ABHANDLUNGEN

Iraqi Reparations and the Security Council

*Bernhard Graefrath**

In earlier times the people of a vanquished State often became the slaves of the victor nation. In the Middle Ages their property was exposed to looting and heavy tributes were imposed on the State[1]. After the First World War the term "tribute" was replaced by the term "reparation" in order to indicate that responsibility for waging a war entailed a duty to make reparation, like being responsible for having committed an internationally wrongful act or causing damage under domestic law[2]. However, in 1914 waging a war was not prohibited under international law and therefore no obligation for reparation could be considered as being a legal consequence of war. The reparation system imposed on Germany after the First World War by the Treaty of Versailles did not work[3] and was easily instrumentalised for nationalistic revenge propaganda. The reparation system was ineffective and in fact ended when Hitler took over and prepared Germany for the Second World War[4].

Distinct from 1919, the reparation system after the Second World War had a legal background. Beginning with the Covenant of the League of Nations, the launching of an aggressive war had been prohibited under

* Prof. Dr., former member of the International Law Commission (1986–1991).

[1] See B. Graefrath, Zur Geschichte der Reparationen, Berlin 1954, 18 et seq.; W. Heintschel von Heinegg, Kriegsentschädigung, Reparation oder Schadenersatz, in: 90 Zeitschrift für vergleichende Rechtswissenschaft 1991, 113.

[2] See Graefrath, ibid., 93 et seq.

[3] See J.M. Keynes, The Economic Consequences of the Peace, Cambridge 1971, vol. II of the Collected Writings.

[4] In art. 5 of the *Londoner Schuldenabkommen*, however, is a safeguard clause which keeps the subject alive; also payments for the Dawes and Young loans were made, BGBl. 1953 II, 331, also UNTS, vol. 333, 3.

international law[5]. The duty to make reparation was mentioned in the different armistices, in the Peace Treaties of 1947 and the Potsdam Agreement[6]. As far as West-Germany and Italy are concerned, reparations have been paid only to some extent. The obligation of these states to make reparation was mainly swallowed by the Cold War and the need to incorporate their military potential into the NATO[7].

After the Iraqi invasion and occupation of Kuwait, the United Nations established a unique reparation mechanism which is commended by some as "a special procedure suited to bring effective and swift justice to the millions of victims"[8] or "as an innovative alternative to a solely adjudicative model"[9], but is criticized by others for disregard of due process principles[10] or as repeating mistakes of the Treaty of Versailles, being

> "in some ways strikingly similar to the reparation scheme established under the Treaty of Versailles ... the most notable similarity is that Iraq, like Germany under the Treaty of Versailles has been denied a meaningful role in the claims process"[11].

There are other parallels, such as the threat to apply military force in case of non-compliance with decisions of the reparation commission, and the open ended amount of the total reparation sum that may be demanded. However, there is surprisingly little discussion of the legal foundation of the reparation mechanism established by the Security Council under the heavy influence of the United States of America. Its legitimacy is mostly taken for granted.

This paper will assess the measures taken by the Security Council to determine and enforce Iraqi reparations after the Gulf War. Based on a short summary of the reparation scheme established by the Security Council it will discuss the competence of the Security Council under Chapter VII of the UN Charter:

---

[5] Treaty Providing for the Renunciation of War as an Instrument of National Policy, Paris August 27, 1928.

[6] See Graefrath (note 1), 101 et seq.; E. Menzel, Die Friedensverträge von 1947, Oberursel 1948.

[7] See Graefrath, ibid., 7; H. Rumpf, Die Regelung der deutschen Reparationen nach dem Zweiten Weltkrieg, in: 23 Archiv des Völkerrechts 1985, 74.

[8] C. Alzamora, Reflections on the UN Compensation Commission, in: 9 Arbitration International 1993, 349.

[9] D.D. Caron, Introductory Note, 31 I.L.M. 1009 (1992).

[10] H. Fox, The Position of the Defendant State in Claims of War Damage, Paper presented at the XXIV Biennial IBA Conference 1992.

[11] E.J. Garmise, The Iraqi Claims process and the Ghost of Versailles, in: 67 New York University Law Review 1992, 840–878, (at 842); an analogy to Versailles is also drawn by N.C. Ulmer, The Gulf War Claims Institution, in: 10 Journal of International Arbitration 1993, 85 (at 92).

– to determine individual reparation claims;
– to impose on Iraq and other member States of the United Nations an enforcement mechanism with quasi-exclusive jurisdiction on reparation claims;
– to claim itself reparations;
– to act based on Iraqi consent;
– to act as agent of Kuwait and its allies;
– to impose sanctions in order to enforce compliance with its reparation scheme;
– to impose a compensation procedure which excludes Iraq from equal participation in establishing the existence of individual reparation claims and in solving disputes in that respect;
– to invent rules which depart from existing rules of international law;
– to impose a form of "organized enslavement" on the Iraqi population to exact payments for reparations and other foreign debts;
– to restrict the right of the Iraqi people to exercise its right to self-determination.

1. Measures Taken by the Security Council

At the end of the Gulf War the Security Council created a specific scheme to determine reparation claims against Iraq and to enforce the implementation of such claims. Before discussing the legal questions raised by that scheme we will shortly describe its main aspects.

Already in its res. 674(1990), 29 October 1990, the Security Council reminded Iraq

> "that under international law it is liable 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".

It also invited

> "States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law"[12].

Only on March 2, 1991 after the suspension of the offensive combat operations by the forces of Kuwait and the Member States cooperating with Kuwait and Iraq's agreement to comply with the previous Security Council resolutions, could the Security Council resume its activity in the

[12] Para. 9 of res. 674(1990), 29 October 1990.

Iraq case. It adopted res. 686(1991) specifying the necessary measures to be undertaken by Iraq which would permit a definitive end to hostilities in which the United Nations were not a party[13]. Under para. 2b of res. 686 the Security Council demanded that Iraq

> "accept in principle 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".

Iraq informed the Secretary-General on 3 March 1991 that it had agreed to fulfil its obligations under res. 686[14]. Iraq had no choice but to accept the conditions set by res. 686, since para. 1 and explicitly para. 4 of that resolution reaffirmed the Security Council's authorization of Kuwait and its allies in res. 678(1990) para. 2 to use force. This threat to use force remains valid during the period required for Iraq to comply with the demands of res. 686[15]. Like the total embargo, imposed by res. 661(1990), it has been upheld by res. 687(1991) paras. 1 and 22 and has not been revoked up to now[16].

Four weeks later, res. 687(1991), on 3 April 1991 defined additional requirements to the armistice, which contain detailed provisions on reparation[17]. Part E of res. 687 deals in its articles 16 to 19 with the obligation to make reparation[18]. The substantive provision on reparation is art. 16 which reaffirmed that Iraq

---

[13] See S. Sur, La Résolution 687 (3, Avril 1991) Du Conseil De Sécurité Dans L'Affaire Du Golfe: Problèmes De Rétablissement Et De Garantie De La Paix, in: 37 AFDI 1991, 25 (at 30).

[14] See S/22320.

[15] We are convinced that res. 687 would not be a sufficient legal justification to renew the use of military force against Iraq, unless Iraq again applies or threatens the use of military force against its neighbors; cf. below at notes 39, 82, 122.

[16] The Security Council from time to time considered whether the conditions allow the lifting of the sanctions but up to now the Security Council never reached consensus on this question. They therefore continue to be in force, see statement of the President of the Security Council 24 Mai 1993 (S/25830), 21 July 1993 (S/2616), 20 September 1993 (S/26474), 18 January 1994 (S/PRST/1994/3).

[17] Accepted by Iraq on 6 April 1991, S/22480; S/22456.

[18] Art. 15 is concerned with restitution and art. 17 with Iraq's foreign debts. Art. 17 demands that Iraq scrupulously adhere to all of its obligations concerning servicing and repayment of its foreign debts. Strictly speaking the question of foreign debts is legally independent of the obligation to pay compensation. It may also be questioned whether debts which are related to arms purchases in preparation of the war can be legally enforced and in particular by the Security Council which has condemned the invasion of Kuwait as a breach of international peace and security (660(1990)) and ordered sanctions under Chapter VII (661(1990)) to fight it. See also G. Cottereau, De La Responsabilité De L'Iraq Selon La Résolution 687 Du Conseil De Sécurité, in: XXXVII AFDI 1991, 99–119.

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

This corresponds to the duty to make reparation under general international law[19].

The meaning of the word "direct" may be open to interpretation. Obviously it was introduced to prevent claims which have no *proxima causa* with the Gulf war. However, what that means in practice remains to be seen. It could be argued that by introducing that term the authors wanted to exclude claims for a *lucrum cessans* and compound interests[20] and to narrow the scope of the term environmental damage. Otherwise it would not make sense to limit the claim to direct loss and damage[21].

---

[19] The term "reparation" is used in different ways. In its wide sense it comprises restitution, compensation, satisfaction and guarantees against repetition. This approach has been chosen by the International Law Commission in its recent definition: "The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition ... either singly or in combination" (ILC, A/CN.4/SR.2288, 20 July 1992; cf. A/48/10, p. 130). In its narrow sense the term reparation is used to describe only compensation (reparation by equivalent, mostly by payment of a sum of money). The proposed definition of the ILC for the compensation claim reads: "The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind". The Peace Treaties after the first and second World War used the term reparation in its narrow sense as a synonym for compensation. Recent resolutions of the Security Council clearly differentiate between restitution and compensation. They generally avoid the term "reparation". See Graefrath (note 1), 113; see also id., Responsibility and Damage Caused, in: 185 Recueil des Cours 1984, 13–143 (at 83, 93). In the following we use the term reparation for any kind of compensation but keep restitution as a separate item.

[20] To the recent use and practice of these terms see G. Arangio-Ruiz, A/CN.4/425, 27 et seq. and 74; Garmise (note 11), 865.

[21] Based on the distinction between direct and indirect losses the Governing Council (GC) of the United Nations Compensation Commission (UNCC) has decided to exclude embargo damages (S/AC.26/9, para. 6), but has accepted interests as part of the compensation claim. A decision on attorney's fees is pending. Cf. B.G. Affaki, The United Nations Compensation Commission, in: 10 Journal of International Arbitration 1993, 21 (at 54). However, the distinction between direct and indirect losses remains a permanent source for difficult disputes, cf. the reports of the Executive Secretary S/AC.26/1993/R.26; cf. the decision of the Governing Council S/AC.26/1992/15. In its decisions No. 11 (S/24363) and 19 (S/AC.26/Dec.19) the Governing Concil decided that members of the Allied Coalition Armed Forces were not eligible for compensation as a consequence of their involvement in coalition military operations, unless there were specific claims, e.g. as prisoners of war or claims based on mistreatment in violation of international humanitarian law.

What is new and due to the specific circumstances of the Gulf war is the reference to environmental damage and the depletion of natural resources in connection with the obligation to make reparation[22]. We find here a term which is a generalisation of a formula used over years in General Assembly resolutions on "permanent sovereignty over national resources in the occupied Palestinian and other Arab territories". In these resolutions the General Assembly reaffirmed

> "the right of the Palestinian and other Arab peoples subjected to Israeli aggression and occupation to the restitution of and full compensation for the exploitation, depletion and loss of and damage to their natural, human and all other resources, wealth and economic activities, and calls upon Israel to meet their just claims"[23].

The Security Council, however, never took any steps to promote or enforce the implementation of this obligation.

Res. 687(1991) as distinct from res. 674 does not confine itself to confirm the obligation to make reparation, to ensure payment of reparations. In para. 18 the Security Council decided to create a fund and to establish a commission. The fund is called the Compensation Fund and the commission is the Compensation Commission. Its structure and powers turned out to be similar to those experienced by Germany after the First World War in the form of the Reparation Commission which was established under the Treaty of Versailles, articles 233–241[24]. Together with the Embargo Committee established under res. 661(1990)[25], the Security Council is in total control of the Iraqi economy and may dispose over every penny of its revenues resulting from petroleum exports and decide what may be imported. Res. 687(1991) as well as the report of the Secretary-General, requested in art. 19 of that resolution, obviously have their roots in the offices of the State Department in Washington.

> "On y trouve une main unique, ou quasiment, on y discerne une plume dominante, main ferme, plume autoritaire, qui sont celles des Etats-Unis. La

---

[22] A prohibition to cause widespread, longterm and severe damage to the natural environment had already been included in art. 35, 3 of the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, see Commentary on the Additional Protocols (eds. Y. Sandoz/ Ch. Swinarski/ B. Zimmermann), Geneva 1987, 390; see also art. 22,2d and art. 26 of the ILC's Draft Code of Crimes against Peace and the Security of Mankind, in: YBILC 1991, vol. II, part two, 104, 107.

[23] See e.g. res. 38/144 of 12 December 1983, para. 7.

[24] See the critical description of that body by Keynes (note 3), 132; see also Garmise (note 11), at 842, 853.

[25] See M. Koskenniemi, Le Comité Des Sanctions (créé par la résolution 661 (1990) du Conseil de Sécurité), in: XXXVII AFDI 1991, 120–137.

conduite de l'affaire a été de bout en bout assurée par la volonté de l'administration americaine. Elle a reposé sur une instrumentalisation du Conseil de sécurité"[26].

Art. 19 directed the Secretary-General to present to the Council recommendations "for the Fund to meet the requirement for the payment of claims" and

> "a programme to implement the decisions in paragraphs 16, 17 [foreign debts!] and 18 above, including: administration of the Fund; mechanisms for determining the appropriate level of Iraq's contribution to the Fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq ...; arrangements for ensuring that payments are made to the Fund; the process by which Funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving dispute claims in respect of Iraq's liability ...; and the composition of the Commission designated above".

The Fund and the Compensation Commission were established by para. 3 of Security Council res. 692(1991), 20 May 1991 in accordance with Section I of the Secretary-General's report of 2 May 1991[27]. The Commission functions under the authority of the Security Council and is a subsidiary body thereof. Its principal organ is a 15-member Governing-Council (reflecting always the composition of the Security Council), assisted by commissioners and experts nominated by the Secretary-General and appointed by the Governing Council. The technical work is done by a Secretariat headed by an Executive Secretary who is appointed by the Secretary-General after consultation with the Governing Council. The expenses of the Commission will be borne by the Fund[28], that is by Iraq.

The Commission has a rather comprehensive mandate in dealing with administrative, financial, legal and policy issues related to the reparation question. This includes the mechanism for determining the level of Iraqi contributions to the Fund, the allocation of funds and payments of

---

[26] Sur (note 13), 35 with reference to the ensemble of Security Council resolutions in relation to Iraq.

[27] See S/22559; Iraq submitted a protest against this resolution since it "includes provisions which endanger not only Iraq but all concepts of justice and equity, as well as the essence of international law", S/22643, 27 May 1991; see also Garmise (note 11), 864: "There is a legitimate basis for the complaint. The U.N. Charter does not give the U.N. or the Security Council the specific power to deal with war reparations or the adjudication of war claims"; see Cottereau (note 18), 108 et seq.; see also B. Stern, Un Système Hybride: La Procédure de Règlement Pour la Réparation des Dommages Résultant de l'Occupation Illicite du Koweit par l'Irak, in: 37 McGill Law Journal 1992, 625–644, (at 629).

[28] Cf. S/22559, para. 8.

claims, the procedure for evaluating losses, listing of claims, verifying their validity and resolving disputed claims[29].

Iraq has no standing in the Commission or in its procedures. Section II of the Secretary-General's report was not confirmed by Security Council res. 692(1991). While the decision to establish the Commission was taken in accordance with Section I of the report, the resolution in para. 5 only directs the Governing Council (GC) to take into account Section II of the Secretary-General's report. The objection against Section II obviously was prompted by recommendations of the Secretary-General that Iraq "will be informed of all claims and will have the right to present its comments to the Commissioners" within a short time delay[30]. This modest proposal to give Iraq a chance to participate in the proceedings was replaced, after long negotiations between Security Council members by the Governing Council in art. 16 of the rules of procedure, by a right to receive the summary reports of the Executive Secretary and comment thereon[31].

The Commission, faced with thousands of individual claims and "an insufficient pool of assets"[32] invented certain categories of claims and envisaged a simplified procedure to deal in an expeditious and fair manner with the huge number of claims. The procedure applied – at least with claims in categories A, B, and C – is similar to class actions which have been used in the USA in mass tort situations[33]. This is said to reflect "a profoundly democratic inspiration" because it gives "priority to processing claims from the most disadvantaged individuals ..."[34]. The Commission established guidelines as to how States may file claims, decided to pay fixed amounts to compensate certain damage without specific documentation of the actual amount of loss, decides on the validity of claims, and on the level of Iraq's payments to the fund, and allocates payments to claimant States.

All this has been justified as "a special procedure suited to the circumstances and to the need to bring effective and swift justice to the millions

---

[29] See S/22559, para. 4 and the Provisional Rules for Claims Procedure, in: S/AC.26/1992/10, 26 June 1992; cf. report of the UNCC in: S/24589, paras. 7–22.

[30] Para. 26 of the report, S/22559.

[31] Art. 16, paras. 2 and 3 of the Provisional Rules of Claim Procedure, S/AC.26/1992/10, 26 June 1992.

[32] Caron (note 9), 1009.

[33] Cf. ibid.; Affaki (note 21), 45; Ulmer (note 11), 88.

[34] Alzamora (note 8), 351.

of victims of Iraq's invasion of Kuwait"[35]. However, this of course is not the only way of bringing effective and swift justice to the victims. And it cannot gloss over the fact that by such an administrative procedure "the commission will act as a party and a judge at the same time"[36]. Or as the Iraqi Government complained, the Security Council has made the Compensation Commission "both an adversary of Iraq and at the same time an arbitrator in its affairs"[37].

The system was finalized by res. 705(1991), 15 August 1991, which decided that for the time being the compensation to be paid by Iraq shall not exceed 30% of the annual value of the exports of petroleum and petroleum products of Iraq, which has to be permitted by the Embargo Committee. With res. 706(1991), 15 August 1991, and res. 712(1991), 15 September 1991, the Security Council authorized a controlled import of Iraqi petroleum up to 1.6 billion dollars. The revenues had to be paid direct into an escrow account administered by the Secretary-General, 30% of which had to go to the Compensation Fund, another percentage to pay costs incurred by the United Nations bodies working in Iraq and a certain amount could be released in three equal portions by the Embargo Committee to satisfy humanitarian requirements of the Iraqi people.

Since Iraq did not export petroleum under these conditions the Security Council adopted with res. 778(1991) on October 2, 1992, that is seven months after the end of hostilities, an additional sanction under Chapter VII. It decided that all States in which there are Iraqi funds that represent the proceeds of sale of Iraqi petroleum or petroleum products paid on or after 6 August 1990 shall cause the transfer of these funds to an escrow account and to transfer to the Compensation Fund 30% of those funds[38].

The whole system established by the Security Council to enforce the payment of compensation is considered as binding upon all States because the Security Council resolutions were adopted as decisions under Chapter VII of the Charter. The embargo originally imposed by res. 661(1990) as

---

[35] Ibid., 349.

[36] Keynes (note 3), 133.

[37] Iraqi Government in its letter of 27 May 1991 (S/22643); see also Fox (note 10).

[38] China abstained in the voting and found this an extraordinary measure, the "seizure of a country's frozen assets abroad is a matter that concerns the sovereignty of that country and involves complicated legal implications", S/PV.3117, 2 October 1992; see also a letter, dated 23 March 1994, from the Iraqi Minister for Foreign Affairs to the Secretary-General which concludes that the provisions of the Security Council resolution "are not legal but are conducive to the collapse of the stable banking practice that constitute the essence and the basis of international trade", S/1994/348.

a sanction under art. 41, and also the authorization to use force in res. 678(1990), to secure immediate withdrawal from Kuwait and to restore the Government of Kuwait, are now – after that goal has been achieved – extended by res. 687 (1991)[39], and amended by the seizure of Iraq's assets abroad, *inter alia* to enforce compliance with the reparation scheme developed by the Security Council.

It should be noted that, contrary to the practice after the Second World War but similar to the procedure after the First World War, up to now no total sum of the reparation claim has been announced, and no general allocation between the different claimant States has been envisaged. Under the direct supervision of the Security Council a mechanism was established which ensures that Iraq can only dispose to a maximum of 30% over revenues from its petroleum exports. The system guarantees priority to the payment and servicing of compensation claims and foreign debts. That makes the living standard – even the physical survival – of the Iraqi people directly dependent on its scrupulously servicing and repaying foreign debts, including reparation. Until the beginning of 1994 the Security Council did not lift the embargo imposed by res. 661(1990) to secure immediate withdrawal of Iraqi forces from Kuwait and to restore the Kuwaiti Government. For years now, the embargo is working as a terrible scourge against the vulnerable and poor in Iraq, in particular women and children. "Iraq has been politically and legally 'flattened' (in the vernacular) and is at the mercy of the United Nations, which has taken unto itself a right to a perpetual stranglehold on the Iraqi economy"[40]. When in 1942 a similar scheme had been discussed in preparing for German reparations, it was rightly labelled by J. M. Keynes as "organized enslavement"[41].

---

[39] See Sur (note 13), 34: "Elle prolonge d'abord, en s'adaptant à la situation, qui résulte des opérations militaires, les résolutions précedentes ... les mesures coercitives d'embargo et de blocus, précedant l'autorisation implicite du recours à la force. Elle sert également de base à l'adoption de mesures subséquentes pour son application ...".

[40] C.N. Brower, Lessons to be Drawn from the Iran-U.S. Claims Tribunal, in: 9 Journal of International Arbitration 1992, 51–58, (at 52).

[41] The Collected Writings of John Maynard Keynes, vol. XXVI, Activities 1941–1946 – Shaping the Post-War World, Bretton Woods and Reparations, ed. D. Moggridge, Cambridge 1978, 335.

2. *Legal Assessment of the Measures Taken by the Security Council to Determine and Enforce Iraqi Reparations*

a) Competence of the Security Council to determine reparation claims

(i) Some theoretical remarks

When adopting the relevant resolutions the Security Council always stressed that it was "acting under Chapter VII of the Charter of the United Nations". This was done to underline the binding character of its decisions. There is no doubt that the Security Council according to art. 24 has the "primary responsibility for the maintenance of international peace", and is authorized (art. 25) to take binding decisions, in particular when acting under Chapter VII. Since all relevant resolutions in the present case explicitly refer to Chapter VII we have no need to discuss whether also decisions taken according to art. 24, without being labelled measures under Chapter VII, can be binding upon member States[42]. The only problem we face is whether the measures taken can be justified as measures under Chapter VII.

Does that solely depend on the intention of the Security Council or are there any legal criteria which ensure that such decisions cannot be taken arbitrarily? Several times the question has been raised, "whether there are any limitations on the power of the Council in taking such decisions"[43]. Also Judge Weeramantry, having stressed the enormous power given to the Security Council, asked: "But does this mean that the Security

---

[42] This was discussed by the ICJ in its Advisory Opinion on Namibia, ICJ Reports, 1971, 52; the broad interpretation of the Court has not met with general support. In favour e.g.: R. Higgins, The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?, in: 21 The International and Comparative Law Quarterly 1972, 275; E. Jimenez de Arèchaga, International Law in the Past Third of a Century, in: 159 Recueil des Cours 1978, 119; R. Sonnenfeld, Resolutions of the United Nations Security Council, Dordrecht/Boston/London 1988, 141; J. Delbrück, in: B. Simma (ed.), Charta der Vereinten Nationen, 1991, 383; P. Cot/A. Pellet, La Charte des Nations Unies, Paris 1985, 462; against e.g.: W.A. Kewenig, Die Problematik der Bindungswirkung von Entscheidungen des Sicherheitsrates, in: Festschrift für U. Scheuner, Berlin 1973, 259 (at 283); M. Krökel, Die Bindungswirkung von Resolutionen des Sicherheitsrates der Vereinten Nationen gegenüber Mitgliedstaaten, Berlin 1977, 169; A. Verdross/B. Simma, Universelles Völkerrecht, Berlin 1984, 107.

[43] Judge Shahabuddeen, ICJ Reports 1992, 30 (114). Cf. also ICJ advisory opinion: Certain Expenses of the United Nations, ICJ Reports 1962, 151; advisory opinion on Namibia, ICJ Reports 1971, 4; and the *Libyan* case, ICJ Reports 1992, 3; see also M. Bedjaoui, Du Contrôle de Légalité des Actes du Conseil de Sécurité, in: Nouveaux itinéraires en droit, Hommage à François Rigaux, Bruxelles 1993, 69–11.

Council discharges its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?" He answered,

> "Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24(2) that the Security Council in discharging its duties under Article 24(1), 'shall act in accordance with the Purposes and Principles of the United Nations'. The duty is imperative and the limits are categorically stated"[44].

It is clear from art. 24 para. 2 that the Security Council in discharging its duties "shall act in accordance with the Purposes and Principles of the United Nations". "Le Conseil de sécurité est tenu au respect tant de la Charte que du droit international"[45].

The mandate of the Security Council is widely and ambiguously defined; especially the term "threat to peace" leaves much room for interpretation, but that does not mean that its powers are unlimited. As Judge Fitzmaurice stressed,

> "limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the functions of the Security Council could be used for purposes never originally intended ..."[46].

Acting under Chapter VII means that the Security Council's action is directed to counter a threat to or a breach of the peace in order to maintain or restore peace. It is up to the Council to determine what constitutes a breach of or a threat to the peace and to decide what measures are necessary and proportionate within the framework given by Chapter VII. In so far the Council has a large margin which gives it considerable discretionary power in taking its decisions. But as the different structures of Chapter VI and Chapter VII of the Charter demonstrate, the Security Council under Chapter VII has a policing function only.

---

[44] ICJ Reports 1992, 64 (174).

[45] M. Bedjaoui (note 43), 87.

[46] Judge Fitzmaurice, diss. opinion, ICJ Reports 1971, 294, para. 116; this paragraph is affirmatively quoted by Judge Bedjaoui in his diss. opinion, ICJ Reports 1992, para. 20, p. 43 (153); see B. Graefrath, Leave to the Court what belongs to the Court, in: 4 European Journal of International Law 1993, 184–205; see also the debate of this question in the forty-sixth session of the ILC, A/49/10, 350 et seq.; A. Pellet, A/CN.4/SR.2340, 18; Ch. Tomuschat, A/CN.4/SR.2343, 7: "he was very much in favour of a broad interpretation of the powers of the Security Council under Chapter VII, but even the rather loose formula 'international peace and security' had certain limits".

"The main point is that, according to the doctrinal view – which did not appear to be seriously challenged – the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under VI into binding settlements of disputes or situations"[47].

Therefore, when acting under Chapter VII the Security Council action normally is confined to stop military activities or avert a specific danger for the maintenance of peace, in order to allow the functioning of peaceful dispute settlement procedures to solve the conflict which led to the breach of the peace[48].

"La finalité de celles-ci (sanctions du Conseil de sécurité), enfin, n'est ni la réparation matérielle d'un quelconque préjudice, ni la restauration de la légalité pour elle-même, mais le rétablissement d'une situation pacifique. On oublie en effet trop souvent que le Conseil de sécurité n'est ni un procureur ni un juge, mais l'organe politique du maintien de la paix"[49].

The Security Council also may determine a specific legal situation or general legal consequences in connection with its measures to maintain or restore peace, it may ensure that no special advantage resulting from aggression shall be recognized as lawful, and decide on necessary measures on disarmament or arms control to prevent a revival or repetition of aggression[50]. But the Security Council is not authorized to settle disputes or decide on individual claims arising out of a wrongful act or to enact specific regulations to settle such problems. That is left to the parties concerned.

---

[47] G. Arangio-Ruiz, A/CN.4/SR.2277, 3.

[48] See also E. Klein, Paralleles Tätigwerden von Sicherheitsrat and Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten, in: Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler, Berlin/Heidelberg/New York 1983, 467 (at 477); M. Krökel (note 42), 79; M. Virally, L'organisation mondiale, 1972, 418; G. Gaja, Réflexions sur le Rôle du Conseil de Sécurité dans le Nouvel Ordre Mondial, A propos des rapports entre maintien de la paix et crime internationaux des Etats, in: 97 RGDIP 1993, 297 (at 312).

[49] P.-M. Dupuy, Responsabilité et Légalité, 23ième Colloque, Le Mans, 31 mai–2 juin 1990, La Responsabilité dans le Système International, 33; id., Sécurité collective et organisation de la paix, in: 97 RGDIP 1993, 617; see also M. Bennouna, A/CN.4/SR.2342, 6: "The Security Council was not a judge and did not apply the law, it was a political body and it had political powers. The Charter did not confer upon it the power to decide on the judicial responsibility of a State. When the Security Council took such a decision, it did so *ultra vires*". See also A/CN.4/SR.2339, 12 and Ch. Tomuschat, A/CN.4/SR.2342, 8: "The Security Council had essentially been entrusted with police functions and its jurisdiction might at most have a preventive character, but under no circumstances that of a court of law".

[50] Cf. T. Marauhn, The Implementation of Disarmament and Arms Control Obligations Imposed upon Iraq by the Security Council, in: 52 ZaöRV 1992, 781.

"Even if a solution imposed by the Council might in general terms help the restoration of international peace and security ... Articles 41 and 42 only enabled the Council to take action directly related to, and not simply with the ultimate object of, restoring international peace and security"[51].

However, the list of measures mentioned in articles 41 and 42 is not exhaustive[52]. While that does not mean it is open ended, it nevertheless has provoked an interpretation which considers the Security Council to be free in choosing whatever measures it deems necessary to apply[53]. Such an interpretation of the UN Charter would justify any measure as long as the Security Council relies on art. 39 and pretends that the action is necessary to maintain or restore peace[54]. Interpreting resolution 687 Schachter, for example, stated, that the aim to restore international peace and security

"appeared to leave room for almost any action by the Security Council that might reasonably be related to ensuring continued peace and security in the Gulf region"[55].

Such a broad interpretation of the Security Council's powers would indeed have made superfluous the detailed provisions in articles 41 and 42, and would obscure the difference between Chapters VI and VII of the

---

[51] D.W. Greig, International Law, London 1976, 746; cf. also L.M. Goodrich, The United Nations, London 1960, 161.

[52] Cf. J.A. Frowein, in: B. Simma (ed.), Charta der Vereinten Nationen, München 1991, 579; C.M. Goodrich/E. Hambro/A.P. Simons, Charter of the United Nations, New York/London 1969, 312; P.M. Eisemann, in: P. Cot/A. Pellet (eds.), La Charte Des Nations Unies, Paris/Bruxelles 1985, 694.

[53] Cf. A. Pellet, Le Tribunal Criminel International pour L'Ex-Yugoslavie: Poudre aux yeux ou avancée décisive?, in: 98 RGDIP 1994, 7 (28).

[54] Obviously recent developments in the Security Council are based on such an approach, as can be seen from resolutions such as res. 748(1992), 827(1993), 837(1993), 955(1994). In the meantime res. 687(1991) already serves as a precedent to justify any means which were said to be in the interest of maintaining or restoring peace; see report of the Secretary-General S/25704, paras. 22, 27; K. Lescure, Le Tribunal Penal International Pour L'Ex-Yugoslavie, Paris 1993, 81; P.C. Szasz, The Proposed War Crimes Tribunal For Ex-Yugoslavia, in: 25 New York University Journal of International Law and Politics 1993, 405 (at 412); Ch. Greenwood, The International Tribunal for former Yugoslavia, in: 69 International Affairs 1994, 641 (at 646); K. Oellers-Frahm, Das Statut des Internationalen Strafgerichtshofs zur Verfolgung von Kriegsverbrechen im ehemaligen Jugoslawien, in: 54 ZaöRV 1994, 416 (at 418).

[55] O. Schachter, United Nations Law in the Gulf Conflict, in: 85 AJIL 1991, 452 (at 467); cf. also Marauhn (note 50), 781 (at 782). In the same sense Ch. Tomuschat holds that if the Security Council is the main body to ensure world peace, it should be in a position to decree the essential elements of a durable peace order, cf. Ein Internationaler Strafgerichtshof als Element einer Weltfriedensordnung, in: 49 Europa Archiv 1994, 61 (at 64).

UN Charter[56]. It in fact would vest the Security Council with the powers of a world government, a government without any democratic control, with the only restraint being that of the veto power of the permanent members of the Security Council. This certainly was not the intention of the drafters of the Charter and will not find the support of member States which continue to rely on the principle of sovereign equality of States as a fundamental principle of the UN Charter.

Since the mandate of the Security Council to assess a situation has been formulated in very broad terms it is all the more important to stress that the Security Council's competence in discharging its functions is also limited by the purpose aimed at, and by the fact that "actions which the Council is authorized to take"[57] are described in Articles 40, 41 and 42. They can only be directed to prevent, avert or terminate a threat or breach to the peace, "to maintain or restore international peace and security" (art. 39). The term "maintain or restore international peace and security" certainly is open to interpretation as is the term "threat to peace". The formula, however, may not be unreasonably stretched; otherwise it would give the Security Council a *carte blanche* to order whatever it believes useful, because it is not difficult to maintain that a measure aims at maintaining or restoring peace. The term has to be seen in connection with preventing or stopping military hostilities or genocide. If separated too much from military activities everything can be said to serve the maintenance or restoration of peace.

The measures justified by that formula are aimed at guaranteeing a situation which would allow the functioning of peaceful settlement procedures between the parties concerned. They are only justified to enable States to solve the underlying dispute or conflict by peaceful means, not to replace or substitute agreement between States by orders of the Security Council. Their purpose is not to determine individual claims or otherwise settle disputes.

> "Précisons, toutefois, que le pouvoir de décision du Conseil de sécurité n'est pas absolu. Son contenue est déterminé par les termes des articles 40 et 41 mème interprétés largement. En particulier, le Conseil de sécurité ne saurait

[56] Cf. T. Farer, The Future of International Law Enforcement under Chapter VII: Is there Room for "New Scenarios"?, in: J. Delbrück (ed.), The Future of International Law Enforcement. New Scenarios – New Law?, Berlin 1993, 39 (at 48).

[57] H. Kelsen, The Law of the United Nations, London 1951, 283.

imposer une méthode de règlement des différends et *a fortiori* les termes d'un règlement"[58].

It therefore may be justified to conclude that the Council's powers under Chapter VII are enormous but not unlimited. They depend on a finding that a situation can be qualified as a threat or breach of the peace and that it is necessary to apply measures "in accordance with Articles 41 and 42 to maintain or restore international peace and security". The Council may not apply enforcement measures foreseen under Articles 41 and 42 for other purposes and the Council is not free to apply any measures whatsoever to reach such purposes.

The UN Charter leaves much discretionary power to the Security Council, but it does not give the Council a blank cheque to do whatever it deems necessary. Thus D. Bowett recently stated:

> "It may be doubted whether States ratifying the Charter ever believed they were granting to the Council a blank cheque to modify their legal rights. ... This is why the last phrase of article 25 –'in accordance with the present Charter'– is so important. The Council decisions are binding only in so far as they are in accordance with the Charter"[59].

And he goes on:

> "there is no reason to suppose that a decision is binding on a Member State when that decision is *ultra vires* precisely because States have under article 25 agreed to accept only such decisions as are in conformity with the Charter. So a decision taken in violation of the Charter should not be held to be binding"[60].

(ii) Practice of the Security Council

Having established the general legal background of the Council's competences under Chapter VII we will now look at what had been its practice in relation to questions of reparation or compensation.

As far as the question of reparation following an aggressive act is concerned, the Security Council always had limited itself to confirming the obligation to make reparation, which is a direct consequence of attributing a wrongful act to a certain State. It never had tried to ascertain specific claims of particular claimants or take decisions to ensure the payment of reparations to certain States or individuals.

---

[58] C.G. Cohn Jonathan, in: J.P. Cot/A. Pellet (eds.), La Charte des Nations Unies, Paris/Bruxelles 1985, 664.

[59] D. Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, in: 5 European Journal of International Law 1994, 89 (at 92).

[60] Ibid., 95; see also Bedjaoui (note 43), 69 (at 92); P.-M. Dupuy, Droit international public, Paris 1992, 127.

When dealing with different kinds of military attacks the Security Council several times had confirmed an obligation to make reparation. Attention may be drawn to res. 262(1968) on the occasion of the air raid by Israel on Beirut airport, or res. 290(1970) by which the Security Council strongly condemned the Government of Portugal for its invasion of the Republic of Guinea and demanded

> "that full compensation by the Government of Portugal be paid to the Republic of Guinea for the extensive damage to life and property caused by the armed attack and invasion and requests the Secretary General to assist the Government of the Republic of Guinea in the assessment of the extent of the damage involved"[61].

In 1976 the Security Council not only condemned South Africa's aggression against the People's Republic of Angola, but also called upon

> "the Government of South Africa to meet the just claims of the People's Republic of Angola for a full compensation for the damage and destruction inflicted on its State and for the restoration of the equipment and materials which its invading forces seized"[62].

It is worth recalling that when this resolution was discussed in the Council the representatives of the United Kingdom and France had strong reservations against any reference to claims of reparation because it would not be a matter for the Security Council to advance such claims[63].

At that time the United Kingdom representative found:

> "The Security Council is not a court of law, nor is it the appropriate forum to determine questions of restitution and compensation for damages. As Article 36 of the Charter indicates, the Council should bear in mind, in our view, that legal disputes should as a general rule be referred by the parties concerned to the International Court of Justice ... There may well have been extensive damage to installations and equipment, there may well be grounds for claims for compensation; but we sincerely believe that the Security Council is not the right place for considerations of questions of that sort"[64].

He was seconded by his French colleague, who held the opinion:

> "as has been pointed out by my colleague from the United Kingdom the Security Council is not a court of justice and does not seem to us to be qualified to judge whether or not claims of damages are well founded"[65].

---

[61] Security Council res. 290(1970), 8 December 1970.

[62] Security Council res. 387(1976), 31 March 1976; see also res. 428(1978), 6 May 1978; 475(1980), 27 June 1980; 545(1983), 20 December 1983.

[63] See S/PV.1906, para. 251; S/PV.1906, para. 253.

[64] S/PV.1906, 31 March 1976, para. 251.

[65] S/PV.1906, 31 March 1976, para. 253.

It should be noted that both representatives did not make any distinction between affirming in principle the obligation to make reparation – that is what the resolution did – and determining individual claims on reparation, what would be up to the parties concerned and in case of dispute to a court or other settlement procedure. They obviously confused these extremely different aspects of the matter in order to argue that any reference to compensation would be outside the Security Council's competence. This distortion of the question was rightly pin-pointed by the Pakistani representative, who exactly underlined the difference between confirming the duty to make reparation as a consequence of a finding that there has been an act of aggression and setting down specific claims, the amount of compensation or the ways and means how to pay.

> "It has been stated that this is not a court of law, that we cannot demand compensation. I do not think that the Council has set down the amount of the compensation or the manner in which it should be paid and so on. This is a duty of a court of law. We are here a political body; we have taken cognizance of the fact that South African forces went into the territory of Angola ... and occupied it for a period of time ... that fact alone called for compensation"[66].

Fifteen years later this position was taken up by Yemen and Cuba when res. 687(1991) was tabled. This time these countries opposed the detailed regulation of compensation claims, sponsored by the United Kingdom and France, which went far beyond a general confirmation of a duty to make reparation and "tends to exceed the United Nations Charter and the Security Council mandate"[67]. The representative of Yemen clearly made the point that it "is the specification of the way in which Iraq should pay reparations" which goes beyond the Security Council's competence.

> "According to international law it is, indeed, a fact that responsibility should be borne by Iraq. But why should the Secretary General be involved in a matter that falls within the purview of the International Court of Justice? ... With regard to reparations, there is no doubt that there will be many claims made from different quarters. Do we not need a neutral party whose procedures are subject to a set of regulations to decide on such claims"[68]?

The Cuban representative, while stressing that it would be legitimate "that Kuwait should be fully compensated for its losses resulting from occupation and violation", did not see any reason or legal competence for the Security Council to enforce compensation claims of foreign individu-

---

66 S/PV.1906, 31 March 1976, para. 279.

67 S/PV.2981, 3 April 1991, 38–40.

68 See S/PV.2981, 41.

als or corporations. He also emphasized that the Charter "which is supposedly the mandate circumscribing the actions of the Security Council, nowhere grants any power to this body to decide or determine with respect to claims of this nature" – this would be a responsibility of the International Court of Justice[69].

The representative of the United Kingdom did not answer the principal questions that were raised. Instead he answered a question which nobody had raised or would have been prepared to dispute. He said that two extremes had to be avoided as far as compensation was concerned: On the one hand "to overlook or to forget the need for compensation", and on the other hand "to cripple Iraq and its economy with the burden of paying for this damage that it is in fact unable to do so"[70]. While this statement is true, it seems that the representative intentionally bypassed the crucial question, which called in doubt the competence of the Security Council to deal with individual reparation claims and establish a machinery to determine and enforce such claims.

Whenever the Security Council has dealt with the question of compensation it only confirmed the existence of such an obligation. Another example is the strong condemnation of the illegal regime in Southern Rhodesia for its continued, intensified and unprovoked acts of aggression against the Republic of Zambia. The Security Council did not hesitate to call "for the payment of full and adequate compensation to the Republic of Zambia by the responsible authorities for the damage to life and property resulting from the acts of aggression"[71].

Condemning the military attack by Israel on Iraq in clear violation of the UN Charter in 1981, the Security Council considered "that Iraq is entitled to appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel"[72].

The Security Council strongly condemned South Africa for its premeditated aggressive act against Lesotho and demanded "the payment by South Africa of full and adequate compensation to the Kingdom of Lesotho for the damage to life and property resulting from this aggressive act"[73].

All these cases have been quoted to show that, if necessary or appropriate, the Security Council has confirmed an obligation to make reparation.

---

[69] See S/PV.2981, 68–70, 71.
[70] See S/PV.2981, 114.
[71] Security Council res. 455(1979), 23 November 1979.
[72] Security Council res. 487(1981), 19 June 1981.
[73] Security Council res. 527(1982), 15 December 1982.

As a legal consequence of the wrongful act, it is a new legal relationship between the offending State and the injured State which needs to be concretized by agreement. While confirming the obligation to make reparation and sometimes describing the scope of such an obligation[74], the Security Council strictly abstained from dealing with questions concerning single claims, the amount due to be paid, the assessment of the damage caused, procedures for the assessment of harm, the procedure to implement reparation claims or solving disputes between States on reparation claims[75]. Garmise in her analysis also confirms that

> "the U.N. Charter does not give the Security Council the specific power to deal with war reparations or the adjudication of war claims"[76].

She believes, however, that there is some justification for the United Nations to handle Gulf war claims because the Charter empowers the UN "to achieve international cooperation in solving international problems of an economic character. ... the U.N. played a crucial role in the Gulf war ...", and "the International Court of Justice operates slowly". All this may be true – but it does not seem to constitute a valid source for legal entitlements of the organization which interfere with the rights of member States[77].

b) Competence of the Security Council to enforce Iraqi reparations

In the past the Security Council had neither determined individual compensation claims nor set up a mechanism to fulfil such a function under its supervision. Obviously the Council rightly did not feel competent to decide on specific reparation claims, impose procedures to determine such claims, enforce the payment of reparation in favour of a State

---

[74] Cf. however, Arangio-Ruiz who questioned the legal competence of the Security Council to determine violations of international law A/CN.4/453/Add.3, para. 103.

[75] Cf. V. Gowlland-Debbas, Security Council Enforcement Action and Issues of State Responsibility, in: 43 International and Comparative Law Quarterly 1994, 55 (at 81): "The Council had, in the past, called for reparation in the form of compensation, but had neither linked this to decisions under Chapter VII nor involved itself in the decision relating to the amount".

[76] Garmise (note 11), 864.

[77] Fox (note 10), concedes: "Whilst the establishment of the Commission and the provision of a Fund may, perhaps, be properly brought within the mandatory enforcement powers under Chapter VII of the Security Council to restore international peace and security, it is submitted that the determination of the compensation claims falls within Chapter VI and is to be carried out by some separate body or procedure", 2.

concerned or solve disputes concerning such claims. So far the Security Council shared the opinion that this has to be left to the States concerned and in case of dispute to dispute settlement procedures agreed upon by the parties.

It may be recalled that also the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Teheran decided:

> "that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events; and that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case"[78].

The Court held the clear position that the determination of the form and amount of the reparation due to the United States first and foremost depends on an agreement with Iran. This is all the more important in view of the fact that the Court felt it necessary to state the extreme seriousness of the violation in terms which brings it into the immediate vicinity of international crimes[79].

The Security Council, as well as the International Court of Justice, always made a clear distinction between a decision stating in principle the existence of a duty to make reparation and an agreement between the parties on the form and amount of such reparation, the procedure how to implement that obligation.

The Security Council started to act in accordance with its previous practice also in the case of Iraq, as can be seen in res. 674(1990). In line with this practice was also its demand in para. 2b of res. 686(1991) that Iraq

---

[78] ICJ Reports 1980, para. 95, subpara. 5 and 6.

[79] The Court considered "it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected", ICJ Reports 1980, para. 92; see also B. Simma, International Crimes: Injury and Counter-measures. Comments on Part 2 of the ILC Work on State Responsibility, in: J.H. Weiler, A. Cassese, M. Spinedi (eds.), International Crimes of State, Berlin/New York 1989, 283 (at 286).

"accept in principle its liability under international law for any loss, damage or injury arisen 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".

It reflects to a certain degree the practice which was applied after the Second World War. The armistice agreements contained provisions on the duty to make reparation for losses caused by military operations and by the occupation. They were later specified in the peace treaties. These provisions, however, were contained in agreements between the parties to the conflict. They clearly determined the total amount which had to be paid[80].

The establishment of the Compensation Fund and the Compensation Commission by res. 692(1991) as well as the imposition of the procedure applied by that Commission on Iraq and other member States of the United Nations and the confiscation of the Iraqi assets according to res. 778(1992) is clearly outside the competence of the Security Council, and cannot be justified as a measure taken under Chapter VII of the Charter to restore peace. These measures have not been taken to end hostilities, but to enforce the payment of debts after hostilities had come to an end and after the liability to compensate the damage caused had been accepted in principle by Iraq.

Nowhere in the Charter is the Security Council entitled to enforce for certain States or the United Nations itself the payment of debts. Decisions of that kind therefore cannot have any binding force *vis à vis* Iraq or other member States.

"The Security Council's powers, even under Article 41 are restricted to measures directly designed to maintain international peace and security. Actions designed to help maintaining international peace and security by imposing a settlement on the parties to a dispute or situation ... cannot be imposed, or furthered by the imposition of sanctions, within Chapter VII of the Charter, but at most can be the subject of recommendations by the Council"[81].

The wording of res. 687(1991), by referring to res. 678(1990), gives the impression that even the "authorization" to use force is sustained until the conditions imposed by res. 687(1991) have been fulfilled by Iraq[82]. However, there is no justification for the application of force under present international law in order to enforce the payment of reparations or

---

[80] See e.g. art. 23 of the Hungarian Peace Treaty and Articles 74 and 80 of the Italian Peace Treaty.

[81] Greig (note 51), 747.

[82] See note 37.

other debts[83]. Unfortunately, the threat to apply military force in such a case is not without historic precedent. It comes frighteningly close to the military occupation of the "Ruhr" territory in 1923, which happened after the Reparation Commission had found a violation of the duty to pay reparation[84]. I, therefore, would not agree with such a general statement that "une violation de la résolution (687) peut justifier la rupture du cessez-le-feu et une reprise des opérations militaires"[85].

But not only the use of military force as a sanction to enforce reparation payments would be illegal. Also the continuation of the embargo ordered by res. 661(1990) to enforce compliance with a political and administrative claims procedure, and the payment of reparations or foreign debts cannot be justified under the UN Charter. The Council, therefore, cannot legally extend the application of the embargo to enforce on Iraq the acceptance of its reparation scheme, to contribute to the Compensation Fund, to accept or comply with decisions of the Compensation Commission or to satisfy specific reparation claims.

The Security Council by res. 687(1991) has not only extended the embargo to a totally different situation. It has at the same time changed the procedure and objectives of that measure. The procedure has been turned around, because originally the decision on the embargo depended on the affirmative vote of the permanent members of the Security Council. After res. 687 the lifting of the embargo is subject to the veto of each permanent member, and thus depends on the consent of the United States. The objective of the sanction is no longer the termination of hostilities, the withdrawal of Iraqi forces, and the restoration of Kuwait's sovereignty, but many detailed demands mainly listed in res. 687, a resolution adopted after the termination of hostilities and welcoming the restoration of Kuwait's sovereignty[86].

---

[83] Cf. B. Graefrath/M. Mohr, Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait, in: 43 Austrian Journal of Public and International Law 1992, 121.

[84] Cf. Graefrath (note 1), 50.

[85] Sur (note 13), 85.

[86] Cf. ibid., 68; cf. V. Gowland-Debbas (note 75), 80; A. Dowty, Zwiespältige Erfahrungen mit Sanktionen – das Beispiel Irak, in: 49 Europa Archiv 1994, 315; L. D. Roberts, United Nations Security Council Resolution 687 and its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy, in: 25 New York University Journal of International Law and Politics 1993, 593 concludes that although res. 687 constitutes an advance towards improving effectiveness of international regulation without adequate checks the Council's new founded powers undermine the legitimacy of interna-

After the end of hostilities, there, obviously, is no legal basis to continue to apply sanctions, which originally were justified to answer a breach of peace, but are now used to enforce the payment of reparations. The application of sanctions under Chapter VII is strictly bound to fulfil a certain function, to serve a purpose clearly defined by the Charter, that is to stop military activities, to restore peace. The Security Council has no mandate to use sanctions foreseen in Chapter VII to ensure the accomplishment of other purposes.

c) Reparation as legal consequence of an international crime

Even if the reparation claim after a war is considered to be a legal consequence of an international crime and therefore may be determined by the Security Council[87] and invoked by the international community, this relates only to the duty to make reparation in general, but not to the individual claim which depends on a substantiated material harm caused by the war and normally is submitted as a consolidated claim by the victim State.

An obligation to make reparation as a consequence of an international crime cannot be questioned if the Security Council has made a determination that such a crime occurred. Such a confirmation of an obligation to make reparation can be found in the Security Council resolutions 674, 686, and 687. However, res. 674 (1990) cannot be interpreted as "roots" of the Commission's jurisdiction[88], it confirms an obligation to make reparation but does not refer to any jurisdiction. Likewise res. 687 could not "confer" jurisdiction to the Commission[89]. As long as the Security Council itself does not have jurisdiction, it cannot confer jurisdiction to a subsidiary body, which did not even exist when res. 687 had been adopted.

The competence of the Security Council to determine that an act of aggression or a breach of the peace occurred and an obligation exists to make reparation for the damage caused, does not justify to impose a repa-

---

tional law. The Security Council acted without authority grounded in international law when it passed res. 687 (at 594).

[87] Cf. Graefrath, Responsibility and Damage (note 19), 54, 68, 91; Graefrath/Mohr (note 83), 109 (at 120); P.-M. Dupuy, Après la Guerre du Golfe, in: RGDIP 1992, 621 (at 626, 635).

[88] So J.R. Crook, The United Nations Compensation Commission – A New Structure to Enforce State Responsibility, in: 87 AJIL 1993, 144 (at 146).

[89] Ibid., 147.

ration scheme on the responsible State which excludes that State from participating in the determination of individual compensation claims and negotiations with the States concerned. It does not transform the Security Council in an agent of the States or individuals that have suffered from the wrongful act. It cannot degenerate the author of the wrongful act from a subject of international law to an object which has to fulfil orders given by the Security Council. Also the assumption that our world is going through a transitional period, where we witness a change to solidarity in the development of international law[90] would not lead to the conclusion that States are deprived of their sovereignty. It could not vest the Security Council with a competence to impose punitive damages, to enforce foreign debts or to subjugate a country to a kind of trusteeship, to assume legislative and judicial functions, or to replace judicial competence by administrative procedures.

The profound difference between the Security Council as a political organ and a judicial organ has recently been stressed by the Special Rapporteur of the International Law Commission in discussing the functions of the Security Council in connection with international crimes. While emphasizing that

> "the Council's competence to decide discretionarily on the existence of one of those situations (threat to the peace, a breach of the peace or an act of aggression) is in principle confined to the purposes of art. 39 and following of Chapter VII of the Charter. That Chapter and the other relevant Charter provisions do not seem to cover the assessment of responsibility except for the determination of the existence and attribution of an act of aggression. ... The question may indeed be asked ... whether recent practice does not show that the scope of the Council's competence has undergone ... an evolution with regard precisely to the 'organized reaction' to certain types of particularly serious international delinquencies. We refer to some resolutions of the Security Council which do not seem to be easily justifiable on the basis of the powers invested in it expressly by the Charter. These resolutions include in particular res. 687(1991), at least for the part imposing upon Iraq the reparation for 'war damage' and the modalities of assessment and payment thereof.
>
> In order to affirm that the practice in question concurred or concurs to the creation or consolidation of the Council's competence in the area of State responsibility for crimes (a conclusion which would, in our view, be problematic), one should produce convincing arguments to the effect that it is a 'juridically decisive' practice. One should notably prove that the practice in question

[90] K.J. Partsch, Von der Souveränität zur Solidarität: Wandelt sich das Völkerrecht?, in: 18 Europäische Grundrechtezeitschrift 1991, 475.

is a law-making practice either within the Charter system (the so-called United Nations law) or within general international law"[91].

To accept that the Security Council could impose its reparation scheme on Iraq and other member States of the United Nations would run completely against the system of the Charter. It would not only confuse political and judicial powers vested intentionally in different organs, but also endow the Security Council with legislative powers which States never have transferred to any United Nations organ.

d) Specific legal justifications to enforce Iraqi reparations?

If the measures taken by the Security Council with a view to determine and enforce reparation claims against Iraq cannot be justified under Chapter VII or according to art. 24 of the Charter the question may be raised, whether there is any other specific legal justification for the UN to enforce reparations from Iraq .

(i) Can the United Nations justify their activity in establishing the reparation scheme as an entitlement which directly follows from their involvement in the Gulf War?

The Iraqi invasion of Kuwait on August 2, 1990 has been condemned the same day by Security Council res. 660(1990). The Security Council acting under art. 39 and 40 of the Charter condemned the Iraqi invasion and demanded that Iraq withdraw immediately and unconditionally all its forces. Already four days later the Security Council adopted res. 661(1991). The Council was deeply concerned that Iraq had not complied with its demands, and affirmed the inherent right of individual or collective self-defence of Kuwait, in accordance with art. 51 of the Charter. Acting under Chapter VII of the Charter the Security Council ordered all States to impose a strict embargo on Iraq to secure compliance of Iraq with its demand for immediate and unconditional withdrawal from Kuwait and to "restore the authority of the legitimate Government of Kuwait"[92].

Thereby the Security Council acted according to art. 41, applied measures to give effect to its decisions aimed to restore international peace. With its res. 670(1990), 25 September 1990, the Security Council

---

[91] See Fifth Report On State Responsibility, G. Arangio-Ruiz, A/CN.4/453/Add.3, 24 June 1993, para. 103–105; see also the debate at the forty-sixth session of the ILC, A/49/10, 350 et seq.; cf. Gaja (note 48), 297.

[92] Para. 2 of res. 661(1991), 6 August 1990.

warned Iraq that its continued failure to comply with the terms of the Security Council's resolutions "could lead to further serious actions by the Council under the Charter ...". It would have been possible for the Security Council to go further and, in applying military measures under art. 42, enforce under its control the withdrawal of Iraq from Kuwait. Instead and "thanks in no small part to United States' sidedeals with the Soviet Union and China"[93] the Security Council in its res. 678(1990) on November 29, authorized the use of force after January 15, to Member States cooperating with the Government of Kuwait[94].

In this context we are not dealing with the legitimacy of that decision. We confine ourselves to state that with that resolution the Security Council did not act under art. 42 of the Charter, did never obtain control over military activities against Iraq and left everything to Kuwait and its allies which acted under art. 51 of the Charter. The military activities which started on 16 January 1991 were "not under the control of or direction by the United Nations"[95]. It has been rightly stated:

> "The Gulf War should be seen within the framework of Article 51 of the United Nations Charter ... in Resolution No. 678 the Security Council declared that it did not want, or rather no longer wanted, to take the 'necessary' measures to restore peace directly ... Accordingly, the Gulf War was an action of collective self-defence. It cannot be regarded – as has been maintained for purposes of political propaganda – ... as an international police action under United Nations auspices"[96].

Also E.V. Rostow found that

> "the resolution is clearly one designed to encourage and support a campaign of collective self-defense, and therefore not a Security Council enforcement action ... During the period of active hostilities, neither the Secretary-General

---

[93] M. Reisman, Some Lessons From Iraq: International Law And Democratic Politics, in: 16 Yale Journal of International Law 1991, 203 (at 206); see also B.H. Weston, Security Council Resolution 678 And Persian Gulf Decision Making: Precarious Legitimacy, in: 85 AJIL 1991, 516 (at 523); see Partsch (note 90), 469.

[94] Para. 2 of res. 678(1990), 29 November 1990.

[95] United Nations Security Council Resolutions Relating To The Situation Between Iraq And Kuwait, UN Department of Public Information, DPI/1104/Rev.3-41183-December 1991, 3; Sur (note 13), 30.

[96] B. Conforti, Non-Coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War, in: 2 European Journal of International Law 1991, 110; see also H. Weston (note 93), 526; Graefrath/Mohr (note 83), 109 (at 115) with further references; also Ch. Dominicé, La sécurité collective et la crise du Golfe, in: 2 European Journal of International Law 1991, 83; M. Hilaire, Use of Force Against Iraq: Self-Defense under the United Nations Charter and Customary International Law?, in: 71 Revue de Droit International 1993, 71.

nor any other part of the United Nations Secretariat attempted to exercise control over military operations ..."[97].

Finally the Secretary-General himself made it unequivocally clear that the Gulf War was not a United Nations war and that there was no United Nations control of the operations[98].

Since the United Nations organization was not a party in the Gulf War, and was not involved in military activities in the Gulf War, it cannot on its own claim reparations which result from that war. The injured parties which are entitled to such claims can only be States or other subjects of international law whose rights have been infringed and which suffered losses caused by the internationally wrongful act[99].

At the same time, or for the same reason, Iraq cannot claim from the United Nations compensation for damage caused to Iraq by activities in connection with "desert storm" without military necessity or in violation of the rules applicable in armed conflict[100]. The United Nations was not a party in the Gulf War. Therefore such claims could only be directed against Kuwait and its allies. After the Second World War ex-enemy States waived any claims against Allied Powers and their nationals arising directly out of war[101]. No such agreement has, so far, been concluded between the parties of the Gulf War.

(ii) The Secretary-General must have been aware that it is not so easy to justify UN measures to enforce reparation claims for Kuwait and its allies. Otherwise, there would have been no reason for him to explain in his report that

---

[97] E.V. Rostow, Until What? Enforcement Action Or Collective Self-Defense?, in: 85 AJIL 1991, 506 (at 508); see also Partsch (note 90), 469; Dupuy (note 87), 621 (at 624); K. Boustany, La Guerre du Golfe et le système d'intervention armée de l'ONU, in: Annuaire Canadien de droit international 1990, 379.

[98] See Weston (note 93), 533 and 526; also the address of the Secretary-General at the University of Bordeaux on 24 April 1991, Press Release Secretary-General/SM/4560, 5; cf. T.M. Menk, Gewalt für Frieden, Berlin 1992, 159.

[99] See art. 5 of part two of the ILC's Draft on State Responsibility, YBILC 1985, vol. II, part two, 25.

[100] After the military activities of the United Nations in the Congo such claims have been raised by several States and were settled in specific agreements with the United Nations; see e.g. the treaty with Belgium in UNTS 535, 199; with Switzerland in UNTS 564, 193; with Luxembourg in UNTS 585, 147 and with Italy in UNTS 588, 197 which all settle compensation claims for damage arising from UN operations in the Congo.

[101] See art. 24 of the Hungarian Peace Treaty; art. 76,1 of the Italian Peace Treaty reads: "Italy waives all claims of an description against the Allied and Associated Powers on behalf of the Italian Government or Italian nationals arising directly out of the war or out of actions taken because of the existence of a state of war in Europe after September 1, 1939, whether or not the Allied or Associated Power was at war with Italy at the time, including the following: ...".

"the legal basis for the payments by Iraq to the Fund is to be found in paragraph 19 of resolution 687(1991). Iraq has officially notified the United Nations of its acceptance of the provisions of the resolution"[102].

The Secretary-General seemed to invoke consent by Iraq as the legal basis for the Fund, the Commission and the procedure applied by the Commission. Lady Fox too, in looking for some justification of the procedure established by the Security Council, believes that "consent ... remains a valid basis of the UN compensation procedure"[103]. Like the Secretary-General she, however, does not distinguish between "accepting in principle liability under international law" (res. 686(1991)) and consent to a particular procedure which did not even exist, when Iraq accepted the conditions imposed on the country by res. 687 (1991) and 692 (1991).

It is clear, however, from the wording of res. 686(1991) that Iraq accepted only "in principle its liability under international law ...". The same goes for res. 687(1991). The acceptance of the obligation to make reparation cannot be interpreted as an advance recognition or acceptance of any individual reparation claim put forward afterwards by Kuwait or its allies, let alone a procedure which had been developed afterwards and which virtually excludes Iraq from equal participation.

The acceptance in principle of its liability can only mean that Iraq is prepared to negotiate, with the States concerned, agreements on reparation which necessarily have to fix the amount due, and also the form and procedure of payment. It does not and cannot imply a recognition of the competence of the Compensation Commission or Compensation Fund and the procedure invented for these instruments which were established by res. 692(1991), that is six weeks after the adoption of res. 687(1991). In that respect the judgment of the International Court of Justice in the *Teheran* case is a perfect analogy. It stated the principal obligation to make reparation but left the agreement on the amount and the ways and means how to implement that obligation to the parties concerned[104].

---

[102] S/22559, para. 16, reference is made to the decision of the National Assembly of Iraq, 6 April 1991, S/22480.

[103] After finding it difficult to justify the procedure under Chapter VII of the Charter, Fox (note 10), 3; cf. also P. d'Argent, Le Fonds et la Commission de Compensation des Nations Unies, in: 25 Revue belge de droit international 1992, 485 who writes: "Il est vrai que la résolution 687 ne connait aucun précédent comparable et qu'il est difficile d'adopter à son égard une position juridique catégorique. On peut dès lors comprendre la prudence du Conseil de sécurité qui, en exigeant que l'exercice de ses pouvoirs soit accepté par l'Irak, s'est assuré qu'ils ne fassent pas l'objet de contestations", (at 493).

[104] See note 78.

Art. 19 of res. 687(1991) to which the Secretary-General refers in his report does not bind Iraq. This article addresses the Secretary-General. It only contains a directive for the work of the Secretary-General in preparing a proposal for consideration and adoption by the Security Council. When the functions and procedure of the Fund and the Commission became clearer, that is with the adoption of res. 692(1991)[105], Iraq launched a protest against a mechanism which would strip her of her sovereignty in negotiating reparation agreements and dispute settlement procedures with the States concerned, and impose a form of "organised enslavement" on the Iraqi people[106].

Even if Iraq's acceptance of the conditions imposed by res. 687(1991) were interpreted as consent to the compensation process, then, as Lady Fox rightly stressed, also

> "the implementation and interpretation of the provisions are subject to that consent. At the very least, the defendant State who consents to an international settlement process is entitled to put forward its view both as to law and fact on the matters to which it has agreed. Thus, it will be argued that whether the basis of the UN compensation process is seen as the Security Council's powers under the Charter or the consent of the defendant State, a minimum standard as to rules of natural justice obtains"[107].

The Secretary-General in his report to the Security Council proposing the establishment of the Compensation Commission and the scheme for the claims procedure explained:

> "Iraq will be informed of all claims and will have the right to present its comments to the commissioners within timedelays to be fixed by the Governing Council or the panel dealing with the individual claim"[108].

The Iraqi Government obviously thought this means that it will receive detailed information on the claimant, the claims and the evidence submitted by the respective governments and that Iraq will have the chance to be heard on the individual claims and present its comments and evidence. Iraq understood the Secretary-General's report as reserving its right to participate in the process like a party before an arbitral commission[109].

---

[105] The procedure was only finalized by decision no. 10 of the Governing Council, 26 June 1992, since the Security Council did not accept Section II of the Secretary-General's report S/22559.

[106] S/22643, 28 May 1991.

[107] Fox (note 10), 3.

[108] S/22559, para. 26.

[109] Equality of the parties is a basic principle of good administration of justice, see Fox (note 10), 7 and the ICJ in its opinion on the UN Administrative Tribunal, ICJ Reports 1956, 86.

As Lady Fox reports, there had indeed been a draft of the provisional rules of the claims procedure which in art. 17 in accordance with the Secretary-General's report required that the government of Iraq be informed of all claims submitted to the Commission[110]. However, after lengthy debates in the Governing Council this article was replaced by art. 16 of the rules which excluded Iraq from the whole process and reduced the information given to Iraq to the periodic reports of the Executive Secretary[111]. These reports contain just a statistical breakdown of the claims submitted to the Commission, but do not include any information on the individual claimants or their claims[112].

The only form of Iraqi participation foreseen in the Commission's procedure is the right to comment on these reports (not the claims) within 30 days as far as claims of categories A, B and C are concerned and within 90 days in case of claims in other categories. It was held that in the administrative procedure, which is mainly a process of allocating damages, there would be no need for Iraqi participation. "Iraq's participation may be regarded as necessarily secondary"[113], and the requirements of due process may be neglected since the Commission is a political body, applying an administrative procedure, is not a court of arbitration or dispute settlement body[114]. However, the fact that the Security Council and the Commission as its subsidiary body are political organs does not release them from the legal limits established by the Charter.

> "There can be no basis for arguing that, as a political organ, the Council is not subject to the *ultra vires* doctrine. Member States have every right to insist that the Council keeps within the powers they have accorded to it under the Charter"[115].

---

[110] Fox (note 10), 9.

[111] Art. 16 of the Provisional Rules for Claims Procedure, adopted by the Governing Council in its decision No. 10, 26 June 1992, S/AC.26/1992/10.

[112] See Reports submitted by the Executive Secretary S/AC.26/1993/R.1, S/AC.26/1993/R.9, S/AC.26/1993/R.16, S/AC.26/1993/R.26, S/AC.26/1994/R.1, S/AC.26/1995/R.9, S/AC.26/1994/R.17.

[113] Alzamora (note 8), 355.

[114] "The aim is to establish an efficient procedure that is free from the constraints which generally encumber judicial proceedings. This means, that the Commission is fundamentally political and administrative in nature, but it does not entirely dispense with elements of judicial settlement ...", ibid., 354.

[115] Bowett (note 59), 95; he quotes the ICJ which declared in its Advisory Opinion on Conditions of Admission to the United Nations: "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment", ICJ Reports 1948, 64.

Therefore, stressing the political character of the Commission does not add any legal argument to explain the legitimacy of mandatory decisions of the Security Council, binding on all members, on individual reparation claims against Iraq, the assessment of damage, or the imposition of a specific reparation procedure.

The Iraqi Government strongly protested against this procedure and interpreted it as a departure from what had been proposed by the Secretary-General in its report and what later on had been adopted by the Security Council in its res. 692(1991). May it suffice to quote the comments of the Iraqi Government to the fourth report of the Executive Secretary[116]:

> "The above mentioned report, like its three predecessors ... adopts the same approach that runs contrary to the principles set forth in the report of the Secretary-General of the United Nations S/22559 of 2 May 1991, approved by the Security Council, which affirmed the need to inform Iraq of all claims and recognized Iraq's right to present its comments thereon. ...
>
> The procedure adopted by the Governing Council of the United Nations Compensation Commission contravenes the recommendations of the Secretary-General of the United Nations, which were approved by the Security Council, by depriving Iraq of the right to examine the details of the claims, thereby contravening the principles of international law and conventions and preventing Iraq from making comments and observations thereon. ...
>
> It is noteworthy that none of the four reports contained any information that could be verified by Iraq as a basis for its comments and observations on the claims included therein. Moreover, they did not even mention the names and nationalities of the claimants. Under these circumstances, how can Iraq comment on reports submitted in this manner and how can it verify the claims contained therein"[117].

Whether there actually exists "a blatant and unjustifiable departure" from the procedure adopted by the Security Council may be questionable, because the Security Council in its res. 692 (1991) did not accept Section II of the Secretary-General's report. In any case, the dispute between the Commission and Iraq in relation to the procedure makes abundantly clear that it is absolutely impossible to assume that Iraq has agreed to a procedure which deprives Iraq of any meaningful participation in the claims process, and to rely on consent as a legal basis for the compensa-

---

[116] S/AC.26/1993/R.16, 30 July 1993.

[117] S/AC.26/1993/None No. 14, p. 1, 2.

tion procedure as practiced by the Commission against Iraq[118]. Even with an extraordinary imagination, Iraq's acceptance of the obligation to pay compensation cannot be construed as waiving its rights to participate in the process of establishing claims and evaluating damage.

It is clear, therefore, that the legal basis for the mechanism established by the Security Council to enforce Iraqi reparations cannot be based on consent between the parties. Neither was the Security Council a party, nor has there been consent to the mechanism which was established by res. 692(1991) and later decisions of the Governing Council of the UNCC.

(iii) In seeking for a legal basis of the Security Council's activities in establishing individual reparation claims and deciding disputes thereon, one may think in terms of a mandate given to the Council by the claimant States. The Reparation Commissions after the First World War and after the Second World War were established by the victor States. They could have done so in the Iraq case too. Why could they not have asked the Security Council to fulfil this function?

After the Second World War the Security Council was asked, for example, to guarantee the status of Triest, which had been proposed by the Allied powers. At that time, after some debate, the Security Council decided that under its responsibility for the maintenance of peace it has the competence to accept that task[119]. The decisive question was whether the task was necessary for the maintenance of peace. Only under such an assumption could the Security Council as an organ of a universal organization accept to fulfil tasks agreed upon by some States in a particular treaty[120]. Otherwise States could confer functions to the Security Council which were not foreseen in the Charter, or which they found difficult or costly to realize themselves.

---

[118] Gowlland-Debbas (note 75), 83 stated: "The unilateral nature of the resolution, which can be amended or revoked by the Security Council at its discretion, is undeniable". Cf. also E. Klein, Völkerrechtliche Aspekte des Golfkonflikts 1990/1991, in: 29 Archiv des Völkerrechts 1991, 421 who concludes in relation to res. 687: "Alle diese Regelungen sind letztlich dem Aggressor vom Sicherheitsrat einseitig auferlegte Bedingungen ...",(at 435).

[119] See ST/PSCA/1, 482–484; also Delbrück (note 42), 373; Greig (note 51), 743.

[120] Another example may be the Convention on the Prohibition of Bacteriological Weapons which entitles a member State to lodge a complaint with the Security Council against another member State in case of an alleged breach of obligations deriving from provisions of the Convention (art. VI). A similar provision is contained in art. V, 3 of the Convention on the Prohibition of Environmental Weapons.

In any case, the task of negotiating and eventually enforcing individual reparation claims against a State which has accepted in principle its liability for reparation cannot be conferred by some States on the Security Council, because that task cannot be justified as a measure to maintain peace. Nor can some States authorize the Security Council to impose a mechanism on the State liable to pay compensation which deprives that State and also claimant States of their right and possibility to negotiate reparation agreements establishing the form and amount of the compensation due and of solving disputes on such claims by peaceful means.

Furthermore, there is also the question whether the involvement of the UN in the preparation of reparation claims is an appropriate procedure that could contribute to minimize the damage (an obligation under international law incumbent upon the claimant State), or whether it rather leads to an unnecessary and thus unjustified aggravation of costs. It does not seem to be a reasonable policy for an organ which has the primary responsibility for the maintenance of international peace to be involved in a procedure establishing individual compensation claims and ensuring the payment of compensation claims for certain States over the next 20 years or more, and thereby working as a fact-finding and quasi-judicial body on topics which are not likely to endanger peace. The Charter does not empower the Security Council to function at the same time as a clearing house, a dispute settlement mechanism and as a bailiff *vis-à-vis* a member State in order to enforce compensation claims of other member States or individuals. All these functions are not covered by Chapter VII, are not foreseen for the Security Council in the Charter. They are *ultra vires* and cannot be justified as a mandate conferred to the Security Council by Kuwait and its allies. Decisions of the Security Council aimed at implementing such a function cannot have any binding force on member States. They cannot hinder States from negotiating and agreeing with Iraq on lump-sum arrangements to settle the reparation problems.

Despite these shortcomings in its legal foundations, the Commission has developed its procedure, the first panels of Commissioners have made their recommendations on B claims and the Commission has allocated the first payments[121]. Some 30 States have participated in the work of the Commission and some 80 States have submitted claims. These are political facts which occur under present political conditions. They may be different tomorrow and they cannot provide a substitute for a legal mandate which is lacking.

---

[121] See S/AC.26/1994/1, 26 May 1994; also e.g. Jordan Times, July 12, 1994, 12.

e) Conclusion

(i) The confirmation of an obligation to make reparation in connection with the determination of the existence of a breach of the peace by the Security Council is in accordance with the Charter and a practice often used by the Council. In connection with such a confirmation the Security Council has repeatedly described the general scope and contents of the obligation to make reparation. Its competence to do so does not raise any question.

(ii) The Security Council, however, is not entitled and has no competence under the Charter, or under an agreement with the States concerned, to set up a compulsory machinery:

– to list and confirm individual reparation claims of certain individuals or States;

– to assess individual damage;

– to solve disputes in relation to individual reparation claims which were not conferred to the Council by the parties concerned.

(iii) The Security Council is not entitled for the purpose of enforcing the payment of reparations:

– to sustain the authorization of Kuwait and its allies to use force (res.678 (1990)) after the hostilities came to an end. There is no doubt that the resumption of military activities against Iraq could not be justified under art. 51 of the Charter and is prohibited by art. 2 para. 4 of the Charter[122].

– to continue to apply or to reimpose (as foreseen in paragraph 9 of res. 692(1991)) economic sanctions which were justified under the conditions of res. 661 (1990).

Making a State pay its debts cannot be considered to be a measure necessary to maintain or restore peace. It seems that both the United States and the United Kingdom have a quite different criterion to uphold sanctions. Both have indicated several times that sanctions would not be lifted as long as Saddam Hussein is in power[123]. To overthrow the gov-

---

[122] The unqualified reference to res. 678 in res. 687 (1991) therefore is at least misleading. It should be recalled that already the Drago doctrine stated that intervention is prohibited which is aimed at making a State pay its public debts. See also the Hague Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 1907.

[123] President Bush told the General Assembly in 1991: "We must keep the United Nations sanctions in place as long as Saddam Hussein remained in power", A/46/PV.4, 24 September 1991, 8; see also International Herald Tribune 21/22 May 1991; cf. the British representative in the Security Council, S/PV 2981, 116: "My Government believes that it

ernment of Saddam Hussein, however, has never been a goal mentioned in Security Council's resolutions. It could not be invoked to justify sanctions against Iraq. To apply sanctions for that purpose simply means that the United Nations is used as an instrument of the United States and the United Kingdom to interfere in the internal affairs of Iraq.

> "Ainsi l'objectif réel des mesures ne serait plus l'évacuation du Koweit et pas seulement l'application rapide et complète de la résolution 687, mais l'éviction du régime actuel de l'Iraq. Objectif publiquement inavouable à l'époque ..."[124].

It seems to me that the enforcement measures of the Charter have not been designed to justify a policy which

> "consiste à maintenir l'ensemble de mesures coercitives confirmées par section F jusqu'à ce que le régime iraquien soit remplacé. Là réside peut être la condition de fond pour l'application de la résolution 687..."[125].

To enforce a worldwide embargo against Iraq, doing great harm to the population of Iraq, in order to cause the Iraqi people to change their Government, is a violation of the principle of sovereign equality of States and of the right to self-determination of the Iraqi people.

Referring to the measures taken by the Allied powers against Germany after the Second World War, Tomuschat stated recently:

> "It was patently clear that all the horrors and atrocities committed by a criminal regime could not serve as a justification for subjecting the population living under such a regime to similar treatment – to do so would ignore the basic principles of humanitarian law and human rights ... A pronouncement of collective guilt was to some extent inevitable, but on no account should innocent people be made to suffer"[126].

In 1994 nobody can claim not to be aware of the fact that the unnecessary continuation of the embargo against Iraq mainly hurts innocent people, in particular women and children.

---

will in fact prove impossible for Iraq to rejoin the community of civilized nations while Saddam Hussein remains in power". See also Ph. Alston, The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath, 13 Australian Yearbook of International Law 1992, 107 (at 155); see also Graefrath/Mohr (note 83), 134.

[124] Sur (note 13), 71.

[125] Ibid., 85.

[126] Cf. Ch. Tomuschat, A/CN.4/SR.2343, 8.

3. Competence and Procedure of the Compensation Commission

a) Legal background of the Commission

The Compensation Commission (CC) and the Compensation Fund were established by para. 3 of Security Council res. 692(1991) in accordance with section I of the Secretary-General's report of 2 May 1991 (S/2259). The Secretary-General's report was submitted on request according to art. 19 of res. 687 (1991). The Compensation Commission is a subsidiary organ of the Security Council, a political body and functions under the Council's authority[127].

The policy-making organ of the Commission is the Governing Council, composed of 15 representatives of the members of the Security Council, "a mini Security Council"[128]. It already has adopted a number of decisions[129] determining the claims eligible for compensation, the procedure for collecting and verifying such claims, the settlement of disputed claims and the mechanism for monitoring oil sales and ensuring payments to the Fund[130]. It will be incumbent upon the Commission to decide on an allocation of funds and a procedure for the payment of claims[131].

The Council is assisted by Commissioners, who are individual experts appointed by the Governing Council. Their task is to verify and evaluate claims not according to international law as independent arbitrators but according to guidelines already established by the Governing Council in its decisions and detailed rules of procedure[132]. While the commissioners can make recommendations as to the verification and evaluation of claims, the final approval is given by a decision of the Governing Council which may increase or reduce the recommended amount. Its final deci-

---

[127] The Commission "will function under the authority of the Security Council and be a subsidiary organ thereof", para. 4 of the Secretary-General's report S/22559.

[128] Brower (note 40), 58.

[129] UN Doc. S/AC.26/1991/1 – S/AC.26/1994/19.

[130] Cf. decision of the Governing Council S/AC.26/1991/6, 23 October 1991.

[131] Cf. Secretary-General's report S/22559, para. 8. At the end of June $ 2.7 million for 670 Category B claimants from 16 countries have been paid; cf. S/AC.26/1994/1.

[132] "The commissioners will implement the guidelines in respect of claims that are presented and in resolving disputed claims"; Secretary-General, S/22559, para. 20; UN Doc. S/AC.26/1991/10, art. 31: "In considering the claims, Commissioners will apply Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law". Cf. Caron (note 9), 1010: "The panels of Commissioners address claims implementing policies of the Council". Cf. Affaki (note 21), 51.

sions are not subject to appeal. The procedure does not allow for a right of appeal. The panels composed of commissioners are under the command of the Governing Council and therefore cannot be compared or equated with judges or arbitrators.

> "The Commissioners, who sit in panels of three have no independent status. They enjoy no security of tenure and are appointed by the Governing Council for specific tasks and terms. These terms of appointment will ensure a subordinate role to the Governing Council"[133].

The technical work based on computerized systems is done by a Secretariat headed by an Executive Secretary. Members of the Secretariat may assist the Commissioners and attend all sessions. Actually it is the Secretariat which prepares the recommendations of the panels. Otherwise the Commissioners could not deal with thousands of cases and voluminous files within the extremely short time limits afforded by the procedural rules.

The Secretariat relies very heavily on personnel with experience gained in the Iran-US Claims Tribunal. However, the procedure of the Compensation Commission is fundamentally different from that applied in the Iran-US Claims Tribunal[134]. All the inconvenient legal safeguards "which generally encumber judicial proceedings"[135] have been carefully eliminated.

In the Iran case, the acceptance by Iran of the obligation to pay compensation was not used to exclude Iran from participating in the process of establishing and verifying the various compensation claims, or to prejudge individual claims, but to agree on the establishment of the Claims Tribunal. All claims had to be decided in a judicial procedure by the Tribunal, an independent adjudicative body, in which Iran is represented on an equal footing[136].

---

[133] Fox (note 10), 8; cf. Stern (note 27), 625 (at 634): "le système ... s'éloigne de tous les précedents que nous avons examinés, qui mettaient en jeu une instance arbitrale. Rien de tel ici. C'est un organ politique qui est chargé de mettre en oeuvre la responsabilité de l'Irak pour dommages causés". She, however, believes that the Commissioners might guarantee some objectivity. "Il s'agit donc en définitive d'un système hybride, regroupant ou présentant les aspects d'un règlement politique et les aspects d'un règlement arbitral effectué sur la base du droit international". Cf. also Ulmer (note 11), 86; Alzamora (note 8), 353.

[134] Cf. Brower (note 40), 51; M. Ball, The Iraq Claims Process – A Progress report, in: 9 Journal of International Arbitration 1992, 37; Ulmer (note 11), 91.

[135] Alzamora (note 8), 354.

[136] Cf. Brower (note 40), 58; Affaki (note 21), 24.

As opposed to that, in the Iraq case the judicial procedure has been replaced by an administrative and a political procedure which is not based on the equality of the parties but which presupposes and reflects a certain hierarchy. Iraq has no standing and no impact in that "simple and expeditious administrative procedure"[137] directed by the Security Council and practised by its subsidiary organ. It is subjugated to the Commission's decisions which are assumed to be legally binding. Iraq has simply to obey and to pay. Failure to carry out the decisions of the Commission shall be notified to the Security Council which

> "intends to retain[138] or to take action to reimpose the prohibition against the import of petroleum and petroleum products"[139].

That is, to apply or order sanctions according to art. 41 to restore international peace and security, as has been done with res. 661(1990), which is thereby extended to enforce reparations as decided by the Compensation Commission. There certainly is no rule in the UN Charter that could be quoted to justify such a measure[140].

The crucial question, however, is whether there is any legal basis that justifies the assumption that the Commission may take decisions which are legally binding upon Iraq and other member States of the UN.

The Compensation Commission is a subsidiary organ of the Security Council. Subsidiary organs may be of very different kind and serve quite different purposes. However, there is unanimous agreement in doctrine and practice that

> "the character of a body as subsidiary organ is determined by the limitation of its authority ... provided that by limitation of its authority is meant that the competence of the subsidiary organ does not go beyond the competence of the organ by which it has been established and that the function of the subsidiary organ is to assist the organ establishing it in the performance of the functions assigned to the latter"[141].

Since the Security Council has no competence under the Charter to determine individual reparation claims, assess damage, or to decide on disputes concerning individual reparation claims, or allocate payments to

---

[137] Crook (note 88), 145.

[138] That means continue to apply sanctions which were only justified and ordered in res. 661(1990) to enforce the withdrawal from Kuwait and the restoration of the Government of Kuwait.

[139] Paragraph 9 of res. 692(1991).

[140] Cf. above, text to note 82.

[141] Kelsen (note 57), 137; see also G. Jaenicke in relation to art. 7 of the Charter, in: B. Simma (ed.), Charta der Vereinten Nationen, München 1991, 160; M. Hilf in relation to art. 29, ibid., 451.

certain claimant States, it cannot authorize a subsidiary organ to do so. It cannot confer a competence which it lacks itself.

Art. 25 of the Charter therefore does not apply, and cannot be interpreted as a source which makes decisions of the Compensation Commission compulsory. All the reasoning already given questioning the Security Council's competence to determine individual reparation claims and enforce them is also valid in regard to the Compensation Commission which functions as the executive subsidiary organ of the Security Council in that field[142].

Obviously in order to justify the unequal administrative procedure imposed upon Iraq, which is praised by Crook as "a new structure to enforce State responsibility[143]", the Secretary-General explained in his report:

> "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. Given the nature of the Commission, it is all the more important that some element of due process be build into the procedure"[144].

It certainly is true that the Commission, despite its functions, is a political organ and not a court. This, however, does not follow from its task. To the contrary, examining claims, verifying their validity, evaluating losses, and assessing payments are no less typical functions of a court or arbitral tribunal than resolving disputes. The whole process of examining claims, verifying their validity, evaluating losses, and assessing payments which includes the determination of admissible evidence, its relevance, materiality and weight[145], is part of a procedure aiming to resolve a dispute, i.e. the dispute on the reparation claim. Referring to these functions therefore underlines the need for some kind of peaceful settlement procedure. It cannot justify or substitute an explanation why it has been decided to mandate a political organ, and not leave that task to negotiations between the parties concerned or a court or quasi-judicial organ agreed upon by the parties, or recommended by the Security Council in accordance with Chapter VI of the Charter.

---

142 Para. 4 of the Secretary-General's report S/22559.

143 Crook (note 88), 144.

144 S/22559, para. 20.

145 Art. 35 of the rules of procedure S/AC.26/1992/10.

It already is very questionable whether the Secretary-General is correct in believing that only the "resolution of disputed claims would ... be quasi-judicial"[146] and therefore needs "some elements of due process". Why not the examination of claims, verifying their validity etc.? Why are only "some elements of due process" needed? What justifies and who has agreed to the elimination of other elements of due process? To state that what normally are judicial functions – for whatever reason – have been conferred on a political organ is no justification at all to reduce the established elements of due process to "some". Elements of due process are nothing other than rights of States in a specific situation. To deprive States of such rights needs a much more substantiated justification to avoid it being considered as a violation of international law. The reparation mechanism, whether established by the Security Council or in any other way, in order to be considered as a legal process has

> "to be conducted in accordance with principles of international law. These principles impose certain legal constraints, in particular procedural requirements of natural justice and equality in the conduct of the claims procedure. In the present context three aspects of natural justice are relevant: the opportunity to present both sides of the case, the decision-maker to be independent and impartial without commitment to one of the parties, and the decision-maker to inform himself and the parties involved fully of the matter to be investigated"[147].

All this is totally absent in the claims procedure applied by the Compensation Commission. It is, therefore, somewhat irritating when the Compensation Commission and its practice are quite often described in legal literature as if it were an international legal process, just because it has been established by the Security Council.

The reparation claim as a consequence of a war is a legal relationship between States. It covers the damage caused by the war or occupation, as described in resolutions 674(1990) and 686(1990) or 687(1991).

It is a consolidated claim, which means it covers all the different compensation claims of the State itself and its nationals (individuals or corporations) caused by the war. This has been the practice after both the First World War and the Second World War. It is the only way to ensure a just distribution of what may be obtained from the obligated State between the different claimants within the receiving State.

The methods of resolving claims caused by a war may be different. They may rest on decisions of mixed claims commissions, or arbitral tri-

---

[146] Cf. Secretary-General S/22559, para. 25.

[147] Fox (note 10), 6.

bunals, or be based on a peace treaty and result in lump-sum agreements which leave the distribution of the compensation to the receiving State. In particular if the damage caused can be compensated only in part, if there are many claimants, difficult questions of evidence and so forth, the method of lump-sum payments is preferred, because it not only settles all these problems, avoids thousands of time-consuming, difficult and costly court procedures but also facilitates the resumption of normal relations between the States concerned[148].

It is up to the States concerned to determine their claim and negotiate an agreement with Iraq that covers the total claim, thereby excluding additional individual claims from being raised in civil law procedures. This was the practice after the Second World War. Agreement on the total amount due and the exclusiveness of the State reparation claim is a necessary guarantee to ensure equal and just satisfaction of the multifarious claims caused by the war[149].

The procedure of verifying claims as established by the Compensation Commission does not live up to this basic condition. On the one hand it excludes Iraq from equal participation and from detailed information on claims accepted by the Commission. On the other hand it considers it as "entirely possible, indeed probable, that individual claimants will proceed with claims against Iraq in their domestic legal systems"[150], notwithstanding the Commission's clumsy compensation claims procedure. This, of course, means: "The likelihood of parallel action taking place on the international level in the Commission and on the domestic level in national courts cannot be ignored"[151]. The Commission's procedure which hides any concrete information from Iraq does not allow Iraq to find out whether certain claims accepted by the Compensation Commission have been submitted twice or were already satisfied in part or total. Nevertheless, the burden to prove that a certain amount paid also covers a claim

---

[148] Cf. Fox (note 10), 5; Garmise (note 11), 84; R.B. Lillich/H. Weston, International Claims: Their Settlement by Lump Sum Agreements, 1975.

[149] Even a somewhat different but similar regulation as e.g. in the German-USA Agreement 1992 presupposes the determination of a total sum from which amounts paid to individual claimants would be deduced, see Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Settlement of Certain Property Claims, Bonn 13 May 1992, articles 2, 3, para. 4, BGBl. II, 1992, 1222.

[150] Secretary-General's report, S/22559, para. 22.

[151] Ibid.

raised under the Commission's procedure would always rest on Iraq and depend on a decision of the Commission[152].

As long as there is no determination of the total amount of the reparation claim the possibility for individuals or corporations to make use of national jurisdiction in order to satisfy their claims could enhance the total amount of the reparation due, could endanger the capacity of the debtor to pay and thereby diminish the chance of a just distribution of the amount eventually available for reparation purposes.

Attention should be given to a remark by Crook who informs the public that the procedures invented by the Compensation Commission and imposed on Iraq will also lay the foundation for future bilateral settlement of claims[153]. That clearly points to an understanding that the claims established in the procedures before the Compensation Commission are not exhaustive, that besides these payments other compensation claims arising out of the war can be brought forward against Iraq on a bilateral basis, and that corporations which got their share via the Commission's procedure could afterwards try again and get more by suing in domestic courts or press their Government to negotiate a bilateral compensation treaty with Iraq. Even individuals who have opted under the Commission's procedure to claim fixed amounts for departure ($ 4000 per person or $ 8000 per family)[154] have only waived to file other claims within the Commission's procedure. They are free to bring additional actions against Iraq in national courts knowing that Iraq, because of the discriminatory claims procedure before the Commission, would not be in a position to prove that they already received their compensation under the Commission's claims procedure.

There is no doubt that even if Iraq were to follow the procedure of the Commission that would not settle its obligation to make reparation *vis-à-vis* individual States.

In his report the Secretary-General explicitly stated:

---

[152] In its decision No. 13 the Compensation Commission decided to request the Government of Iraq to provide the Commission with information about claims against Iraq in national courts and invited Governments to provide the Commission with information regarding relevant lawsuits pending in their courts and recipients of payments for losses incurred as a result of Iraq's invasion and occupation of Kuwait. It also decided that Governments and employers that include amounts in their own claims which have already been paid to individual claimants from the Fund will not be eligible for compensation and that payments received otherwise will be deducted from the compensation to be paid from the Fund, S/AC.26/1992/13.

[153] Crook (note 88), 157; cf. also d'Argent (note 103), 516.

[154] Cf. S/AC.26/1991/1, 2 August 1991, and S/2392, 17 December 1991.

"Resolution 687(1991) could not, and does not, establish the Commission as an organ with exclusive competence to consider claims arising from Iraq's unlawful invasion and occupation of Kuwait"[155].

That means bilateral disputes are not excluded and even will necessarily follow. It is precisely because the Security Council and the Commission have no right to decide on individual reparation claims that they cannot prevent an individual, a corporation or a State from raising such claims *vis-à-vis* Iraq. The nonexclusiveness of the Commission's procedure points to the weakness of its legal basis. It also makes clear that there is no incentive for Iraq to comply with a procedure which cannot finally settle the issue and which from all perspectives is designed and practised to its disadvantage[156].

The nonexclusiveness of the regulation of reparation claims is in sharp contrast to the normal regulation of such obligations in peace treaties. Art. 80 of the Peace Treaty with Italy, for example, explicitly stated:

"The Allied and Associated Powers declare that the rights attributed to them under Articles 74 and 79 of the present Treaty cover all their claims and those of their nationals for loss or damage due to acts of war, including measures due to the occupation of their territory, attributable to Italy and having occurred outside Italian territory, with the exception of claims based on Articles 75 and 78" (which concern the return of property removed from United Nations territory and return of United Nations property in Italy)[157].

Furthermore, there is a need to determine the total amount of the reparation claims *vis-à-vis* Iraq because it is necessary to take into account the capability of the debtor State to pay, different priority aspects of victim States, and the general goal of strengthening future peaceful relations in the area. Reparation after a war is not reigned by usual commercial

---

[155] Secretary-General report S/22559, para. 22.

[156] The problems created by this non-exclusive procedure certainly cannot be overcome by inviting "in particular the Government of Iraq, to provide any information which would help to ensure that compensation is paid only once for the same damage", Alzamora (note 8), 353; cf. S/AC.26/Dec.13.

[157] The Agreement between the USA and the Federal Republic of Germany concerning the settlement of certain property claims leaves it to the individuals concerned to decide within six months whether they claim a portion of the settlement amount or pursue domestic remedies in the Federal Republic of Germany (art. 3). It is up to the Government of the United States to provide the Federal Republic of Germany with a list of all its nationals with claims covered by art. 1 indicating the election made, as well as available details of the claims covered by the agreement. Finally it concludes: "This agreement shall constitute a full and final settlement of claims covered by article 1 of ...".

terms[158]. Its implementation has to be subject to the establishment of a lasting and comprehensive peace[159]. It can be taken for sure that Iraq is not able to compensate all and every damage, as had been Germany or Japan after the Second World War. Therefore a fixation of the total amount of the reparation claim that can be implemented is also needed to allocate specific shares to the entitled States.

Without determining the total amount which Iraq is due to pay as reparation the obligation would be an open-ended resource to exploit Iraqi petroleum and economic resources and to force the Iraqi people to work in the foreseeable future for servicing foreign debts[160]. The reparation claim would thus degenerate into an instrument for manageing the difficult dilemma between ruining Iraq and milking her for an unlimited period of time[161]. It is not by chance that the compensation procedure established by the Security Council is not commended as "progressive development of international law" but evokes "the Ghost of Versailles".

> "In sum, the Iraqi claims process and the post-World War I claims process are similar in both structure and procedure. Both forced the defeated nation to take moral and financial responsibility for most of the damage resulting from the war. Both were designed around a multinational commission from which the defeated nation were excluded. Furthermore, both commissions were entrusted with evaluating claims presented by each government and setting the level of reparation payments in a fixed payment schedule"[162].

The history of reparations after the First World War is a lesson to be learned from. Such a policy, certainly, was not and is not in the interest of strengthening peace. Today it would also be in violation of generally accepted human rights.

Since the total amount available for reparation is less then the damage caused and it is left to the receiving State to decide how to distribute its

---

[158] Cf. J.I. Brownlie, International Law and the Use of Force by States, London 1963, 144; cf. R.J. Morrison, Gulf War Reparations: Iraq, OPEC, and the Transfer Problem, in: 51 The American Journal of Economics and Sociology 1992, 385.

[159] Keynes (note 41), 400.

[160] Even M. Reisman states: "The permanent members undertook to sequester the natural resource wealth of a state without its agreement and to require it to pay a potentially large amount of damages, whose quantum and beneficiaries will be determined, in the ultimate instance, by the Council. Thus, with the end of the Cold War, the Council not only has revived atrophied functions, but also has undertaken activities that, arguably, may not have been contemplated at its inception", The Constitutional Crisis in The United Nations, in: 87 AJIL 1993, 83 (at 85).

[161] Keynes (note 41), 335, a term used in relation to Germany.

[162] Garmise (note 11), 870; Morrison (note 158), 385.

share of the reparation received[163], it does not make much sense to determine each and every individual claim[164], even if nicely arranged by sophisticated software. It would be easier and more efficient to negotiate lump-sum agreements that cover the total consolidated claim.

While the Compensation Commission, in its decision 17[165] established "Guiding Principles" for the priority of payments, explicitly stated that the "distribution of compensation will be the responsibility of each Government concerned", in its decision 18[166] it immediately made clear that this should not be interpreted as leaving to the Government a discretionary power to distribute the money received according to its own priorities. Governments may offset to a certain degree their costs of processing claims, but they shall provide information to the Compensation Commission on the arrangements made for the distribution of funds to the claimants; they should distribute funds to the relevant claimants within six months of receiving the payment; they shall report to the Compensation Commission on the amounts distributed and the reasons for non-distribution; in case of insufficient information the Compensation Commission may decide not to distribute further funds to that particular Government. At the end payments not distributed shall be reimbursed to the Compensation Fund.

These provisions show that the Compensation Commission tries to remain in control of the whole reparation process. It decides not only on the validity of compensation claims but also on the mode of payments and continues to monitor the distribution of the payment to the Government to the individual claimant. The whole reparation-process has been internationalized, the Government concerned acts like a representative of the claimant and an agent of the Commission. The Commission decides and controls everything in relation to reparation claims, as if States had mandated the Security Council to administer their reparation claims. For the time being, as long as they get money, Governments may not object, in particular because Iraq has to pay in any case and Governments continue to be free to pursue their claims on a bilateral level or under municipal law, the procedure of the Compensation Commission appears all-embracing, but it remains non-exclusive.

---

[163] Again a reference to the US-German Agreement may be useful. Art. 2 para. 9 contains the common formula: "The United States shall be exclusively responsible for the distribution of the final transfer amount in accordance with the law of the United States".

[164] Cf. Keynes (note 41), 351 et seq.

[165] S/AC.26/Dec.17, 23 March 1994.

[166] S/AC.26/Dec.18, 23 March 1994.

The setting up of the Compensation Commission by the Security Council, with the far-reaching legislative and quasi-judicial competences conferred to it, is outside the competence of the Security Council. Decisions of the Compensation Commission therefore are not binding upon Iraq or claimant States. The Compensation Commission is unnecessary and incompetent to determine the distribution of compensation that should be paid to individual claimant States. The Compensation Commission cannot replace or question reparation agreements concluded between Iraq and individual States. The Compensation Commission cannot act as a dispute settlement mechanism because it can rely neither on Iraq's acceptance of such a function nor on a mandate authorized by claimant States. It also violates general accepted legal principles which exclude a political organ of the UN from usurping jurisdiction to decide in favour of individuals, corporations, a State or a group of States on the existence and the amount of an obligation between States, as well as the ways and means to implement it, and thereby either functions as a party and a judge at the same time or as an organ from a hierarchical higher level.

Since the Compensation Commission is unnecessary and has no legitimate competence *vis-à-vis* Iraq, there is no legal justification for burdening Iraq with the costs of this institution. If claimant States deemed it necessary to establish a common reparation Agent to agree on the total sum that could be successfully claimed, coordinate their reparation policies and harmonize their proportionate shares, they are free to do so. But this is their problem. It cannot be considered to be a legitimate function of the Security Council under Chapter VII of the Charter, in particular since the UN was not a party to the Gulf War and Iraq had accepted in principle its duty to make reparation.

Iraq is under no legal obligation to pay for a machinery that the claimant States considered necessary to create in order to coordinate their policy and to enforce a procedure on Iraq that cannot be justified under international law. It is a generally accepted legal principle that reasonable measures have to be taken to avoid an aggravation of harm. The Compensation Commission is doing the contrary in causing costs which are absolutely superfluous and can easily be avoided. The Compensation Commission itself states in decision No. 9: "The total amount of compensable losses will be reduced to the extent that those losses

could reasonably have been avoided"[167]. The expenses of the Compensation Commission certainly are a case in point.

The expenses of the Secretariat of the Compensation Commission up to 1993 already amounted to US $ 16 million and the average annual expenditures were estimated to exceed US $ 10 million. In the Secretary-General's report it had been proposed that the expenses of the Commission should in principle be paid from the Fund, that is by Iraq[168]. If the establishment of the Compensation Commission and its procedure cannot be justified under international law it follows that there is no legal basis to burden Iraq with the expenses of an inefficient and illegal procedure which deprives Iraq of basic rights, "in particular procedural requirements of natural justice and equality"[169]. The Iraqi Government already has launched a strong protest against burdening Iraq with costs for a procedure which exhibits

> "a tendency to ramify and diversify the liabilities that they are attempting to impose on Iraq, thereby making them, on the whole inconsistent with the principles of international law and international precedents ... also from the principles set forth in the Security Council's resolutions and the reports of the Secretary-General of the United Nations ..."[170].

b) Procedure developed by the Compensation Commission

The procedure developed by the Commission is in essence a political or an administrative procedure designed to get rid of judicial guarantees and was established by a kind of "legislation" which is unprecedented as far as its source and contents is concerned. It is unprecedented and – to put it mildly – without legal justification under international law.

The Compensation Commission is much more than an administrative organ which works according to generally recognized rules or at least rules agreed upon by the parties. While it is true that the claims procedure established by the Commission is "a simple and expeditious administrative procedure", it must not be forgotten that this procedure, to a

---

[167] S/AC.26/1992/9, para.6; the Commission even added a commentary to this sentence explaining: "The duty to mitigate applies to all claims ..." (S/AC.26/1992/15).

[168] S/22559, para. 29.

[169] Fox (note 10), 6; cf. the protest of the Iraqi Government against burdening Iraq with the payment of the excessive costs of the UNCC in S/AC.26/None No. 17, November 1993.

[170] Letter of the Iraqi Minister of Foreign Affairs, 14 November 1993, S/AC.26/1993/None No. 17.

large extent, came into being by "legislation" of the Commission itself. What in the unpretentious language of the Secretary-General is called "guidelines", in fact has the character of law imposed on Iraq. In establishing rules for the work of the Commission the Governing Council has tried to create new legal rules which apply to the compensation claims of individuals and States resulting from the Gulf war. They replace existing rules of international law as applied by international arbitral tribunals and bind the commissioners in their work[171].

Res. 692(1991) which establishes the Commission determines its mandate in para. 3 "in accordance with section I of the Secretary General's report" and directs the Governing Council in para. 5 to "take into account the recommendations in section II of the Secretary General's report". To understand the legislative function of the Compensation Commission we have to go back to the Secretary-General's report[172]. According to para. 10 of the report the Governing Council will have

> "the responsibility for establishing guidelines on all policy matters, in particular, those relating to ... the procedures to be applied to the processing of claims and to the settlement of disputed claims, as well as to the payments to be made from the Fund".

According to para. 20 of the report, "it will fall to the Governing Council to establish the guidelines regarding the claims procedure". Already "claims procedure" in this context became a term of art, meaning:

> "The process by which funds will be allocated and claims paid, the appropriate procedure for evaluating losses, the listing of claims and the verification of their validity and the resolution of disputed claims as set out in paragraph 19 of resolution 687(1991)".

In fulfilling its function the Commission has not simply adapted a number of rules generally accepted in international relations to a similar case. Beyond that, the Commission has developed many absolutely innovative procedures and rules, and it has abandoned legal guarantees without even seeking the consent of the States concerned.

To justify this approach it is often said that there is no doubt that Iraq has an obligation to make reparation. This obligation is part and parcel of the process of establishing a lasting peace and therefore the Security Council is competent to decree whatever is necessary, including a reparation procedure, and to establish the relevant organs to implement that

---

[171] Cf. Crook (note 88), 145; Brower (note 40), 56; in July 1991 "the Council has made such marked progress that it can be said to have already completed its legislative work", Alzamora (note 8), 351.

[172] The reference is always to S/22559 of 2 May 1991.

procedure. For the first time the Security Council could act as organ of the international community to suppress an aggression and decide on the consequences. Instead of leaving it to the individual States to pursue their reparation claims an international organ could consolidate the various claims, which run into millions, establish priorities for the losses of individuals and ensure that the claims of individuals are satisfied on an equal level. The Compensation Commission more or less is seen as an international version of national claims commissions. It applies an administrative procedure to allocate damages. There would be no need to allow Iraq to participate in this process as long as undoubtedly the available assets were less than the damage caused by the Iraqi occupation of Kuwait.

While it is not at all convincing that Iraq may be excluded from participation in the procedure as long as it cannot pay full compensation this, however, provokes the question whether it makes much sense to present claims of individuals and of different categories. That had been avoided after the Second World War. Already in 1943 J.M. Keynes argued:

> "Since it is evident that such claims even if confined to certain limited categories are likely greatly to exceed Germany's capacity to pay, no Allied country can on any basis of division hope to receive more than a small proportion of its claim. It follows that classification of claims according to whether they should or should not rank is only important as affecting the different shares of the different claimant Governments, and would not affect the aggregate amount which Germany is required to pay, which will in any case be the largest sum which it seems advisable to demand. The makers of the Treaty of Versailles were suffering or pretending to suffer, or acquiescing in the imputation of suffering, from the illusion that their total claims against the enemy could be met. It became necessary therefore that they should establish and justify a detailed inventory of claims. With their disillusion and the world's experience behind us the Committee felt themselves excused from a similar task. ... The purpose and the only object of considering which claims should rank is in order to reach a method at arriving at a broad answer to such questions as what should be the Russian percentage share of the whole available receipts from Germany, what should be the British share, and so on. In the view of the Committee it is simply not worth while to devote an immense amount of time and labour to assessing the claim of each Allied country and discussing the merits of the different classes of claims with a view to the distribution between the Allies of the compensation recovered"[173].

[173] Keynes (note 41), 352.

The recommendation developed was: Assessment of the total amount of compensation, and the securing of a proportionate share of the compensation obtained for each claimant Government;

> "it should be left to each of the Allied Governments concerned to decide what to do with the compensation which it received, e.g. whether and how the amounts received should be divided between its different classes of claimants, the extent to which those amounts should be used for the relief of the general tax-payer, and so on"[174].

To cope with the large number of claims a considerable input of legal thinking has been accomplished by the Secretariat of the Compensation Commission, in particular in establishing criteria for the different categories of claims, to define what evidence and documentation would be necessary and sufficient, etc. A lot of experience gained in the USA with mass tort litigations, which dealt with huge numbers of claimants has been analysed and adapted to the somewhat different international sphere[175]. This may explain why new methods to handle large numbers of similar claims were necessary. But first, it remains questionable whether it was necessary to collect thousands of individual claims instead of concluding lump-sum agreements based on a general assessment, and second the reference to American class actions cannot justify the exclusion of the defendant from the proceedings. There is no analogy and no justification for such procedure.

It has been said that the aim was "to establish an efficient procedure that is free from the constraints which generally encumber judicial proceedings"[176]. This explains what has been done. However, it poses the question again, because the legitimacy problem of the procedure is exactly to what degree it is legally possible to exclude established principles of international law by decisions of the Security Council or one of its subsidiary bodies.

(i) Exclusion of Iraq from participating in the procedure

Normally a claim for compensation arising out of an internationally wrongful act has to be established by an agreement between the States concerned or a dispute settlement mechanism agreed upon by the parties. According to the claims procedure of the Commission Iraq is virtually

---

[174] Ibid., 356.
[175] Cf. Ulmer (note 11), 88.
[176] Alzamora (note 8), 354.

excluded from participating in establishing compensation claims. Iraq's request for an observer status in the Governing Council was rejected. Iraq does not have any access to the files, the panels, or the Commissioners which deal with individual claims. Iraq's role is reduced to receiving the Executive Secretary's quarterly reports[177], and the right to present within a short time limit "additional information and views concerning the report to the Executive Secretary for transmission to the panels of Commissioners"[178]. That means that Iraq does not receive any documented information concerning individual claims submitted by individuals, corporations or States to the Commission. It has no right to present its comments concerning individual claims or to question their validity in either of the six categories invented by the Commission.

> "All records received or developed by the Commission will be confidential ... Panels will conduct their work in private"[179].

The claims received by the Commission will be considered in private by panels composed of three Commissioners according to the guidelines adopted by the Governing Council[180].

While the published opinion is that a participation of Iraq is unnecessary, even within the Secretariat the exclusion of Iraq from the procedure has raised considerable concern. There is a broad feeling that this position is highly questionable and cannot be sustained when it comes to claims of categories D, E, and F. It has been said that rule 36a, which deals with unusually large or complex cases allows Governments, including Iraq, to be invited to present their views in writing or in oral proceedings. In such cases, according to rule 38d panels have the possibility to ask for additional written submissions or held oral proceedings. Also art. 43a allows Commissioners to make additional procedural rulings and the Governing Council may "adopt further procedures or revise" the rules. This is true. But referring to possible corrections or amendments does not remove or change the existing situation which simply violates the principles of equality of parties in a dispute and even the *maxim audi alteram partem*.

> "It would seem extraordinary if the Council were able to make a finding of legal responsibility against a State ... without offering that State an opportunity of being heard"[181].

---

[177] Provisional Rules for Claims Procedure, S/AC.26/1992/10, art. 16,2, 26 June 1992.
[178] Ibid., art. 16,3.
[179] Ibid., art. 30, paras. 1 and 2.
[180] Cf. Procedural rules S/AC.26/1992/10, IV, 26 June 1992.
[181] Bowett (note 59), 96.

This was said in relation to procedures of the Security Council; however, there is no reason to believe that it would not have the same relevance for subsidiary organs of the Security Council.

The panels will determine the admissibility and weight of evidence submitted. They may request further written or oral information from the claimant and decide by majority on an amount recommended to be allocated for each consolidated claim or the individual claim. The whole claims procedure takes place in private and excludes the defendant from any active participation. Also the final decision of the Governing Council, which is not subject to appeal or review, is taken in private without the participation of Iraq.

> "The amounts recommended by the panels of Commissioners will be subject to approval by the Governing Council. The Governing Council may review the amounts recommended and, where it determines circumstances require, increase or reduce them"[182].

The procedure finally leads to some kind of publicity, but:

> "Decisions of the Governing Council and, after the relevant decision is made, the associated report of the panel of Commissioners, will be made public, except the Executive Secretary will delete from the reports of panels of Commissioners the identities of individual claimants and other information determined by the panels to be confidential or privileged"[183].

The quarterly reports of the Executive Secretary, the only information available during the whole process to Iraq, contain mere statistical summaries and breakdowns of claims received. They give just a survey of which countries have submitted what kinds of claims and the total amount. In addition the reports refer in general terms to some significant factual and legal issues which have been raised in order to establish general guidelines for the work of the panels[184].

This means that the Commission has invented a procedure which allows a compensation claim to be presented against a State without informing that State of the details of the claim. The same procedure also keeps the claim confidential during the whole process up to the decision, determines the admissibility of the evidence submitted (art. 35) in private, and allows the decision to be taken in private without any participation of

---

[182] S/AC.26/1992/10, 26 June 1992, art. 40,1.

[183] Ibid., art. 40,5.

[184] Cf. e.g. report No. 2 submitted by the Executive Secretary to the Governing Council, S/AC.26/1993/R.1, 29 January 1993; S/AC.26/1993/R.26, 29 October 1993; S/AC.26/1994/R.1, 31 January 1994; S/AC.26/1994/R.9, 29 April 1994; S/AC.26/1994/R.17, 25 July 1994.

the defendant. That surely is a unique procedure. It most effectively eliminates all principles of fair procedure and transparency in the decision-making process, as codified, for example, in the UNCITRAL Arbitration Rules. "The element of due process, adverted to by the UN Secretary-General, is singularly absent from these procedures ..."[185].

(ii) Invention of categories of claims and fixed payments

The Commission is not dealing with general reparation claims of States which cover the whole damage caused. Instead it has asked States to collect claims of individuals, corporations and their own claims for losses resulting from the war, consolidate certain categories of claims and submit them to the Commission for verification and decision. States submit lists of individual claims, and in certain cases corporations can even themselves submit claims[186]. The Government does not condense these claims to one reparation claim of the State which once and for all settles the claims resulting from the war. It just collects the claims, adds an affirmation that the individuals or corporations are its nationals or residents, that it has no reason to believe that the information stated is incorrect[187], and submits them to the Commission as claims of individuals or corporations, who, however, do not have direct access to the Commissioners[188]. Finally, the Commission has made arrangements to control whether the allocated damages were in fact distributed by the relevant Governments to the individuals whose claims have been confirmed by the Commission.

Thereby the Commission itself has caused being flooded with thousands of claims urging some kind of a summary or expedited procedure to process claims on a mass administrative basis. This procedure brings the Compensation Commission into the position of an international claims commission which decides on individual claims and uses Governments and their claims commissions as agents of the international community. It has the advantage that individuals have a chance actively to pursue their cases, and do not totally depend on their Government decisions, neither as to the verification of their claims nor on the distribution

---

185 Fox (note 10), 9.

186 Cf. S/AC.26/1991/7, 28 November 1991, para. II,11; S/AC.26/1992/10, art. 5,3.

187 See e.g. S/AC.26/1991/1, para. 21.

188 Cf. Alzamora (note 8), 353; claims of Palestinians can be submitted by International Organizations as UNRWA, UNDP or UNHCR, so far claims have been listed by UNDP and UNRWA, see sixth report of the Executive Secretary, S/AC.26/R.1, 31 January 1994.

of amounts received as compensation. The system has been praised as one in which

> "for the first time in the history of international compensation institutions and procedures, the interest of the individual prevails over that of business or even Governments"[189].

Even if that turns out to be true, it remains extremely questionable whether the administrative efforts, developed to establish a quasi civil law compensation procedure (as far as the victim is concerned), on the one hand, and the restrains of due process, on the other hand, justify the replacement of clear-cut agreements between Governments on defined amounts of reparations which would have set an end to hostile international relations and would have left it to the Government concerned to decide on priorities in the distribution of payments received as reparation.

To cope with the bulk of claims the Commission distinguished five categories of claims and developed corresponding claim forms which were distributed by Governments.

Category A: Fixed payments for departure from Iraq or Kuwait;

Category B: Fixed payments for serious personal injury or the death of spouse, child or parent;

Category C: Claims amounting up to $ 100000[190];

Category D: Claims exceeding the amount of $ 100000[191];

Category E: Corporation claims[192];

Category F: Claims of Governments and international organizations[193].

Expecting 1.5 to 2 million claims within categories A, B and C, so-called small claims relating to losses by individuals, the Commission tried to develop a "simple and relatively fast" procedure in order to give some priority to the satisfaction of claims which directly affect the life of individuals. Up to 1994 the Executive Secretary presented eight reports[194] which summarize 875 consolidated claims in categories A, B and C from 2 113646 claimants of 47 States amounting to US $ 6 664294 410.03. These are the small claims, they do not comprise claims exceeding the amount of $ 100000, claims of corporations, organizations or Govern-

---

189 Alzamora (note 8), 351.

190 For categories A, B, C see S/AC.26/1991/1, 2 August 1991.

191 Cf. S/AC.26/1991/7, 28 November 1991, revised 16 March 1992.

192 Cf. S/AC.26/1991/7, II, 28 November 1991; S/AC.26/1992/9, 6 March 1992; S/AC.26/1992/15, 18 December 1992.

193 Cf. S/AC.26/1991/7, III, Rev., 16 March 1992.

194 S/AC.26/1994/R.1, 31 January 1994; S/AC.26/1994/R.9; S/AC.26/1994/R.17.

ments themselves. It is the minor part of the claims expected which were estimated to amount to more than US $ 150 billion[195].

For claims in categories A and B, fixed payments can be made without requesting proof for actual losses. All non-Iraqis who can show by "simple documentation of the fact and date of departure from Iraq or Kuwait" that they left between 2 August 1990 and 2 March 1991 may claim a fixed payment of $ 4000 per person or $ 8000 per family[196]. Claimants do not have to prove that they were forced by the war to leave the country. It is sufficient if they could show that they were in the country and left during the critical period of time. Whether they left to participate in a birthday party, or for a holiday trip, does not matter. It is simply assumed that they were forced to leave the country because of Iraq's invasion and occupation of Kuwait.

> "What has happened is that the U.N. Compensation Commission ... by fiat or dictate virtually says: We establish an irrebuttable presumption to the effect that if you left, just physically went over the border, out of Kuwait or Iraq during the stated period of time you would in fact have been unlawfully expelled and you are entitled to an award. It is not necessary even to prove that whatever happened was attributable to the government"[197].

Fixed payments up to $ 2500 per person or $ 10000 per family may also be claimed for serious personal injury or the death of spouse, child or parent, "where there is simple documentation of the fact and date of the injury" or the "death and family relationship"[198]. Again no proof is needed that the injury or death has been caused directly by the invasion or occupation. To document personal injury it is sufficient to provide a short description of the circumstances of the injury and a statement of the health care provider. To document the death of a spouse, child or parent, a photocopy of a marriage license, birth certificate or other official record and a copy of a death or burial certificate, military or other record are sufficient. The decision of the Commission explicitly stated that: "Documentation of the actual amount of loss will not be required"[199].

---

[195] Cf. Morrison (note 158), 393; Ball (note 134), 45; Garmise (note 11), 840.

[196] S/AC.26/1991/1, para. 11.

[197] Brower (note 40), 56.

[198] Ibid., para. 12; the Commission has adopted a rather detailed and reasonable definition of what may be considered to be a serious injury and on mental pain and anguish S/AC.26/1991/3, 23 October 1991; it has also adopted ceylings for compensation for mental pain and anguish going up to 30000 $ per claimant and 60000 $ per family.

[199] S/AC.26/1991/1, paras. 11, 12; S/AC.26/1992/10, art. 35,(2a,b).

Whenever the loss in question is greater than the fixed amounts it may be claimed under a different category which, however, needs more substantiated proof. But the evidence required even for category C, claims up to $ 100000, "will be the reasonable minimum that is appropriate under the circumstances, and a lesser degree of documentary evidence would ordinarily be required" for claims below $ 20000[200].

The expedited procedure adopted for these three categories of urgent claims reduces the verification to "checking individual claims on a sample basis, with further verification only if circumstances warranted"[201]. It is based totally on computerized information and processed with a specific software developed by American specialists in dealing with class actions. "The system of fixed payments for "A" (departure) claimants is perhaps the Commission's most significant innovation"[202]. It surely is, but it suffers from the flaw that it does not have any legal justification and is below any established legal standard. Every non-Iraqi who left Iraq or Kuwait during that time, for what ever reason, may claim money from Iraq, without having to fear that his name will be given to Iraq. Whether he actually has a claim to compensation remains an open question because neither damage nor even the motive for the departure[203] has to be proven.

Another invention of the Commission, which is a departure from existing international law, is that States may present claims of individuals who are not their nationals, but are residents[204].

The summary procedure established by the Compensation Commission to determine eligible claims in categories A, B and C and the setting up of fixed amounts for claims in categories A and B is nothing more than a method to evaluate the harm caused by abstract parameters which replace normal rules of evidence; it is "a significant departure from previous international arbitral practice"[205]. It certainly is not a judicial or quasi-judicial method of verifying individual claims. It is an administrative procedure introduced by legislation. Even if it is justified as an analogy to mass tort actions, it is obvious that the Compensation Commission has

---

[200] Ibid., para. 15; S/AC.26/1992/10, art. 35,(2c); cf. Affaki (note 21), 25 et seq.

[201] Ibid., para. 8; S/AC.26/1992/10, art. 37b.

[202] Crook (note 88), 152.

[203] "Departure" is a short form for convenient reading. The broad and questionable criteria established by the Commission in S/AC.26/1991/1, para. 18 reads: "Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period".

[204] Cf. Brower (note 40), 57, for certain cases this may be quite helpful and a useful innovation, but it raises particularly difficult questions in relation to corporations and shareholders.

[205] Garmise (note 11), 869.

no competence to impose such a procedure on Iraq or other national jurisdictions, or to legislate in regard to principles of State responsibility. To set up generalized amounts for certain damages and provide fixed payments for small claims with reduced requirements of evidence and verification may be a possible and effective procedure to deal with a large mass of claims. Such a procedure can easily be introduced by legislation within a State and may facilitate the work of a State's claims commission, but it cannot be imposed upon a State on the international level.

c) Conclusion

The Compensation Commission decides everything without the participation of Iraq: what cases are eligible, who is entitled to submit claims, what is a direct loss[206], what circumstances are covered by the term "result of Iraq's unlawful invasion and occupation of Kuwait"[207], what may be considered as compensable business losses[208], what evidence is sufficient, how to assess different kinds of damage and what amounts have to be paid as compensation.

Iraq has no say in the whole proceedings. The procedure is set up to work without any representation of the defendant State. The system is based on the assumption that Iraq has to pay what the Compensation Commission decides from time to time without any agreement on the total reparation claim. It does not even exclude separate reparation claims by individuals, corporations or States. It starts from the supposition that the Compensation Commission is authorized to legislate as to what claims are eligible for compensation, as to verification procedures, the causal relationship needed, assessing damage and fixing amounts of damages, reducing the evidence needed to establish a claim and the procedure to resolve disputes without the party concerned. While it seems to serve the interests of the individuals who suffered from the war, it actually enforces a long-term exploitation of Iraqi national resources to satisfy foreign interests. This procedure is in clear violation of the legal requirements for due process.

---

[206] S/AC.26/1992/15, 18 December 1992.
[207] S/AC.26/1991/1, para. 18; S/AC.26/1991/7; S/AC.26/1992/15.
[208] S/AC.26/1992/9, 6 March 1992.

4. The Regime Established by the Security Council to Enforce Iraqi Reparations Violates the Principle of Sovereign Equality of States and Basic Human Rights

a) Excluding Iraq from equal participation in establishing the existence of individual reparation claims as has been stipulated by the procedure of the Compensation Commission, a subsidiary organ of the Security Council, is a violation of general international law, of the principle of sovereign equality of States. International law justifies specific measures to be taken against an aggressor State. They may be decided upon either by the Security Council under Chapter VII of the Charter or taken as measures of self-defence according to article 51 of the Charter. However, they do not result in outlawing the aggressor State. The State remains a subject of international law, its diplomatic and treaty relations are not automatically extinguished and the rules applicable in armed conflict apply equally and "without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict"[209].

In conformity with this legal situation the Security Council in res. 660(1990), acting under articles 39 and 40 of the Charter, condemned the Iraqi invasion of Kuwait but at the same time, based on the principle of sovereign equality, in para. 3 of res. 660(1990) called "upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences ...". The Security Council ordered a strict embargo under res. 661(1990) but not the severance of diplomatic relations. In the preambles of res. 686(1991) and 687(1991) the Security Council explicitly affirmed "the commitment of all member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq ...". While the Security Council, having condemned the Iraqi invasion, without any doubt could determine Iraq's obligation to make reparation and its scope and contents – as the Security Council actually did in res. 687(1991) – it could not, however, go further and exclude Iraq from participating on an equal footing in negotiations determining the total sum it can afford to pay in reparations, and in establishing, as the case may be, the existence, nature and extent of individual claims. The procedure established by the Compensation Commission, which gives Iraq no standing at all, is highly discriminatory, in flagrant violation of the principle of

[209] Preamble of the Additional Protocol (I) of 8 June 1977 to the Geneva Conventions of 12 August 1949.

sovereign equality and cannot be justified under the Charter of the United Nations.

b) The purpose of ensuring priority for the servicing and payment of reparations and other foreign debts is being used to justify the far-reaching measures which the Security Council imposed on Iraq. These measures subjugate the whole Iraqi economy to the supervision of the Security Council, thereby exerting coercion and imposing severe discrimination upon the Iraqi people in order to exploit as much as possible their labour by confiscating the revenues of their petroleum exports. The percentage of Iraq's export revenues which the Iraqi people is allowed to use for purchasing food, medical supply and raw materials, and for satisfying their humanitarian and economic needs, depends on decisions of the Security Council and its subsidiary bodies, the Sanctions Committee and the Compensation Commission. When res. 687(1991) was adopted the French representative in the Security Council declared:

> "The necessary goal of the restoration of lasting peace in the Gulf should not involve measures that are unnecessarily punitive or vindictive against the Iraqi people. It would be unjust if they were held responsible for the actions of their leaders"[210].

As it turned out, however, the system is designed to force the Iraqi people to work in order to export petroleum and petroleum products. Only if Iraq exports petroleum, and directly dependent on the quantum of its petroleum exports, will the Commission permit Iraq to dispose over a certain amount of the export revenues in order to satisfy the basic needs of its population. Such a system, indeed, is very similar to imposing debt bondage on a whole people. It could rightly be seen as "organized enslavement"[211] and corresponds very much to descriptions of modern forms of slavery as contained, for instance, in a report of the Special Rapporteur on Slavery:

> "The phenomenon of slavery manifests several of the gravest forms of violation of human rights: often it combines coercion, severe discrimination and the most extreme form of economic exploitation. It is the ultimate structural abuse of human power"[212].

---

[210] S/PV.2981, 94.

[211] See note 41.

[212] See updated report of the Subcommission's Special Rapporteur on Slavery, E/CN.4/Sub.2/1982/20 and Add.1; see United Nations Action in the Field of Human Rights, New York 1983, 137; cf. H. Köchler, Ethische Aspekte der Sanktionen im Völkerrecht, Wien 1994; J. McMahan/R. Kim, The Just War and the Gulf War, in: Canadian Journal of Philosophy 1993, 536.

Slavery, servitude and similar forms of forced or compulsory labour or collective punishment are strictly prohibited under contemporary international law[213]. Of course, they cannot be justified as sanctions under Chapter VII of the UN Charter.

When considering possible consequences of international crimes, several members in the ILC stressed that sanctions ordered by the Security Council under Chapter VII of the UN Charter cannot justify disregard for the human rights of the population concerned.

> "Even if a crime was committed by the leaders of a State, that was not a justification for the State, including its population, its resources and other areas, to suffer discrimination through the consequences, whether in form of reparations, sanctions, means of deterrence or punishment"[214].

It seems that there is general agreement in the ILC that legal consequences of an internationally wrongful act, whether a delict or an international crime, must not involve a breach of an obligation arising from a peremptory norm of general international law. As an example of a measure which would be in violation of this rule, reference was made to

> "a long-standing embargo which, imposed for political reasons, for example on Iraq, forced sacrifices on the most vulnerable part of the population, the children. If an embargo went on too long, it might well be asked whether it was compatible with basic human rights, and in particular with the rights of children"[215].

c) The obligation to render reparation is not unlimited. Aggression, as with any violation of an international obligation, entails a duty to make reparation. But a reparation claim in a case of aggression, an international crime, has certain particularities as compared with the normal reparation claim which follows as a legal consequence from an international delict. The reparation claim is embedded in a peace concept and affected by the goal of establishing and constructing durable peaceful relations after the conclusion of a war. It was Tomuschat who stressed this aspect during the forty-sixth session of the ILC:

> "In all probability Iraq would never be able to provide compensation for all the damage that it had caused. Putting an end to a conflict required a great deal

---

[213] See the Slavery Convention (1953) and the Supplementary Convention on the Abolition of Slavery (1956), UNTS 182,51; and art. 8 of the Covenant on Civil and Political Rights.

[214] K. Rao, A/CN.4/SR.2343, 14.

[215] M. Bennouna, A/CN.4/SR.2342, 7; cf. also Ch. Tomuschat, A/CN.4/SR. 8; cf. also R. Normand/Ch. af Jochnick, The Legitimation of Violence: A Critical Analysis of the Gulf War, in: 35 Harvard International Law Journal 1994, 387 (at 402); cf. also Köchler (note 212), 20.

of statesmanship. If retribution and revenge were the sole objectives, tensions would only be perpetuated. From the seventeenth to the nineteenth century in Europe, the art of achieving comprehensive peace settlements had been highly developed. Inevitably, two things must be reconciled: just reparation and satisfaction for the victim, but also reconciliation with a view to building a durable foundation for a peaceful future"[216].

Furthermore, the reparation claim cannot be seen in isolation from measures of demilitarisation and other regulations which affect the economy and reconstruction of the country. While on the one hand this limits the margin open to negotiation for the guilty State, on the other hand the victim States have to take into consideration a number of aspects which are widely determined by the economic capacity of the loser and by humanitarian considerations.

Experience after the First World War and after the Second World War has proven that:

"No possible reparation arrangement can be fully compensatory, providing an offset to the costs and burdens of war. Nor should reparation be regarded as punitive. It should be a payment by the ex-enemy countries in recognition of the tremendous costs of war for which they were responsible and the needs for reconstruction in the Allied countries resulting from the acts of the aggressors"[217].

The Peace Treaties after the Second World War show that several factors were taken into account which led to the determination of a fixed amount for the reparation due, which in general was less than could have been claimed theoretically. Art. 23 of the Hungarian Peace Treaty of 1947 reads:

"Losses caused to the Soviet Union, Czechoslovakia and Yugoslavia by military operations and by the occupation by Hungary of the territories of these States shall be made good by Hungary. ... taking into consideration that Hungary has not only withdrawn from the war against the United Nations, but has also declared war on Germany, the Parties agree that compensation for the above losses will be made by Hungary not in full but only in part ...".

Another reason for reducing a reparation claim, which in most cases is of considerable importance, was mentioned in Art. 14 of the Japanese Peace Treaty of 1951:

---

[216] A/CN.4/SR.2343, 9.

[217] United States representative at the Paris Peace Conference, A Decade of American Foreign Policy, 969; cf. Brownlie (note 158), 144; see the critical remarks of Keynes (note 3) in relation to the Allied reparation policy after the First World War, 73 et seq.

"It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations".

This leads Brownlie to stress the particularity of reparation claims after a war by stating:

"The actual amount of reparation payments was in each case dependent on many factors: the willingness of particular members of the United Nations to forgo claims, the economic situation of the claimant, the desire to promote economic recovery in ex-enemy states and the capacity of the ex-enemy states to meet demands[218]. ... Apart from questions of waiver, an unsatisfactory vagueness attends the various equitable considerations which have been allowed to affect the determination of the actual quantum of reparations. One of these, the reference to the economic capacity of the aggressor and the avoidance of undue hardship to its population, appears with considerable regularity. It is possible that it is now an established principle"[219].

The reparation claim after a war is a State-to-State relationship in which the compensation claim of the victim is presented as a consolidated claim. It comprises any loss caused by the war, military operation and occupation, to the State, its nationals and corporations in the form of a lump sum. That covers all possible claims[220], and leaves the distribution of the compensation received to the claimant State[221]. It also takes into

---

[218] Brownlie, ibid., 144; R. Jennings and D. Watt in the 9th edition of Oppenheim's International Law, vol. II, part 2, London 1992, 53, go so far to state: "A somewhat special situation arises where, after the conclusion of a war, the loser is required to pay to the victor reparations for the losses incurred by the latter in waging war. While such reparations are distinguishable from the payment of damages for an international wrong, there may nevertheless be affinities between them".

[219] Brownlie (note 158), 147; even the UK representative stated that it does not make sense to cripple Iraq and its economy with the burden of paying a damage that it is in fact unable to pay, S/PV.2981, 114; also the Chinese representative found that "consideration should be given to the requirements of the people of Iraq and in particular their humanitarian needs, and to Iraq's payment capacity and the needs of Iraqui economic reconstruction", S/PV.2981, 97.

[220] See art. 80 of the Italian Peace treaty which explicitly states: "The Allied and Associated Powers declare that the rights attributed to them under Articles 74 and 79 of the present Treaty cover all their claims and those of their nationals for loss or damage due to acts of war, including measures due to the occupation of their territory, attributable to Italy and having occurred outside Italian territory, with the exception of claims based on Articles 75 and 78" (which concern the return of property removed from United Nations territory and return of United Nations property in Italy).

[221] Cf. Keynes (note 41), 352 et seq.

account vital economic aspects of the debtor State and different political aspects related to the specific international situation.

In determining the reparation claim and the method of payment, not only undue hardship to the population of the aggressor State but also any infringement of the people's right to self-determination have to be avoided. The principal human rights standards do not lose their validity because of an obligation to pay reparations. In other words, to enforce the payment of reparations does not justify suspending the prohibition of collective punishment[222], slavery or forced or compulsory labour[223]. It cannot justify causing, fostering or tolerating starvation, the spread of epidemics or the pauperization of the population. A people cannot be deprived of its means for subsistence, and it cannot be deprived of its right to dispose over its natural resources[224]. This is now an established principle under international law which, *inter alia*, limits the extent and the ways and means of enforcing reparations after the termination of a war.

The system established by the Security Council to enforce Iraqi reparations violates these criteria. It does not leave room for the Iraqi people to decide on its political and economic system but imposes tributes on its economic revenues which strip the people of its means of subsistence and even of its right to determine what would be its minimum subsistence in order to survive.

The system established by the Security Council is also highly questionable from a political perspective. It depends very much on Iraqi cooperation, but does not provide for any incentives which could stimulate Iraq and accelerate the process of normalizing peaceful relations. It is directed to overthrowing the government of Saddam Hussein, but actually exposes the Iraqi people to poverty and misery, a situation which cannot be accepted or tolerated by any government of Iraq. It may even make it impossible, or at least extremely difficult, for any democratic movement in Iraq to gain momentum. It could be costly to neglect the lessons which should be drawn from the economic and political consequences of Versailles.

---

[222] See art. 75 of the Additional Protocol (I) of 8 June 1977 to the Geneva Conventions of 12 August 1949.

[223] Art. 8 of the Covenant on Civil and Political Rights.

[224] Art. 1, para. 2 of the Covenant on Civil and Political Rights and of the Covenant on Economic, Social and Cultural Rights.

5. Final Remarks

Our examination results in the following findings:

a) The decisions of the Security Council:

– in so far as they establish a compulsory mechanism to list and confirm individual reparation claims against Iraq, to assess individual damages or to solve disputes in relation to individual reparation claims, and

– in so far as they apply sanctions, which originally were adopted under Chapter VII of the Charter to terminate the occupation of Kuwait, to enforce compliance with its reparation mechanism,

are not and cannot be justified under the UN Charter.

b) The regime established by the Security Council which excludes Iraq from equal participation in establishing reparation claims violates the principle of sovereign equality of States (art. 2,1) and by imposing a form of "organized enslavement" on the Iraqi people violates basic human rights.

These findings lead to the conclusion that the pertinent decisions of the Security Council are *ultra vires*, since the Security Council in adopting them did not act "in accordance with the Purposes and Principles of the United Nations" (art. 24,2). Thereby the delicate question arises as to who is entitled to determine that the Security Council decisions were not in conformity with the Charter. This question until recently has rarely been discussed in legal literature and so far has been of only limited importance in the Security Council's practice. In answering this question the wording of art. 25 is not very helpful[225].

It is doubtful whether the Charter intended to entitle every member State to examine and decide whether decisions taken by the Security Council were in conformity with the purposes and principles of the Charter. This would negate the binding force of Security Council decisions, or at least weaken them to such a degree that the Council might be unable to fulfil its functions[226]. Others interpret art. 25 to mean that the obligation to accept and carry out the decisions of the Security Council applies only to decisions taken in conformity with the Charter, but want to limit any examination to the procedural aspect of the decision-making[227]. That would result in accepting not only an omnipotence of the

[225] Cf. Kelsen (note 57), 95, 293; Delbrück (note 42), 378; Cohen-Jonathan (note 58), 479.

[226] Cf. G. Dahm, Völkerrecht, vol. II, Stuttgart 1961, 212.

[227] Delbrück (note 42), 381.

Security Council but also the fact that the Council always remains its own judge. Such a result would be in contradiction to the main organisational principle of the Organisation, which is the recognition of the sovereign equality of its member States.

If decisions of the Security Council were binding whenever the Security Council so decides and were not subject to any review when questioned, that would actually abolish the prohibition of arbitrary decisions which was established by art. 24 and the limitation to certain purposes and actions under Chapter VII of the Charter[228]. It would also make art. 2(7) of the Charter meaningless, because the Security Council would always be the master in deciding how and to what extent to interfere with State sovereignty. There would be no reason to mention in art. 2(7) enforcement measures under Chapter VII as the only exception, since any decision taken by the Security Council could be binding and could not be challenged by the State concerned.

The United Nations Charter is based on the sovereign equality of States and did not vest the Security Council with unlimited powers. As Judge Bustamente rightly explained in his dissenting opinion to the advisory opinion of the International Court of Justice on Certain Expenses of the United Nations:

> "The United Nations is an association of States in which the rights and the obligations of the Members are contractually prescribed in its constituent charter. It is the Charter which governs the mutual relations of the associates and their relations with the Organization itself. Only because of their acceptance of the purposes of the Charter and the guarantees therein laid down have the Member States partially limited the scope of their sovereign powers (art. 2). It goes without saying, therefore, that the real reason for the obedience of States Members to the authorities of the Organization is the conformity of the mandate of its competent organs with the text of the Charter. This principle of the conditional link between the duty to accept institutional decisions and the conformity of those decisions with the Charter is enshrined in art. 25, which also referring explicitly to the Security Council, in my opinion lays down a fundamental basic rule which is generally applicable to the whole system of the Charter. Article 2, paragraph 2, confirms this interpretation"[229].

Member States must have the right to challenge the legality of a Security Council decision which affects their sovereign rights. Such an objection may not affect the application of the decision as long as it is directed

---

[228] Cf. Bedjaoui (note 43), 77.

[229] ICJ Reports 1962, 304.

to stopping or preventing military activities or other breaches to the peace, acts of genocide or other serious violations of human rights which cannot be said to be within the sovereignty of a State. Otherwise, however, its performance may be suspended until a competent decision on the legality of the opposed decision has been reached.

> "There is ... a legal presumption that each of the organs of the Organization is careful in its actions to comply with the prescriptions of the Charter; but when, in the opinion of one of the Member States, a mistake of interpretation has been made or there has even been an infringement of the Charter, there is a right to challenge the resolution in which the error has been noted for the purpose of determining whether or not it departed from the Charter.
>
> It cannot be maintained that the resolutions of any organ of the United Nations are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgment – always fallible – of the organs"[230].

Member States may challenge a Security Council decision in the Security Council or in the General Assembly; even if they cannot manage to get the decision revised or obtain a majority support in favour of their position, this may open the way for the General Assembly to ask the ICJ for an advisory opinion. If the General Assembly sees fit to request an advisory opinion, the ICJ is in a position to review the formal and substantial legality of Security Council decisions, which were not a political assessment of a situation or a decision to cease acts endangering or violating peace[231]. The Court did so in the Namibia advisory opinion, when after a thorough examination the Court

> "reached the conclusion that the decision made by the Security Council in paragraphs 2 and 5 of resolutions 276(1970), as related to paragraph 3 of resolution 264(1969) and paragraph 5 of resolution 269(1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with Articles 24 and 25"[232].

Bowett, discussing the impact of Security Council decisions on dispute settlement proceedings stresses that the ICJ would be competent to review the legality of a Security Council decision if this would be necessary in a dispute between States before the Court or if the validity of the decision is challenged in connection with an advisory opinion[233]. Bowett goes on with the general statement that "it is unacceptable in a

---

[230] Judge Bustamente in his diss. opinion, in: ICJ Reports 1962, 304.
[231] Cf. Gaja (note 48), 315.
[232] ICJ Reports 1971, 53.
[233] Bowett (note 59), 98; cf. Graefrath (note 46), 181.

legal system to attach to decisions of an executive organ an irrebuttable presumption of legality"[234].

Also in the Libyan case, judges raised not only the question as to what are the limitations for the Security Council in discharging its functions but also the role of the ICJ. As Th. M. Franck stated:

> "The majority and dissenting opinions seem to be in agreement that there are such limits and that they cannot be left exclusively to the Security Council to interpret. The legality of actions by any UN organ must be judged by reference to the Charter as a "constitution" of delegated powers. In extreme cases, the Court may have to be the last-resort defender of the system's legitimacy if the United Nations is to enjoy the adherence of its members. This seems to be tacitly acknowledged judicial common ground"[235].

While it is true that strengthening the role of the Court is a possible and important step to control the legality of the Security Council's decisions, it may not be sufficient. Recent developments in international relations have caused such a far-reaching change in the equilibrium between the organs of the United Nations and a turn towards the use of force in the name of the United Nations that it would endanger the whole system if: "On peut tout faire avec l'Organisation à condition de vouloir et de savoir l'utiliser"[236]. This certainly was not and should not be the meaning of the Charter.

---

[234] Bowett, ibid., 101.

[235] Th. M. Franck, The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?, in: 86 AJIL 1992, 519 (at 522).

[236] Sur (note 13), 37.