ARBITRATION TO SETTLE PRIVATE WAR-DAMAGE CLAIMS?
THE ERITREA-ETHIOPIA CLAIMS COMMISSION REVISITED

Hans van Houtte

Thomas Wälde, with his curious and inquisitive mind, was always exploring new venues in dispute settlement. Now that it has become accepted that the suffering of private parties and companies in armed conflicts should be redressed by the ‘guilty’ warring State, Thomas surely would have been intrigued by the question whether arbitration would be a useful vehicle to settle private war-claims. This contribution, to honour the dynamic and original scholar that Thomas was, will explore how the Eritrea Ethiopia Claims Commission [EECC] has arbitrated the compensation due for the sufferings which Ethiopia and Eritrea have inflicted respectively upon Eritrean and Ethiopian citizens in the war which raged between 1998 and 2000 between these two countries.²

A closer analysis of the EECC and its achievements very well illustrates the possibilities and limitations of arbitration as a process to settle private war-damage claims.

This contribution will first briefly mention the genesis of reparation of private war-damage claims by the ‘guilty’ State (I). The focus will then shift to the actual focus of this paper, the EECC as an arbitral body to settle private war-damage claims³ (II). One of the crucial options when setting up a private war-damage claims is whether private war-damage can be directly claimed by the private party, who actually suffered the damage, or whether it has to be claimed by the State on behalf of its nationals. The EECC’s option

---

¹ Professor of Law (KULeuven – Belgium); FCIArb; formerly Commissioner for Real Property Claims in Bosnia Herzegovina (1996–2003); member of the United Nations Claims Commission (1998–2001), Arbitrator at the Claims Resolution Tribunal for Dormant Accounts (1999–2004) and former President of the Eritrea Ethiopia Claims Commission (2001–2009). This contribution is made in his personal capacity and does not bind said Claims Commission. H. van Houtte may be contacted at: hans.vanhoutte@law.kuleuven.be


³ This chapter focuses only on the private war-damage, inflicted to nationals of one State by another State. It does not deal with the possibility for citizens to claim compensation from their own State, who may have received a lump sum as war-compensation of another State.
for the latter has determined its way to operate (III). An efficient set-up of an arbitral settlement mechanism should optimally cope with the ‘numbers-costs—evidence-time pyramid’. How this pyramid has equally determined the EECC’s settlement process will be discussed in the next section (IV). This pyramid also influenced the extent to which the individual claims could be dealt with in a mass-claims process (V). Thereafter the awards of the EECC will be discussed (VI). This contribution will conclude with an assessment of the EECC process to redress private war-damage and a critical evaluation of the strengths and weaknesses of arbitration as a formula to settle private war-claims.

Much has to be covered in a few pages. The analysis will consequently have to be succinct. However, it may be hoped that the present contribution will inspire others to deepen the subject. Moreover, the author of this contribution is not ideally placed to make a critical analysis of the EECC-process and achievements, having been its President. Nevertheless, having been intensely involved with the EECC from cradle to the end-of-mission, he may point to some interesting features which are not obvious to outsiders, but may be useful for a further analysis.

I. Reparation of Private War-Damage by the ‘Guilty State’

Since the Antiquity the tribute, which the victor imposed upon the vanquished at the end of the war, did not reflect actual damage or cost but depended on the victor’s discretion.4 The conduct of war itself went hand in hand with war booty, looting and destruction of private property, but no specific compensation was granted therefore. On the contrary, goods taken became the property of the seizing soldier: part of the booty served as salary, while the rest was personal enrichment. The 1648 Peace of Westphalia, for instance, did not provide for compensation of war-damage inflicted in the Thirty Years’ War; on the contrary, it introduced a general pardon for all property which was taken or destroyed.5

---