
The UN Compensation Commission: Old Rules, New Procedures on War Reparations

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Abstract

Since its inception, the legitimacy of the United Nations Compensation Commission (UNCC) has been controversial, particularly the Security Council's competence to establish it. In this article, the author maintains that the UNCC, although it represents an unprecedented example of institutionalized international cooperation, follows and improves on the tradition of international law rules on war reparations. Although some of its procedural and substantial aspects might be open to criticism, the work hitherto accomplished by the various UNCC panels shows a very high standard of legal skill and fairness, and has contributed significantly to the clarification and development of various international law rules on claims settlement. Nevertheless, a final political compromise with Iraq is necessary if the UNCC is to be acknowledged as the first fully successful model of a collective relief system organized by the international community in response to an aggression.

1 Introduction: War Reparations in Theory and in Practice

It is a widespread belief that the consequences of war, particularly of major wars, inevitably escape strict juridical appraisal. For various and often contradictory extrajudicial reasons, factors above and beyond the law seem to determine how the consequences of war are dealt with. On the one hand, the need to re-establish conditions which render a peaceful co-existence possible suggests far-sighted magnanimity; on the other hand, a drive for punishment, and possibly for vengeance, requires that wrongdoers are dealt with severely. Politics, not law, is reckoned to dictate the rules.

Yet, throughout the twentieth century, international law succeeded in developing principles and rules to deal with acts of aggression by states. It is striking how little

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scholarship has been devoted to the question of post-conflict settlement, as compared with the vast amount of scholarship devoted to matters such as a definition of aggression or the range of measures which the international community can take to defeat aggression. The avoidance in international legal doctrine of verifying its own presumptions on the consequences of aggression by examining actual state practice casts doubt on the correctness of those presumptions.

This hesitation is, however, unjustified. As the present writer tries to demonstrate elsewhere,¹ the consequences of aggression are in themselves comparable to the consequences of any other international wrong, at least with regard to reparations. The codification work of the International Law Commission on the topic of state responsibility has clearly shown that war settlements are not to be dealt with on a basis different from the settlement of other international disputes, both from a theoretical and a practical point of view. While the possibility of a *lex specialis* is recognized in Article 55 of the Draft Articles on State Responsibility, and a saving clause in relation to the Charter of the United Nations is contained in Article 59,² there is no similar provision to Article 75 of the Vienna Convention on the Law of Treaties, which expressly excepts the case of an aggressor state. Therefore, in the case of war reparations, as much as in the case of any other internationally wrongful act, the responsible state is under the obligation contained in draft Article 31 to make ‘full reparation’ for the injury caused.

Of course, it is debatable what ‘full reparation’ actually means,³ but we can assume, for the sake of clarity and with some degree of ingenuousness — knowing the ILC’s dexterity in skimming over delicate questions — that the chosen formulae should be interpreted with its ordinary meaning and that therefore ‘full’ means exactly what that word conveys to an ordinary person. Interestingly, the ILC, on the second reading of the Draft Articles, decided to delete the proviso made in an earlier draft of the Article dealing with reparations, according to which ‘in no case [shall] reparation result in depriving the population of a State of its own means of subsistence’.⁴ For the Special Rapporteur, James Crawford, such a proviso, clearly devised to take into account the consequences of ‘major disasters like the Second World War’, would be both unnecessary and ambiguous, because it confuses questions related to the *quantum dare* with those related to the means of payment.⁵ What is even more telling,

¹ See A. Gattini, *Le riparazioni di guerra nel diritto internazionale* (2002 forthcoming).

² The Draft Articles on the Responsibility of States for Internationally Wrongful Acts were adopted by the ILC on second reading at its 53rd Session; see UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001.

³ For debate on the scope of the norm, see ‘ILC Report of Its 52nd Session’, (2000), GAOR A/55/10, at 31, para. 95: ‘The view was expressed that the reference to “full reparation” in paragraph 1 was questionable for the following reasons: the goal was not full reparation, but as much reparation as possible to remedy the consequences of the wrongful act.’ In its commentary to Article 31, the ILC speaks of the obligation to make full reparation ‘in the *Factory at Chorzow* sense’.

⁴ See the ILC commentary on the disputed adoption of Draft Article 42(3) in UN General Assembly Official Records, 51st Session, Supplement No. 10 (A/750/10) at 152.

⁵ Cf. Crawford, ‘Third Report on State Responsibility’, UN Doc. A/CN.4/507, 15 March 2000, para. 42.

the call for its deletion came from the governments. For example, for the United States the proviso would have created 'avenues for abuses';⁶ for Japan, the proviso could be used as a 'pretext by the wrongdoing State to refuse full reparation'.⁷ A predictable exception was that of the German Government,⁸ which pleaded for the maintenance of the proviso in the Draft Articles. Its position is noteworthy not only because it was advanced as a matter of principle, but also because it referred to international practice, such as the implementation through the UN Compensation Commission of Security Council Resolutions 662 and 687 relating to the Iraqi aggression against Kuwait.

The deletion of the proviso of then Article 42(3) upset some scholars, such as Tomuschat, who wrote that the criticism levelled against the proviso overlooked the full dimension of the problem and was inspired by 'petty fears'.⁹ But, on closer scrutiny, the ILC decision to delete the proviso is coherent with its purpose to keep strictly to the exclusive codification of general secondary rules. Indeed, there are some undeniable peculiarities in the rules dictating the consequences of a war of aggression, if only because of the immeasurability of material damage which such wars often cause and which in practice requires some mitigation from the principle of full reparation.

Nevertheless, the reasons for such a peculiarity are often misapprehended in the international law literature. In the settlements which followed the First and Second World Wars, a common pattern was discernible, which it would be false to dismiss cursorily as 'victors' justice'. Just as in the national context in the aftermath of a revolution or of a civil war a new constituent power creates a new legal order, so in the international context the legal order is reconstituted. It is international law itself which bestows a constitutionally relevant status on the states which at that time are in a better position to articulate, defend and impose certain standards of international society.¹⁰ Here again it is interesting to refer to the solution proposed by the ILC in its Draft Articles on State Responsibility. Article 48(1) states that, in certain circumstances, including in the case of a breach of an obligation which is owed to the international community as a whole, any state other than the injured state is entitled to invoke the responsibility of another state. Article 48(1)(2)(b) specifies that any such state may seek from the responsible state the performance of the obligation of reparation in the interests of the injured state or of the beneficiaries of the obligation breached. Article 41, which deals with the particular consequences of a serious

⁶ Cf. UN Doc. A/CN.4/488, 107.

⁷ Cf. UN Doc. A/CN.4/492, 14.

⁸ Cf. UN Doc. A/CN.4/488.

⁹ Cf. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours de l'Académie de droit international* (1999) 9, at 293.

¹⁰ Cf. Sinclair, *Vienna Convention on the Law of Treaties* (1984) 95: 'The theory that the victors in a major world conflict enjoy some kind of special authority entitled to universal recognition is still accepted in contemporary international relations' Brownlie, 'Politics and Principle in Major International Settlements', in R. St. John Macdonald (ed.), *Essays in Honor of Wang Tieya* (1994).

breach of an obligation under peremptory norms of general international law, states that such a serious breach entails for all other states the obligation, *inter alia*, to cooperate to bring the breach to an end. It is submitted that the rule would read better as: ‘... to bring to an end any serious breach, and to have its consequences made good.’

Seen in this perspective, the resolution of the issues at stake after a major conflict, in particular those dealing with reparations, becomes a mixture of obligations, sense of opportunity and reasonableness. What we are now experiencing with the United Nations Compensation Commission (UNCC) is an ambitious attempt to substitute and strengthen the traditional loose pattern of cooperation between the victorious powers with a highly institutionalized framework provided by the UN, in order better to reach a settlement which satisfactorily achieves the imperatives of principle and policy.

2 The Security Council’s Competence

Ten years ago, the Security Council adopted Resolution 692¹¹ and instituted the UNCC and the Compensation Fund. Some authoritative and outspoken scholars, such as Arangio-Ruiz and Graefrath, condemned the regime as being both beyond the range of the Security Council’s competences and unfounded in international law.¹² Other, more prudent commentators regarded this new expression of the Security Council’s ‘interventionism’ with anxiety, but eventually found justification for its legality in the framework of the Security Council’s competences under Article 41 of the Charter.¹³

But, on a closer look, the broader implications of the latter argument do not convince. In fact, to select Article 41 as the basis of Resolution 692 is equivalent to stressing the political quality of the Security Council’s decision and minimizes or fully denies its relevance as an enforcement of general international law principles. This position overlooks the fact that the establishment of the UNCC did not have as a goal the sanctioning of Iraq, but rather the effective handling of millions of claims by establishing a regime which could at one and the same time do justice to the rights of the injured and take into account the needs of Iraq’s people. Until now, it has not been sufficiently noted that the UN management of Iraqi war reparations is as much a guarantee of Iraq’s interests as of those of the claimants, in that it deals with masses of potentially disruptive claims in an impartial and orderly manner.

The pivotal argument of the present contribution is that the Security Council, by establishing the UNCC, acted with the conviction that it was operating in accordance

¹¹ Security Council Resolution 692 of 20 May 1991.

¹² Cf. Graefrath, ‘Iraqi Reparations and the Security Council’, 55 *Zeitschrift für ausländische öffentliches Recht und Völkerrecht* (1995) 1, at 34; Graefrath, ‘International Crimes and Collective Security’, in Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (1998) 237, at 244; followed by Arangio-Ruiz, ‘On the Security Council’s “Law Making”’, 83 *Rivista di diritto internazionale* (2000) 609, at 717.

¹³ Cf. among others Frigessi di Rattalma, *Nazioni Unite e danni derivanti dalla guerra del Golfo* (1995).

with general international law.¹⁴ Of course, there are some novel aspects to the UNCC. One novel aspect can be found precisely in the fact that the UNCC offers a unique mechanism of non-discriminatory — with the notable exception of Iraqi claims (which we shall return to later) — claims management and allocation on a worldwide basis. The UNCC does not represent the interests of a single state, for example Kuwait, nor of the coalition of states which fought for the liberation of Kuwait, but rather of the whole international community. It is incorrect, from both a historical and a methodological standpoint, to evoke as a UNCC predecessor the Versailles Inter-Allied Reparation Commission established after the First World War.¹⁵ It suffices to observe that one of the major criticisms levelled against the Versailles Commission was in fact the absence of a connection with the League of Nations system and in particular the lack of control by the Council of the League.¹⁶

Therefore, if one is seeking a basis for the Security Council's action in this field, one has to turn to its inherent powers. The critics of this doctrine, while stressing some unpalatable (as they see it) implications,¹⁷ disregard the fact that the doctrine serves as a guide better to fix the boundaries of the Security Council's competence rather than unduly to enlarge them. If the Security Council has primary responsibility not only for the maintenance, but also for the re-establishment, of peace and security, it is only reasonable that, in the case of the gravest of all violations, namely aggression, it should exercise its authority in order to regulate the consequences of aggression. But, leaving aside the debatable doctrine of implied powers, one can also assess the

¹⁴ The present author does not fully agree with the view that the UNCC would fit in the tradition of time-honoured claims commissions: see Bederman, 'The United Nations Compensation Commission and the Tradition of International Claims Settlement', 27 *New York Journal of International Law and Politics* (1994) 1; Bederman, 'Historic Analogues of the UN Compensation Commission', in Lillich (ed.), *UN Compensation Commission* (1995) 257. This perspective may be right for some aspects, but it certainly is erroneous when it presents the UNCC as an umpteenth example of 'victors' justice'. Bederman, 'The United Nations Compensation Commission', at 6, maintains that: 'Given this history, the character of the UNCC as a retributive instrument of international power politics should hardly be surprising . . . Claims settlements practice had retained — even in this century — coercive, unilateral, and fundamentally inequitable features.' Given this assumption, one can only read with some perplexity Bederman's closing words (*ibid.* at 42) that 'far from being unprecedented and anomalous, the UNCC should be vindicated as the fulfilment of the ideal of peaceful settlement of disputes' (emphasis added).

¹⁵ Among the many commentators who succumbed to this temptation, see Garmise, 'The Iraqi Claims Process and the Ghost of Versailles', 27 *New York Journal of International Law and Politics* (1992) 840 (with the extenuating circumstance of the author's intention to show up her wit by alluding to a successful opera staged at that same time at the Metropolitan Opera House); Bederman, 'The United Nations Compensation Commission', *supra* note 14, at 6; Graefrath, 'Iraqi Reparations', *supra* note 12, at 45; Boelert-Suominen, 'Iraqi War Reparations and the Laws of War', 50 *Zeitschrift für öffentliches Recht* (1996) 225, at 271; and Romano, 'Woe to the Vanquished? A Comparison of the Reparations Process After World War I (1914–1918) and the Gulf War (1990–1991)', 2 *Austrian Review of International and European Law* (1997) 361.

¹⁶ See Walters, *A History of the League of Nations* (1952) 94: 'From a strictly national point of view [the Conference of Ambassadors] was far preferable to the Council of the League. It was small; it was secret. . . It had no rules except the Treaties, and was not forced to listen to the views of small or neutral powers.'

¹⁷ Such as the so-called 'federal analogy': see Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', 8 *European Journal of International Law* (1997) 1; and Arangio-Ruiz, *supra* note 12, at 688.

legitimacy of the Security Council's action by decisively relocating its actions within general international law. The decision to institutionalize the mechanism of compensation after what would at that time have been called an international crime has to be viewed not as a politically charged and punitive measure against a pariah state, but rather as a way to enhance the enforcement of the international legal order.¹⁸ Seen in this light, the preferred view of whether the UN acted on the basis of its own constitutional framework or as a *material organ* of the international community, as another theory suggests,¹⁹ should not change the judgment as to the substantial legitimacy of the UNCC.

3 The UNCC's Composition and Functioning

A criticism repeatedly raised is to consider the UNCC Governing Council as an *alter ego* of the Security Council, with the consequence that the latter would act 'as law-maker, prosecutor and judge' at the same time.²⁰ This view is untenable, according to what has already been said in regard to the Security Council's intention to abide by general international law. It is equally incorrect to identify the UNCC Governing Council with the Security Council, merely on the basis of the identical composition of the two bodies.²¹ It suffices to note that the UNCC decides as a rule by majority voting without the possibility of a veto, and that only decisions relating to questions of measures to ensure Iraqi payments into the Fund are taken by consensus, which paradoxically weakens instead of strengthens the permanent members' position.²²

As for the functioning of the UNCC, it is remarkable that its very first decision, adopted symbolically enough on the anniversary of Iraq's invasion, gave precedence to the processing of claims by individuals not exceeding US\$100,000, as opposed to claims by corporations and governments.²³ The political intent of the UNCC, to offer a

¹⁸ For similar considerations, see Dupuy, 'Après la guerre du Golfe ...', 95 *Revue générale droit international public* (1991) 617, at 635; and, with certain reserves, Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *International and Comparative Law Quarterly* (1994) 55, at 57. For a radically contrary view see M. Iovane, *La tutela dei valori fondamentali nel diritto internazionale* (2000), at 519, who views the Iraqi war reparations as 'sanzione punitiva'.

¹⁹ Cf. Picone, 'Interventi delle Nazioni Unite e obblighi erga omnes', in Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale* (1995) 517, at 551, and particularly note 170 for the observation in relation to Resolution 687 of the 'peculiari poteri "sanzionatori" di cui l'Organizzazione viene investita, quando provveda per conto degli Stati alla determinazione delle conseguenze da ricollegare alla commissione di un crimine internazionale'.

²⁰ Cf. Kirgis, 'Claims Settlement and the UN Legal Structure', in Lillich, *supra* note 14, at 108; Fox, 'Reparations and State Responsibility', in Rowe (ed.), *The Gulf War 1990–91 in International and English Law* (1993) 285.

²¹ Cf. Graefrath, 'Iraqi Reparations', *supra* note 12, at 37 *et seq.*

²² For all these aspects, see Alzamora, 'Reflections on the UN Compensation Commission', 9 *Arbitration International* (1993) 349; and Alzamora, 'The UN Compensation Commission: An Overview', in Lillich, *supra* note 14, at 3. The author, who was the first Executive Secretary of the UNCC, refers emphatically to the UNCC's 'democratic spirit'.

²³ Decision No. 1, 'Criteria for Expedited Processings of Urgent Claims', Doc. S/AC 26/1991/1, 2 August 1991, reproduced in 30 *ILM* (1991) 1712.

very different model to that of the US–Iran Claims Tribunal, is evident here,²⁴ and was strengthened in 1994 by Decision No. 17 of the UNCC, according to which all claims in categories A, B and C would receive a minimum compensation of US\$2,500 each, before starting with the payments for category D, E and F claims.²⁵

The huge and politically charged problem of funding some categories of claims — especially those relating to the evacuation from Iraq or Kuwait (category A) and those relating to serious personal injury or the death of a spouse, a child or a parent (category B) — has resulted in only modest lump sum payments being made and equally modest ceilings being established for compensation for certain classes of injuries, such as mental pain and anguish. The modest amount of compensation available has brought the Secretary-General first and the UNCC Governing Council later to exclude the exhaustive character of such payments. Possibly, a further ground for stressing its non-exhaustive character was a reticence in taking sides on the question of the nature of the UNCC as an administrative damages assessor or as a proper juridical body.²⁶ Indeed, there is some controversy on the scope of paragraph 16 of Resolution 687.²⁷ For some, the Security Council had confined itself to making a statement of principle and entrusted the UNCC with the task of ascertaining case-by-case Iraq's responsibility under international law.²⁸ For others, the Security Council fully disposed of the matter of Iraq's responsibility and therefore the UNCC was limited to assessing claims and distributing the compensation.²⁹

However, as was said by the first Executive Secretary, Mr Alzamora, the system envisaged is hybrid. Rightly or wrongly, the Security Council started from the assumption that Iraqi responsibility was already established 'under international law', and therefore created the UNCC with the primary purposes — to use the words of the then Secretary-General Perez de Cuellar — of 'examining claims, verifying their validity, evaluating losses [and] assessing payments'.³⁰ Yet, should the UNCC be confronted with questions, which could give rise to some interpretative doubts, then

²⁴ Cf. Alzamora, 'Reflections', *supra* note 22.

²⁵ Decision No. 17, 'Priority of Payment and Payment Mechanism', Doc. S/AC 26/1994/17, 24 March 1994, reproduced in 34 ILM (1995) 250.

²⁶ On this point, one has to share the criticism by Graefrath, 'Iraqi Reparations', *supra* note 12, at 44, who observes that the non-exclusiveness of the procedure 'makes clear that there is no incentive for Iraq to comply with a procedure which cannot finally settle the issue'. A major feature of all past post-war settlements, and notably after the Second World War, was to dispose of the matter once for all with such devices as waivers of claims and bars to access to domestic courts.

²⁷ Para. 16 of Resolution 687 reads: 'Iraq is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injuries to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.'

²⁸ In this sense, cf. Boelart-Suominen, *supra* note 15, at 271. A more complex view is given by Kirgis, *supra* note 20, at 108.

²⁹ In this sense, cf. Glod, 'International Claims Arising from Iraq's Invasion of Kuwait', 25 *International Lawyer* (1991) 713, at 715; Ulmer, 'The Gulf War Claims Institution', 10 *Journal of International Arbitration* (1993) 85, at 91; and Lillich and Brower, 'Opinion Regarding the Jurisdiction and Powers of the United Nations Compensation Commission', 38 *Virginia Journal of International Law* (1997–1998) 25.

³⁰ UN Doc. S/22559, 2 May 1991, para. 20.

the Governing Council would assume a guiding role, by determining general criteria for particular categories of claims. Oddly enough, Article 31 of the UNCC's Provisional Rules on Procedure³¹ mentions the application by the commissioners of other 'relevant rules of international law' only 'where necessary'. This does not mean, however, that, as a matter of law and principle, the general criteria contained in the Governing Council's decisions should not be respectful of pertinent international law rules.

Nevertheless, from time to time, critical voices have been raised against various procedural or substantial aspects of the UNCC's work, which demand a careful analysis.

4 On Some Procedural Aspects of the UNCC's Work

To begin with alleged procedural flaws, the main criticism concerns Iraq's lack of standing in the UNCC. This is obviously a very sensitive matter, as it deals with fundamental values of fairness and due process.³²

Some concern could arise with regard to some of the UNCC's Provisional Rules for Claims Procedure adopted by consensus by the Governing Council on 26 June 1992. Its 43 Articles are divided into four parts: general provisions; the submission and filing of claims; commissioners; and procedures governing the work of the panels. Of outstanding importance for Iraq's position is Article 16, entitled 'Reports and views on claims'. In accordance with this provision, the Executive Secretary is required to make at least quarterly reports to the Governing Council concerning claims received. In addition to certain information regarding the categories of claims submitted, the number of claimants and the total amount of compensation requested, each report should indicate 'significant legal and factual issues raised by the claims'. Within a relative short time of the publishing of the report (30 days for categories A, B and C, and 90 days for categories D, E and F), the Government of Iraq, as well as other governments and international organizations, may present 'additional information and views concerning the report to the Executive Secretary for transmission to Panels of Commissioners'. This is the only institutionalized pathway for Iraq to take cognizance of the claims submitted and to cooperate with the panels of commissioners.³³

³¹ Provisional Rules for Claims Procedure, UN Doc. S/AC 26/1992/10, 26 June 1992, reproduced in 31 *ILM* (1992) 1053. On the Provisional Rules, see Raboin, 'The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processings', in Lillich, *supra* note 14, at 119.

³² On this question see particularly Carver, 'Dispute Resolution or Administrative Tribunal: A Question of Due Process', in Lillich, *supra* note 14, at 69; Crook, 'Is Iraq Entitled to Judicial Due Process?', in Lillich, *supra* note 14, at 77. For a radical critical view, see Schneider, 'How Fair and Efficient is the United Nations Compensation Commission System?', 15 *Journal of International Arbitration* (1998) 15. Not surprisingly, the author represented the Republic of Iraq before the UNCC.

³³ Raboin, who was at that time Vice-Executive Secretary, reveals that the Executive Secretary had 'urged, *inter alia* for reasons of transparency, that Iraq not be excluded from the UNCC's procedures', see Raboin, *supra* note 31, at 126.

However, these limitations on the ability of Iraq to express its views are partly corrected by Articles 35 and 36. The Provisional Rules envisage considerable differences in the processing of small, urgent claims (i.e. categories A, B and C) and the other three categories of claims. Article 35, 'Evidence', requires that claims by corporations and other entities, and claims by governments and international organizations, 'must be supported by documentary and other appropriate evidence'. Article 36 adds that, in unusually large or complex cases, a panel of commissioners may request further written submissions and may invite individuals, corporations, governments, international organizations or other entities to present their views in oral proceedings (Article 36(a)) or may request 'additional information from any other source . . . as necessary' (Article 36(b)). It is thanks to these procedural devices that the panels of commissioners can establish a solid link with the Iraqi Government. So far, all panels entrusted with the settlement of unusually large or complex cases have availed themselves of the opportunity of asking Iraq to express its views in written form, and have taken those views into account even when they arrived late. Recently, there have even been oral proceedings at the request of Iraq, in which it could present its views.³⁴ In the Executive Secretariat's view, the panels' practice transmitting claims files to Iraq is applied in the following cases:

- 1 where the Government of Iraq is a party to a contract forming part of the subject-matter of the claim;
- 2 where the *situs* of the alleged loss is in Iraq;
- 3 when Iraq's view is otherwise helpful in order to verify or evaluate the claim; and
- 4 where the amount claimed is more than US\$100 million.

In conclusion, it is submitted that the UNCC's procedures do not infringe fundamental due process requirements, although much is left to the sense of fairness of the individual panels.

A practical question concerns the possibility of making part of the Commission's budget or operating reserve available to Iraq for the purposes of allowing Iraq to seek technical expertise and assistance in preparing its responses to claims. A similar request was formally submitted by the Iraqi Government on 27 July 1996 on the eve

³⁴ Cf. 'Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F4" Claims', Doc. S/AC 26/2001/16, 22 June 2001, para. 24. This practice does away with the doubts to which Article 38(d) gave rise. This rule allows the panel, in cases of unusually large or complex claims, to ask for additional written submissions and to hold oral proceedings, and in the latter case establishes that the claimant 'may present the case directly to the panel'. The simplest explanation would be that, in cases of oral proceedings, only the claimant would have the right to present its case directly to the panel, while Iraq would be confined to presenting its view only if invited by the panel under Article 36(a). But, as has been pointed out by one commentator (O'Brien, 'The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission', 31 *Cornell International Law Journal* (1998) 1, at 21 in footnote), it is hard to see how it would be possible on the one hand to invite Iraq to express its views in an oral proceeding and on the other hand not to permit it to 'directly' present them in front of the panel. It is possibly only a case of bad drafting. The alternative explanation would be a much more unpalatable one, namely, that the drafters of the Provisional Rules did not consider Iraq under Article 36(a) but only under Article 36(b) as 'any other source' from which the panel may draw additional information.

of the assessment of the first large category D, E and F claims, but on that occasion the request was denied.³⁵ While there is no duty either on the UNCC or on the Security Council to concede such a request, there are some good reasons for doing so, not least to enhance the UNCC's overall efficiency. Therefore, the recent decision taken by the Governing Council to provide technical assistance to Iraq in respect of environmental claims (category F4 claims), because of 'their complexity and the limited amount of relevant international practice',³⁶ has to be welcomed.

Turning now to another UNCC procedural peculiarity, it is striking that the rules regarding the submission of claims do not follow the traditionally espousal model. The role of governments is restricted to the collection and transmission of individual claims. That the recipients of the sums awarded by the UNCC are not governments (with the exception of their own claims in category F) but their citizens is made clear by the Provisional Rules and UNCC decisions. For example, Article 5(3) and Article 11(2)(c) of the Provisional Rules establish that, in the case of a corporation or other private legal entity whose state of incorporation or organization fails to submit a claim falling within the applicable criteria, the corporation or entity may itself make the claim to the Commission within three months, stating in its application why its claim is not being submitted by a government.

Governing Council Decision No. 18 acknowledges the responsibility of states to establish their own mechanisms to distribute payments in a fair, efficient and timely manner, but under the control of the UNCC.³⁷ Therefore, if a state fails to distribute funds within six months of their receipt or does not submit reports to the Executive Secretary documenting the payments made within the prescribed time, the Governing Council may decide as a last resort not to distribute further funds to that particular state. Unfortunately, the rule omits to specify the consequences of this decision, namely, whether the Governing Council may instead distribute the funds directly to the individuals or whether the state incurs any liability towards its citizens. Where a government fails to transmit a corporation's claim, the corporation may make its claim directly; by analogy, therefore, where a government fails to pass on any compensation awarded, the compensation ought instead to be given directly to the claimant.

The privileged position of the individual claimant in the UNCC system — which is to be welcomed as possibly the most significant contribution of the UNCC to the development of international law in the field of claims settlement³⁸ — argues against a requirement of strict conformity with the customary rules on diplomatic protection,

³⁵ The 'Request to the Governing Council of the UNCC on Behalf of the Government of Iraq' of 27 July 1996, drawn up by the Lalive Legal Office in Geneva, is on file with the author.

³⁶ Decision No. 124, Doc. S/AC 26/2001/124, 19 June 2001. Payments to the experts, freely selected by Iraq and approved by the Secretary Executive of the UNCC, will be made directly by the UNCC to a maximum of US\$5 million.

³⁷ Decision No. 18, 'Distribution of Payments and Transparency', Doc. S/AC 26/1994/18, 24 March 1994.

³⁸ In the same sense, cf. Crook, *supra* note 32, at 87; Wassgren, 'The UN Compensation Commission: Lessons of Legitimacy, State Responsibility and War Reparations', 11 *Leiden Journal of International Law* (1998) 473, at 488.

and is a sufficient reason to justify the many innovations as regards the continuity-of-nationality rule, the effective nationality rule and the protection of non-nationals.³⁹ What is important for the UNCC is to avoid the risk that the individual receives a double compensation. To that end, the Governing Council adopted Decision No. 13, in which it established guidelines aimed at avoiding multiple recovery within the UNCC, and invited governments to provide the Commission with information regarding *inter alia* any lawsuit pending against Iraq in the courts of their jurisdiction, or any compensation awarded by those courts, for losses suffered as a result of Iraq's invasion and occupation of Kuwait.⁴⁰

5 On Some Substantive Aspects of the UNCC's Work

Here some preliminary remarks are appropriate. Based on the ancillary position which Article 31 of the Provisional Rules reserves to international law, it would appear, in the Governing Council's view, that the UNCC system could function almost entirely in a self-sufficient way. This assumption of unfettered discretion on the part of the Governing Council may appear overly self-confident and may in fact prove unattainable, but, as has been rightly observed by Bederman,⁴¹ there would be nothing wrong per se with the UNCC elaborating an 'exquisitely developed' *lex specialis*. That would of course operate to the detriment of the precedential value of the UNCC's jurisprudence in the process of customary international law, but would not necessarily operate to the detriment of its legitimacy.⁴²

On the other hand, the opinion cannot be shared of those commentators who think that the international law rules on state responsibility are too general, too abstract and in some regards too disputed to provide guidance and who suggest instead turning to the more specific and limited rules of the law of war.⁴³ This partial approach

³⁹ For these aspects, see Frigessi di Rattalma, *supra* note 13, at 95 *et seq*; Christenson, 'State Responsibility and the UN Compensation Commission: Compensating Victims of Crimes of States', in Lillich, *supra* note 14, at 311, for whom the deviations from the customary rules on diplomatic protection and the eligibility of claims are justified by the character of the international crime of Iraq's conduct, which 'entails different legal consequences that permit, in effect, direct awards at least to non-Iraqi victims without regard to status or nationality'; *ibid*, at 343. For a comparison with the jurisprudence of other recent international claims tribunals, see Brower, 'The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?', 32 *Virginia Journal of International Law* (1992) 421.

⁴⁰ Governing Council's Decision No. 13, 'Further Measures to Avoid Multiple Recovery of Compensation by Claimants', Doc. S/AC 26/1992/13, 25 September 1992.

⁴¹ Bederman, 'The United Nations Compensation Commission', *supra* note 14, at 39.

⁴² On this issue, see Wühler, 'The United Nations Compensation Commission. A New Contribution to the Process of International Claims Resolution', 2 *Journal of International Economic Law* (1999) 249. It is remarkable that the ILC Special Rapporteur, James Crawford, in his Third Report on State Responsibility, mentioned the UNCC, alongside other courts and tribunals, as a relevant body dealing with issues of reparation. The Special Rapporteur, while admitting elements of *lex specialis* in the work of such bodies, maintains that there is a general presumption in international law against the existence of wholly self-contained regimes in the field of reparation. Cf. Crawford, *supra* note 5, at para. 156.

⁴³ Cf. Fox, *supra* note 20, at 277.

is doubly flawed, because it denies the capability of the general international law rules on responsibility to cope with the consequences of an aggression and it artificially insulates the rules of the law of war from general international law.

Before discussing the UNCC's jurisprudence, a brief mention must be made of the formulation of paragraph 16 of Resolution 687. Some commentators have contested the term 'direct loss' as being devoid of meaning. As the former Special Rapporteur to the ILC on the subject of state responsibility, Arangio-Ruiz, clearly demonstrated, the formula has indeed been employed in many arbitral awards in the past, but mainly as a device to justify the arbitrators' decision not to allow compensation for a particular class of claims because of a lack of causality, whatever the particular concept of causality used by them might have been.⁴⁴

Admittedly, the use of the term 'direct losses' by the Security Council may seem inopportune, bound to a specific Anglo-Saxon tradition and old-fashioned, but nevertheless one still wonders what the criticism aims at. Far from increasing Iraq's liability for losses, use of the term 'direct' to qualify the loss will, if anything, reduce Iraq's liability for losses.⁴⁵ Decision Nos 11 and 19 of the Governing Council can be understood in this sense, decisions which respectively exclude (with some exceptions) the eligibility for compensation of members of the Allied coalition force for loss or injury arising as a consequence of their involvement in military operations against Iraq,⁴⁶ and (with no exceptions) the eligibility for compensation for the costs of the Allied coalition forces, including those of military operations against Iraq,⁴⁷ despite their obvious and direct link to the fact of the Iraqi invasion and occupation of Kuwait.

As for the UNCC's work, here, too, a more detailed analysis is required in order to establish how and why some of the criticisms made might prove well-founded. Given the scope of the present contribution, it will not be possible to review every particular aspect of the by now copious UNCC jurisprudence. Attention will instead be focused on

⁴⁴ Cf. Arangio-Ruiz, 'Second Report on State Responsibility', *Yearbook of the International Law Commission*, vol. II (1989), Part One, at 12, following Hariou, 'Les dommages indirects dans les arbitrages internationaux', 31 *Revue générale droit international public* (1924) 203, at 217. For an ultimate rebuttal of the distinction between direct and indirect damages, see the US–Germany Mixed Claims Commission award in the *War Risk Insurance* case of 1923: 'The distinction sought to be made between damages which are direct and indirect is frequently illusory and fanciful and should have no place in international law' (*US–Germany Mixed Claims Commission, Consolidated Edition of Decisions and Opinions*, vol. 2 (1925) 33). Hence, the question of the 'directness of loss' is nothing other than the question of causation itself. Also, according to the Special Rapporteur, James Crawford, there is no overarching concept of causality in international law. Besides, in national legal systems also, different criteria for causality may be used depending on the nature of the claim: in common law, foreseeability of damage is the criterion in cases of negligence, directness in cases of trespass. See Crawford, *supra* note 5, at note 59. Following the Special Rapporteur's view, the ILC renounced its intention to give its own definition of causality, and restricted itself to restating the obligation of the responsible state to make full reparation for the injuries 'arising in consequence of the international wrongful act' (Article 31 of the Draft Articles).

⁴⁵ And therefore criticized by Lillich and Brower, *supra* note 29, at 33.

⁴⁶ Decision No. 11, 'Eligibility for Compensation of Members of the Allied Coalition Armed Forces', Doc. A/SC 26/1992/11, 26 June 1992.

⁴⁷ Decision No. 19, Doc. A/AC 26/1992/19, 24 March 1994. For Fox, *supra* note 20, at 277, these costs are in themselves 'direct losses'.

some fundamental and intertwined issues such as attribution, causality and directness of loss. Anticipating the outcome of this research, one may say that on the whole the UNCC's work stands up well to the parameters laid down by the ILC in its codification project on state responsibility.⁴⁸

As to the question of attribution, some commentators have strongly criticized the attribution of responsibility to Iraq for damages resulting from military operations by either side and from the breakdown of civil order in Kuwait and Iraq during the period from 2 August 1990 to 2 March 1991. It seems opportune to consider the two headings separately, since they present different aspects.

As to the first (damages resulting from military operations by either side), the starting point is the existence in contemporary international law of a norm which *post bellum* permits or even demands the liability of the aggressor state, charging it with an obligation to make good not only the entire amount of damage caused by itself, but also damage arising from the legitimate exercise of self-defence by the state that is the victim of the aggression. The only damage which the attacked state cannot place at the door of the aggressor is of course that resulting from the former's own grave violations of humanitarian law under the four Geneva Conventions of 1949.

As for the second heading (losses arising from the breakdown of civil order in Kuwait and Iraq), it is true that the question of attribution still plays a central role in the international system of state responsibility, but it is not correct to maintain that the UNCC's decision to attribute such losses to Iraq is unprecedented in international law. In the *Samoan Claims* case in 1902, the US–UK commissioners awarded compensation to German citizens for damages occurring during the 1899 military operations, not because of the bombardments, but because of plundering by the indigenous population during the absence of a governmental administration.⁴⁹ Similarly, in the well-known *Naulilaa* case, decided in 1928, the arbitrators attributed to Germany responsibility for damage suffered by Portugal in its colonies because of the indigenous rebellion which broke out after the German reprisal, arguing on the basis of the 'reasonable foreseeability' of the consequences that the German action set in motion.⁵⁰

Indeed, in a situation of total breakdown of civil order, the focus of attention should shift from the narrow and specific rules on attribution and agency to the broader issue of causation, as the two cases discussed above show, and as has already been suggested by some commentators with respect to situations involving insurgency and revolution, such as those prevailing in Iran in 1979.⁵¹

Turning to the question of causation, it does not seem that the Governing Council has drawn from the term 'direct losses' consequences which could not otherwise be inferred from customary norms of state responsibility. One possible exception is that of

⁴⁸ Christenson, *supra* note 39, at 358.

⁴⁹ See Whiteman, *Damages in International Law* (1937), at 1779.

⁵⁰ 2 UNRIAA 1014, at 1032.

⁵¹ Caron, 'The Basis of Responsibility: Attribution and Other Transsubstantive Rules', in Lillich and Magraw (eds), *The Iran–United States Claims Tribunal. Its Contribution to the Law of State Responsibility* (1998) 109, at 146.

the compensatability for an individual's mental pain and anguish where such mental pain and anguish is not accompanied by any physical injury or pecuniary losses;⁵² this innovation should be welcomed as a progressive development in international claims settlement. Here it should be noted that the Governing Council, in its Decision Nos 1 and 7,⁵³ determined the meaning of 'direct loss, damage or injury' in the following terms:

- 1 military operations or the threat of military action by either side during the period from 2 August 1990 to 2 March 1991;
- 2 departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;
- 3 actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
- 4 the breakdown of civil order in Kuwait or Iraq during that period; and
- 5 hostage-taking or other illegal detention.

The (perfectly legitimate) position of the UNCC seems to be that of recognizing a regime of the global responsibility of Iraq for all the consequences of its aggression, but then limiting and specifying that liability in individual cases. To that extent, it is right to state that the question of causation requires different considerations depending on the different categories of claim. Nonetheless, it is necessary first to consider two more general questions, the first concerning business losses and the second concerning 'parallel causation'.

As to business losses, the Governing Council adopted a specific decision on business losses, the types of damages and their valuation. According to Decision No. 9, the economic value of a business may include loss of future earnings and profits 'where they can be ascertained with reasonable certainty',⁵⁴ but, initially, compensation will

⁵² Cf. Decision No. 3, 'Personal Injury and Mental Pain and Anguish', Doc. A/AC 26/1991/3, 23 October 1991, reproduced in 31 ILM (1992) 1028. According to this decision, compensation will also be provided for non-pecuniary injuries resulting from mental pain and anguish arising from, for example, the fact that the individual witnessed the intentional infliction of death, dismemberment, significant disfigurement, sexual assault on his or her spouse, child or parent (Article 3(d)), or from the fact that the individual was forced to hide for more than three days 'on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained' (Article 3(f)). In a working paper presented by the Executive Secretary some days before the adoption of Decision No. 3 (WP 12 Secretariat, 7 October 1991), it was stated that 'mere injury to feelings unaccompanied by physical injury is considered only when it is a direct result of a tort committed against a victim'. In the same sense, cf. Crook, *supra* note 32, at 154, for whom 'the Council's work defining serious personal injury and allowable claims for mental pain and anguish is essentially legislative'. On the other hand, the decision of the UNCC Governing Council to establish fixed (and modest) amounts for compensation for mental pain and anguish appears to be, as noted in a working paper of the Executive Secretary (WP 18 Secretary, 20 November 1991), 'virtually unprecedented in both municipal and international law'.

⁵³ Decision No. 1, 'Criteria for Expedited Processings of Urgent Claims', Doc. S/AC 26/1991/1, 2 August 1991, reproduced in 30 ILM (1991) 1712; Decision No. 7, 'Criteria for Additional Categories of Claims', Doc. S/AC 26/1991/7, 4 December 1991, reproduced in 31 ILM (1992) 1045.

⁵⁴ Decision No. 9, 'Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation', Doc. S/AC 26/1992/9, 6 March 1992, reproduced in 31 ILM (1992) 1037.

be limited to losses in connection with contracts or past business practice, losses relating to tangible assets and losses relating to income-producing properties (the latter incidentally present the advantage of being easier to prove).⁵⁵ In particular, with reference to the quantum of the latter, the Governing Council has followed contemporary international law standards:⁵⁶ on the premise that the business was a going concern, the Governing Council uses various alternative methods of deriving a quantum of loss, such as the market value method, the discounted cash flow method and the price/earnings method, without expressing a preference for any one particular method of valuation.

In considering the second question, parallel causation (i.e. where losses can be attributed to more than one cause), the Governing Council was confronted with the difficult task of drawing a distinction between damage due to the fact of the Iraqi invasion of Kuwait and that due to the operation of the UN sanctions, the so-called embargo losses. Embargo claims include those relating to the general increase of oil prices, or freight and insurance premiums, or the decrease in tourism or the loss of revenues from maritime and air traffic.

Already, in some earlier decisions, the Governing Council had affirmed that neither the trade embargo and related measures nor the economic situation caused thereby would be accepted as a basis for compensation. Nevertheless, some cases could prove more intractable under such a general heading, such as those relating to the loss sustained by a ship, which could not unload, first, because of the fighting and, later, because of the embargo; or the loss sustained by a construction or engineering company which evacuated its employees because of the fighting before the project was completed and which could not later recover sums due to it for work done because of the freezing of all commercial transactions. The difficult question which the Governing Council had to solve was whether compensation should be awarded where the loss or damage was a direct result of Iraq's invasion, notwithstanding the fact that it might also have been attributable to the trade embargo. The Governing Council gave a positive answer in its Decision No. 15 and awarded full compensation without any reduction for the parallel cause.⁵⁷

This solution may appear innovative when compared with the historical precedents of war claims settlements. After the First World War, even the French–German Mixed Arbitral Tribunal, known for its strict attitude towards any defence raised by Germany, decided in many instances that Germany, although generally responsible for requisition measures taken against enemy individuals, was not to be held liable for

⁵⁵ For issues related to burden of proof, see Kazazi, 'An Overview of Evidence Before the United Nations Compensation Commission', 1 *International Law Forum* (1999) 219.

⁵⁶ Cf. Arangio-Ruiz, *supra* note 44, at 18.

⁵⁷ Decision No. 15, 'Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait Where the Trade Embargo and Related Measures Were Also a Cause', Doc. S/AC 26/1992/15, 4 January 1993, reproduced in 59 *ILM* (1995) 244.

certain damages which would have occurred anyway because of the state of war.⁵⁸ The exception to responsibility due to an intervening parallel causation — whether due to *force majeure* or to a genuinely alternative cause — is generally maintained in the legal literature.⁵⁹ But, on a closer look, the legal standard is less well-defined, as shown by the different views of the two Special Rapporteurs on State Responsibility, Arangio-Ruiz and Crawford, the first admitting and the second denying a partial reduction of a state's liability in cases of parallel causes.⁶⁰

On balance, the UNCC position is entirely legitimate, especially in view of the principle of liability *post bellum* of the aggressor. If by contemporary standards of international law the state responsible for an aggression can no longer rely on a state of war caused by its own conduct as a *force majeure* defence, neither may it take advantage of the existence of collective coercive measures adopted by the international community against its misdeeds.

Yet, a final question must still be raised, namely, whether Iraq should be obliged to pay compensation when the parallel causation was a genuine case of 'act of God'. The Governing Council did not provide for a particular exception for this type of case, but nothing in its decisions prevents single panels of commissioners reaching a conclusion in accordance with general principles of law.⁶¹

Some doubts have been raised also with regard to the Security Council's decision in paragraph 16 of Resolution 687 to make Iraq liable for 'environmental damage and the depletion of natural resources'. The Security Council's decision may represent a novelty in the practice of war reparations, but it is not per se a novel theory. Even if one concedes that the law of warfare is still in need of clearer and more stringent rules on the protection of the environment,⁶² it is nevertheless a well-established principle, already enshrined in Article 53 of the fourth Geneva Convention, that the occupying power may not destroy 'real or personal property belonging individually or

⁵⁸ Cf. the cases *Klotz*, *Rémi Martin* and *Carnabatu* in respectively *Recueil des Tribunaux Arbitraux Mixtes*, vol. II, 758, vol. IV, 415, vol. V, 288.

⁵⁹ Cf. Bollecker Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973) 275; Gray, *Judicial Remedies in International Law* (1990) 23.

⁶⁰ See Arangio-Ruiz, *supra* note 44, at paras 44 *et seq*; Crawford, *supra* note 5, at para. 34.

⁶¹ Cf. Wühler, 'Causation and Directness of Damages', in Lillich, *supra* note 14, at 207.

⁶² Among the many contributions on this aspect, see Plant (ed.), *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict* (1992); Zedalis, 'Military Necessity and Iraqi Destruction of Kuwait Oil', 23 *Revue Belge de droit international* (1990) 323; Zedalis, 'Burning of the Kuwait Oilfields and the Laws of War', 24 *Vanderbilt Journal of Transnational Law* (1991) 711; Momtaz, 'Les règles relatives à la protection de l'environnement au cours des conflits armés à l'épreuve du conflit entre l'Irak et le Koweït', 37 *Annuaire français droit international* (1991) 203; Feliciano, 'Marine Pollution and Spoliation of Natural Resources as War Measures: A Note on Some International Law Problems in the Gulf War', 14 *Houston Journal of International Law* (1992) 483; Joyner and Kirkhope, 'The Persian Gulf War Oil Spill: Reassessing the Law of Environmental Protection and the Law of Armed Conflict', 24 *Case Western Reserve Journal of International Law* (1992) 29; Ljinzaad and Tanja, 'Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War', 40 *Netherlands International Law Review* (1993) 169; Tarasofsky, 'Legal Protection of the Environment During International Armed Conflict', 24 *Netherlands Yearbook of International Law* (1993) 17; Low and Hodgkinson, 'Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War', 35 *Virginia Journal of International Law* (1994–1995) 405.

collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations'. It is true that Article 53 excepts destruction which is dictated by absolute military necessity, but it is also true that — leaving aside here the question of the practical usefulness of the environment-spoiling measures ordered by Saddam Hussein before withdrawing from Kuwait⁶³ — contemporary international law does permit, if not demand, the *post bellum* liability of the aggressor, as the 'unjust' belligerent, by denying him the exculpatory ground of military necessity.⁶⁴

It is interesting to note that not even Iraq dared to question the soundness of the Security Council's decision to make environmental damage compensatable, but it preferred to defend itself by questioning the authenticity and trustworthiness of Kuwaiti evidence on this matter. In a category E claim submitted by the Kuwait Oil Company (KOC) for the losses and costs incurred by the setting alight of 788 Kuwaiti oil wells,⁶⁵ the Iraqi Government, before deciding no longer to participate in the proceedings in protest against alleged discriminatory procedural rules, sent a letter to the panel, in which it accused Kuwait and its allies of having falsified evidence in order to mask the fact that the well fires were due to indiscriminate Allied bombing after 17 January 1991, which therefore had to be considered an 'intervening event', thus breaking the chain of causality. The panel took special care in assessing the veracity of KOC's assertions and eventually relied on Article 21(a) of Decision No. 7, according to which Iraq shall be liable for any 'military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991'.

While the question of Iraq's liability has been definitively disposed of, the insertion of the environmental damage head into Resolution 687 raises some questions of a more general nature. On the one hand, neither the resolution nor the relevant part of Decision No. 7 sets any limit on the geographical location of losses, a circumstance which could have given rise to difficult issues of proof of causation and of evidence, were it not for the fact that eventually only the states of the Gulf region and no international organization had submitted claims in the first group of the F4 category.⁶⁶ On the other hand, there are strict time limits which reduce the possibility of accurately assessing the damage: first, the damage must have occurred between 2 August 1990 and 2 March 1991; and, secondly, the governments had to file their claims by 1 February 1997. It is obvious that time limits had to be set, in order not to keep Iraq indefinitely exposed to whatever claims for whatever amount may be made. Yet, it is clear, too, that environmental damage of such magnitude will most probably have long-term, widespread and at present not yet fully apparent negative effects.

⁶³ Cf. Wallach, 'The Use of Crude Oil by an Occupying Belligerent State as a Munition de Guerre', 41 *International and Comparative Law Quarterly* (1992) 287.

⁶⁴ With specific reference to Iraq, see Fox, *supra* note 20, at 283; Crook, *supra* note 32, at 81; and Zedalis, 'Burning of the Kuwaiti Oilfields', *supra* note 62, at 277, footnote.

⁶⁵ Doc. S/AC 26/1996/5/Annex, 18 December 1996.

⁶⁶ For a critical appraisal of the lack of attention to the 'defence of common environmental heritage', see Aznar-Gomez, 'Environmental Damages and the 1991 Gulf War: Some Yardsticks before the UNCC', 14 *Leiden Journal of International Law* (2001), at 301. The present author wishes to thank Professor Aznar-Gomez for his kind permission to read the manuscript.

Therefore, the panel entrusted with category F4 claims had first to master the difficult task of determining whether and to what extent expenses incurred by states resulting from monitoring and assessment activities already undertaken or to be undertaken to identify and evaluate the damage could be characterized as ‘direct environmental damage’.⁶⁷ In this field, as in many other related fields, the panel will have to break new ground and take precedent-setting decisions which will have effects which will go well beyond the specific claims submitted to it.⁶⁸

6 Overview of the Panel’s Work

Taking a broad overview of the jurisprudence of the panels of commissioners, it can be seen that the commissioners are not only exemplary in their fairness and impartiality — as one would expect, given the level of professionalism and scholarship shared by most commissioners — but that their work is a significant contribution to the clarification and development of various rules of international law on claims settlement.

Among the main contributions made by the category C panel — which by June 1999 completed its task⁶⁹ — mention should be made of decisions of the panel relating to the assessment of damages for mental pain and anguish, particularly in view of both the novelty of the UNCC’s decision to compensate for mental pain and anguish and the inherent difficulty of the subject-matter. The commissioners sought assistance where appropriate from a group of experts in psychiatry, psychology, medicine and war medicine, but in the end it was the commissioners who made the often very difficult decisions on causality.⁷⁰

With regard to the work of the category D panel, the juridical questions were similar to those of the category C panel, with the difference that in category D cases larger sums were involved. Due to the essential similarity of the legal issues in category C and

⁶⁷ Cf. ‘Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of “F4” Claims’, *supra* note 34.

⁶⁸ For example, the panel recommended no compensation for a claim of US\$826,000 submitted by Iran, for a study on the use of genetically modified bacteria to combat residual oil pollution. The panel started by noting that ‘evidence indicates that bacterial biodegradation of oil is most effective if undertaken soon after an oil spill’, but significantly added that ‘the Panel has serious reservations about the deliberate release of genetically modified organisms into the environment . . . In the absence of reliable scientific knowledge about the threat posed by these organisms, it is not advisable for Iran to undertake such a potentially risky procedure’ (‘Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of “F4” Claims’, *supra* note 34, at paras 169 *et seq.*). Therefore the present author does not fully agree with the view expressed by Aznar-Gomez, *supra* note 66, according to whom the UNCC system for environmental claims ‘provides us with relative landmarks, and, as a precedent, it is scarcely useful for future *normal* international claims for environmental harm’ (*ibid.*, at 332, emphasis in the original).

⁶⁹ From 1994 to 1999, the category C panel reported in seven instalments on 1,659,840 category C claims. It recommended compensation awards in 633,081 cases totalling an amount of US\$4,855,070,690.

⁷⁰ On the category C panel’s jurisprudence, see Cottureau, ‘Responsabilité de l’Iraq: Aperçu sur les indemnités urgentes des personnes physiques’, 41 *Annuaire français de droit international* (1995) 151.

category D cases, the category D panel was well aware of the importance of establishing standards consistent with those set by the category C panel. So far, on the whole, this has been successfully accomplished, with only minor divergences. One such divergence has occurred with regard to compensation for economic losses due to the death of a relative. Whereas the category C panel confined itself to an average actuarial method of calculation considered both 'conservative and equitable',⁷¹ the category D panel adopted a very sophisticated method of calculation, by distinguishing between those deceased with a stable and documented income prior to 2 August 1990 and those deceased without such an income, and depending also on the age of the deceased, the familial link with the claimant, and the inflation rate in the country of residence.⁷²

Being aware of the complexity of many questions concerning category E claims, the Governing Council entrusted four different panels of commissioners with the task of resolving category E claims.⁷³ Summing up, all four panels have exercised the utmost stringency in evaluating losses. Particularly remarkable are the criteria laid down in the E2 panel's reports, which are exemplary in their juridical skilfulness and insight on many aspects of international claims rules. Special attention was given to the requirement of directness of losses. The commissioners went so far as to develop their own interpretative criteria of the events and circumstances listed in paragraph 21 of Decision No. 7 in the particular context of the claims under review. Therefore, with regard to the 'threat of military action' mentioned in paragraph 21(a) of Decision No. 7, the commissioners delineated with precision the limits of the compensatable areas and periods, distinguished claims by country and by business sector. For example, with regard to the air transport industry's claims, the commissioners decided that in respect of cancelled air operations to Kuwait the compensatable period ran from 2 August 1990 to 22 April 1991, because only from that latter date could regular operations by foreign airlines be resumed, while no losses alleged to have been sustained *inter alia* in Cyprus, Egypt or Turkey were allowed, because the military operations or the threats of military actions in those regions were deemed insufficient to meet the requirements of directness.⁷⁴

As regards category F claims, it is probably still premature to determine with

⁷¹ 'Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "C" Claims', Doc. S/AC 26/1994/3, 21 December 1994 at para. 125.

⁷² 'Report and Recommendations of the Panel of Commissioners Concerning D) Claims — First Instalment, Part One', Doc. S/AC 26/1998/1, 3 February 1998, para. 47. The sums go from a minimum of US\$10,000 for the death of a child to a maximum of US\$100,000 for the death of a spouse less than 55 years old (plus US\$15,000 for each minor child under 21 who is dependent on the claimant).

⁷³ The nearly 100 category E1 claims concern the oil sector; the approximately 2,500 category E2 claims are those filed on behalf of non-Kuwaiti corporations and other business entities, excluding the oil sector, construction and engineering contracts and export-guarantee claims; the approximately 400 category E3 claims cover the non-Kuwaiti construction and engineering sectors; and the 2,750 category E4 claims are those filed by Kuwait on behalf of the private sector, excluding the oil sector.

⁷⁴ Cf. 'Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of "E2" Claims', Doc. S/AC 26/1999/22, 9 December 1999, paras 59 *et seq.*

certainly the jurisprudence of the four panels. Yet it is possible from the reports already released, especially those of the F1 panel competent for government claims for losses related to departure and evacuation costs as well as for damage to physical property and for claims of international organizations, to discern some principles.⁷⁵

Among the costs typically incurred by governments which the panel has been ready to compensate are those relating to the evacuation and repatriation of individuals, even from countries other than Iraq or Kuwait, such as Saudi Arabia or Israel. In line with precedents from category C or E panels, humanitarian considerations led the F1 panel to evaluate with some generosity the evacuation costs, by admitting costs for medical assistance during and after evacuation, as well as subsidies to repatriated individuals for up to seven months.

In contrast, the panel's view is much stricter with regard to costs related to the public service. Indeed, some governments seem to have lost all sense of a reasonable perspective in presenting their claims. For example, one government submitted a claim for extra lunch vouchers for a crisis-management team in the foreign affairs ministry, while another government sought compensation for the purchase of emergency equipment such as blankets, mattresses and gas stoves for its embassies in the region.⁷⁶ However, more interesting from a theoretical point of view are the claims related to the exercise of diplomatic protection, such as those for costs incurred for the organization of evacuation operations, or for the maintenance of diplomatic relations, such as the transfer of diplomats and their families, or the rent of buildings for embassies and staff residences which were not used. Quite rightly, the commissioners refused to allow any indemnity for costs which by their very nature are connected to the diplomatic function and its inherent risks.⁷⁷

7 Conclusion

Up to 26 July 2001, the UN Compensation Commission had resolved almost all of the 2.6 million cases submitted to it and had awarded compensation to approximately 1.5 million of those cases in a total amount of US\$35 billion, of which more than US\$12 billion has already been paid to claimants. The figures are impressive, and the UNCC can look back at the work it has done with satisfaction for the relief brought to the injured, and for the contribution made to the development of international law. Yet the compensation sought by the 10,550 claims still outstanding at the time of writing is six times greater than the whole of the compensation so far awarded, totalling some US\$200 billion, a half of which is claimed by Kuwait.⁷⁸

⁷⁵ Cf. Heiskanen and O'Brien, 'UN Compensation Commission Panel Sets Precedents on Government Claims', 92 *American Journal of International Law* (1998) 339.

⁷⁶ Cf. 'Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of F1 Claims', Doc. A/AC 26/1999/7, 19 March 1999, paras 55 and 63 respectively.

⁷⁷ Cf. 'Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of F1 Claims', Doc. S/AC 26/1998/12, 2 October 1998, para. 81.

⁷⁸ See 'Status of Claims Processing' on the UNCC website, <www.unog.ch/uncc/status.htm>, visited on 31 August 2001.

Therefore, the task before the panels of commissioners is still daunting. However praiseworthy the UNCC work has been so far, it still runs two risks, which could doom it to failure. The first risk is the loss of momentum and commitment to the UNCC, which will inevitably follow the lifting of sanctions against Iraq. Until now, the UNCC's funds are assured by the 30 per cent (now reduced to 25 per cent) allocation of the revenues of Iraqi oil sales, which take place under the authority of the UN pursuant to the 'oil-for-food' scheme of Security Council Resolution 986.⁷⁹ Given the likely unwillingness of Iraq to comply voluntarily with its obligations towards the UNCC, it will be necessary for the UN to use persuasion, if not coercion, to guarantee the continuing flow of money from Iraq.

The second risk, which is related to the first, is the future attitude of individuals, corporations and governments towards the UNCC and its jurisprudence. As has been repeatedly said, the UNCC was not intended as a substitute for all other possible legal means to recover losses. The risk of flooding national courts with lawsuits or other proceedings against Iraq is inversely proportional to the degree of 'customer satisfaction' provided by the UNCC.⁸⁰ The temptation by some to circumvent the UNCC, by asking a national judge or an arbitrator to re-examine their case, can only be countered to the extent that the UNCC imposes its authority by living up to high standards of judicial skill and practical efficiency.

Yet there is another fundamental aspect which tends to be neglected by those commentators too prone to think in terms of international commercial disputes practice, but which weighs more heavily than the foregoing thoughts, and that is Iraq's legitimate expectation to be acquitted of its past wrongs in a foreseeable future. Recalling the imperatives of principle, policy and reasonableness which should mark every durable peace settlement, the best solution for the UN would be to let the UNCC accomplish its work of assessing damages and processing the remaining claims by 2003 as scheduled, but eventually to settle the matter with Iraq by way of a lump sum payment. Only thus will the UNCC have the chance to be remembered in the history of international law not as an isolated case of stern, uncompromising retribution, but as the first successful model of a collective relief system organized by the international community in response to an aggression.

⁷⁹ According to Resolution 986 of 14 April 1995, the Security Council authorized states to import oil from Iraq to a value of US\$1.6 billion every 90 days. The programme started on 10 December 1996. Resolution 1153 of 20 February 1998 significantly increased the value of the oil trade, and finally Resolution 1284 of 17 December 1999, para. 15, authorized states to permit the import of an unlimited amount of petroleum and petroleum products originating in Iraq. The payments are to be made to an escrow account on behalf of the UN. On the 'oil-for-food' mechanism, see Forteau, 'La formule "pétrole contre nourriture" mise en place par les Nations Unies en Irak: beaucoup de bruit pour rien?', 43 *Annuaire français de droit international* (1997) 132; Oette, 'Die Entwicklung des Oil for Food-Programms und die gegenwärtige humanitäre Lage im Irak', 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999) 839.

⁸⁰ For some practical insights on this issue, see Ulmer, 'Claimant's Expectations from the United Nations Compensation Commission', 15 *Journal of International Arbitration* (1998) 7.