

# United Nations Compensation Commission and Liability for Use of Force

*Mojtaba Kazazi\**

## I. Introduction

In the context of the Max Planck Trialogues project on the international law concerning the reparations for victims of armed conflict, the practice and jurisprudence of the United Nations Compensation Commission (“UNCC” or “Commission”) serves as an important example of the post-conflict reparations programmes. Established by the Security Council in May 1991 soon after the liberation of Kuwait, the UNCC represents a successful and harmonious effort of the international community through the United Nations for imposing reparations on Iraq for its unlawful invasion and occupation of Kuwait. The UNCC fulfilled its mandate by reviewing and deciding on 2.7 million claims, and, except for one claim, it has actually paid all its approximately 1.5 million successful awards in full. In addition, through its work and jurisprudence, the UNCC has significantly contributed to the development and progress of international law particularly in the areas of State responsibility, reparations, and international dispute resolution.

The UNCC was a pioneer in many areas of mass claims processing, including the use of sampling, as support for verification of a large group of individual claims with a common factual background, and applying statistical regression models and analysis for the valuation of large groups of homogenous claims. Of significance is also the Commission’s groundbreaking work on evaluation of damage to the environment and depletion of natural resources as a result of military operations,<sup>1</sup> and a follow-up programme for environmental awards, established by the UNCC in 2005, to monitor the

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\* Docteur en droit, UCL Louvain; former Executive Head, UNCC; Vice-President, Institut de Droit International.

<sup>1</sup> See, e.g., *M. Kazazi*, *Environmental Damage in the Practice of UNCC*, in: M. Bowman/A. Boyle (eds.), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation*, 2002, 111 et seq.; and *C. Payne/P. Sand* (eds.), *Gulf War Reparations and the UN Compensation Commission*, 2011.

financial and technical implementation of long term environmental projects for which compensations were awarded.<sup>2</sup>

## II. Nature of the UNCC and Groups of Claims

It is important to note that the UNCC was not an international court or tribunal,<sup>3</sup> but an administrative fact-finding body. It functioned under the authority of the Security Council, as a subsidiary organ thereof. Its policy-making organ, the Governing Council, composed of the 15 state members of the Security Council, was assisted by a specialised Secretariat and multiple expert Commissioners. The Secretariat and Panels of Commissioners reviewed and assessed claims on the basis of criteria developed by the Governing Council and for its approval. There was no veto right for the Security Council permanent members in the Governing Council, and all of its decisions have been taken by consensus.

The Commission received approximately 2.7 million claims, through nearly 100 Governments and a number of international organisations, on behalf of nationals (individuals or companies) or for the benefit of the Governments or international organisations. The total amount claimed by all claimants was US\$ 352 billion. The Commission awarded in total US\$ 52.4 billion in compensation.

For the purposes of review, the Commission grouped claims from individuals, businesses, corporations, and Governments into six categories, with tailor-made claim forms, methodologies and appropriate evidentiary requirement for assessing the validity of each group of claims:

Category “A”: claims of individuals who had to depart from Kuwait or Iraq as a result of Iraq’s invasion of Kuwait (2.8.1990).<sup>4</sup>

Category “B”: claims of individuals who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq’s invasion and occupation of Kuwait.<sup>5</sup>

Category “C”: claims of individuals for damages up to US\$ 100,000 each, mainly claims arising from death or personal injury, hostage-taking and other il-

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<sup>2</sup> See, e.g., *M. Kazazi*, The UNCC Follow-Up Programme for Environmental Awards, in: T. M. Ndiaye/R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes*, 2007, 1109 et seq.

<sup>3</sup> See Secretary-General’s Report of 2.5.1991 (UN Doc. S/22559), at para. 20.

<sup>4</sup> Number of “A” claims: over 923,000.

<sup>5</sup> Number of “B” claims: approximately 6,000.

legal detention, loss of income, support, housing or personal property, medical expenses, costs of departure and business losses.<sup>6</sup>

Category “D”: claims of individuals for damages above US\$ 100,000 each.<sup>7</sup>

Category “E”: claims submitted by or on behalf of corporations and other private legal entities, as well as public-sector enterprises.<sup>8</sup>

Category “F”: claims filed by Governments and international organizations for losses incurred, including damage to environment and depletion of natural resources.<sup>9</sup>

The UNCC claims exercise represents one of the first instances of direct recourse for affected individuals, companies, and international organisations. Claims of individuals and companies were put forward through governments, however, they were not considered “espoused” claims by the States but claims of individuals or corporations. In addition, arrangements were made for filing by stateless persons through a number of relevant international organisations, and for direct filing by the companies where the State of the incorporation refused to forward the claims.

### III. Payment of Compensation

The Commission has ensured payment of its awards to the successful claimants out of the United Nations Compensation Fund, established for that purpose by the Security Council. The Compensation Fund receives a percentage of the proceeds from the sales of Iraq’s oil.<sup>10</sup> A total of US\$ 47.9 billion has already been paid to successful claimants in all categories of claims. The remaining unpaid amount of US\$ 4.5 billion concerns the largest compensation award by the Commission, for which payment was sus-

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<sup>6</sup> Number of “C” claims: over 1.7 million category “C” claims (including approximately 1.2 million salary claims by Egyptian workers in Iraq). Claims in this category (and in category “D”) were in addition to, and supplemented, the small fixed amounts that could be claimed under categories “A” and “B”, and were for the claimants who requested higher amounts and able to provide additional documents.

<sup>7</sup> Number of “D” claims: approximately 12,000.

<sup>8</sup> Number of “E” claims: approximately 7,000.

<sup>9</sup> Number of “F” claims: approximately 400 claims.

<sup>10</sup> Originally set at 30 % by the Security Council resolution 705 (1991), Iraq’s contribution was reduced eventually to 5 % in accordance with para. 21 of Council resolution 1483 (2003), suspended from 2014-2017, and resumed with 0.5 % in 2018. The level of Iraq payment is scheduled to increase in 2019-2020 in order to achieve full payment of the remaining award by the end of 2021.

pending in 2014 and resumed as of January 2018 under the terms of an agreement reached by Iraq and Kuwait.<sup>11</sup>

The Governing Council decided the order and priority of payment to successful claimants. Due to shortage of funds in the early years of the work of the Commission and on humanitarian grounds, the Governing Council accorded priority in both processing of claims and payment of awards to the small claims from individuals (i.e., categories “A”, “B”, and “C”), before allocating funds for payment of the larger individual claims, and to corporate and governmental claims. About 100 governments and international organisations assisted the UNCC in distribution of funds to individual and corporate claimants and provided reports and confirmation of payments.

#### IV. Liability of Iraq

An important and rather unique feature of the Commission was its ability to accept a wide-range of claims from individuals, corporations, governments and international organisations. The jurisdiction of the Commission in each case was based on whether there was a direct and uninterrupted causal link between the loss suffered and the wrongful act, i.e., the invasion and occupation of Kuwait by Iraq, rather than limiting it to instances of violations of the international humanitarian law (*jus in bello*). This approach was only made possible because of pronouncement in para. 16 of resolution 687 (1991), adopted under Chapter VII of the UN Charter, wherein the Security Council reaffirmed Iraq’s liability under international law for payment of compensation for any direct loss or damage “*as a result of Iraq’s unlawful invasion and occupation of Kuwait*”. This provision, included in a Security Council armistice resolution that set out the terms and conditions for the termination of the UN-authorized military operations against Iraq, was based on the Iraq’s violation of a fundamental rule of international law, expressed in Art. 2(4) of the UN Charter, on prohibition of the use of force. By reaffirming the liability of Iraq under international law for any direct loss resulting from Iraq’s illegal use of force against Kuwait, the Security Council in fact clarified that the jurisdiction of the UNCC would not be limited to violations of international humanitarian law (*jus in bello*) and that it would include losses resulting from *jus ad bellum* too. This determination of the Security Council simplified the task of the Commission and its claims

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<sup>11</sup> See Governing Council Decision 276, UN Doc. S/AC.26/Dec.276 (2017), 21.11.2017. The claim was for oil production and sales losses as a result of damages to Kuwait’s oil-fields. It was awarded a total of US\$ 14.7 billion.

review process in substance and procedurally as there was no need for the claimants to prove the responsibility of Iraq in each case. It was hence sufficient for the claimants to show, and for the UNCC to verify, a direct link between the loss and the invasion and occupation of Kuwait, and the extent of the loss. The UNCC Governing Council facilitated the review process and the task of the Commissioners even further by identifying the main circumstances that could give rise to compensable loss, including military operations or threat of military action by either side during the period of the invasion, and the breakdown of civil order in Kuwait or Iraq during that period.<sup>12</sup>

There were two major factors that arguably contributed to consensus building and collective affirmation of the liability of Iraq for payment of compensation under international law by the Security Council, and the adoption of resolution 687 in general. First, the undisputed and non-complex nature of the violation of the UN Charter and illegal use of force by Iraq; and second, that the invasion of Kuwait coincided with a time of a highly collaborative atmosphere at the Security Council and among its permanent members following the perceived end of the Cold War.

The relatively unique circumstances of the Persian Gulf War are not likely to repeat themselves. In addition, as required by the Security Council, Iraq did agree to the terms of resolution 687 as a condition for ending the allies' military operations against Iraq. Nevertheless, the UNCC's comprehensive jurisdiction and its advantages and disadvantages have set a significant precedent in international law that will be difficult to ignore in the future, in spite of the administrative and fact-finding nature of the Commission.<sup>13</sup>

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<sup>12</sup> See Governing Council Decision 1, UN Doc. S/AC.26/1991/1, 2.8.1991, Criteria for expedited processing of urgent claims, at para. 18; and Decision 7, UN Doc. S/AC.26/1991/7/Rev, 17.3.1992, Criteria for additional Categories of Claims, at paras. 6, 21 and 34.

<sup>13</sup> For more information on the UNCC and its claims processing see generally the Commission's website <<http://www.uncc.ch>>; and, e.g., *T. J. Feighery/C. S. Gibson/T. M. Rajab* (eds.), *War Reparations and the UN Compensation Commission*, 2015.

