The United Nations Compensation Commission: time for an assessment?

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Introduction

On 2 August 1990, Iraq invaded Kuwait. Occurring less than nine months after the fall of the Berlin Wall, this event coincided with downing of a new era in international relations, free of the bipolarism which had characterized the Cold War period. The United Nations Security Council was therefore able to find the necessary majority to enforce its will very quickly, condemning the Iraqi invasion and occupation of Kuwait and subsequently organizing an unprecedented military operation to force Iraqi troops from Kuwaiti territory\(^1\). The Coalition of States mandated by Security Council Resolution 678 at the end of November 1990 achieved the goal of liberating Kuwait at the beginning of March 1991. However, at that time, the Iraqi military operations against Kuwait and the war between Iraq and the UN-mandated Coalition had already caused significant loss, damage or injury to a large number of individuals, corporations and States\(^2\).

Resolution 687, the so-called “cease-fire resolution” adopted by a unanimous vote of Security Council members, set out the steps to be followed for restoring peace and security in the region: the re-establishment of good neighbourliness between Iraq and Kuwait (para. 2), the demarcation of the boundary between the two States (paras. 3 and 4), the creation of a United Nations observer mission (para. 5), disarmament (paras. 7-14), an embargo (paras. 20-29), and a mechanism to provide compensation to individuals, corporations and States which suffered damage because of the Iraqi invasion and occupation of Kuwait (paras. 16-19). This compensation mechanism was to be composed of a fund and of a commission charged to administer the fund. This mechanism was outlined in Resolution 687 and subsequently explained in more detail by a report of the Secretary-General of 2 May 1991\(^3\), following the mandate he received in paragraph 19 of Resolution 687. Resolution 692, endorsing this Secretary-General’s report, materially created the United Nations Compensation Commission (UNCC) and the Compensation Fund.

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The legal basis that allowed the payment of compensation to be imposed on Iraq for all damage caused as a result of its unlawful acts had already been established already in Resolution 686. Its paragraph 2 demanded that Iraq “accept its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States and their nationals and corporations as a result of the invasion and illegal occupation of Kuwait by Iraq”⁴. The establishment of Iraqi responsibility was reaffirmed in paragraph 16 of Resolution 687, a provision which explicitly included responsibility for environmental damage. The Security Council confirmed that Iraq was “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”⁵. As Professor Bothe judiciously remarked, the competence of the UNCC “only relate[d] to a particular unlawful act and […] therefore other basis for compensation which may also exist [were] not relevant […] The only rule which the Commission [had] to apply [was] that of the duty to compensate damage caused by the violation of the prohibition of the use of force”⁶.

In Resolution 687, the establishment of Iraq’s responsibility is coupled with the decision, figuring in paragraph 18, to give compensation to eligible subjects through an appropriate mechanism. The interplay between paragraphs 16, 18 and 19 of Resolution 687 – i.e. between Iraqi responsibility, its obligation to pay compensation and the guidelines given to the Secretary-General for the establishment of the compensation commission and of the fund – gave birth to the UNCC system. The then Secretary-General, Javier Pérez de Cuéllar, in its report of 2 May 1991⁷, suggested that the compensation commission be a subsidiary organ of the Security Council, and not a judicial organ to be created by treaty.

The main goal of Resolution 687 was the restoration of peace and security in the Gulf region. However, this resolution appeared to be, at the time of its adoption, more than an attempt to restore peace and security. It has been defined “a harbinger of a renewed effort by the Security Council to empower the UN system through the Charter of the United Nations”⁸. This “renewed effort” had been rendered possible by the new political balance that arose from the collapse of the Soviet Union and the ensuing predominance of liberal values, which, at the international level, permitted the Security Council to fully exercise its authority for the first time⁹. Resolution 687 is clearly imbued with the Security Council’s desire not only to end a war and sort

⁷ Report of the Secretary-General, op. cit.
⁸ Roberts, op. cit., p. 594.
⁹ Ibidem.
out the post-war situation, but also to set new standards for its own action in the domain of the maintenance of international peace and security.

Not only has the UNCC thus become a symbol of this exceptional effort by the United Nations, but it has also introduced several novelties when compared with compensation commissions of the past. The UNCC, in effect, was neither the fruit of the imposition of the victor’s law over the vanquished power, as was the case in the Versailles Treaty, nor the result of an intergovernmental agreement, such as, for instance, that which created the Iran-United States claims tribunal. It was not supposed to be a court, nor an arbitral tribunal. It was, on the contrary, an original international organism, based on a special procedure adapted to the circumstances and to the claims at stake, of which the primary goal was effectiveness, *i.e.* to bring justice, within the shortest possible timeframe, to the almost 2.7 million individuals who were victims of the Iraqi invasion and occupation of Kuwait.

This article will explore the most innovative aspects of the UNCC in its composition (1), its procedure (2) and its material competence (3) and will also try to answer the question of whether the Compensation Commission is capable of inspiring initiatives for future post-war settlements or, on the other hand, is destined to remain a unique occurrence (4).

1. An original composition

The UNCC was composed of three organs: the Governing Council, the political decision-making organ, made of 15 members each representing the 15 members of the Security Council at any given time; the Panels of Commissioners, each made of three commissioners, experts in various fields, charged with examining claims and suggesting payments; and the Secretariat, the administrative organ of the Commission responsible for the administration of the Compensation Fund.

This structure is unique in the history of claims commissions. Claims commissions of the past were, in effect, judicial bodies. They were usually composed of one sole organ resolving disputes on international law grounds which was constituted by arbitrators or commissioners, appointed by each of the parties to the dispute and

10 The expression “compensation commissions” as used in the present article covers claims and compensation commissions, arbitral tribunals, international courts and mixed commissions dealing with compensation issues. For an overview of the notion of mixed commissions see Boisson de Chazournes and Campanelli, “Mixed Commissions”, in *Max Planck Encyclopedia of Public International Law, Second Edition*, forthcoming.
12 See www.iusct.org.
generally chaired by a neutral arbitrator or commissioner\textsuperscript{14}. The UNCC, on the contrary, had a dual structure with separate political and fact-finding organs. Although it possessed some similarities with judicial bodies, the UNCC did not perform a purely judicial function: the Secretary-General in his report of 2 May 1991 affirmed that “the commission is not a court or an arbitral tribunal before which the parties appear, it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved”\textsuperscript{15}. Indeed, no organ of the UNCC has been called to decide legal issues, because the Security Council, in its Resolution 687, had already established Iraq’s responsibility under international law for a series of unlawful acts, a responsibility that did not need to be reviewed or reassessed by the UNCC’s organs\textsuperscript{16}.

Moreover, Article 31 of the UNCC’s Provisional Rules for Claims Procedure provided that the law to be applied by commissioners in the performance of their tasks was constituted by Security Council resolutions, Governing Council decisions and “in addition, where necessary […] other relevant rules of international law”\textsuperscript{17}. It appears quite clear that “other relevant rules of international law” were seen as a subsidiary source, to be used only “where necessary”. In other words, as opposed to traditional claims commissions, the UNCC operated on the basis of a \textit{lex specialis}—that mostly developed through Governing Council decisions—and only when necessary on the basis of international law\textsuperscript{18}.

The main reason justifying both the Compensation Commission’s tripartite structure and its applicable law was that, in contrast to claims adjudication experiences of the past, the Iraqi invasion and occupation of Kuwait produced an incredibly high number of victims seeking compensation. No prior claims commission had adjudicated more than 20,000 claims\textsuperscript{19}, while the UNCC was expected to go through more than 2 million files. Considering that traditional claims commissions proceeded at a pace rarely exceeding 1,000 claims per year, these exceptional circumstance compelled the Secretary-General and the Security Council to establish a far faster mechanism.

\textsuperscript{14} See Bederman, “Historic Analogues of the UN Compensation Commission”, in Lillich, \textit{op. cit.}, pp. 257 ff.
\textsuperscript{18} Bederman, \textit{op. cit.}, p. 286.
\textsuperscript{19} \textit{Ibidem}, p. 270.
a) The Governing Council

The Governing Council, as already mentioned, was the political decision-making body, composed of representatives of the Security Council members. As an author has pointed out, “the (external) creator of the Commission, the Security Council, and the (internal) policy-maker of the Commission, the Governing Council are effectively the same.”\(^{20}\) The only difference with the Security Council is that at the UNCC Governing Council there was no veto power. The composition of the Governing Council could have allowed, in theory, the participation of Iraq, if elected as a non-permanent member of the Security Council. However, this (unlikely) situation never eventuated.

The composition of the Governing Council guaranteed the constant presence of States that participated in the Coalition which defeated Iraq. The independence and impartiality of this organ can thus be challenged. As a consequence, as it has been pointed out\(^{21}\), the UNCC should not be considered a strictly super partes body. Furthermore, in the already cited Secretary-General report of 2 May 1991 there was no requirement that the Governing Council act according to criteria of impartiality and independence. However, as regards the decisions on claims, it should be noted that throughout its practice the Governing Council never once refused the recommendations of the Panels of Commissioners, de facto limiting its decision-making role vis-à-vis the reports of the Panels to mere adoption. Consequently, one could argue that as a matter of fact the organ which exclusively took decisions on filed claims was not the Governing Council, but rather the Panels of Commissioners, which was also the organ, as we will subsequently see, in a better position, because of its characteristics, to deal with the evaluation and the awarding of claims.

b) The Panels of Commissioners

The Panels of Commissioners were composed of experts in fields relevant to the claims they were called upon to examine and all of them were chosen on the basis of their high international standing, with due regard to their “geographical representation, professional qualifications, experience and integrity”\(^{22}\), in order to guarantee their impartiality. As to their independence, the Commissioners were chosen from a list of experts established by the Secretary-General, and appointed by the Governing Council on the basis of recommendations made by the UNCC Executive Secretary\(^{23}\).

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21 Campanelli, op. cit., p. 122.
22 Report of the Secretary-General, op. cit.
23 See Art. 18 and 20 of the Provisional Rules for Claims Procedure, op. cit.
Furthermore, Commissioners were required to act in their personal capacities and not as representatives of their countries of origin\textsuperscript{24}.

These characteristics may be considered as proof of the Commissioners’ independence and impartiality, which are typical and necessary elements of members of claims commissions. It must also be noted, however, that the UNCC Panels of Commissioners also possessed a series of original features by reference to commissioners of past claims commissions. First of all they were not always legal experts — often they were rather experts in fields such as biology, medicine, chemistry, financing, engineering etc. Secondly, they were not directly appointed, neither by the claimant Governments, nor by Iraq. Thirdly, the Commissioners were neither acting arbitrators nor as judges, but rather “claims adjustors”\textsuperscript{25}, working on the sole basis of the evidence presented by claimants and with only a duty of notification to Iraq (with the exception of environmental claims)\textsuperscript{26}. Fourthly, they did not have formal decision-making powers, but only recommendatory powers towards the Governing Council (even if, as noted above, the Governing Council never used its powers to review or return claims to the Panels for reconsideration).

As a result, the interplay between the Governing Council and the Panels of Commissioners is also original: the former stated the principles to be applied to different categories of claims, without having the power of examining specific cases, but only to adopt or to refuse the Panels of Commissioners’ recommendations; while the latter’s task was that of examining the claims, following Governing Council decisions on claims processing, without a formal decision-making power.

c) The Secretariat and the Compensation Fund

The Secretariat, headed by its Executive Secretary, is the administrative organ of the Compensation Commission, servicing both the Governing Council and the Panels of Commissioners. In contrast to classic secretariats of claims commissions, its powers were not limited to administrative functions as the Secretariat made preliminary assessments of claims “in order to determine whether they [meet] the formal requirements established by the Governing Council”\textsuperscript{27}. These assessments were to be taken into consideration by the Panels of Commissioners, according to Article 34 of the procedural rules\textsuperscript{28}. This means that the Secretariat was granted an active participation in the process of adjudicating on the claims.

\textsuperscript{24} Art. 21 of the Provisional Rules for Claims Procedure, op. cit.
\textsuperscript{26} See infra p. 10.
\textsuperscript{27} Art. 14 of the Provisional Rules for Claims Procedure, op. cit.
\textsuperscript{28} Provisional Rules for Claims Procedure, op. cit.
The Secretariat was also charged, as already noted, with administering the Compensation Fund, which is part and parcel of the UNCC system. The Compensation Fund is a unique feature of the UNCC. In traditional claims commissions, binding decisions of the commissioners or arbitrators were addressed to the concerned State which was obliged to pay compensation directly to the claimant State. At the UNCC, on the other hand, successful claimants are indemnified with money taken from the Compensation Fund. The Compensation Fund is supplied exclusively through a percentage of the revenues obtained through the exports of Iraqi petroleum and petroleum products. A fixed percentage of the Iraqi revenues in the petroleum export sector — which was, until late 2003, under the control of the United Nations through the Oil-for-Food programme — has been destined and will continue to be destined for the Compensation Fund throughout the payment process, which is still far from being concluded. The money in the Compensation Fund is used not only to pay successful claimants, but also to pay all the costs of the UNCC proceedings, facilities and personnel. Iraq, however, does not have any form of control over the payments. It has been stressed that this situation where only the defendant State — Iraq — pays for the Commission’s costs without the possibility of benefiting from the Compensation Fund money for promoting its own interests before the UNCC (with the exception, however, of environmental claims) “create[d] an imbalance in the proceedings which flies in the face of elementary justice”.

2. An original procedure

Paragraph 16 of Resolution 687 exercised a fundamental influence over the UNCC procedure in at least two respects. First, the determination of Iraq’s responsibility ex ante meant that neither the Governing Council, nor the Panels of Commissioners were called to deal with State responsibility issues, and this enabled the Commission to speed up the process of evaluating claims. Second, eligible claimants were not only private persons (whether individuals or private corporations), as has usually been the case before traditional claims commissions, instead States too were permitted to file claims on their own behalf.

29 This percentage varied throughout the time from 30% of the years 1991-2000 (see Security Council Resolutions 705 of 1991 (UN Doc. S/RES/705), to 25% of the years 2000-2003 (see Resolution 1330 of 2000 (UN Doc. S/RES/1330) and has been fixed since the year 2003 at a rate of 5% (see para 21 of Resolution 1483 of 2003, UN Doc. S/RES/1483; para 24 of Resolution 1546 of 2004, UN Doc. S/RES/1546; para. 3 of Resolution 1637 of 2005, UN Doc. S/RES/2637; and para. 3 of Resolution 1723 of 2006, UN Doc. S/RES/1723).


31 Of the 52.4 billion US$ awarded by the UNCC to successful claimants, only 22.5 billion US$ had been paid in August 2007 and 29.9 billion US$ still remain to be paid. See www.uncc.ch.

32 See infra p. 10.

The approach of the UNCC to procedural issues arising in its treatment of claims is also very original. From the first days of its activities, the Governing Council issued guidelines designed to assist the Panels of Commissioners in the performance of their tasks. The claims were divided by the Governing Council, in its first decision, into six categories, named from “A” to “F”.

Category “A” was for individuals who fled from Kuwait or Iraq as a result of the invasion or occupation of Kuwait. Category “B” was for claims in relations to deaths or serious personal injury resulting from the invasion or occupation of Kuwait. Successful claimants of categories “A” and “B” were awarded lump-sums previously determined by the Governing Council. Category “C” concerned individuals claiming for damages up to US$ 100,000, while category “D” was intended for individuals claiming for damages above US$ 100,000. Category “E” was for corporations and other legal entities and category “F” regarded claims of governments and international organizations. Categories “E” and “F” were further divided into several subcategories, for each of which the Governing Council established a separate Panel of Commissioners. Subcategory “E1” concerned claims made by the oil sector. Subcategory “E2” claims were claims of non-Kuwaiti corporations that did not fall into any other subcategory of the “E” category. Subcategory “E3” related to claims of non-Kuwaiti corporations belonging to the field of construction and engineering (excluding corporations of the oil sector). “E4” claims were those of Kuwaiti corporations (excluding claims of oil corporations). Subcategory “F1” concerned claims or losses suffered by States and international organizations in connection with departure and evacuation of individuals and for damage to property belonging to States and international organizations. “F2” claims were those of Jordan and Saudi Arabia. Subcategory “F3” dealt with claims filed by Kuwait, excluding environmental claims. Subcategory “F4” concerned claims for environmental damage. Finally, subcategory “E/F” related to claims in the field of export guarantee and insurance submitted both under category “E” and category “F”.

The six claims categories were divided into two main groups, namely urgent and non-urgent claims. Urgent claims were those belonging to categories “A”, “B” and “C” (all concerning claims of individuals) which were given priority over the other, non-urgent, categories. It is the first time in the history of claims commissions that such a meticulous and sophisticated categorization was made. The adaptation of procedural and evidentiary features depending on the claims' characteristics is also unique. Such particularities have been clearly dictated by the context of mass processing and inspired by the necessity to give practical justice, within a short delay of

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35 Provisional Rules for Claims Procedure, op. cit.
36 Ibidem.
time, to the claimants – especially those who filed claims belonging to urgent categories.

As regards the procedure before the UNCC, it should be noted that this was not exactly an adversarial procedure, fully based on elements of the classical concept of “due process of law” (i.e. a right to defence, a balance in the burden of proof and a reasonable period of time in the settlement of the dispute). There were undeniably several elements of due process in the UNCC procedure, in particular the attention to the fast treatment of claims. However, a true right to defence for Iraq and a perfect balance in the burden of proof was clearly lacking. According to the debates that surrounded the aftermath of the Secretary-General report of 2 May 1991, it was necessary that “some element of due process of law be built into the procedure.” However, this path was not followed during the negotiations for the creation of the UNCC and the right to due process of law has been restricted. The rationale for this was that the requirement of a minimum standard of right to defence was to be balanced by the claimants’ right to have their claims adjudicated within the shortest possible period of time. Iraq’s right to defence was thus limited to its submission of its views and opinions to the Panels of Commissioners (the latter, however, being obliged neither to endorse these comments, nor to mention them in their reports). Iraq could do so in three cases, namely: at the preliminary assessment of the claims made by the Secretariat (article 16 of the Provisional Rules); where the Panels of Commissioners, in their discretion, determined that a case was “unusually large and complex” permitting Iraq to provide written submissions and to participate in oral proceedings (article 36 (a) of the Provisional Rules); and for environmental “F4” claims for which, because of the “complexity and the limited amount of relevant international practice,” Iraq was allowed not only to submit its views, but also to benefit from the assistance of experts for preparing its comments (Governing Council Decision 124).

As regards a balance in the burden of proof, as already mentioned, the procedural rules elaborated different burdens for different claims categories: for categories considered as urgent, evidentiary requirements were lower than those required for non-urgent claims. For categories “A” and “B”, for instance, the claimant simply needed to present documentary evidence of the relevant facts and even a written statement of the claimant was in some cases considered sufficient. For category

39 Report of the Secretary-General, op. cit.
40 Campanelli, op. cit., p. 125.
41 See supra para. 1 (c) at p. 7.
43 Governing Council Decision 124, op. cit
44 See Art. 35 (2) (a) of the Provisional Rules for Claims Procedure, op. cit.
“C” claims, the procedural rules required “appropriate evidence of the circumstances and amount of the claimed loss”45. Finally, claims in categories “D”, “E” and “F” were to be supported “by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss”46. Urgent claims benefited from a simplified evidence regime – especially lump-sum claims – and for non-urgent claims (where higher amounts of money were at stake), evidence was to be more fully substantiated. This multi-speed regime for evidence is another unique feature of the UNCC and it answered to the need for rapid treatment of individuals’ urgent claims in particular. Indeed, it is not a coincidence that claims categories requiring little evidence were also those for which lump-sums were quickly provided to successful claimants.

The features mentioned above are not the only departures the UNCC regime made from traditional claims commissions. It should be added that Iraq did not have access to the evidence presented by claimants and that all hearings before the Panels of Commissioners, until the moment of the adoption of the Panel’s recommendations by the Governing Council, were strictly confidential47.

3. A noteworthy novelty in the material competence of the UNCC: the compensability of environmental damage

Resolution 687, in its paragraph 16, specified that environmental damage and the depletion of natural resources were also to be included in compensable damage. As has already been pointed out, the environment was not mentioned in Resolution 686, which is the first resolution that established Iraq’s responsibility. This precision concerning the environmental damage was not technically necessary for environmental damage to be included among compensable damage, because of the simple fact that the resolution in question established general compensability for “any direct loss, damage [...] and injury”. On the condition that it could be proven to be an instance of direct damage, any environmental damage would have been compensable even without the precision of paragraph 16. In other words, on the one hand Resolution 687 has established for the first time in history a State’s liability for environmental damage caused during an armed conflict; on the other the legal basis for this compensability came from “a violation of the prohibition of the use of force” and thus “other basis for compensation which may also exist [were] not relevant”48. This does not mean that international environmental law played no role before the UNCC as, in practice, it was taken into account by the Panels of Commissioners in the evaluation, verification and assessment of environmental claims. Considering that the majority of doctrine does not yet recognize the existence of a customary

45 Art. 35 (2) (c) of the Provisional Rules for Claims Procedure, op. cit.
46 Art. 35 (3) of the Provisional Rules for Claims Procedure, op. cit.
48 Bothe, op. cit., p. 63.
norm of *ius in bello* imposing liability for environmental damage during armed conflicts, and considering also that Iraq is not a party to the main conventions dealing with this issue\textsuperscript{49}, the path chosen by the Security Council in Resolution 687 seems to have been the only practicable way of including environmental damage in compensable damage. As a consequence, "claims assigned to the environmental Panel [the "F4" Panel] are not grouped on the basis of a specific definition of the environment but rather on the basis of practical considerations, namely in order to ensure that claims involving environmental issues are reviewed together by the Panels and experts on environmental matters"\textsuperscript{50}.

Another novelty in the treatment of environmental damage consists in the fact that the costs incurred by States for monitoring and assessing the environmental damage they suffered were admitted before the UNCC as compensable activities. Following a 1998 agreement between some claimant States and the UNCC, the Governing Council agreed to give priority to "monitoring and assessment claims" and to resolve them separately from substantive claims, to which they originally belonged\textsuperscript{51}. The reason for this choice was that, in order to establish whether or not an environmental damage was imputable to the Iraqi illegal war activities, costly studies and surveys were necessary, for the conduct of which claimant States were considered to be in a better position than the competent Panel. Once again, this approach gave the Commission the opportunity to save time in the processing and adjudication of claims.

It seems debatable, now, whether these studies and surveys should be considered as evidence of the damage suffered\textsuperscript{52}, or rather as fact-finding activities, which was a task typically assigned to the Panels of Commissioners. The "F4" Panel of Commissioners specified that "the purpose of monitoring and assessment is to enable a claimant to develop evidence to establish whether environmental damage has occurred and to quantify the extent of the resulting loss"\textsuperscript{53}. In any case, as far as the present

\textsuperscript{49} Namely the 1977 Additional Protocol I to the Four Geneva Conventions of 1949 and the 1977 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (also known as the ENMOD Convention).

\textsuperscript{50} Kazazi, "Environmental Damage in the Practice of the UN Compensation Commission", in Bowman and Boyle (eds.), Environmental Damage in International Law and Comparative Law – Problems of Definition and Valuation, Oxford, Oxford University Press, 2001, p. 117. This is the reason why there is no definition of "environment" and of "natural resources" neither in resolution 687, nor in any Governing Council decision: a definition of "environment" or a distinction between "environment" and "natural resources" is of no great interest before the UNCC, given that the scope of its jurisdiction is based on the directness of the causal link between a damage and the invasion and occupation of Kuwait, and not on the definition of "environment".

\textsuperscript{51} 107 "monitoring and assessment" claims have been filed before the UNCC, over a total of 168 substantive environmental claims. Kazazi, op. cit., p. 126.

\textsuperscript{52} See Art. 35, para. 3 of the Provisional Rules for Claims Procedure, op. cit.

writers know, this is the first time in the history of claims commissions that costs incurred in collecting the evidence necessary for the submission of claims were deemed compensable.

As to the treatment of substantive environmental claims, the most noteworthy element is the adherence of the "F4" Panel's recommendations to international environmental law governing causality and evaluation issues, as well as to the customary law of State responsibility. Concerning causality, the most complex activity of all Panels of Commissioners has been that of determining whether an instance of damage directly stemmed from the Iraqi invasion and occupation of Kuwait, i.e. through an unbroken chain of cause-to-effect events. Applicable Governing Council Decisions, namely Decision 155 and Decision 756, gave some guidance to the Panels, by enumerating a non-exhaustive list of situations where damage was to be considered direct. However, no Governing Council decision provided for a definition of "direct damage", thus obliging the Commissioners to elaborate their own "jurisprudence", mainly by reference to general international law. In addition, the "F4" Panel, in contrast to other panels, was called to adjudicate on claims for environmental damage during an armed conflict, a subject that had never before been treated by any claims commission.

Another interesting and novel feature of the UNCC work on environmental claims is that environmental claims - both substantive and monitoring and assessment claims - have been submitted to compulsory follow-up tracking in order to ensure that the payment of the award be used by successful claimant States to reach agreed environmental objectives and standards57.

54 Only few exceptions can be reported, such as, for instance, the systematic rejection by the "F4" Panel of claims without sufficient evidence for determining what proportion of the loss could be attributed to Iraq's unlawful acts, in cases where environmental damage was attributable to several different causes (Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of "F4" Claims, UN Doc. S/AC.26/2003/31). The commentary of the International Law Commission's Articles on State responsibility provides that in cases of injury caused by more sources of pollution, "unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct" (Commentary to the draft articles on State on responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its Fifty-third session, 2001, in Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, Chapter IV.E.2, UN Doc. A/56/10, para. 13, pp. 230-231).


56 UN Doc. S/AC.26/1991/7/Rev.1

The particular position of Iraq before the “F4” Panel of Commissioners has already been discussed. It is however important to recall that Iraq’s situation was sui generis both compared with typical claims commissions or international courts or tribunals, and with regard to the Iraqi position before other Panels of Commissioners, because of the modifications introduced by Governing Council Decision 124. As a result of this decision, the interplay between Iraq and the “F4” Panel of Commissioners, if compared to the procedure followed for other claims’ categories, was more similar to that existing before international courts or tribunals between claimants and arbitrators.

4. Conclusions: uniqueness or a model for the future?

The UNCC was envisaged and created in a very particular historical and political context. Firstly, an extraordinary enforcement action of the UN Security Council was organized against a State which manifestly breached international peace and security within the meaning of Chapter VII of the UN Charter. Secondly, the extremely high number of potential claimants forced the Security Council to create a special adjudicatory mechanism, using new methods of mass claims processing in order to guarantee fast and effective justice for claimants in need of aid. In the future, probably only the simultaneous presence of these two fundamental elements could give rise to an outcome similar to Resolution 687 and the creation of a body resembling to the UNCC. In cases not similar to that of Iraq in 1990-1991, traditional mechanisms of claims settlement remain still valid today – at least when the number of claims is not extremely high – as the recent example of the Eritrea-Ethiopia Claims Commission (which is an arbitral tribunal) shows.

Not all particularities of the UNCC are destined to remain unique. In several respects – from a legal as well as from a practical point of view – the UNCC could serve as a perfect model for other compensation bodies. An adjudicatory organism created and operating under the control of the UN is likely to be proposed again in the future. The control exercised by the United Nations, if not a guarantee of impartiality and independence in the processing of claims, gives better assurances as to the effectiveness of the adjudicatory process and avoids the risk that the victorious State’s will is unilaterally imposed over that of the defeated State.

Another aspect susceptible to subsequent imitation consists in the techniques used for the treatment of a massive number of claims, the highest in the history of claims commissions, namely: claims categorization, the taking into account of urgency, the

58 See supra pp. 10-11.
59 Campanelli, op. cit., p. 128.
participation of experts in the Panels of commissioners, different evidentiary requirements as a function both of urgency and of the size of the claims. These are but some of the novelties introduced by the UNCC that could be followed and developed by future adjudicatory bodies called on to process a high number of claims.

As to the Compensation Fund, the idea of a fund managed by an independent organ and compulsorily supplied by the guilty State, constitutes a guarantee for successful claimants that their compensation will not be subject to the will of the debtor State, nor to the uncertainties of its internal policy, and that it will be liquidated within reasonable time. The scheme of the Compensation Fund, moreover, also proved to be useful in safeguarding the debtor State’s economy: the UNCC Compensation Fund, supplied by fixed percentages of the Iraqi revenues in the domain of the exportation of oil and petroleum products permits Iraq to carry out its obligation to give compensation to successful claimants without overcoming a fixed percentage of its petroleum industry revenues, thus limiting the risk of serious detrimental effects on the Iraqi economy.

Finally, future references to the UNCC organs’ decisions and recommendations for the development of international law and in the domain of claims settlement seems rather unlikely because, as pointed out above, the UNCC worked on the basis its own lex specialis.

An evaluation of definitive data about the work of the UNCC, disclosed in August 2007, helps to corroborate our tentative conclusions – especially concerning the effectiveness of the UNCC process. Out of a total of almost 2.7 million claims, about 1.5 million have been awarded compensation. The 1.2 million claims that have been discarded were almost entirely category “C” claims, which constituted the highest number of claims (1.7 million). On the contrary, the second highest number of claims, category “A” claims, were almost all awarded a lump-sum. This is clearly a consequence of the different evidentiary requirements for these two categories of claims – heavier for category “C”, lighter for category “A”.

Another interesting fact emerges in relation to the highest amounts claimed. “F3” claims (those of the Kuwaiti government, excluding environmental claims) sought a total of almost US$114 billion, followed by “F4” claims with about US$ 85 billion. These two subcategories are characterized by a low percentage of awarded amount against claimed amount (around 6-7%), while the 67 “F1” claims (those of the oil sector) were awarded the highest compensation – US$ 21.5 billion, which is almost half of the total compensation awarded by the UNCC (US$ 52.4 billion).

This data clearly reflects the two-speed procedure of the UNCC, the faster speed for urgent claims, the slower for non-urgent ones. The Compensation Commission’s

61 Bederman, op. cit., pp. 286-287. See supra pp. 4-5.
62 The data referred to in this article are available at www.uncc.ch.
effectiveness in the treatment of urgent claims is evidenced by the short delay of
time within which these claims have been processed and paid: the category “A”
Panel of Commissioners completed its work in 1996; the category “B” Panel in
1995; and the category “C” Panel in 1999. All these claims were the first to be paid
in their entirety. Thus, the success of the Compensation Commission in its determi­
nation to bring economic aid as quickly as possible to distressed individuals is unde­
niable and, as a consequence of this clear success, the UNCC methods and tech­
niques should be taken into consideration for future cases of mass urgent individual
claims.

The data also shows that the UNCC awarded the highest sums to category “E”
claims (about US$27 billion), followed by category “F” (about 14 billion) and by
individual claims (about 11 billion), despite the fact that category “E” claims were
4,000, category “F” 185 and individual claims almost 2 million. Moreover, as a
matter of fact, “E1” claims and “E4” claims (claims of Kuwaiti corporations, ex­
cluding those of the oil sector) are the only subcategories among all non-urgent
claims subcategories where compensation sought exceeded US$11 billion (namely
“E1”, “E2”, “E4” and all “F” subcategories), presenting a percentage of awarded
amount against claimed amount higher than 20% (48.1% for “E1” claims and 29.3%
for “E4” claims).

It was pointed out in 1995 that “there is in the air an as yet undefined and unde­
clared policy of the major powers not to treat Iraq too harshly with respect to those
reparations, and thus not to permit too many billions of dollars in awards. The idea,
not unreasonably, is to ensure that Iraq’s[... ] economy not be injured by difficult
reparations, and that the Commissioners recognize these policy considerations
through strict application of the jurisdictional and merits requirements”63. Now that
the Commission has ended its work, it might be important to look back on this
statement and to assess in economic as well as political terms the overall set of deci­
sions and recommendations of the UNCC.

63 Rovine and Hanessian, “Toward a Foreseeability Approach to Causation Questions at the