

Article

Understanding “IMCCs”: Compensation and Closure in the Formation and Function of International Mass Claims Commissions

Lea Brilmayer†

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† Lea Brilmayer is the Howard Holtzmann Professor of International Law at Yale Law School. She wishes to acknowledge with gratitude the important role that Judge Holtzmann—an important historical figure in the development of IMCCs—played in his support for her work in international adjudication, as well as for the great personal kindness that he showed to her (as to all of his younger colleagues). She also wishes to thank the editors of the Yale Journal of International Law for their skillful assistance—in particular, Shikha Garg for terrific research assistance. Professor Brilmayer was lead counsel for the State of Eritrea at the Eritrea-Ethiopia Claims Commission. The views expressed here, however, are her own independent academic opinions which have not been shaped in any way by any influence on the part of the Eritrean government.

## INTRODUCTION

International law is increasingly “judicialized.” A once straightforward and simple world of unconditional State sovereignty evolves before our eyes into a maze of regional courts,<sup>1</sup> State-to-State arbitrations,<sup>2</sup> specialized substantive adjudications,<sup>3</sup> international criminal tribunals,<sup>4</sup> and human rights commissions.<sup>5</sup> This Article takes as its subject one particular kind of international adjudicative tribunal that has become increasingly important in recent years: international mass claims commissions (IMCCs). IMCCs are ad hoc tribunals set up for adjudicating large-scale violations of international law, typically arising out of cross-border conflicts between two or more sovereign States. There have been

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1. Regional courts include the Court of Justice of the European Union (CJEU) and the Economic Community of West African States Court of Justice, among others. *See generally Courts and Tribunals of Regional Economic Communities*, INT’L JUST. RESOURCE CTR., <http://www.ijrcenter.org/regional-communities> (last visited Mar. 2, 2018). The Court of Justice of the European Union, for example, derives its jurisdiction from several different treaties. *See European Union Competences of the Court of Justice of the European Union*, EUR. PARLIAMENT (Oct. 2017), [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU\\_1.3.10.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_1.3.10.html) (summarizing these treaties and their grants of jurisdiction).

2. Fora for State-to-State arbitration include the Permanent Court of Arbitration, PERMANENT CT. ARB., <https://pca-cpa.org> (seat of public international law arbitrations) (last visited Mar. 6, 2018); the World Trade Organization (WTO) Dispute Settlement Body, *Dispute Settlement*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited Mar. 6, 2018); and ad hoc tribunals. *See also* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012); Nathalie Bernasconi-Osterwalder, *State-State Dispute Settlement in Investment Treaties*, INT’L INST. SUSTAINABLE DEV. (Oct. 2014), <https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf>; Charles H. Brower II, *Arbitration*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Feb. 2007), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e11?rsk=8HS7wB&result=7&prd=EPIL>.

3. Specialized adjudication occurs at tribunals such as the International Tribunal for the Law of the Sea, INT’L TRIBUNAL L. SEA, <https://www.itlos.org> (last visited Mar. 6, 2018); the WTO Dispute Settlement Body, *see Dispute Settlement*, *supra* note 2; and the NAFTA dispute settlement mechanism, *Overview of the Dispute Settlement Provisions*, NAFTA SECRETARIAT, <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions> (last visited Mar. 6, 2018).

4. International criminal tribunals include the International Criminal Court, INT’L CRIM. CT., <https://www.icc-cpi.int> (last visited Mar. 6, 2018), which is a permanent standing court, as well as various ad hoc tribunals such as the Special Court for Sierra Leone, SPECIAL CT. FOR SIERRA LEONE, <http://www.rscsl.org> (last visited Mar. 6, 2018); the International Criminal Tribunal for the former Yugoslavia, INT’L CRIM. TRIBUNAL FOR FORMER YUGO., <http://www.icty.org> (last visited Mar. 6, 2018); the International Criminal Tribunal for Rwanda, INT’L CRIM. TRIBUNAL FOR RWANDA, <http://unictr.unmict.org> (last visited Mar. 6, 2018); the Extraordinary Chambers in the Courts of Cambodia, EXTRAORDINARY CHAMBERS CTS. CAMBODIA, <https://www.eccc.gov.kh/en> (last visited Mar. 6, 2018); and the Special Tribunal for Lebanon, SPECIAL TRIBUNAL FOR LEB., <https://www.stl-tsl.org/en> (last visited Mar. 6, 2018). *See generally* Wolfgang Schomburg & Jan Nemitz, *International Criminal Courts and Tribunals, Procedure*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Dec. 2010), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1678>.

5. Examples of human rights commissions include the Inter-American Court of Human Rights, INTER-AM. CT. HUMAN RTS., <http://www.corteidh.or.cr> (last visited Mar. 6, 2018); the European Court of Human Rights, EUR. CT. HUMAN RTS., <http://www.echr.coe.int> (last visited Mar. 6, 2018); and the African Commission on Human and Peoples’ Rights, AFR. COMMISSION ON HUM. & PEOPLES’ RTS., <http://www.achpr.org> (last visited Mar. 6, 2018). *See generally Regional Systems*, INT’L JUST. RESOURCE CTR., <http://www.ijrcenter.org/regional> (last visited Mar. 2, 2018).

three tribunals fitting this description, all established in the last four decades: the Iran-U.S. Claims Tribunal (IUSCT), the United Nations Compensation Commission (UNCC), and the Eritrea-Ethiopia Claims Commission (EECC).<sup>6</sup>

IMCCs are the behemoths of international litigation—large, slow-moving, lumbering beasts that maneuver awkwardly and are almost impossible to steer. As the name suggests, IMCCs are huge. The numbers of claims that they are called upon to resolve can run easily into the millions and the awards into the billions.<sup>7</sup> The legal issues that they deal with are complex and the administrative difficulties are staggering.<sup>8</sup> Some IMCCs seemingly last forever: the shortest of the modern IMCCs lasted nearly a decade, with the longest just now winding down after almost forty years in action.<sup>9</sup> And the legal precedents that they announce live on, often being disproportionately influential.<sup>10</sup> Given their size,

6. See *infra* Section II.A. Another, somewhat similar, example is the Commission for Real Property Claims of Displaced Persons and Refugees, created pursuant to the Dayton Peace Agreements in the aftermath of the conflict in the former Yugoslavia, which was responsible for settling ownership of real property that had been seized or abandoned during the war. However, this Commission did not have full adjudicative authority and had a very limited range of remedies. See Hans van Houtte, *Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina*, 48 INT'L & COMP. L.Q. 625, 626 (1999).

7. The Iran-U.S. Claims Tribunal (IUSCT) has successfully resolved over 3,900 claims and is still hearing cases in The Hague. See *About the Tribunal*, IRAN-U.S. CLAIMS TRIBUNAL, <https://www.iusct.net/Pages/Public/A-About.aspx> (last visited Mar. 6, 2018). To date, the Tribunal has awarded more than \$2.5 billion to U.S. nationals and companies. An overview of the Tribunal is available through the U.S. State Department at *Iran-U.S. Claims Tribunal*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/3199.htm> (last visited Mar. 6, 2018). The U.N. Compensation Commission (UNCC) processed about 2.7 million claims seeking more than \$350 billion in compensation between 1991 and 2005. See WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT xi (Timothy J. Feighery, Christopher S. Gibson & Trevor M. Rajah eds., 2015); David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1 (1994); see also Timothy J. Feighery, *The United Nations Compensation Commission*, in THE RULES, PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 515 (Chiara Giorgetti ed., 2012).

8. See U.N. Secretary-General, *Report Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, ¶ 21, U.N. Doc. S/2255 (May 2, 1991) [hereinafter U.N. Secretary-General Report on UNCC] (discussing administrative difficulties with managing "tens of thousands of claims"); Lee M. Caplan, *Arbitrator Challenges at the Iran-U.S. Claims Tribunals*, in CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 115 (Chiara Giorgetti ed., 2015) (illustrating the political arrangements that were necessary to administer the claims); Sandrine Giroud & Sam Moss, *Mass Claims Processes Under Public International Law*, in COLLECTIVE REDRESS IN EUROPE 481, 497 (Eva Lein et al. eds., 2015) (discussing difficulties related to the "sheer number of claims" and obstacles to obtaining evidence); Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 178-80 (2009) (discussing in part the complexity of claims at the UNCC).

9. The IUSCT has been in operation for almost forty years, having been established in 1981. See IRAN-U.S. CLAIMS TRIBUNAL, <http://www.iusct.net> (last visited Mar. 6, 2018). On the other hand, the UNCC operated for fourteen years (from 1991 to 2005), and the EECC operated for about a decade (from 2000 to 2009). See U.N. COMPENSATION COMMISSION, <http://www.uncc.ch> (last visited Mar. 6, 2018); *Case View: Eritrea-Ethiopia Claims Commission*, PERMANENT CT. ARB., <https://pcacases.com/web/view/71> (last visited Mar. 6, 2018).

10. Legal rulings from mass compensation commissions "while not binding, are often influential." HOWARD M. HOLTZMANN & EDDA KRISTIÁNSDÓTTIR, INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 118 (2007). Though there is not a formal rule of stare decisis, in practice, decisions have been treated as precedent. See *id.* at 118-19, 122-23; Arturo J. Carrillo, *Transnational Mass Claims Processes (TMCPs) in International Law and Practice*, 28 BERKELEY J. INT'L L. 343, 404-05 (2010); see also CYMIE R. PAYNE & PETER H. SAND, GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENTAL LIABILITY 273 (2011) (discussing the UNCC's

significance, and staying power, IMCCs teeter on the border between garden-variety one-shot arbitrations and standing international tribunals charged with setting the future course of international law.<sup>11</sup>

Their responsibilities may be enormous, but their resources—tangible or intangible—are sometimes not. As ad hoc tribunals, IMCCs have to earn the recognition that standing courts automatically receive from the international community. Launched with nothing for credentials other than the agreement of the States that created them, IMCCs have a tenure that is defined solely by reference to the parties' wishes.<sup>12</sup> Typically, the tribunals' decisions are not reviewable, depriving IMCC awards of whatever affirmation an appellate process might provide.

Moreover, the claims they hear are mostly ones that would not get an audience before any other international tribunal. Their mandates often demand seemingly impossible feats, such as adjudication of tens of thousands of undocumented small claims arising during armed conflict in unfamiliar portions of the globe.<sup>13</sup> The usual punctilious standards of evidentiary proof may be a wishful fantasy.<sup>14</sup> To obtain funding, some IMCCs must constantly ask the parties themselves, whose enthusiasm for the litigation cannot be relied upon.<sup>15</sup>

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influence on decisionmakers responsible for compensating victims at all levels); John P. Gaffney, *Precedent in the United Nations Compensation Commission*, 5 *TRANSNAT'L DISPUTE MGMT.* 1 (2008).

11. It should therefore be no surprise that they attract top arbitrators. Claims commission arbitrators have included well-known academics, former International Court of Justice judges, former Supreme Court Justices, law firm partners, former presidents of the American Society of International Law, and former claims commission arbitrators. See *Arbitrators*, IRAN-U.S. CLAIMS TRIBUNAL, <https://www.iusct.net/Pages/Public/A-Arbitrators.aspx> (last visited Apr. 20, 2018); *Commissioners*, U.N. COMPENSATION COMMISSION, <http://www.uncc.ch/commissioners> (last visited Apr. 20, 2018); *Case View: Eritrea-Ethiopia Claims Commission*, *supra* note 9.

12. For example, the Algiers Agreement of December 12, 2000, which established the EECC, required that the Commission endeavor to complete its work within three years of the parties' deadline to file claims. Agreement Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, Eth.-Eri., arts. 5(8), 5(12), Dec. 12, 2000, 2138 U.N.T.S. 93, 97-98 [hereinafter Algiers II]. Additionally, the UNCC completed its work in 2005 when it had finished processing all claims. Press Release, U.N. Comp. Comm'n, Governing Council of United Nations Compensation Commissions Has Concluded Its Fifty-Sixth Session, U.N. Doc. PR/2005/8 (June 30, 2005), <http://www.uncc.ch/sites/default/files/attachments/documents/56%20close.pdf>. The UNCC remains in operation only "to correct duplicate awards and to make additional payments." Carrillo, *supra* note 10, at 372.

13. For example, the EECC was established following a ruinous boundary war that resulted in significant loss of life, personal injury, and economic damage. The conflict killed approximately 70,000 people, and up to another 350,000 were internally displaced. Aaron Maasho, *Eritrea, Ethiopia Trade Blame for Border Clashes*, REUTERS (June 13, 2016), <https://www.reuters.com/article/us-ethiopia-eritrea-attacks/eritrea-ethiopia-trade-blame-for-border-clashes-idUSKCN0YZ0IL>; Nita Bhalla, *War "Devastated" Ethiopian Economy*, BBC NEWS (Aug. 7, 2001), <http://news.bbc.co.uk/2/hi/africa/1476618.stm>. The UNCC also had a monumental task in processing the variety of losses resulting from Iraq's invasion of Kuwait in 1990. The Commission was responsible for processing over 2.7 million claims seeking more than \$350 billion in compensation over just fourteen years. Geoffrey Senogles, *The United Nations Compensation Commission's Utilisation of Experts*, in *INSIDE THE BLACK BOX: HOW ARBITRAL TRIBUNALS OPERATE AND REACH THEIR DECISIONS* 93, 93 (Bernhard Berger & Michael E. Schneider eds., 2013).

14. The UNCC, for instance, had significant evidentiary difficulties because people often lacked proper documentation about their claims and because the conflict destroyed much of the evidence. See *infra* note 36.

15. There are a variety of models by which IMCCs are funded. For example, the UNCC had a

Despite such profound challenges, these tribunals purport to issue rulings that bind sovereign States.<sup>16</sup> With their promise of “do it yourself” justice, IMCCs seem to display optimism about the potential of international law—an optimism that is all too rare these days. But do IMCCs deliver the goods?

The conclusions reached below are not entirely encouraging. As is generally recognized in the academic literature, a variety of community interests support both the establishment of international tribunals and the widespread recognition of the decisions they reach.<sup>17</sup> Such a variety of interests is not only desirable but arguably necessary. The more interests at stake, the more likely that at least one actor, somewhere in the community, will find a particular IMCC worthy of support. The result, however, is that the various actors in the international system who are called on for support will very likely have different reasons for supporting mass adjudication. The interests of the international community are neither identical to the interests of the parties nor homogeneous. In particular, the international community is typically just as interested in putting an end to the conflict as it is in addressing the merits of individual complaints, and actual payment of the individual awards may matter even less.

This Article is a methodological hybrid: partly descriptive, partly analytical, and partly predictive. It seeks to describe and analyze the IUSCT, the UNCC, and the EECC in such a way as to facilitate predictions about the likely outcome of future IMCCs. It does so in part by generalizing from the experience of the three IMCCs. This Article also explores what certain kinds of actors, with certain motives and interests, are likely to do or say under certain circumstances. It is believed that much of the puzzling international conduct surrounding this relatively new form of adjudication makes sense upon examination. This Article aims to spell out the hidden logic of IMCCs, to provide examples from existing

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stable source of capital that was automatically diverted to pay successful claims and operation costs. The IUSCT, on the other hand, had an initial pool of funds but was forced to rely on the parties’ commitment to replenish funds as they ran out. For a more detailed discussion of the funding of IMCCs, see LEA BRILMAYER, CHIARA GIORGETTI & LORRAINE CHARLTON, *INTERNATIONAL CLAIMS COMMISSIONS: RIGHTING WRONGS AFTER CONFLICT* 140-66 (2017).

16. For example, the Algiers Agreement of December 12, 2000, creating the EECC, stated that decisions and awards of the Commission are “final and binding” and “[t]he parties agree to honor all decisions and to pay any monetary awards rendered against them promptly.” Algiers II, *supra* note 12, art. 5(17). For similar provisions in the instruments that created other IMCCs, see Article 4 of the Claims Settlement Declaration that created the IUSCT, which provides that “[a]ll decisions and awards of the Tribunal shall be final and binding.” Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Iran-U.S., art. IV, Jan. 19, 1981, 20 I.L.M. 230 (1981), 1 Iran-U.S. CTR 9 (1983) [hereinafter IUSCT Claims Settlement Declaration]. For another example, see paragraphs 16 through 19 of the U.N. Security Council Resolution that created the UNCC. S.C. Res. 687, ¶ 18, (Apr. 8, 1991) (“[d]ecid[ing] also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund”). Even international courts that do not deal with States as parties have the power to bind States. For example, States that are parties to the Rome Statute have obligations pertaining to investigating, gathering evidence, and arresting and surrendering individuals to the International Criminal Court. See generally Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 767 (2002).

17. See *infra* Section I.B. For a further discussion of the various interests that States have when considering an IMCC, see BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 193-209.

experience, and to make predictive claims that will be useful either to scholars or diplomats considering how best to approach the problem of mass loss during international conflict.

An important question that is likely to arise in future practice is whether, in a particular case, a claims commission is likely to produce the desired results. Studying the three IMCCs can offer some generalized insights about the circumstances in which successful completion of an IMCC's mandate is most likely. For example, the IUSCT and the UNCC were different from the EECC because the States had the resources to pay compensation.<sup>18</sup> Perhaps even more importantly, the two tribunals were allowed to exert effective control over these resources by sequestering a fund needed to pay the judgment. At the EECC, neither State had the financial capacity or natural resources for an IMCC to sequester.<sup>19</sup> In addition, the higher monetary value of most of the claims, the greater ability to hire lawyers that follows from these higher stakes, and the level of sophistication in the world of arbitration when the victims are wealthy businesspeople rather than subsistence farmers and herdsmen meant that in the former two tribunals, claims might be filed and adjudicated individually.<sup>20</sup> These factors help to explain how "compensation" never reached the individual victims in the EECC.

One consideration likely to be important in the prediction about likely success or failure of an IMCC is the existence of objectives other than compensation when establishing an IMCC. The EECC was created as part of a peace process designed to terminate a bloody war that threatened to destabilize the entire Horn of Africa.<sup>21</sup> Throughout the negotiations, it was entirely possible that fighting would resume with disastrous consequences for the region. Powerful third-party States that had a vested interest in legal resolution were in a position to pressure the parties to go along with a claims process, even though it had little promise of achieving the promised compensation. These factors, among others, explain why claims were paid in only two of the three IMCCs studied, providing a basis for prediction about the likelihood of future IMCC success.

Part I sets out the direct compensation interests of the parties that IMCCs are ordinarily designed to serve as well as the indirect public interests of the community. It identifies the interests that IMCCs serve and the international actors for whom those interests matter. Part II then applies these arguments to a particular issue that IMCCs face within the context of enforcing awards. Looking specifically at the IUSCT, the UNCC, and the EECC, this Part illustrates how the first two tribunals ended with full compensation for meritorious claims, while the EECC did not, largely due to the parties' and the international community's mixed interests in resolving the Eritrean-Ethiopian dispute. These divergent interests were reflected in the drafting of the agreements to form the three

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18. See *infra* Section II.B.

19. See *infra* Section II.B.2.

20. See *infra* Section II.B.3.

21. See *infra* Section II.C.

commissions. Reading between the lines, the IUSCT and UNCC agreements reveal an expectation that compensation would actually be paid, while the EECC agreement projects a lack of optimism on that very issue.

Despite IMCC proponents' high hopes, the circumstances in which it is realistic to expect compensation through international mass adjudication—the ostensible primary objective of IMCCs—are limited. Secondary objectives may supply sufficient justification, but this cannot be taken for granted. Studying IMCCs reveals the intrinsic limitations on international adjudication. We are wrong if we assume that a problem is solved simply because it has been handed over to an international tribunal. With IMCCs (as with international law more generally) enthusiasm and optimism are appropriate—but only when administered with a dose of cautious realism.

## I. INTERNATIONAL MASS CLAIMS COMMISSIONS AS SEMI-PUBLIC INSTITUTIONS

IMCCs promise an attractive opportunity to validate the utility of international adjudication. Upon examination, the indicators all seem positive: IMCCs, when they function properly, not only provide compensation to the victims for whose direct benefit they were created but also promote the public benefits that international adjudication supposedly promotes to a wide range of States.

### A. *The Modern Claims Commission*

Historically, States have not typically been inclined to resolve their compensation claims through claims commissions, let alone mass claims commissions. Claims commissions existed historically, of course, and some of them were substantial operations.<sup>22</sup> However, they were not designed to resolve all claims for violations of international law. Mostly, claims commissions were designed to manage mid- to large-sized commercial claims—and generally they involved the expectation of State settlement of claims rather than case-by-case determination of the merits of an individual's claim.<sup>23</sup>

Only in the last fifty years or so have mass claims commissions been recognized as a standard tool of international conflict resolution. At these modern tribunals, jurisdiction tends to be broadly defined to include all claims based on violations of international law occurring as incidental to the particular conflict at issue.<sup>24</sup> Certainly, this includes lost property and commercial claims,

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22. For a history of claims commissions, see Rudolf Dolzer, *Mixed Claims Commissions*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e64>.

23. Only States were able to file claims with nineteenth-century claims commissions. *Id.* ¶¶ 17-18. However, this has changed more recently. For example, the IUSCT, created in the early 1980s, permitted individuals to appear if the amount of their claims was greater than \$250,000. *Id.* ¶ 18.

24. For instance, the EECC gave the Commission jurisdiction over violations of international humanitarian law and other violations of international law. *See* Algiers II, *supra* note 12, arts. 5(1), 5(12); *see also* SEAN D. MURPHY, WON KIDANE & THOMAS R. SNIDER, *LITIGATING WAR: MASS CIVIL INJURY AND THE ERITREA-ETHIOPIA CLAIMS COMMISSION* 66-68 (2013).

but it also includes claims for violations of human rights and humanitarian law, as well as treaties in effect between the States in question.

For present purposes, “IMCC” includes *ad hoc* tribunals set up after international conflicts to remedy large-scale violations of international law through the provision of compensation.<sup>25</sup> As explained above, there are three modern examples of IMCCs, all of which were established in the last four decades; indeed, two of them were established post-2000. The IUSCT was established to handle claims arising out of the Iranian Revolution and the ensuing occupation of the U.S. Embassy in Tehran;<sup>26</sup> the UNCC was established for claims arising out of Saddam Hussein’s invasion of Kuwait; and the EECC was established for claims arising out of the 1998-2000 border war between Ethiopia and Eritrea.<sup>27</sup> The proposed definition of IMCC does not include non-binding mediation,<sup>28</sup> truth and reconciliation commissions,<sup>29</sup> criminal tribunals (whether

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25. A more detailed and technically precise definition is provided in BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 5-6:

IMCCs are *ad hoc* bodies and their structure, jurisdiction, procedure and ability to remedy vary considerably. Indeed, there is no uniform, formal definition of IMCCs. They make up an eclectic and unique group, characterized by important shared characteristics. First, IMCCs are binding dispute resolution mechanisms; second, they are structured and act like judicial bodies; third, they are created after an event of international relevance; fourth, they are international law instruments; fifth, they engage the responsibility of states; and sixth, they are *ad hoc* institutions.

26. For an excellent overview, see Jeremy K. Sharpe, *Iran-United States Claims Tribunals*, in THE RULES, PRACTICE AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 545 (Chiara Giorgetti ed., 2012). See also THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 (Richard Lillich ed., 1984) (reviewing the establishment and initial jurisprudence of the Tribunal).

27. For background on the establishment of these three IMCCs, see *infra* Section II.A.

28. Unlike non-binding mediation, IMCCs issue binding decisions. See *supra* note 16. Additionally, the definition of IMCCs provided *supra* in note 25 specifies that IMCCs are binding dispute resolution mechanisms.

29. Truth and Reconciliation Commissions are typically created after a violent international or domestic event that significantly impacted a State. The fundamental functions of these commissions are to provide an instrument of reconciliation and closure to the parties involved through a process of dialogue, and to create a historical record. IMCCs, on the other hand, are adjudicative bodies and are therefore inherently different from Truth and Reconciliation Commissions. Examples of Truth and Reconciliation Commissions include the South African Truth and Reconciliation Commission created after the abolition of apartheid, <http://www.justice.gov.za/trc> (last visited Mar. 6, 2018), and the Argentinian National Commission on the Disappearance of Persons created after the Dirty War and the military dictatorship that ruled Argentina from 1976 to 1983, see *Truth Commission: Argentina*, U.S. INST. FOR PEACE, <https://www.usip.org/publications/1983/12/truth-commission-argentina> (last visited Mar. 6, 2018).



standing<sup>30</sup> or ad hoc<sup>31</sup>), or domestic legal mechanisms such as class actions.<sup>32</sup>

Mass claims commissions have been, or are being, considered for a variety of claims: injury and death during a cholera epidemic introduced into Haiti by a U.N. peacekeeping operation following an earthquake;<sup>33</sup> the seizure of property during the seventy-year duration of the Arab-Israeli conflict,<sup>34</sup> and worldwide economic damage due to climate change.<sup>35</sup> Although the momentum now seems

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30. Criminal tribunals apply international criminal law—a specialized body of law—and typically have higher standards of proof than IMCCs. They typically do not award compensation to the victims. Generally, some sort of prosecutor’s office is responsible for bringing charges. For reasons such as these, they are quite different from IMCCs. Standing criminal tribunals include the International Criminal Court. *See* INT’L CRIM. CT., *supra* note 4.

31. Ad hoc criminal tribunals include the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and others. *See supra* note 4. These tribunals deal with individual responsibility, not with reviewing the acts of States. At times, these mechanisms are created in parallel with other claims commissions but remain separate. For instance, several real-property claims processes ran in parallel to the ICTY. These included the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia-Herzegovina (CRPC), established by the 1995 Dayton Peace Agreement. The CRPC was headquartered in Sarajevo and had a mixed composition of nine members: six internationals appointed by the president of the European Court of Human Rights, and six nationals, two appointed by the Republika Srpska and four appointed by the Federation of Bosnia and Herzegovina. The CRPC dealt only with mass property claims resulting from the disintegration of Yugoslavia. *See* van Houtte, *supra* note 6.

32. Domestic compensation mechanisms are numerous. In the United States, for example, the Foreign Claims Settlement Commission (FCSC), an agency of the Department of Justice, settles claims that U.S. nationals have against foreign governments. The jurisdiction of the FCSC is conferred by Congress, through an international claims settlement agreement, or at the request of the Secretary of State. Its funds derive from either Congressional appropriations, international claims settlements, or from liquidation of foreign assets in the United States. Completed FCSC programs include claims against the Federal Republic of Germany, Bulgaria, Romania, Poland, and Albania. *See Foreign Claims Settlement Commission of the U.S.*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/fcsc/about-commission> (last visited Apr. 20, 2018). Although international in origin, these claims are fully addressed and resolved in the domestic context by a U.S. government agency. Other claims commissions are created to deal with wholly domestic events such as the Gulf Coast Claims Facility, a \$20 billion fund to settle claims resulting from the 2010 Deepwater Horizon oil spill. *See, e.g.*, Catherine Clifford, *BP Oil Spill Fund: \$5 Billion in Claims Paid Out*, CNN MONEY (Aug. 23, 2011), [http://money.cnn.com/2011/08/23/smallbusiness/BP\\_oil\\_spill\\_claims/index.htm](http://money.cnn.com/2011/08/23/smallbusiness/BP_oil_spill_claims/index.htm). Such commissions handle entirely domestic claims; they may use mass claims procedures but have little else in common with IMCCs.

33. The Institute for Justice and Democracy in Haiti has advocated for the creation of an independent standing claims commission to compensate Haitian cholera victims. *See Justice for Haiti Cholera Victims: The Lawsuit Against the United Nations*, INST. FOR JUSTICE & DEMOCRACY IN HAITI 3 (Dec. 16, 2014), <http://www.ijdh.org/wp-content/uploads/2014/12/Cholera-Litigation-FAQ-12.16.2014.pdf>; *see also* Muneer I. Ahmad & Alice M. Miller, *It’s Time for the UN To Compensate Haitians for Its Cholera Disaster*, NATION (Aug. 23, 2016), <https://www.thenation.com/article/its-time-for-the-united-nations-to-compensate-haiti-for-its-cholera-disaster>.

34. *See, e.g.*, Framework Agreement for Permanent Status, Discussion Draft, art. 7, May 20, 2000 (provided only as an online appendix—Appendix Z—to WILLIAM B. QUANDT, PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967 (3d ed. 2005), <https://www.brookings.edu/wp-content/uploads/2016/07/Appendix-Z.pdf>, and proposing the creation of an international commission to decide Palestinian compensation claims); U.N. Conciliation Comm’n for Palestine, Historical Survey of Efforts of the U.N. Conciliation Comm’n for Palestine to Secure the Implementation of Paragraph 11 of Gen. Assembly Resol. 194 (III), ¶20, U.N. Doc. A/AC.25/W/81/Rev.2 (Oct. 2, 1961) (discussing in part the ability of a claims commission to assist with determining compensation for the parties’ financial losses “incurred during the recent fighting”); Leila Hilal, *Reparation for Lost Palestinian Property Inside Israel: A Review of International Developments*, 33 JERUSALEM Q. 56 (2008) (discussing the applicability of a claims commission to the Israel-Palestine conflict).

35. *See, e.g.*, Maxine Burkett, *Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States*, 13 SANTA CLARA J. INT’L L. 81 (2015) (proposing a claims

to be growing, it will probably be many decades before we can discern whether mass claims commissions have become a standard component of the international lawyer's toolkit. However, the increased incidence and visibility of tribunals of this sort are undeniable.

The increased activity in the mass claims context is partially rooted in our newfound facility with handling mass paperwork. It is hard to imagine creating an institution such as the 1991 UNCC five decades earlier. The claims numbered in the millions, many of them small in size and lacking conventional documentation.<sup>36</sup> How would it have been possible to collect, process, prove, and pay all of these claims in an era of manual typewriters and carbon paper? Such a project would have been largely unthinkable in a world without the Internet, email, digital scanners, and laptops—a world in which smartphones were familiar mainly to readers of Dick Tracy cartoons.<sup>37</sup>

But there is more to this new development than laptops and iPhones. It seems clear that the interests favoring the creation and success of IMCCs are both substantial and widespread. The increasing prevalence of IMCCs strongly suggests that these tribunals are widely believed to be somehow useful. But for what? And to whom?

To a certain degree, the objectives of IMCCs are the same as those underlying other sorts of international tribunals. Compensation and deterrence, for example, are also goals of various human rights tribunals and international courts of general jurisdiction.<sup>38</sup> However, these objectives may take a different form or have a different priority than IMCCs; the reason that IMCCs are formed is that no existing tribunal can be expected to do the job.<sup>39</sup>

### B. Primary and Secondary Objectives

IMCCs are formed at the initiative of the States that sign what are, in effect,

commission to compensate small island States); Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605 (2006) (discussing which types of environmental harms could be addressed by a compensation system such as a claims commission).

36. The UNCC received approximately 2.69 million claims. *The Claims*, U.N. COMPENSATION COMMISSION, <http://www.uncc.ch/claims> (last visited Apr. 20, 2018). Lack of documentation was a key challenge for the UNCC. Many of the individuals who submitted claims had fled their homes in a hurry, bringing little or no documentation with them, and the looting and destruction of property destroyed much evidence. John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA J. INT'L L. & FOREIGN AFF. 141, 153 (2005); see also U.N. Comp. Comm'n Governing Council, Rep. and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages Above US\$100,000 (Category "D" Claims), ¶ 72, U.N. Doc. S/AC.26/1998/1 (Feb. 3, 1998) (acknowledging that "[i]n many cases, relevant documents do not exist, have been destroyed, or were left behind by claimants who fled Kuwait or Iraq").

37. See, e.g., *The Dick Tracy Show: Phony Pharmers* (United Productions of America 1961).

38. For example, the Inter-American Court of Human Rights and the International Court of Justice (ICJ) are both authorized to award compensation. See, e.g., Dapo Akande, *Award of Compensation by International Tribunals in Inter-State Cases: ICJ Decision in the Diallo Case*, EJIL: TALK! (June 21, 2012), <http://www.ejiltalk.org/award-of-compensation-by-international-tribunals-in-inter-state-cases-icj-decision-in-the-diallo-case>.

39. The ICJ, for example, may order compensation for States parties on theory of diplomatic representation, but individualized compensation will not be awarded to particular victims.

arbitration agreements. The commissioners who hear and decide cases are chosen by the parties, both claimants and respondents. Any compensation that is recovered goes to the individual claimants and the States of which they are nationals. Clearly, strong private interests are at stake. Yet IMCCs (like all ad hoc international adjudications) depend on the international community for support. They purport to make judgments that are binding against sovereign States that will be recognized by the international community at large. Third States may be called on to assist with funding or expertise. Why does the private choice of State parties looking for a private benefit—compensation—entitle those private parties to the assistance of the international public?

Standing international tribunals, such as the International Court of Justice (ICJ), are typically established by a general multilateral agreement, a source of legitimacy that is not available to IMCCs.<sup>40</sup> One can point to the consent that the parties give in establishing their tribunal, but the more that an IMCC affects third States' interests, the less that consent-based reasoning does to make its acts legitimate.<sup>41</sup>

The justification for the international system's authority is already tenuous enough; critics accuse supra-national organizations like the United Nations or the European Union of being undemocratic and therefore illegitimate.<sup>42</sup> But ad hoc IMCCs—large, long-lived, and empowered to decide important legal issues—test the limits. The widespread and varied nature of the interests that IMCCs potentially serve is key to their acceptance and ability to marshal support. The power and influence of IMCCs depend on the extent to which they further the interests of both the State and private parties in the world community as a whole.

IMCCs have no single purpose that sets the standard against which they should be judged. Although their ostensible purpose is to provide compensation, different international actors support IMCCs for different reasons. Whether a particular IMCC is viewed as a success or a failure may depend on whom you ask and that international actor's interests and expectations.

The interests that might be served by the creation of a claims commission

40. The ICJ was established through the ICJ Statute, which forms part of the U.N. Charter. See Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 933. The International Criminal Court is another example of a standing tribunal that was established through multilateral agreement. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. IMCCs, however, are not standing tribunals and may be set up with varying levels of consent. See *infra* note 61.

41. For example, decisions of mass claims commissions can affect a State's nationals through economic effects, such as higher taxes necessitated by the government having to pay a large award. See *infra* note 53. In contrast, arbitration decisions generally do not affect non-parties. See Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgements: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 187 (2013) ("[I]nternational arbitral awards . . . generally do not affect non-parties who did not agree to be bound by the arbitration.").

42. For a discussion of these criticisms, see, e.g., Madeline Albright, *Think Again: The United Nations*, FOREIGN POL'Y, (Oct. 29, 2009), <http://foreignpolicy.com/2009/10/29/think-again-the-united-nations>; James Arkedis, *It's Time for a New United Nations*, ATLANTIC (Sept. 17, 2013), <http://www.theatlantic.com/international/archive/2013/09/its-time-for-a-new-united-nations/279738>; Vaughn Miller & Jon Lunn, *The European Union: A Democratic Institution?* (House of Commons Research Paper 14/25, Apr. 29, 2014).

are enormously varied, and some are more common and central than others.<sup>43</sup> There are at least four different types of basic objectives that IMCCs seek to promote: compensation, retribution, deterrence, and closure. The first of these is ostensibly primary—after all, what is being assessed is a mass compensation commission—and the other three are secondary. The four overlap in the sense that several different objectives may be at stake in any particular case. But they are conceptually distinct and do not necessarily coincide.

### 1. Compensation

In the present context, compensation refers to an award pursuant to a determination of wrongdoing that requires payment to the victims of the violation. Compensation is designed to put the victim back in the position he or she would have been in had no violation occurred; that is, compensation is intended to make the victim whole.<sup>44</sup> The direct interest in compensation is held by the injured individual or (under a theory of diplomatic representation) the State of which the claimant is a national.

The interest in compensation exists only where the injured party has a meritorious legal claim; it does not come into existence simply because the claimant has suffered a loss. For an award to be justified as *compensation*, there must be a valid legal reason that the State charged with bearing the loss is required to pay. The private interest in compensation therefore requires that meritorious claims be recognized and that the claimant's award actually be paid.

Compensation is the most obvious objective of an IMCC. Indeed, the names given to certain claims commissions make explicit reference to the objective of "compensation" while others imply a compensatory objective by inclusion of the word "claims."<sup>45</sup> Compensation is the only interest that we have included as part of our definition of IMCCs; a tribunal would not qualify under

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43. In addition to the interests discussed here, other interests include cementing peaceful relations between the parties by providing a forum for lawful interaction, truth-telling to set the historical record straight for future generations, and satisfying one of the parties such that it is willing to put an end to whatever conflict is causing the damage in question. See BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 239-41.

44. See Stephan Wittich, *Compensation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2008), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1025>; see also Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶ 152 (Sept. 25) ("It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."); Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.").

45. Commissions that have the word "compensation" in their title include the UNCC and the German Forced Labour Compensation Programme, the latter of which was created by the International Organization for Migration. See *German Forced Labour Compensation Programme (GFLCP)*, INT'L ORG. FOR MIGRATION, <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/German-Forced-Labour-Compensation-Programme-GFLCP.pdf> (last visited Apr. 20, 2018). Commissions with the word "claims" in their title include the IUSCT; the EEC; the Commission for Real Property Claims of Displaced Persons, see van Houtte, *supra* note 6; and the Claims Resolution Tribunal for Dormant Accounts in Switzerland II, CLAIMS RESOL. TRIBUNAL FOR DORMANT ACCOUNTS SWITZ., [http://www.crt-ii.org/\\_crt-i/frame.html](http://www.crt-ii.org/_crt-i/frame.html) (last visited Apr. 20, 2018).

this definition if it did not set out to compensate. By definition, therefore, compensation is ordinarily the primary interest furthered by claims commissions.

## 2. Retribution

A close analog of compensation is retribution, or punishment for unlawful conduct that causes harm. Retribution goes hand in hand with compensation; retribution and compensation are different ways of characterizing the same legal consequence of the same wrongful act. The defendant pays the claimant’s damages (compensation) and is both simultaneously and commensurately punished (retribution).

Retribution means depriving the perpetrator of the benefit, if any, that it obtained through its violation. It might also require incarceration or punitive damages. International claims litigation can sometimes be justified by reference to retributive policies, but punishment by incarceration, for example, is chiefly the objective of international criminal tribunals, not IMCCs. Moreover, punitive damages are generally not awarded in international compensation cases.<sup>46</sup> Retribution is therefore at most a secondary objective of IMCCs.

## 3. Deterrence

A third possible objective is deterrence. General deterrence entails discouraging future actors that may be contemplating similar violations by setting an example of the negative consequences. Typically, this would be accomplished by requiring the perpetrator to pay for the damage caused to the victim. Deterrence is further enhanced by the perpetrator’s burden of defending against the accusation. Finally, upon the rendering of an unfavorable award, the perpetrator bears the cost of public exposure as a violator of international law (so-called “naming and shaming”). Indeed, in some cases a declaration of violation has been declared a sufficient award in and of itself.<sup>47</sup>

Both deterrence and retribution often coincide with compensation. Like compensation, deterrence and retribution interests are implicated only in response to a wrongful act. The act of paying the claimant’s damages (compensation) is simultaneously also an act of retribution and deterrence.

Whether attempts at deterrence are effective is debatable. Deterrence requires that potential perpetrators be fairly certain that the threatened consequences will materialize and that they have a deep enough aversion to the threatened penalty that they will be willing to alter their behavior. But regardless

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46. See Wittich, *supra* note 44, ¶ 44 (noting that because “in international law damages are purely compensatory . . . punitive damages are generally rejected”).

47. For example, see the EICC Final Award on Eritrea’s Diplomatic Claim, recognizing apology as an adequate remedy for violations of diplomatic protection. Eri.-Eth. Claims Comm’n, Final Award—Eritrea’s Damages Claims, XXVI R.I.A.A. 505, 509, 619-20 (Aug. 17, 2009) [hereinafter Final Award of Eritrea’s Damages Claims] (finding that “satisfaction . . . in the form of a declaration of wrongfulness” was sufficient). See generally JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 569-71, 575-77 (8th ed. 2012) (discussing other cases in which international tribunals have found declaratory judgments to be sufficient remedies).

of empirical doubts about the likelihood of successful deterrence, enough observers believe in the efficacy of deterrence to make it a frequently cited reason for supporting the creation of IMCCs.<sup>48</sup>

#### 4. Closure

The fourth category of objectives is closure. Closure involves laying the dispute to rest and coming to a final determination that can be taken as authoritative. The announcement of an authoritative determination changes the international status quo in important ways, even when the decision calls for no remedy. A State's ability to marshal international support for its claims is vastly reinforced by a favorable decision and is severely undercut by an unfavorable one. One does not have to be a naïve idealist, optimistic that States will always step in line immediately and fulfill their adjudicated responsibilities, to see the announcement of an arbitral or court award as affecting a State's chances at getting what it wants. Putting legal claims to rest through adjudication is one step towards the fulfillment of valid claims and one step towards reestablishing international peace.

The significance of closure is often underestimated. Without assurances that the matter will be conclusively determined, accused perpetrators will have less reason to agree to set up a commission in the first place. Closure is particularly important to a State facing duplicative litigation in other fora, such as in a domestic court that happens to have concurrent jurisdiction. Often, the agreement that establishes the IMCC specifically provides that the IMCC shall be the exclusive forum for litigating the liability at issue, and claims not filed by the deadline set out in the agreement will be extinguished.<sup>49</sup> Closure, in this way, is automatic.

As thus conceived, closure means that an authoritative determination has been made regarding the legal sufficiency of a claim of specific unlawful conduct for which the individual victim requests compensation. In the context of IMCCs, however, closure also has a second meaning. With IMCCs, the alleged unlawful conduct typically took place in the context of some broader conflict, such as a war or an invasion. For complete closure, this broader conflict must also be put to rest.

The tribunal does not necessarily put that broader conflict to rest by

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48. See, e.g., MURPHY, KIDANE & SNIDER, *supra* note 24, at 403; Tiffani Y. Lee, *Environmental Liability Provisions Under the U.N. Compensation Commission: Remarkable Achievement with Room for Improved Deterrence*, 11 GEO. INT'L ENVTL. L. REV. 209, 216 (1998) (discussing successes of the UNCC and proposing recommendations for increased deterrence on environmental damage claims); see also M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 294 (2010) (discussing the goal of prevention through deterrence in international criminal justice).

49. For example, the Algiers Agreement establishing the BECC made the Commission's jurisdiction exclusive. Algiers II, *supra* note 12, art. 5(8). Similarly, Article VII(2) of the IUSCT's Claims Settlement Declaration also provides for the Tribunal's exclusivity. See IUSCT Claims Settlement Declaration, *supra* note 16. However, not all claims commissions require exclusivity, and some instead allow for dual prosecution of claims. Paragraph 22 of the U.N. Secretary-General's report regarding the UNCC, for example, reaffirmed that "Resolution 687 (1991) could not, and does not, establish the Commission as an organ with exclusive competence to consider claims arising from Iraq's unlawful invasion and occupation of Kuwait." U.N. Secretary-General Report on UNCC, *supra* note 8, ¶ 22.

adjudicating the lawfulness or unlawfulness of the events that gave rise to the conflicts in the first place. These events may not even be within the tribunal's jurisdiction. But because the continued existence of legal claims for damages may be expected to interfere with the renewal of peaceful relations, the practical longer-range consequence of litigating (and foreclosing) the individual claims may be to facilitate closure of that wider issue. We might call closure of the individual claims "formal," because it gives rise to actual legal preclusive effect. Closure of the larger issue as a consequence of resolving all the individual claims is, however, more "informal."

Resolving these individual claims through establishment of an IMCC allows the parties to move beyond their prior dispute and achieve genuine closure to their larger conflict. Indeed, by "kicking the can down the road"—postponing resolution of the mass claims for several years until the litigation is complete—the agreement to establish an IMCC has the potential to encourage immediate improvement of relations, even prior to the rendering of a final award by the IMCC. The establishment of the tribunal with the authority to render final and binding awards delays the particularistic compensation that individuals hope to get as remedies for their injuries, but it "locks in" the institutional solution that promises such compensation eventually. The larger conflict can begin to heal even though the individual claims are waiting for their individual determinations.

Closure is in some respects quite different from compensation, retribution, and deterrence. Those three interests are focused on providing an award for the claimant; they function as reasons that the defendant should bear the costs of an injury that the defendant caused. These interests are not satisfied unless the claim is accepted and the award is actually paid. A tribunal fails to meet its mandate if it wrongly decides that recovery is not appropriate—in such a case, the interests in compensation, retribution, and deterrence are all frustrated.

Closure, it stands to reason, is somewhat different. First, an award of compensation to a claimant provides closure, but an award for the defendant also provides closure and is at least as valuable. Indeed, an award for the defendant—whether erroneous or correct—may be more valuable than an award for the claimant, because it precludes the need for litigation about the damages. If closure is all that matters, the best possible result would be a denial of claims—meritorious or not—at the earliest possible point.

This holds true even if the result of the claim is to erroneously deny recovery. The purpose of closure is to resolve the dispute without regard for the correctness of the result. Put differently, the determination is final regardless of whether or not it is correct, as the entire purpose of closure is to terminate future legal inquiry into the correctness of the result. Calling a decision authoritative means that the matter is closed to second guessing about whether the tribunal's decision was right or wrong.

Second, the interest in closure is furthered to some degree even if an award is not paid. A damages award for the claimant provides closure of the underlying dispute; the claimant is vindicated when a claims commission "sets the historical record straight" through a finding of unlawful conduct. And, further inquiry into the merits is not permitted.

Third, closure does not depend on whether a claim has actually been filed and litigated on the merits. Typically, the arbitration agreement that establishes the IMCC provides that closure is automatic, simply by operation of law. Failure to file a claim results in closure.

Closure is therefore different from the other interests that IMCCs further. Closure competes with compensation because it terminates even valid claims to a damages remedy. The community's interests in deterrence and retribution generally coincide with the claimants' interest in compensation; it is only closure that threatens to point in a different direction. Closure is thus in tension with the other interests.

### *C. For Whose Benefit? The Interested Actors*

Of these four types of functions, only one (compensation) is fully private, in the sense that it works to the benefit of the individual victim. Retribution, deterrence, and closure provide greater benefits to the international community. This distinction is central to the public function of IMCCs. It accounts for why the world community is likely to support them and what their responsibilities to the public are.

#### *1. Parties and Individual Claimants: The Intended Beneficiaries*

Certain generalizations about IMCCs can be made based on the general principles of international law that make them possible. For example, the fact that IMCCs are established by State consent indicates that States agree to IMCCs hoping to better their positions. Similarly, because in a symmetric proceeding (one where both sides are allowed to bring claims against the other) a State can appear as either a claimant or a defendant, the disadvantage that a State gets from more demanding rules (e.g., a higher burden of proof) is likely to be offset by the rule's advantages. Of course, these are only generalizations, which may or may not be true in particular cases. Nevertheless, it is worth considering the interests of the various intended beneficiaries of IMCCs to determine, generally speaking, which interests IMCCs tend to favor.

The international system is inhabited by actors of different kinds: individuals, States, international governmental organizations, international non-governmental organizations (both not-for-profit and for-profit), and potentially a long list of others.<sup>50</sup> The parties to proceedings before an IMCC—those whose

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50. Until the last half of the twentieth century, it was generally understood that only States could be claimants under international law; individuals and organizations had to be represented by the State of which they were nationals. See Rainer Grote, *Westphalian System*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (June 2006), <http://opil.ouplaw.com/view/10.1093/law/epil/978019231690/law-978019231690-e1500>, for a general discussion of actors in the international system. For a more in-depth discussion of parties, see BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 106-25. Depending on your belief set, you might grant a place in international society to all ethnic or linguistic groups or to all indigenous groups, to all endangered species, or to the maritime environment. See, e.g., MONICA TENNBERG, *INDIGENOUS PEOPLES AS INTERNATIONAL POLITICAL ACTORS: A SUMMARY* 264-70 (2010) (discussing the potential of indigenous groups to be international actors); Fiona B. Adamson & Madeleine Demetriou, *Remapping the Boundaries of "State" and "National Identity": Incorporating*



direct legal interests are implicated—will ordinarily be either States or private individuals, including corporations or non-governmental organizations. Their interests depend on the capacity in which they appear in a particular proceeding. There are two issues of capacity. The first issue is whether they act on their own behalf or in a representative capacity. The second is whether they appear as a claimant (victim) or as a defendant (perpetrator).

State parties often appear on their own behalf, for example, where a State claims that the defendant's invading army destroyed public property such as schools or hospitals.<sup>51</sup> They may also represent the interests of their nationals through the doctrine of diplomatic representation, or espousal.<sup>52</sup> Whether individuals can technically be parties depends on the way that a particular IMCC is set up. Sometimes, individual claimants are empowered to bring claims to the tribunal directly; otherwise, diplomatic representation is the individual victims' only recourse.

Thus, both States and individuals may, depending on the commission agreement, be able to appear as victims. Typically, however, only States can be named as defendants.<sup>53</sup> The consequence is that individuals' interests tend to be on the side of claimants generally—they are all claiming to be victims of unlawful conduct—while States have interests on both sides.

Because individuals can act only as claimants, they are generally advantaged by enhancements to the tribunal's power. Claimants are by definition dissatisfied with the status quo and seek to upset it by obtaining an order requiring compensation. To accomplish this, the tribunal must have the authority to act.

Rules that restrict the power of the tribunal, in contrast, generally are to the advantage of defendants. Because States act as both claimants and defendants, they are more likely to be neutral between rules that enhance or limit tribunal authority.

## 2. *Non-Parties: The Incidental Beneficiaries*

States that are not parties to any of the legal claims presented may still have indirect interests in the dispute. Their interests may stem from proximity

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*Diasporas into IR Theorizing*, 13 EUR. J. INT'L REL. 489 (2007) (discussing the role of diasporas in international relations).

51. Individuals are not ordinarily subjects of international law. *See, e.g.*, THOMAS ERSKINE HOLLAND, LECTURES ON INTERNATIONAL LAW 53 (1933) ("The exclusive business of International Law is to define the Rights and Duties of each State with reference to the rest.")

52. State espousal, or diplomatic protection, allows States to file claims for reparations on behalf of their nationals. BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE 10, 36-37 (2011); *see also* Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30) ("[I]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.")

53. Nevertheless, individuals would have indirect interests as nationals of a State defending legal claims. Hypothetically, if a State were held responsible and compelled to pay an award, that State might raise taxes or reduce social services in order to pay the award, and thereby could adversely affect the economic situation of its own nationals.

("spillover interests"), being in a situation similar to that of one of the parties ("precedential interests"), or simply membership in the international community ("universal interests").

Spillover interests should be expected. The objective of States suffering from spillover effects is likely to be closure of the broad underlying conflict. Non-parties may desire nothing more than a cessation of the hostilities. For example, neighboring States may have interests in bringing an end to the conflict because continuation threatens to cause increased refugee flows or the spread of ethnic or sectarian tension across borders. If the conflict threatens an international waterway, in particular a strategically important strait, this may have implications for States that are located in the region or depend on the strait for strategic or commercial transport. If one of the States directly involved in the conflict holds a near-monopoly on important natural resources, the spillover effects can be widespread and economically devastating.

Non-party States with precedential interests, however, are more likely to support the objective of deterrence. Deterrence discourages similar bad conduct by other actors in the future, and non-party States in positions similar to those of the current party litigants may tend to support deterrent actions if they envision themselves as potential victims.

Finally, States as well as other international actors throughout the entire community potentially have a universal interest in commonly held values. For this reason, they generally favor solutions to international problems that promote peace, development, human rights, and friendly relations. Closure is important to such international actors because conflict threatens human well-being. For example, unless brought to a close, a war may exacerbate food insecurity or the spread of infectious diseases. And it is at least arguable that all States have an interest in the enforcement of international law, including through support for international tribunals. Universal interests may be amorphous or diffuse, but this does not mean that they are not influential.

International non-governmental organizations are one important category of actors with universal interests that have as their objectives the promotion of ideals such as international human rights, development, democracy, transitional justice, and protection of the natural or cultural environment. By their own organizing principles, they take an interest in the furtherance of certain values in the international setting. While scholars may debate whether States have interests in such principles—a thorny philosophical issue—these organizations would have no reason for being if such interests were not generally recognized. Depending on which values supply their organizing principles, such organizations might have an interest in promoting institutions that seek to provide compensation for the violation of international law.

This list is illustrative and not intended to be exhaustive. Interests in the formation of, and support for, IMCCs are extensive and varied. Generally speaking, almost all of the important actors in the international legal system have good reasons to expect substantial benefits from the availability of international mass claims tribunals. We should not be surprised if such actors lobby, pressure, and build coalitions in support of international adjudicative institutions,

including IMCCs. It is in their interest to do so.

### 3. *Private versus Public Interests*

It might seem at first that the existence of public interests would necessarily increase support for IMCCs. The group of individual victims (holders of private interests) is a small subset of the world community as a whole. Because there are more interested actors involved once public interests are taken into account, the amount of support for adjudicative solutions might be thought to be correspondingly enlarged. The logic of collective action, however, shows why increasing the size of the pool of potential supporters for IMCCs does not necessarily make them stronger.<sup>54</sup> Economic theory suggests that the so-called "free-rider problem" will arise under certain conditions that are often encountered in international affairs.<sup>55</sup>

This problem occurs because some or all of the actors in the system may assume that, if they do nothing, others will take up the burden of supporting the interest that they share. If so, they recognize that they will be able to get its benefits while contributing nothing. In such cases, some or all will abstain from producing the good, even though, paradoxically, all would benefit if it were produced.<sup>56</sup> Certain conditions must be met for the problem to arise,<sup>57</sup> but it is

54. The free-rider problem is an economic theory, which explains why some actors benefit from goods they do not pay for because they rely on other interested actors to bear the costs. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971); Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 12-13 (1986). For a discussion of free riding in international climate agreements, see Ana Espínola-Arredondo & Félix Muñoz-García, *Free-Riding in International Environmental Agreements: A Signaling Approach to Non-Enforceable Treaties*, 23 J. THEORETICAL POL. 111 (2011).

55. If States are excluded from enjoying a certain good, they have an incentive to work towards providing the good to ensure their own access. See Robert Albanese & David D. van Fleet, *Rational Behavior in Groups: The Free-Riding Tendency*, 10 ACAD. MGMT. REV. 244 (1985); Wolfgang Stroebe & Bruno S. Frey, *Self-Interest and Collective Action: The Economics and Psychology of Public Goods*, 21 BRIT. J. SOC. PSYCHOL. 121 (1982).

56. This problem does not occur when there is a practical method for forcing the free riders to pay their share. States cannot be "free" riders if they are forced to pay to access public goods. See, e.g., ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 74 (1987) ("[C]ollective goods tend to be underprovided unless the interests of some actor cause it to assume a disproportionate share of the costs or some agency (e.g., government) exists that can force consumers to pay for the good."); Ben O'Neill, *Solving the "Problem" of Free Riding*, MISES INST. (Nov. 13, 2007), <https://mises.org/library/solving-problem-free-riding>.

57. Even a public good will not generate free-rider problems if there is, for example, a tax system in effect that compels the financial support of the general population. Moreover, the benefits and costs must satisfy certain arithmetical relations; if the distribution of a good is unequal, it is possible that one actor will find it in his interest to produce the good, even if this encourages free riding by others. The free-rider problem can moreover be dealt with if there is a single actor (generally assumed to be a large actor) in the system that can produce the good at a cost lower than the benefit it will receive. If this requirement is satisfied, then that large actor may produce the good even though others can take advantage of its efforts without any concomitant effort of their own. It would not be rational to abstain from production simply to spite the lazy free-loaders. Ian Clark has shown that these conditions may be satisfied if a single hegemon dominates the system, such that it captures enough benefit to warrant the costs of production:

The hegemon plays the leading role in establishing an institutional environment which is favourable to its own interests (free trade, informal empire) but also accepts costs in being the mainstay of the system (providing financial services, a source of capital, and a pattern of

commonplace in the international relations literature for free riding to be considered a serious impediment to collective action in international affairs.<sup>58</sup> It therefore cannot be assumed that simply increasing the number and variety of interests furthered will make the task of finding support for IMCCs easier.

A problem more specific to the present situation occurs when the public interests that would be advanced are not entirely compatible with the private compensatory purposes that the IMCC was created to serve. Here, the private interest in compensation is potentially in tension with the public interest in closure—namely, putting a definitive end to conflict, especially conflict involving use of force.<sup>59</sup>

Compensation is obviously a central reason for having claims commissions in the first place, and closure is a key reason for the international community to support them. However, the tension between the two interests arises because compensation is a function of the merits of the claim, while closure is indifferent to which claim is meritorious. Streamlining decision-making promotes closure but threatens the quality of justice awarded. For example, heavy reliance on evidentiary presumptions provides a quick resolution but comes at the expense of accuracy. Additionally, it may promote closure to impose a compromise solution, or to impose a solution that favors the stronger party or the one that is favored by the status quo. However, in all of these situations, the desire to achieve closure threatens to compromise the merits.

There is reason for concern that the States not party to a dispute may value closure at the expense of compensation for meritorious claims. In the mass claims context, it is no easy feat to determine accurately the compensation needed by each claimant and to deliver it to the right person. The costs of such an undertaking are substantial, and the guarantees of accurate accomplishment are minimal.<sup>60</sup> Without some sort of monitoring system—a costly undertaking for which the tribunal is unlikely to be well equipped—it may not be possible to

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military support). According to this conception, the hegemon is the main beneficiary of the system but also the main provider of externalities to the other members: it receives disproportionate benefits but accepts disproportionate burdens.

IAN CLARK, *THE HIERARCHY OF STATES: REFORM AND RESISTANCE IN THE INTERNATIONAL ORDER* 106-07 (1989) (arguing also that public goods can be supplied in the absence of a single hegemon). For example, security is a public good because States located in a region where security has been ensured by a hegemon cannot be excluded from enjoying its benefits. The hegemon provides security for the region because the hegemon "possesses a superior interest in preserving peace and stability in its environment, and is compelled to produce the common good on its own even without the support of others." Harald Müller, *The Role of Hegemonies and Alliances*, in *SECURITY WITHOUT NUCLEAR WEAPONS?: DIFFERENT PERSPECTIVES ON NON-NUCLEAR SECURITY* 226, 228 (Regina Cowen Karp ed., 1992) (citation omitted). The same logic is at work to explain production of the good when a former hegemon still captures more than its pro rata share of the benefit.

58. See, e.g., Stephen R. Gill & David Law, *Global Hegemony and the Structural Power of Capital*, 33 INT'L STUD. Q. 475, 492 (1989) (noting that the free-rider temptation is reduced when dealing with a smaller number of States).

59. Closure and compensation are the two interests most likely to come in conflict. For reasons already given, retribution and deterrence are not generally important in mass claims cases. See *supra* Section I.B; *infra* Part II.

60. See BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 191, for a further discussion of the challenges in accurately calculating damages.

confirm whether the award moneys are distributed to the right parties, or distributed at all.

#### *D. IMCCs as Semi-Public Institutions*

Where public and private interests are incompatible, what should be done? An answer may be sought in general principles about rational behavior in circumstances where no central government with reliable centralized enforcement power can be found. The IMCC's mandate is to adjudicate the individual- and State-owned claims of the victims concerning international law violations. An IMCC owes its existence, obviously, to the parties that created it—whether the parties did so with enthusiasm or reluctance.<sup>61</sup> But the parties' willingness to comply might not be enough. In some situations, the support of the international community becomes important. It is risky for the parties to simply ignore the public interest when public support may turn out to be crucial. In the long run, the IMCC's ability to carry out its mandate may depend on whether it has public support.

States at war may sometimes find it difficult to reach agreement because diplomatic communications have broken down. In such cases, neighboring States or major powers from outside the region might be asked to step in to facilitate negotiations. Precisely what might be done depends on particular circumstances, but one can generalize about some possibilities. If the parties find themselves at a political impasse, diplomats from other States may assist by floating proposals or by drafting language acceptable to both sides. Third-party States may offer financial support for the typically very expensive process of investigating and litigating claims. Technical expertise may be needed, which can be provided by cartographers, oceanographers, or military specialists from non-party States or international organizations. Former colonial powers sometimes provide assistance in locating evidence (e.g., historical documents archived in their colonial libraries).

Powerful non-party States that take an interest in the resolution of a dispute also can play an important role in holding both parties to the process. Over the course of the proceedings, one party or the other may become discouraged about the likelihood of success and try to find a way out of the process. This is easier to do if there is no other State with an interest in the proceedings that can create a sense of urgency for the reluctant party. And of course, once the process is complete, third-party support may be essential in inducing the parties to comply with the awards. If nothing else, third-party expressions of approval for the process or the results encourage general acceptance of an IMCC's exercise of its authority.

It should be expected that ad hoc tribunals such as IMCCs would likely need to marshal more international support than standing international tribunals.

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61. While some commissions are set up through direct consent between the States involved, such as the EECC, consent to a claims commission may be less explicit. For example, the UNCC was created by a resolution of the U.N. Security Council in the aftermath of Iraq's invasion of Kuwait. S.C. Res. 687, *supra* note 16.

Several factors may explain this difference. First, non-party States may already be committed to assisting the work of a particular standing tribunal. Standing tribunals exist independently of a particular adjudication, and there will be non-party States that are committed to that standing tribunal through preexisting treaty. Second, standing tribunals presumably already have a reliable source of funding; financial support for judges' salaries, physical infrastructure, day-to-day expenses, et cetera, will have been arranged at an earlier point.

Third, standing tribunals already have credibility. Their track record of decided cases makes them a known and accepted quantity. In particular, the judges on a standing court will have been chosen for their reputation in the community at large and will probably already enjoy community confidence. Most of the commissioners on an ad hoc tribunal will have been party-appointed and therefore assumed not to be entirely neutral. Especially if this is their first quasi-judicial appointment, they are unlikely to be as well known to the community as a full-time sitting judge. As a general matter, a standing tribunal is less likely to be suspected of bias or political motivation; it was established, and its judges and procedures were selected, prior to the submission of a particular dispute to the tribunal.

Finally, when a case is brought before a standing court, States will be aware that the day may come when they will need that court in a case of their own. It does not pay, for example, to refuse evidentiary assistance to a court before which one might have to appear. A State that contemplates bringing a case before a particular standing court some day is less likely to denigrate the authority of a court's award. Standing courts, for all of these reasons, are better positioned to expect the assistance of the international community. Ad hoc tribunals have to earn the community's confidence.

The likelihood of third-party support is important to IMCCs because of the role that the international community plays in ensuring recognition of, and respect for, international law. Anything that adds to the benefits that IMCCs are capable of producing potentially increases the community's support. It is a truism that without a centralized government, the task of encouraging respect for international law and legal institutions falls to the States themselves and to the individuals in the international community that have interests in international affairs. Anything that increases community support for IMCCs would seem to further an IMCC's chances of successfully completing its mandate.

It is difficult to generalize about the proper course of action when private and public interests conflict. IMCCs distinctively combine public and private functions. As ad hoc bodies, IMCCs seem to come out of nowhere, pulling themselves up by their bootstraps and eventually disbanding their own operations, on their own initiative, when they determine that their mandate (as defined by the agreement that created them) has been carried out. With no institutional past and only a limited future, the immediate loyalties of ad hoc tribunals are to the parties that created them.

Yet large and long-standing claims commissions, dealing with major issues of public international law, can cast as long a shadow as some standing

international courts.<sup>62</sup> Although an IMCC's first responsibility is to its mandate, IMCCs may be unable to carry out their mandate if they cannot attract and then retain public support. IMCCs do not act in isolation. Their first resource will probably be the parties—whether the need concerns financial support, recognition of their authority, or technical expertise. However, when the parties are unwilling or unable to assist, the international community may step in with money, expertise, or assistance in enforcing judgments. Thus, IMCCs are semi-public institutions.

## II. CLOSURE VERSUS COMPENSATION: THREE IMCCS COMPARED

Tensions between the various interests in IMCC adjudication is illustrated by the disparate outcomes of three modern international claims tribunals: the IUSCT, the UNCC, and the EECC. These three commissions were not all equally successful in accomplishing the purposes for which they were ostensibly created. The IUSCT is only now completing its work, almost forty years after it commenced operation. Over its tenure, the IUSCT has delivered \$2.5 billion-worth of awards, almost all of which have been paid.<sup>63</sup> The UNCC finished its work and closed its doors in 2005; its awards totaled around \$50 billion, almost all of which has been paid.<sup>64</sup> Lastly, the EECC finished its work and disbanded in 2009, with its awards totaling around \$350 million, none of which has ever been paid.<sup>65</sup>

Why did the claimants at the UNCC and IUSCT end up with compensation while the claimants at the EECC did not? The explanation for this difference is suggested by the way that the initial agreements were framed. The first two agreements were written in a way that made it clear that individual compensation was the object, while the text of the third agreement suggests the opposite. The contours of the Eritrea-Ethiopia peace agreement suggest that the dominant interest underlying formation of the EECC was not compensation but closure. None of this can be appreciated without an understanding of the background of the three IMCCs.

### A. Background

The background of each conflict that gave rise to the claims constitutes an essential element of any explanation for the differences in outcome between the three IMCCs. The first of these commissions, chronologically, was the IUSCT. It traces its genesis to the events of the early 1980s.

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62. See *supra* note 10 and accompanying text.

63. The U.S. Department of State provides a helpful overview of the IUSCT. *Iran-U.S. Claims Tribunal*, *supra* note 7.

64. The UNCC has awarded a total of \$52.4 billion in compensation to approximately 1.5 million successful claimants. U.N. COMPENSATION COMMISSION, *supra* note 9.

65. The EECC awards amount to about \$161 million to the Eritrean government, about \$2 million to individual Eritreans, and \$174 million to the Ethiopian government. See Final Award of Eritrea's Damages Claims, *supra* note 47, at 629-30, 768-70; Eri.-Eth. Claims Comm'n, Final Award—Ethiopia's Damages Claims, XXVI R.I.A.A. 631, 758-70 (Aug. 17, 2009) [hereinafter Final Award of Ethiopia's Damages Claims].

### 1. *The Iran-U.S. Claims Tribunal*

The IUSCT arose out of the conflict between Iran and the United States following the Iranian revolution in 1979. The United States had supported the previous ruler, the Shah of Iran. With the ousting of the Shah and the establishment of the Islamic Republic of Iran, U.S. nationals found the atmosphere in Iran increasingly poisonous. When the new revolutionary government commenced a program of nationalizing the banking, insurance, and oil sectors of its economy, around 45,000 Americans who had been living in Iran fled, many leaving considerable property behind.<sup>66</sup>

On November 4, 1979, a group of Iranian militants seized the U.S. Embassy in Tehran and detained a number of diplomats and consular officers. It was clear that they were aligned with and supported by the new Iranian government. The United States froze Iranian assets located in the United States in retaliation, but by the fall of 1980, the hostages still had not been released.<sup>67</sup>

The situation of the hostages in the embassy was of considerable concern in the United States, which was then in the throes of a presidential election.<sup>68</sup> As the United States had severed diplomatic ties, the two States could not negotiate directly and instead relied on Algeria as an intermediary in the negotiations. The agreements that became known as the Algiers Accords (not to be confused with the Algiers Agreements forming the EECC<sup>69</sup>) were signed in January 1981, thereby creating the IUSCT.<sup>70</sup>

The IUSCT still operates in The Hague. It has nine judges: three from the United States, three from Iran, and three from other States. It is authorized to hear the private claims of U.S. nationals against Iran and of Iranian nationals against the United States arising out of debts, contracts, expropriations, or other measures that affect property rights. The Claims Settlement Declaration of the Algiers Accords states that the "Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial

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66. See CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 1-2 (1998).

67. *Id.* at 4-6.

68. For an account of the effect that the hostage crisis had on the U.S. presidential election, see Office of the Historian, *The Iranian Hostage Crisis*, U.S. DEP'T OF STATE, <https://history.state.gov/departmenthistory/short-history/iraniancrises> (last visited Apr. 20, 2018):

While the courage of the American hostages in Tehran and of their families at home reflected the best tradition of the Department of State, the Iran hostage crisis undermined Carter's conduct of foreign policy. The crisis dominated the headlines and news broadcasts and made the Administration look weak and ineffectual. Although patient diplomacy conducted by Deputy Secretary Warren Christopher eventually resolved the crisis, Carter's foreign policy team often seemed weak and vacillating.

69. See *infra* Section II.A.3.

70. The Algiers Accords consist of two separate declarations, known as the General Declaration and the Claims Settlement Declaration. The General Declaration addressed the liberation of the U.S. hostages, the transfer of some frozen assets back to Iran, and the termination of litigation in the U.S. courts in favor of arbitration. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 224 (1981), 1 Iran-U.S. CTR 3 (1983) [hereinafter IUSCT General Declaration]. The Claims Settlement Declaration established the IUSCT. See IUSCT Claims Settlement Declaration, *supra* note 16.



and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."<sup>71</sup>

Claims under \$250,000 are defined as small claims. About 2,800 small claims were filed—the great majority by U.S. nationals—and were settled by a lump sum payment of \$105 million to the United States.<sup>72</sup> About one thousand large claims were filed and decided by 2003. These were filed by the claimants individually and not by the United States on the claimants' behalf.<sup>73</sup>

The IUSCT also has jurisdiction over official claims between Iran and the United States based on contractual arrangements for the purchase and sale of goods and services. Washington has filed twenty-four cases and Tehran has filed fifty-three. Seventy-two of these have been resolved, and the remainder await resolution. Overall, the IUSCT has awarded more than \$2.5 billion to U.S. nationals and companies.<sup>74</sup> The IUSCT has successfully resolved over 3,900 claims and continues to this day to carry out its mandate.<sup>75</sup>

## 2. *The United Nations Compensation Commission*

Iraq invaded Kuwait on August 2, 1990, and shortly thereafter announced Kuwait's annexation. The human losses of the invasion and the occupation that followed were considerable: thousands of civilians were killed or injured, and hundreds of thousands of foreign workers were forced to flee. The invasion and occupation also caused tremendous property damage; much of it was deliberate, including the setting on fire of more than six hundred oil wells. A U.N.-sanctioned military coalition ousted the Iraqi army from Kuwait in January and February 1991. The United Nations thereupon created a compensation commission to process claims for the losses brought about by Iraq's invasion.

U.N. Security Council Resolution 687 provided the terms for the Commission's creation. In that Resolution, Iraq was declared to be "liable under international law for any direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations."<sup>76</sup> The UNCC's jurisdiction included claims of individuals who were forced to leave Iraq or Kuwait as a result of the invasion,

71. IUSCT Claims Settlement Declaration, *supra* note 16, art. 5.

72. *Foreign Claims Settlement Commission of the U.S., Completed Programs: Iran*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/fcsc/completed-programs-iran> (last visited Apr. 20, 2018).

73. Amsterdam Int'l L. Clinic, *Monetary Payments for Civilian Harm in International and National Practice*, CTR. FOR CIVILIANS IN CONFLICT 37 (citing United States of America, on behalf of U.S. Nationals v. Islamic Republic of Iran, Case Nos. 86, B38, B76 & B77, Award on Agreed Terms for Claims of Less Than \$250,000 (Iran-U.S. Cl. Trib. June 22, 1990)); *see also* BROWER & BRUESCHKE, *supra* note 66, at 116-18.

74. In addition to the \$2.5 billion awarded to U.S. claimants, the IUSCT has awarded \$1 billion to Iranian claimants. John Bellinger, *U.S. Settlement of Iran Claims Tribunal Claim Was Prudent but Possible Linkage to Release of Americans Is Regrettable*, LAWFARE (Jan. 18, 2016 11:53 AM), <http://www.lawfareblog.com/us-settlement-iran-claims-tribunal-claim-was-prudent-possible-linkage-release-americans-regrettable>.

75. *See About the Tribunal*, *supra* note 7.

76. S.C. Res. 687, *supra* note 16.

as well as individual claims for serious personal injury, death, or other damages.

The drafters streamlined the claims process as much as possible in order to deal with the unusually challenging circumstances. Iraq was not permitted to submit claims of its own; it figured solely as a defendant, thus eliminating one potentially time-consuming set of issues. Resolution 687 avoided litigation of certain other legal issues by explicitly declaring Iraq liable. Additionally, many of the basic factual assumptions that the claimant would ordinarily need to prove were declared to be provable by presumption, thus obviating the need for detailed evidentiary showings in tens of thousands of smaller claims.<sup>77</sup> The proceedings in this way took on something of an administrative, rather than a purely adjudicative, character. Iraq's consent to the formation of the Commission, with its unusual procedural features, was a condition of ending the allied military coalition's march on Baghdad.

Unsurprisingly, Iraq denounced the UNCC repeatedly.<sup>78</sup> It became more cooperative after a U.S.-led coalition invaded Iraq in the Second Persian Gulf War and deposed Saddam Hussein. By the time the Commission finished taking claims, about 2.7 million claims had been submitted, totaling more than \$350 billion.<sup>79</sup> Between 1991 and 2005, the UNCC awarded more than \$50 billion to 1.5 million successful claimants.<sup>80</sup> So far, \$47.8 billion in compensation has been paid.<sup>81</sup>

### 3. *The Eritrea-Ethiopia Claims Commission*

The EECC was created by the second Algiers Agreement ("Algiers II") of December 12, 2000.<sup>82</sup> A comprehensive peace treaty, Algiers II followed a separate June 2000 Agreement on Cessation of Hostilities, also signed in Algiers

77. Article 35 of the UNCC's Rules concerned evidence. Article 35(2) discussed the minimum standards of evidence required. For payment of fixed amounts in departure cases, claimants only needed to provide "simple documentation of the fact and date of departure from Iraq or Kuwait. Documentation of the actual amount of loss [was] not required." For claims below \$100,000, claims needed to "be documented by appropriate evidence of the circumstances and amount of the claimed loss." However, the UNCC noted that "[d]ocuments and other evidence required will be the reasonable minimum that is appropriate under the particular circumstances of the case." Provisional Rules for Claims Procedure, as Adopted by Decision of the Governing Council of the U.N. Compensation Commission Taken at the 27th Meeting, art. 35, U.N. Doc. S/AC.26/1992/10 (June 26, 1992), [http://repository.un.org/bitstream/handle/11176/55079/S\\_AC.26\\_1992\\_Inf.1-EN.pdf?sequence=1&isAllowed=y](http://repository.un.org/bitstream/handle/11176/55079/S_AC.26_1992_Inf.1-EN.pdf?sequence=1&isAllowed=y).

78. See Michael E. Schneider, *The Role of Iraq in the UNCC Process with Special Emphasis on the Environmental Claims*, in WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT, *supra* note 7, at 135.

79. See U.N. COMPENSATION COMMISSION, *supra* note 9. The UNCC website maintains a record of awards. See *Decisions of the Governing Council*, U.N. COMPENSATION COMMISSION, <https://www.uncc.ch/decisions-governing-council> (last visited Apr. 20, 2018).

80. For an overview of the UNCC, see WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT, *supra* note 7; Bederman, *supra* note 7; Feighery, *supra* note 7.

81. The remaining unpaid amount of \$4.6 billion pertains to a single claim awarded to Kuwait for the production and revenue losses resulting from damages to Kuwait's oilfield assets. *UN Panel Pays Out Over \$1 Billion in Reparations for Iraq's Invasion of Kuwait*, U.N. NEWS SERV. (Oct. 23, 2014), <http://www.un.org/apps/news/story.asp?NewsID=49150#.WXn5jYiGM2w>.

82. Algiers II, *supra* note 12.

(“Algiers I”). Algiers I had put an end to Ethiopia and Eritrea’s bloody two-year border war.<sup>83</sup> Paragraph 12 of Algiers I contained a provision for a temporary security zone to be patrolled by a U.N. peacekeeping mission (UNMEE). Article 3 of Algiers II directed the creation of an Organization of African Unity (OAU) body to determine the causes of the conflict, and Article 4 established the Eritrea-Ethiopia Boundary Commission (EEBC) to determine the proper permanent location of the boundary.

A claims commission, the EECC, was created by Article 5 of Algiers II. Article 5 empowered the EECC to decide “through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party” that were related to the conflict and resulted “from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.”<sup>84</sup>

The EECC was established under the auspices of the Permanent Court of Arbitration (PCA), which served as its registry, maintained the Commission’s files, and managed communications between the Commission and the parties.<sup>85</sup> Under Algiers II, claims had to be filed by December 12, 2001, one year after the signing of the Agreement. The EECC issued its first decisions on jurisdiction and procedure in 2001, several partial awards on the merits from 2003 to 2005, and final awards on damages in August 2009. In its partial awards, the EECC dealt with a variety of issues, including the treatment of prisoners of war; internees and civilians; the legality of certain means and methods of warfare; the treatment of diplomatic premises and personnel; and the looting, seizure, and unlawful destruction of private property.

Algiers II instructed the EECC to attempt to finalize proceedings within three years after the claims-filing period; this deadline was later extended and the Commission did not issue its final decision until 2009. The final damage awards ordered the payment of about \$161 million to Eritrea and about \$2 million to Eritrean nationals. The EECC awarded about \$174 million to Ethiopia.<sup>86</sup> No award money was ever transferred in either direction.

When it came to resolving the legal claims of the parties, all three of these IMCCs were as successful as could be expected, considering their circumstances. They were competent, professional, reasonably expeditious, and decisive—and the awards that they issued went largely unchallenged by the parties. In this regard, the resolution of legal claims counts as a reason to be optimistic about IMCCs’ future success. When it came to the actual payment of damages to injured individuals, however, the record is less clear. The IUSCT and the UNCC were able to compensate the injured individuals. But the EECC was not. Clues

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83. Agreement on Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Eri., June 18, 2000, 2138 U.N.T.S. 85 [hereinafter Algiers I].

84. Algiers II, *supra* note 12, art. 5.12.

85. See *Case View: Eritrea-Ethiopia Claims Commission*, *supra* note 9.

86. See Final Award of Ethiopia’s Damages Claims, *supra* note 65 and accompanying text.

about the reasons why can be found in the text of the three arbitration agreements that created the IMCCs.

*B. Relevant Treaty Differences: Thick and Thin IMCCs*

The relevant differences between the three commissions are all tied to the various ways that the parties and the international community prioritized their specific interests. Their expectations, and apparently their objectives, were different. Reading between the lines of the three agreements to arbitrate, it is clear that the IUSCT and the UNCC are more like one another than either is like the EECC. Looking at the agreements that were drafted by the parties—in some circumstances under the influence of international facilitators—a clear pattern emerges.

The two earlier agreements—the ones establishing the IUSCT and UNCC—created IMCCs with the capacity to award individualized compensation. The last of the three—the one establishing the EECC—created an IMCC almost completely devoid of that capacity. The participants in the EECC drafting process never seemed to expect individualized compensation. State-to-State compensation was the only remaining alternative, under which an informal set-off—in which only the difference between the two lump sum awards would be payable—was the predictable outcome. It would not be reasonable to expect individualized awards; and after a set-off, compensation for individual victims was a near impossibility.

The pattern can be summed up in terms of the difference in “thickness” or “thinness” of the treatment that the parties gave to various issues. The relatively thick provision made by the IUSCT and UNCC agreements for individualized awards indicates seriousness of purpose and thus the parties’ expectations. The extraordinarily thin provision made by the EECC agreement about the same issue suggests the opposite.

Unlike the IUSCT and the UNCC, the EECC was not designed to require individual payments of compensation to individuals, nor to deal with problems of non-payment of awards.<sup>87</sup> The point is not that participants in the process intended all along that no compensation should be paid. It seems likely that, all else being equal, they would have considered payment of compensation desirable. Rather, the point, as will be shown below, is that it would have been clear to the parties and to third-State observers from the outset that compensation was unlikely to take place—and yet they decided to proceed regardless. That is, something other than compensation seems to have motivated the establishment of the EECC. Closure, an interest in tension with compensation, seems to have been the motivating objective here.

*1. Thickness and Thinness of Agreements to Arbitrate*

It is not just the *content* of the treaty that indicates what the parties have in mind; it is also the *form* that the agreement takes. The extent to which an

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87. See BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 212-15.

agreement gives detailed, individualized attention to certain provisions is likely to reflect the drafters' priorities.

Some IMCCs can be characterized as "thick" while others can only be characterized as "thin." Thick IMCCs are robust institutions with large staff, extensive administrative responsibilities, guaranteed sources of funding, adequate resources to deal directly with large numbers of individual claimants, and long-term expected existence. Their institutional presence is so secure and longstanding that they almost approach the solidity of a standing body such as a court. Provisions dealing with their capacities are detailed and their methods of exercising power are spelled out. They are at one end of the spectrum.

The "thin" IMCCs are at the other end of that spectrum. Limited in staff to hardly more than their (usually part-time) commission members, thin IMCCs have no secure funding and must request money for costs from the parties when they need it. They may rely on services of an external registry such as the PCA rather than hiring their own administrative staff. The agreement that sets them in motion may specify only a short period of time in which to finish their work, after which they are authorized to take additional time only if necessary.

Likewise, the individual matters covered in an arbitration agreement can be more individualized and detailed ("thick") or less ("thin"). The thickness or thinness of a provision in the arbitration agreement serves as a proxy for the seriousness of the parties' attention to practical planning. Where a certain matter (e.g., the procedure for payment of awards) is dealt with in detail, with attention to anticipated difficulties and relatively specific guidance about how to manage future problems, it is clear that the issue is being taken seriously. If a particular issue is never mentioned, or mentioned only in passing, this suggests that it is not being treated as a real source of concern.

The agreements establishing the IUSCT and the UNCC were very different from the agreement establishing the EECC in their responses to several important questions. First, did the agreement provide the relevant commission with the resources needed to carry out its responsibilities? "Resources" includes the financial and other practical support required to undertake such an assignment. It also includes the procedural structure that makes management of such an assignment possible (e.g., procedural specifications that describe how claims should be filed, the necessary ingredients of a claim, any evidentiary rules, et cetera). Second, did the parties take precautionary steps to ensure payment of the awards? The answers to these questions reveal implicit expectations of the agreements' drafters regarding how the three commissions were likely to perform.

## 2. *Sufficiency of Process and Adequacy of Institutional Support*

In terms of the process specified in the arbitration agreement and the resources committed to the IMCC's functioning, there is simply no comparison between the IUSCT and the UNCC, on the one hand, and the EECC, on the other.

The IUSCT is the longest-running international commission in history.<sup>88</sup> It is almost a standing court, with smooth turnover, replacement of judges, and routine publication of legal awards—a system of precedent. The Tribunal has taken on a presence and a persona that are unique in the annals of international arbitration.

The IUSCT received claims for one year (the deadline for filing was January 1982)<sup>89</sup> and the resulting docket was huge. About 2,800 small claims were filed—the great majority by U.S. nationals—and were settled by a lump sum payment to the United States of \$105 million.<sup>90</sup> About one-thousand large claims were filed and decided by 2003. These were filed by the claimants individually and not by the United States on the claimants' behalf.<sup>91</sup> The IUSCT entertained each claim individually on a full evidentiary record.<sup>92</sup>

The IUSCT began work in facilities provided by the PCA in The Hague but later rented a permanent location from the Dutch government—two buildings with 2,500 square feet of space—which it still occupies.<sup>93</sup> When originally rented, the IUSCT headquarters was empty except for carpet and draperies. The two buildings had to be fully furnished and built out to the particular specifications of the IUSCT, including a separate prayer annex and a fully functioning cafeteria able to prepare meals to accommodate the religious strictures of all personnel.<sup>94</sup>

The UNCC was also an enormous enterprise. Its administrative structure

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88. This discussion of practicalities of IMCC administration is taken from Chapter 5 of BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15. See also Caplan, *supra* note 8; Sharpe, *supra* note 26.

89. IUSCT Claims Settlement Declaration, *supra* note 16, art. III(4). For a further discussion, see BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 151.

90. See *Foreign Claims Settlement Commission of the U.S., Completed Programs: Iran*, *supra* note 72; United States of America, on behalf of U.S. Nationals v. Islamic Republic of Iran, Case Nos. 86, B38, B76 & B77, Award on Agreed Terms for Claims of Less Than \$250,000 (Iran-U.S. Cl. Trib. June 22, 1990), reprinted in 25 Iran-U.S. Cl. Trib. Rep. 327 (1990).

91. See *About the Tribunal*, *supra* note 7; see also BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 17.

92. Eight years later, so many small claims had accumulated that the IUSCT outsourced them to the FCSC, a standing entity within the U.S. Department of Justice. See *supra* note 32. The FCSC's loaning of its facilities and resources to the IUSCT is an excellent illustration of the support that can be given to IMCCs by the international community. Since 1948, the IUSCT has been the conduit through which the United States outsources its mass claims programs and has gained considerable experience in conducting programs of this kind. Of the 3,066 claims for under \$250,000 transferred to the FCSC from the IUSCT, 1,066 awards were made totaling over \$41.5 million. Claimants received actual damages to a limit of \$10,000. An additional 578 claims were withdrawn or dismissed for failure to appear, and 1,422 claims were denied. The process took five years. *Final Report on the Iran Claims Program*, U.S. DEP'T OF JUSTICE 1-2, [http://www.justice.gov/sites/default/files/pages/attachments/2014/08/26/final\\_report\\_on\\_the\\_iran\\_claims\\_program.pdf](http://www.justice.gov/sites/default/files/pages/attachments/2014/08/26/final_report_on_the_iran_claims_program.pdf) (last visited Apr. 20, 2018).

93. Christopher Pinto, *Institutional Aspects of the Tribunal*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION* 95, 100 (David D. Caron & John R. Crook eds., 2000).

94. *Id.* at 114.

was comprised of a Governing Council,<sup>95</sup> a group of commissioners,<sup>96</sup> and the Secretariat. The Secretariat was headquartered in Geneva, Switzerland, and the members of the Secretariat alone totaled 250 at its highest. Headed by an executive secretary, the Secretariat supported the work of both the Governing Council and the commissioners.

The administrative side of the EECC was as thin as the IUSCT's and UNCC's were thick. The EECC itself had no full-time staff, no dedicated building for office space, and no other permanent assets. The commissioners were part time—two academics, two practicing lawyers, and one judge.<sup>97</sup> The EECC saved money by outsourcing its requirements to the PCA, which, throughout the proceedings, acted as the registry. By such measures, the Commission made the most of its meager endowment.<sup>98</sup>

In an early procedural ruling, the EECC made provision for mass claims filings, allowing compensation fixed by category of claim.<sup>99</sup> The Commission was to provide a standardized claim form for the parties to use. However, both parties instead chose to employ a diplomatic representation model in which the State brought claims on behalf of individual citizens.<sup>100</sup> This approach significantly reduced the costs of preparing and litigating the claims because the injured parties did not have to all be named individually, nor did the specifics of all their injuries have to be provided. In its Partial Awards on liability, the Commission either accepted or rejected a generalized showing that some alleged violation did occur, leaving the thorny question of how many times the violation occurred for the second (damages) phase of the litigation. At that point, the Commission simply made its best estimate based on the evidence that the parties had provided.<sup>101</sup>

95. The Governing Council's membership was identical to that of the Security Council. It was the principal organ responsible for the general policy and legal framework. It also reviewed and finally approved the reports and recommendations on claims made by the commissioners.

96. The commissioners were nominated by the U.N. Secretary-General upon recommendation of the executive secretary of the UNCC and sat in panels of three members to consider and render recommendations on claims in specific categories.

97. Commissioners Hans van Houtte and James Paul were academics, Lucy Reed and John Crook were practicing lawyers, and George Aldrich was a judge. *See Case View: Eritrea-Ethiopia Claims Commission, supra* note 9.

98. *See* BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 155 ("[The EECC] used the PCA space for filings, hearings and the occasional meeting of the parties or the commissioners. The commissioners did the bulk of their work from home offices, communicating by telephone and email and sharing documents on a secure server that was provided by a commissioner's law firm.")

99. Decision 2 of the Commission stated:

The Commission has decided to establish a mass claims process under which claims of persons in Categories 1-5 may be filed for fixed amount compensation. The Parties shall prepare claims forms for all such claims, using forms to be established by the Commission. Specified data derived from those forms may be filed with the Commission in electronic form pursuant to guidance the Commission will provide.

Eri.-Eth. Claims Comm'n, Preliminary Decision No. 2, XXVI R.I.A.A. 6, 6 (Aug. 2001).

100. Eri.-Eth. Claims Comm'n, Preliminary Decision No. 8, XXVI R.I.A.A. 21, ¶3 (July 27, 2007) (recognizing that the parties had chosen to file inter-State claims) [hereinafter EECC Preliminary Decision No. 8].

101. The Commission noted that given the circumstances, it "made the best estimates possible on the basis of the available evidence," and it recognized that "when obligated to determine appropriate

Having thus reduced as much as possible the practical difficulties that would otherwise have been encountered in adjudicating such a large number of claims, the EECC was still hard put to complete such a large and complicated task within its nine-year lifespan. Algiers II, astonishingly, had instructed the Commission to endeavor to complete its work within three years. After almost four decades of operation, the IUSCT, as noted above, has still not completed its work, and the UNCC took around fourteen years to complete its assignment.<sup>102</sup> The EECC, with a small fraction of the resources of these two massive enterprises, was asked to fulfill its mandate in only three.

### 3. *Why Procedural and Resource Sufficiency Matter*

The fact that the EECC had seemingly been tasked with responsibilities far beyond its resources is important. Considering the dearth of resources—the parties’ as well as the Commission’s—it hardly seems possible that the participants in the drafting process expected a more individualized proceeding than what the Commission ultimately provided. Facing the same resource problem as the Commission, the parties chose to submit their claims in accordance with these expectations. Moreover, since the Commission was not at the outset given the evidence of unlawful injury in individualized form, it was impossible to give awards in an individualized form. But if the awards were announced in lump sum format, an informal set-off was almost inevitable and compensation to the individual claimants became, practically speaking, quite unlikely.

The parties revealed their expectations early on, when they submitted their claims on an inter-State, or diplomatic representation, basis.<sup>103</sup> That is to say, each State party submitted evidence about injury to its nationals as part of a claim that was legally held by the State itself. This was one of the options that had been provided by the Commission’s Rules of Procedure.<sup>104</sup> That claims were filed in accordance with a diplomatic representation model rather than on an individualized basis greatly reduced the parties’ and the Commission’s administrative burden.

Under the diplomatic representation model, the injuries of individuals

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compensation, it must do so even if the process involves estimation, or even guesswork, within the range of possibilities indicated by the evidence.” Final Award of Eritrea’s Damages Claims, *supra* note 47, at 655-56; Final Award of Ethiopia’s Damages Claims, *supra* note 65, at 528; *see also* MICHAEL J. MATHESON, INTERNATIONAL CIVIL TRIBUNALS AND ARMED CONFLICT 242 (2012) (“This sense of limitations and the need for pragmatic approaches was evident throughout the Commission’s work on damages.”).

102. *See supra* note 9.

103. *See supra* note 100 and accompanying text.

104. Eri.-Eth. Claims Comm’n, Rules of Procedure (Oct. 1, 2001). Chapter Two, in particular, addressed the “Procedures for Individual Consideration of Claims” and provided:

This Chapter applies to all claims that are to be individually arbitrated. These claims include all claims by the government of one party on its own behalf against the government of the other party, all claims for compensation in excess of US\$100,000 on behalf of persons, and any other claims for which individual treatment is required by Chapter Three.

*Id.* art. 23. Chapter Three, titled “Mass Claims Procedures,” dealt with claims for fixed amount compensation.



harmful during the war featured simply as evidence of a general pattern of unlawful conduct. The tens of thousands of injured individuals thus did not have to be identified at the outset when claims were filed. If a claim was rejected at the liability phase, these individuals would never have to be identified. And if the claim was accepted, then at the damages phase, the Commission could estimate a suitable single lump sum amount in damages. The State would take responsibility for disaggregating that lump sum and passing the proceeds along to individual claimants.

For the Commission to handle such a large number of claims on a more individualized basis—in the allotted time, with the limited resources that it commanded—would have been nearly impossible as a practical matter. This must have been appreciated when Article 5 of Algiers II was drafted. In any event, the parties spared the Commission this burden when they also bowed to reality and submitted their claims on an inter-State basis. The choice to entertain claims on an inter-State basis was the only reasonable one under the circumstances.

But the filing of cases as State-to-State rather than as individualized claims effectively compromised the compensation interests of the individuals who were ultimately determined to be entitled to recovery.<sup>105</sup> Diplomatic representation (espousal) subsumes the individual compensation interest under the interests of the State and treats as a purely domestic matter the State's exercise of dominion over its nationals' property (namely, his or her claims award).<sup>106</sup> Although the decision was the only possible practical one, it had irreversible consequences for the injured individuals' chances of receiving any recovery.

The result of the choice was that it was simply not possible for the Commission to give individualized awards.<sup>107</sup> To afford compensation on an individualized basis, with awards going directly to the injured claimants, the Commission would have had to announce awards on a person-by-person basis.<sup>108</sup> As the claims had been submitted in aggregated form under the diplomatic representation model, the information necessary to individualize the awards was simply not in the record. The only possibility was, therefore, a lump sum award.

Given the inevitability of a lump sum award, the informal set-off that eventually transpired—neither side paid anything to the other, on the grounds

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105. See EECC Preliminary Decision No. 8, *supra* note 100, at 21, ¶ 3 ("The Commission recognizes that the Parties chose to pursue inter-State claims, and that each Party has full authority to determine the use and distribution of any damages awarded to it.")

106. For a discussion of some of the positive reasons why a State should be permitted to use damages awarded to its nationals as part of a set-off, see BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 202-09.

107. It is debatable, of course, whether the Commission would have taken the unusual step of issuing an award in a form different from the one chosen by the parties when they submitted their claims. The point here, however, is merely that this option was precluded as a practical matter, both because it would have been difficult administratively to manage so many awards of compensation and because the Commission could not have had the information to pursue that path.

108. Had the Commission somehow attempted to do this, the administrative burden would have increased accordingly. In such a model that awards payment on an individualized basis, the compensating State must be monitored because it has an incentive not to surrender the money. For a further discussion of compliance, see BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 191-214.

that the amounts owed were not very different—was also unavoidable. It would have done the individual victims of wartime legal violations no good at all for the two States to simply exchange the cash that the Commission had awarded. Thus, the individuals who had been injured during the war went uncompensated.

Looking at the text of Article 5 of Algiers II, it is hard to imagine that the parties expected individualized awards; to the contrary, from the outset, when the agreement was being drafted, it would have been clear that the project was realistic only as a State-to-State proceeding, especially on the shoestring budget at the Commission's disposal. The parties' subsequent individual decisions to file claims State-to-State reflected practicalities that would have been obvious from the beginning. It would simply not have been cost effective to file tens of thousands of individual claims, with individual bodies of supporting evidence, individual hearings, and so forth, considering the small size of the average claim and the lack of access to documentary proof.

The IUSCT and the UNCC had access to enough resources—financial and temporal—such that they could entertain the necessary number of individual claims. They had the administrative capacity to manage the many thousands of claims; this administrative capacity simply did not exist at the EECC. Moreover, it was clear from the way that the Algiers Accords (establishing the IUSCT) and U.N. Security Council Resolution 687 (establishing the UNCC) were drafted that the two commissions were expected to issue awards of individualized compensation that identified the injured parties themselves, rather than issue awards according to a diplomatic representation model. The Claims Settlement Declaration of the Algiers Accords states that “[c]laims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than \$250,000, by the government of such national.”<sup>109</sup> At the UNCC, claims were presented by the State on behalf of injured parties who were its nationals, but the process was completed in an individualized format using a standard claim form.<sup>110</sup> This element was entirely absent from the agreement authorizing the creation of the EECC.

#### 4. *Measures for Ensuring Payment: The “Judgment-Proof” State*

One final difference between the EECC arbitration agreement and the agreements setting up the IUSCT and UNCC must be mentioned. This difference bears strongly on the question of how the individual claimants at the EECC ended up with nothing. It concerns the provisions for ensuring payment of the awards that the three agreements contained. The clearest difference concerning payment of awards between the IUSCT and the UNCC, on the one hand, and the EEC, on the other, arises directly out of the arbitration agreements' explicit

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109. IUSCT Claims Settlement Declaration, *supra* note 16, art. III(3).

110. See U.N. Comp. Comm'n Governing Council, Decision Taken by the Governing Council of the U.N. Compensation Commission at the 27th Meeting, Sixth Session, at 1-5, U.N. Doc. S/AC.26/1992/10 (June 26, 1992) (approving the UNCC's Provisional Rules for Claims Procedure, including Article 5(1)(a), which provided that “[a] Government may submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory”).

provisions on the subject.

The drafters of the agreement establishing the IUSCT took care to create a system in which compensation, if awarded, would actually be paid. First, the Algiers Accords enlisted the support of domestic courts all around the globe. Article IV(3) of the Claims Settlement Declaration states that "[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws."<sup>111</sup> Second, the Algiers Accords specified that Iran would create a fund for paying the Tribunal's awards. It provided that a "mutually agreeable Central Bank" was to be established as the depository of funds to facilitate the transfer of financial assets between Iran and the United States.<sup>112</sup> The escrow account that was created in the Central Bank was also the conduit through which Washington returned all remaining Iranian assets in the United States.<sup>113</sup> Half of these assets went into a special interest-bearing security account that was to be used solely for the purpose of paying claims against Iran. Whenever the balance in the security account fell below the mandated \$500 million limit, the Central Bank would turn to Iran and require that it supply additional funds.<sup>114</sup>

Likewise, Security Council Resolution 687, establishing the UNCC, provided for a Compensation Fund to finance both the operations of claims processing and the payment of awards.<sup>115</sup> It was supported by a set-aside from the sale of Iraqi petroleum.<sup>116</sup> If Iraq failed to comply with its funding obligations, the UNCC had alternative means, such as freezing assets derived from Iraqi oil sales in particular States.<sup>117</sup> The Oil-for-Food Program was also later introduced to ensure that Iraq contributed the necessary payments to the Fund.<sup>118</sup>

As for the EECC, the provision in Algiers II that was designed to deal with the payment of awards could hardly have been more different. The entirety of its discussion of implementation is a two-sentence provision: "Decisions and awards of the commission shall be final and binding. The parties agree to honor all decisions and to pay any monetary awards rendered against them

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111. IUSCT Claims Settlement Declaration, *supra* note 16, art. IV(3).

112. IUSCT General Declaration, *supra* note 70, at General Principles ¶ 2.

113. *Id.* at General Principles ¶ 6.

114. *Id.* at General Principles ¶ 7.

115. S.C. Res. 687, *supra* note 16, ¶ 18; *see also* S.C. Res. 692 (May 20, 1991) (establishing the Fund for payment of awards rendered by the UNCC and detailing the funding procedures).

116. *See* S.C. Res. 692, *supra* note 115, ¶ 6. Security Council Resolution 687, however, provided that, in determining Iraq's contribution to the Fund, the Secretary-General would "tak[e] into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions . . . , and the needs of the Iraqi economy." S.C. Res. 687, *supra* note 16, ¶ 19.

117. *See, e.g.*, S.C. Res. 1483, ¶ 23 (May 22, 2003); S.C. Res. 1546, ¶ 29 (June 8, 2004).

118. The "Oil-for-Food" Program automatically allocated a certain percentage of Iraq's annual revenues from oil exports to the Fund. *See* S.C. Res. 986 (Apr. 14, 1995) (establishing the Program); *see also* S.C. Res. 705 (Aug. 15, 1991) (originally allocating up to thirty percent of annual oil revenues to the Compensation Fund); S.C. Res. 1360, ¶ 9 (July 3, 2001) (decreasing the annual allocation to twenty-five percent of oil revenues); S.C. Res. 1483, *supra* note 117, ¶ 21 (decreasing the percentage yet further to five percent of annual oil revenues).

promptly.”<sup>119</sup>

The absence of any real effort to provide assurances of payment of the awards is striking. When this absence is combined with the unrealistic mandate requiring individualized awards within the time and resources allocated, it is hard to imagine Algiers II as a serious plan to provide compensation for the persons who had suffered losses during the war. To practical persons giving the matter serious thought, it seems that the most likely outcome of the EECC process would have been exactly the outcome that transpired.

One objection to this analysis is that it overlooks a very important—perhaps, the single most important—feature distinguishing the EECC from its predecessors: the relative economic situations of the States involved. Iran, the United States, and Iraq all had the resources at the outset of the proceedings to establish special funds to cover their legal liabilities. Even if they had been unwilling or unable to set aside money for the satisfaction of future judgments, they would have been in a reasonable position to pay awards after they were announced. Is that not the real difference between those two commissions and the EECC? Two of the poorest States in the world—Ethiopia and Eritrea—lacked the resources necessary to either establish a fund at the outset or ultimately pay the awards. They were, effectively, judgment-proof.

It is a difference, but it does not address the issue being argued here. It is true that this lack of resources meant that the most logical method for settling liabilities would be through informally setting off the award of one State against the award of the other. The consequence of treating the two awards as a set-off was necessarily that many, most, or even all of the claimants would receive nothing. But while the result can be explained in terms of the relative poverty of the State parties, this does not solve the real puzzle.

The poverty of the two State parties was certainly apparent during the negotiations leading up to Algiers II. That the two States were judgment-proof only makes the entire enterprise even more mysterious. If poverty is the true explanation for the failure to compensate, the basic question still remains: if an IMCC cannot reasonably be expected to result in compensation—if after huge expenses for lawyers and high commission costs, years of waiting, and a terrific expenditure of local people’s energy, *the result is almost certainly to be that the claimants will actually be worse off*—then what is the reason for embarking on this project?

Indeed, those injured persons holding meritorious claims were worse off than they would have been with no provision for any IMCC at all. Despite being entitled, in theory, to compensation, all were barred by Algiers II from seeking recovery in any other forum.<sup>120</sup> Article 5 of Algiers II made the EECC their exclusive forum; there was no other permissible forum to which they could go.

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119. Algiers II, *supra* note 12, art. 5(17).

120. Algiers II, *supra* note 12, art. 5(8) (“[T]he Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this Article . . .”).

C. *The Interests of the Involved Actors: Closure versus Compensation*

The creation of the IUSCT and the UNCC was clearly motivated by the desire for compensation. Although the United States wanted most importantly to obtain release of the hostages at the U.S. Embassy in Tehran, compensation was certainly a priority in the drafting of the Claims Settlement Declaration of the IUSCT. The attention to provisions dealing with filing claims and creating a fund for payment of awards indicates that the compensation commission was being taken seriously and was expected to produce individual results. This is not surprising. U.S. nationals, some of them politically influential individuals or wealthy commercial interests, held many large claims.<sup>121</sup> At the UNCC, likewise, many powerful commercial interests were represented.

The EECC, in contrast, was created as part of a general effort by interested members of the international community to resolve the military conflict between Ethiopia and Eritrea. The parties and the international community could not have seen compensation for the injured victims as a first priority because, without first establishing peace, a claims commission would not have been workable anyway. The way that Algiers II was drafted set the stage for inaction on the award.<sup>122</sup> The Commission's establishment in Article 5 of Algiers II was important as an inducement to one or both of the parties to sign Algiers II as a whole, thereby putting a definitive end to the States' border war, but it was a means to an end; the interest in compensation was incidental to the comprehensive peace treaty.

Who was responsible for the failure of text to provide a grounding for actual compensation? Not the Commission, certainly, which took the agreement as it found it. The die had already been cast before the Commission was fully constituted. The parties were of course responsible, having signed Algiers II.

But the international community also bears some of the responsibility for

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121. There were about 650 large claims filed by U.S. nationals against Iran. *U.S.-Iran Claims Tribunal: Recent Developments, Statement Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Foreign Affairs* (Dec. 7, 1982) (statement of James H. Michel, Deputy Legal Adviser, U.S. Dep't of State), in DEP'T ST. BULL., Apr. 1983, at 74. Large claims involved amounts greater than \$250,000, indicating the wealth of the individuals who filed such claims.

122. Ethiopia's acquiescence in the nonpayment was probably due in large part to the fact that it was in a poor diplomatic position to demand compliance. At the time that the EECC was completing its work, Ethiopia had already been in violation of the Boundary Commission's delimitation decision for over six years. Ethiopia's violation started immediately upon announcement of the Delimitation Award. See generally Rep. of the S.C., at Annex I, Sixth Report of the Eritrea-Ethiopia Boundary Commission, U.N. Doc. S/2002/977 (Aug. 30, 2002) (discussing Ethiopia's violation of the delimitation decision). Ethiopia had refused to remove its troops from Eritrean territory after certain contested areas were awarded to Eritrea, and, moreover, Ethiopia embarked upon a program of settling Ethiopians on the land that had just been declared Eritrean. *Id.* ¶ 10. An Eritrea-Ethiopia Boundary Commission (EEBC) instruction to remove these settlers, backed up by the U.N. Secretary-General, went ignored. See Eri.-Eth. Boundary Comm'n, Border Delimitation Determinations, XXV R.I.A.A. 204, 204-05 (Nov. 7, 2002) (noting Ethiopia's failure to remove Ethiopians from Eritrean territory and instructing Ethiopia to remove settlers); U.N. Secretary-General, *Progress Report of the Secretary-General on Ethiopia and Eritrea*, ¶ 30, U.N. Doc. S/2002/977 (Aug. 30, 2002) (supporting the EEBC's decision to "ensure that no population resettlement takes place across the delimitation line"); cf. S.C. Res. 1466, ¶ 2 (Mar. 14, 2003) (urging "both Ethiopia and Eritrea to continue to assume their responsibilities and fulfil their commitments under the Algiers Agreements" and "call[ing] upon them to cooperate fully and promptly with the Boundary Commission") (emphasis omitted).

the contours of Algiers II. Algiers I—the Cessation of Hostilities Agreement—which contained the ceasefire terms that put an end to the fighting in June of that year, explicitly stated that it was negotiated with the assistance of the United Nations, the OAU (now, the African Union), the United States, and others.<sup>123</sup> The United States was deeply involved in the negotiations leading up to Algiers II; photographs of the signing ceremony show U.S. Secretary of State Madeleine Albright prominently on the platform when the Eritrean President and the Ethiopian Prime Minister affixed their signatures.<sup>124</sup> Of all countries, the United States most surely understood the mechanics of drafting the provisions that establish a mass claims tribunal; after all, it had been involved in the drafting that led to the creation of the IUSCT and the UNCC.

When the EECC is compared with the other two illustrative commissions, it is easy to conclude that the UNCC and the IUSCT were truly set up to award compensation whereas the EECC was not. But that still leaves us with something of a puzzle. It seems that the parties, and their legally sophisticated supporters in the international community, had drafted a legal instrument setting up a claims commission that was doomed to fail. The IMCC that they created was virtually guaranteed to extinguish all of the meritorious legal claims of the parties without providing anyone with compensation.

It might seem logical to think that support for establishing a tribunal is an indicator of an interest in compensation, and that the proponents of IMCCs would therefore care as much about getting the claimants paid as they did about encouraging the parties to take their dispute to adjudication in the first place. That does not always seem to be the case.<sup>125</sup> At the EECC, other States supported the parties—or even urged them—to establish a claims tribunal but then showed no interest when the award was not paid.

One possible explanation is some sort of bad faith, especially bias. A party that seeks to avoid an award may have had powerful supporters with influence

123. See Algiers I, *supra* note 83, pmb. (noting that the agreement was made pursuant to talks organized by the OAU and with the participation of the United States and the European Union).

124. The U.N. thanked the United States for its “role in achieving the Algiers Agreement.” Press Release, Security Council, Security Council Welcomes Peace Agreement Between Ethiopia and Eritrea, Urges Full, Expeditious Cooperation with United Nations Mission, U.N. Press Release SC/7011 (Feb. 9, 2001). Madeleine Albright, in her remarks at the signing of the agreement, also acknowledged the role of the United States in negotiating it. Madeleine K. Albright, U.S. Sec’y of State, Remarks at Ethiopia/Eritrea Peace Agreement Ceremony (Dec. 12, 2000), [https://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/er\\_ethio\\_albright\\_12122000.pdf](https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/er_ethio_albright_12122000.pdf) (“[T]he United States is proud . . . to have assisted in achieving this agreement . . .”); see also Fikrejesus Amahazion, *Justice Deferred: The 15th Anniversary of the Eritrea-Ethiopia Boundary Commission Verdict*, FOREIGN POL’Y J. (Apr. 14, 2007), <https://www.foreignpolicyjournal.com/2017/04/14/justice-deferred-the-15th-anniversary-of-the-eritrea-ethiopia-boundary-commission-verdict/> (“[T]here was heavy-handed involvement by the U.S. during both the conflict and throughout the peace negotiation process on the side of Ethiopia.”); Sally Healy & Martin Plaut, *Ethiopia and Eritrea: Allergic to Persuasion*, CHATHAM HOUSE 2 (Jan. 2007), <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/bpethiopiaeritrea.pdf> (“Major powers, notably the United States, had put serious effort and resources into trying first to prevent and later to resolve the dispute.”).

125. Consider, for example, the EECC. Both Eritrea and Ethiopia were pressured to establish a boundary commission, but the States that were most active in bringing pressure to bear made no investment in carrying out the award.

in the international community. Perhaps at the outset these powerful supporters thought that their ally would prevail and thus supported the idea; then, when their prediction turned out to be mistaken, they decided not to support enforcement because it was against their ally's interest.

Bias is certainly one possible explanation. But there are other explanations that do not require assuming bad faith on the part of powerful third States. Another explanation is based on the relative importance that States are likely to attach to the different interests that are affected. Compensation, as was argued earlier, is not the only interest supporting the formation of IMCCs, and in some circumstances it may be the least influential factor in explaining the actions of the international community.

IMCCs serve both the private interest in compensation and also the public interest in closure.<sup>126</sup> The private interest in compensation is held by the individual claimant and the State of which he or she is a national. It is an interest in compensation for meritorious claims and not some sort of humanitarian interest that attaches simply because of the need of the victim. It is a consequence of the fact that the defendant State conducted itself unlawfully under international law, and this conduct brought about the claimant's injury.

Other States that are not parties to the dispute, but simply take an interest as members of the international community, do not gain direct benefits when the claimants are compensated. An intangible interest in compensation, in principle, may exist, but even if that is true, it is likely to be more diluted than the private interest in winning a tangible remedy. A State may be reluctant to act on a commitment to compensation in principle; States may simply not want to take a position on which of the two parties is right and which is wrong. Where there are disputes of fact or law about the merits of the claims, other States may consider themselves ill-informed, or they may have reasons (good or bad) to remain neutral between the disputants. In any truly difficult international problem, it can be problematic for the community to undertake anything other than manifestly neutral action.

Support for the formation of an adjudicative tribunal—independent of the merits of the various claims—may be one of the few neutral steps available to the international community. Unlike support for compensation, encouraging adjudication does not require taking sides about the merits of the legal claims. Support for an adjudicative solution also has other advantages. The public has an interest in closure, in particular closure by legal means and not by resort to force. Adjudication is likely to promote closure, effectively resolving not only

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126. These private and public interests have different characteristics, and these differences are to some extent a consequence of which international actors possess the relevant interests. The discussion in the text focuses on the differences between compensation and closure. However, deterrence has its own unique features. Deterrence has its effect on future actors who are not parties to the present conflict. As such, it depends on the public perception of correct punishment. Deciding what action to take therefore requires making a judgment about the merits of the claims. Deterrence, however, requires not that the penalty be paid (let alone, that it be paid by the correct party), but rather only requires that the public *believe* that it has been paid and by the correct party. Deterrence requires that future wrongdoers believe that they will be punished; so long as they believe that the guilty party has been punished in the past, it is not important whether their belief is correct.

claims that are filed, but also, through preclusive effect, any claims that are not filed.

The private interest in compensation requires that meritorious claims be recognized and that the claimant's award be paid; the interest in closure does not. Closure is achieved simply through the establishment of the tribunal—regardless of the merits of the claims, regardless of whether a claim is even filed, and regardless of whether the award is paid. The international community may fail to support enforcement of an award, despite having urged the parties to establish a commission, because compensation was not the reason that it supported forming a commission in the first place. The true reason is likely to be closure.

#### CONCLUSION

It is risky to generalize about IMCCs so early in their history. However, based on the above account, several discrete observations are appropriate. First, the fact that an institution qualifies to be called an "international mass claims commission" does not mean that compensation is the only interest that it serves. There are other possible interests underlying the formation and functioning of international ad hoc adjudicative institutions. Indeed, furthering these other interests of the international community may in some circumstances require compromise of the goal of compensation.

Second, an IMCC may further the interests of those who supported it by foreclosing claims. By cutting off future legal recourse, an IMCC serves the interests of both the State party against whom the claim is directed and the international community desirous of stopping conflict. But this will not compensate the victims.

Third, simply forming an IMCC does not address the problem of compensation if the available resources are inadequate to support the IMCC's work and payment of awards. No matter how well designed an institution might be, it cannot resolve large numbers of difficult cases on the merits without financial support. This includes, in particular, cases where the only asset likely to be available to pay an award is a State's own award against the other party; in such cases, the only thing that will be accomplished is foreclosure of the victims' hope for compensation.

Finally, despite the euphoria of the moment—imminent release of hostages, ouster of a neighboring aggressor from occupied territory, or termination of a bloody war—should not the participants step back and ask whether it is worth embarking on an enterprise of this sort? The answer will not always be "yes." In certain circumstances, it will be rather predictable that even victims with meritorious claims will not receive compensation. Because they will be foreclosed from searching for another forum, the victims will, if anything, be worse off than if there had been no IMCC at all. The beneficiaries will turn out to have been the State parties acting as defendants, whose liability will have been paid by the set-off and then extinguished, as well as the international community, whose main interest was that the problem go away. All this comes at great human and material expense. This extended analysis of the three modern mass claims



commissions hopefully shines some light on how and when this would be the result—and perhaps provides some practical suggestions that might, in certain situations, assist in efforts to forestall it.

IMCCs must serve public interests if they are to be supported. But what should happen when public interests, as determined by the international community, are inconsistent with private objectives? This is not the place for a general theory for reconciling public and private interests, nor can this Article answer the question of how a State's interests should be balanced against the interests of its nationals when States make claims on their behalf.<sup>127</sup>

It is to be expected that IMCCs will sometimes necessitate the subordination of private to public interests. In order to gain international support, compensation may have to be compromised. This is true despite the fact that compensation is, ostensibly, the very reason for an IMCC's existence. The irony of IMCCs is that ad hoc tribunals come into existence and act solely at the instance of the parties. Yet in some cases the public interest, especially closure, is a better explanation for the eventual outcome of mass claims litigation. This much is suggested by a comparison of the results of three modern IMCCs, and by the logic of IMCCs, properly understood.

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127. See BRILMAYER, GIORGETTI & CHARLTON, *supra* note 15, at 202-09, for a discussion on the use of private claims recovery to "set off" the liability of the claimant's State.

