NEW VOICES IN INTERNATIONAL LAW: REMEDIES AND REPARATIONS FOR INDIVIDUALS UNDER INTERNATIONAL LAW

This panel was convened at 9:00 a.m. on Saturday, April 9, 2022, by its moderator, Kimberly Larkin of Three Crowns LLP, who introduced the speakers: Ashley Barnes of the University of Toronto Faculty of Law; Brian L. Cox of Cornell Law School; and Sotirios-Ioannis Lekkas of the University of Groningen Faculty of Law.

Remarks by Ashley Barnes

doi:10.1017/amp.2023.9

Violations of international law harm large numbers of individuals—in situations ranging from armed conflicts to environmental disasters. Legal and practical obstacles remain for these individuals in accessing justice under international law.[1] There are, however, early signs of change. My paper's contribution to the panel is in identifying a legal sensibility coalescing around new approaches to compensation for mass harms—what I call an emerging law of international compensation (or ELIC). ELIC is a combination of ideas, forms, practices, and procedures that provide previously unavailable opportunities for large numbers of individuals to seek redress at the international level. Looking more closely at various innovative approaches to compensation within a broader push for access to justice internationally, I discuss what is meant by ELIC, its key attributes, and why it matters.

As a legal sensibility, ELIC is a cluster, bundle, or mixture of ideas. It does not originate from the application of international precedents. ELIC's different iterations draw inspiration from international and domestic law and procedure from the bottom up. In contrast to an individual right of reparation,[2] ELIC is not a single human right or confined to a single context. Instead, it should be understood as a cluster of attributes that exist in mass compensation in different places and varying forms. These four attributes are an expectation that individuals should have a direct remedy for mass harm caused by violations of international law, innovation using a mix of familiar procedural frames, opening up new access points, and a willingness to stretch established international legal principles. It is possible to see these attributes and draw similarities across seemingly unrelated areas of international law.

Relevant examples of the diverse areas where these attributes are seen include international criminal law and investment arbitration. The reparations regime of the International Criminal Court (ICC) permanently institutionalizes procedures designed to provide a remedy for victims of international crimes.[3] In investment arbitration, a tribunal allowed the use of a coordinated action, or mass investor claim, by smaller-scale investors.[4] Though these developments are not

[1] *See, e.g.*, Francesco Francioni, Access to Justice as a Human Right (2007).

[2] Christine Evans, The Right to Reparation in International Law for Victims of Armed Conflict (2012).

[3] Luke Moffet, Justice for Victims Before the International Criminal Court (2014).

[4] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB-07-5, The Argentine Republic, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

normally put alongside one another, upon closer examination, they demonstrate in their own way ELIC's four attributes—reflecting similar instincts despite arising in different contexts.

One of ELIC's key attributes is the expectation that individuals should have a direct remedy for mass harms caused by a violation of international law. Both examples from international compensation practice were a means of directly remedying the harm suffered primarily by individuals under international law. The wrongs experienced were not understood exclusively in private terms. Rather, they were directly linked to specific public international law violations whether in the criminal or investment context. The ICC reparations regime provides an international law avenue for individual victims to put forward their claims for compensation linked to ICC prosecutions. The ICC prosecutes individual perpetrators for international crimes while acknowledging, through its reparations and other victim-centered justice measures, that these not only offend the international community but directly impact private individuals. In the investment example, the creation of mass investor claims was predicated on ensuring the wrongs alleged by private actors (individuals and small businesses) would have the opportunity to be brought forward within international investment arbitration. The investment tribunal enabled private, small-scale investors to enforce their rights or interests, in a coordinated fashion not seen before, based on bilateral treaty commitments between a host state and foreign investors, and international standards of treatment of foreign investors. In both instances, private wrongs could be based on public international legal violations, thereby blurring the line between private and public forms of justice.

In seeking to directly remedy mass harms, international lawyers in both contexts demonstrated ELIC's next attribute of innovating using familiar procedural legal frames. They borrowed terminology and practices from international and domestic law, repurposing them for entirely new contexts. The ICC's reparations regime was influenced by both international experience (the failure to incorporate victims into prior ad hoc international criminal tribunals) and domestic developments (the increased recognition of roles for victims in domestic criminal proceedings, including the notion of a *partie civile* to support victims in civil law jurisdictions).[5] The appropriate use of domestic procedural frames was deeply contested with the advent of mass investor claims. Arbitrators disagreed over whether domestic processes were a relevant comparison and if so whether the appropriate comparison was mass, representative, aggregative, or multiparty claims.[6] They struggled to capture the legal character of this new variant of "mass" claim, identify a clear foundation in bilateral investment treaties, and fill in procedural gaps. Indeed, there was a painstaking effort to provide an analogy to familiar procedures.

ELIC is also made up of an instinct to open new access points—improvising some previous unavailable opportunity for actors to access an international process. For example, in international criminal law developing formal reparations procedures for individuals and in investment arbitration allowing ad hoc mass investor claims, there was an effort to promote access. Yet, the shared instinct to open access points at the international level can also have ambiguous outcomes. Enhancing access for some will still have its limits and may even perpetuate inequities for others. With the ICC, it is possible to critique its limits on access. There are victims who will go uncompensated or receive inadequate compensation. If the ICC prosecutor does not pursue the particular crimes or situations that impacted an individual victim, that victim may not have any access to compensation at the international level and none may be available at the domestic level.[7] Funds

[5] Christoph Sperfeldt, *Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court*, 17 Int'l Crim. L. Rev. 351, 359 (2017).

[6] *Abaclat*, *supra* note 4, paras. 483–88; *see, e.g.,* Siegfried Wiessner, *Democratizing International Arbitration? Mass Claims Proceedings in* Abaclat v. Argentina, 1 J. Int'l & Comp. L. 55 (2014).

[7] Conor McCarthy, Reparations and Victim Support in the International Criminal Court 71 (2012).

https://doi.org/10.1017/amp.2023.9 Published online by Cambridge University Press

accessible through the ICC may not provide a sufficient or appropriate measure of justice for those affected. Similarly, revolutionary access for individuals in the context of international investment arbitration fed into existing criticisms of the unprecedented recent growth of investment arbitration, giving far too much leverage to Western investors over the interests of the host states and their citizens, and calls for reform.[8]

Finally, ELIC also consists of a willingness to stretch established international legal principles. The expectation of direct remedy together with the instinct to open up new access points can lead to a loosening of more restrictive understandings of long-held international legal principles. This aim is not explicit but arises out of necessary implication. In the case of the ICC, a relevant principle was that of state responsibility. The ICC reparations regime was not linked to the actions of one state against another or in representing the interests of their citizens—normally a crucial element of state responsibility. Instead, the reparations regime uses a trust fund model of voluntary contributions. In this way, it moves just beyond strict state responsibility to a more disparate understanding of responsibility of individual perpetrators as regards victims and the international community. Similarly, in investment arbitration, access to justice for small-scale investors depended on a loosening of the principle of consent—a cornerstone of international law. Though contentious, the tribunal reasoned that consent did not suddenly end with the inclusion of a large number of smaller parties and could accommodate mass investor claims as a procedural adaptation,[9] even if that meant stretching the initial host state consent.

Since it is possible to see ELIC's four attributes across different areas of international law, there is something in the air as part of a wider drive for access to justice. The common legal sensibility of ELIC is likely to arise in further fields of international law that involve mass harms. What this looks like will be worked out by the actors in that field, just as the actors did in the examples of international criminal and investment law. For example, the expectation of direct remedy will be similar, but the legal frames of reference that are familiar and available may differ. No area of international law is necessarily off limits when it comes to ELIC. To the contrary, compensation became possible in international criminal law, even among states with no domestic legal tradition of incorporating victim compensation into criminal law. It became possible in international investment law, another field of international law in which there was no precedent. International legal mechanisms are in the mix now in innovative and, at times, unexpected ways, in the drive for a remedy. ELIC has the potential to shape the future direction of international law in ensuring access to justice for large-scale injury.

Remarks by Brian L. Cox

doi:10.1017/amp.2023.10

Establishing the circumstances pursuant to which parties to an armed conflict are required to provide reparations or other compensation for harm inflicted in the course of hostilities is an enduring and seemingly intractable challenge in the field of public international law. With the recent full-scale invasion of Ukraine by Russia and the ensuing harm to civilian persons and property being inflicted daily on an almost unimaginable scale as a result of the ongoing fighting, the issue of recompense for damage inflicted in the course of armed conflict has become infused with a renewed

[8] *See, e.g.*, Stefan Hindelang & Markus Krajewski, Shifting Paradigms of International Investment Law (2016).

[9] Andrea Marco Steingruber, Abaclat and Others v. Argentine Republic*: Consent in Large-Scale Arbitration Proceedings*, 27 ICSID Rev. 237 (2012).