

Reparations for Historical Wrongs: From ad hoc Mass Claims Programs to an International Framework Program?

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Introduction

This paper outlines how international and national mass claims programs have been employed over the last two hundred years to redress the consequences of massive wrongs arising out of historical events such as wars, revolutions and other extraordinary incidents, and that have affected a large number of individuals in a similar manner. This paper will focus on the mechanisms used to facilitate financial compensation without considering whether this form of remedy is the most appropriate one from a policy point of view, or indeed from the point of view of the victims themselves. In addition, in terms of the specific consequences of wrongs, we will focus on one particular category of claims, namely those dealing with death and personal injury.¹

While each of the mechanisms or processes considered here are *ad hoc*, *i.e.* established to deal with the consequences of certain specific historical wrongs or events, patterns emerge as to the manner in which claims concerning liability for death and personal injury have been dealt with. The question arises as to what extent such past programs might be referred to in addressing the consequences of any contemporary or future events or wrongs. To what extent should such programs be considered precedent or models? To what extent should they be adjusted to the particular circumstances of each individual case? While we do not propose to offer any ready-made solutions, as this would be outside the scope of this paper, we

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1 In the common law tradition, lawyers tend to use the terminology of "personal injury claims." The Black's Law Dictionary defines "personal injury" as follows: "*Torts*. 1. In a negligence action, any harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury. 2. Any invasion of a personal right, including mental suffering and false imprisonment." See: B.A. Garner (ed.), *Black's Law Dictionary*, Eight Edition, 2004.

do suggest that a careful analysis should be made of the relevant past and current programs when designing a novel mass claims process.

The paper will consider the evolution of compensation programs from a historical perspective, bearing in mind that these programs were originally established mainly to deal with property and financial issues arising out of wars, revolutions or other historical events (I). The novel trend of adjudicating death and personal injury claims by mass claims programs will then be investigated (II).

I. The Evolution of Compensation Programs for Property Issues: An Overview

Historically, compensation programs for property issues may be broken down into three relatively easily identifiable phases. From the Jay Treaty of 1794 until World War II, international claims commissions and mixed arbitral tribunals were predominant (A). Then, in the wake of World War II, these programs were "nationalized" and substituted by "lump-sum" settlement agreements, which were negotiated at an inter-governmental level (B). The creation of the Iran-U.S. Claims Tribunal, the end of the Cold War and the rise of information technology in the 1980s marked the rise of a wide variety of international and national mass claims programs (C).²

A. From the Jay Treaty of 1794 to World War II: The Age of Mixed Claims Commissions

Doctrine usually defines a "claims commission" as 1) an arbitration court 2) established by agreement of two or more states; 3) to adjust a class of claims within a specified competence; 4) brought or espoused by nationals of the parties; and 5) which, actually renders an award on some or all of those claims.³ Typically, this "class of claims" would concern property and other economic rights to the exclusion of personal injury damage suffered by individuals.

2 This periodisation of the law of international claims has been proposed by V. Heiskanen, "Virtue out of Necessity: International Mass Claims and New Uses of Information Technology," in The Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes, Innovative Responses to Unique Challenges*, Oxford: Oxford University Press, 2006, ss. 25-37.

3 See: D.J. Bederman, "The Glorious Past and Uncertain Future of International Claims Tribunals," in M.W. Janis (ed.), *International Courts for the Twenty-First Century*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992, p. 161.

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It is widely recognized that the modern era of international arbitration, as one of the mechanisms for resolution of sensitive international disputes, finds its genesis in the Jay Treaty of 1794, which can also be viewed as the predecessor of international claims commissions.⁴ The relative success of the arbitration established by the Jay Treaty was replicated in the Alabama arbitrations of 1872.⁵

Scores of claims commissions were subsequently established in the late 19th century and early 20th century to deal with the consequences of wars, revolutions and other conflicts.⁶ The Boxer Commission, the United States-Mexican Claims Commissions of 1868 and of the 1920s and 1930s, and the United States-German Mixed Claims Commission⁷ are among the best-

- 4 Treaty of Amity, Commerce and Navigation, 19 November 1794, U.S.-Great Britain, 8 Stat, 116, 119-20, 122 (hereinafter the "Jay Treaty"), also available at <http://www.earlyamerica.com/earlyamerica/milestones/jaytreaty/text.html>, in particular Art. VII (last visited on 3 November 2006). The Jay Treaty established commissions to resolve commercial disputes between the United States and Great Britain through the arbitration of claims by British creditors against U.S. nationals. With a potential war with Britain looming over the U.S. failure to compensate British creditors, the U.S. President, George Washington, commissioned Chief Justice John Jay to negotiate a compromise and conclude a political settlement. The Jay Treaty did not expressly state that the United States were responsible for the non-payment of British creditors. However, it obligated the United States to pay full compensation and to adjudicate these claims before a panel of five commissioners, two appointed by each country and the fifth by unanimous consent. When determining the disputes, the panel allocated liability on a case-by-case basis.
- 5 The Alabama arbitrations followed allegations that Great Britain had violated its neutrality between the United States Government and the Confederate Government, during the American civil war, by building and deliberately delivering a warship, the *Alabama*, to the confederate army. The *Alabama* captured more than 60 vessels and caused considerable damage to the Northern economy. After having first refused to submit the cases to arbitration, the British Government in 1871, worried by the worsening of the political situation on the Continent following the victory of the Germans against the French, wished to liquidate the remaining bones of contention with the United States. The United States and the British Government consequently signed, in 1871, the Washington Treaty, whereby the British Government expressed its apologies for the escape of the *Alabama*, and agreed to submit the ensuing monetary claims to arbitration. The Government of Great Britain acknowledged implicitly its responsibility in the treaty, and the scope of liability was later determined by the arbitral tribunals, on a case-by-case basis.
- 6 It is estimated that over sixty-five such mixed claims commissions were established over more than two centuries. See: D.J. Bederman, "The Glorious Past...", p. 161.
- 7 The language used in the United States - Mexican General Claims Convention and the United States - Mexican Special Claims Convention both of 1923 expressly refers to damage to property and damage suffered by persons. Similar language is included in the (Berlin) Treaty of Peace of 25 August 1921 between the United States and Germany; cited in *Lillian Byrdine Grimm v. Government of the Islamic Republic of Iran*, 2 Iran-U.S. C.T.R. 78. The scope of the class of claims adjudicated by these mixed claims commissions was broad and arguably encompassed

known examples, but numerous other mixed arbitral tribunals and claims commissions were also created during that era.⁸

One of the common features of the Jay Treaty, the Alabama arbitrations and the other international claims commissions was that private claims concerning property rights were submitted to a third party panel for resolution. These institutions rendered awards, which were seldom challenged on their merit.⁹

The key advantage of international claims commissions to resolve mass claims has been aptly described as follows:

“It makes for a superb face-saving device in the conduct of international relations. Contentious disputes are submitted to what appear to be a neutral authority which adjudicates them on the basis of a respect for law. The highly-charged political circumstances which gave rise to the claims – whether wars or political upheavals – are neutralized with (usually) years of dispassionate legal analysis and adjustment. If nothing else, international claims settlement is a superb political soporific.”¹⁰

However, delay in processing the claims was also a common characteristic and the main drawback of claims commissions.¹¹ For example, the United States-Germany Mixed Claims Commission, one of the most successful claims programs in its time, spent some seventeen years in resolving approximately 20,000 claims. Thus, these delays are often cited as one of the reasons why international claims commissions “fell out of fashion.”¹²

personal injury claims. This was uncommon at the time since the instruments establishing the mixed claims commissions were usually silent on the issue.

8 The Paris Peace Treaties and other peace treaties concluded after World War I provided for the establishment of fifty-seven mixed arbitral tribunals and claims commissions. Thirty-eight of these tribunals and claims commissions were actually established. See: N. Wühler, “Mixed Arbitral Tribunals,” in I.R. Bernhardt (ed.), Instalment I, E.P.I.L., 1981, 143. For a discussion of the jurisprudence of the various early international claims commissions, See: M. Whiteman, *Damages in International Law*, 1943.

9 See: D.J. Bederman, “The Glorious Past...p. 168.

10 See: D.J. Bederman, “The Glorious Past...p. 166.

11 See: V. Heiskanen, “Virtue Out of Necessity...”, p.25.

12 V. Heiskanen, “Virtue Out of Necessity...”, citing D.J. Bederman, “The United Nations Compensation Commission and the Traditional Claims Settlement,” *New York University Journal of International Law and Policy*, 27, 1994, p. 18 (“The phenomenon of delay was undoubtedly the primary cause of disaffection with the institu-

In the wake of World War II, a new mechanism for resolving mass claims disputes appeared: lump-sum settlements agreements. This mechanism was shaped at the governmental level and used not only to settle the traditional private claims to compensate victims of the war or revolution, but also to deal with claims arising out of nationalization and expropriation of foreign property.¹³

B. The Post World War II as the Lump Sum Agreements Era

A lump-sum settlement agreement can be defined as a scheme in which the compensating State pays to the claiming State a specific damage indemnity. The claiming State in turn - in lieu of submitting the private claims to arbitration - establishes a national claims commission to adjudicate private claims and allocate specific damage indemnity amongst successful claimants. With this new scheme, the determination of the private claims of individuals or companies was no longer dealt with by an independent *ad hoc* mixed arbitral tribunal or international claims commission, but by a body of the claimant State itself. The functions previously exercised by international claims commissions were "nationalized."

Lump-sum agreements became the preferred tool to settle political crisis after World War II and typically would deal exclusively with claims relating to property rights. Lump-sum agreements were typically part of any package put forward by would-be peace brokers.¹⁴ According to some authors, there have been a total of one hundred and sixty-eight lump sum agree-

tion of claims settlement by international tribunals.")

13 See: V. Heiskanen, "Virtue Out of Necessity...", p. 26; See: also R.B. Lillich, D.J. Bederman, B.H. Weston, *International Claims: Their Settlement by Lump Sum Agreements 1975-1995*, New York: Transnational Publishers, 1999.

14 For example, a lump-sum agreement was suggested in 1951 by the UN Conciliation Commission for Palestine (CCP) with respect to the Middle East refugees, to no avail. Likewise, the former UN Secretary General, Mr. Boutros-Ghali advocated the same principles to the governments involved in the Cyprus problem. See: Annex to the Report of the Secretary General to the Security Council, UN Doc. S/24472, Annex, 1992, 18, Arts. 76 and 77 ("76. Each community will establish an agency to deal with all matters related to displaced persons. 77. The ownership of the property of displaced persons, in respect of which these persons seek compensation, will be transferred to the ownership of the community in which the property is located. To this end, all titles to properties will be exchanged on a global communal basis between the two agencies at the 1974 value plus inflation. Displaced persons will be compensated by the agency of their community from funds obtained from the sale of the properties transferred to the agency, or through the exchange of property. The shortfall in funds necessary for compensation will be covered by the federal government from a compensation fund.")

ments concluded between 1945 and 1988.¹⁵ Remarkably, only six agreements included admission of liability.¹⁶

Some authors (and sometimes interested parties) advocate that there are clear advantages to lump sum agreements for the involved States. For the claimant State, lump sum agreements usually result in prompt payment, less costly procedures for distributing the funds and control over these procedures. For the paying State, the benefits include: (i) the State knows in advance the extent of its liability, without future increase; (ii) the saving of the high cost of a mixed claims commission; (iii) the possibility to compensate victims without admitting responsibility, and (iv) arguably, a favourable standard of compensation.

Indeed, with regard to the standard of compensation applied in lump sum settlement agreements, the principle which emerged in the post-war period was that of "adequate" compensation (and not full compensation).¹⁷

When questions of national honor intrude in the settlement negotiations and when there is no clear victorious State, it is sometimes contended to be difficult to secure the acceptance of a lump-sum agreement, and thus avoid the necessity of establishing an international institution of some sort and referring claims to a sort of third party arbitration. In other words, the conclusion of lump-sum agreements requires negotiating flexibility.

Two historical lessons arise. First, if claims commissions and lump sums agreements were the preferred instruments for dealing with claims arising out of wars or revolutions, both were not entirely satisfactory and the compensation of victims was not the principal concern of States. Second, the remedy granted by these institutions could only be financial compensation for damage to property or other economic interests. More recently, the

15 See: R.B. Lillich and B.H. Weston, "Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims," *American Journal of International Law*, 82, p. 69.

16 All of these six agreements referred to Japan's responsibility during the Second World War, all the others being silent on the issue of responsibility. See: D.J. Bederman, "The Glorious Past..."

17 For example, following the unification of Germany, the German Constitutional Court considered that the standard of compensation for property expropriated between 1945 and 1949 in the former GDR need not be at full market value. See: E. Benvenisti and E. Zamir, "Private Claims to Property Rights in The Future Israeli-Palestinian Settlement," 89, *American Journal of International Law* 1995, p. 331.

