

International Claims: Their Preparation and Presentation (Book Review)

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BOOK REVIEWS

INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION. By Richard B. Lillich and Gordon A. Christenson. Syracuse, New York: Syracuse University Press, 1962. Pp. 173. \$7.50.

Published as a companion volume to Professor Lillich's *International Claims: Their Adjudication by National Commissions*, *International Claims: Their Preparation and Presentation* represents the second volume in a series prepared under the auspices of Syracuse University College of Law's International Legal Studies Program. The subject matter of this slender treatise is a forbidding and unexplored area notorious for its lack of precedent or authority—procedural international law.

The writings of jurists and scholars have traditionally been entitled to greater weight in international law than any other area.¹ Consequently, international law has had more than its share of commentators, who have grandiloquently explored and settled the substantive minutiae of the law of nations. Strangely lacking amid their writings, however, are any references to the procedural vehicles for the individual enforcement of substantive legal rights. The reason is very simple: to the individual claimant there are very few procedures available. The established principle that only states have rights under international law prevents the individual claimant from presenting his claim directly to a foreign state. Instead, he must utilize whatever remedies are available in his home state. But what remedies are available? And how does he go about enforcing them?

The average practitioner is aware that his "case" in international law is referred to as a "claim," but aside from a vague reference to "diplomatic channels" and, perhaps, a sheepish letter of inquiry to the Department of State, he has little notion of how to proceed with the claim procedurally.

In this country, the processing of individual international claims operates mainly through the offices of the Department of State, our international diplomatic representative, and the Foreign Claims Settlement Commission, an independent federal agency

¹ Cf. *The Paquete Habana*, 175 U.S. 677 (1900).

functioning as this country's national claims commission. The Department of State "espouses" claims on the claimant's behalf and deals with the foreign sovereign through "diplomatic channels." The FCSC, however, adjudicates claims domestically, according to the principles of international law, and certifies them for payment by the United States Treasury. The mechanics of preparing and presenting a claim before each of these two organs of our government constitute the major portion of the book.

Chapter I discusses the initial procedural determination that must be made, one similar to the concept of "standing to sue" in a civil court—is the claimant eligible? In order for the government to adopt the private grievance of a party and espouse it as an international claim against an offending foreign state, the claimant must first convince the Department of State (or the Foreign Claims Settlement Commission) that he is an eligible claimant—one entitled to protection. In the main, this question depends on whether or not the claimant was a national of this country on the date his claim arose. The authors in this chapter discuss various problems of eligibility on the part of individuals, partnerships, corporations, administrators, assignees, executors, guardians, heirs, legatees, receivers, and subrogees.

The next three chapters are devoted to the actual preparation of an international claim for submission to the Department of State or the Foreign Claims Settlement Commission. In marshalling the evidence to substantiate his claim, the claimant must first prove his nationality—various problems of proof of this particular item are taken up in Chapter II.

The international claim itself generally consists of the following three elements: 1) ownership,² 2) a "wrongful act" on the part of the foreign sovereign, and 3) damage. Each of these elements is respectively treated in several short chapters. Chapter III deals with ownership and some of its more common problems in wrongful death, personal injury, and property claims. Particular attention is devoted to claims involving corporations, stockholders, subsidiary companies, and situations of derivative ownership. Similar difficulties exist in the substantive definition of a "wrongful act" by a state. In Chapter IV, these are investigated, in their procedural context, in wrongful death, personal injury, property, and war claims.

Having established his ownership and the foreign state's wrongful act, the claimant must then show the precise nature and extent of his damages. In general, this area is similar to that of damages

² LILICH & CHRISTENSON, *INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION* 40-41 (1962). This element includes ownership of the personal "cause of action" or the property on which the claim is based, and ownership of the resulting claim itself. *Ibid.*

in domestic law. In Chapter V, the authors treat various aspects of proving the element of damages in personal injury, property damage, wrongful death and contract claims. Special problems created, for instance, by the evaluation of foreign property, the deductions of amounts obtained through local remedies in foreign countries, the costs of preparing the claim itself, and currency problems are explored.

Having traced the preparation and proof of each element of the claim in a concise and informative fashion, the authors proceed to the next step—the actual presentation of the claim to the appropriate office or tribunal of this government. Chapter VI, originally appearing in substance as an article by Mr. Christenson in the *Syracuse Law Review*,³ delves into the presentation of the claim to the Department of State and the Office of the Legal Adviser in that Department.

In this chapter, the authors have skillfully attempted to describe an elaborate formal procedure for processing claims in the Legal Adviser's Office where, in fact, no such formal procedure exists.⁴ Although their effort is understandable,⁵ it has here resulted in an inaccurate and somewhat misleading picture. In discussing "Procedural Safeguards" in the Department of State and the Legal Adviser's Office, for instance, the authors assert that "no procedural rights are formalized."⁶ In reality, this bland generalization cloaks a multitude of disconcerting procedural facts:⁷ the decision to espouse a claim is entirely within the discretion of the Department of State; there are no provisions for formal filing; no required standards of proof or evidence; no rights to either an administrative or judicial hearing; no rights to appeal and no appellate procedure; no provisions for the subpoena or deposition of witnesses, documents, or records; no formal rules of practice, and therefore, among other things, no formal oral argument, cross-examination, or third-party intervention; no constitutional protections; no

³ Christenson, *International Claims Procedure Before the Department of State*, 13 SYRACUSE L. REV. 527 (1962).

⁴ The claimant may make appointments to meet with officers of the Legal Adviser's Office, forward convincing evidence by mail, and participate with legal officers in a decision-making process. In addition, by constantly referring to this procedure as the *initial, informal* presentation the authors seem to imply a later, formal presentation before that office which does not exist. LILLICH & CHRISTENSON, *op. cit. supra* note 2, at 89-93.

⁵ Mr. Christenson is an attorney in the Office of the Legal Adviser.

⁶ LILLICH & CHRISTENSON, *op. cit. supra* note 2, at 89.

⁷ On the lack of uniform procedure for the filing of claims before the Department of State, see RESTATEMENT, FOREIGN RELATIONS §217, Reporters' Note at 728 (Proposed Official Draft 1962); Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 MICH. L. REV. 1079, 1082 nn.14, 15 (1962).

guarantee of espousal, and, even if the claim is espoused,⁸ no guarantee of payment. Furthermore, despite Mr. Christenson's unconvincing objections that "the built-in separation of the Legal Adviser's Office from the political and other bureaus of the Department of State" constitutes an "insurance against arbitrariness,"⁹ the overall decision by the Department of State to espouse the claim is subject to the most arbitrary of arbitrariness—political considerations dictated by the current state of international relations. Claimants and attorneys alike may therefore be forgiven for recoiling with horror at the authors' astonishing suggestion that "the *liberality* accorded claimants short of espousal may someday be accepted as the *norm of protection* under the law of international claims."¹⁰

Rather than the overly lengthy and theoretical discussion of the functions of the Legal Adviser's Office, both real¹¹ and imagined,¹² a more thorough treatment of the actual procedures utilized by the diplomatic offices of the Department of State in espousing an international claim would have been more helpful and informative.¹³

⁸ LILlich & CHRISTENSON, *op. cit. supra* note 2, at 89-99; see RESTATEMENT, *supra* note 7; *cf.* HUDSON, INTERNATIONAL TRIBUNALS 191 (1944). It is theoretically just as possible for the State Department to espouse an invalid claim as it is not to espouse a valid one.

⁹ LILlich & CHRISTENSON, *op. cit. supra* note 2, at 90.

¹⁰ LILlich & CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION 102 (1962). (Emphasis added.) In reality, the trend could not be in a more opposite direction. The techniques of the lump-sum settlement (whereby large numbers of similar claims are settled en masse and the claimant is provided with individual recourse to a domestic claims commission to prove his case and receive payment if successful) and the vesting of foreign assets to settle large numbers of similar American claims (with the same recourse to a domestic claims commission) have been in ever-increasing use since 1954. For the procedural operation of these various devices, see generally [1954-present] FOREIGN CLAIMS SETTLEMENT COMMISSION SEMIANN. REPS. 1-15. This trend toward the use of domestic judicial facilities rather than formal international espousal of each claim has been increasingly reflected in current legislation. See note 33 *infra*.

¹¹ The principal function of the office in this context is to advise the department on the legal merits of a claim. In so doing, the Legal Adviser's Office applies a legal method. See LILlich & CHRISTENSON, *op. cit. supra* note 10, at 90.

¹² The authors compare the functions of the Legal Adviser's Office, among other things, to "that of a lawyer who must decide whether to take a client's cause," and to that of "a critical lawyer who cross-examines his client." LILlich & CHRISTENSON, *op. cit. supra* note 10, at 91. This comparison is further belabored, however, by a citation to WHITEMAN, DAMAGES IN INTERNATIONAL LAW 165 (1937-1943): "Whiteman compares this function to that of a tribunal of first instance." *Ibid.* Miss Whiteman is also an attorney in the Legal Adviser's Office.

¹³ These methods, "not quite juridical or formal in nature," are listed simply as the rendering of "(1) information regarding local remedies; (2)

If the authors have unduly formalized the essentially informal procedures of the Department of State, they are guilty in the final chapter, VII, of exactly the opposite failing—informalizing the procedures before the Foreign Claims Settlement Commission. The FCSC is essentially a court before which claimants against particular countries appear pursuant to statutory rules of practice and procedure.¹⁴ The Commission's Rules of Practice are similar in scope to those of the federal district courts,¹⁵ and cover all phases of both the administrative and adjudicatory processes: appearance and practice before the Commission; subpoenas, depositions, and oaths; service of process, rules of evidence, and cross-examination; procedures for the filing of claims and their determination by the Commission; proposed decisions; rights to hearing on the merits; oral argument; appellate procedures; pre-settlement conferences; payment of claims and other matters.¹⁶ The scant and inadequate treatment given these detailed procedures will not prove of substantial benefit to anyone having occasion to appear before the Commission.

In addition, the chapter on the work of the FCSC¹⁷ reveals an unfamiliarity with Commission procedures and the latest developments thereof. No note is taken, for instance, of the recent innovations of Commission procedures and operations which were in preparation for over a year.¹⁸ The authors' use of authorities no longer in effect has also resulted in several inaccuracies.¹⁹

consular services; (3) good offices; (4) mediation; and finally (5) political intervention." LILICH & CHRISTENSON, *op. cit. supra* note 10, at 99. Treatment of each alternative is limited to pages 100-01.

¹⁴ The FCSC has jurisdiction to adjudicate various classes of claims under specific programs enacted by Congress to implement lump-sum settlements, the vesting of foreign assets, or other treaty or agreement provisions for the en masse settlement of claims. Potential claimants must qualify under the particular program in which they are filing. See generally Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 MICH. L. REV. 1079 (1962).

¹⁵ Cf. LILICH & CHRISTENSON, *op. cit. supra* note 10, at 108. The Commission may invoke the aid of any United States District Court in enforcing its subpoena and contempt powers. FCSC Reg., 45 C.F.R. § 501.2(e) (1960).

¹⁶ See generally FCSC Reg., 45 C.F.R. §§ 500.1-531.6 (1961).

¹⁷ The chapter, entitled "The Presentation of an International Claim to National or International Commissions," concerns itself solely with the work of the FCSC, and ends: "Since it is apparent that most United States nationals with international claims against foreign countries will be presenting them, at least in the foreseeable future, to the Foreign Claims Settlement Commission, no attempt will be made here to discuss the operations of international commissions." LILICH & CHRISTENSON, *op. cit. supra* note 10, at 115-16.

¹⁸ See [July-Dec. 1961] 15 FOREIGN CLAIMS SETTLEMENT COMMISSION SEMIANN. REP. 3.

¹⁹ See, e.g., the description of hearings before the FCSC. LILICH &

An oversight was the failure to mention extensive landmark legislation in the area of international claims approved last year by the Congress.²⁰ For these reasons, the chapter on the work of the FCSC in the processing and adjudication of international claims will date very quickly.

The Appendix to the book consists of a Sample Statement of Claim before the Department of State, an actual FCSC filing form, various Department of State memos, and the Rules of Procedure of the U. S. Japanese Property Commission,²¹ together with a selected bibliography.

It must be said, in conclusion, that although Lillich & Christenson's volume is well-conceived and organized, it shows all the earmarks of hasty preparation and research. For the layman or the practitioner unfamiliar with the area of procedural international law, it will provide a concise and readable introduction. For the international attorney, it is hardly likely to fill the need for an authoritative manual of procedural international law—an area which has been metaphorically termed "the Antarctica of international law."

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CHRISTENSON, *op. cit. supra* note 10, at 109-11. A constant reliance on Professor Lillich's companion volume, *International Claims: Their Adjudication by National Commissions* (1962), as settled authority, is also to be noted.

²⁰ See, e.g., 76 Stat. 1107 (1962) (World War II Claims Bill authorizing War Damage Claims against sixteen European and Asiatic countries); 76 Stat. 411 (1962) (authorizing payment of certain claims in the Republic of the Philippines); 76 Stat. 413 (1962) (authorizing payment of Guamanian claims); 76 Stat. 387 (1962) (authorizing the investigation of claims arising out of the construction of Gut Dam by Canada). These acts, together with their respective implementing regulations announced by the FCSC, contain important procedural provisions. See also S. 1987, 87th Cong., 1st Sess. (1961) (a bill to amend the International Claims Settlement Act of 1949). Each of the above was pending in Congress in various stages prior to publication of the book in May 1962. A review of these measures while they were pending may be found in Re, *supra* note 14, at 1094-1100. As a practical alternative to delaying publication of the book pending the outcome of this important legislation in Congress, reference might have been made to the various measures by bill number.

²¹ The authors would have been well-advised to include as an Appendix the Rules of Practice of the FCSC, which constitute an important portion of the book's subject matter.

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