Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law

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Introduction

At its 2005 session the UN Commission on Human Rights adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.¹ The Basic Principles are a welcome addition to the arsenal of international human rights instruments because they offer a much needed comprehensive codification of the rights of victims of gross violations of human dignity. Much thought and numerous consultation rounds have been devoted to the elaboration of the Basic Principles since the project began in 1989, initially under the guidance of Professor Theo van Boven, later joined by Professor Cherif Bassiouni.

But the Principles focus on questions of substantive law only. They do not suggest which kind of institutions would help ensure the effective exercise of remedies. Nevertheless, without such institutions the Principles are unlikely to have the intended effect.

The purpose of this brief contribution therefore is to try and take the Basic Principles a step further by proposing the establishment of a new, permanent international body that would have the competence to award monetary compensation and restitution of property to victims of violations of international humanitarian law.

Before attempting an outline of such a Permanent International Claims Commission, however, I will first discuss the need for any new institutions – whether domestic or international - under three broad headings: criminal justice; truth and reconciliation; and compensation and restitution of property.

Criminal justice

The struggle against the impunity of the perpetrators of international crimes has made much progress in recent years, both at the domestic and the international level. Domestic laws have been modified to allow for prosecutions of international crimes whether or not on the basis of universal jurisdiction and various types of ad hoc international criminal tribunals have been created in quick succession. There has even been a significant number of successful trials both at the domestic and the international level in which defendants have been convicted of international crimes. In some of these procedures victims have standing to initiate proceedings or to claim damages. Nevertheless, states have seen fit to establish a permanent International Criminal Court with a role complementary to that of domestic courts. Undoubtedly, domestic institutions in most states should still be further improved to be able to respond more effectively to international crimes. Clearly, however, there is no need for another international body with the competence to convict individuals of such crimes.

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Truth and reconciliation

The aspect of what is commonly referred to as ‘truth and reconciliation’ is not well developed in the Basic Principles. However, Principle 22 (b) refers to ‘full and public disclosure of the truth’ as a form of satisfaction to which victims are entitled and Principle 24 provides that victims are entitled to learn the truth about the causes and conditions of the violations to which they have been subjected. One international mechanism that could perhaps fulfil this function at the international level is the International Humanitarian Fact-Finding Commission, established in 1991. However, the Commission has had no cases referred to it so far. At the domestic level, there have been numerous experiments with truth and reconciliation mechanisms, whether or not as an alternative to criminal justice, including in Chile, Argentina, El Salvador, Guatemala, and South Africa. There also continue to be discussions of truth and reconciliation mechanisms to be set up under UN auspices. In East Timor, a Commission for Reception, Truth and Reconciliation was established under UN auspices in 2001. The creation of an international truth and reconciliation mechanism, however, would not appear to be an attractive option for several reasons. Apart from the Orwellian connotations of an International Truth and Reconciliation Mechanism, it is difficult to see the added value, given the contextual, essentially domestic nature of the truth and reconciliation process. The most that could perhaps be aimed for would be the identification and subsequent adoption of elements of a model Truth and Reconciliation Commission that could be used as a starting point for the establishment of such bodies in the future. But the urgency of such a project would not appear to be particularly great in view of the abundant literature that already exists on the subject.

Compensation and restitution of property

Preferably of course, victims of violations of international humanitarian law should be able to turn to domestic courts or other domestic institutions in order to obtain monetary compensation or restitution of property. Experience shows, however, that domestic institutions only rarely respond positively to such requests. Legal obstacles preventing successful claims include sovereign immunity, the difficulty of deriving individual rights from provisions of international humanitarian law and the non-enforceability of foreign judgments. One of the underlying purposes of the Basic Principles is to encourage states to eliminate these obstacles but the obstacles are of such a fundamental nature that this is unlikely to occur overnight. In practice, therefore, victims of international humanitarian law violations, especially if they are numerous victims of international armed conflict, will receive compensation or restitution of property only if they can have their claims authoritatively decided and these decisions effectively enforced by a competent international body.

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3 See, in particular, Priscilla Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (2001).
During the past 25 years considerable experience has been gained with various types of ad hoc international claims bodies designed to perform this function. The three most notable ones are the Iran-United States Claims Tribunal, the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission.⁵ A quick overview of the role played by these three bodies offers an interesting picture of accumulated experience since each mechanism has been a conscious attempt to overcome the perceived disadvantages of its predecessor.

The Iran-United States Claims Tribunal established in 1981 through an agreement between Iran and the United States,⁶ is a traditional judicial body for the settlement of international claims arising from damage caused by the Iranian revolution and the American hostages crisis. In the view of its detractors one of its main weaknesses is its excessive slowness. As of today it has not managed to dispose of all of the 4000 claims submitted to it. According to the critics the main reason for the delay has been the recalcitrant role played by Iran and the Iranian judges on the Tribunal. The designers of the next ad hoc international claims mechanism (in particular the United States) therefore attempted to ensure that opportunities for delaying tactics would not occur again.⁷

The United Nations Compensation Commission (UNCC) was established in 1991 by the Security Council to resolve claims arising from losses caused by Iraq’s occupation of Kuwait. Under Security Council Resolution 687 (1991) Iraq was held ‘liable under international law for any direct loss … as a result of Iraq’s unlawful invasion and occupation of Kuwait.’ This a priori establishment of liability had the advantage of enabling the UNCC to resolve 2.6 million claims within a relatively short span of time. Claimants did not have to demonstrate that they were victims of a breach by Iraq of an international humanitarian law obligation owed to them. They merely had to demonstrate that the loss they had suffered was a direct result of Iraq’s invasion of Kuwait. Admirably, the UNCC gave priority to the consideration of small claims from individuals over larger claims from states and companies. Unlike traditional international claims mechanisms, individuals were therefore compensated before states and companies. More importantly, the UNCC pioneered the use of mass claims settlement techniques and it is widely credited with having been successful in this respect. All claims submitted to the UNCC are expected to have been resolved by June 2005.⁸ However, the UNCC also some serious disadvantages. It has been criticized for imposing victors’ justice on Iraq, in particular because liability was imposed on it through a decision of a the Security Council, a political organ hardly equipped for this role. The UNCC has also been criticized for failing to provide due process to Iraq, the respondent state. Furthermore, it is increasingly becoming clear that the system for resolving mass claims employed by the UNCC is susceptible to fraud and overcompensation of claims.⁹ This is because the verification system is based on computerised sampling techniques without detailed scrutiny of individual claims.

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⁵ For more detailed discussion of these three bodies, as well as the Commission for Real Property Claims for Displaced Persons and Refugees in Bosnia-Herzegovia, the Housing and Property Claims Commission in Kosovo and the German Forced Labour Compensation Programme administered by the International Organisation for Migration, see the contribution by Norbert Wühler in this volume.


⁸ According to information provided on the website of the UNCC: http://www2.unog.ch/uncc/ataglance.htm.

The Eritrea-Ethiopia Claims Commission (EECC), established in 2000, shows how the pendulum has swung back again. Like the Iran-United States Claims Tribunal, the EECC was set up by an agreement between the two states concerned. Although it is empowered to employ mass claims settlement techniques there was no a priori determination of liability based on a violation of jus ad bellum like in the case of the UNCC. Its case law so far appears to strike an intermediary course between the individualised, judicial approach of the Iran-United States Claims Tribunal and the broad, administrative approach of the UNCC. Liability is based on violations of applicable standards of international law, particularly international humanitarian law. The Commission focuses on ‘persistent and widespread patterns of misconduct, rather than individual acts’. There is no role in the proceedings for individual claimants. The required standard of proof is clear and convincing evidence. The Commission has not been so far been allowed to resort to the use of mass claims processing techniques.

The question that arises is whether this process of establishing international claims bodies on an ad hoc basis should be continued. Or is the time now ripe to consider the establishment of a permanent international claims body for victims of violations of international humanitarian law? The precedent that comes to mind, of course, is the International Criminal Court. The ICC after all is a consolidation of the experience of the ad hoc criminal tribunals that pre-date it.

There are two schools of thought on this question. Some experts consider that the ad hoc approach to resolving international claims in the wake of an armed conflict is not necessarily a bad one since it enables the development of tailor made solutions and allows each mechanism to build on the experience of the past. Others point out that victims of violations of international humanitarian law are entitled to effective, predictable remedies. Whether or not they receive compensation or restitution of property should not be dependent on politically motivated decisions made by states after each armed conflict.

In my own view, the arguments of both the proponents of the ad hoc approach and the advocates of a permanent institution have some merit. An intermediary approach might therefore be appropriate. What is needed is a new international institution that would combine the advantages of the two approaches. A Permanent International Claims Commission would offer a flexible model that could be adapted to suit the circumstances of a particular armed conflict. But it would also offer predictability to victims since it would function in accordance with standards and procedures laid down beforehand.

A Permanent International Claims Commission

Institutionally, a Permanent International Claims Commission (PICC) would be closely linked to the Permanent Court of International Arbitration (PCIA) in The Hague. Like the PCIA the PICC would be established by a multilateral treaty and it would be served by the

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11 Article 5(1), Agreement Between Eritrea and Ethiopia, supra note 10.
13 Authorised under Article 5(10) of the 2000 Agreement between Eritrea and Ethiopia, supra note …
14 Gillard, supra note 4, at 552.
15 Zegveld, supra note 4, at 523.
16 The acronym PICC already has a surprising number of meanings, none of which looks prohibitive however: Pediatric Interim Care Center, Parents Instructing Challenged Children, Prescribed Interexchange Carrier Charge, Peripherally Inserted Central Catheter, Potash Import and Chemical Corporation and People's Insurance Company of China.
Bureau of the PCIA. Like the PCIA the PICC would actually be a misnomer since it would not consist of a permanent tribunal but a permanent machinery for establishing ad hoc claims commissions. Commissioners with suitable expertise could be selected from a roster of possible candidates. As the need arises, they could be assigned the task of resolving claims from victims of violations of international humanitarian law in a particular armed conflict. This process could be triggered either by an agreement between the parties to a conflict or, in the absence of such an agreement, be imposed on the parties by a decision of the Security Council. 

The liability standard applied by the PICC would resemble that of the EECC. Accordingly, liability would arise from a breach of specific rule of international (humanitarian) law. Unlike the UNCC, a mere victim of collateral damage that was not caused by a violation of international humanitarian law would not qualify for compensation. If desired, commissions set up under the PICC, like the UNCC and the EECC, would be authorised to process large numbers of claims quickly and efficiently by employing computer based sampling techniques to verify claims. When evaluating and resolving claims the commissions set up under the auspices of the PICCC would be guided by humanitarian considerations. Accordingly, like the UNCC, they would give priority to urgent cases of individual suffering rather than to claims from states and corporations. They would award damages for harm caused not only by states but also by armed opposition groups. Unlike the UNCC, the PICC would afford due process (the right to comment on claims and policies) to the respondent state.

The PICC would thus strike an intermediate course between a judicial mechanism administering justice in individual cases and an administrative body providing compensation on a non-individualised basis. This would square with the approach taken by the Basic Principles. The Principles stress that they are based on the concept of social and human solidarity and not merely on the concept of state responsibility.\(^\text{17}\) The PICC would represent an attempt to overcome some of the difficulties encountered by victims of violations of international humanitarian law in obtaining reparation for harm suffered. It would side-step the question whether they enjoy legal rights under international humanitarian law. And it would effectively address the difficulties caused by massive numbers of claims. Even if a claims commission were imposed by the Security Council it would be less susceptible to the criticism of ‘victors justice’ than the UNCC because the defendant state would be given the opportunity to challenge individual claims.

Funding a commission set up under the PICCC would not represent a major problem if it was established through an agreement between the parties. As is the case with respect to the EECC, the parties would then simply share the operational costs and each party would pay any damages awarded against it. In some cases third states might also be willing to provide some funding as part of a post-conflict resolution scheme. Admittedly more problematic would be how to finance operational costs and enforce awards against a non-cooperating state by a commission imposed by the Security Council. Imposing financial sanctions is problematic even if valuable natural resources are available to support them. It may be recalled that the Oil for Food Program was only accepted and implemented by Iraq in 1995, five years after the establishment of the UNCC. Only from that moment the UNCC began to receive sufficient funds to be able to make substantial payments to successful claimants. If Iraq had continued to refuse to implement the Oil for Food Program the UNCC would have been unable to disburse substantial sums until after the occupation of Iraq in 2003.

\(^{17}\) 11th Preambular paragraph and Explanatory Comments of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, supra note 1.
Concluding observations

The idea of a Permanent International Claims Commission may appear far-fetched at a time when the world’s only superpower is working hard to frustrate the work of the International Criminal Court and increasing its pressure on the ad hoc international criminal tribunals to close down their operations as soon as possible. But, of course, ‘fancy’ and ‘far-fetched’ are precisely the labels that were given to the initial proposals to establish an International Criminal Court and the post of UN High Commissioner for Human Rights. When the political climate is ripe even the most radical proposals may suddenly gain momentum.

In fact, the approach advocated in this paper appears closely related to an initiative already quietly being carried out over a number of years under the auspices of the PCIA by a Steering Committee on Mass Claims Processes, chaired by judge Howard Holtzmann. The Committee has set itself the task of producing a comprehensive ‘annotated checklist’ that may be of assistance during the establishment of future mass claims procedures. This is not far removed from the idea of a Statute of a Permanent International Claims Commission.

From a trial attorney’s point of view, an individual complaints procedure may be more appealing than the compensation mechanism outlined here. From the point of view of the victims of violations of international humanitarian law, however, the establishment of a PICC is likely to be a more attractive option than an international complaints mechanism. This is because the compensation scheme outlined in this paper would not require protracted litigation and would offer a prospect of monetary compensation and return of property within a reasonable period of time, thus enabling victims to get on with their lives. While an individual complaints procedure might also be empowered, like the ICC, to award compensation it is difficult to imagine how these institutions could ever deal with the massive numbers of claims typically associated with an armed conflict.

Finally, a significant side effect of the establishment of a PICC would be the authoritative case law that would be produced by the commissions set up under its auspices. Jurisprudence emanating from ad hoc bodies with a peculiar one-off mandate, such as the UNCC, can easily be discounted because of the unique circumstances under which they were operating. Case law produced under the auspices of the PICC, on the other hand, would carry the stamp of authority. Establishment of the PICC is thus likely to help resolve some of the substantive legal questions concerning the rights of individuals under international humanitarian law raised in this volume. As experience with regional human rights courts and the ad hoc international criminal tribunals has shown, some of the more intricate questions concerning the status of individuals in international law are more likely to be resolved by international case law than by international legislation.

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18 For details see the website of the PCIA: http://www.pca-cpa.org/ENGLISH/MCP/.