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**The Role of Individuals  
in International Humanitarian Law  
and Challenges for States in Its  
Development**

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**A** CENTURY AGO, ADMIRAL CHARLES H. STOCKTON prepared a U.S. Naval War Code which was approved by President McKinley in June 1900 but was revoked four years later after certain concerns were expressed by foreign governments. While it appears that the episode would deserve a historical study evaluating the significance of this particular code both for training Navy officers at the time and for later similar efforts, the more general question of the role of individuals in international humanitarian law appears worth being reflected upon in a study honoring Charles Stockton. What is the role of individuals in international law? To what extent are individuals bearers of international legal rights and obligations? What is their role as actors in the progressive development of that law?

Not surprisingly, different answers to these complex questions have been considered over time, and they remain rather controversial. As Karl Josef Partsch concluded in 1985, it is difficult to formulate a thesis in this respect

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which both reflects a general consensus among writers and conforms with State practice. He also expressed doubts whether the increased concern for the protection of human rights during the last decades has led to a transformation of the legal position of the individual.<sup>1</sup> Indeed, the central role of States as sovereign subjects of international law has not changed very much throughout this century. But political efforts to ensure protection of the individual and the non-governmental, as well as governmental, international organizations working to this end have gained considerable influence. It is significant that practical aspects in the wider field of human rights and public opinion in many quarters have increasingly challenged more traditional views of international law as a whole, thus underlining the rights of individuals which all States must respect and protect.

The aims of this study are to describe the role of the individual in the ongoing evolution of international humanitarian law as a result of both factual and policy developments, assess certain deficiencies of existing conventional law, and develop various methodological considerations regarding international law-making for military operations. Conclusions to be drawn from these thoughts may affect the work of policy makers, legal practitioners, and academic lawyers alike.

### **Evolution of International Humanitarian Law**

Rights and obligations of individuals vis-à-vis their government have been postulated since long before our present age. The specific question of whether the Sovereign has an international obligation to observe the ordinary laws of war even toward rebellious subjects who openly take up arms against him had already surfaced by the eighteenth century.<sup>2</sup> Individuals were not seen as *subjects* of international law, a role that has been reserved for States since early times. But characterizing human beings as pure *objects* of international law has never been a convincing conclusion either. The subject-object dichotomy appears hardly appropriate in an area where legal protection of individuals is of topical importance.<sup>3</sup>

The rapid factual development during the present century has added additional arguments: national sovereignty is challenged today by the end of the Cold War, failed processes of modernization, and still-existing burdens inherited from colonialism. There is, indeed, a need for global response to existing security risks. Acts of terrorism, drug abuse, problems of migration, and environmental protection require combined efforts which States today cannot successfully perform except in cooperation with other States,

international organizations, and even individuals. Challenged to deal with security matters in a broader sense, States and societies are called upon to make new efforts in order to overcome practical inabilities in the implementation of shared principles. New ideas, attitudes, and resources have to be developed jointly to ensure economic well-being and to meet environmental risks. The challenges of our present information age require long-term attitudes based on technological skills not always available within existing State establishments, thus calling for increased cooperation between government agencies, private companies, and individuals.

A distinct international interest on the part of national parliaments in a growing number of democratic States today very significantly affects effort taken on a global scale. Widely shared political concerns (in some States even constitutional constraints) are relevant for parliamentary decision-making regarding the use of military power. But there is also an increasing role for human rights considerations, in calling for responsible action towards gross violations in other States. National parliaments are increasingly involved in international relations. They pass legislation regulating the sending of their military forces abroad and the long-term or short-term stationing of foreign forces on their own territory. Members of national parliaments participate in international conferences and are important interlocutors for official visitors from foreign States. Parliamentary debates are often used to articulate a political interest in developments within other countries.

Human rights violations are typical fields of legitimate interference in matters of general concern which today cannot be left to the domestic jurisdiction of a particular State. State sovereignty at the end of this century is no longer the same as it was at its beginning. These trends also reveal evolving restraints in State immunity law, restraints which deserve thorough evaluation from both national and international legal perspectives.

The present evolution of humanitarian law may be described as an evolution of terms. The term *armed conflict*, which for a long time was not considered very different from a war between States (whether formerly declared or factually started), has now more or less evolved in meaning vis-à-vis its international character. By far, most armed conflicts today are non-international. Very much to be deplored, this development has not led to a decrease in cruelty on the battlefield. The extent of suffering in non-international armed conflicts calls for an international response. The term *humanitarian protection* has undergone a similar development. It was first used to indicate protection granted by States, on issues limited by strict adherence to the principle of non-interference in the political affairs of other States. But there is hardly any objection today to

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application of this term in a broader sense, including the right to intervene for humanitarian purposes against policy positions taken by other States. It also encompasses the activities of non-governmental organizations (NGOs), and even individuals, to ensure and strengthen human rights protection. This change inevitably leads to a new notion of *international law*, which is no longer confined to the conduct of States in their mutual relationships but now extends to individual human rights and to the global commitments of States not only to respect but also to ensure respect for the protection of victims of human rights violations.

In 1899 and 1907 the Hague Peace Conferences took decisive steps, first by incorporating the obligation to issue instructions to the armed forces on the laws and customs of war on land (Article 1 of Hague Convention IV), and later by providing that a belligerent party which violates these regulations shall be responsible for all acts committed by its armed forces and liable to pay compensation (Article 3 of Hague Convention IV).

After World War I there were but weak attempts to develop individual criminal responsibility under international law.<sup>4</sup> However, individual rights were stressed and developed in various domains. The concept of the protection of minorities, provided for in several peace treaties and special conventions connected therewith, generated a new attitude of conflict management in certain States which had either gained their independence or whose territory was otherwise affected by the results of the war. Although the great powers effectively rejected any effort to extend this protection to minorities in other States, the underlying legal principles influenced the Declaration on the International Rights of Man adopted by the Institut de Droit International in 1929.<sup>5</sup> The concept of self-determination, developed by President Woodrow Wilson, constituted the basis for the protection of non-self-governing territories under the League of Nations mandate system. For the first time, the protection of refugees under international law was implemented in a multinational framework. Last, but not least, the Geneva Conventions of 1929 considerably improved the condition of the wounded and sick in armies in the field, as well as the treatment of prisoners of war.

No effort was made at that time to enact individual responsibility of either political or military leaders or those executing orders. But acts of genocide, war crimes, and crimes against humanity committed in World War II mobilized the international community to take at least the first steps to close this gap. The Genocide Convention of 1948 defined *genocide* as a crime under international law and introduced an obligation to try or extradite persons charged with this crime. It provides that competence rests with national tribunals of the State in

the territory of which the act was committed, or “such international penal tribunal as may have jurisdiction” (Article VI). The obligation under the Geneva Conventions of 1949 to punish or extradite persons who have committed grave breaches of humanitarian law was similarly based on the idea of national jurisdiction. The same applies to penal and disciplinary sanctions under Article 28 of the Cultural Property Convention of 1954. Nevertheless, these instruments effectively introduced the principle of individual responsibility for war crimes and crimes against humanity into conventional law, thus confirming the conclusion of the Nuremberg Tribunal that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>6</sup>

While the idea of individual responsibility under international law has developed considerably during this century, there is still a reluctance to accept corresponding rights of the individual, rights based on international legal rules and given teeth by specific remedies against one’s own, as well as foreign, States. Current State practice normally limits legal remedies to strict rules under existing national law. Arguments based on international law are hardly of importance to national jurisdiction. Where the question of remedies for violation of rights based on international law is raised, it is as a matter of principle not for the individual owner of such rights to take effective action, but rather the State of which he or she is a national.

The Third Geneva Convention of 1949 was one of the first international instruments to establish an individual right corresponding to the idea of individual responsibility. According to its Article 109, paragraph 3, no sick or injured prisoner of war may be repatriated against his will during hostilities. This right was further developed by the evolving practice of ensuring each prisoner of war the right to refuse repatriation at the end of an armed conflict, if he so chooses, and the right to have a private interview with an ICRC (International Committee of the Red Cross) official to confirm that his decision was made freely and without coercion.

The 1977 Additional Protocols did not further develop those individual rights, except to provide fundamental legal guarantees to be granted within the relevant national system (Article 75 of Protocol I) and a right to refuse surgical operation (Article 11). In human rights conventions, however, a decisive step was taken to strengthen the rights of individual persons. The 1966 Optional Protocol to the International Covenant on Civil and Political Rights provides that a State may recognize the competence of the Committee of Human Rights to receive and consider communications from individuals subject to its

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jurisdiction who claim to be victims of a violation by that State of any of the rights enumerated in the Covenant, provided they have exhausted all available domestic remedies. Likewise, the 1984 Torture Convention introduced the option for a State to accept the competence of the International Committee against Torture to investigate complaints by individuals falling under the jurisdiction of that particular State.

Even in the absence of legal remedies, individuals may claim collective rights, e.g., the right of self-determination as confirmed in Article 1(2) of the UN Charter and common Article 1(1) of the 1966 Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights. There is some sense, therefore, in assuming that respect for this right is an *erga omnes* obligation binding all States and owed to the international community as a whole. The right of self-determination cannot be limited to the peoples of existing States; otherwise, there would be no self-determination beyond a closed and often very arbitrary system which in itself provides the basis for demands for change. There is, however, no consensus on the present legal prerequisites for claiming a right of self-determination. The liquidation of former European colonial regimes might be least controversial today. The United Nations has outlawed colonialism, and all relevant decisions can be effectively based on Chapters XI–XIII of the UN Charter. The right of self-determination may also be used to support efforts to restore sovereignty in territories where it has been illegally denied in recent times. In situations, however, which are characterized by neither colonialism nor illegal occupation, any recourse to the right of self-determination remains highly controversial. There is no right of separation from well-established States. An exception to this rule may be the fact that serious human rights violations could generate a right of separation as a last resort.<sup>7</sup> Consensus on this issue will remain difficult to achieve. It is no surprise that acceptance of the right of self-determination in the international community tends to increase proportionally with the distance from actual events.

Within the Organization on Security and Cooperation in Europe (OSCE) process, the significance of the human dimension was stressed by the third basket of the Helsinki Final Act of August 1, 1975, and more specifically during the meetings held in 1989 (Vienna), 1990 (Copenhagen), and 1991 (Cracow, Geneva, and Moscow). It remains to be seen, however, whether this process may lead to the creation of new individual rights which go beyond a strengthening of existing commitments under the International Covenant on Civil and Political Rights of 1966 and the European Convention on Human Rights and Fundamental Freedoms of 1950. The International Helsinki

Federation, in its 1997 Report, stated that human rights violations had been, and were still being, committed in thirty-two of the fifty-four OSCE member States; yet, there is no effective international mechanism to examine such allegations or to ensure that appropriate remedies are available in the interest of the victims.

In accordance with the jurisdiction of the Court of Justice of the European Communities, any citizen of the European Union has a right to see the law determining his or her position respected by Community institutions, as well as member States.<sup>8</sup> This right, and the corresponding remedies under European Union law, is comparable to national legal guarantees granted by a State to its citizens. Such guarantees cannot be expected to become part of global international law in the foreseeable future.

In a recent systematic study of the rights and obligations of individuals as subjects of international humanitarian law, George Aldrich has assessed the existing individual criminal responsibility under international law for war crimes, genocide, and crimes against peace, in the framework of possible individual rights corresponding to individual obligations.<sup>9</sup> He very convincingly stresses that the latter are much less developed than the former. In this context, he has coined the term "imperfect right" to describe a situation where (1) legal rights of an individual have been violated, (2) the individual perpetrator is subject to criminal punishment as a result, and (3) the perpetrator, as well as his State, may at least theoretically be liable for damages. While individual remedies are available only in exceptional cases, individual claims remain widely dependent upon protection by the State concerned, and the latter is alone authorized to put such claims forward, or even waive them at the expense of those whose rights have been violated.

The extent to which attempts to solve this situation are realistic is debatable. International cooperation is regularly developed without the benefits of law courts, without sanctions protecting the owner of specific rights against violations, and without a full-fledged system of reparations. Disputes can very often be settled only through negotiations on the basis of formal equality, without recourse to higher authorities. Where reparations can be achieved, they often tend to remain rather symbolic.

Yet the role of legal arguments in such cooperation should not be underestimated. Legal positions are of importance, irrespective of the opportunity for enforcing their implementation. Even symbolic acts of reparation may have relevance for the participants as part of psychological or historical *Vergangenheitsbewältigung*. The dissuasive role of legal reasoning may

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add to the significance of such activities in avoiding possible claims as much as in settling existing ones.

The evolution of law is a complex process, influenced by many players and dependent on various different sources. This is particularly true for international law, with all its imperfections. Efforts to overcome deficiencies in this area require patience and a good sense of proportion. It is in this spirit that existing gaps in existing international law ought to be assessed.

### **Deficiencies of Existing Conventional Law**

At the present stage of legal development, it is no longer possible, as a matter of positive law, to regard States as the only subjects of international law.<sup>10</sup> However, there are a number of deficiencies which make it difficult for individuals either to exercise rights not deriving from their national legal system against their own State or to exercise rights against foreign States without the support of their own government acting on their behalf.

The most important deficiency of international humanitarian law as laid down in existing conventions and agreements is its limited scope of applicability. Designed for armed conflicts of an international character, most of these rules do not formally apply to non-international armed conflicts. In an effort to secure minimum rules in such conflicts, common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II have underlined the legal difference between international and non-international armed conflicts in a rather rudimentary way. If these provisions were understood as limiting legal protection in non-international conflicts to an enumerative set of minimum rules, they would have to be considered as counterproductive in the interest of individual victims. Such a perception would be in strong contradiction to undeniable requirements of reality on the battlefield and would run counter to widely accepted principles of the rule of law. An excessively restrictive observance of the difference between international and non-international armed conflicts in State practice would evidence a two-book mentality unlikely to find any support in public opinion. There are but few armed forces, however, which have formally abolished such double standards by following an official policy of compliance with the full body of rules of international humanitarian law during non-international conflicts.<sup>11</sup> Corresponding recommendations developed at the international level have not been implemented as widely as one would wish.<sup>12</sup> The fact that such a policy serves not only humanitarian interests but also operational requirements has been stressed by experts;<sup>13</sup> nonetheless, widespread ignorance of it remains.



Yet concrete results have never been fully investigated by legal and operational experts. The degree to which rules of international armed conflict are tailored to police-type operations in different levels of crisis during non-international conflicts may also be a matter of dispute. The use of the shotgun and tear gas, which must be seriously questioned during armed conflicts, was never prohibited for police operations, although the three general principles underlying the law of armed conflict are fully relevant to police operations: that the use of force is permissible only if it is directed against legitimate targets, it is prohibited to cause unnecessary suffering, and perfidious acts are unlawful. The relevance of armed conflict law for military operations other than war needs to be studied in further detail. While interdisciplinary efforts to this effect would seem appropriate, and though the role of operational experts cannot be underestimated, it should not be overlooked that legal and policy considerations will often be decisive when balanced against factual and operational considerations.

A further deficiency of international humanitarian law remains the large number of breaches of its existing rules. The problem is not unique to this field of law; it also applies to certain parts of national law, such as traffic law, taxation, customs, or environmental provisions. Though it would appear inappropriate to draw comparisons between these very different areas of legal regulation, one possible common conclusion may be that frequent violations do not necessarily amount to complete disregard of the law. Nevertheless, the need to further develop sanctions and foster dissemination of particular rules must be underlined.

Objective fact-finding, so essential for effective law enforcement, is difficult to achieve. The Commission established under Article 90 of the 1977 Protocol I Additional to the Geneva Conventions to investigate allegations of serious violations of the Conventions and of the Protocol has not yet been given a single chance to provide its services. This is the case even though a growing number of States have recognized its competence and despite the fact that it is designed to work without publicity so as to avoid publicly offending States and to facilitate diplomatic solutions. There is no effective international jurisdiction at a global scale for adjudicating claims for violations of humanitarian law. The national jurisdiction of the author State is in many cases not sufficient. As far as the national jurisdiction of third States is concerned, the act of State doctrine still provides for sovereign immunity of the author State for *acta iure imperii*, with no exception for serious human rights violations.

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Given this situation, the issue of whether claims brought before the courts of the author State may be based on national or international law is less relevant. It may be noted, however, that the German Federal Constitutional Court has held that no general rule of international law excludes individual claims for acts or omissions of a foreign State committed during a war.<sup>14</sup> The Court saw, in principle, parallel remedies for individuals and States, but it also underlined the fact that individual claims may be expressly excluded by peace treaties and similar treaties, such as the London Agreement on German External Debts of February 27, 1953.<sup>15</sup>

Rights of the individual are decisively expressed by the manner and extent to which claims may be pursued; legal remedies to receive reparation (in terms of restitution or compensation) are still very imperfect. Full reparation can hardly be achieved in cases involving violations of humanitarian law. In this respect, pecuniary harm should not obscure the importance of reparation for emotional and moral damage. Legal restitution in terms of criminal sanctions had important psychological reparation effects for raped women in the former Yugoslavia, even where financial payments were impossible or unrealistic. The work of the Truth Commission in South Africa, which leads to a lump sum payment of no more than two thousand Rand (U.S. \$400) to each of twenty-two thousand victims of the apartheid regime, irrespective of the amount and degree of suffering, nevertheless has had the effect of restoring individual confidence in the rule of law in situations where adequate payment of damages is impossible or not expected.

These few examples may suffice to support the thesis that no system of individual claims could be considered sufficient for systematic and massive violations of legal principles and rules. Even States trying in the most diligent manner to arrange for reparations have failed to cope with the extent of cruelty of which humankind is capable.

The imperfect state of international humanitarian law implementation reflects a situation common to many areas of international law, one that may be best influenced by personal activities within governments, non-governmental organizations, and by the public.<sup>16</sup> This deficiency also offers opportunities for an active role by the individual, given that all implementation work depends on human activities at various levels of the State and on the willingness and ability of State officials to cooperate with non-governmental organizations and private citizens.

The role of individuals may also be affected by challenges to the law of neutrality during the present period of rapid development in the law. Both the Hague Peace Conferences prior to World War I and the development of the

Geneva Conventions are important examples of the role of neutral States in supporting the implementation and further development of humanitarian rules. The responsibility of neutral States to develop the law protecting individuals in the future is also evident.<sup>17</sup>

In failing States—which remain subjects of international law but, due to their lack of capacity to act, are exempt from responsibility under international law—even fundamental individual rights are unprotected. Failing States are characterized by total dissolution of order as a consequence of internal development and the absence of an effective negotiating partner vis-à-vis the international community. Although direct criminal responsibility of individuals exists, and criminal jurisdiction can be exercised by third States and competent international tribunals, individual claims would appear unrealistic under such conditions.<sup>18</sup>

### Considerations for International Law-Making

It is particularly difficult to assess possibilities for international law-making in areas relating to military operations. States tend to stress the ad hoc significance of such operations. Even in cases in which military forces are operating in implementation of Security Council resolutions, it is not beyond dispute which body of law—that of armed conflict or law of peacetime operations—is properly applicable. This might explain the reluctance to acknowledge a need to develop further the rules, especially in a systematic manner. Furthermore, there are both general and specific obstacles to developing new conventional law in this area. *Opinio iuris*, a prerequisite for law creation (not only in the context of customary law), is only slowly, and often rather vaguely, shaped by public opinion and State practice.

A cautious attitude towards conventional law creation is also suggested by recent developments. The most important example remains the experience with the 1977 Protocols Additional to the Geneva Conventions. It took considerable time, despite the presence of the ICRC as an effective and professional promoter of that law, to establish the consensus necessary to reach the stage of signature in 1977, and even more so to carry the effort through to ratification (now in more than 140 States). In each case, ratification was based on national decisions, formally closed to international coordination—although nevertheless subject to a certain extent to outside influences.

The lesson which may be gleaned from the 1980 Convention on Certain Conventional Weapons is not very different. Developed as a side-result of the negotiations on the 1977 Protocols, the 1980 Convention was at first limited to

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a prohibition of particular means and methods of combat that were of no distinct operational importance.<sup>19</sup> The number of States parties to this Convention remained considerably low until the First Review Conference in 1995 when the new Protocol IV on Blinding Laser Weapons of October 13, 1995, was added, a remarkable, although limited, step towards new conventional rules. The revision of Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices on May 3, 1996, was an even more important second step, one supported by the international campaign against land mines. In this respect, the concerted efforts of many energetic players and the overwhelming evidence of excessive civilian casualties in more than a hundred States mobilized public opinion and soon led a considerable number of governments to change their position as to the desirability and extent of a prohibition. At the same time, this exceptional campaign illustrated that the creation of conventional law is uncertain even in the face of overwhelming public expectations. Successful efforts to prohibit certain uses of anti-personnel land mines have not been accompanied in all quarters by equally effective efforts toward a prohibition of production, stockpiling, and sale. Thus, the new Convention on the Prohibition of Landmines, which was opened for signature in Ottawa on December 3, 1997, did not gain the same initial support as the revised Protocol II in 1996. Furthermore, individual rights have not been stipulated in this context; the issue, however, may well be taken up later.

Political commitments and a policy of "soft law" implementation in some States may facilitate such trends. But they cannot substitute for a solid and often cumbersome process of creating conventional legal rules based on reciprocity, careful implementation of existing law, and the exercise of sanctions against breaches.

The relevant UN policy is still uncertain in many respects. While individual human rights were first addressed in the Charter and international instruments developed under the auspices of the World Organization, many solutions have remained rather erratic. New legal provisions remain subject to the political will of governments. Proposals developed within the United Nations Secretariat have to cope with this reality. Yet the responsibility of, and opportunities for, the UN to influence legal perceptions by offering relevant information and developing appropriate proposals should not be underestimated; they should be given full support by the member States.

An important example in this respect is the 1994 Convention on the Safety of United Nations and Associated Personnel. Efforts to prepare this new convention did not go as far as consolidating and codifying international rules

suggested by the Secretary-General.<sup>20</sup> The Convention contains a few articles on certain fundamental obligations of States, balanced by provisions on the relevant obligations of such personnel. The solution found is not free from gaps and uncertainties. It is based on a considerable misunderstanding that Article 2(2) of the Convention excludes UN operations authorized by the Security Council as enforcement actions under Chapter VII “in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.” Enforcement actions under Chapter VII should never be, and hence never be misinterpreted as, armed conflicts between the military forces involved. Rather, UN forces must be respected as enjoying immunity under Article 105 of the Charter and the general terms of the 1946 Convention on Privileges and Immunities of the United Nations. Their members may not be taken as prisoners of war; in the event they are detained, it would be absurd to suggest they should not be released before “the cessation of active hostilities” in accordance with Article 118(1) of the Third Geneva Convention, the accepted rule for combatants in armed conflicts. Thus, the 1994 Convention does not meet important requirements of peace enforcement which led to its development.<sup>21</sup>

More successful, though considerably more controversial and time consuming, were efforts to establish the International Criminal Court (ICC). After several decades of discussion in various fora, this idea is now supported by the global consensus on the urgent need to establish the ad hoc tribunals for the former Yugoslavia and for Rwanda. A conference of States will be convened in 1998 to prepare the legal basis of the ICC in more concrete terms than ever before. The competence of the ICC will be limited to acts of genocide, crimes against humanity, war crimes, and wars of aggression. Its jurisdiction will be subsidiary; only cases that cannot be adjudicated by national courts because they are unable or unwilling to restore justice shall be brought to the International Tribunal. In this context, the extent to which a State Party to the planned ICC Statute may have to modify its national laws (e.g., concerning extradition of nationals) remains to be clarified.<sup>22</sup> Jurisdiction over command responsibility issues will remain a complex subject.<sup>23</sup> Major efforts will be required to introduce rules of procedure that are not included in the statute, subject to further experience of the ICC. In this respect, the development of international rules of evidence will be of key importance.<sup>24</sup>

Once established, the permanent International Criminal Tribunal will be a great step forward to ensuring the rule of law as a prerequisite for internal security, social stability, and peaceful development. It will support justice

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where national judicial organs are failing. To build confidence on the part of the victims, to ensure legal balance, and avoid creating perceptions of victors' justice, a permanent international court is preferable to any ad hoc tribunal. The relationship between national and international jurisdiction should, however, be assessed in greater detail. Under what constraints should a State extradite its own nationals? Moreover, when should it extradite its own military personnel, who are subject to particular national order and discipline, and accountable to the highest political leadership? Are there limits to the *ne bis in idem* rule in cases where a national court has issued a sentence that at the international level might be considered too mild in comparison? How should cooperation between international and national judicial organs be developed?

A thorough reassessment also appears to be necessary on the issue of individual claims. The ILC Draft Articles on State Responsibility, adopted in 1996, did not mention the individual as a bearer of rights and obligations at all.<sup>25</sup> Its Article 40 offers a very broad definition of the injured State, including even infringements of rights arising from a multilateral treaty or rules of customary international law in third States, anywhere on the globe, if it is established that "the right has been created or is established for the protection of human rights and fundamental freedoms." Thus, human rights violations in any part of the world would allow any State to consider itself as injured and entitled under Article 42 of the draft "to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination." Hardly any State, however, will defend claims of citizens of third States. If the individual victim himself could put claims forward against the author State and base his claim on international law rather than the national law of that State, reparations might be more effective.

An excellent example of an expert proposal compiled in international cooperation to support lawmaking by States is the revised set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law prepared by Theo van Boven as Special Rapporteur of the UN Commission on Human Rights.<sup>26</sup> It starts from the principle that every State has the duty to respect, and to ensure respect for, human rights and humanitarian law. This obligation includes the duty to prevent violations, investigate violations, take appropriate action against violators, and afford remedies and reparation to victims. As stipulated by the Special Rapporteur, every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights

have been violated. Reparation may be claimed by the direct victims or their immediate family. It includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Restitution, which is designed to reestablish the situation that existed prior to the violations, shall include restoration of liberty, family life, citizenship, return to one's place of residence, and use of property. Compensation shall be provided for any pecuniarily assessable damage resulting from violations of human rights and humanitarian law, such as physical or mental harm, (including pain, suffering, and emotional distress) and lost opportunities (including education, material damages, and loss of earnings—including in turn loss of earning potential, harm to reputation or dignity, and costs required for legal or expert assistance). Rehabilitation shall be provided, and it will include medical and psychological care as well as legal and social services. Satisfaction and guarantees of non-repetition shall be provided, including, as necessary, cessation of continuing violations, verification of the facts and full and public disclosure of the truth; an official declaration or a judicial decision restoring the dignity, reputation, and legal rights of the persons connected with the victim; an apology, including public acknowledgement of the facts and acceptance of responsibility; judicial or administrative sanctions against persons responsible for the violations; commemorations and tributes to the victims; inclusion in human rights training and in history textbooks of an accurate account of the violations committed in the field of human rights and humanitarian law; and preventing the recurrence of violations—by such means as ensuring effective civilian control of military and security forces, restricting the jurisdiction of military tribunals to only specifically military offenses committed by members of the armed forces, strengthening the independence of the judiciary, protecting the legal profession and human rights defenders, and improving, on a priority basis, human rights training for all sectors of society, in particular for military and security forces, as well as for law enforcement officials.

Acceptance of these draft principles and guidelines would progressively develop existing international law, which is still very far from providing full reparations in favor of individuals. In most situations, the right to reparation still rests within municipal legal orders; there are no other means of enforcement except under national law.

International judicial mechanisms developed under the European and the American Conventions on Human Rights will hardly gain more than regional importance in this respect, although the interlinked mechanism of the European Commission and the European Court of Human Rights, which allows for a certain degree of individual complaint against infringements of

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fundamental freedoms, has been recommended as a model for other areas.<sup>27</sup> Of practical significance could be the relevant UN procedures in fora such as the United Nations Claims Commission (UNCC). In this respect, however, more experience still has to be collected. In addition to the fact that practice remains to be developed in administering funds on behalf of UN organs, State practice remains decisive for legal development. This practice will be influenced, but not exclusively governed, by general principles as shaped in legal writings over the centuries.<sup>28</sup> There is still no comprehensive concept of reparations in cases of breach of humanitarian law. Practical solutions remain rudimentary, and it must be admitted that full reparation can hardly be expected in any case, even those involving grave breaches of the law.

Considering the issue in more general terms, and maybe in a longer time frame, however, allows for an overall picture in which legal principles are of clear relevance. The Martens clause, shaped into conventional law at the First Hague Peace Conference in 1899 and reaffirmed in the 1977 Additional Protocols to the Geneva Conventions, has been used to close legal lacunae and develop appropriate principles and rules in cases not covered by existing conventional law. Its reference to established custom, the principles of humanity, and the dictates of public conscience has provided arguments that have been seen as describing underlying principles for legal provisions and rules of conduct for States and international organizations. The relevance of these provisions and rules for legal and policy decisions has never been seriously disputed. The role of the media and its influence for international decision making has been very often enhanced by principles and attitudes which enjoy support in various quarters, even among people who disagree on many daily political issues. Backed by professional international institutions such as the ICRC, by relevant NGOs, and by academia, such principles are part of the process of law creation today, even in areas where there were different, or even no, rules at an earlier stage. This may lead to an application of legal rules developed for other purposes, in cases that had previously been considered quite different.

Lawmaking by analogy is not a new idea. Lawyers tend to draw arguments from comparable situations, cases, and legal regulations. Vattel was convinced that the rules of the natural law of nations can be derived by analogy from the natural law of man;<sup>29</sup> the opposite was, however, never common consensus. Rules of the law of nations have only limited influence on internal law. The differences in the responsibilities and interests involved are too great. Individuals can hardly compare their interests with group interests. It would be inappropriate to compare individuals with States; it may even remain an open question whether or not it is in the best interest of the individual to develop



rights (and duties) under international law independently from rights and duties of his or her home State. Yet individuals need protection against States, a requirement which is not limited to the relationship with their own State. This is so because today considerable ties, expanding in quantity and quality, exist between States and nationals of other States, requiring both sides to observe rules towards each other and making it necessary for individuals to claim rights on their own behalf without recourse to support from their home State. There is an evolving custom and indeed a developing legal *opinio* to prove the existence of such rights.<sup>30</sup>

This process has also affected the role of the individual in the development of law, its possible influence on decision making, and the interpretation of rules and their implementation. There are but rare exceptions to the principle that rules of international law are created by States and not by private individuals. But it should be remembered that States act through individual men and women as their representatives. These representatives are not only bound by instructions in performing their particular mission, but they very often actively develop positions that are approved by their superiors, even accepted without further deliberation. As are all individuals, government experts are subject to outside influences in a complex personal process of decision making. This is well accepted even by traditional law. The sources of international law enumerated in Article 38, paragraph 1 (a–c), of the Statute of the International Court of Justice reveal a certain role of the individual in the lawmaking process. Treaties and contracts may be concluded between States or international organizations and foreign private law persons. Customary law and general principles of law are based on man-made arguments, subject to confirmation by State practice. As subsidiary means for the determination of rules of international law, Article 38, paragraph 1(d), expressly refers not only to judicial decisions but also to “the teachings of the most highly qualified publicists of the various nations.” The present information age may lead to a considerable increase in the influence of a large number of such persons. At the same time, the transparency of available information may also support mainstream trends in arguments and consideration of relevant State practice. Thus this development often contributes to practice-oriented, and less extravagant, results.

### Conclusions

Even if the present assessment remains incomplete in various respects and is subject to further developments, there can be no doubt of the fact that

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individuals clearly have an active role to play as bearers of individual rights and obligations under international humanitarian law, or that individuals acting for States, international organizations, or even on their own enjoy considerable opportunity to participate in the development of that law.

The many factors of human decision making require an interdisciplinary approach, one which includes ethical, cultural, technological, economic, and operational considerations. A complete assessment must be based on an array of different aspects. There is no guarantee, however, that objective criteria will be observed. Rather, the importance of policy constraints suggests that the degree to which particular aspects will be taken into due consideration and weighed against other aspects and requirements is undergoing rapid development. The role of legal advisors in this complex process of decision making is a delicate one. Weighing different interests exposes him or her to blame for wishful thinking; sticking to the more technical task of interpreting existing rules and provisions would offer less than might be rightly expected.

Lawyers should stress the importance of policy constraints on military operations. It is their task to balance the rights and obligations of the operators in the field to ensure that they are fully informed about the relevant legal framework and that they fully use existing opportunities. This advisory task, however, has to be performed with a sense of proportion as regards the methods to be applied and the objective to be sought. It would be wrong to see the legal advisor solely in the role of *post factum* defender of the operator. Rather, he has to involve himself in the decision-making process, influence target selection, accept full responsibility for his advice, and develop the courage to dissuade others from excessive plans.

As Rosalyn Higgins has suggested, international law is a process of authoritative decision making, not just the neutral application of rules.<sup>31</sup> This is especially true for rules of armed conflict law, which are based on policy considerations derived from the principle of distinction between civilian objects and military objectives, the avoidance of unnecessary suffering or superfluous injury, and the prohibition of acts of perfidy. The whole body of humanitarian law in armed conflicts is to be understood as a process of respecting and implementing these few principles. It is not a fixed set of bright line rules which can be applied irrespective of the factual context. To use Rosalyn Higgins's words, none of the problems explored can be satisfactorily resolved by confident invocation of a "correct rule."

It is interesting to speculate how Admiral Stockton would have reacted to some of the modern challenges described in this contribution. He would probably have developed arguments and positions different from those he

chose in his time. But he would surely have done so with an attitude very similar to that for which he was well known by his contemporaries. Practical assessments, professionalism, and legal passion might have led him to personal initiatives in support of both national interests and the protection of the rights of individuals.

It should be stressed that none of the many issues to be raised in this context can be solved without international cooperation. The existence of international rights and obligations depends on acceptance by more than one State. It is therefore not enough to draw on a particular national legal system. Rather, it is the international environment of individual action that also influences the legal assessment in a given context.

Results in this continuing process will remain as incomplete and imperfect as nearly everything else in legal development. It remains difficult to make convincing assessments except in retrospect. Long-term effects often remain obscure, and anticipating objections which may arise at a later stage is risky by any standard. Thus developing humanitarian law remains as much a challenge for individual actors as for States and organizations authorizing, sponsoring, or supporting this task.

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#### Notes

1. Partsch, *Individuals in International Law*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 316-21 (Bernhardt ed., 1985).

2. DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DU DROIT NATUREL*, 1758, , bk. III, ch. XVIII, p. 238 (Edition Carnegie, 1916); REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL* (1960).

3. HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 48-55 (1994), rightly developed the argument that the whole notion of "subjects" and "objects" has no credible reality and no functional purpose, considering that individuals are participants, along with States and international organizations, of a dynamic process of international cooperation in which international legal obligations are implemented, remedies and sanctions exercised, and disputes settled.

4. Similar efforts date back in the fifteenth century. See Green, *War Crimes, Crimes against Humanity and Command Responsibility*, *NAVAL WAR COLL. REV.*, Spring 1997 at 26.

5. 35 (II) *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 298 (1929).

6. *THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY*, pt. 22 (H.M.S.O. 1950), at 447.

7. Thürer, *Das Selbstbestimmungsrecht der Völker und die Anerkennung neuer Staaten*, in *NEUES EUROPÄISCHES VÖLKERRECHT NACH DEM ENDE DES OST-WEST-KONFLIKTES?* 43-58 (Neuhold & Simma eds., 1996).

8. Case 26/62, *van Gend & Loos*, Feb. 5, 1963, ECR 3. See also Case 33/70 (1970).

9. Aldrich, *Individuals as Subjects of International Humanitarian Law*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* 851 (Makarczyk ed., 1996).

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10. I OPPENHEIM, *INTERNATIONAL LAW* 848 (pt. 2-4) (Jennings & Watts eds., 9th ed. 1992).
11. DoD Directive 5100.77, DOD LAW OF WAR PROGRAM, July 10, 1979, para. E-1; U.S. NAVY, *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL WARFARE* (NWP 1-14M) (1995), para. 6.1.2; FEDERAL MINISTRY OF DEFENCE OF GERMANY, *HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL*, § 211 (1992).
12. International Institute of Humanitarian Law, *Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts*, INT'L REV. RED CROSS, Sept.-Oct. 1990, at 404.
13. Greenwood, *Scope of Application of Humanitarian Law*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, § 211, para. 5 (Fleck ed., 1995).
14. BVerfGE 94,315, 330 (decision of May 13, 1996).
15. 333 U.N.T.S. 3; BGBl 1953 II 331. Art. 5, para. 2, of the London Agreement provided that "claims arising out of the Second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich, including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen shall be deferred until the final settlement of the problem of reparation." The Treaty on the Final Settlement with respect to Germany of 12 September 1990 (BGBl 1990 II 1317) did not address reparations.
16. Fleck, *Implementing International Humanitarian Law—Problems and Priorities*, INT'L REV. RED CROSS, March-April 1991, at 140.
17. Thürer, *Humanität und Neutralität—zum politischen und völkerrechtlichen Spannungsverhältnis zweier Grundprinzipien der schweizerischen Aussenpolitik*, in *VÖLKERRECHT IM DIENSTE DES MENSCHEN: FESTSCHRIFT FÜR HANS HAUG* 279, 307 (Hangartner & Trechsel eds., 1986).
18. Thürer, in THÜRER, HERDEGEN & HOHLOCH, *DER WEGFALL EFFEKTIVER STAATSGEWALT: THE FAILED STATE*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, 1996, at 9-47.
19. Differences of opinion on the military value of incendiary weapons, as affected (though not largely prohibited) by Protocol III of the Convention, may be of minor importance in this context.
20. Bourloyannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 INT'L & COMP. L. Q. 560 (1995).
21. Fleck & Saalfeld, *Combining Efforts to Improve the Legal Status of UN Peace-keeping Forces and their Effective Protection*, INT'L PEACEKEEPING, June-August 1994, at 82-84.
22. Penna, *The International Criminal Court*, 1 SINGAPORE J. INT'L & COMP. L. 227 (1997).
23. Green, *War Crimes, Crimes against Humanity, and Command Responsibility*, NAVAL WAR COLL. REV., Spring 1997, at 26-68.
24. Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81 (1997).
25. Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, G.A.O.R., 51st sess., supp. 10 (A/5110), at 125 (on the ILC Draft Articles).
26. E/CN.4/Sub.2/1996/17 (24 May 1996) (for the revised Basic Principles and Guidelines). See Report of the UN Secretary-General (E/CN.4/1997/29) and Commission on Human Rights Resolution 1997/29.
27. Dinstein, *The Implementation of International Human Rights*, in *RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG. FESTSCHRIFT FÜR RUDOLF BERNHARDT* 353 (Beyerlin et al. eds., 1995).

28. Green, *Enforcement of the Law in International and Non-International Conflicts—The Way Ahead*, 24 DENVER J. INT'L L. & POL'Y 285 (1996).

29. REMEC, *supra* note 2, at 128.

30. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).  
HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988).

31. HIGGINS, *supra* note 3, at 267.