The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict

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Presently, there is a strong increase in interest in legal issues connected with claims for reparation by victims of violations of international humanitarian law rules during armed conflicts. This is reflected in such claims being brought before domestic courts in a number of states, the fact that the 2018 programme of the Hague Summer Academy includes a lecture on such issues – and, of course, the Trialogue project initiated and run by the Heidelberg Max Planck Institute.

This situation reminds one of the late 1990s when such claims by victims of German and Japanese war crimes committed during World War II were brought before domestic courts, both in Germany and Japan but also elsewhere.[1] Such claims raised – and still raise – the following four legal issues:

- Do victims of violations of applicable rules of international (humanitarian) law have a right to reparation, in particular monetary compensation, under applicable domestic law of state liability? German courts considered (and continue to consider) that German *Amtshaftungsrecht* is, in principle, not applicable during times of armed conflict and is replaced by the special regime of the laws of war.[2]

- If the national law of the state in which such war crimes were committed provided or provides (possibly retroactively) such an individual right to reparation against the state responsible for those acts, may that latter state invoke the international law principle of state immunity? This is, at least, the position of al-

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1 See *R. Hofmann*, Compensation for Personal Damages Suffered During World War II, in: R. Wolfrum (ed.), MPEPIL, accessible under <http://opil.ouplaw.com/home/epil>.

2 See for acts committed during World War II, Bundesgerichtshof, *Distomo* Case, NJW 56 (2003), 3488 and Bundesverfassungsgericht, NJW 59 (2006), 2542 as well as ECtHR, Appl. 24120/2006 (*Sfountouris v. Germany*), Judgement of 31.5.2012; and for recent incidents the *Kunduz* Case, Bundesgerichtshof, NJW 69 (2016), 3656.

most all international or national courts that ruled on this issue[3] with the remarkable exception of the Italian *Corte Costituzionale*.[4]

- During World War II, did the then applicable international law provide victims of such crimes with an individual right to claim reparation including monetary compensation – or were only the victims' state(s) of nationality entitled to claim such reparation from the state responsible? General state practice did not recognise such a right with respect to acts committed during World War II;[5] this situation does not seem to have changed in a considerable way – at least as yet.

- If such a right had already existed or came into existence, could or can the victims sue the responsible state today not only before its own courts but also before courts of third countries? Or could the responsible state invoke the principle of state immunity? Again, the answer seemed to be an affirmative one – as probably also today.[6]

In this situation, the International Law Association (ILA) established a Committee tasked to look into this situation in 2003. In a first step, it established that the overwhelming practice of domestic courts did not recognise such an individual right under international law as it stood during World War II; moreover, its members felt that there had not been any significant changes as concerned the *lex lata* as it stood in the early 2000s. Therefore, they decided to draft two documents of a *de lege ferenda* nature, declarations reflecting international law as it is progressively developing – or as it should develop: The first would deal with the substantive issues connected with such claims for reparation including monetary compensation; it was finally adopted at the 2010 ILA biennial conference in The Hague.[7] The second addressed procedural issues and was eventually adopted at the 2014 ILA biennial conference in Washington, D.C.,[8] as the Committee had de-

[3] See ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening*), ICJ Reports 2012, 99 and the extensive information on domestic case-law.

[4] For a discussion of Judgement 238/14 of 22.10.2014 see *R. Hofmann*, The Corte Costituzionale, the International Court of Justice and the Law of State immunity, in: G. Biaggini/O. Diggelmann/C. Kaufmann (eds.), Polis und Kosmopolis. Festschrift für Daniel Thürer, 2015, 273 et seq.

[5] See *R. Hofmann*, Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation Against States Under International Law?, in: P. M. Dupuy/B. Fassbender/M. N. Shaw/K. P. Sommermann (eds.), Völkerrecht als Wertordnung. Common Values in International Law. Festschrift für Christian Tomuschat, 2006, 341 et seq.

[6] See for Germany Bundesgerichtshof, *Varvarin* Case NJW 57 (2004), 525 and Bundesverfassungsgericht <http://www.bverfg.de> and *Kunduz* Case (note 2), 3656.

[7] ILA, Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), available at <http://www.ila-hq.org>.

[8] ILA, Declaration on Procedural Principles for Reparation Mechanisms, available at <http://www.ila-hq.org>.

cided to suspend work on this document in order to be able to take into account the ICJ judgement in the *Jurisdictional Immunities* Case.

The legal reasoning for this approach was based on the understanding that international law not recognising an individual right to reparation did not properly reflect the state of present international law with respect to the position of the individual. Present international law recognises the, albeit limited, legal personality of individuals and provides, at least on the regional level, for a system of rights, i.e. human rights, the violation of which results, in principle, in a claim for reparation by the individual victim against the State responsible for the violations of such right. It is indeed difficult to accept that the situation should be different under international humanitarian law. In particular, in a period of time when the traditional view as to the mutually exclusive applicability of human rights and humanitarian law has been abandoned, it is difficult to maintain that individual victims of a violation of a human rights norm, applicable under the specific conditions of the relevant armed conflict, should have an individual claim for reparation, including monetary compensation, against the responsible state, whereas the individual victims of an international humanitarian law norm conferring individual rights would not have such a claim.

This meant that Art. 3 1907 Hague Convention IV and also Art. 91 Protocol Additional to the 1949 Geneva Conventions ("Additional Protocol I") of 1977 should in the future be interpreted and applied in such a way as to accord an individual right to compensation for violations of humanitarian law against the state responsible for the violations. This would solve the problem that the mere existence of primary rights, such as human rights and rights of individuals under international humanitarian law, does not *per se* result in the existence of secondary rights, such as the right to a remedy and the right to reparation, including compensation. Given that there is still little evidence in customary international law for an individual right to a remedy against, and reparation for, violations of international humanitarian law, it remains true that such a right must be explicitly provided for. Applying the generally recognised methods of systematic and teleological or dynamic treaty interpretation, Art. 3 1907 Hague Convention IV as well as Art. 91 Additional Protocol I could – if not should – be interpreted in such a way as to confer, on the individual victims of violations of international humanitarian law, a right to claim compensation for such violations. From a systematic point of view, such an interpretation would resolve the problem of the – not only at first view – incomprehensible difference between violations of human rights and violations of humanitarian law; from a teleological perspective, the conferral of such a procedural right would enhance the legal

position of the individual and, thus, the extent of legal protection. Also, such an interpretation would be fully in-line with the approach of dynamic interpretation which should not only be generally used for human rights treaties, but also to international humanitarian law norms. It was also felt that such an interpretation would not be incompatible with any other accepted rule of treaty interpretation.

The Declaration, which is accompanied by an extensive commentary, is structured into five sections. Section I contains definitions of the basic terms used throughout the Declaration; fully in line with present international law, the term reparation includes restitution, compensation, satisfaction and guarantees and assurances of non-repetition (Art. 1 in conjunction with Arts. 6-10, respectively). As to the scope of application of the Declaration, the Committee decided that the term "armed conflict" should cover all situations where international humanitarian law is applicable (Art. 2). It further decided that the violation of any international law rules applicable during armed conflict may give rise to the right to reparation and other secondary rights and obligations as reflected in the Declaration; such applicable international law rules include international humanitarian law, but also other regimes such as international human rights law as applicable during armed conflict (Art. 3). For the purposes of the Declaration, the term victim means any person who has suffered harm as result of a violation of such applicable rules (Art. 4). The Declaration also addresses the controversial issues of incidental losses and the question as to whether only serious or gross violations of international law entail a right to reparation. The Committee determined that responsible parties would not only be states but also International Organisations and, as appropriate, other non-state actors (Art. 5). Section II (Arts. 6-10) deals with the various rights of victims of armed conflict (reparation, restitution, compensation, etc.) whereas Section III (Art. 11) addresses the obligation of responsible parties to strengthen the rights of victims. Section IV (Arts. 12-13) stipulates the obligations of the international community to promote justice, peace and reconciliation and of states to assure victims' rights to reparation under national law. The Final Clauses in Section V (Arts. 14-16) refer to issues such as the interpretation of the provisions of the Declaration and its progressive development, confirm that such provisions shall have no retroactive effect and address the problem of statutory limitations.

To conclude, it seems that this declaration and its commentary might give some guidance for and have impact on the presently ongoing discussion on reparation under international law.