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# ITA IN REVIEW

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# INTERNATIONAL ARBITRATION AND THE RULE OF LAW: ARBITRATION AND PEACE

*by* Lucy F. Reed

Keynote address delivered at the Celebrating the 75th Anniversary of The Center for American and International Law

You know, we're usually not competitive people personally, but I've been a best friend of Deborah for 30 years. So, there you go. It is a bit dark up here, so I might have to hold my notes up. I apologize. I want to thank CAIL[1] for inviting me to give this very short lecture and celebrate and congratulate CAIL on the 75th anniversary. That reminds me that CAIL started the center right in the peacetime that followed the end of World War II, which is appropriate for the theme of their 75th anniversary.

Tom Sikora and Charles H. "Chip" Brower invited me to give this talk on the 24th of January, and so I started by harkening back to my Hague lectures and my Brower lecture,[2] (Thank you Charlie (Charles N. Brower)), on arbitration of crisis cases. But standing here, how my thinking and our thinking has changed on the rule of law and peace in the few months since then, with the Russian invasion of Ukraine. I have done some rewriting, but not as much as you might think, because arbitration and peace is only a subset. It is, however, an important subset, for people here, of the rule of law and peace.

As I originally discussed with Tom and Chip, I want to start with a look back, in specific to the 1872 *Alabama* Claims arbitration. It is true that we can actually trace the modern history of international arbitration to the 1794 *Jay* Treaty Commission, set up after the US Revolutionary War, and as Chip has written, "the Jay Treaty afforded the first prominent example of arbitration by collegial tribunals issuing reasoned awards based on the application of legal principles."[3] I think however, it is

[1] The Center for American and International Law.

[2] Lucy F. Reed, *Mixed Private and Public International Law Solutions to International Crises*, 306 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 177 (2003); Lucy Reed, Ninth Annual Charles N. Brower Lecture: Crisis Cases - Not Reconceiving International Dispute Resolution (Mar. 26, 2021).

[3] Charles H. Brower II, *The Functions and Limits of Arbitration and Judicial Settlement under Private and*

safe to say that for those of us here today, our livelihood in international arbitration dates back to the *Alabama* Tribunal. This was the first tribunal with a majority of third-party appointed arbitrators rather than quasi-diplomats appointed by the warring states. That *Alabam*a tribunal, not without some drama that has been described quite elegantly by Johnny Veeder at an ASIL meeting in his Brower Lecture,[4] applied agreed principles of the Law of neutrality, albeit retroactive application of new laws of neutrality, to the facts of the British construction of armed ships sent to the Confederacy during the US Civil War. We know we can say with certainty that it was the *Alabama* Claims arbitration that inspired President Teddy Roosevelt and the Czar of Russia to convene the Hague Conferences of 1899 and 1907 to further international arbitration as a method of peaceful dispute resolution.

Less well known though, and I'll come back to it later, is that it also inspired Gustav Moynier's proposal to establish an international court to rule on breaches of the 1864 Convention on the Treatment of Wounded Combatants.[5] We can also trace *Alabama* to the creation of the Permanent Court of Arbitration, as well as the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). The journey always focused on the rule of law; to quote John Collier and Vaughan Lowe in their treatise on the settlement of disputes in international law, at this time:

> [a]rbitration was seen as a move away from the power-based system of negotiated settlements towards a more principled system. It is, in the broadest [sense], an attempt to bring the Rule of Law into international relations and to replace the use of force with the routine of litigation (or, in our case, arbitration).[6]

We can keep tracing through the world wars to Article 33 of the UN Charter,[7] of course, which expressly includes arbitration as one of the methods of peaceful

*Public International Law*, 18 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 259, 270 (2008).

[4] V.V. Veeder, Inaugural Annual Charles N. Brower Lecture: The Historical Keystone to International Arbitration - The Party-Appointed Arbitrator—From Miami to Geneva (Apr. 5, 2013).

[5] Christopher Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INTERNATIONAL REVIEW OF THE RED CROSS, 57-74 (Mar. 31, 1998).

[6] JOHN COLLIER & VAUGHAN LOWE, *Methods of Settlement of Disputes*, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 33 (1st ed. 1999) [hereinafter Collier & Lowe].

[7] U.N. Charter, art. 33.

dispute resolution to maintain international peace. For present purposes, what is most noteworthy about *Alabama* is that this arbitration tribunal was established in the wake of an armed conflict, the US Civil War, and it avoided an impending armed conflict between Great Britain and the US. I dare say that most of our commercial and treaty arbitrations cannot be so directly connected to armed conflict or even to conflict *per se*.

As I have always told my students, Collier and Lowe at the opening of their treatise, on page one, make the difference between disputes and conflicts, or they distinguish those two. They define conflict as a general state of hostility between the parties, and dispute as "a specific disagreement relating to a question of rights and interests in which the parties proceed by way of claims, counterclaims, denials, and so on."[8] As we watch what's unfolding in Ukraine with horror, it is important for us as arbitration lawyers to remember, with realism and with humility, that arbitration does not resolve conflicts. It does not make peace. Arbitration resolves legal disputes. However, as was the case with *Alabama*, an arbitration process can be a critical piece, a part of peace negotiations, usually with a third state mediator bringing peace to conflict. I have personally been very privileged to be involved in several post conflict arbitration tribunals and I plan today to go through some of them. What I have added is an audit of sorts, of what models might make sense going forward, depending on the unknown outcome of what is happening in Ukraine.

I will now take a look forward, but before I do, I want to put up some book ends, just to distinguish the models that I will not be discussing. At one end of the bookshelf are international courts, and the ICJ has already issued its provisional measures order in Ukraine v Russia.[9] I am sure you all know this, but creatively Ukraine latched on to Russia's assertion that the invasion was to stop genocide against Russians in Ukraine by arguing that Ukraine has a right under the Genocide Convention not to be subject to a false claim of genocide as justification for armed conflict. And I think we will see

[8] COLLIER & LOWE, *supra* note 6, 1.

[9] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order on Provisional Measures, (March 16, 2022).

prosecutions at the International Criminal Court (ICC) for war crimes and crimes against humanity. There may also be a Nuremberg style international criminal tribunal because the ICC does not have jurisdiction over the international crime of aggression. Philippe Sands, among others, is propounding this, and for ASIL members here, you will remember Ben Ferencz, as always, a fixture in our meetings, fighting after his time at Nuremberg to have the crime of aggression be recognized. The other bookend that I am not discussing is investment treaty arbitration cases that may be brought by individual investors against Russia. These will come, I'm sure, but personally I am not comfortable talking about this or seeing pitches for such work when the carnage and the refugee crisis continue. In any event, individual economic arbitrations are not part of peace keeping.

With those bookends set, what models should we look at? First, might there be an Iran-US claims tribunal type arbitration system set up? I think not, because that was a bilateral situation and started under unique circumstances. Second, in comparison though, a mass claims commission like the UN Compensation Commission is possible. I underscore *possible*. As background for some of you, the UNCC was established in 1991 after Iraq's illegal invasion of Kuwait and defeat. So, it was victors justice. The UNCC operated as an administrative arbitral tribunal really, using sampling of different categories of claims. It was successful. No doubt about it. Iraq ultimately paid over US$50 billion to over US$1.5 million individual, government, international organization (IO) and corporate claimants. But it wasn't fast, at least overall, as the last payment was not made until January 2022. That was 30 years later. But, and this is important, this is very important, the most vulnerable claimants who were guest workers who had to flee Iraq with nothing, were paid first, and they were paid in modest fixed amounts, but they were paid quickly. We could see something like this as compensation to Ukrainian refugees who can't return or who have to rebuild when they return.

The UNCC worked because the UN funded it and the UN Oil-for-Food Program was used to pay the compensation. And Russia is on the Security Council. My bottom line is that while it is possible that we would see a claims commission tribunal, it

would take an extraordinary peace agreement with Russia or involving Russia, or perhaps worked around Russia, and perhaps with access to frozen Russian assets. If this path opens, although I am not optimistic that it will, we do have excellent blueprints for arbitration mechanisms in the handbook that our friends Dr. Norbert Wühler and Dr. Heike Neibergall wrote at the end of the Holocaust Arbitration tribunals run by the International Organization for Migration.[10]

How about a real property commission like the *Dayton* Commission? The formal name of that is the 'Commission for Real Property Claims of Displaced Persons and Refugees', and it was set up as part of the 1995 Dayton Accords at the end of the armed conflict between Bosnia, Croatia, and Serbia. That Commission is not too well known, even though it issued 300,000 decisions, covering property of displaced persons during the war in the former Yugoslavia. Depending on the outcome in geographic Ukraine or maybe Ukraine overall, there might be a role for such a real property commission, and if the displacement patterns justify it.

Finally, what about an international humanitarian law arbitration tribunal like the Eritrea Ethiopia Claims Commission (hereinafter EECC or Claims Commission)? As background, the Claims Commission and the parallel Boundary Commission were set up by agreement reached through Algeria as part of the peace process after the ceasefire in the Eritrea-Ethiopia civil war back in 2000.[11] Both were, I would say, imperfect arbitral processes, but nonetheless the construct of having these arbitral commissions, was critical in bringing peace to the region and saving lives. I see John Crook here, who was a commissioner with me on the EECC. We are particularly proud of the impact of our decisions on Prisoners of War (POWs) in the Claims Commission,[12] leading to the freeing of POWs who had been held far longer than they should have been. And we were pleased to see the ICJ cite to the Claims Commission's

[10] Norbert Wühler & Heike Niebergall, INTERNATIONAL ORGANIZATION FOR MIGRATION, PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMS 35, (2008).

[11] The Eritrea-Ethiopia Claims Commission was an independent body established and operated pursuant to Article 5 of the Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia.

[12] Eritrea-Ethiopia Claims Commission (EECC): Partial Award On Prisoners Of War (Ethiopia's Claim 4), 42 INTERNATIONAL LEGAL MATERIALS, , no. 5, 1056–82 (2003).

damages awards in the recent Democratic Republic of Congo (DRC) v. Uganda case.[13]

So should such a Commission be tried now? Well, we certainly have plenty of evidence. It is easy to get evidence, you can see it in the media of attacks by Russia on schools, hospitals, maternity wards, etc. And there are also reports that Ukrainians are shooting Russian combatants rather than taking them as POWs. So maybe, *maybe*. But standing here today I am not at all sure that Ukraine and Russia and other states would see their way to arbitrating International Humanitarian Law (IHL) violations. And even if they did, the challenge of funding remains.

With that, my audit is over and I hasten to add that even in discussing such arbitration avenues, we have to be very cautious. Post conflict arbitration tribunals have to be tailored to the specific conflict, the specific peace and the specific disputes going forward that need resolution. And we can't know what will happen in Ukraine. We do not know who will win, who will lose, or some other verb to use, and we do not know the terms of any truces or peace agreements that will follow. Just because some of us lawyers know how to set up a post conflict arbitration tribunal does not mean that they will be welcomed or needed and we have to, again with humility, remember that well-meaning efforts to make peace through arbitration have failed. For example, the Israeli-Palestinian Jerusalem Arbitration Center, and so was the case, by the way, with the high minded '*Bryan* Treaties' of 1913 and 14, which was a set of 50 bilateral treaties entered into by the US to set up standing commissions of inquiry to maintain the peace and avoid conflict, which led nowhere, with the exception, 80 years later, of the one Chile-US Letelier-Moffitt Compensation Commission.[14]

To conclude, I return back to *Alabama*. Lord Bingham, in his truly wonderful description of those arbitrations in the 2005 International Comparative Law Quarterly, wrote this:

> Gladstone considered the award 'harsh in its extent and punitive in its basis' [but] 'as dust in the balance compared with the moral example set' of two proud nations going 'in peace

[13] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment of 9 February 2022, paras 107, 110, 123, 164, 189, 214, 382, 384, 392.

[14] Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt 30 ILM 412 (Chile-U.S. Commn for Settlement of Disputes 1991); 31 ILM 1 (1992).

> and concord before a judicial tribunal' rather than 'resorting to the arbitrament of the sword'. One may question whether even the most ethical of foreign policies could accommodate such grandeur of vision today. The *Alabama* arbitration did not, regrettably, herald a century in which judicial arbitration of international differences became the norm.[15]

Lord Bingham went on to quote the words of the PCIJ President, Gustavo Guerrero in 1939, "[i]n the last resort, recourse to international justice depends on the will of governments and on their readiness to submit for legal decision all which can and should be preserved from the arbitrament of violence."[16]

As much as we, or at least some of us, understandably want to use our judicial arbitration skills to further peace and the rule of law in specific, perhaps to play a role in a post conflict arbitration mechanism at the end of Russia's special military operations, we have to be realistic and patient and modest. To borrow President Guerrero's words, this all depends on the will of governments. It depends on some semblance of political will of Russia and Ukraine and other states to use arbitration for peace and the will, where we could offer our assistance, to negotiate the necessary and complicated protocols and procedures that underlay the creation of any standing arbitral tribunal and the will to pay for it, to contribute a fortune for operations and for payment of successful victim claimants.

Thank you.

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[15] TOM BINGHAM, '*The Alabama Claims Arbitration*, 54 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 24 (2005) [hereinafter Bingham].

[16] BINGHAM, *supra* note 15, at 25.

**INSTITUTE FOR TRANSNATIONAL ARBITRATION**
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