

law, highlighting not just how individuals experience international law in their daily lives and contribute to its creation, but what elements of their experience do state-state disputes take into account and which are highlighted or, instead, ignored.

Examples of the symbiotic relationship between states and individuals include issues the determination of compensation for impacts on livelihood, the displacement of individuals or communities when boundaries are redrawn, and how trade rules can create winners and losers both at home and abroad.

The panelists' discussion focused on three specific issues:

First, we examined how the determination of compensation for impacts of livelihood has changed and has evolved historically. It is particularly interesting in this area to think about international claims commissions and how their work has changed over time. For example, the commissioners of the United Nations Compensation Commission (UNCC)<sup>1</sup> which was established after Iraq's invasion of Kuwait, innovatively decided to prioritize small claims of individuals who had to flee the region over claims by companies and states. Those claims were compensated with a modest fixed sum. More recently, the International Court of Justice (ICJ) ordered Uganda to pay \$65 million to the Democratic Republic of the Congo (DRC) for five years for violation of human rights as well violation of the DRC's territorial sovereignty, and the looting, plundering, and exploitation of the DRC's natural resources.<sup>2</sup>

Second, we examined how boundaries and international decisions over boundaries affect individuals concretely. Boundary disputes often result in the displacement of individuals. The panelists discussed both territorial and maritime boundaries generally and focusing on specific example. Panelists in particular focused on mass expulsion and nationality issues that ensue from certain boundaries disputes. In this situation, the examples of the UNCC and the Eritrea-Ethiopia Claims Commission are important illustrative case studies.

Third, and finally, we explored the issues of trade and this create both winners and losers. The focus was on the negotiation of new trade agreements, specifically among the United States-Mexico-Canada Agreement (USMCA),<sup>3</sup> and also addressed issues of labor rights.

The discussion was illuminating and I sincerely thank the speakers—John Crook, Massimo Landi, Aristeo Lopez, and Yusra Suedi—for engaging with these questions and for their thoughtful remarks.

## REMARKS BY JOHN R. CROOK\*

doi:10.1017/amp.2022.17

Our panel is looking at the complex interactions between individuals and the processes for creating and applying international law. How do individual actions lead to state-state disputes? How do the rules and procedures for resolving these disputes impact affected people? As the panel notes says, the idea is to address a vital question: “what about me?”

Our caption refers to the “symbiotic relationship between states and individuals in state-state dispute settlement” in various areas. I am going to look briefly at two: the evolving position of individuals in international dispute settlement; followed by a brief comment about the importance of settled international borders.

<sup>1</sup> For an overview of the work of the UNCC, see UNCC, *Home*, at <https://uncc.ch>.

<sup>2</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. v. Uganda)*, at <https://www.icj-cij.org/en/case/116>.

<sup>3</sup> For more information, see <https://usmca.com>.

\* Professor of Law, George Washington University Law School.

The textbook definition of symbiosis emphasizes the idea of mutual benefit. It seems to me that international dispute settlement is evolving toward a more truly symbiotic relationship, one offering greater benefits to the individual as well as to the state.

As we know, many international law rules are rooted in disputes between states involving injuries to one state's nationals by action of the other. *Barcelona Traction* involved Belgium's unsuccessful claims for its nationals' loss of their investment. *Oscar Chinn* involved Mr. Chinn's difficulties competing with a rival company subsidized by Belgian authorities. *Ahmadou Sadio Diallo* involved Mr. Diallo's treatment by the DRC authorities. There are many more.

Such interstate proceedings have major limitations as remedies for individuals' injuries. Under the international law of diplomatic protection, they can only address violations of international law. Claims under contracts and many claims for personal injuries or property losses are out. And, the state is in total control. It can elect to bring an international claim for its nationals' injuries, or not to claim. It can waive a national's claim entirely. It can settle claims for a few cents on the dollar, as has often occurred. And, if there is a recovery, it is the state's money. It can share it with injured nationals, or not. Everything is up to the state.

However, over time, I have seen a potentially significant shift in how some states approach disputes involving injury to individuals. Consider some examples.

The Iran-U.S. Claims Tribunal is an important step in this shift away from classical diplomatic protection. The Tribunal was created in 1981 as part of the agreements between the United States and the Islamic Republic of Iran to end the hostage crisis. Before the 1979 Islamic Revolution, U.S. nationals had extensive business and investment relationships in Iran. These were largely ended by the Revolution, resulting in thousands of claims by U.S. persons against Iran in U.S. courts. To address these, Iran and the United States created a claims tribunal that operated outside of the international law framework of diplomatic protection. For example, all claims over \$250,000 were presented by the individual claimants, not the state. Claimants and their lawyers were in control of their claims throughout. If claimants prevailed, they, and not the state, received any recovery.

This caused anxiety for some observers, who insisted that this thing was not diplomatic protection and asked, if not diplomatic protection, what is it? The answer is that the law of diplomatic protection is not *jus cogens*. International law permitted Iran and the United States to create a framework to address claims outside of the traditional method of diplomatic protection.

The UN Compensation Commission is another landmark. The United Nations Compensation Commission (UNCC) was created by the UN Security Council to compensate persons injured by Iraq's 1990 invasion of Kuwait. Although it has received relatively little notice, the UNCC awarded about \$52.4 billion to 1.5 million successful claimants before recently concluding its activities. The UNCC utilized various administrative methods, rather than traditional hearings with sparring advocates, to collect and process claims. I cannot go into the mechanisms they created, but I will note a couple of significant points. First, compensation was available for a wide range of injuries, not just those involving violations of international law. Second, while states played a significant role in marshalling and presenting their nationals' claims, the UNCC also created mechanisms to receive claims from stateless persons or individuals falling into jurisdictional black holes.

I should mention a third situation, the Eritrea-Ethiopia Claims Commission (EECC). The EECC was created to address claims for violations of international humanitarian law in the 1998–2000 war between Ethiopia and Eritrea. The two countries' agreement creating the UNCC was state-centric, and most of the claims were by one state against the other. The agreement did include the possibility of mass claims processes similar to the UNCC's and for individuals to bring claims, but for various reasons these had limited effect.

The state-centric character of the EECC concerned the Commission's members, but the legal framework did not allow compensation to be directed to particularly affected victims or groups, even assuming this could have been accomplished in practice. Accordingly, the Commission urged the parties to consider ways to use any damage awards to achieve humanitarian objectives through collective programs such as those providing health, agricultural, and other services. (Similar concerns are expressed in Judge Yusuf's and Judge Salam's criticisms of the relief recently awarded by the International Court of Justice in the damages phase of *DRC v. Uganda*.)

We will see what the future brings. However, my prediction is that future mechanisms created to deal with situations like those leading to the Iran-U.S. Claims Tribunal, the UNCC, and the Eritrea-Ethiopia Claims Commission are likely to continue seeking forms of relief more responsive to the needs of individuals.

I will shift gears to say a few words about borders and border disputes. Obviously, changing borders, or creating new ones, can have enormous and painful consequences for individuals. Consider the dreadful results of the August 1947 partition of British-ruled India into India and Pakistan. Partition triggered huge movements of people in both directions; millions of Muslims trekked to West and East Pakistan, while Hindus and Sikhs went the other way. These population movements were accompanied by great violence and cruelty. Hundreds of thousands were murdered. Millions were displaced, and between one and two million died.

Consider the huge movements of people after World War II. Among others, millions of ethnic Germans were expelled or fled from places where their communities sometimes had lived for centuries, particularly in Czechoslovakia and the German territories that once constituted East Prussia. It has been estimated that more than twelve million people were displaced from Central and Eastern Europe. Tragically, such events are not unique. Today we are seeing vast new disruptions of people's lives resulting from yet another effort to move borders by force.

Each situation is different, but they all pose challenging issues of possible losses of nationality and needs for humanitarian assistance and protection. These issues are beyond what we can address here. The simple point, though, is that moving borders can have enormous human consequences.

In this regard, I recently saw something that I found very moving. It was a picture in the *New York Times* of displaced Ukrainians arriving at the tidy train station in Przemyśl, a small Polish city a few miles from the Ukrainian border. The *Times* reported that thousands of fleeing Ukrainians—and their pets—were being welcomed and cared for by the Polish residents.

Many have never heard of Przemyśl, but in 1914, it was part of the Austro-Hungarian Empire. It was the site of a great Austro-Hungarian fortress that was the scene of intense fighting between Russian and Austro-Hungarian forces during World War I.

Przemyśl is in a part of the world that has known many shifts of borders and rulers, often accompanied by great violence and bloodshed. Since the eighth century, it has been variously ruled as part of the Moravian empire, the Kingdom of Poland, by Rus, and by the Mongols, among others. Transitions between rulers were often violent.

The Austrians annexed the region in 1772, and during the Crimean war began work on the fortress to defend their eastern frontier against the Russians. Przemyśl had a hard time during World War I, suffering a long siege and a Russian occupation. When the Austro-Hungarian Empire disintegrated in 1918, the city was disputed in bitter fighting between Polish and Ukrainian forces. With Poland's victory, it became part of Poland for a few years. When the German and Red armies invaded Poland in 1939, they briefly divided the town, separated by the river through the town. The Germans then took over as they invaded the Soviet Union in 1941. The Red Army then retook the city in 1944, and Przemyśl wound up just inside Poland's new borders when the USSR and its Polish comrades drew a new border in 1945. Throughout

the years, the city's large Jewish population experienced recurring bouts of vicious anti-Semitism, culminating with mass deportation and murder during the German occupation. Many of the city's non-Jewish leaders and intelligentsia were also arrested, deported, or executed as rulers periodically changed through the years.

Why does this history matter? The history of this one mid-sized Polish town illustrates in microcosm the terrible human consequences that too often follow from a lack of secure and settled borders, particularly when ambitious neighbors seek to redraw them by force

## THE “WHAT ABOUT ME?” QUESTION IN ICJ PROCEEDINGS ON COMPENSATION AND MARITIME DELIMITATION

doi:10.1017/amp.2022.18

By Massimo Lando\*

### I. THE ICJ AND THE “WHAT ABOUT ME?” QUESTION

This brief contribution contains some reflections on the relevance of the “what about me?” question in proceedings on compensation and maritime delimitation. The focus is on disputes at the International Court of Justice (ICJ or Court). My argument is that, as things currently stand at the ICJ, the Court is ill-equipped to address the “what about me?” question and that, as a result, ICJ proceedings remain very much state-centric. This view likely is not surprising because the Court was conceived, since its origins in the 1920s, as an interstate judicial organ. Other dispute settlement institutions have developed since then to bring dispute settlement closer to individuals, such as regional human rights courts and arbitral tribunals in the investor-state context. However, this situation does not mean that the ICJ should not take into account individuals in deciding disputes submitted to its jurisdiction. What this situation does mean is that one would need to rethink some procedural aspects of ICJ dispute settlement, which I will discuss in relation to compensation, and parts of the ICJ's jurisprudence, which I will discuss in relation to maritime delimitation.

### II. COMPENSATION

On February 9, 2022, the ICJ handed down its judgment in the compensation phase of *Armed Activities on the Territory of the Congo (DRC v. Uganda)*. This judgment signals the end of the dispute between the DRC and Uganda originating from the armed conflict between the two states that straddled the end of the 1990s and the beginning of the twenty-first century. The dispute concerned questions of international responsibility for injury caused during the armed conflict and subsequent occupation of parts of the DRC's territory by Uganda, which Uganda had undertaken in response to cross-border actions against it carried out by non-state armed groups based on the DRC's territory. In 2005, the Court had found that Uganda was internationally responsible for injury caused to the DRC as a result of the conflict and the occupation and that the former had an obligation to pay compensation to the latter for that injury.<sup>1</sup> Uganda was found to be responsible for, *inter alia*, wanton destruction of property, exploitation of natural resources, and personal injury

\* Assistant Professor, School of Law, City University of Hong Kong; Global Fellow, Centre for International Law, National University of Singapore.

<sup>1</sup> *Armed Activities on the Territory of the Congo (Dem Rep. Congo v. Uganda)*, Merits, Judgment, 2005 ICJ Rep. 168 (Dec. 19).