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Ari Dybnis

Loyola Law School, Los Angeles

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WAS THE ERITREA–ETHIOPIA CLAIMS COMMISSION MERELY A ZERO-SUM GAME?: EXPOSING THE LIMITS OF ARBITRATION IN RESOLVING VIOLENT TRANSNATIONAL CONFLICT

*Ari Dybnis**

I. INTRODUCTION

In 2000, Eritrea and Ethiopia filed claims against each other in the Eritrea–Ethiopia Claims Commission (Commission) for humanitarian international law violations that arose from a violent border dispute between the two countries.¹ Eritrea claimed approximately \$6 billion in damages,² while Ethiopia countered with claims for approximately \$14.3 billion in damages.³ Nearly ten years later, on August 17, 2009, the Commission reached a final determination on these damage claims.⁴ The Commission awarded approximately \$174 million to Ethiopia, and approximately \$161 million to Eritrea.⁵ The practical result of these awards, however, is a mere \$13 million judgment that Eritrea owes to

* I would like to acknowledge Dawn Shock who first brought the Eritrea–Ethiopia Claims Commission to my attention and Cesare Romano who helped me avoid some serious pitfalls when I first began structuring my thoughts for this note. I would also like to dedicate this to Josh Dybnis who would have scrutinized this entire Note purely to challenge me on every argument and assertion.

1. See Final Award—Ethiopia’s Damages Claims (Eri. v. Eth.), 26 R.I.A.A. 631, ¶ 5 (Eri.–Eth. Claims Comm’n 2009) [hereinafter EECC Ethiopia Final Award].

2. *Eritrea Takes Advantage Over Ethiopia in War Damages Award*, REPORTER (Aug. 22, 2009), http://en.ethiopianreporter.com/index.php?option=com_content&task=view&id=1547.

3. *Id.*

4. Duncan Hollis, *Eritrea–Ethiopia Claims Commission Awards Final Damages*, OPINIO JURIS (Aug. 19, 2008, 9:42 AM), <http://opiniojuris.org/2009/08/19/Eritrea-Ethiopia-claims-commission-awards-final-damages>.

5. *Id.*

the Ethiopian government, none of which is assured to reach any of the actual victims of the violence.⁶

There is a common saying that “if something is worth doing, then it is worth doing right.” In the international context, the “right way” to redress a wrong is often impractical, infeasible, or even unknowable until after the fact. It is within this framework that this Note contends that the Commission was not the “right way” to address the damage that thousands of victims suffered as a result of the border conflict between Eritrea and Ethiopia.

The commissioners of the Commission were able to accomplish admirable feats with their allotted resources and employed some sophisticated techniques and methodologies to determine the final awards. However, these ultimately ineffective final awards highlight the inherent limitations of traditional arbitration as a method for redressing mass claims of humanitarian violations. The governments should have utilized modern alternative mechanisms that international bodies have developed to address mass claims specifically, instead of relying on the traditional arbitration model. Utilization of these mechanisms would have increased the chances that the actual victims of the war could receive any sort of justice.

In Part I, this Note will explain the background of the Commission, including the history of the border conflict between Eritrea and Ethiopia that raged between 1998 and 2000, the composition of the Commission, and the Commission’s ten-year history. Part II will explain how the inherent structural problems in the Commission’s arbitration model prevent the final monetary awards from providing victims with just compensation, despite the admirable work done by the commissioners. These structural problems result in awards that effectively cancel out without providing any meaningful benefit to the victims. Part II will also explore how these same structural defects prevented the Commission from assuring peace and security in the international community.

Part III will then describe the history and structure of the United Nations Compensation Commission and the Bosnia Commission for Real Property Claims of Displaced Persons, two modern examples of

6. The money will go to the governments because the claims were only filed for government-to-government violations; the Commission, however, “encouraged the Parties to consider how, in the exercise of their discretion, compensation can best be used to accomplish the humanitarian objectives” of their peace agreement. EECC Ethiopia Final Award, *supra* note 1, ¶ 25. Without any official mandate it is dubious that the money will actually reach victims, as explained later in this Note.

commissions that have enjoyed success. Part III will also discuss the success of these two commissions as compared to those of the Commission, and why they should have had a stronger impact on the latter.

Finally, just because there might exist an alternative “right way,” there are admittedly many road-blocks that obstruct the implementation of such mechanisms. The principal obstacles are resources, time, and the will to implement a better system. Part IV will explore these impediments and address their impacts, ultimately concluding that despite these serious considerations, the involved parties could have implemented a modern claims commission that would have resulted in a more just outcome.

II. THE ERITREA–ETHIOPIA CONFLICT AND AN AGREEMENT TO ARBITRATE VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

A. Conflict Arose from a Dispute over the Border Town of Badme and Quickly Developed into a Violent Two-Year War

Eritrea and Ethiopia are neighboring countries with intermeshed histories located in the northeastern part of Africa.⁷ Eritrea was previously a province of Ethiopia, but in 1993 the people of Eritrea won their independence.⁸ Relative peace existed between the two countries until 1998, when the two neighbors engaged in a deadly war covering multiple fronts along their common border.⁹ This conflict displaced and affected hundreds of thousands of people.¹⁰

The conflict began in May when the two parties began to fight over who could claim the territory of Badme.¹¹ Each side blamed the

7. See *Eritrea Country Profile*, BBC NEWS (Nov. 30, 2010), http://news.bbc.co.uk/2/hi/africa/country_profiles/1070813.stm.

8. See Partial Award: Civilian Claims—Eritrea’s Claims 15–16, 23, 27–32 (Eri. v. Eth.), 26 R.I.A.A. 197, 205 (Eri.–Eth. Claims Comm’n 2004) [hereinafter *EECC Civilian Claims*]; Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps its Boundaries: A Partial Award?*, 17 EUR. J. INT’L L. 699, 700 n.3 (2006).

9. See PERMANENT COURT OF ARBITRATION, INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 33 (Howard M. Holtzmann & Edda Kristjánsdóttir eds., 2007).

10. *Id.*; *UNMEE: United Nations Mission in Ethiopia and Eritrea, Background*, UNITED NATIONS, <http://www.un.org/depts/dpko/missions/unmee/background.html> (last visited Sept. 6, 2011) [hereinafter *Background*] (“As of March 2000, it was estimated that over 370,000 Eritreans and approximately 350,000 Ethiopians had been affected by the war. The humanitarian situation in parts of Ethiopia was exacerbated by the severe drought, which led to the emergence of a major food crisis with almost 8 million people affected.”).

11. Gray, *supra* note 8, at 700.

other for instigating the initial fighting.¹² The fundamental conflict concerned the location of the border between the two countries—what one side characterized as an invasion, the other characterized as a domestic occupation.¹³ Within one month, the fighting spread along the entire border between the two countries.¹⁴ Later the same year, the Organization of African Unity¹⁵ and the United Nations Security Council both observed the severity of the conflict and attempted to intervene so as to calm the dispute.¹⁶ On December 17, 1998, the Organization of African Unity drafted a “framework agreement” calling on Eritrea to withdraw troops from Badme so that the cartographic section of the United Nations could determine and demarcate the border.¹⁷ Eritrea did not accept the proposal, believing that such a withdrawal might indicate a concession that the territory belonged to Ethiopia.¹⁸ Consequently, the violence continued to rage.

By early 1999, the conflict had escalated into a full-scale war.¹⁹ The Secretary-General of the United Nations contacted the leaders of Eritrea and Ethiopia and urged them to resolve the matter peacefully.²⁰ The countries ignored these pleas and the violence continued until Eritrea finally accepted the framework agreement on February 27, 1999.²¹ By this point, Ethiopia’s military position had strengthened and, as a result, Ethiopia refused to accept the agreement.²² Instead, Ethiopia demanded that Eritrea automatically recognize Ethiopia’s sovereignty over all of the territories in dispute, rather than letting the United Nations demarcate the border.²³ Finally, on May 17, 2000, the United

12. *See id.*

13. *See id.*

14. Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea–Ethiopia Claims Commission in the Hague*, 25 WIS. INT’L L.J. 23, 28 (2007).

15. The Organization of African Unity is now known as the African Union. *Organization of African Unity (OAU)/African Union (AU)*, DEP’T INT’L RELATIONS & COOPERATION, S. AFR., <http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm> (last visited Sept. 6, 2011).

16. *See Gray, supra* note 8, at 701.

17. *See id.* at 701–02.

18. *See id.* at 702. Oxford Professor Christine Gray argues that Eritrea’s concerns were ultimately justified by the Commission’s Partial Award on *jus ad bellum* claims, which assigned liability for the conflict to Eritrea. *Id.*

19. *Id.*

20. *See Background, supra* note 10.

21. *See Gray, supra* note 8, at 702.

22. *See id.*

23. *See id.*

Nations Security Council adopted Resolution 1298, which imposed sanctions and trade restrictions on the two countries.²⁴

B. Fighting Ceased When the Countries Signed the Algiers Agreement, Which Created the Commission to Arbitrate Violations of Humanitarian Law

In June 2000, the two countries began to negotiate a ceasefire agreement,²⁵ followed by a full peace agreement in December 2000.²⁶ This agreement is known as the “Algiers Agreement,” because the parties negotiated and signed it in Algiers.²⁷ The parties never published details of the negotiation, “but it is known that Eritrean and Ethiopian negotiators and their legal advisers met with legal experts familiar with the Permanent Court of Arbitration, the United Nations Compensation Commission (UNCC) in Geneva, and other contemporary Mass Claims Processes.”²⁸ This agreement was the result of substantial pressure from and efforts by the international community to end the conflict.²⁹

The Algiers Agreement called for the creation of three bodies: (1) an independent body created under the Organization of African Unity to “determine the origins of the conflict,” (2) a neutral boundary commission to officially demarcate the border between the two countries, and (3) a neutral tribunal to arbitrate claims of international law violations.³⁰ The first body was never established, and the second body is known as the Boundary Commission.³¹ The third body is the Commission.³²

24. See *Background*, *supra* note 10; S.C. Res. 1298, ¶ 6, U.N. Doc. S/RES/1298 (May 17, 2000).

25. Agreement on Cessation of Hostilities Between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, Eri.–Eth., June 18, 2000, 2138 U.N.T.S. 37273.

26. Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.–Eri., Dec. 12, 2000, 40 I.L.M. 260 [hereinafter *Algiers Agreement*]; see also Gray, *supra* note 8, at 703; Identical Letters Dated 12 December 2000 from the Permanent Representative of Algeria to the United Nations Addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2000/1183 (Dec. 13, 2000).

27. *Id.*

28. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 34.

29. See *id.*

30. See *Algiers Agreement*, *supra* note 26, arts. 3–5.

31. See Gray, *supra* note 8, at 703.

32. See *Algiers Agreement*, *supra* note 26, art. 5, ¶ 1; Gray, *supra* note 8, at 703.

The Algiers Agreement required that:

[T]he [Eritrea–Ethiopia Claims] Commission is 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 The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.³³

The Algiers Agreement was specific in the overall goal of the Commission, yet it afforded the Commission an incredible amount of flexibility in determining particular procedures for handling claims and in modifying its own rules.³⁴ The adopted rules of procedure and rules of evidence were original to the Commission, although they were based on the “Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States,” which itself is based on the “United Nations Commission on International Trade Law.”³⁵ In addition, the Commission still retained the ability to modify the rules after consultation with the parties.³⁶

According to the Algiers Agreement, the Commission was to decide claims resulting from violations of international humanitarian law, but not claims arising from actual military operations or use of force, unless they too involved violations of international humanitarian law.³⁷ The relevant rules of law the Commission followed were: (1) international conventions, (2) international custom, (3) general principles of law recognized by civilized nations, and (4) previous judicial and arbitral decisions.³⁸

33. Algiers Agreement, *supra* note 26, art. 5, ¶ 1.

34. See PERMANENT COURT OF ARBITRATION, *supra* note 9, at 51.

35. See Eritrea–Ethiopia Claims Comm’n, Rules of Procedure, art. 1, ¶¶ 1–2 (2000), available at <http://www.pca-cpa.org/upload/files/Rules%20of%20Procedure.PDF>; Jon Lockart & Tania Voon, *Reviewing Appellate Review in the WTO Dispute Settlement System*, 6 MELB. J. INT’L L. 474, 481 (2005).

36. Eritrea–Ethiopia Claims Comm’n, Rules of Procedure, *supra* note 35, art. 1, ¶ 2.

37. See Algiers Agreement, *supra* note 26, art. 5, ¶ 1.

38. See Partial Award: Central Front—Ethiopia’s Claim 2 (Eri. v. Eth.), 26 R.I.A.A. 155, ¶ 13 (Eri.–Eth. Claims Comm’n 2004); Partial Award: Prisoners of War—Eritrea’s Claim 17 (Eri. v. Eth.), 26 R.I.A.A. 23, ¶ 31 (Eri.–Eth. Claims Comm’n 2003) [hereinafter EECC Prisoners of War].

The Algiers Agreement also defined the structure and organization of the Commission.³⁹ It created the Commission under the auspices of the Permanent Court of Arbitration, located in The Hague, which acted as a base and as a registry for the Commission.⁴⁰ The Permanent Court of Arbitration stored and cataloged the parties' pleadings and acted as an intermediary between the parties and the Commission.⁴¹ Outside of the services the Permanent Court of Arbitration provided, all costs resulting from the Commission were split equally among the two governments.⁴²

As for the actual composition of the Commission, it was comprised of five arbitrators.⁴³ These commissioners only worked on a part-time basis.⁴⁴ Aside from the commissioners and the Permanent Court of Arbitration, the Commission "employ[ed] no full-time staff" and relied heavily upon email "to limit travel and other costs."⁴⁵

The structure of the Commission was similar to traditional arbitration tribunals, yet unlike traditional arbitration mechanisms, the Algiers Agreement created the Commission to arbitrate a binding and final conclusion without any possibility of appeal.⁴⁶ Yet despite declaring the Commission's decisions as final and binding, the Algiers Agreement provided no method for enforcement of judgments.⁴⁷

Originally, the mandate for the Commission required a three-year deadline to arbitrate all claims.⁴⁸ The Algiers Agreement provided no procedure for extending this deadline, nor did either party request or attempt to extend this deadline.⁴⁹ The Commission therefore only accepted claims that the parties filed within the first year of its existence and extinguished all later claims, in an attempt to meet the three-year deadline.⁵⁰ Both Eritrea and Ethiopia filed claims past the deadline and

39. See Kidane, *supra* note 14, at 29.

40. See *id.*

41. See PERMANENT COURT OF ARBITRATION, *supra* note 9, at 308.

42. See Algiers Agreement, *supra* note 26, art. 5, ¶ 15; PERMANENT COURT OF ARBITRATION, *supra* note 9, at 362–63.

43. Algiers Agreement, *supra* note 26, art. 5, ¶ 2.

44. See PERMANENT COURT OF ARBITRATION, *supra* note 9, at 308.

45. *Id.*

46. See Algiers Agreement, *supra* note 26, art. 5, ¶ 17 ("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 promptly.").

47. See *id.*

48. See *id.* art. 5, ¶ 12.

49. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 162.

50. The Algiers Agreement states that "[a]ll claims submitted to the Commission shall be filed no later than one year from the effective date of this Agreement [S]uch claims which

the Commission refused to consider them due to the lack of timeliness.⁵¹ As this Note will explore in Part II, this deadline played an important role in how the Commission evolved. Ultimately, it became very clear to the commissioners that the three-year deadline was unrealistic and they agreed to extend the deadline, which is how the Commission then expanded into a ten-year process.⁵²

Both Eritrea and Ethiopia asserted a huge variety of claims, so the Commission decided to lump the States' claims into categories which it could then systematically address.⁵³ These categories included:

Category 1 – Claims of natural persons for unlawful expulsion from the country of their residence; Category 2 – Claims of natural persons for unlawful displacement from their residence; Category 3 – Claims of prisoners of war for injuries suffered from unlawful treatment; Category 4 – Claims of civilians for unlawful detention and injuries suffered from unlawful treatment during detention; Category 5 – Claims of persons for loss, damage or injury other than those covered by the other categories; Category 6 – Claims of [the two party] Governments for loss, damage or injury.⁵⁴

Also, both parties drafted extensive filings that the Commission then followed with private hearings.⁵⁵ International aid organizations and advocacy groups could have provided information to the government parties, but only the governments themselves were actually allowed to file information with the Commission directly.⁵⁶

C. The Boundary Commission, Partial Awards of the Commission, Resistance of the Two Parties, and Enforcement Issues

The Boundary Commission, the second commission formed under the Algiers Agreement, issued its findings in a decision on April 13,

could have been and were not submitted by that deadline shall be extinguished, in accordance with international law." Algiers Agreement, *supra* note 26, art. 5, ¶ 8.

51. See Kidane, *supra* note 14, at 48–51.

52. See Final Award—Eritrea's Damages Claims (Eri. v. Eth.), 26 R.I.A.A. 505, 518 (Eri.–Eth. Claims Comm'n 2009) [hereinafter EECC Eritrea Final Award].

53. See Eritrea–Ethiopia Claims Comm'n (Eri. v. Eth.), Decision No. 2, available at <http://pca-cpa.org/upload/files/Decision%202.pdf>.

54. *Id.*

55. See generally EECC Eritrea Final Award, *supra* note 52, ¶¶ 6, 10; EECC Ethiopia Final Award, *supra* note 1, ¶¶ 6, 10 (discussing the pleadings and hearings that took place).

56. See generally Eritrea–Ethiopia Claims Comm'n, Rules of Procedure, *supra* note 35, art. 13 (describing the arbitral procedures of hearings).

2002.⁵⁷ The decision indicated that Badme, the site of the original outbreak of violence, was an Eritrean territory.⁵⁸ Both parties initially accepted the border decision on paper, but once the Commission set out to physically demarcate the border, the decision was met with severe resistance by Ethiopia.⁵⁹ Ethiopia refused to allow preparations for the demarcation on the property it controlled.⁶⁰ In 2003, Ethiopia wrote a letter to the United Nations Secretary General declaring that the Boundary Commission's decision was "totally illegal, unjust and irresponsible."⁶¹ In response, Eritrea refused to allow the demarcation of another part of the border until Ethiopia allowed its portion to be demarcated.⁶² The Commission hit a standstill and, as a result, the Boundary Commission's work still has yet to be completed, despite numerous United Nations resolutions urging such action.⁶³

In October 2005, exasperated by Ethiopia's refusal to comply with the boundary ruling, Eritrea refused to cooperate with the United Nations Mission in Eritrea and Ethiopia (UNMEE)—a monitor mission—and forbade its helicopters in Eritrean airspace.⁶⁴ As a result, on July 30, 2008, the United Nations Security Council unanimously adopted Resolution 1827,⁶⁵ which terminated the United Nations Mission in Eritrea and Ethiopia.⁶⁶ The Resolution again implored Eritrea and Ethiopia to refrain from threats or force against one

57. See U.N. Secretary-General, Letter dated Apr. 15, 2002 from the Secretary-General to the President of the Security Council, U.N. Doc S/2002/423 (Apr. 15, 2002) (by Kofi A. Annan).

58. See Eritrea–Ethiopia Boundary Comm'n (Eri. v. Eth.), Decision Regarding Delimitation of the Border Between the State of Eritrea and the Federal Democratic Republic of Ethiopia, ¶¶ 5.94–5.95, U.N. Doc. S/2002/423 (Apr. 13, 2002); Gray, *supra* note 8, at 700, 707–08.

59. See U.N. Secretary-General, *Report of the Secretary-General on Ethiopia and Eritrea*, U.N. Sec. Council, ¶¶ 3–4, U.N. Doc 2/2002/744 (July 10, 2002).

60. See *id.* ¶ 4.

61. U.N. Secretary-General, *Progress Report of the Secretary-General on Ethiopia and Eritrea*, U.N. Sec. Council, ¶ 10, U.N. Doc. 2/2003/1186 (Dec. 19, 2003) (containing the Eleventh Report of the Eritrea–Ethiopia Boundary Commission, Appendix 1).

62. See *id.* ¶ 12; U.N. Secretary-General, *Report of the Secretary-General on Ethiopia and Eritrea*, U.N. Sec. Council, ¶ 13, U.N. Doc 2/2005/142 (Mar. 7, 2005) (containing the Sixteenth Report of the Eritrea–Ethiopia Boundary Commission).

63. See, e.g., S.C. Res. 1430, U.N. Doc. S/RES/1430 (Aug. 14, 2002); S.C. Res. 1466, U.N. Doc S/RES/1466 (Mar. 14, 2003); S.C. Res. 1507, U.N. Doc. S/RES/1507 (Sept. 12, 2003); S.C. Res. 1531, U.N. Doc. S/RES/1531 (Mar. 12, 2004); S.C. Res. 1560, U.N. Doc. S/RES/1560 (Sept. 14, 2004).

64. See U.N. Secretary-General, *Report of the Secretary-General on Ethiopia and Eritrea*, ¶ 2, U.N. Sec. Council, U.N. Doc 2/2006/1 (Jan. 3, 2006).

65. S.C. Res. 1827, U.N. Doc. S/RES/1827 (July 30, 2008).

66. *Last Peacekeepers Leave UNMEE*, U.N. MISSION IN ETHIOPIA AND ERITREA, <http://unmee.unmissions.org/Default.aspx?tabid=54&ctl=Details&mid=376&ItemID=368> (last visited Sept. 6, 2011).

another.⁶⁷ Resolution 1827 was one of twenty-eight resolutions the United Nations Security Council passed between 1998 and 2008, deploring the violence and demanding an immediate end to hostility, which the two countries continued to ignore.⁶⁸

At the same time, the Commission continued its work and sought to find liability for the conflict of 1998 to 2000.⁶⁹ It began this work in March 2001 and came to a conclusion on this issue in December 2005.⁷⁰ In addition to the question of liability, the Commission rendered multiple “partial awards.”⁷¹ The Commission heard arguments concerning its first substantive claim, concerning prisoners of war, in December 2002.⁷² The Commission submitted a partial award for this claim on July 1, 2003.⁷³ The Commission held a second hearing, concerning claims associated with the central front, in November 2003, which was followed by another partial award on April 28, 2004.⁷⁴ In all of these judgments, the Commission found violations of international law on both sides.⁷⁵

In April 2005, the Commission held another hearing concerning claims that included Eritrea’s Western Front, Aerial Bombardment, Pensions, Diplomatic, and Non-Resident Property Loss Claims, in addition to Ethiopia’s Western and Eastern Front, Port, Economic Loss, Diplomatic, and *Jus ad Bellum* (justification for going to war) claims.⁷⁶ It rendered partial awards for all these claims on December 19, 2005.⁷⁷

67. S.C. Res. 1827, *supra* note 65, ¶ 2.

68. See UNMEE: *United Nations Mission in Ethiopia and Eritrea*, U.N. Documents, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/unmee/resolutions.html> (last visited Sept. 6, 2011) (listing all Resolutions passed during this interval).

69. See *Eritrea–Ethiopia Claims Commission*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1151 (last visited Sept. 6, 2011). Professor Christine Gray has persuasively argued that this question of liability was outside the jurisdiction of the Eritrea–Ethiopia Claim Commission’s mandate. Because, however, the Organization of African Unity never formed the first commission described in the Algiers Agreement, the liability commission, the Commission, had to find liability to conclude its mandate. See generally Gray, *supra* note 8, at 714–20 (explaining the Commission’s approach to determining liability for the war).

70. See *Eritrea–Ethiopia Claims Commission*, *supra* note 69.

71. Awards are “partial” in that they do not become final until after the subsequent damages phase. See *id.*

72. See *id.*

73. EECC Prisoners of War, *supra* note 38; Partial Award: Prisoners of War—Ethiopia’s Claim 4 (Eri. v. Eth.), 26 R.I.A.A. 73 (Eri.–Eth. Claims Comm’n 2003).

74. See *Eritrea–Ethiopia Claims Commission*, *supra* note 69.

75. See Kidane, *supra* note 14, at 31–33.

76. See *Eritrea–Ethiopia Claims Commission*, *supra* note 69.

77. See *id.*

One of the most important conclusions of these hearings was that Eritrea actually caused the initial conflict when it carried out a series of unlawful armed attacks against Ethiopia, violating Article 2, Paragraph 4 of the Charter of the United Nations, which prohibits the threat or use of force against the territorial integrity or political independence of any state.⁷⁸ However, the Commission reserved judgment and damage amounts for a later final award determination.⁷⁹

D. The Commission Announces Its Final Damages Award Determinations

On August 17, 2009, the Commission rendered two final awards on damages.⁸⁰ One award was to Eritrea for \$161,455,000, plus an additional \$2,065,865 for six individual claimants, and the other award was to Ethiopia for \$174,036,520.⁸¹ This left a difference of \$10,515,655 that Eritrea owed to Ethiopia. These awards were for the claims that the Commission heard in previous hearings between July 1, 2003, and December 19, 2005, for which it had only made partial awards and no determination on damages.⁸²

In reference to these awards, Martin Plaut, an Africa analyst for the British Broadcasting Corporation, very succinctly explained that the “real tragedy is that the money, like the rest of the internationally supported peace process, will settle very little.”⁸³ The following sections of this Note seek to explain the validity of Plaut’s assertion and to offer some possible alternatives that the countries and the international community could have taken to avoid such an unfortunate result.

78. Partial Award: *Jus Ad Bellum—Ethiopia’s Claims 1–8 (Eri. v. Eth.)*, 26 R.I.A.A. 457, ¶ 16 (Eri.–Eth. Claims Comm’n 2005).

79. *See id.* ¶ 3.

80. *See* Press Release, Eritrea–Ethiopia Claims Comm’n, Eritrea–Ethiopia Claims Commission Renders Final Awards on Damages, (Aug. 17, 2009), <http://www.pca-cpa.org/upload/files/EECC%20Final%20Awards%20Press%20Release.pdf> [hereinafter EECC Press Release].

81. Hollis, *supra* note 4.

82. *See* EECC Press Release, *supra* note 80.

83. *Eritrea to Pay Ethiopia Millions*, BBC NEWS (Aug. 18, 2009), <http://news.bbc.co.uk/2/hi/africa/8208285.stm>.

III. THE COMMISSION FAILED TO PROVIDE COMPENSATION TO THE
VICTIMS AND AWARDS THAT WOULD MEANINGFULLY FURTHER PEACE
AND SECURITY IN THE REGION

*A. At Best, the Final Awards Fund the Coffers of the Warring Parties
But Do Not Adequately Assure Any Compensation to the Actual Victims
for the Harm They Suffered During the Conflict*

The damages the Commission granted to the two countries were primarily for harms suffered by individuals, yet these amounts were not awarded to the individuals themselves. For example, the Eritrea award included damages for: loss of business property and buildings; injuries to civilians due to loss of health care caused by the conflict; damage to cultural property; mistreatment of prisoners of war; failure to prevent rape; forcible expulsions; arbitrary deprivation of citizenship for dual citizens; failure to provide care to expelled nationals; failure to provide compensation for vehicles requisitioned by nonresident citizens; other property losses of nonresident citizens; imprisonment under harsh conditions for civilians on security charges; violations of diplomatic premises and property; and interference with departing diplomats.⁸⁴

This discrepancy was also true for Ethiopia's claims that included damages for: death, injury, disappearance, forced labor, and conscription of citizens; failure to prevent rape; destruction and looting of houses; looting and damage to government buildings and infrastructure; destruction and looting of religious institutions; mistreatment of prisoners of war; failure to protect citizens from threats and violence; failure to ensure Ethiopian citizens in Eritrea access to employment; failure to assure that Ethiopians received medical care comparable to Eritrean citizens; wrongful detention of civilians; failure to protect property of detainees expelled from Eritrea; and failure to ensure the safe repatriation of departing Ethiopians.⁸⁵

As the Commission found in an earlier partial ruling that ultimate liability for the conflict laid with Eritrea, the Ethiopian award included damages for *jus in bello* (conduct during war) claims and *jus ad bellum* (justification for going to war) claims.⁸⁶ Therefore, the Ethiopian award also included *jus ad bellum* damages for: human suffering and loss of income associated with internal displacement of persons; civilian death and injury; damage to civilian property; damage to public buildings and

84. See EECC Eritrea Final Award, *supra* note 52, at 629–30, ¶¶ 1–18.

85. See EECC Ethiopia Final Award, *supra* note 1, at 768–69, § A, ¶¶ 1–19.

86. See *id.* ¶ 7.

infrastructure; looting and destruction of religious institutions; death and injury caused by Eritrean landmines; destruction of government facilities and other government losses; lost profits for certain private businesses; and reconstruction and assistance to internally displaced persons.⁸⁷

More significantly, individual human beings felt the consequences of these violations, such as the claims for rape and forced labor; however, the Commission awarded the final monetary damages solely to the States, and not to the individual victims or to the States as trustees for the individual victims.⁸⁸ In its final decisions, the Commission repeatedly “encouraged” the parties to consider how the awards could be used to accomplish humanitarian objectives or compensate the victims,⁸⁹ and it also requested the parties explain how they intended to distribute the damages.⁹⁰ Yet there was no demand for the States to take any specific actions with the awards.⁹¹ Because the awards were not conditional on the countries’ compensating the individual victims within their borders, the final awards will essentially fill the general coffers of the respective countries to be spent as the countries see fit. This result, however, was not solely the fault of the commissioners when reaching their conclusion on damages. It was necessary for the Commission to award damages in this way because, for the most part, the countries only filed claims for nation-to-nation harms, rather than harms that the nations caused against individual victims.⁹²

The Commission established a mass claims process by which the parties could have filed claims for individuals.⁹³ This process included fixed tiers of compensation for individual claims.⁹⁴ The different tiers

87. *See id.* at 769–70, § B, ¶¶ 1–17.

88. *See id.* ¶ 3.

89. *See, e.g., id.* ¶ 25 (“[T]he Commission has encouraged the Parties to consider how, in exercise of their discretion, compensation can best be used to accomplish the humanitarian objectives of Article 5(1) of the Agreement.”); *id.* ¶ 82 (“Any compensation goes to the claimant State, not to injured individuals (although the Commission remains confident that the Parties are mindful of their responsibility, within the scope of the resources available to them, to ensure that their nationals who are victims of the conflict receive relief).”).

90. *See, e.g., id.* ¶ 11(1) (“[T]he Commission requests that the Parties inform it in their first filings how they intend to ensure distribution of damages received to civilian victims, including presently available information on existing or anticipated structures and procedures for this purpose.”).

91. *See id.* ¶ 3.

92. *See id.*

93. Eritrea–Ethiopia Claims Comm’n (Eri. v. Eth.), Decision No. 5, § B, *available at* <http://www.pca-cpa.org/upload/files/Decision%205.pdf> [hereinafter EECC Decision No. 5].

94. *See id.*

depended upon how many categories of damages corresponded with each individual's claim.⁹⁵ The two parties were to provide standard paper and electronic claim forms, based on the forms that the Commission planned to prepare for any individual claims.⁹⁶ The Commission intended to use computers and docket management software to select sample groups, using expert advised characteristics as a guide when setting sufficient compensation for certain sub-groupings of claims.⁹⁷ This procedure was a very innovative and progressive measure that could have streamlined the imposing project.

Nonetheless, one of the major failures of this scheme was that the Algiers Agreement did not address any mechanism to inform potential claimants of their eligibility to file claims under the Commission.⁹⁸ Instead, this responsibility was left to the States themselves.⁹⁹ Additionally, the Algiers Agreement did not give priority to these individual claims over the nation-to-nation claims, nor did it mandate that the nations file these individual claims if they decided to file nation-to-nation claims.¹⁰⁰ Consequently, despite the availability of this mass claims option, the parties chose only to file government-to-government claims, with the exception of six claims which Eritrea filed on behalf of six individuals whom Ethiopia had expelled.¹⁰¹

These problems might not have resulted in the abandonment of individual claims had it not been for the deadline that the Commission set for the collection of claims and the time that it would take to adequately collect individuals' claims. The mandate for the Commission called for a three-year deadline to arbitrate all claims.¹⁰² Accordingly, to adhere to this timetable, the Commission only accepted claims filed within the first year of its existence, extinguishing all later claims.¹⁰³ Further, the Algiers Agreement provided no procedure for extending this deadline.¹⁰⁴ If not for this deadline, then the parties might have considered collecting individuals' claims and utilizing the mass claims procedure.

95. *See id.* §§ B–C.

96. *See* PERMANENT COURT OF ARBITRATION, *supra* note 9, at 155.

97. *See id.* at 252.

98. *See id.* at 146.

99. *Id.*

100. *See id.* at 155.

101. *See* EECC Civilian Claims, *supra* note 8, ¶ 18.

102. *See* Algiers Agreement, *supra* note 26, art. 5.

103. *See id.* art. 5, ¶ 8.

104. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 162.

The Commission actually noted that filing inter-State claims instead of individual claims was understandable, “given limits of time and resources.”¹⁰⁵ Additionally, experts from the International Organization for Migration (IOM), who were serving the Commission as technical consultants, also expressed the opinion that an adequate mass claims procedure required more time to collect claims than the designated one-year deadline.¹⁰⁶ Paradoxically, this deadline was a significant factor in inhibiting the parties from filing individuals’ claims, as the deadline was a result of the Commission’s attempt to hasten its work to meet the “recurring concern that the proceeds accruing from the damages proceedings be used by the Parties to assist civilian victims of the conflict.”¹⁰⁷

The deadline set by the Commission does not solely explain why the parties chose to abandon the mass claims option. In addition to the deadline, there appears to have been a lack of will among the parties to find compensation for individuals who suffered harm. This is first illustrated by the fact that neither party requested nor attempted to extend the filing deadline.¹⁰⁸ Both Eritrea and Ethiopia disregarded the time limit and attempted to file inter-State claims past the deadline, yet never attempted to file individuals’ claims.¹⁰⁹ Furthermore, once it became clear that the three-year timetable to handle all claims was unrealistic, the commissioners agreed to extend the three-year deadline.¹¹⁰ It is reasonable to assume that if the commissioners were willing to extend the deadline for the Commission’s work, then they may have been willing to extend the filing deadline if the parties had expressed such a desire. Additionally, a lack of will to file individual claims is also evidenced by the fact that the parties did not push for separate individual claims, despite having already documented individuals’ claims on claim forms in an effort to facilitate the preparation of damages for the States’ own actions.¹¹¹ There was actually a system in place for individual claims, but the two countries involved did not care to use it, the Commission made it harder for these

105. EECC Ethiopia Final Award, *supra* note 1, ¶ 25.

106. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 156.

107. EECC Ethiopia Final Award, *supra* note 1, ¶ 10.

108. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 162.

109. *See* Kidane, *supra* note 14, at 48.

110. *See id.* at 31–32.

111. Eritrea collected 28,815 forms (25,595 claiming loss or damage to personal property and 3,220 claiming damage to business) from individuals to support the number the country claimed Ethiopia owed it for part of its claim. *See* EECC Ethiopia Final Award, *supra* note 1, ¶ 56.

countries to use it, and the Commission never organized the process in a way that forced the parties to give priority to individual claims for humanitarian violations.

B. The Ten Million Dollar Difference Between Ethiopia's Award of \$174,036,520 and Eritrea's Award of \$161,455,000 Did Not Provide Adequate Compensation

An award of over a hundred million dollars may seem like a lot of money to the average person, but to the average nation state it is a pittance. Yet an award in this range could be significant to an extremely impoverished country. The award is sizeable enough to provide some sort of deterrence against disapproved future actions and could provide at least some relief to victims. This is probably the thought process of the Commission when it made its final awards.

However, in a broader context, these awards are drastically insufficient. Because the damages are an exchange of money between states, the majority of, or entirety of, the award one country receives will only cover the amount owed to the other. This exchange results in an approximately \$10 million difference that Eritrea owes Ethiopia. This is only 0.25% of the annual gross domestic product (GDP) of Eritrea,¹¹² which has a relatively small GDP as one of the poorest nations in the world.¹¹³ The amount is insignificant in part because the Commission heavily discounted the final award amounts, leaving it impossible for either party to be fairly compensated.

Even if the full amount of the final awards went directly to compensating victims of Ethiopia and Eritrea's unlawful actions then there still would not be just compensation because the amount was inadequate. The commissioners had the herculean task to wade through the mass of information which the two parties provided it to concoct a reasonable figure for damage awards. After tabulating reasonable amounts, however, the Commission then discounted many of these amounts depending on the reliability of the evidence,¹¹⁴ and then discounted these amounts even further due to consideration of the wealth, or lack thereof, of the two countries.¹¹⁵ This deep, and in many

112. See *The World Factbook: Eritrea*, U.S. CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/er.html> (last visited Sept. 6, 2011)

113. Eritrea ranks 168th in world economies. See *id.*

114. EECC Ethiopia Final Award, *supra* note 1, ¶ 38 (“[C]ompensation levels also have been reduced, balancing the uncertainties flowing from the lower standard of proof.”).

115. See EECC Eritrea Final Award, *supra* note 52, at 507–08.

cases seemingly arbitrary, discounting resulted in final award amounts that were far from the amounts the Commission determined as fair compensation for the parties' wrongful actions.

In the opening paragraphs of the final award decisions, the Commission explained that the awards "probably do not reflect the totality of damages that either Party suffered in violation of international law. Instead, they reflect the damages that could be established with sufficient certainty through the available evidence in the context of complex international legal proceedings carried out by the Parties with modest resources and under necessary pressures of time."¹¹⁶

These opening lines explain the balance the Commission attempted to strike between certainty and fair compensation. Essentially, it concedes that the awards are not adequate, and reveal that there are issues with the Commission's structure that inherently restricted it from allowing a fair resolution of the circumstances.

The Commission depended solely upon the information that the two parties provided to it. Other organizations could have presented evidence to the parties, but not directly to the Commission.¹¹⁷ Additionally, the Commission did not have the staff or resources to conduct its own investigations.¹¹⁸ Therefore, it often did not have sufficient evidence and had to resort to employing "estimation" or "guesswork" to determine the amount of compensation for particular claims.¹¹⁹ For example, the Commission found that the Eritreans suffered significant losses of property at the hands of Ethiopian forces during the invasion,¹²⁰ yet the evidence presented did not quantify the magnitude of that injury.¹²¹ The Commission did indicate that the evidence was available, but that the Commission "[d[id] not have time or resources" to review the information.¹²² Instead, the Commission relied upon "a reasonable estimate of the losses."¹²³ These estimates are problematic.

116. *Id.* at 507.

117. *See generally* Eritrea–Ethiopia Claims Comm'n, Rules of Procedure, *supra* note 35, art. 13 (describing the hearing process for the proceedings between Ethiopia and Eritrea).

118. *See id.* ¶ 71.

119. EECC Ethiopia Final Award, *supra* note 1, ¶ 37.

120. EECC Eritrea Final Award, *supra* note 52, ¶ 70.

121. *Id.*

122. *Id.* ¶ 71.

123. *Id.* ¶ 72.

When there was insufficient evidence for a claim, as often was the case, this type of “guesswork” became the default method for determining a conclusion.¹²⁴ The result had to be either an amount that was completely false, because it was the product of a guess, or grossly ineffective, as the Commission was erring on the side of caution in that case.¹²⁵

In addition to the problems with the first type of discounting, the Commission also discounted to account for the wealth of the two countries.¹²⁶ This type of discounting was not totally unreasonable. As the Commission points out, the amount of damages that Ethiopia requested was three times the entire GDP of Eritrea in 2005.¹²⁷ The Commission was therefore concerned that since the countries were so poor and the damages so high, serious damages would further destabilize peace in the region, similar to what happened with the Treaty of Versailles and Germany after World War I.¹²⁸

Furthermore, the Commission was concerned that because the countries were so poor, large awards would cripple the governments’ ability to pay for the essential services that their people needed, and would force the governments to neglect their obligations under the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.¹²⁹ These were serious considerations. The Commission’s purpose was to foster peace, stability, and compensate victims, not to further destabilize the region or take away services from the survivors of war. However, as reasonable as it sounds, this conclusion is problematic for various reasons.

First, the Commission’s choice to abandon true compensation and adequate justice for victims in favor of political stability was just as likely to foster resentment and instability as payment of large awards. The Commission’s choice assured that the victims of the war would never receive the compensation they were due for their harms. Second, the Commission took a short-term view of the problem; there are countless examples of extremely poor countries that in a relatively short

124. *See id.* at 508.

125. *See id.* The Commission would in some cases award no compensation at all for claims when it did not have sufficient evidence. *See, e.g., id.* ¶ 307.

126. EECC Ethiopia Final Award, *supra* note 1, ¶ 18 (“In assessing both Parties’ damages claims, the Commission has been mindful of the harsh fact that these countries are among the poorest on earth.”).

127. *Id.*

128. *Id.* ¶ 315.

129. *Id.* ¶¶ 19, 21.

period of time transformed into significant global economic leaders, such as China or Germany.¹³⁰

Unlike the Treaty of Versailles, the Algiers Agreement provided no mechanism for enforcement or a timetable for distribution of the awards.¹³¹ Consequently, the Commission could have provided that repayment for the majority of the awards be dependent upon the size of the countries' economies, not upon any time deadline. If the countries were to become able to pay the damages without causing detriment to their own citizens, then they would. Otherwise, the amounts that the parties owed could stay close to the current discounted awards. This payment structure would have at least allowed for an opportunity to provide the victims with just compensation instead of discounted awards, a decision that guarantees that there will be no comparable opportunity.

The problems related to the discounting of the awards and the fact that the awards negate each other would not be as problematic if the money exchanged between the two countries went directly to victims rather than to the other State's general coffers. That still would have stood in the way of fair compensation for everyone, but it would not have been as extreme, and at least could have provided compensation for some. For example, the Commission awarded Eritrea and Ethiopia each two million dollars in parallel awards "for failing to prevent the rape of known and unknown victims in the towns of Senafe, Barentu and Teseney."¹³² The Commission did so with the "hope that Eritrea (and Ethiopia) [would] use the funds awarded to develop and support health programs for women and girls in the affected areas."¹³³ In reality, Eritrea and Ethiopia will merely exchange checks for identical sums of money. Essentially, the result will be the same regardless of whether the Commission awards ten times the amount of money, or awards no money at all. On the other hand, if the States pay the rape victims directly or pay organizations that provide support to the rape victims,

130. See Justin Yifu Lin, *Development and Transition: Idea, Strategy, and Viability* 7 (China Ctr. for Econ. Research, Working Paper No. E2007007, 2007), available at <http://en.ccer.edu.cn/download/6401-1.pdf>.

131. See The Peace Treaty of Versailles, June 28, 1919, Part IX: Financial Clauses, art. 259, available at <http://net.lib.byu.edu/~rdh7/wwi/versa/versa8.html> (describing enforcement and time requirements for Germany to pay its financial obligations under the Treaty); Algiers Agreement, *supra* note 26, art. 5, ¶ 17 (merely providing that "[t]he parties agree to honor all decisions and to pay any monetary awards rendered against them promptly).

132. EECC Eritrea Final Award, *supra* note 52, ¶ 239.

133. *Id.*

then the award, regardless of the amount, would at least have some impact.

*C. It Is Doubtful the Final Awards Furthered Peace and Stability
Between the Two Countries*

Aside from the issue of just compensation, a serious question arises as to whether the final award will truly further the peace and stability between Eritrea and Ethiopia. This was the primary goal of the peace which the parties brokered in Algiers and from which the Commission arose.¹³⁴ The long term impact of the final awards is still unclear; nevertheless, the immediate effects are troubling. Neither Eritrea nor Ethiopia has expressed satisfaction with the results of the Commission. In the opening paragraphs of the final award decisions, the Commission noted that the “awards of monetary compensation for damages are less—probably much less—than the Parties believe to be due.”¹³⁵

The Ethiopian government has explicitly and publically expressed its dissatisfaction with the Commission’s ruling.¹³⁶ Eritrea has accepted the award due to the final and binding nature of the Algiers Agreement, but has also expressed reservations about the final award amounts.¹³⁷ Additionally, Eritrea continues to express its dissatisfaction to the United Nations Security Council over the international community’s treatment of the conflict.¹³⁸ This dissatisfaction has partially resulted in Eritrea isolating itself from the international community.¹³⁹ As of the time of this Note, Ethiopia has still refused to allow the United Nations to demarcate the border with Eritrea.¹⁴⁰ Eritrea has, as a result, further

134. See Algiers Agreement, *supra* note 26, arts. 1–2.

135. EECC Eritrea Final Award, *supra* note 52, ¶ 2.

136. Desalegn Sisay & Konye Obaji Ori, *Ethiopia and Eritrea to Pay for War Damages: Ethiopia Not Satisfied with Ruling*, AFRIK-NEWS.COM (Aug. 19, 2009), <http://en.afrik.com/article16061.html> (“The Ethiopian government is dissatisfied with the commission’s ruling, after they (the commission) found out that Eritrea was the offender and had dragged Ethiopia into the grave war said the ministry. It also said, Ethiopia will further study the details of the final award and measures that could be taken to ensure what is owed to Ethiopia by Eritrea is settled.”).

137. See Press Release, Statement of the Government of Eritrea on the Award of the Claims Commission (Aug. 18, 2009), *available at* <http://adalvoice.wordpress.com/2009/08/18/eritrea-accepts-the-award-of-the-claims-commission/>.

138. See Jeremy Clarke, *Eritrea Dismisses New Border Violence Accusation*, REUTERS (Oct. 29, 2009, 12:25 PM), <http://af.reuters.com/article/topNews/idAFJ0E59S0H320091029?pageNumber=1&virtualBrandChannel=0>.

139. See *id.*

140. *Eritrea–Ethiopia: UN Urges Ethiopia to Cooperate with Border Commission*, IRIN, <http://www.irinnews.org/report.aspx?reportid=47953> (last visited Sept. 6, 2011).

isolated itself from the international community, and no money has been exchanged between Eritrea and Ethiopia for the victims of the border war. Relations between the parties have not progressed since they brokered the Algiers Agreement, despite the ten years' work of the Commission.¹⁴¹

IV. INSTEAD OF A TRADITIONAL ARBITRATION MODEL, THE COMMISSION SHOULD HAVE MORE HEAVILY RELIED UPON THE MODEL OF THE UNITED NATIONS COMPENSATION COMMISSION AND THE COMMISSION FOR REAL PROPERTY CLAIMS OF DISPLACED PERSONS AND REFUGEES

This Note has presented flaws in the Commission, flaws in the final awards, and the consequences of these problems. The solution to many of these problems are systematic and could have been avoided if the structure of the Commission was, from the beginning, dramatically altered to match modern mass claim techniques utilized by the United Nations Compensation Commission (UNCC) and the Commission for Real Property Claims of Displaced Persons and Refugees.

A. The Success of the United Nations Compensation Commission in Resolving Mass Claims Efficiently and with Relative Speed

The UNCC is a subsidiary organ of the United Nations Security Council, which the Security Council established in 1991 to compensate victims of Iraq's invasion and occupation of Kuwait.¹⁴² The UNCC did not have the task of deciding liability, but only determining damages, as the Security Council had already found that Iraq was liable for any losses that resulted from the invasion or occupation.¹⁴³ The UNCC also had a similar task to that of the Commission's after it had made its partial rulings; however, that is the extent of the similarities between the two bodies.

As the Secretary-General of the United Nations stated:

[T]he Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims;

141. See THE INT'L CRISIS GRP., ERITREA: THE SIEGE STATE, AFRICA REPORT NO. 163 22–26 (2010), available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/ethiopia-eritrea/163%20Eritrea%20The%20Siege%20State.pdf>.

142. *Introduction*, U.N. COMPENSATION COMM'N, <http://www.uncc.ch/introduc.htm> (last visited Sept. 6, 2011).

143. See *id.*

it is only in this last respect that a quasi-judicial function may be involved.¹⁴⁴

The damages that the UNCC established were drawn directly from a special account that sales of Iraqi oil funded.¹⁴⁵ The Secretary-General, however, initially recommended that the amounts paid by Iraq should not exceed thirty percent of the value of its oil exports.¹⁴⁶ The amount was ultimately reduced to twenty-five percent, pursuant to Security Council Resolution 1330, but the UNCC enacted the general scheme that the Secretary-General recommended.¹⁴⁷

The UNCC has been a resounding success. Since the Security Council established the UNCC in 1991, victims have filed more than 2.6 million claims and have sought a total of approximately \$368 billion in compensation.¹⁴⁸ Out of these claims, the UNCC awarded compensation for 1,543,619 claims and, as of January 27, 2011, distributed a total of \$31,303,180,576.¹⁴⁹ The vast majority of these claims came from individuals for relatively small amounts.¹⁵⁰ Victims filed all of these claims in a six-year span, with many of the claims falling under a January 1, 1995, deadline; other claims falling under a January 1, 1996, deadline; and the last group of claims falling under a February 1, 1997, deadline.¹⁵¹ The UNCC finished its processing task in 2005 and made its last payments to individuals in 2007.¹⁵²

The UNCC was able to efficiently resolve a huge volume of cases and distribute a large volume of payments, while still safeguarding against frivolous claims, because it utilized a modern approach to mass claim processing.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id.*

148. *The Claims*, U.N. COMPENSATION COMM'N, <http://www.uncc.ch/theclaims.htm> (last visited Sept. 6, 2011).

149. *Status of Processing and Payment of Claims*, U.N. COMPENSATION COMM'N, <http://www.uncc.ch/status.htm> (last updated Sept. 6, 2011).

150. Norbert Wühler, *Institutional and Procedural Aspects of Mass Claims Settlement Systems: The United Nations Compensation Commission*, in *INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS* 17, 18 (Int'l Bureau of the Permanent Court of Arbitration ed., 2000) [hereinafter *Institutional and Procedural Aspects of Mass Claims Settlement Systems: The United Nations Compensation Commission*].

151. *The Claims*, *supra* note 148.

152. U.N. COMPENSATION COMM'N, <http://www.uncc.ch/start.htm> (last updated July 29, 2008).

One technique that the UNCC employed was to break down the types of claims which people could file into categories.¹⁵³ Four of these categories provided for individual claims, one for corporate claims, and one for government claims.¹⁵⁴ The UNCC dealt with the individual claims first and then addressed the other claims.¹⁵⁵ This assured that priority was given to individual victims before governments. It also grouped and processed claims by common legal, factual, and valuation issues.¹⁵⁶ Norbert Wühler, a former UNCC chief, observed that, “[g]iven the traditional emphasis in previous claims resolution processes on the losses suffered by governments and corporations, this humanitarian decision to focus first on urgent individual claims marked a significant step in the evolution of international claims practice.”¹⁵⁷

Another UNCC innovation was the use of computer software to match claims and information sampling to examine claims against existing databases and statistical models.¹⁵⁸ This system contributed to the speed and efficiency with which it was able to work, as the UNCC could then quickly determine whether there was documentation to justify an award.¹⁵⁹

The UNCC also employed two different evidentiary standards: one for individual claims and one for businesses or government claims.¹⁶⁰ “Appropriate evidence” of the circumstances and amount of the loss was sufficient as long as the evidence reached a “reasonable minimum” for the former.¹⁶¹ The UNCC, however, demanded documentation and other appropriate evidence “sufficient to demonstrate the circumstances and amount of the loss” for the latter.¹⁶²

In order to verify and evaluate the claims and evidence, the UNCC made considerable use of experts, consultants, and other specialists.¹⁶³ In addition to relying on experts, the UNCC had access to several fact

153. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 56.

154. *Id.* at 57.

155. *Id.* at 56–57.

156. *Id.* at 248.

157. Norbert Wühler, *The United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution*, 2 J. INT’L ECON. L. 249, 261 (1999).

158. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 248–49.

159. See Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 185 (2009).

160. *Institutional and Procedural Aspects of Mass Claims Settlement Systems: The United Nations Compensation Commission*, *supra* note 150, at 20–21.

161. *Id.* at 20 (emphasis omitted).

162. *Id.* at 21 (emphasis omitted).

163. *Id.*

finding studies that the United Nations had commissioned shortly after the liberation of Kuwait, but before the filing of claims was even an option.¹⁶⁴ These studies provided essential information for the UNCC in its work.¹⁶⁵ These reports were effective because they were prepared under the authority of the United Nations and not one of the interested parties.¹⁶⁶

The UNCC also created specific claim forms that it then distributed to governments.¹⁶⁷ A standardized claim form allowed the UNCC to more easily process the forms and avoid the issues with the claim forms which Eritrea and Ethiopia created.¹⁶⁸ Governments and organizations filed individual claims with the UNCC; however, the governments acted as trustees for individuals.¹⁶⁹ Conversely, the Commission processed individuals' claims only as a means to reach a conclusion on the two government parties' claims.¹⁷⁰

Much of the strength of the UNCC rested in its ability to safeguard individual claimants by using an inquisitorial process rather than an adversarial process. As one law professor explained:

The use of an inquisitorial type of procedure for the claim resolution process has been described as the "signal distinction" of the Commission. . . . [A]n adversarial process would not have been able to achieve fundamental fairness for the individual claimants or Iraq. [It] would have likely resulted in patently unfair outcomes due to decisions based primarily on technical grounds, rather than the substantive merit of the claims.¹⁷¹

A judicial or arbitral solution is useful in many circumstances but the organizers of the UNCC recognized that, in a situation involving mass claims for humanitarian violations, an inquisitorial model is more appropriate.¹⁷² This had become apparent, in part, when past attempts to

164. 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, 167 (2005).

165. *See id.* at 167–68.

166. *See id.* at 167, 168 n.100.

167. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 150.

168. The Commission actually disregarded a large amount of claim forms that Eritrea had created because Eritrea did not make them appropriately. *See* EECC Eritrea Final Award, *supra* note 52, ¶¶ 69–72.

169. *See The Claims*, *supra* note 148.

170. *See* EECC Ethiopia Final Award, *supra* note 1, ¶ 3 (explaining that the process was not intended to determine appropriate individual compensation, but to determine broader awards for the states as claimants).

171. Chung, *supra* note 164, at 162.

172. *See id.*

utilize the former model resulted in chaos.¹⁷³ The unwieldy Iran–United States Claims Tribunal, a tribunal based on the traditional arbitration model similar to that of the Commission, is one example.¹⁷⁴ The Iran–United States Claims Tribunal worked at a very slow pace and had great difficulty with individual claims due to a lack of causation evidence.¹⁷⁵ The Commission should have learned from the past and referred to the UNCC’s established practices.

B. The Success of the Commission for Real Property Claims of Displaced Persons and Refugees in Resolving Mass Claims Efficiently and with Relative Speed

The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) was an international commission established to process and resolve claims by Bosnians who sought to reacquire property lost or left in the Bosnia–Herzegovina conflict of 1992 to 1995.¹⁷⁶ The CRPC was established in 1996 and completed its work in 2003.¹⁷⁷ During this period, the CRPC rendered a total of 311,757 decisions,¹⁷⁸ an incredible number of claims for such a short period of time. These decisions “are estimated to have benefitted close to one million people.”¹⁷⁹

Like the Commission, the CRPC arose out of a peace agreement, the Dayton Peace Agreement, which sought to end the Bosnian war.¹⁸⁰ The CRPC accepted claims directly from individuals.¹⁸¹ First, staff members interviewed claimants to gather evidence and then sorted the information in a computer database.¹⁸² The CRPC also crafted the forms for the claimants to fill out so that they were comprehensive and user-friendly.¹⁸³ To make a binding decision, a panel of judges then

173. *See id.* at 175.

174. *See id.* at 174–75.

175. *Id.* at 174 (“While most of the claims before the Iran Tribunal were settled, approximately 250 claims were arbitrated to a decision. It took ten years to arbitrate these 250 claims to conclusion.”).

176. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 23.

177. *Id.*

178. *Id.* at 24.

179. *Id.*

180. Hans van Houtte, *Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina*, in INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS 23, 24 (Int’l Bureau of the Permanent Court of Arbitration ed., 2000).

181. *See id.* at 32.

182. *Id.* at 33.

183. *Id.*

examined the evidentiary record, information from the interviews, and any existing official registries.¹⁸⁴ Like the UNCC, there was no adversarial process.¹⁸⁵

The CRPC returned the title of property to many individuals; however, it did so knowing that the local authorities were still responsible for facilitating the return of all real property.¹⁸⁶ This means that a remedy for these victims might not be available for some time, but at least the victims have the authority for future legal action when it becomes politically feasible.¹⁸⁷ This is the appropriate long-term view of remedies that the Commission should have taken.

C. A Similar Political Commission Solution is More Viable than a Judicial Solution Due to the History of, and Current Power Struggle Between, Eritrea and Ethiopia

The UNCC, the CRPC, and the countries involved in those two structures have many similarities to the Commission and the parties involved in that Commission. The countries involved in all of these, for the most part, were relatively poor and had recently been through significant military conflicts.¹⁸⁸ Indeed, each crisis is unique and will require its own approach. For example, Iraq is unique in that it had a strong source of revenue in oil.¹⁸⁹ Despite these differences, there are still enough similarities between these structures that there will always be important lessons from which future commissions can draw. It is evident that the Commission could have achieved more success by more closely following the examples of prior mass claims processes.

184. *See id.* at 33, 39–40.

185. *See id.* at 33.

186. *Id.* at 41.

187. *Id.* at 42 (“It would be unrealistic to expect that the Commission’s decisions, which go against the political and even financial interests of the local power structure, will immediately be fully recognised or implemented by the local authorities. However, even if implementation in the short term may give rise to some problems, the decisions have been formally taken and are in the hands of the public. Sooner or later they have to be implemented. In Germany owners had to wait for 50 years but their titles to property located in the former German Democratic Republic were finally recognised after the reunification.”).

188. These countries include Bosnia, Herzegovina, Iraq, and Kuwait. U.N. Compensation Comm’n Governing Council, Special Report and Recommendations Made by the “D1” Panel of Commissioners Concerning 223 Claims of Bosnia and Herzegovina for Departure from Iraq or Kuwait (Category “A” Claims), ¶¶ 1(a), 18, U.N. Sec. Council, U.N. Doc S/AC.26/2000/15 (Sept. 29, 2000).

189. *Iraq Overview*, U.S. ENERGY INFO. ADMIN., <http://205.254.135.24/countries/country-data.cfm?fips=IZ> (last visited Sept. 6, 2011).

V. TIME, RESOURCES, AND WILL ARE POTENTIAL OBSTACLES TO
SELECTING AND IMPLEMENTING A PROCESS THAT UTILIZES SUCCESSFUL
FEATURES OF PAST MASS CLAIMS MECHANISMS, BUT THESE OBSTACLES
ARE NOT INSURMOUNTABLE

There are justifiable reasons why the Commission handled only inter-State claims and followed a traditional arbitration model, albeit with a few innovative measures, instead of handling individual claims through a modern mass claims process like the aforementioned commissions. The most significant reasons are time, resources, and will; however, in hindsight, these three impediments are not impassable road blocks.

Arguably, the most imposing barrier is the lack of money and resources. The Commission repeatedly bemoaned its lack of sufficient resources and how this inhibited them from performing at a high level.¹⁹⁰ At one point, the Commission directly contrasted itself to the UNCC, explaining that it could not achieve what the Compensation Commission did for lack of resources.¹⁹¹ These complaints are accurate and fair. Both the UNCC and the CRPC had much larger budgets than the Commission and employed much larger staffs. The administrative costs of the UNCC from the time it began through 2005 totaled \$362.6 million.¹⁹² Conversely, the CPRC had a much smaller budget; it used approximately \$33.49 million from 1997 to 2003.¹⁹³

Consequently, both commissions had a much larger working staff than the Commission. The UNCC had “[a]t its height . . . approximately three hundred professional and general services staff.”¹⁹⁴ The CRPC even had over 250 staff members running its operations.¹⁹⁵ Alternatively, the Commission was comprised of only five commissioners.¹⁹⁶ As opposed to the other commissioners, these commissioners worked only on a part-time basis.¹⁹⁷ The Permanent Court of Arbitration provided some support, but the Commission employed no full-time staff.¹⁹⁸ The actual expense figures for the

190. See EECC Eritrea Final Award, *supra* note 52, ¶ 71.

191. *Id.*

192. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 349.

193. *Id.* at 350.

194. *Id.* at 302.

195. Van Houtte, *supra* note 180, at 26.

196. See Algiers Agreement, *supra* note 26, art. 5, ¶ 2.

197. See PERMANENT COURT OF ARBITRATION, *supra* note 9, at 308.

198. *Id.*

Commission have not been made public yet, but it is known that it was quite modest in relation to these other commissions.¹⁹⁹

As modest as the budget may have been, it did not have to stand in the way of utilizing an efficient and effective mass claims procedure. First, gathering and sharing technologies developed by past tribunals should lower the cost of future ones.²⁰⁰ Accordingly, the Commission did not have to reinvent the wheel and its costs did not have to be as significant as that of the UNCC. Second, because the Commission was tailored as an adversarial model, both Eritrea and Ethiopia must have spent a substantial sum on attorneys' fees and expert legal consultants, which instead could have been used to supplement the budget. For five to ten years, Ethiopia employed eleven lawyers and consultants and Eritrea employed seventeen lawyers and consultants to work on their cases before the Commission.²⁰¹ Third, the necessary costs are not truly overly imposing. For all that it did, the UNCC's budget was only actually 0.1% of the amount of claims asserted before the Commission.²⁰² Furthermore, the entire cost of the UNCC's fourteen years of operation was roughly only a half a percent of Ethiopia's annual gross domestic product²⁰³ and only nine percent of Eritrea's annual gross domestic product.²⁰⁴

Additionally, the costs should not have barred a modern mass claims process that would have been more successful in providing just compensation, because the Commission had already done a lot of the work in creating a model for such a procedure.²⁰⁵ This underscores how the excuse of funding can really be a veiled justification when there is a lack of will. The lack of will was not only present within the Commission and the participating States, but also in the international community. The amount of money necessary for a mass claims procedure is very insignificant in relation to the global economy, and it is not unprecedented that, in the interest of peace and security, the

199. *Id.* at 352.

200. See Howard M. Holtzmann, *Mass Claims Systems: Potentials and Pitfalls*, in INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS 1, 6 (Int'l Bureau of the Permanent Court of Arbitration ed., 2000).

201. See EECC Ethiopia Final Award, *supra* note 1, at 639–40.

202. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 349.

203. Ethiopia's GDP as of 2008 was \$72.24 billion. *The World Factbook: Ethiopia*, U.S. CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (last visited Sept. 6, 2011).

204. Eritrea's GDP as of 2008 was \$3.877 billion. See *The World Factbook: Eritrea*, *supra* note 112.

205. See EECC Decision No. 5, *supra* note 93, § B.

international community has funded similar projects. For example, the majority of the CRPC's budget was paid by a collection of international states.²⁰⁶ Furthermore, the international community spent \$1.32 billion, a significantly higher amount than would be necessary for a mass claims procedure, to support the UNMEE mission.²⁰⁷

Another issue is the source of funds necessary to fairly compensate the victims. In Iraq, the UNCC was able to levy a portion of Iraq's oil revenue to compensate the victims,²⁰⁸ but neither Eritrea nor Ethiopia has an industry that is as reliably profitable.²⁰⁹ Nevertheless, if the countries were able to find enough resources to engage in war, then there should have been no excuse to find the money necessary to compensate the victims of their war. The amount spent on the war was not negligible either; Ethiopia paid approximately three billion dollars.²¹⁰

Furthermore, compensation need not be immediate, as it could be a long-term, structured project. The possibility of compensation in the future is better than none at all. As the citizens of the countries involved are very poor, the amounts necessary for individual claims should be relatively insubstantial. This was the case with the UNCC where the amounts for individual claims were relatively small amounts.²¹¹ However, small awards can make a huge difference to these individual victims.

Before the UNCC began, there were critics who claimed that the project was doomed because there would never be enough money to award all of the claims.²¹² This was not a reason to abandon the project, however. Indeed, the UNCC was consequently able to compensate a large number of victims.²¹³

206. See PERMANENT COURT OF ARBITRATION, *supra* note 9, at 359–60.

207. UNMEE: *United Nations Mission in Ethiopia and Eritrea, Facts and Figures*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/unmee/facts.html> (last visited Sept. 6, 2011).

208. McGovern, *supra* note 159, at 187–88.

209. See *The World Factbook: Ethiopia*, *supra* note 203; *The World Factbook: Eritrea*, *supra* note 112.

210. *Violations of Academic Freedom in Ethiopia*, Jan. 24, 2003, A1502, available at <http://www.unhcr.org/refworld/docid/3f4f59533.html>.

211. See McGovern, *supra* note 159, at 188.

212. Charles N. Brower, *Lessons to be Drawn from the Iran–U.S. Claims Tribunal*, 9 J. INT'L ARB. 50, 56 (1992) (stating that “[t]here will never, by any projection that anyone has seen, be enough money to pay 100 per cent of the claims” before the UNCC).

213. See McGovern, *supra* note 159, at 188.

The final substantial impediment is time. Dr. Norbert Wühler, the director of the IOM, highlighted that “in every mass claims programme, a tension exists . . . between the search for individual justice and fairness and the requirement of an expedient process that resolves all the claims within a reasonable time period.”²¹⁴ The Commission stressed that many of the organizational and procedural steps it took were due to a desire to finish proceedings as quickly as possible and help the victims immediately.²¹⁵ This, however, effectively sacrificed actual and just compensation to the victims. Instead, the Commission should have committed more time to making its determination, if it meant that ultimately the Commission could fairly compensate the victims.

Further, both the UNCC and the CRPC illustrate that the time needed by the Commission to adequately compensate the victims should not have been much longer than the Commission took to conclude. The Commission spent almost ten years to reach a final decision on awards.²¹⁶ Furthermore, there has yet to be any payments made.²¹⁷ Alternatively, the UNCC started in 1991 and had completely finished processing claims by the end of 2005.²¹⁸ It made its last payments in 2007.²¹⁹ The CRPC was established in 1996 and ended in 2003.²²⁰ The difference between these three commissions is negligible, considering the benefit that could have been gained by taking the slightly longer approach.

VI. CONCLUSION

The Commission has been successful in many regards. Professor Won Kidane, who worked with Ethiopia during the Commission, described many of its successes:

- (1) It has contributed to the development of norms of international humanitarian law in the civil compensation context,
- (2) it has significantly contributed to the emerging consensus regarding the status of some norms of international humanitarian law as customary norms,
- (3) it has identified gaps in the existing standards of

214. *Institutional and Procedural Aspects of Mass Claims Settlement Systems: The United Nations Compensation Commission*, *supra* note 150, at 20.

215. See EECC Ethiopia Final Award, *supra* note 1, ¶ 16.

216. See *id.* at 644, 770.

217. Author's correspondence with Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University Law School, Washington, D.C. (Aug. 2, 2011).

218. U.N. COMPENSATION COMM'N, *supra* note 152.

219. *Id.*

220. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 23.

international humanitarian law and suggested the development of new norms to fill those gaps, (4) it has refined procedures and evidentiary standards of adjudication for mass claims processes, (5) it has clearly demonstrated that there is a feasible way to determine civil liability for violations of international humanitarian law occurring during and in the aftermath of armed conflict for the compensation of victims of such violations, and most importantly, (6) it has shown that determination of civil liability is a realistic alternative and an important supplement to criminal prosecution as a mechanism of enforcement of violations of humanitarian law.²²¹

Absent from this list, however, is “relief and compensation for the victims of Eritrea–Ethiopia border war” and “peace and security in the region.”

The Algiers Agreement provided a mandate for the Commission that should have forced more individual claims, instead of allowing only inter-State claims.²²² There are good examples in recent history that could have guided the Commission in processing these claims, resulting in more substantial benefit to the individual victims.

In particular, there are five primary lessons that the Commission should have learned. First, and most importantly, the Commission should have focused on individuals instead of governments. The Commission created a mass claims process, but it did not necessitate its use or prioritize individual claims over government claims in the way that the UNCC did. Second, the Commission should have allowed the time necessary to run a modern mass claim process. Both the CRPC and the UNCC were relatively short enterprises with ultimately very little benefit in trying to keep stringent deadlines. Third, the Commission should have abandoned its reliance on an adversarial approach, and instead should have approached the violations of humanitarian international law as an impartial investigatory organ like the CRPC and the UNCC. The Commission also should have developed standardized claim forms, such as the ones the CRPC and the UNCC utilized, to assure consistency and efficiency. This would have reduced both costs and time, while still allowing the Commission the flexibility to award damages more easily to the victims of the war.

Fourth, the Commission should have allowed impartial experts and organizations to file information directly to the Commission, instead of

221. Kidane, *supra* note 14, at 86.

222. PERMANENT COURT OF ARBITRATION, *supra* note 9, at 67–68; Algiers Agreement, *supra* note 26, art. 5, ¶ 1.

through the government parties, and should have conducted more of its own independent research, much like how the UNCC had its own unbiased reports on which to rely. This would have made it easier for the Commission to finish its work more easily and more sufficiently. Lastly, the Commission should have focused on remedies through a long-term lens. Instead of discounting the amounts necessary for compensation, the Commission should have followed the example of the CRPC and granted remedies that might not have been as practical or enforceable currently, but that could have become more meaningful and feasible in the future.

The Commission and its commissioners worked extremely hard and were extremely clever in their approach to problems that arose. Nevertheless, due to many circumstances in and out of their control, the result was a negligible award that most likely will not justly compensate a majority of the victims or significantly further peace between Eritrea and Ethiopia. This should serve as an example to the international community when a similar situation arises in the future—that it is better and not much more costly (in time or resources) to implement a modern mass claims process that is effective in compensating victims and furthering humanitarian goals than it is to adhere to a traditional arbitration or judicial model.