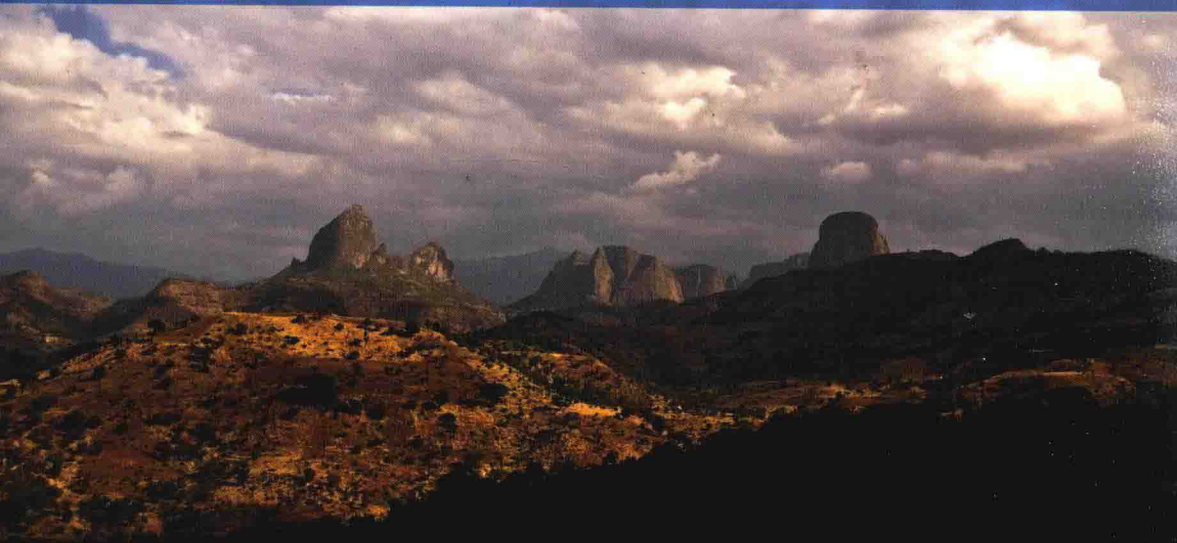


SEAN D. MURPHY • WON KIDANE • THOMAS R. SNIDER



LITIGATING WAR

MASS CIVIL INJURY AND THE
ERITREA-ETHIOPIA CLAIMS COMMISSION

OXFORD

Litigating War

ARBITRATION OF CIVIL INJURY BY THE ERITREA-ETHIOPIA
CLAIMS COMMISSION

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Preface

THE MIXED COMMISSION, to many international lawyers, is synonymous with the origins of their discipline, or at least with the manifestation of it that emerged in the 18th and 19th centuries.¹ The awards of adjudicatory bodies such as the United States–Great Britain Claims Commission, established under the Jay Treaty of 1794, and other such tribunals were significant in the development of the rules of state responsibility, state succession, diplomatic protection, and, owing to the fact that many such commissions were convened under the most skeletal of mandates, the rules of international procedure. What one sometimes misses, reading awards long since familiar, is the sense of improvisation—of doing things for the first time, of making it up as one goes along, making it up from partly existing materials, no doubt, and within the constraints of a mandate, but creating nonetheless. I am sure that the earlier commissioners of the Venezuelan, Mexican, and Italian mixed commissions—indeed the members of the Alabama Tribunal—would have felt the same about their work, even if one cannot see it in their awards: *ars celare artem*.

The ad hoc arbitral commission has now inherited the mantle of the mixed commission in international law. Of these bodies, one of the most significant of recent times has been the Eritrea–Ethiopia Claims Commission (Commission), formed under Article 5 of a treaty² signed by the two states on 12 December 2000 and ending a singularly destructive and useless

¹ For a brief account, see Laurence Boisson de Chazournes and Danio Campanelli, *Mixed Commissions*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Rüdiger Wolfrum, gen. ed., OUP online ed. 2005). In a broader sense, the term may also be used to refer to the phenomenon of mixed claims commissions, such as the Iran–U.S. Claims Tribunal. See Rudolf Dolzer, *Mixed Claims Commissions*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Rüdiger Wolfrum, gen. ed., OUP online ed. 2011).

² Agreement, Eri.–Eth., Dec. 12, 2000, 2138 U.N.T.S. 94, 40 I.L.M. 260.

war. The purposes of the Algiers Agreement (as it came to be called), apart from bringing to an end the armed conflict between Ethiopia and Eritrea that had been fought from May 1998, was threefold: it envisaged an Organization of African Unity (OAU) inquiry into the origins of the conflict; a Boundary Commission to delimit and demarcate the boundary based on earlier treaty definitions; and a Claims Commission to compensate war victims who suffered loss as a result of “violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.”³ The agreement, however, excluded “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.”⁴ Claims could be brought by the two states’ parties in their own right or they could act as a conduit for claims of their nationals. In the event (except for six Eritrean claims) all claims were brought by the two governments in their own right, a choice which undoubtedly made the handling of claims easier.

The three authors of this volume were among counsel for Ethiopia; the present writer was one of Eritrea’s team of counsel, led with extraordinary diligence and ability by Professor Lea Brilmayer of Yale Law School. Inevitably, views will differ between counsel on different sides as to the merits of individual decisions of the Commission; for example, the authors approve of the Commission’s decision to take jurisdiction over Ethiopia’s *jus ad bellum* claim (see Chapter IV), notwithstanding the apparently clear exclusion in Article 5 of the Algiers Agreement, a point on which I would respectfully but firmly disagree.

Nonetheless, this volume is a thorough account of the work of the Commission, and of its varied findings of law and fact. It was a stressful exercise for all concerned due to constraints of time and resources, and the difficulties of obtaining accurate information. There was very much a feeling of developing processes and arguing about issues of first impression. Moreover, it is a symptom of the very poor relations between the two states that the OAU inquiry was never held, the Boundary Commission’s delimitation decision has not yet been implemented because Ethiopia would not allow the placement of pillars on the ground in accordance with the Boundary Commission’s demarcation decision, and the two Claims Commission awards on damages against each of Ethiopia and Eritrea have neither been paid nor agreed to be offset.

Nonetheless the Claims Commission made an important contribution to the law of international claims on issues such as nationality, succession, the customary status of the 1949 Geneva Conventions (which Eritrea only acceded to after the end of hostilities) and its Protocol I of 1977 (to which Eritrea also had not acceded), the treatment and return of prisoners of war, and many other points, including important rulings on evidence and procedure. The work of the Commission, and this detailed account will certainly contribute to that end. Moreover, the insight the authors bring to the Commission’s work by dint of their involvement adds considerably to its authority. It can well stand alongside Feller’s study of the Mexican Claims Commissions⁵ as a work of synthesis and criticism.

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³ *Id.*, art. 5(1).

⁴ *Id.*

⁵ A.H. FELLER, *THE MEXICAN CLAIMS COMMISSIONS 1923-1934* (1935).

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The authors are grateful to Professor James Crawford, who wrote the Preface to this volume and served as a superb counsel for Eritrea before the Claims Commission. Kevin Pendergast, formerly of Oxford University Press, deserves credit for launching this project, while John Louth and David Lipp are thanked for ensuring a safe landing. We thank the Permanent Court of Arbitration, as copyright holder, for permission to use the photograph that appears at the beginning of this volume and the maps that appear as Figures 1–2 and 1–3. Our thanks also go to the International Boundaries Research Unit, Durham University, as copyright holder, for permission to use the map that appears as Figure 1–2.

Table of Select Abbreviations

IN EACH CHAPTER, when a key treaty or decision/award of the Eritrea-Ethiopia Claims Commission is cited for the first time, a full citation is provided. Thereafter, however, an abbreviated form is used, per the table below. Full copies of the Commission’s principal instruments, decisions, and awards are contained in the annexes at the end of this volume; when those items are cited in the chapters, cross-references in the form of “[*see infra* p. XXX]” indicate the page number of this volume where the original source material may be found.

Abbreviation	Full Citation
Cessation of Hostilities Agreement	Agreement on Cessation of Hostilities, Eri.-Eth., June 18, 2000, 2138 U.N.T.S. 86 [Annex 1]
December 2000 Algiers Agreement	Agreement, Eri.-Eth., Dec. 12, 2000, 2138 U.N.T.S. 94, 40 I.L.M. 260 [Annex 2]
Decision No. 1	Eritrea-Ethiopia Claims Commission, Decision No. 1, The Commission’s Mandate/Temporal Scope of Jurisdiction (Aug. 2001) [Annex 3]
Decision No. 2	Eritrea-Ethiopia Claims Commission, Decision No. 2, Claims Categories, Forms and Procedures (Aug. 2001) [Annex 4]
Decision No. 3	Eritrea-Ethiopia Claims Commission, Decision No. 3, Remedies (Aug. 2001) [Annex 5]

Abbreviation	Full Citation
Decision No. 4	Eritrea-Ethiopia Claims Commission, Decision No. 4, Evidence (Aug. 2001) [Annex 6]
Decision No. 5	Eritrea-Ethiopia Claims Commission, Decision No. 5, Multiple Claims in the Mass Claims Process, Fixed-Sum Compensation at the \$500 and \$1500 Levels, Multiplier for Household Claims (Aug. 2001) [Annex 7]
Decision No. 6	Eritrea-Ethiopia Claims Commission, Decision No. 6, Eritrea's Claim 18 (Dec. 19, 2005) [Annex 8]
Decision No. 7	Eritrea-Ethiopia Claims Commission, Decision No. 7, Guidance Regarding <i>Jus Ad Bellum</i> Liability (July 27, 2007), 46 I.L.M. 1121 (2007) [Annex 9]
Decision No. 8	Eritrea-Ethiopia Claims Commission, Decision No. 8, Relief to War Victims (July 27, 2007) [Annex 10]
Eritrea's Central Front Claims, Partial Award	Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 & 22 (Apr. 28, 2004), 43 I.L.M. 1249 (2004) [Annex 11]
Ethiopia's Central Front Claim, Partial Award	Partial Award, Central Front, Ethiopia's Claim 2 (Apr. 28, 2004), 43 I.L.M. 1275 (2004) [Annex 12]
Eritrea's Civilian Claims, Partial Award	Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32 (Dec. 17, 2004), 44 I.L.M. 601 (2005) [Annex 13]
Ethiopia's Civilian Claims, Partial Award	Partial Award, Civilians Claims, Ethiopia's Claim 5 (Dec. 17, 2004), 40 I.L.M. 430 (2005) [Annex 14]
Eritrea's Damages, Final Award	Final Award, Eritrea's Damages Claims (Aug. 17, 2009) [Annex 15]
Ethiopia's Damages, Final Award	Final Award, Ethiopia's Damages Claims (Aug. 17, 2009) [Annex 16]
Eritrea's Diplomatic Claim, Partial Award	Partial Award, Diplomatic Claim, Eritrea's Claim 20 (Dec. 19, 2005) [Annex 17]
Ethiopia's Diplomatic Claim, Partial Award	Partial Award, Diplomatic Claim, Ethiopia's Claim 8 (Dec. 19, 2005), 45 I.L.M. 621 (2006) [Annex 18]
Ethiopia's Economic Loss Claim, Partial Award	Partial Award, Economic Loss Throughout Ethiopia, Ethiopia's Claim 7 (Dec. 19, 2005) [Annex 19]
Ethiopia's <i>Jus Ad Bellum</i> Claims, Partial Award	Partial Award, <i>Jus Ad Bellum</i> , Ethiopia's Claims 1-8 (Dec. 19, 2005), 45 I.L.M. 430 (2006) [Annex 20]
Eritrea's Non-Residents Claim, Partial Award	Partial Award, Loss of Property in Ethiopia Owned by Non-Residents, Eritrea's Claim 24 (Dec. 19, 2005) [Annex 21]
Eritrea's Pension Claims, Final Award	Final Award, Pensions, Eritrea's Claims 15, 19 & 23 (Dec. 19, 2005), 45 I.L.M. 633 (2006) [Annex 22]
Ethiopia's Ports Claim, Final Award	Final Award, Ports, Ethiopia's Claim 6 (Dec. 19, 2005), 45 I.L.M. 792 (2006) [Annex 23]

Abbreviation	Full Citation
Eritrea's POW Claim, Partial Award	Partial Award, Prisoners of War, Eritrea's Claim No. 17 (July 1, 2003), 42 I.L.M. 1083 (2003) [Annex 24]
Ethiopia's POW Claim, Partial Award	Partial Award, Prisoners of War, Ethiopia's Claim No. 4 (July 1, 2003), 42 I.L.M. 1056 (2003) [Annex 25]
Eritrea's Western Front/ Aerial Bombardment Claims, Partial Award	Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26 (Dec. 19, 2005), 45 I.L.M. 396 (2006) [Annex 26]
Ethiopia's Western/Eastern Front Claims, Partial Award	Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 & 3 (Dec. 19, 2005) [Annex 27]
Rules of Procedure	Eritrea-Ethiopia Claims Commission, Rules of Procedure (Oct. 2001) [Annex 28]
Geneva Convention I	Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31
Geneva Convention II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85
Geneva Convention III	Geneva Convention III Relevant to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135
Geneva Convention IV	Geneva Convention IV Relevant to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287
Geneva Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3
Geneva Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 609
Hague Regulations	Hague Convention IV Respecting the Laws and Customs of War on Land, Annex Containing Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, T.S. No. 539



The Ethiopia-Eritrea Claims Commission during one of its initial hearings, held at the Peace Palace in The Hague. From left-to-right: James Paul, Lucy Reed, Hans Van Houtte, John Crook, and George Aldrich.

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