording just satisfaction to the entire group would draw a false picture of victimisation. This runs counter to the very purpose of the proposed supervisory organ, which is to establish the truth and providing reparation to victims of violations. If one considers group complaints as desirable in general, the aspect of just satisfaction should thus be detached from the issue of standing. Just satisfaction should be afforded to individual victims alone.

¹⁵ Shelton, Remedies in International Human Rights Law, Oxford 1999, pp. 183-189.



In a similar way, **international governmental and non-governmental organisations** should be given standing. Victims of violations of international humanitarian law often do not have a voice and IGO's and NGO's then are the only ones in a position to speak up for them. Furthermore, such organisations frequently have attained a high degree of expertise and have developed effective means of fact-finding, including the documentation of violations of international humanitarian law. These resources should be used and IGO's and NGO's be allowed to bring complaints on behalf of victims in the form of an *actio popularis*, similar to the one foreseen in Article 44 of the Inter-American Convention on Human Rights. In order to avoid abuse, only those should be given standing who are legally recognised in one or more of the States Parties to the instrument. A similarly vital role could be envisaged for the **International Fact-Finding Commission (IFFC)** established under Article 90 of Additional Protocol I. The difficulty of giving the IFFC standing before the supervisory organ is that it would run counter to the confidential nature of its findings unless all the Parties to the conflict have requested the Commission to report them publicly.¹⁶ It therefore would most likely undermine the willingness of States to accept the competence of the IFFC. The role of the IFFC in the procedure of the supervisory organ should therefore be confined to aspects of fact-finding (see below). Moreover, NGO's are afforded certain rights under international humanitarian law, such as Article 63 of the Fourth Geneva Convention. It provides that "recognized National Red Cross (Red Crescent, Red Lion and Sun) Societies should be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions;" and forbids the Occupying Power to require any "changes in the personnel or structure of these societies, which would prejudice the aforesaid activities". NGO's should be given the right to invoke these rights before the supervisory organ *qua* NGO's. Just satisfaction, however, should only be afforded to them if they are the bearers of the rights they invoke. On the other hand, if the ICRC brought a complaint on behalf of an individual, for example alleging a grave breach against a prisoner of war, and the supervisory organ found that such a violation indeed occurred, just satisfaction should be afforded to the victim or, in case of death, his/her dependants and not to the ICRC.

The vital question must also be answered **against whom** a complaint can be brought. While international human rights law is addressed first and foremost to States, international humanitarian law is addressed to the parties to the conflict, which, depending on the nature of the conflict may be States and non-State actors.¹⁷

Given the fact that today's armed conflicts are predominantly of a non-international character, States as well as non-State actors, such as armed opposition groups, commit violations of international humanitarian law. Additionally, violations of international humanitarian law defined as broadly as above (including genocide, crimes against humanity and minimum humanitarian standards) may also involve groups with a lower degree of organisation than what is internationally required for a classification as non-international armed conflict in the meaning of Article 1 of Additional Protocol II, namely to be "organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" or in the meaning of common Article 3.

While complaints against a State and its agents (including armed opposition groups acting on behalf or with acquiescence of a State) fit into the traditional scheme of individual complaints procedures, individual complaints on the international level against non-state actors and groups acting on their own behalf are a novelty and raise a number of questions.

First, the responsibilities of the State and non-state actors have to be distinguished. The responsibility of the former extends to the obligation to prosecute violations of international humanitarian law of armed opposition groups.¹⁸ Individual complaints against non-prosecution of those acts could thus be directed against the State on whose territory the armed opposition group has acted, provided that the

¹⁶ Article 90 (5)(c) AP I.

¹⁷ Liesbeth Zegveld, *supra* note 12, pp. 17-18, para. 24.

¹⁸ *Ibid*, pp. 39-45.



State is exercising the degree of effective control required. On the other hand, armed opposition groups and other non-State entities also bear independent responsibilities under international humanitarian law, e. g. under common Article 3 and AP II and other rules of international humanitarian law.¹⁹ In case of violations of these responsibilities, the question thus arises if and how such non-State actors can be complained against.

The answer to that question depends on the group in question fulfilling certain criteria, which differ according to the specific rule of international humanitarian law invoked before the supervisory organ, namely common Article 3, AP II and other rules of international humanitarian law.

Although there exists no uniform set of criteria for the determination of whether or not a group is to be considered a “Party to the conflict” within the meaning of common Article 3, the provision has been interpreted by the ad-hoc tribunals and the Inter-American Commission as applying to “organized” armed groups capable of carrying out “protracted hostilities”.²⁰ Additional Protocol II, in contrast, requires a higher threshold and thus is of narrower application than common Article 3. The criteria under the former instrument are that the armed group in question control territory, carry out sustained and concerted military operations and be under responsible command.²¹ It can thus be distinguished from the requirements of common Article 3 by adding the element of territorial control of the group in question.²²

These requirements suggest that groups with a lower degree of organisation and lacking the capability of carrying out protracted hostilities as required under the lower threshold of common Article 3 cannot be complained against. Instead, the State on whose territory the alleged violations of international humanitarian law are committed is regarded the sole bearer of responsibility.

Second, due to their temporary nature (except from the case where the former armed opposition replaces the old government in case of which the conduct of the armed groups are considered as the conduct of the new State²³), a complaint might come before the supervisory organ which alleges a violation of an armed group which has ceased to exist in the meantime. In that case, complaining against such groups may be futile. Their successor organisations, such as political parties and – in the absence of the former – their (previous) organisational structure, consisting of groups and individuals, for example commanders and members of organs with decision-making powers as well as other individuals bearing responsibilities, could thus enter the stage as potential respondents.

Other problems are bound to occur in connection to the requirement that local remedies be exhausted (see below, Article 14).

As far as the competence *ratione loci* is concerned, the supervisory organ should not be confined to acts which occur in the territory of a State party. As indicated above, the competence should instead comprise the jurisdiction of the State Party so as to cover acts abroad. This is particularly relevant in the context of international armed conflicts, where violations of international humanitarian law often occur on the territory of the adverse party.

Lastly, the question arises whether the supervisory organ should be given the competence to initiate an investigation *proprio muto* on the basis of reliable information which appears to it to contain well-founded indications that violations of international humanitarian law are committed in the territory subject to its jurisdiction. The given difficulties with regard to access to the supervisory organ by victims and to areas where violations of international humanitarian law occur by non-governmental organisations, such a competence could further close gaps regarding information flow.

¹⁹ Ibid, pp. 103-131

²⁰ ICTY Appeals Chamber, Tadic Interlocutory Appeal on Jurisdiction, para. 70; Liesbeth Zegveld, *supra*, note 12, pp. 152-160.

²¹ Compare Article 1 (1) AP II; Liesbeth Zegveld, *supra*, note 12, pp. 160-165.

²² Ibid, p. 163, para. 75.

²³ Article 15 of the ILC Draft Articles on State Responsibility.



The relevant provision could therefore read as follows:

ARTICLE 12

“1. A State Party to the present [instrument] recognizes the competence of the [supervisory organ] to receive and consider communications from individuals, groups of individuals, groups or governmental or non-governmental organisations legally recognised in one or more States Parties, to lodge a complaint containing denunciations or complaints of violations of international humanitarian law committed in the territory subject to its jurisdiction, including, but not limited to:

- a. violations of the Four Geneva Conventions (1949) and Additional Protocol I thereto (1977);
- b. violations of the laws and customs of war applicable in international armed conflicts;
- c. violations of Article 3 common to the Four Geneva Conventions (1949) and Additional Protocol II thereto (1977);
- d. violations of the laws and customs of war applicable in internal armed conflicts;
- e. genocide;
- f. crimes against humanity;
- g. violations of minimum humanitarian standards;
- h. violations of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols;
- i. violations of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction;
- j. violations of the 1976 Convention on the prohibition of military or any hostile use of environmental modification techniques;
- k. violations of the 1980 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;
- l. violations of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries;
- m. violations of the 1993 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction;
- n. violations of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction;

provided the State Party concerned is bound by the rules invoked.

[2. A provision which imposes on State Parties a positive obligation can only be invoked after a reasonable period of time specified by the [supervisory organ] has lapsed.]

3. The supervisory organ may also initiate investigations *proprio muto* on the basis of reliable information which appears to it to contain well-founded indications that violations of international humanitarian law are committed in territory subject to a State Party’s jurisdiction.

Article 13 Competence *ratione temporis*

The competence *ratione temporis* of the supervisory organ should not be of a retroactive nature but should only cover acts which occurred after the ratification of the instrument.

The relevant provision could therefore read as follows:



ARTICLE 13

“The [supervisory organ] shall be competent to receive complaints only with respect to facts which occurred after the State party ratified the present treaty.”

PART IV - PROCEDURE

Article 14 Admissibility

The existing human rights mechanisms all apply similar admissibility criteria. For a complaint to be declared inadmissible, it must fall into one of the categories of anonymity, abuse of the right to complain, incompatibility with the provisions of the instrument, non-exhaustion of local remedies, or it must be manifestly ill-founded, unsubstantiated, not be submitted in time, or be substantially the same as a matter that has already been examined by the same or another supervisory organ.

Clearly, the criteria of anonymity, abuse, incompatibility, manifest ill foundedness, and unsubstantiated complaints can be transferred to the present context without significant problems. An anonymous complaint which does not reveal the identity of the victim would give rise to insurmountable problems. This should not be confused, however, with the possibility of complainants to request that their identity not be made public, which can be crucial for the complainant's protection. Likewise, if applicants file multiple complaints which have no foundation or if they use insulting, provocative or threatening language, the supervisory organ should have the possibility to declare those inadmissible as abusive in order to avoid unnecessary work and to be able to fulfil its real functions. The notion of incompatibility relates to the competence of the supervisory organ and would serve as a tool to filter out complaints which fall outside the ambit of the organ's competence *ratione materiae, personae, loci* and *temporis*. A complaint should be declared inadmissible as manifestly ill-founded if the supervisory organ decides that it is unmeritorious or that no *prima facie* violation of international humanitarian law has occurred.

The applicability of the admissibility criteria of exhausting local remedies, non-submission in time and non-examination by another supervisory organ, on the other hand, raises several questions.

As to the **exhaustion of local remedies**, one should bear in mind that violations of international humanitarian law regularly occur in the context of an armed conflict. Armed conflicts, especially those of a non-international character which represent the large majority of today's conflicts, frequently entail the partial or complete breaking down of public order in part of or in the entire territory. Moreover, the right to a remedy as guaranteed by human rights conventions does not fall into the category of non-derogable rights,²⁴ with the consequence that States may choose to restrict the right to a remedy in such times of public emergencies. In the words of the European Court of Human Rights, in a situation of significant civil strife such as the one between Turkey and the PKK in South-East Turkey “it must be recognised that there may be obstacles to the proper functioning of the system of the administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile and the administrative inquiries on which such remedies depend may be prevented from taking place.”²⁵ Accordingly, a traditional approach to the requirement that local remedies be exhausted before a case can be admissible before the supervisory organ appears to be both unrealistic and counterproductive in the light of the organ's purpose to provide a remedy for violations of international humanitarian law. Instead, the initial burden should be upon the respondent to show

²⁴ Compare Articles 2 (3) in conjunction with 4 of the ICCPR.

²⁵ European Court of Human Rights, *Akdivar and Others v. Turkey*, case No. 99/1995/605/693, judgment of 30 August 1996, at para. 69.



that there are remedies available which the applicant could be reasonably expected to exhaust. In making the assessment, the supervisory organ should take into account all relevant factors of the case. Moreover, the reversion of the burden of proof with respect to the exhaustion of local remedies is particularly relevant given the fact that contemporary armed conflicts are predominantly of a non-international character, in which at least one of the parties is a non-State entity with often even more limited possibilities of providing effective remedies. The most extreme example of that problem is the case of failed States in which a central governmental authority has ceased to exist and remedies must thus be presumed to be absent. In these situations, the lack of territorial control or the absence of a government temporarily removes the State's accountability without relieving the non-State actors, such as armed opposition groups, from their responsibilities under international humanitarian law.²⁶ Yet, as already indicated, these latter groups have very limited means at their disposal to provide for effective remedies. In fact, it will most probably be a rare exception that a situation arises in the course of an internal armed conflict in which non-State actors are in a position to provide effective remedies for violations of international humanitarian law.

Another problem relates to remedies against alleged crimes against humanity or acts of genocide. As part of a plan or policy directed against the civilian population or specific groups, often with involvement or acquiescence of State authorities, the risk of ineffective remedies is inherent to their occurrence. Where an administrative practice consisting of violations of international humanitarian law is officially tolerated by the authorities, there is a strong presumption that local remedies are futile or ineffective.

Thus, instead of emphasizing the subsidiary character of the supervisory organ, as is done in the individual complaints mechanisms in the field of human rights, the initial burden of proof should be shifted upon the respondent to prove that there is an effective remedy available in theory and in practice at the relevant time, i.e. that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.

Accordingly, the supervisory organ would become a mechanism of first resort unless the respondent State or group can establish that local remedies are available and that they are effective and sufficient to afford redress in respect of the breaches alleged.

As far as declaring an application inadmissible because it has **not being submitted in time**, human rights treaties providing for individual complaints procedures typically include the criteria that applications are inadmissible if they are submitted after the lapse of a certain period of time counted from the date on which the final decision was taken in the course of exhausting domestic remedies.²⁷ Some of the human rights instruments include rather strict time periods, such as the European Convention which gives applicants no more than six months. Others, in contrast, provide for a considerable degree of flexibility, such as the African Charter, which merely refers to a "reasonable period".

As indicated above, the time period cannot be connected to the exhaustion of local remedies as the rule will be that these will be ineffective or absent. Thus, the occurrence of the violation should be the point of reference for the determination whether the submission of the complaint took place within a reasonable period of time. In determining what is "reasonable", the organ should be given the necessary flexibility to take into account the environment in which violations of international humanitarian law occur. Remedies are often absent (see above: exhaustion of local remedies) and victims of violations of international humanitarian law often do not have the means at their disposal to communicate freely and bring violations to the attention of the supervisory organ or others who could do so on their behalf. If, for example, prisoners of war are confined in denial of their right to communication, access of humanitarian organisations etc., their fate is likely to come to light only after their release which may be only after a considerable period of time has lapsed. For these reasons, the supervisory organ should apply the flexible notion of "reasonable time" instead of a strict time-period.

²⁶ Liesbeth Zegveld, *supra* note 12, pp. 58-59, paras. 45-46.

²⁷ Compare Articles 35 (1) of the European Convention on Human Rights as amended by the 11th Protocol; 56 (6) African Charter; ...



On the other hand, in the case local remedies proved to be effective and have been exhausted, submission should be required as speedily as possible. A strict time limit for the case local remedies have been exhausted would thus be recommendable.

As far as declaring an application inadmissible because it is **substantially the same** as a matter that has already been examined by the same or another supervisory organ, several aspects deserve to be mentioned.

First, as to examination by the same organ, this should not preclude complaints to be brought arising out of the same “incident” but by different complainants, nor the bringing of complaints regarding the same “incident” after new facts came to light. It is thus submitted that the notion of “substantially the same” must be understood as including the same claim concerning the same individual.²⁸

Moreover, in order to be substantially the same, the other supervisory organ must also allow for individual complaints as opposed to cases which have been brought before an organ by States, such as the ICJ or other dispute settlement mechanisms and procedures which are concerned with the examination of “situations” rather than individual complaints, such as the *ECOSOC-Resolution-1503-procedure* of the UN Human Rights Commission.²⁹

As far as substantial identity is concerned, the question arises whether the use of human rights mechanisms would and should preclude the recourse to the supervisory organ. As mentioned earlier, the former in the first instance apply human rights, thus operating within a different legal framework. However, protection may overlap as regards the substance of the rights concerned, namely as regards complaints against violations of non-derogable rights. On the other hand, human rights mechanisms cannot afford protection for a considerable number of rights under international humanitarian law. It follows that for these rights, recourse to the supervisory organ should not be precluded even though other violations of non-derogable rights of the same individual and arising out of the same incident have been or are being examined by another individual complaints procedure. However, in order to avoid duplication of work by processing the complaints before two separate organs, the supervisory organ should be called upon to adopt rules of procedure which allow for the coordination of tasks between the various individual complaints procedures. These rules could include the possibility of transferral of cases to and from the supervisory organ.

The relevant provision could therefore read as follows:

ARTICLE 14

“1. The [supervisory organ] shall declare inadmissible all cases which are:

- a) anonymous
- b) abusive of the right of application,
- c) incompatible with the provisions of the present [instrument],
- d) manifestly ill-founded, or
- e) unsubstantiated.

2. The [supervisory organ] shall not declare inadmissible any case on the ground that not all domestic remedies have been exhausted, except in the case where the respondent [entity][State or group] can show that an effective remedy is available at the relevant time. In making such a determination, the [supervisory organ] shall have regard to all relevant circumstances of the case, inter alia, the accessibility of remedies, its capability of providing

²⁸ Human Rights Committee, see e.g. Communication No. 75/1980, V.O. v. Norway, cited in McGoldrick, *The Human Rights Committee*, Oxford 1991, pp. 182-183, notes 606-609 and accompanying text.

²⁹ This is in conformity with the application of this admissibility criterion by international individual complaints mechanisms. See for the Human Rights Committee: McGoldrick, pp. 182-187, para. 4.91.



redress in respect of the applicant's complaints and whether it offers reasonable prospects of success.

3. The [supervisory organ] shall also declare inadmissible all cases which are not submitted within a reasonable time after the occurrence of the alleged violation. In case local remedies are effective, the time period shall be six months from the date on which the final decision was taken in the course of exhausting domestic remedies.

4. The [supervisory organ] shall also declare inadmissible all cases which are being or have been examined under another procedure of international investigation or settlement. It shall adopt rules of procedure to coordinate its work with that of other individual complaints procedures with a view to afford the widest protection and avoid duplication of work, including the adoption of adequate transferral procedures for cases in which efficiency and consistency so warrants.

Article 15 Fact-Finding

As already indicated (see above Article 12), the International Fact-Finding Commission has a valuable role to play in establishing the facts in a given situation.³⁰ However, some issues require analysis.

First, the competence of the IFFC has to be specifically recognised *ipso facto*³¹ by States or requested by one of the parties to the conflict³² and is limited by reciprocity or mutual acceptance³³. The optional clause under Article 90 (2)(a), however, has not been recognised by many States.³⁴ The question thus arises what to do when the parties to the conflict have neither recognized the optional clause nor requested the Commission to institute an enquiry. In these cases, one possibility would be to assign a similar role to a small panel of the supervisory organ's members. In that way, the coordination of the two organs could be directed towards avoiding duplication of work as far as possible and the fact-finding competence of the two organs would be complementary (complementary fact-finding). Another possibility would be to go beyond the current framework of AP I and assign the fact-finding competence to the IFFC under the instrument independently of whether States have accepted its competence under the Protocol (exclusive and general fact-finding by the IFFC). This would thus establish the IFFC as *the* fact-finding institution for alleged violations of international humanitarian law. Besides avoiding different approaches to (and consequently possible outcomes of) fact-finding by two different organs, such a structure could also serve as an incentive of States parties which are parties to both instruments to accept the competence of the IFFC according to Article 90 (2) AP I.

Second, the IFFC has no competence in non-international armed conflicts. Depending on the answer to the aforementioned question (complementary fact-finding or exclusive and general competence of the IFFC), establishing the facts under these circumstances would thus be left entirely to the supervisory organ or the IFFC's competence would have to be broadened.

Third, the IFFC is bound to confidentiality when reporting its findings, unless all the Parties to the conflict have decided otherwise.³⁵ Such confidentiality runs counter to the public nature of hearings and access to documents (see below, Article 16). In order to preserve the integrity of the fact-finding process under AP I, presentations of the IFFC before the supervisory organ should nevertheless not be

³⁰ For an overview see: Dieter Fleck, Die International Ermittlungskommission: Probleme und Perspektiven einer neuen Einrichtung des Humanitären Völkerrechts, in: Schöttler/Hoffmann, Die Genfer Zusatzprotokolle – Kommentare und Analysen, Bonn (1993), pp. 252-262.

³¹ Article 90 (2)(a).

³² Article 90 (2)(d).

³³ Article 90 (2)(a): “[...] in relation to any other High Contracting Party *accepting the same obligation*, [...]” (emphasis added); Article 90 (2)(d): “[...] only with the consent of the other Party or Parties concerned [...]”

³⁴ Currently, some 57 States have recognised the competence.

³⁵ Article 90 (5)(c).



public. Likewise, access to the documents supplied by the IFFC should be denied unless the parties to the conflict agree otherwise. However, the denunciation of violations of international humanitarian law is one of the important aims of the supervisory organ, as exposing them creates considerable embarrassment for the violator(s) and might thus contribute to the prevention of future violations. Exposing violations also acknowledges the suffering of the victims. In case the supervisory organ has found a violation, the facts as presented by the IFFC should thus be integrated into the publicly available judgment/decision of the supervisory organ.

The relevant provision could therefore read as follows:

ARTICLE 15

“1. [The International Fact-Finding Commission shall enquire into any facts alleged to constitute violations of international humanitarian law within the meaning of the present instrument.] [The International Fact-Finding Commission shall enquire into any facts alleged to constitute violations of international humanitarian law within its competence according to Article 90 of the 1977 Additional Protocol. In other cases, the [supervisory organ] shall establish a panel of [three][five] of its members to enquire into any facts alleged to constitute violations of international humanitarian law within the meaning of the present instrument.]
2. Oral and written submissions of and submission of documents by the International Fact-Finding Commission to the supervisory organ shall be confidential. This is without prejudice to the inclusion of the facts presented by the International Fact-Finding Commission into a [judgment][decision] in case a violation has occurred.”

Article 16 Public hearings and access to documents

Notwithstanding the confidential aspects of fact-finding, proceedings should generally be public and documents accessible to the public, including pleadings. In fact, transparency and publicity of the proceedings before the supervisory organ will be pivotal to its aim, which is to expose violations and provide victims with an effective remedy. The public nature of hearings is also recognised under and required by international human rights law.³⁶ Exceptions should be allowed to the extent strictly necessary where publicity would prejudice the interests of the complainants or the respondent to an unacceptable degree. However, the decision whether or not that threshold has been satisfied should be left to the supervisory organ.

The relevant provision could therefore read:

ARTICLE 16

“1. Without prejudice to the preceding provision, proceedings before the supervisory organ shall be public. All documents shall be made publicly available.
2. The Press and the public may be excluded from all or part of the proceedings to the extent strictly necessary when publicity would prejudice the interests of the parties concerned to an intolerable degree in the opinion of the [supervisory organ].”

Article 17 [Judgments][Decisions] of the supervisory organ

As the most universal expert body, the supervisory organ should be considered the final arbiter in questions of individual complaints against violations of international humanitarian law. Judgments or

³⁶ Article 14 (1) ICCPR states that “[i]n the determination of [...] his rights and obligations in a suit at law, everyone shall be entitled to a fair and *public* hearing by a competent, independent and impartial tribunal established by law. ...” (emphasis added).



decisions should therefore be final and not be subject to any appeal to another authority. Moreover, its judgments or decisions should be published.

The relevant provision could therefore read as follows:

ARTICLE 17

“The [judgments] [decisions] of the [supervisory organ] shall be final and be published.”

Article 18 Binding force and execution of [Judgments][Decisions]

Judgments or decisions of the supervisory organ should be binding, i.e. they should impose a legal obligation on the respondent to comply. Since complaints can be brought against States but also against groups which fulfil the necessary requirements under international humanitarian law and other respondents (see supra: Article 12), the relevant provision should clarify that such respondents are equally bound by the judgment or decision of the supervisory organ. This would not alter their status under international law but merely reaffirm their separate responsibilities. The relevant nexus for the competence of the supervisory organ is that the armed opposition group operate on the territory of a State Party, because armed opposition groups and other respondents derive their obligations through the state on whose territory they operate.³⁷

One central problem will certainly be the execution of the judgment or decision of the supervisory organ against States and such non-state respondents. The supervision of the execution will be the task of the Assembly of States (see below Article 23) and the supervisory organ in cooperation with States and international organisations. It has to be noted that, as confirmed by the jurisprudence of the existing human rights supervisory mechanisms, judgments and decisions should leave to the State the initial choice of means to be utilised in its domestic system for performance of its obligations flowing from the judgment or decision.³⁸ However, the supervisory organ should be allowed to indicate a limited period for the execution of the judgment or decision in case the judgment or decision is not executed with immediate effect. Upon expiry or prior to it, the respondent should then report to the supervisory organ and the Assembly of States whether and what measures the respondent has taken. The supervisory organ should assess their adequacy and, provided the judgment or decision have not been complied with in full, should be allowed to make consequential orders specifying concrete measures to be taken by the respondent in a specified period of time. Upon expiry of that second period and after the respondent has also reported on the execution of these consequential orders to the supervisory organ and the Assembly of States, the supervisory organ should again assess the performance of the respondent and, if a further instance of non-compliance is found, should call upon the Assembly of States and other appropriate international and regional organisations to adopt measures to enforce compliance. Such measures could include imposing arms embargoes and other acts of retorsion.³⁹

It thus becomes apparent that the Assembly of States will share the supervision with the supervisory organ. Since the former organ will consist of permanent representatives of States Parties, it will be a political body. Such a body, if concerned with the question whether acts are sufficient to comply with the terms of a supervisory organ's judgment or decision, would be required to make (quasi-) judicial assessments for which the supervisory organ is the more suitable body. The supervisory organ should thus be given a role in the supervision of the execution of judgments or decisions and the different tasks of the Assembly and the Organ divided along their competences as (quasi-) judicial or executive bodies. Accordingly, the assessment of compliance would be left to the supervisory organ while the decision on and implementation of concrete measures in response to non-compliance would be left to

³⁷ Liesbeth Zegveld, supra note 12, pp. 108-110, paras. 11, fn. 27 and accompanying text, para. 14, pp. 118-119, paras. 20-21.

³⁸ Compare the jurisprudence of the European Court of Human Rights since *Marckx v. Belgium*, A 31 (1979), para. 58.

³⁹ See Karl Josef Partsch, *Retorsion*, in: *EPIL* 9 (1986), pp. 335-336.



the Assembly of States. The Assembly of States' supervisory role in connection to the execution of such consequential orders would thus be confined to purely executive aspects.

As regards co-operation, it should be borne in mind that several international and regional organisations have competences in or related to violations of international humanitarian law. The existing mechanisms should therefore be used and strengthened where possible. For instance, violations of international humanitarian law can be qualified as constituting a breach of or threat to international peace and security, falling into the competence of the UN Security Council. In these cases, it should be possible for the supervisory organ to seek the assistance of the UN Security Council in order to supervise its judgments or decisions. Likewise, international observer missions deployed in situations of armed conflicts can provide a valuable source of information in order to assess whether the judgment or decision is indeed executed with by the respondents. Furthermore, individual States might be in the position to further enhance compliance with the judgment or decision. This might be the case where a State serves as protecting power in a given conflict, or, due to its geographical location, is in a position to contribute to the effective execution of a judgment or decision.

The relevant provision could read:

ARTICLE 18

“1. The High Contracting Parties and other respondents to communications according to Article 12 operating on territory subject to their jurisdiction undertake to abide by the final [judgment][decision] of the [supervisory organ] in any case to which they are parties. [Judgments][Decisions] shall have immediate effect unless otherwise specified by the [supervisory organ].

2. The final [judgment][decision] of the [supervisory organ] shall be transmitted to the Assembly of States, which, together with the [supervisory organ] shall supervise its execution. The following procedure shall apply in case the [judgment][decision] is not executed with immediate effect:

- a. The [supervisory organ] organ shall be competent to specify a limited period of time for the execution of the [judgment][decision]. Upon expiry or prior to it, the respondent State or entity shall report to the [supervisory organ] and the Assembly of States on measures taken to comply with the [judgment][decision]. The [supervisory organ] shall assess such measures.
- b. Provided the [judgment][decision] has not been complied with in full, the [supervisory organ] shall be competent to make consequential orders specifying measures to be taken by the respondent in a specified period of time. Upon expiry of that period and after the respondent has reported on the execution of these consequential orders to the [supervisory organ] and the Assembly of States, the former shall assess the performance of the respondent. If the respondent continues not to comply, the [supervisory organ] shall call upon the Assembly of States to adopt measures to enforce compliance. Where appropriate, the Assembly of States shall seek the co-operation of States Parties, third States and appropriate international and regional organisations, including the UN Security Council.”



Article 19 Reparation and Provisional Measures

The supervisory organ should also be competent to afford reparations. Reparations consist of measures which 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 deterring them.⁴⁰ One can broadly distinguish between restitution, compensation, rehabilitation and satisfaction. Restitution aims at re-establishing the situation for the victim prior to the wrongful acts.⁴¹ In contrast to the latter's *ex ante* perspective, compensation seeks to economically assess damage resulting from the wrongful act and to afford an amount of money to the victim or his/her relatives.⁴² Rehabilitation includes legal, medical, psychological and other care and services aimed at restoring the dignity and reputation of the victims.⁴³ The last form of reparation is satisfaction and guarantees of non-repetition which can include measures ranging from an apology to humanitarian law training of all sectors of society.⁴⁴

The supervisory organ should be competent to afford reparation in these various forms. In order to enhance the effective implementation of compensation afforded by the supervisory organ, that part of a judgment that stipulates compensatory damages should be executed in the country concerned in accordance with domestic procedure. Such an approach is derived from the relevant provisions of the Inter-American Convention on Human Rights.⁴⁵

In order to avoid irreparable damage to persons in cases of extreme gravity and urgency, the supervisory organ should also be allowed to adopt such provisional measures as it deems relevant in matters it has under consideration.

The relevant provision could therefore read as follows:

Article 19

“1. If the [supervisory organ] finds that there has been a violation, the [supervisory organ] shall rule that the injured party be ensured the enjoyment of his right that was violated and the situation prior to the violation re-established. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right are remedied, that fair compensation is paid to the injured party, that victims be rehabilitated and satisfaction and guarantees of non-repetition be given.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure.

3. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the [supervisory organ] shall adopt such provisional measures as it deems pertinent in matters it has under consideration.”

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 Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, at para. 137, Proposed Basic Principle 3.

⁴¹ Ibid., Proposed Basic Principle 8.

⁴² Ibid., Proposed Basic Principle 9.

⁴³ Ibid., Proposed Basic Principle 10.

⁴⁴ Ibid., Proposed Basic Principle 11.

⁴⁵ Cf. Articles 63, 68 IACHR.



Article 20 Advisory opinions, preliminary rulings and general comments

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Some of the existing human rights supervisory organs also are competent to give advisory opinions.⁴⁶ However, the instrument should clarify that such competence is without prejudice to the consideration of contentious cases through the individual complaints procedure according to Article 12, which is envisaged to be the primary task of the supervisory organ. Comparable to existing procedures, which allow for the request of advisory opinions, their subject should be limited to legal questions concerning the interpretation of Article 12 of the instrument. Advisory opinions should be open to a variety of entities, such as the Assembly of States and individual States, incl. their national courts and parliaments, armed opposition groups and other entities, namely impartial humanitarian non-governmental organisations, such as the ICRC.

Preliminary rulings, on the other hand, serve a different purpose. Instead of answering a question into the abstract, they open the way to the supervisory organ for national courts and tribunals of States Parties where they are confronted with a question relating to a specific violation of international humanitarian law. In that case, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the supervisory organ to give a ruling thereon. Such a case could arise if individuals would assert in national courts that an international humanitarian right had been violated. The national court could then request a preliminary ruling from the supervisory organ. Such a procedure, derived from the preliminary ruling procedure under Article 234 (ex Article 177) EC Treaty, could serve as a useful tool to enhance the dialogue between the supervisory organ and national enforcement mechanisms, thereby contributing to a more uniform application of international humanitarian law. Preliminary rulings would also be a valuable incentive for national enforcement, since national courts would be allowed to seek guidance in the field of international humanitarian law in which they usually lack the necessary expertise. Gradually attaining and developing their knowledge through such a process would make national enforcement mechanisms in cases of violations of international humanitarian law more effective.

Lastly, the supervisory organ should also be competent to take the initiative and make statements on matters related to its competence in the form of general comments. Such a competence is inspired by comparable competences of the Human Rights Committee and the Committee against Torture. In that way, the supervisory organ could respond to more general trends and problems. If, for example, the question of armed conflicts over natural resources – and violations of international humanitarian law committed in the course of such conflicts - is one of the likely future scenarios but has not been raised through other procedures before the supervisory organ, the latter should nevertheless have the possibility to address these issues. Giving the right to initiative to the supervisory organ would enhance its preventive potential in as much as it would be allowed to point at developments which have not yet led to violations but which are likely to do so in the future.

The relevant provision could read:

ARTICLE 20

“1. The [supervisory organ] may, at the request of the Assembly of States, individual States Parties and their organs, armed opposition groups, and governmental and non-governmental organisations, give advisory opinions on legal questions concerning the interpretation of Article 12 of the present instrument.

2. Such opinions shall not deal with any question relating to a communication according to Article 12 of the present instrument, or with any other question which the [supervisory organ] might have to consider in consequence of any such proceedings.

3. Decisions of the Assembly of States to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit in the Assembly of States.

4. Where a question relating to a violation of international humanitarian law is raised before any court or tribunal of a State Party, that court or tribunal may, if it considers that a decision

⁴⁶ Cf. Second Protocol to the European Convention and Article 47 of the Convention as amended by that Protocol; Article 64 of the Inter-American Convention on Human Rights.



on the question is necessary to enable it to give judgment, request the supervisory organ to give a preliminary ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a State Party against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the [supervisory organ].

5. The [supervisory organ] shall decide whether a request submitted for an advisory opinion or a preliminary ruling is within its competence.

6. In addition, the [supervisory organ] may give general comments on matters related to its competence on its own initiative.”

Article 21 Reasons for [Judgments][Decisions], advisory opinions, preliminary rulings and general comments

One of the principles that should guide the supervisory organ is transparency. Consequently, the supervisory organ should give reasons for its judgments or decisions, advisory opinions, preliminary rulings and general comments. However, members should be allowed to attach dissenting or separate opinions in case the judgment or decision, advisory opinion, preliminary ruling and general comment does not represent their opinion in whole or in part.

The relevant provision could read as follows:

ARTICLE 21

“1. Reasons shall be given for the [judgment][decision], advisory opinion, preliminary ruling and general comment of the [supervisory organ].

2. If the [judgment][decision], advisory opinion, preliminary ruling or general comment does not represent in whole or in part the unanimous opinion of the members, any member shall be entitled to have his dissenting or separate opinion attached to the [judgment][decision], recommendation or advisory opinion.”

Part V - Final Provisions

Article 22 - Assembly of States

The Assembly of States is the executive organ established under the present instrument. Like the supervisory organ, it should be a permanent institution and consist of permanent representatives of States Parties. The functions of the Assembly of States will be

- the election of members in accordance with Article 4
- voting the budget in accordance with Article 11
- the supervision of execution of judgments or decisions in accordance with Article 18

Decisions should be taken by simple majority unless otherwise stipulated in the instrument.

ARTICLE 22

“1. The Assembly of States is the executive organ of the [supervisory organ] and shall have such functions as provided for in the present instrument.

2. Each member shall be entitled to one permanent representative in the Assembly of States, and each representative shall be entitled to one vote.

3. Unless otherwise provided, decisions of the [supervisory organ] shall be taken by the majority of the States Parties present and voting, while two thirds of the Assembly of States shall constitute a quorum.”



Article 23 Denunciation

Rules on the denunciation of the instrument should take into consideration its particularities as procedure for violations of international humanitarian law. The relevant provision should be modelled on relevant rules of international humanitarian law⁴⁷ with the consequence that States should not be allowed to denounce the instrument during an armed conflict or during times in which rules of international humanitarian law remain applicable, such as occupation. Denunciation should therefore not take effect until such occupation or other operations connected with the release, repatriation or re-establishment of persons protected by international humanitarian law have been terminated.

Like other individual complaints procedures, the denunciation of the instrument should also not release the State concerned from its obligations in respect of alleged violations of international humanitarian law performed before the date at which the denunciation becomes effective.⁴⁸

The relevant article could read:

ARTICLE 23

1. A State Party may denounce the present instrument only after the expiry of [...] years from the date on which it became a party to it and after [one year] notice contained in a notification addressed to the Secretary General of the United Nations, who shall inform the Assembly of States. If, however, on the expiry of that period the denouncing Party is engaged in an armed conflict or is occupied, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the release, repatriation or re-establishment of persons protected by international humanitarian law have been terminated.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from its obligations under this instrument in respect of any act which, being capable of constituting a violation of international humanitarian law, may have been performed by it before the date at which the denunciation became effective.”

⁴⁷ Cf. Article 99 AP I.

⁴⁸ Cf. Article 58 ECHR.