

.....

# *The UN Compensation Commission: Practical Justice, not Retribution*

David D. Caron and Brian Morris\*

## **Abstract**

*Over the decade of the United Nations Compensation Commission's work, there has been voiced by some a vague sense that the UNCC, although created to give some justice to those directly injured by Iraq's invasion and occupation of Kuwait, should instead be viewed as a part of the system of international economic sanctions. While it is true that any compensatory mechanism may be said to sanction the wrongful actor, the UNCC is not an economic sanction as that term is understood in international relations and law. Rather, the UNCC provides a measure of practical justice to those who suffered damage as a direct result of the crime of aggression. In this essay, the authors ask when it may be said that that which ostensibly is a compensation procedure partakes more of a scheme of retribution, and should be analysed in terms not of the adequacy of compensation to the victims, but rather of the extent of the punishment that is indirectly inflicted on the population of the wrongdoing state. Applying such an analysis, it is concluded that the UNCC should not be viewed as an economic sanction, but rather an institution that has delivered practical justice to millions of victims of Iraq's invasion and occupation of Kuwait.*

## **Introduction**

In focusing on the more than 10 years of sanctions placed upon Iraq by the United Nations, this symposium seeks to analyse the impact that that decade has had on international law. But more than a milestone of 10 years prompts this symposium. It

\* David Caron is the C. William Maxeiner Distinguished Professor of Law, University of California at Berkeley School of Law; and Commissioner, United Nations Compensation Commission. Brian Morris is a Senior Legal Officer with the Secretariat of the United Nations Compensation Commission. The views expressed in this manuscript are those of the authors and do not reflect the view of the UNCC.

is motivated in large part by the view, not insignificant at present, that the sanctions regime placed on Iraq has served primarily not to influence Iraq's leaders but rather to cripple Iraqi society and unfairly, if unintentionally, injure its most vulnerable citizens. Under this view, commentators then conclude that a major reshaping of the sanctions regime is needed. This critical focus on the humanitarian dimension of sanctions is voiced in other contexts; the sanctions placed on the Afghan Taliban regime prior to the 11 September 2001 bombings being but one other. A thread emerging in these discussions is the sense that as there exist rules limiting the use of military force, there are — or should be — similar rules limiting the use of economic sanctions. A *jus ad sanctions* and *jus in sanction* as it were.

In the case of Iraq, the once nearly universal support among states for the present sanctions regime has unravelled somewhat.<sup>1</sup> Several countries, particularly several of the Arab states, have chosen to breach the sanctions in a variety of ways, albeit primarily symbolic ones at present. For example, at least three Arab states — Egypt, Jordan and Syria — have begun regular flights to Iraq, despite the ban in place by the Security Council.<sup>2</sup> Simultaneously, however, it is felt by many states that the threat to regional stability posed by the Iraqi leadership has not, at least rhetorically, diminished. Thus, in practice, there is a distinction between assessments of the Iraqi leadership and compassion for the Iraqi people. At the recent March 2001 Arab Summit in Jordan, for example, the Arab states reportedly did not act on Iraq's demands that Arab states break the economic sanctions, condemn allied air patrols over Iraq and resume regular civilian flights to Baghdad because of the continued bellicose statements of Saddam Hussein and Iraq's refusal to fulfil United Nations resolutions passed at the end of the Gulf War.<sup>3</sup> In this sense, it appears that the economic sanctions are critiqued not on the ground that the Iraq leadership seems unfairly accused of being a threat to regional stability, but rather because the sanctions are seen as an excessive burden on the Iraqi people.

Within this framework of inquiry for the symposium, it should be *prima facie* surprising and curious that the United Nations Compensation Commission (UNCC) should be one of the post-Gulf War institutions to be considered. It should be surprising because the UNCC was not created to punish Iraq or to encourage certain changes in its leadership. The UNCC is qualitatively different from the economic sanctions in place on Iraq for over a decade. Although it is true that any compensatory

<sup>1</sup> See, e.g., Gordon, 'Chokehold on the World', 27 *The Nation* (January 1, 2001); Friedman, 'The War Saddam Won', *NY Times*, 6 February 2001, at A25; Perlez, 'The General Picks Up Where He Left Off', *NY Times*, 28 January 2001, sec. 4, at 5. See also Lehman, 'The Iraq Factor: Will the New Bush Team's Old Memories Shape its Foreign Policy', *The New Yorker*, 22 January 2001, at 34.

<sup>2</sup> Burns, '10 Years Later, Hussein is Firmly in Control', *NY Times*, 26 February 2001. At least a dozen countries have broken the air embargo by authorizing a flight by their national carriers into Baghdad. *Ibid.* These actions may in part be an analogous extension of the flights resumed in the case of Libya. See, e.g., Jehl, 'Arab Countries Vote to Defy U.N. Sanctions against Libya', *NY Times*, 27 September 1997, at A8.

<sup>3</sup> See MacFarquhar, 'Arab Leaders End Meeting in Disarray Over Iraq', *NY Times*, 29 March 2001. Likewise, Saddam Hussein's son, Uday, recently declared in a working paper presented to the Iraqi parliament that the map of Iraq must be redrawn to include Kuwait as part of Iraq. Burns, *supra* note 2.

mechanism may be said to sanction the wrongful actor, the UNCC is not an economic sanction as that term is understood in international relations and law.<sup>4</sup> Rather, the UNCC is a mechanism established to provide a measure of practical justice to those who suffered damage as a direct result of Iraq's invasion and occupation of Kuwait.<sup>5</sup> This difference is apparent in the fact, for example, that the work of the UNCC is not in any way tied to, or conditioned by, changes in the future behaviour of Iraq's leadership. It is true that the Governing Council of the UNCC, or the Security Council itself, might choose at some future date to not authorize the full payment of all awards recommended by Panels of Commissioners and subsequently approved by the Council. Such a choice, however, would be taken in a context of justice, not one of explicit unrelated policy objectives having been met.

Yet, over the decade of the UNCC's work, there has been voiced by some a vague sense that the UNCC, although created to give some justice to those directly injured by the crime of aggression, should instead be viewed as a part of the system of international economic sanctions. Only with knowledge of this vague criticism does it become less surprising that the UNCC is a part of this symposium.

We profoundly disagree with the vague allegation that the UNCC is in some sense a tainted international economic sanction upon Iraq. It is the task of this essay to ascertain the possible elements of this vague sense, and to evaluate the work and jurisprudence of the UNCC in terms of these elements. We have no doubt that the decade of work by the UNCC will be judged as having made fundamentally important contributions to the international processes and outlook for international claims resolution, particularly the mass resolution of claims following catastrophic events such as war and revolution.<sup>6</sup> This essay, however, focuses on the distinct question of when may it be said that that which ostensibly is a compensation procedure partakes more of a scheme of retribution and should thus be analysed, and perhaps rethought, in terms not of the adequacy of compensation to the victims, but rather of the extent of the punishment which is indirectly inflicted on the population of the wrongdoing state. Such an analysis implicates not only the UNCC and the economic sanctions in Iraq, but also the foundations of international law and the appropriateness of collective responsibility generally implicit in state responsibility.

In Part 1, we briefly review the work and structure of the UNCC, and the range of criticisms that have been raised concerning its work. We conclude this part of the essay by identifying two possible bases for regarding a compensatory institution, such as the UNCC, as partaking more of an international economic sanction. First, the institution may by its structure or its *de facto* operation be suspect in that it appears that the decisions of the institution are far more concerned with politically motivated

<sup>4</sup> For sources as to the meaning of the term 'sanction', see Caron, 'International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries', 16 *Ecology LQ* (1989) 311. See also Nossal, 'International Sanctions as International Punishment' 43 *Int'l Org.* (1989) 301.

<sup>5</sup> See, e.g., Caron, 'The Gulf War, the United Nations Compensation Commission and the Search for Practical Justice', 24 *The Transcript* (Fall 1991) 26.

<sup>6</sup> An extensive bibliography is maintained by the UNCC at <[www.uncc.ch](http://www.uncc.ch)>. See generally R. Lillich (ed.), *The United Nations Compensation Commission* (1995).

punishment of the wrongdoer than compensation of the victims under the rule of law. Second, the award of monies in full or partial satisfaction of the decisions of the institution, even if those decisions themselves are legitimate, may be of such a significant amount, given the circumstances of the debtor state, or be imposed upon the debtor state in such a short period of time that the extraction of such funds from the debtor state may be said to be punitive or unwise. These two lines of questioning, with particular reference to the UNCC, are the subject of Parts 2 and 3. We conclude by reflecting on the more fundamental implications of such a vague critique not only in terms of humanitarian law, but more generally of state responsibility.

## 1 The UNCC: Its Mandate, Successes and Critics

### A *The Mandate and Successes of the UNCC*

UN Security Council Resolution 687 (1991) reaffirmed that Iraq 'is liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.<sup>7</sup> It was widely accepted in 1991, and remains so today, that Iraq had breached fundamental peremptory norms of international law and that it was liable in principle for the direct consequences of those wrongful acts.<sup>8</sup>

Having reaffirmed such liability, Resolution 687 created a Commission to (1) determine and resolve claims and (2) administer a Fund whereby such claims might be satisfied. The Resolution then directed the Secretary-General to present a report to the Council within 30 days with 'recommendations for the fund ... and for a programme to implement the decisions' of Resolution 687. The Secretary-General, in his report of 2 May 1991, called for a Commission with three bodies: (1) a Governing Council composed of the representatives of states to the UN in Geneva who, at any given time, are the members of the UN Security Council and who would be responsible for setting policy regarding the Fund and the procedures applicable for claims resolution; (2) Panels of Commissioners who would apply the procedures adopted by the Governing Council to the claims submitted; and (3) a Secretariat that would support the work of the Council and Commissioners and administer the

<sup>7</sup> Para. 16.

<sup>8</sup> Iraq's action in invading and occupying Kuwait breached a number of established, objective rules governing the conduct of nations under international law. For example, Iraq's actions violated, among others, the United Nations Charter (Art. 2(4) the primary obligation prohibiting use of force against territorial integrity or political independence of any state), the Hague Conventions, the Geneva Conventions, customary international law relating to injury to nationals of Kuwait and of third countries, and international environmental law. Indeed, the government of Iraq itself, at the time of Resolution 687, conceded that it was liable for the damages that it had caused and agreed to the establishment of a mechanism to determine the amount of its liability stemming from its illegal invasion and occupation of Kuwait in a letter to the United Nations Security Council dated 6 April 1991. The United Nations Security Council promptly notified Iraq that its acceptance of liability was 'irrevocable and qualified [and] legally binding on the Republic of Iraq'; *ibid.*

Fund.<sup>9</sup> This report was adopted by the Security Council and the UNCC was established in the summer of 1991.<sup>10</sup>

For the purposes of this essay, it is crucial to emphasize a fundamental structural point that was both foreshadowed in the Security Council resolutions, and has been evident in the work of the UNCC throughout its history: From the outset of the UNCC, the task of making a determination as to the merits of the claims has been separate from the question of the extent to which awards based on such determinations would be satisfied.

Indeed, one of us in 1991 — aware, as was the UNCC, of the potential number of claims and the possible extent of liability for Iraq — wrote: ‘Thus the problems are twofold: (1) to be fast but fair and (2) to collect and divide a clearly inadequate pie.’<sup>11</sup> In fact, it was never assumed by those involved at the outset that all claims recommended by Commissioners and approved by the Governing Council would be fully satisfied. But before turning to a more detailed examination of these two tasks and their relevance to this essay, we will quickly summarize the approach the UNCC has taken to its work and the outcome of those efforts over the past decade.

In 1991, the UNCC analysed its likely docket and looked to procedures that would be appropriate for various categories of claims. The docket was divided into six categories designated by the letters ‘A’ through ‘F’. Categories ‘D’, ‘E’ and ‘F’ are delineated by the nature of the claimant and are respectively the claims of individuals for over US\$100,000 (‘D’), corporations and other commercial entities (‘E’), and governments and international organizations (‘F’). Categories ‘A’, ‘B’ and ‘C’ were claims of individuals deemed to be of a more urgent character. The UNCC decided to resolve the A, B and C claims first, given the humanitarian urgency of these claims. As a consequence of this decision, there have been thus far two broad phases to the work of the UNCC. First, from the summer of 1991 to approximately the summer of 1996, the UNCC focused on the resolution of the A, B and C claims. Second, since the summer of 1996, the work of Panels has been directed at resolving the far fewer, but larger and more complex, D, E, and F claims. Payment of the A, B and C awards was authorized in tranches and were paid in their entirety by the end of September 2000.<sup>12</sup> A capped partial payment of the D, E, and F awards was authorized in tranches beginning in 1999.<sup>13</sup>

The first phase of the UNCC’s work is one of the most significant and underreported

<sup>9</sup> Report of the Secretary-General pursuant to paragraph 19 of Security Resolution 687 (1991), UN Doc. S/22559, 2 May 1991.

<sup>10</sup> SC Res 692 (20 May 1991).

<sup>11</sup> Caron, *supra* note 5 at 28.

<sup>12</sup> See Governing Council Decisions 17 and 73.

<sup>13</sup> Governing Council Decision 73 (25 June 1999) authorized payments of up to US\$100,000 for claims in the D, E and F categories. The ceiling on payments was increased to an initial payment of US\$5 million by Governing Council Decision 100 (15 June 2000).

success stories of the United Nations. Over two and a half million A, B and C claims were filed. The merits of all of these claims were determined and all the monies awarded were paid to the individual claimants within less than 10 years after the liberation of Kuwait. The guiding principle to the approach taken by the UNCC to the A, B and C claims was one of ‘practical justice’; that is, a justice that would be swift and efficient, yet not rough. The Commission placed these claims on a fast track, resolving them through ‘mass claims processing’ techniques, including clearly defined evidentiary standards and fixed amounts of damage for various forms of injury.<sup>14</sup> Large numbers of individuals suffered the greatest and most direct losses as a result of Iraq’s invasion and occupation of Kuwait and the dire situation in which many of these individuals found themselves demanded swift action.<sup>15</sup> The Commission’s response was appropriate and is an unparalleled success in the history of claims resolution. In terms of the UNCC’s first task (resolving the merits of claims), the humanitarian claims of individuals were processed first. In terms of its second task (satisfying awards), the A, B and C awards likewise were paid first.

During the second phase of its work, the UNCC has focused on the fewer, yet larger and more complex D, E and F claims and has adopted more exacting procedures appropriate to the changing face of the docket under consideration. The UNCC adopted a five-year work plan in 1998 and anticipates completion of its task of resolving the merits of these remaining claims by the middle of 2003. The UNCC has no timetable for satisfaction of the full amount of all D, E and F awards.

The decisions of the UNCC for all six categories of claims constitute an authoritative and conservative (given the jurisdictional limits and evidentiary requirements) record of what occurred to millions of individuals and thousands of commercial entities. This function is supported by the UNCC’s adoption of procedures that focus on the injured party (whether it be an individual, commercial entity, international organization or government, and whether or not that national’s government was a part of the Allied Coalition). For example, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the United Nations Development Programme (UNDP), and the United Nations High Commission for Refugees (UNHCR) have submitted the individual claims of more than 3,000 stateless persons. In earlier claims commissions, this aspect of the record of the impact of a war would simply have been lost.<sup>16</sup> As a *de facto* mechanism for truth-telling, the UNCC, by the scheduled

<sup>14</sup> See particularly the contributions by Michael Raboin and Christopher Gibson to Lillich, *supra* note 6.

<sup>15</sup> It must be remembered that more than 1,000,000 people, mostly workers from Bangladesh, Egypt, India, Jordan, Pakistan, the Philippines and Sri Lanka, had to leave Iraq or Kuwait after Iraq’s invasion on 2 August 1990. Indeed, the Commission resolved a consolidated claim by 1.24 million Egyptian workers concerning remittances in Category C.

<sup>16</sup> The broad inclusiveness of injured parties is reflected in the fact that Kuwait filed fewer than 7 per cent of the claims in Category A and roughly only 12 per cent of the claims in Category C. Remarkably, more than half of the approximately 6,000 claimants in Category C, individuals who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq’s invasion and occupation of Kuwait, were nationals of countries other than Kuwait. Kuwait filed 70,323 of the approximately 920,000 claims filed in Category A, a number topped by Egypt with 303,375, India with 112,026, and Sri Lanka with 92,739. In Category C, Kuwait filed 162,780 of the 1,240,000 claims.

completion of the resolution of claims in 2003, will have *conservatively* ascertained the amount of damages directly resulting from Iraq's invasion and six-month occupation of Kuwait. War and aggression impose many costs upon the world, not the least being financial. The tremendous estimates of the financial costs and human suffering that the war inflicted upon civil society in Kuwait and the region are turning out to be quite real. This record manifests a further noteworthy dimension to the distinction between determining the merits of the claims and the paying of awards. The task of determining the claims is, of course, a precondition to the separate task of satisfying the awards. But the determination of the merits of claims, regardless of eventual satisfaction, is itself a form of satisfaction.

### ***B The Vague Critique: Examining the Line between Justice to the Victim and Punishment of the Wrongdoer, between the Rule of Law and Rule through Law***

What critique might justify viewing the UNCC not as a compensation mechanism but rather as an international economic sanction either unfairly exacting retribution or inappropriately seeking political objectives other than compensation of injured parties?

It might be thought appropriate to include the UNCC in this symposium because it was set up after all as part of the initial ceasefire Security Council resolution which also created the sanctions regime placed on Iraq. But that resolution also created other institutions, the boundary demarcation commission, for example, and those institutions are not a part of this symposium for the simple reason that they are not viewed as a part of the 'sanctions' regime in place in Iraq. In this sense, it is not its origin *per se* that justifies the inclusion of the UNCC in this symposium. Rather it must be something about its nature.

Regarding its nature, the UNCC, as just described, is an institution that (1) determines the amounts of compensation owing to individuals and entities injured by Iraq's invasion and occupation of Kuwait and (2) when authorized by the UNCC's Governing Council, distributes monies to individuals and entities in satisfaction of the amounts recommended by Panels of Commissioners and subsequently approved by the Governing Council. The monies that are distributed are drawn from the Fund. But despite its *prima facie* nature as a compensation mechanism, a number of commentators have cautioned that the UNCC needs to be careful to not become a mechanism for something more akin to retribution than compensation. In voicing this concern, it is clear that these commentators often have some notion of the legacy of 'Versailles' in mind.<sup>17</sup>

This recitation leads us to two fundamental questions regarding the Commission

<sup>17</sup> See, e.g., Garmise, 'The Iraqi Claims Process and the Ghost of Versailles', 67 *NYU L. Rev.* (1992) 840, at 843 (arguing that the most notable similarity between the Commission and the reparations scheme established pursuant to the Treaty of Versailles is the exclusion of Iraq and Germany from the claims process).

and compensation mechanisms generally. First, when does a compensation mechanism and the decisions that it renders become illegitimate because of the procedures that it employs in reviewing the claims?<sup>18</sup> Second, under what circumstances does a compensation mechanism, such as the Commission, become an instrument of retribution against a vanquished nation?

In looking at these two questions, there is an echo of the Commission's two tasks: first to resolve the merits of claims presented; and second, to oversee the payment of awards from the Fund to those who suffered losses arising from Iraq's invasion and occupation of Kuwait. The first question relates primarily to the first task; the second question, the second task. It is crucial to recognize that an institution resolving the merits of claims and providing some measure of a record cannot by itself be an instrument of retribution. Retribution arises instead with the actual financial burden imposed. At what point (or dollar amount) does Iraq's liability transform the UNCC efforts from being a reimbursement of individuals and governments for their actual losses to an on-going punishment against Iraq for its past wrongful acts?

We examine the first question, procedural fairness, in Part 2 and ask primarily whether the Commission unfairly excludes Iraq from the processes by which it resolves claims, although we assert that the question is more complex than that. In Part 3, we turn to the question of whether the Commission's satisfaction of awards from the Fund plays a part in a system of retribution against Iraq.

## 2 The UNCC and the Resolution of Claims: Assessing Legitimacy

### *A Assessing Legitimacy of Claims Resolution in Mass Claims Institutions*

The legitimacy of the UNCC's resolution of the merits of a claim, as opposed to its facilitating payment of meritorious claims, has been the subject of some commentary. This is likely to be the case because one means of assessing such legitimacy is to inquire into the procedural fairness of the process, an analysis familiar to lawyers and legal scholars.

In approaching the question of whether the claims resolution process used by the UNCC is so fundamentally misplaced as to transform the UNCC into an instrument of retribution, we feel that an analysis of the due process afforded Iraq is important, but it is only one branch of the assessment. Due process is the only tool for analysis when the defendant faces only one trial. In that instance, the guarantees of an impartial adjudicator and rules of procedural fairness are a substitute for the likely more difficult task of assessing whether the adjudicator's decision in the particular case was

<sup>18</sup> Let us assume that the institution is otherwise legitimate. In the case of the UNCC, this requires placing to the side the question of whether the Security Council possessed the authority to create the UNCC.



substantively correct. However, when the defendant faces repeated claims, then we can also look statistically at the outcome of the many decisions so as to gain a sense of whether there is, for example, a rate of success for plaintiffs that is unusually high.

The following sections apply both types of analyses. We conclude that:

- 1 the UNCC has adopted procedures appropriate to the various categories in the docket in the sense that the legitimate interests of Iraq in the accuracy of such claims resolution have been protected;
- 2 the UNCC, through the provisions of the relevant Security Council resolutions, decisions of the Governing Council and the reports of the various Panels, has in fact limited — both in time and space — the liability of Iraq to losses that arose directly from Iraq's invasion and occupation of Kuwait; and
- 3 an analysis of the rates of recovery of claimants shows, if anything, a remarkably low rate of success.

### **B Legitimacy and Fairness in Terms of the Procedures of the UNCC**

The Commission has followed at least a two-pronged procedural approach to its docket.<sup>19</sup> Under one prong, the Commission's analysis of the millions of individual claims for amounts less than US\$100,000 filed in Categories A, B and C can best be described as 'mass claims processing'.<sup>20</sup> The Commission granted priority to the millions of small claims filed by individuals and awarded pre-set amounts for those claims deemed to be compensable regardless of the actual 'loss' to the claimant. The procedures adopted for Categories A, B and C are unfamiliar to some legal scholars because they are drawn from the mass claims experience of several legal systems. Most lawyers and legal scholars, however, approach the notion of due process in terms of case-by-case adjudication, an approach that would have been totally impractical given the large number of claims.

Under the other prong, the Commission has reviewed individually the claims filed by governments, corporations and other legal entities for those claims filed in Categories D, E and F. The more individualized scrutiny applied to larger individual claims and those claims filed by governments, corporations and other legal entities reflects an effort to reconcile the Commission's competing challenges of speedy resolution of claims and fairness to Iraq.<sup>21</sup>

Under both prongs, Iraq receives notice through the Commission's detailed 'Article

<sup>19</sup> See also Andrea Gattini's contribution to this symposium, at 161 and Crook, 'The UNCC and Its Critics: Is Iraq Entitled to Judicial Due Process?', in Lillich, *supra* note 6 at 77.

<sup>20</sup> Moreover, as noted by one commentator, the Commission's rules require corporate claimants to submit their entire claim with their initial Statement of Claim, including all documentary support, witness statements, expert evidence, and any other supporting documents. See Gibson, 'Mass Claims Processing: Techniques for Processing over 400,000 Claims for Individual Losses at the United Nations Compensation Commission', in Lillich, *supra* note 6, at 155.

<sup>21</sup> Brower, 'Lessons of the Iran-U.S. Claims Tribunal', in Lillich *supra* note 6, at 21–22, citing Provisional Rules at Art. 14 and Art. 35, para. 3.

16 Reports' of the types of claims to be heard in all categories of claims and the legal issues contained therein, along with the opportunity to present its views. Article 16 reports describe the type of claims presented by the upcoming instalments to be heard by the various Panels of Commissioners. The Article 16 reports also identify new legal issues presented by these claims and invite comments from concerned parties, including Iraq. These reports are sent to all governments which have claims filed before the Commission. Numerous governments comment; the governments of Iraq, Kuwait and the United States submit comments on a routine basis.

As far as the interests of Iraq in presenting its views on claims are concerned, the Article 16 reports go a great distance in satisfying any such interest. These reports distil the issues likely to arise and allow Iraq to file a focused statement of its views. It should be recalled that Iraq's basic liability for its invasion and occupation of Kuwait is not at issue. The legal issues present have primarily to do with the proof, valuation and directness, in a causal sense, of the losses asserted.

The Article 16 report mechanism, the primary mechanism available to Iraq in the case of Categories A, B and C, was further supplemented in Category D, E and F claims in order 'to permit Iraq to make its position known'.<sup>22</sup> In particular, the Commission has provided Iraq with the chance to review individual claim files for those claims filed in Categories D, E and F where it might be thought that Iraq has particular information in its control relevant to the resolution of the merits of the claim. (It needs to be recalled that in most cases Iraq has no particular knowledge of the loss that was suffered allegedly as a result of its invasion and occupation of Kuwait.) Thus, under this practice, the Commission identifies all claims in a particular instalment, or batch, of claims being heard by a Panel of Commissioners in a particular category that involve a contract with an Iraqi party. These contracts generally involve a letter of credit as part of the financing scheme for the transaction. This is particularly the case with respect to those claims deemed to be 'large and complex'.<sup>23</sup> The Panel of Commissioners issues a procedural order that directs the Commission to send the relevant claims files to Iraq and invites the Government of Iraq to offer any comments on the claims within one year of the date of the procedural order. As Iraq was a party to these transactions, it is assumed that it may have factual information in its possession that could affect the Commission's resolution of the claim.

A typical instalment in the 'E2' category of claims may include approximately 60–80 claims being sent to Iraq out of 200 total claims in the instalment. The remaining claims would involve transactions with non-Iraqi parties, decline in business claims, or claims for extra costs incurred as a result of the invasion, such as the evacuation of personnel or the purchase of gas masks. Iraq would have no factual

<sup>22</sup> Raboin, 'The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing', in Lillich *supra* note 6, at 153.

<sup>23</sup> The UNCC's standard practices, embodied in Decision 114, defines 'large and complex' claims to include those claims in which the amount sought by the claimant exceeds US\$10,000,000, the number of volumes of documents submitted is three or more; or verification and quantification of the claim is unlikely to be feasible within six months.

information to add to these claims as they were not involved in the underlying transactions or business. However, Iraq, as always, would receive notice of the factual and legal issues raised by such claims through the Article 16 reports.

More recently, for claims involving large amounts, the Commission has held oral proceedings at which Iraq has participated.

### *C Legitimacy and Fairness in Terms of the Jurisprudence of the UNCC*

The various limitations on the jurisdiction of the UNCC that arise in Resolution 687, various Governing Council decisions and the reports of various Panels of Commissioners all support an image of a compensation mechanism focused on the tortious or delictual responsibility for injuries which may be said to be the direct result (proximate cause) of Iraq's invasion and occupation of Kuwait. These limitations include:

#### *1 The Proximate Cause ('Direct Result') Limit on Compensability*

The Commission has ruled that its jurisdiction extends only to those losses or injuries directly related to Iraq's invasion and occupation. In its second report, the 'E2' Panel developed the concept of 'compensable area' as a presumptive indicator of a direct loss. With very limited exceptions, the Commission's jurisdiction extends only to those losses suffered as a result of a 'military operation or threat of military action by either side during the period 2 August 1990 to 2 March 1991'.<sup>24</sup> This decision left thousands of claims submitted by claimants in countries such as Egypt, Syria, Turkey, the United Arab Emirates and Cyprus, outside the Commission's jurisdiction. No actual military operations ever took place in any of these countries, yet no doubt thousands of people, small businesses, and partnerships in these countries suffered tremendous economic losses as a distant result of Iraq's invasion and occupation of Kuwait.<sup>25</sup>

#### *2 The Exclusion of Pre-existing Debts*

Early in its existence, the Commission undertook to evaluate the meaning of the 'arising prior to' exclusionary clause contained in Resolution 687. At the time of Iraq's invasion of Kuwait, its foreign debt stood at an astounding US\$42 billion,

<sup>24</sup> Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of 'E2' Claims (S/AC.26/1999/22), at paras 60–62, citing Governing Council decision 7, para. 21(a).

<sup>25</sup> The Commission has limited the compensable areas to those areas that were the subject of 'actual and specific military operations' or a 'credible and serious' threat of military action which ultimately was connected to Iraq's invasion and occupation of Kuwait and which was within Iraq's military capability. In addition to Iraq and Kuwait for the period 2 August 1990 through 2 March 1991, the Commission has deemed the following locations to fall within the compensable period: 1) that portion of Saudi Arabia within the range of Iraq's scud missiles during the period 2 August 1990 through 2 March 1991; 2) that portion of the Persian Gulf north of the 27th parallel; 3) Israel during the period 15 January 1991 through 2 March 1991; 4) Jordanian airspace during the period 15 January 1991 through 2 March 1991; 5) Bahrain during the period 22 February 1991 through 2 March 1991; and 6) Qatar during the period 25 February 1991 through 2 March 1991. See Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of 'E2' Claims (12 October 1999) S/AC.26/1999/R.40, at para. 77.

compared with its annual gross national product of US\$16 billion.<sup>26</sup> This foreign debt had accrued during Iraq's protracted conflict with neighbouring Iran. The Commission interpreted Resolution 687 to the effect that debts associated with the supply of goods or services that took place more than three months before Iraq's invasion of Kuwait on 2 August 1990, or before 2 May 1990, constituted pre-existing debts of Iraq. Claims based on such pre-existing debts are excluded from the Commission jurisdiction.<sup>27</sup>

### 3 *The Exclusion of the Costs of Prosecuting the War*

The emphasis on the UNCC compensating victims of the war is likewise present in the exclusion of claims 'for the costs of the Allied Coalition Forces, including those of military operations against Iraq'.<sup>28</sup>

### **D Legitimacy as May be Seen in Terms of the D, E, and F Awards of the UNCC**

The term 'compensation' implies a payment or recompense to restore an injured party to their pre-injury condition. On the other hand, the term 'retribution' connotes more than a mere repayment; it goes beyond restoration to punishment of the perceived wrongdoer. A careful review of the outcomes for the D, E and F claims before the Commission affirms the fairness of the proceedings and impartiality of the Commission *vis-à-vis* Iraq. The Commission's decisions manifest a process that imposes a high evidentiary standard on claimants, thereby protecting Iraq from frivolous claims and unwarranted windfall to claimants. Indeed, the statistics can be read to suggest that the Commission is harsh on claimants, although much further analysis would be needed to substantiate such a conclusion or the reasons for it.

We have reviewed carefully the results rendered by the Commission with respect to

<sup>26</sup> In a letter to the Security Council, dated 16 August 1991, the Government of Iraq confirmed that its 'external debt and financial commitments' totalled US\$42,097 million. 'Letter from the Permanent Representative of Iraq to the United Nations, addressed to the Security Council' (S/22957). This figure has been described as 'one of the lowest estimates' of Iraq's foreign debt at the time of its invasion and occupation of Kuwait in 1990. See, e.g., Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'E2' Claims (3 July 1998) (S/AC.26/1998/7), at para. 72.

<sup>27</sup> Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'E2' Claims (3 July 1998) (S/AC.26/1998/7), at para. 90. Based on existing commercial practice in Iraq before its war with Iran skewed its commercial transactions, the 'E2' Panel determined that '[a] foreign party contracting with Iraq [reasonably] could have been expected to have been paid within three months' of completion of performance under a contract, *ibid.*, at para. 89.

<sup>28</sup> Decision 19.

the claims in the E2 category so as to assess the Commission's actions.<sup>29</sup> This particular category of claims includes all those filed by corporations which are based outside of Kuwait.<sup>30</sup> We focus on the non-Kuwaiti-based corporate claims because one would expect that claims filed by corporations based in Kuwait would receive a higher pay-out rate by the Commission for the simple reason that these corporations were based at the centre of the conflict.<sup>31</sup>

We reviewed those claims in the E2 category in which the claimant sought to recover a loss of profits associated either with an interrupted contract or with a general decline in its business. It is these types of claims where it could be argued that claimants perhaps would seek unfairly to recover windfall profits.<sup>32</sup> The Commission's careful scrutiny of these claims, however, is evidenced by the meagre 10 per cent success rate for such claims.<sup>33</sup> This 10 per cent success rate on loss of profits claims

<sup>29</sup> It is not clear how the A, B and C awards could be analysed for a similar measure. As discussed above, the Commission resolved the millions of small claims filed by individuals through more 'mass claims process' techniques, including computerized matching of claims and verification information, sampling, individual review of some claims, and the statistical modelling of others. And, most importantly, the amounts of damages were fixed.

However, an examination of the recipients of awards from the Commission belies any claim that the Commission seeks retribution against Iraq. For example, the Commission received approximately 920,000 Category A claims from 77 governments and 13 offices of three separate international organizations. These claims sought a total of US\$ 3.6 billion. Kuwait filed slightly more than 7.5 per cent of these claims. India, not a member of the Allied Coalition, filed 112,026. By contrast, Egypt filed 303,375, or roughly one-third of the Category A claims, and Bangladesh filed nearly as many claims as Kuwait.

<sup>30</sup> With the exception of the specialized claims filed by corporations in the oil and gas industry and corporations in the construction industry, those claims falling into their own separate E panels.

<sup>31</sup> Indeed, the most recent statistics available indicate that claimants in Category E4 (Kuwait) have recovered at a rate of approximately 30 per cent of the claimed amounts compared to a 9 per cent recovery rate for claimants in the E2 category. See UNCC web site, Status of Claims Processing. Not surprisingly, many of these Kuwaiti corporate claimants suffered disruption of their business operations, often accompanied by theft or destruction of tangible property and/or damage to real property. One would expect these claimants, which by default are located at the centre of the compensable area, to have suffered the greatest losses, and, more importantly, have the ability to satisfy the Commission's evidentiary standards, including being able to document their losses. Moreover, the government of Kuwait quite understandably made a substantial effort to aid its individual and corporate nationals in preparing their claims for submission, thereby eliminating the collective action problem present in other countries.

<sup>32</sup> Most of these non-Kuwaiti corporations likely understood the risks associated with doing business in the region, such as delayed payment and charged premium prices to the Iraqi buyers to offset these risks. Fewer of them, however, would have expected that they would have workers in the area taken hostage following an invasion of Kuwait or that they would have their equipment and supplies looted or summarily expropriated by the Iraqis. Not surprisingly, therefore, these non-Kuwaiti corporate claimants have fared relatively better before the Commission for claims relating to losses of tangible property or evacuation of foreign employees and staff from Iraq or Kuwait.

<sup>33</sup> To date, the Commission has reviewed loss of profits claims in the E2 category that involved total claimed amounts of US\$1,750,810,237. The Commission has recommended total awards of US\$179,638,505. The Commission has completed seven of its scheduled 15 instalments as of the writing of this article. The authors have reviewed the reports and recommendations prepared by the panel of commissioners for each of these seven instalments in compiling this information. The statistics remain on file with the authors.

compares with an overall success rate of 9 per cent for all types of losses, including loss types that are excluded, in Category E2. Recommended awards of US\$0.10 for every US\$1.00 claimed hardly represents the type of rubber-stamping of claims feared by some of the Commission's early critics.<sup>34</sup> Rather, our review of the claims in which a non-Kuwaiti corporation in the E2 category of claims sought to recover lost profits on an interrupted contract and lost profits on a decline in business reveals the care, if not tight-fisted approach, taken by the Commission.

### **E Conclusion**

There may be a question, in our view, as to whether and why the UNCC has been overly stringent in resolving the merits of particular claims, but there is little doubt, we believe, that the UNCC has adopted procedures appropriate to the docket before it and appropriately protective of Iraq's legitimate interests in such resolution.

## **3 The UNCC and the Legitimacy of the 'Burden' of Its Awards on Iraq**

### **A Assessing the Legitimacy of the 'Burden' of State Responsibility**

At the outset of this essay, we asked whether the award of monies in full or partial satisfaction of the decisions of a claims institution, even if those decisions themselves are legitimate, may be of such a significant amount given the circumstances of the debtor state, or be imposed upon the debtor state in such a short period of time, that the extraction of such funds from the debtor state may be said to be punitive or unwise. A part of the vague criticism of the UNCC rests on this possibility.

In this section, we review the mechanism for satisfaction of the UNCC's awards and the legitimacy of the burden that such satisfaction places on Iraq. But at the outset, we stress that a criticism based on this view is applicable not only to liability based on injuries directly arising from the breach of a norm of *jus cogens* (such as the prohibition on *jus cogens* aggression in the case of Iraq's invasion and annexation of Kuwait), but also to all debts which arise under the general doctrines of state responsibility. This recognition is crucial because it points to the incompleteness of this line of criticism of the UNCC, incomplete in the sense that there is not a general call for a major rethinking of the legitimacy of liability under state responsibility in terms of the ability of the debtor state to bear such costs.

### **B The Present Extent of the Burden Placed on Iraq**

It might be said that the Commission's second function, as the payment vehicle for awards, is a hidden motivation for continued sanctions against Iraq. This is inaccurate in the sense that awards may only be satisfied to the degree that the sanctions on the export of oil are lifted, not maintained. It is true, however, that satisfaction of the awards will require the continuation of a system of diverting some

<sup>34</sup> See, e.g., Garmise, *supra* note 17.

portion of Iraq oil revenues to the Fund created for that purpose. The awards of the UNCC are not enforceable outside of the Fund mechanism provided for in Resolution 687.

In devising the system for satisfaction of the awards, the Security Council in 1991 had few sources of hard currency from Iraq on which it could draw. Iraq's future oil revenue seemed the most likely prospect. Basically the idea was that a percentage of Iraq's future oil revenue would go to pay for the damage it caused through its invasion and occupation of Kuwait. The Security Council debated the amount of this percentage, with a ceiling of 30 per cent (today 25 per cent) finally being settled upon, in part because it was approximately the percentage spent on the military by the Iraqi leadership prior to the Gulf War.

As the economic sanctions continued for longer than originally envisioned, an exception to the regime developed allowing Iraq to sell oil on the world market through a programme administered by the United Nations. The so-called oil-for-food programme permits Iraq to sell pre-determined quantities of oil, while the United Nations receives the receipts from these oil sales and allows Iraq to repatriate the proceeds only in the form of purchases of food and medicine.<sup>35</sup> In the process, the United Nations diverts 25 per cent of the proceeds to the Fund administered by the secretariat of the Commission.<sup>36</sup> The Commission, in turn, uses this money, as authorized by the Governing Council, to pay awards to successful claimants and to fund its operations.

On the basis of pre-war economic statistics, Iraq was expected to produce US\$21 billion annually in oil revenues against annual imports of US\$8 billion to cover civilian demands. The Council estimated that 22 per cent of Iraq's oil revenue would be needed by Iraq to service its pre-existing foreign debt. In this context, the Security Council concluded that Iraq could absorb up to a 30 per cent diversion of its oil revenues to the Fund without placing undue demands on Iraq, its economy and people.<sup>37</sup>

<sup>35</sup> SC Res. 705 (1991).

<sup>36</sup> The Security Council originally set the figure at 30 per cent, see SC Res. 705 (1991), but the Security Council lowered the figure to 25 per cent in 2001.

<sup>37</sup> Note annexed to a letter, dated 30 May 1991, from the Secretary-General to the President of the Security Council (S/22661), at para. 7. The Governing Council, in determining the level of Iraq's contribution to the compensation fund, must consider the likely amount of Iraq's oil revenues, the amount of Iraq's past military spending, the requirements to service Iraq's foreign debt, and the need for reconstruction and development of Iraq. Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 at 5, UN Doc. S.22559 (1991). Iraq's expected ready source of cash in the form of oil exports contrasts sharply with the situation in Germany following its defeat in World War I. The reparations scheme adopted pursuant to the Treaty of Versailles erroneously calculated that the post-war German economy could generate a sufficient trade surplus to cover its reparations obligations. See, e.g., J. M. Keynes, *The Economic Consequences of the Peace* (1920), at 208, ('[I]n what export trade is German labor going to find a greatly increased revenue . . . The annual surplus which German labor can produce for capital improvements at home is no measure, either theoretically or practically of the annual tribute which she can pay abroad.').

### ***C The Political and Legal Dimensions of State Debt and the Legitimacy of the UNCC Burden***

As emphasized at the beginning of this section, the legitimacy of placing collective responsibility on a state for an international debt is a foundational question for state responsibility generally. Evaluated in that light, the system in place under the UNCC is, if anything, more responsive to the burden on the debtor state than is generally the case. In particular, all payments must be authorized by the Governing Council, which makes its decisions on the basis of consensus and taking into account, *inter alia*, the needs of Iraq.<sup>38</sup>

There is no doctrine in international law under which a state may make a declaration of bankruptcy or unilaterally seek to reorganize its debts. We do not note this to justify the lack of such a doctrine, but rather to emphasize that the restructuring of state debt remains at present in the political, rather than the legal, realm. Several times in recent years, the international community has been called upon to relieve the debt burden saddling developing nations. The highly indebted poor countries (HIPC) have been forced to seek relief through political means as there is no equivalent under international law of a bankruptcy regime. These political efforts have resulted in arrangements such as the Paris Club and the HIPC initiative, to cite two examples.

In this sense, it seems particularly curious to us that it would be suggested that it is appropriate to limit the compensation to victims of Iraq's aggression while simultaneously maintaining the right of state creditors to pursue debts against Iraq predating the Gulf War. This 'pre-existing debt', excluded from the jurisdiction of the UNCC, remains unpaid for the most part to this day. Yet amidst the concern voiced over the burden that satisfaction of the awards of the UNCC might place on Iraqi society there has been no suggestion that the comparable pre-existing debt of Iraq should be forgiven by those creditor states. Resolution 687 explicitly demands that Iraq 'adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt'.<sup>39</sup> Ironically, some of those states who are most critical of the UNCC and the burden it places on Iraq are also substantial creditors of Iraq's pre-existing debt.

One can certainly envision legal principles to guide the extent of debt to be borne by a state, but such principles, given current practice, remain an area for the progressive development of the law.

## **Conclusions**

The UNCC is not an economic sanction, rather it is an institution that has delivered practical justice to millions of victims of Iraq's invasion and occupation of Kuwait. It has done so in a remarkably short period of time and will very likely complete its work before the end of 2003.

<sup>38</sup> *Ibid.*

<sup>39</sup> SC Res. 687, at para. 17.



The decade of economic sanctions in place on Iraq, and the suffering of the Iraqi people during that same period, has not only led to a scrutiny of the law of sanctions, the central focus of this symposium, it also has clouded the nature, efforts and successes of the UNCC. This is an unfortunate spillover. Peremptory norms should be reinforced as possible. The UNCC's record of the Gulf War aggression is a part of the movement for accountability and is important in its own right. Moreover, the authorization of satisfaction of the awards of the UNCC will take place in the context of the UNCC's Governing Council. That Council will no doubt take into account both the interests of the victims of that aggression and the capacities of the Iraqi people to indirectly bear the costs of compensating those who were injured. In our view, however, if debt relief is sought to be provided to Iraq, then such relief should be considered in the light of the entire context of Iraqi debt. In doing so, appropriate choices may be made between the pre-existing debt incurred contractually with Iraq primarily during its war with Iran and the debts that tortiously resulted from the Gulf War in terms of trauma to individuals, the destruction of property and the degradation of the environment that sustains us all.