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International Claims Commissions: Righting Wrongs After Conflict

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In 2002, Lorraine Charlton took a six-month sabbatical from her career as an international capital markets lawyer to work on a public international arbitration. Five years later, she returned to the international capital markets, but not without a deep appreciation for the community of people who work to bring stability, justice and peace to the aftermath of an armed conflict.

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Lea and Chiara on this book has been every bit as interesting, challenging, and rewarding as expected – and then some! Ms. Charlton thanks both for their many helpful suggestions and encouragement. She also owes a particular debt to Pamela Fiawoo, the Latham & Watkins law librarian who laid her hands on any book requested and kept the lending libraries at bay when all those books were well past their due dates.

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Introduction: international mass claims commissions: “build-it-yourself” justice?

Why might states or international institutions support the creation of mass claims commissions? Presumably because mass claims commissions achieve results that cannot be accomplished in any other way.¹ The paucity of international adjudicative institutions with compulsory jurisdiction means that there are no standing bodies with jurisdiction and managerial competence that can match the accomplishments of which claims commissions are able.

Or are thought to be able – the states and statesmen that create them are not always realistic. Whether in retrospect a particular commission deserved the confidence that was entrusted to it is not always clear, to put the matter politely. But claims commissions must be compared to the alternative, which in the international sphere means no remedy at all. And this may be the reason that their failings are often viewed more charitably than these commissions would otherwise deserve. Claims commissions, however imperfect, are created to fill a void that has become increasingly troublesome in international relations.

We focus mainly on three relatively recent cases: the Iran–US Claims Tribunal, the United Nations Compensation Commission and the Eritrea–Ethiopia Claims Commission. What the claims commissions considered here all have in common is that they were established to determine appropriate compensation for large-scale injuries from violence involving violations of international law.² All were designed to be more efficient at adjudicating a larger number of more varied claims than any existing international court could manage. Claims commissions are thought to be better equipped to tailor their procedures, substantive law and remedies to the specific needs of the parties to the particular dispute – hardly a small accomplishment. The conflicts and the types of claims that they

¹ See Chapter 2 for a discussion of the advantages and disadvantages of resolving mass claims through a claims commission.

² Each of these programs is described in detail in Chapter 1.

have addressed have been varied – traditional wars between states, violent revolutions and genocides – and the decision-making structures that the parties have created to resolve their legal claims were as varied as the upheavals that made them necessary. What makes claims to almost infinite flexibility plausible is that claims commissions are *ad hoc*.

We can illustrate what this means by recounting the tale of a hypothetical dispute between two bordering states, Alpha and Beta. Alpha alleges that Beta invaded it to establish a puppet government that would guarantee Beta privileged access to Alpha's valuable natural resources. Beta was also allegedly entertaining hopes that it might eventually annex Alpha's entire territory through the puppet government's connivance, and, indeed, it tried to do that. Alpha believed itself to be the aggrieved party, but it responded, alleges Beta, with legal violations of its own; mistreatment of its ethnic Beta minority, deliberate shelling of civilians in Beta, violations of Beta's diplomatic immunities and so forth. Tens of thousands of innocent civilians were injured on both sides.

An ordinary domestic dispute would be resolved more or less as follows. Whichever side wanted more to obtain a legal resolution would search out the most appropriate legal institution (probably a trial court) already in existence. The steps to be followed would be roughly these:

1. Dispute resolution mechanisms already exist (courts) with standing judges and procedures.
2. Beta and Alpha's dispute arises.
3. The aggrieved party files in appropriate pre-existing court.
4. The forum applies its own procedural law.
5. Court determines/selects the appropriate law, remedy.
6. Appeal filed by dissatisfied party.
7. Final remedy is enforced.

But Beta and Alpha's conflict is not a domestic dispute, and the parties are probably states, over whom domestic courts typically have no jurisdiction.

Another alternative might be to search for an existing international court, such as the International Court of Justice, which has compulsory jurisdiction in certain instances. The order in which the events occur match stages one through five. But there may not already be such a structure in existence; indeed, there probably won't be. The existing international adjudicative institutions are strictly limited in jurisdiction and subject matter, and their capabilities are limited as well. If claims are

to be heard, a new institutional solution must be devised. The answer is “build-it-yourself” justice.

The difference that this makes is enormous. The downside is that the parties may be unable to agree on any legal resolution at all; most international conflicts do not generate mechanisms for creating a body to hear claims for violations of international law, after all. But an obvious upside also exists: Because the commission is created after the dispute arises, it is possible to tailor the structure and the competence to the specific numbers and types of damages claims that are anticipated. And the new commission proceeds with the parties’ agreement – a fairly substantial sign of international legitimacy. This is a subject worth studying!

The result is a different progression of the steps in the dispute resolution process, particularly the point at which the adjudicative mechanism is established and then constituted.

1. Dispute between Beta and Alpha arises.
2. Beta and Alpha agree to end the conflict and settle their claims legally.
3. A commission is established by the parties’ agreement.
4. The commission is constituted by the parties choosing the members, who select a chair.
5. The commission follows the peace agreement where it specifies substantive and procedural rules.
6. Where the agreement does not address certain questions, the commission decides.
7. The commission resolves the facts and law for the competing claims.
8. Typically, no provision is made for appeal.
9. There may or may not be provision for enforcement.
10. Upon completion of the task, the commission disbands.

As this list suggests, the steps in the post-decision process are also different from the stages in domestic courts (compare stages 6 and 7 of the first example to stages 8 and 9 of the second). The latter typically have appellate bodies to review their decisions and the power of the state to enforce them. International claims commissions typically have neither.³

³ Issues arising out of crafting a suitable remedy and enforcing it are discussed in Chapter 7.

The most important of these differences is that commissions are created after the dispute arises; those drafting the instrument that creates the commission can take the characteristics of the dispute into account and tailor the new commission's provisions to a dispute's unique characteristics. Even the judges are chosen by the parties with an eye toward suitability and expertise in the particular subject matter. This, essentially, is the functional meaning of the phrase "*ad hoc*." Standing institutions – those already in existence before the dispute arose – obviously lack this flexibility.

The chapters below spell out the numerous ways in which the *ad hoc* character of claims commissions makes a difference. One enduring difference affects the framing of almost every legal issue there identified. A discussion of claims commissions cannot focus exclusively on existing law, the way that a treatise on international maritime or intellectual property law would do. On many of the issues that we discuss, there *is* no existing law but only determination of what the parties provided in their peace agreement. A book on claims commissions therefore fulfills an important purpose even where it simply identifies issues that may arise in the course of the proceedings. When put on notice, the parties can choose either to address the issues in their consent to arbitration, or leave the question open for the commission to decide.

We started this Introduction by asking what claims commissions have to offer that accounts for the parties' willingness to create them. As will be shown in the chapters that follow, the costs and benefits are not merely theoretical. There is one underlying motive for establishment of claims commissions that has not been mentioned yet, however, and it may be the real reason that some of them are established. That reason is their ability to contribute to the termination of conflict between the parties by channeling the parties' energies into pursuit of their (real or supposed) *legal* rights. Even while honestly striving for a negotiated end to violent international upheaval, the parties will probably not be positioned to formulate and prove their legal demands for compensation. Creation of a claims commission effectively "kicks the can down the road" so that peace need not wait until mass claims are resolved. The parties can start to rebuild their countries and the lives of their inhabitants. Once the hostilities have halted, they are difficult to resume; halting the fighting temporarily can therefore bestow significant benefits. This is certainly a substantial benefit to the parties and to the international communities, and, even when unspoken, may be the most important benefit of all.