

Dispute System Design: The United Nations Compensation Commission

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I. INTRODUCTION

The Security Council of the United Nations established the United Nations Compensation Commission (“UNCC”) with its Resolution 687 on April 3, 1991.¹ It was the first compensation system established under the authority of Chapter VII of the U.N. Charter and was designed to process and pay claims arising from the Iraqi invasion of Kuwait in 1990.² Resolution 687 confirmed that Iraq was liable “for any direct loss, damage, including environmental damages and the depletion of natural resources, or injury to foreign Governments, nationals and corporations”³ Resolution 687 also created a fund to pay those claims and a commission to administer that fund. The details of the compensation fund and the commission were established by Security Council Resolution 692 on May 20, 1991.⁴

The goals of the UNCC were (1) to effect a speedy, fair, and efficient evaluation of the claims made against Iraq and to process them in accordance with the various resolutions of the U.N. Security Council, and (2) to make payments to claimants from the funds obtained

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1. S.C. Res. 687, ¶ 18, U.N. Doc. S/RES/687 (Apr. 3, 1991), available at <http://www2.unog.ch/uncc/resolutio/res0687.pdf>.

2. Chapter VII of the United Nations Charter is entitled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” See Carlos Alzamora, *The UN Compensation Commission: An Overview*, in THE UNITED NATIONS COMPENSATION COMMISSION 3, 3–4 (Richard B. Lillich ed., 1995); Veijo Heiskanen, *The United Nations Compensation Commission*, 296 RECUEIL DES COURS 259, 265–67 (2002); Norbert Wuhler, *The United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution*, 2 J. INT’L ECON. L. 249, 251 (1999).

3. S.C. Res. 687, *supra* note 1, ¶ 16.

4. S.C. Res. 692, U.N. Doc. S/RES/692 (May 20, 1991), available at <http://www2.unog.ch/uncc/resolutio/res0692.pdf>.

from Iraq in accordance with the procedures and priorities decided by the Security Council.⁵

The progress of the UNCC was speedy by international standards. After its conception in April of 1991,⁶ the Secretariat of the UNCC was established on July 29, 1991, the first decisions of the Governing Council were made in August, 1991,⁷ and claim forms were distributed that December.⁸ The first Commissioners were appointed on March 30, 1993,⁹ and the first report by Commissioners of claims was submitted to the Governing Council on April 14, 1994.¹⁰ The UNCC completed the entire claim review process by June of 2005.¹¹

Eventually, the staff of the Secretariat grew to over 300 employees. There were eighteen panels of Commissioners who made recommendations on the 2.68 million claims that were submitted for a total claimed amount of \$352.5 billion.¹² Roughly 15% of those claims were recommended for payment and approximately \$20 billion has been paid to claimants from funding out of Iraq's oil export revenues.¹³

The purpose of this paper is to examine the design of the UNCC from a variety of perspectives: its historical setting, the alternative design approaches that have been taken in other compensation contexts, the details of its design, and its role in the design of future claims resolution facilities. This paper also examines the extent to which concepts of legitimacy and rough justice¹⁴ conflict or reinforce each other in the context of the UNCC.

5. See generally David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT'L L. 183, 186–89 (2002) (discussing the mandate of the United Nations Compensation Commission and its successes).

6. Alzamora, *supra* note 2, at 12.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Peter H. Sand, *Compensation for Environmental Damage from the 1991 Gulf War*, 35 ENVTL. POL'Y & L. 244, 245 (2005).

12. *Id.*; see also John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA J. INT'L L. & FOREIGN AFF. 141, 143 (2005).

13. Sand, *supra* note 11, at 245.

14. "Rough justice" embodies the philosophical conflict between fairness and efficiency, often described as a conflict between Kant and Bentham. In more common parlance, is "perfect" the enemy of the "good"? To what extent does the need for a precise evaluation of one person's damages, for example, preclude the evaluation of other persons' damages because of the lack of time or money. "Rough justice" errs on the side of efficiency, arguably sacrificing equity in individual cases in order to

II. HISTORICAL BACKGROUND

Iraq invaded Kuwait on August 2, 1990.¹⁵ After a series of United Nations Security Council resolutions condemning the invasion, demanding withdrawal, and imposing an arms embargo and economic sanctions, the Gulf War was commenced on January 16, 1991.¹⁶ On March 2, 1991, U.N. Security Council Resolution 686 demanded compliance with its previous resolutions and that Iraq “[a]cept in principle its liability under international law for” losses, damages, and injuries as a result of its invasion and occupation of Kuwait.¹⁷ Iraq agreed to comply with Resolution 686 the following day.¹⁸ Security Council Resolution 687 reaffirmed that Iraq “is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.”¹⁹ The same resolution created a fund to pay the claims for these losses and directed the Secretary-General to develop recommendations for implementing the resolution.²⁰

The Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 on May 2, 1991 proposed the UNCC.²¹ The historic model for reparations has been a lump sum payment by the vanquished to be distributed by a sovereign victor. The amount of the payment was generally related to punitive intensity and the ability to pay. The distribution was usually a political process and the beneficiaries could vary considerably.²² The UNCC,

achieve equity for the whole. *See generally* Caron & Morris, *supra* note 5, at 190–99 (analyzing the legitimacy and fairness of the UNCC claims process).

15. Heiskanen, *supra* note 2, at 265.

16. *Id.* at 266.

17. S.C. Res. 686, ¶ 2(b), U.N. Doc. S/RES/686 (Mar. 2, 1991), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/596/22/IMG/NR059622.pdf?OpenElement>.

18. Letter from Tariq Aziz, Deputy Prime Minister and Minister of Foreign Affairs of the Republic of Iraq, to President of the Security Council, U.N. Doc. S/22320 (1991), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N91/072/05/img/N9107205.pdf?OpenElement>. *See also* Heiskanen, *supra* note 2, at 266.

19. S.C. Res. 687, *supra* note 1, ¶ 16.

20. *Id.* at ¶¶ 18–19.

21. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687*, ¶ 4, delivered to the Security Council, U.N. Doc. S/22559 (May 2, 1991), reprinted in *THE UNITED NATIONS COMPENSATION COMMISSION 385* (Richard B. Lillich ed., 1995).

22. *See* John R. Crook, *The UNCC and its Critics: Is Iraq Entitled to Judicial Due Process?*, in *THE UNITED NATIONS COMPENSATION COMMISSION 77*, 85–87 (Richard B. Lillich ed., 1995). For a detailed discussion of the historical analogues of the UNCC,

although not inconsistent with its war reparations ancestry, drew on three more recent models: (1) the Iran-U.S. Claims Tribunals, (2) a variety of government-sponsored compensation programs, (3) and a broad range of claims resolution facilities from other contexts.

The Iran-U.S. Claims Tribunal ("the Tribunal") was established in 1981 as part of the Algiers Accords, which resolved Iran's November 4, 1979 seizure of the American Embassy in Tehran and retention of U.S. Embassy personnel as hostages, and the subsequent freezing by the United States of Iranian assets in the U.S.²³ It is a bilateral adjudicative body located in The Hague, The Netherlands. After more than 26 years of operations, the end of its work is not yet in sight. The Tribunal is based upon an international arbitration model with full equality of representation and consequential adversarial processes.²⁴ It consists of full-time judges who work together to resolve cases one-by-one with full deliberations.²⁵ These judges ostensibly are not part of a political process and are required under the Tribunal's rules, which are modified UNCITRAL rules of arbitration, to act independently. The initial focus of the Tribunal was on the business and government claims rather than individual claims.²⁶ The funding for these claims was secured by a requirement in the Algiers Accords that Iran post a \$500 million security account to pay any claims against it.²⁷

The authors of the UNCC were intimately involved in the Iran-U.S. Claims Tribunal and were insistent on avoiding its perceived failings: the bias toward business and governments, the obstructive potential of party-appointed judges operating against the backdrop of often hostile relations between the two sponsoring states, the pitfalls of the same judges ruling on the same issues presented by repeat players, the expense, the slow pace, and the general frustration of

see generally David J. Bederman, *Historic Analogies of the UN Compensation Commission*, in *THE UNITED NATIONS COMPENSATION COMMISSION* 257 (Richard B. Lillich ed., 1995).

23. Charles N. Brower, *The Lessons of the Iran-U.S. Claims Tribunal Applied to Claims Against Iraq*, in *THE UNITED NATIONS COMPENSATION COMMISSION* 15, 15 (Richard B. Lillich ed., 1995).

24. See *id.* at 16.

25. See *id.* at 18.

26. See *id.* at 19-22.

27. *Id.* at 25.

powerlessness for the political process to operate in an open and transparent manner.²⁸

A second source of authority for the UNCC arises from numerous government sponsored claims processes detailed in Appendix A. These generally statutory or litigation-oriented programs were created in response to perceived governmental or corporate wrongs that had not been adequately addressed. While each process was substantively different, they shared many similarities. They each had a rationale, a source of authority and funding, and a defined administrative scheme and mechanism for managing costs. Each process also required a definition of beneficiaries, proof for an award, and a predetermined computation method for determining the amount of an award. Although some processes provided for an opt-out right, most were designed to be global. A review of these various designs reveals common elements for reparation that focus on “rough justice”²⁹ in the distribution process. They have a legal and political approach to the calculation of damages as well as elements of individualization in the distribution process.

Appendix B focuses on a third series of claims resolution approaches: common U.S. procedures for compensation. An overview of these facilities by the method for calculating a distribution, or the model, the decider, implementation, size, funding, and rationale, narrative, metaphor, or paradigm provides some insight into the thinking of the designers of the UNCC. There are several varieties of valuation methodologies: flat payment, a grid, selected variables, a formula based upon surrogate variables, or all potential variables. The decider can vary from legislature to judge to jury to the parties themselves. Implementation is by third party administrator, a judicial administrator, or the litigation process. Size varies from less than 1,000 to over 5,000. Funding can be limited or unlimited, public or private. The metaphor can be disaster, reparations, welfare, tort, or contract.

An analysis of these designs reveals little consistency except in the relationships of the metaphor to the valuation methodology. The more the metaphor seems to reflect fate and collective harm, the more the valuation methodology seems to be the same for the claimants. The more there seems to be accountability or blame for the harm, the more the valuation methodology becomes individualized.

28.

29. See *infra* notes 58–60.

III. DESIGN OF THE UNCC

There are at least eight initial variables that must be considered in designing a claims resolution process: function, metaphor, authority and funding, size and similarity, organization and implementation, eligibility criteria, damage methodology, and compensation.³⁰

A. *Function*

The UNCC had the dual function of determining the total amount of damages and the allocation of those damages to each claim.³¹ Rather than the traditional bifurcated procedure of first determining a lump sum payment and then deciding how the fund created by that payment should be allocated to each claim, the UNCC evaluated each claim individually and the sum of all claims constituted the total damages. Since the funding came from a percentage of the oil sold by Iraq—25-30 % at different times—the total amount available for distribution was calculated on a rolling basis.³² The Governing Council prioritized payments depending upon the type of claim filed, with a priority to the smaller, individual claims.³³

B. *Metaphor*

A second and potentially most critical variable is the narrative, metaphor, or paradigm that best represents the claims resolution facility. In the case of the UNCC, the metaphor is mixed. The paradigm for the Iran-U.S. Claims Tribunal, which was the international conflict claims resolution facility that immediately preceded the UNCC, was international arbitration.³⁴ The authors of the UNCC process were attempting to create a new paradigm because of the perceived slowness, expense, and detriment to individual claims experienced in the Iran-US Claims Tribunal. At the same time, they did not believe that a single, lump sum payment approach could be accurately determined. The alternative they used was more bottom-up: value each claim on its own merits, total the value of all the claims,

30. See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1362-74 (2005).

31. S.C. Res. 687, *supra* note 1, ¶¶ 16-19.

32. Sand, *supra* note 11, at 245 (noting that as of June 2005, roughly \$20 billion of the \$52.5 billion awarded has been disbursed to victims).

33. Michael F. Raboin, *The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing*, in THE UNITED NATIONS COMPENSATION COMMISSION 119, 130-31 (Richard B. Lillich ed., 1995).

34. See Bederman, *supra* note 22, at 268.

prioritize the payment of those claims, and the overall outcome would be based upon the independent evaluation of neutral decision-makers, guided by broad guidelines established by the political judgment of the international community.

The narrative was a hybrid process: political and judicial; largely inquisitorial with some adversarial elements; both collective and individual depending upon the type of claim; and bottom-up rather than top-down.³⁵ Arguably the UNCC is *sui generis* and its holdings *lex specialis*. The closest analogies for the process of evaluating smaller claims would be the tort claims resolution facilities in the U.S. The process for deciding larger claims appear to be more like international arbitration. The role of Iraq, however, was limited and the Commissioners were constrained by the guidelines provided by the Governing Council. The other distinguishing factor was the sheer volume of the claims: 2.6 million claims for \$352.5 billion.³⁶ The metaphor would best be described on the basis of a hybrid political-judicial process dispensing “rough justice.”

C. Authority and Funding

The authority for the UNCC was the United Nations. Security Council Resolution 686 was based upon Chapter VII of the U.N. Charter that applied to all U.N. members, including Iraq.³⁷ In addition, Iraq agreed to the claims resolution process in conjunction with the end of the hostilities.³⁸ Thirdly, the implementation of the claims process was accomplished by an international body subject to its traditional constraints.³⁹ The Security Council also established a funding mechanism. Originally, Security Council Resolution 778, adopted on October 2, 1992, provided operational funding for the

35. See generally Bederman, *supra* note 22 (arguing that the UNCC was largely consistent in terms of structure and jurisprudence with traditional modern international claims practices); Chung, *supra* note 13 (discussing the importance of the UNCC's use of neutral third party adjudicators to undertake fact-finding and its largely inquisitorial rather than adversarial process to achieving the delicate balance between protecting the rights individual claimants and the rights of the Government of Iraq).

36. Sand, *supra* note 11, at 245.

37. S.C. Res. 686, *supra* note 17.

38. Heiskanen, *supra* note 2, at 266–67 (noting that on April 6, 1991, Iraq accepted the terms of the ceasefire agreement as set forth in U.N. Security Council Resolution 687, which included compensation provisions).

39. Alzamora, *supra* note 2, at 3–4 (“[The Security Council] decided that appropriate compensation should be provided through procedures and bodies established within the multilateral framework of the United Nations. . . . The UNCC thus became a subsidiary organ of the Security Council, with all the effects and consequences . . . which that implies.”)

UNCC pending the implementation of more permanent financing contained in Security Council Resolutions 705 and 986 by allocating 30% of Iraq's annual oil revenues to the UNCC.⁴⁰ That percentage was changed in Security Council Resolution 1330 to 25% in 2000 and in Security Council Resolution 1483 to 5% in 2003.⁴¹ As of June, 2005, more than \$20 billion has been paid to claimants.⁴²

D. *Size and Similarity*

The size and similarity of claims are also critical variables in designing a claims resolution facility. The Governing Council, upon recommendation by the Secretariat, decided to divide the claims into six categories for processing and disposition.⁴³ Category "A" consisted of claims for those individuals who had to leave Kuwait or Iraq between the invasion on August 2, 1990, and the end of hostilities on March 2, 1991. Category "B" was for claims for individuals who suffered serious personal injury or lost a family member as a result of the invasion. Category "C" claims were for individuals making claims for a variety of damages up to \$100,000. Category "D" claims were for individuals seeking more than \$100,000 in compensation. Category "E" claims were designed for corporations and other business entities. Category "F" contained claims for governments and international organizations.

The theory behind Category "A" claims was that a known total number of non-Iraqis left either Kuwait or Iraq as a result of the invasion and should be eligible for limited compensation for their dislocation.⁴⁴ The Governing Council assigned \$2,500 to \$8,000 for each claimant depending on whether there were other family members involved. The claims were submitted by countries on behalf of their

40. S.C. Res. 778, ¶¶ 1–4, U.N. Doc. S/RES/778 (Oct. 2, 1992), available at <http://www2.unog.ch/uncc/resolutio/res0778.pdf>; S.C. Res. 705, ¶ 2, U.N. Doc. S/RES/705 (Aug. 15, 1991), available at <http://www.uncc.ch/resolutio/res0705.pdf>; S.C. Res. 986, ¶ 8(c), U.N. Doc. S/RES/986 (Apr. 14, 1995), available at <http://www2.unog.ch/uncc/resolutio/res0986.pdf> (creating the "Oil-For-Food Program").

41. S.C. Res. 1330, ¶ 12, U.N. Doc. S/RES/1330 (Dec. 5, 2000) available at <http://www2.unog.ch/uncc/resolutio/res1330.pdf>; S.C. Res. 1483, ¶¶ 20–21, U.N. Doc. S/RES/1483 (May 22, 2003), available at <http://www2.unog.ch/uncc/resolutio/res1483.pdf>; S.C. Res. 1546, ¶ 24, U.N. Doc. S/RES/1546 (June 8, 2004), available at <http://www2.unog.ch/uncc/resolutio/res1546.pdf>.

42. Sand, *supra* note 11, at 246.

43. Raboin, *supra* note 33, at 120.

44. See Francis E. McGovern, *The Intellectual Heritage of Claims Processing at the United Nations Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION 187, 196–97 (Richard B. Lillich ed., 1995).

respective nationals and could be submitted in a computerized format. The assumptions were that minimal proof would be adequate, that Iraq was responsible for any dislocation, that the dislocation caused some level of harm, and that the total number of claims would not exceed the total number of foreign nationals who were in Kuwait or Iraq on August 2, 1990.⁴⁵

Category “B” claims were limited to \$2,500 to \$10,000 per claimant and were designed for the smaller personal injury claims that could be processed expeditiously with limited proof requirements.⁴⁶ The Commissioners could request additional information from the Category “B” claimants and were required to determine that there was a causal relationship between the conflict and the harm.⁴⁷

For other individual claims for departure, personal injury, death, personal property loss, lost securities, lost income, real property damage, and individual business losses up to \$100,000, there was Category “C”.⁴⁸ As with “A” and “B”, the processing of “C” claims was expedited. The Governing Council left to the Commissioners the issues of causation and valuation. The level of supporting documentation for “C” claims varied considerably. The Commissioners were asked to decide in any given case whether or not the damage claimed should be awarded, recognizing the practical difficulties of retrieving documents in the context of an armed conflict.

If an individual wanted to claim more than \$100,000 for the same types of harm listed in “C”, they would need to file a Category “D” claim.⁴⁹ The elements of the “D” claim were identical to “C”—awards for departure, personal injury, death, personal property loss, lost securities, lost income, real property damage, and individual business losses. It was possible to claim up to \$100,000 in “C” and the remainder in “D,” or to claim all losses in “D”.⁵⁰

45. *Id.*

46. *Criteria for Expedited Processing of Urgent Claims*, U.N. Compensation Comm’n, ¶¶ 10–13, U.N. Doc. S/AC. 26/1991/1 (Aug. 2, 1991), available at http://www.uncc.ch/decision/dec_01.pdf [hereinafter *Criteria for Expedited Processing of Urgent Claims*].

47. McGovern, *supra* note 44, at 201.

48. *Criteria for Expedited Processing of Urgent Claims*, *supra* note 43, ¶¶ 14–15.

49. *Criteria for Additional Categories of Claims*, U.N. Compensation Comm’n, ¶ 7, U.N. Doc. S/AC.26/191/7 (Dec. 4, 1991), available at http://www2.unog.ch/uncc/decision/dec_07r.pdf [hereinafter *Criteria for Additional Categories of Claims*].

50. Heiskanen, *supra* note 2, at 283–84.

The category "E" claims were for corporate or other entity losses except for losses incurred from the trade embargo and related measures.⁵¹ Losses included payments to employees or others pursuant to contractual obligations. The "E" claims were further divided into "E1" oil sector claims; "E2" for other corporate or business entity claims; "E3" for non-Kuwaiti construction and engineering claims; and "E4" for Kuwaiti private sector claims other than oil claims.⁵²

The final category of claims, "F", was designed for governments and international organizations for losses of government property, evacuation costs, payments to employees or in accordance with contractual obligations, and environmental damages and depletion of natural resources.⁵³ The "F" claims were further divided into "F1" claims for evacuation costs, property losses, and other similar losses; "F2" for Jordanian and Saudi Arabian claims, "F3" for Kuwaiti claims, and "F4" for environmental claims.⁵⁴ There was also a mixed E/F category for overlapping claims involving export guarantees and insurance claims.⁵⁵

E. *Organization and Implementation*

As previously indicated, the organization of the UNCC consisted of three separate entities: the Governing Council, the Secretariat, and the Commissioners.⁵⁶ The Governing Council was composed of all members of the Security Council at any given time.⁵⁷ Its role was to determine policy, establish the financing and administration of the fund, approve the processes and procedures for determining claims, and to make payments from the fund.

The Secretariat was composed of an Executive Secretary appointed by the Secretary-General in consultation with the Governing Council and a staff of lawyers, professional consultants, and other support personnel.⁵⁸ The Secretariat was located at the Villa La Pelouse on the grounds of the United Nations in Geneva, Switzerland.

51. *Criteria for Additional Categories of Claims*, *supra* note 49, ¶9.

52. Heiskanen, *supra* note 2, at 284–85.

53. *Criteria for Additional Categories of Claims*, *supra* note 49, ¶¶ 16–22.

54. Heiskanen, *supra* note 2, at 286.

55. *Id.* at 285.

56. Alzamora, *supra* note 2, at 4.

57. Heiskanen, *supra* note 2, at 270–71.

58. *Id.* at 272–74.

The Commissioners were nominated by the Secretary-General as recommended by the Executive Secretary and appointed by the Governing Council.⁵⁹ Their role was to sit in panels of three to review and evaluate claims and submit to the Governing Council their recommendations for payment. The Commissioners were drawn from a wide range of geographical and professional backgrounds including law, finance, and damage evaluation, and performed their functions as independent neutrals who were asked to make their decisions in their individual capacity rather than as representative of any parties of interest.⁶⁰ The staffing for the Commissioners came from the Secretariat whose functions included giving them legal, technical, and administrative assistance.

The interaction between legitimacy and rough justice in the UNCC appears most vividly in the interaction among the Governing Council, Secretariat, and Commissioners. The Governing Council provided legitimacy to the UNCC because it was coterminous with the Security Council of the United Nations and operated by consensus. The Commissioners provided legitimacy because they were independent and impartial. The Secretariat provided legitimacy because of its international composition and its role as an implementer, not a policy maker.

On the other hand, the Governing Council was the ultimate decision maker and its decision-making process was largely political. As a result, political decisions regarding rough justice that were made by the Governing Council without input from Iraq conflicted with some conceptions of legitimacy. The Commissioners and the Secretariat were bound by these decisions. In practice, however, the Governing Council delegated most decisions and the application of their policies to the Commissioners.

From the perspective of rough justice, this interaction was quite similar. The Governing Council made a small number of policy decisions that were converted into reality by the Commissioners and implemented by the Secretariat.

The limitations on the role of Iraq in this process created some conflict between legitimacy and rough justice. Because the total losses incurred by virtue of the invasion most probably did not exceed

59. *Provisional Rules for Claims Procedure*, U.N. Compensation Comm'n, Art. 18, ¶ 1, U.N. Doc. S/AC. 26/ 1992/10 (June 26, 1992), available at http://www.uncc.ch/decision/dec_10.pdf [hereinafter *Provisional Rules for Claims Procedure*].

60. *Id.* at Art. 19, ¶ 2—Art. 21, ¶ 1. See also Raboin, *supra* note 33, at 135–36.

the losses awarded, the amount of money paid by Iraq in the aggregate was, in all likelihood, unaffected by its lack of role. Rough justice and legitimacy were not pulling in different directions. In any given case, however, the rough justice mandated by the expedited process probably was affected by the lack of participation by Iraq, and hence, there was, at the detail level, an undermining of legitimacy by the procedures used by the UNCC.

Like many other claims resolution facilities, the UNCC utilized an inquisitorial model of decision-making with a large number of self-imposed institutional restraints embodied in the Provisional Rules for Claims Procedures.⁶¹ These rules were adopted by the Governing Council on June 26, 1992, and contained the essential procedures for claimants to file claims, for the Secretariat to process claims, and for the Commissioners to decide claims.⁶²

Section I contained general provisions and definitions.⁶³ Claimants were defined broadly, but non-governmental organizations were not included as entities who could file claims. Submissions and evidence provided by a claimant were not exclusionary.

Section II related to the submission and filing of claims.⁶⁴ With a few exceptions, only governments and international organizations of states were permitted to file claims and those claims were required to be submitted in a prescribed format and in English. Contacts with claimants were to be made only through the minions of governments filing claims. The rules provided for the creation of a Registry with the Secretariat to receive and register claims and to make a preliminary assessment of claims to ensure that all formal requirements were followed.

One of the most important rules was contained in Article 16, which provided for periodic reports by the Executive Secretary concerning the number, type, and compensation sought in claims as well as any significant legal and factual issues raised by the claims.⁶⁵ The reports also provided an opportunity for Iraq and other governments and international organizations who had filed claims to make comments and to provide additional information.

Section III was based upon the United Nations Commission on International Trade Law ("UNCITRAL") rules and governed the appointment, conflicts, qualifications, requirements, and privileges and

61. *Provisional Rules for Claims Procedure*, *supra* note 59.

62. Raboin, *supra* note 33, at 131.

63. *Provisional Rules for Claims Procedure*, *supra* note 59, Art. 1-3.

64. *Id.* at Art. 4-17.

65. *Id.* at Art. 16, ¶¶ 1-2.

immunities of Commissioners.⁶⁶ The pool of Commissioners was designed to be diverse with regard to geography and expertise, and was limited to individuals with unquestioned integrity and experience.

The procedures for the operation of the panels of Commissioners were contained in Section IV.⁶⁷ Each of the Commissioners on a panel of three must be of a different nationality; work was to be conducted in private; and confidentiality was required. Priority was given to the “A”, “B” and “C” panels over all others and expeditious processing with consistent application of rules was reinforced. Article 31 established the hierarchy of applicable law: Security Council resolutions, decisions of the Governing Council, and other rules of international law.⁶⁸

Article 32, in conjunction with Article 16, operated to ensure that the government of Iraq or any other government may produce information or views concerning factual or legal issues raised by claims and that the Commissioners would have access to those filings.⁶⁹ The rules anticipated meetings of each panel of Commissioners called by the Chairman to be held in Geneva and virtually unlimited assistance from the Executive Secretary and Secretariat. The amounts recommended for payment by the Commissioners were subject to review by the Governing Council. The decisions of the Governing Council were final and the reports of the Commissioners were public except for the names of individual claimants and any other information determined to be confidential.

F. *Eligibility Criteria*

One of the most critical aspects of any claims resolution facility is contained in the criteria that establish eligibility for payment. As previously discussed, non-Iraqi governments and international organizations of states were the only eligible entities who could file claims for individuals or business organizations with the requirement of “direct loss, damage . . . or injury . . . as a result of Iraq’s unlawful invasion and occupation of Kuwait.”⁷⁰ A variety of UNCC decisions allowed claims resulting from military operations from August 2, 1990 to March 2, 1991: departure from or inability to leave Iraq or

66. *Id.* at Art. 18–27. See also Raboin, *supra* note 33, at 135–36.

67. *Provisional Rules for Claims Procedure*, *supra* note 59, Art. 28–43.

68. Raboin, *supra* note 33, at 138.

69. *Provisional Rules for Claims Procedure*, *supra* note 59, Art. 32, ¶¶ 1–2.

70. S.C. Res. 687, *supra* note 1, ¶ 16

Kuwait, actions by Iraq in connection with the invasion or occupation, the breakdown of civil order in Kuwait or Iraq, or illegal detention.⁷¹

In regard to business losses, the Governing Council held that all property losses attributable to direct Iraqi confiscation or destruction were compensable as well as damages because of the absence of personnel.⁷² Contract cases were limited to losses resulting from the invasion and occupation of Kuwait.⁷³ Losses occurring in connection with trade sanctions against Iraq were not eligible for compensation.⁷⁴ Combined losses could be apportioned by the Commissioners.⁷⁵

Reflecting the Governing Council's desire to expedite the "A", "B", and "C" claims, the evidentiary provisions in Article 35 of the Provisional Rules for Claims Procedures provided that the claimants had the responsibility for providing "simple documentation" for "A" and "B" claims and "appropriate evidence" for "C" claims.⁷⁶ Other claims "must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss."⁷⁷ The Commissioners were the arbiters of the quantity and quality of evidence required, and they could request additional evidence for the "D", "E", and "F" claims.⁷⁸

G. *Damage Methodology*

The damage methodology chosen by the Secretariat and approved by the Commissioners and the Governing Council was particularly innovative.⁷⁹ "Commissioners will wish to apply relevant valuation methods to different categories of loss."⁸⁰ For the "A"

71. See Bederman, *supra* note 22, at 291.

72. *Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Evolution*, U.N. Compensation Comm'n, ¶¶ 12–13, U.N. Doc. S/AC.26/1992/9 (Mar. 6, 1992), available at http://www.uncc.ch/decision/dec_09.pdf.

73. *Id.* at ¶¶ 7–10.

74. *Id.* at ¶ 6.

75. *Compensation for Business Losses Resulting From Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were Also a Cause*, U.N. Compensation Comm'n, ¶ 9, U.N. Doc. S/AC.26/1992/15 (Jan. 4, 1993), available at http://www.uncc.ch/decision/dec_15.pdf [hereinafter *Compensation for Business Losses*].

76. *Provisional Rules for Claims Procedure*, *supra* note 60, Art. 35, ¶ 2.

77. *Id.* at Art. 35, ¶ 3.

78. *Id.* at Art. 35, ¶ 4.

79. McGovern, *supra* note 44, at 195–203 (describing the unique nature of the UNCC reparations program in that its "mandate is neither in the typical reparations nor the typical arbitration mold").

80. *Compensation for Business Losses*, *supra* note 76, ¶ 7.

claims there was a “matching” process wherein computerized claims filed by governments were run against data gathered from independent sources of arrival and departure information to determine if there was simple documentation to justify an award.⁸¹ The “A” panel of Commissioners developed a series of decision rules incorporated into the computer programs in order to verify or create extrapolation verification of the claims. Approximately 920,000 “A” claims were processed using this methodology by October of 1996.⁸²

Because there were less than 6,000 “B” claims, the Secretariat organized them by issues and the “B” panel of Commissioners decided those issues in the context of individual cases.⁸³ Once those decision rules were applied to groups of cases, the Commissioners could ensure that there was horizontal consistency among similarly situated cases. All the “B” claims were processed by December, 1995.⁸⁴

The “C” claims represented a more intense methodological challenge. Not only were there more loss elements than “A” or “B” claims—departure, personal injury, death, personal property loss, lost securities, lost income, real property damage, and individual business losses—there were also more claims – approximately 1,660,000.⁸⁵ Included within these claims was a consolidated claim filed by the Central Bank of Egypt on behalf of over 800,000 Egyptian workers who had not received full compensation for their employment prior to the Iraqi invasion of Kuwait.⁸⁶

The Secretariat and the “C” panel of Commissioners used a variety of methodologies drawn largely from the experiences of U.S. claims resolution facilities for personal injury torts.⁸⁷ They used computerized decision trees, case matching, regression analysis-based modeling, range verification modeling, and even some case-by-case determinations. In essence, the methodology was based upon claim type and varied in accordance with the data submitted, independent data available, and principles of “rough justice.” Article 36

81. McGovern, *supra* note 44, at 200.

82. Heiskanen, *supra* note 2, at 278–79.

83. McGovern, *supra* note 44, at 201.

84. Heiskanen, *supra* note 2, at 280.

85. *Id.* at 282.

86. *Id.* (noting that the consolidated claim represented roughly 1.2 million individual claims valued at over \$490 million); see also *Final Report and Recommendations of the Panel of Commissioners Concerning the Egyptian Workers' Claims*, U.N. Compensation Comm'n, ¶¶ 2, 63, U.N. Doc. S/AC.26/1997/3 (Oct. 2, 1997), available at <http://www.uncc.ch/reports/r97-03.pdf> (awarding roughly \$84.4 million for 223,000 workers).

87. McGovern, *supra* note 44, at 201–02.

of the Provisional Rules for Claims Procedures allowed the Commissioners to seek expert advice on the verification and valuation of claims. Thus, the Secretariat and the Commissioners could obtain external data to assist in the analysis of claims.⁸⁸ Claims that were within the state's statistically predictable ranges received less scrutiny. Claims made for amounts higher than those statistical expectations received more scrutiny. The verification process was conducted by the Secretariat and Commissioners without resort to requests for additional evidence from individual claimants. The claims processing was completed in June, 1999.⁸⁹

The "D" claims were essentially the same as "C" but for individual losses above \$100,000. The Governing Council, however, established more exacting requirements for the "D", "E", and "F" Commissioners to follow: "documents and other evidence must exceed the reasonable minimum that was required for claims in categories 'A', 'B', and 'C'."⁹⁰ As a result, the purely inquisitorial approach eventually moved toward the arbitral approach as the claims became larger and more complex. The methodology of the "D" commissioners varied among the approximately 10,800 claims.⁹¹ As appropriate, "C" methodology was used but, because of the smaller number of claims, more individual attention could be given to each claim. Article 38 of the Provisional Rules for Claims Procedures addressed the "D", "E", and "F" claims and allowed the panels to "adopt special procedures appropriate to the character, amount and subject matter of particular types of claims under consideration."⁹² The claims could be organized differently, could involve additional requests for information from claimants, could allow direct contact with claimants, and could involve input from the Government of Iraq. The processing of the "D" claims was to be completed in July, 2003.⁹³

There were approximately 5,800 "E" claims analyzed by five "E" panels of Commissioners.⁹⁴ Great attention was given to individual

88. *Provisional Rules for Claims Procedure*, *supra* note 60, Art. 36.

89. *Report and Recommendations Made by the Panel of Commissioners Concerning the Seventh Installment of Individual Claims for Damages Up to US \$100,000 (Category "C" Claims)*, U.N. Compensation Comm'n, ¶ 1, U.N. Doc. S/AC. 26/1999/11 (June 24, 1999), available at <http://www.uncc.ch/reports/r99-11.pdf>.

90. *Decision Concerning Explanatory Statements by Claimants in Categories "D", "E", and "F"*, U.N. Compensation Comm'n, U.N. Doc. S/AC. 26/Dec. 46 (Feb. 3, 1998), available at http://www.uncc.ch/decision/dec_46.pdf.

91. Heiskanen, *supra* note 2, at 284.

92. *Provisional Rules for Claims Procedure*, *supra* note 59, Art. 38.

93. Heiskanen, *supra* note 2, at 284.

94. *Id.* at 285.

determinations that a loss eligible for compensation actually occurred.⁹⁵ In addition, there were individual reviews to determine the amount of the actual and eligible loss. As a result, the mass processing methodology utilized in “A”, “B”, and “C” claims was not available. The most systematic approaches involved standardized valuation procedures and verification methods developed with the assistance of experts in the fields of accounting and insurance loss adjusting.⁹⁶ As a result, the Commissioners were able to use consistent approaches to expense claims, tangible asset and property losses, non-pecuniary losses, real property losses, contract losses, and loss of business and business interruption claims.⁹⁷ There were also uniform practices for exchange rates, collateral sources, mitigation of damages, interest, subrogation, and duplicate and overlapping claims.⁹⁸

Almost 400 “F” claims were filed by governments and international organizations.⁹⁹ These claims were disaggregated and organized in a fashion similar to the large and complex “E” claims and were subject to the same level of scrutiny and individualized review. Probably the most challenging claims were for environmental losses including abatement and prevention, cleaning and restoring, monitoring and assessment, and depletion or damage to natural resources.¹⁰⁰ The “F4” panel of Commissioners worked at the cutting edge of environmental science and law to make its decisions on the 168 claims before it. Their reports of over 500 pages recommended payment of \$5.26 billion on total claims of \$85 billion.¹⁰¹

H. *Compensation*

As indicated previously, compensation for claims awarded by the Commissioners and the Governing Council was made with monetary contributions from Iraq based upon a percentage of the value of its oil exports. Funding for the UNCC was based upon Security Council Resolutions 705 and 706 in 1991. Initially, however, Iraq did not agree and Security Council Resolution 778 in 1992 allowed the use of frozen Iraqi assets.¹⁰² Eventually 25 percent of the proceeds from Iraqi oil sales under the 1995 Security Council Resolution 986 “oil-

95. *Id.* at 367.

96. *Id.*

97. *Id.* at 370–78.

98. Bederman, *supra* note 22, at 305-07.

99. Heiskanen, *supra* note 2, at 287.

100. Sand, *supra* note 11, at 247–49.

101. *Id.* at 245.

102. S.C. Res. 778, *supra* note 40, ¶ 1.

for-food” program went to the Compensation Fund.¹⁰³ The Governing Council established in its Decision 17 on March 23, 1994 a priority schedule for the payment of claims, and in Decision 18 on the same date, rules for distribution and transparency.¹⁰⁴ Priority was given to “A”, “B”, and “C” with pro rata payments until there were sufficient funds to pay all of these claims. Eventually 852,499 “A” claims were paid \$3.15 billion, 91.16 % out of the 923,158 claims made for \$3.5 billion; 3,935 “B” claims were paid \$13.4 million, 66.84% out of 5,734 claims filed for \$20.1 million, and of 1,736,288 “C” claims filed for \$11.5 billion, approximately \$5.2 billion, or 45.08%, was paid to 672,452 claimants.¹⁰⁵ In total, approximately \$8.4 billion has been paid to 1.5 million individual “A”, “B”, and “C” claimants. “D” claims of 13,864 for \$16.5 billion resulted in 10,343 claims approved for a total of \$3.3 billion.¹⁰⁶ Of 6,571 “E” claims made for \$78.7 billion, 4,048 were awarded \$26.3 billion.¹⁰⁷ Of 123 “E/F” claims for \$6.15 billion, 57 claimants were awarded \$311 million.¹⁰⁸ A total of 393 “F” claims for \$236.1 billion were reduced to 285 claims and \$14 billion awarded.¹⁰⁹

IV. CONCLUSION

The design of the United Nations Compensation Commission was, in some respects, well within the tradition of war reparations facilities and, in other respects, unique. Its political governance structure within the U.N. and the Governing Council ensured that it was responsive to the demands of its founders. Its quasi-judicial elements—rules of procedure, independent Commissioners, evidentiary standards, inquisitorial style—made it a hybrid entity, neither purely political, nor purely adjudicatory. One of the most striking aspects of its procedure was its lack of adversarialness with restrictions on Iraq’s ability to participate in its decision-making processes. Probably the most legitimizing aspects of its procedure related to the

103. S.C. Res. 986, *supra* note 40, ¶ 8.

104. *Priority of Payment and Payment Mechanism: Guiding Principles*, U.N. Compensation Comm’n, U.N. Doc. S/AC. 26/ Dec. 17 (Mar. 24, 1994), available at http://www.uncc.ch/decision/dec_17.pdf; *Distribution of Payments and Transparency*, U.N. Compensation Comm’n, U.N. Doc. S/AC. 26/Dec. 18 (Mar. 24, 1994), available at http://www.uncc.ch/decision/dec_18.pdf.

105. Status of Processing and Payment of Claims, <http://www2.unog.ch/uncc/status.htm> (last visited Nov. 10, 2008).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

transparency of its proceedings. Notwithstanding the political oversight, the operation of the UNCC was consistent with the well-established tradition of claims resolution facilities—inquisitorial process, horizontal and vertical equity in the application of its rulings, and a reasoned elaboration of those rulings.

What distinguishes the UNCC most from its predecessors is the quantity and variety of the claims before it. The UNCC was able to process and pay millions of disparate claims within a record time frame. This accomplishment was achieved by the disaggregation of claims into more digestible segments, and the application of state-of-the-art decision-making tools to assist the Commissioners in reaching their decisions. The hallmark of the UNCC was pragmatism: the assimilation of “rough justice” into judicial proceedings without destroying the legitimacy of the enterprise in the eyes of the international community. There will be a continuing debate in the context of the UNCC regarding the concept of legitimacy and the concept of rough justice, as well as the interaction between them. Hopefully, the design of the United Nations Compensation Commission will serve as a model, or at least a yardstick, for future claims facility designs.

The UNCC will remain unique, particularly because of the open-ended nature of its funding and the *lex specialis* necessitated by its governance. The UNCC should, however, be a model for the design of future claims resolution facilities because of its tailoring of decision-making techniques to different types of claims. By adopting the processes to the claims, rather than vice versa, the UNCC has become a model of rough justice that will have long-lasting precedential impact.

Appendix A

Indian Claims

Rationale	Compensation for real property
Authority/Payer	Statute/U.S. Government
Nature of Reparation	\$818,172,607 + ongoing
Global/Finality/Opt Out	Global/No Finality/Opt Out Right
Administration/Cost	Commission/ \$5,000,000 +
Definition of Beneficiaries/Number of Claims/Proof	Identifiable Indian tribe/546 claims/ Treaty with U.S. Government
Computation of Award/ Proof	Commission heard land cases./ Indian tribe had to prove: the extent of use and occupancy of the land, the exclusiveness of the use and occupancy, and whether the use continued "for a long time."

Radiation Exposure

Rationale	Exposure to radiation 1942-1972
Authority/Payer	Statute (1990)/ U.S. Government
Nature of Reparation	~\$1,148,503,470
Global/Finality/Opt Out	Intended to be/Not final/Opt Out Right
Administration/Cost	Compensation System/ minimal
Definition of Beneficiaries/Number of Claims/Proof	<i>Downwinder</i> : living in the area (14,557 claims) <i>Onsite Participant</i> : working at the site (7,576 claims) <i>Uranium Miner</i> : working in the mine (7,266 claims) <i>Uranium Miller</i> : manufacturing the uranium (1,213 claims) <i>Ore Transporter</i> : transporting the ore (279 claims) ~25,891 total claims
Computation of Award/ Proof	Act provided fixed payments in the following amounts: \$50,000: downwinders \$75,000: onsite worker \$100,000 for miners, millers, and transporters.

Syphilis Experiments

Rationale	Medical Experiment 1932-1972
Authority/Payer	Settlement of law suit (1973)/ U.S. Government
Nature of Reparation	\$9,066,000; free medical and burial services for living participants; public apology by US President

Global/Finality/Opt Out Administration/Cost	Global/Final/Opt Out Right Court/ Lawyer's fee of \$1,000,000
Definition of Beneficiaries/Number of Claims/Proof	600 black men in Macon County, Alabama/579 claimants/Claimants were found via study records.
Computation of Award/ Proof	Living Syphilitics: \$37,500 Living Controls: \$16,000 Deceased Syphilitics: \$15,000 Deceased Controls: \$5,000

September 11th Compensation Fund

Rationale	Terrorist Attacks September 11, 2001
Authority/Payer	Statute (2001)/ U.S. Government
Nature of Reparation	\$7,049,415,537
Global/Finality/Opt Out Administration/Cost	Global/Final/ Opt Out Right Special Master/\$86,873,312
Definition of Beneficiaries/Number of Claims/Proof	Individuals present in NY, DC, or PA who were physically injured or killed./ 7,403 claims/ Present at a site or sought treatment within 24-72 hours.
Computation of Award/ Proof	\$250,000-\$7.1 million (depending on income level)

Holocaust: German Slave Labor in Eastern Europe

Rationale	Slave Labor by German Government
Authority/Payer	Class action settlement/German statute (2001)/ US Government promise of "peace"/ public and private contributions.
Nature of Reparation	\$5 billion
Global/Finality/Opt Out Administration/Cost	Global/Not Final/Yes Opt Out International and Governmental Agencies
Definition of Beneficiaries/Number of Claims/Proof	Slave laborers Forced laborers
Computation of Award/ Proof	\$7,500 for former slaves \$2,500 for former forced laborers Burden of proof was very low.

Appendix B

Asbestos Bankruptcies

MODEL: Surrogate Variables/Formula
DECIDER: Parties
SIZE: 1 Million+
IMPLEMENTATION: Administrator
FUNDING: Limited/Defendant
PARADIGM: Tort

Dalkon Shield

MODEL: Surrogate Variables/Formula
DECIDER: Parties
SIZE: 300,000
IMPLEMENTATION: Administrator
FUNDING: Limited/Defendant
PARADIGM: Tort

Silicon Gel Breast Implants

MODEL: Selected Variables/Grid
DECIDER: Parties
SIZE: 250,000
IMPLEMENTATION: Administrator
FUNDING: Limited/Defendant
PARADIGM: Tort/Welfare

Toxic Waste Sites

MODEL: Surrogate Variables/Formula
DECIDER: Parties
SIZE: 3-100,000
IMPLEMENTATION: Administrator
FUNDING: Limited/Defendant
PARADIGM: Tort/Welfare

Childhood Vaccine Statute

MODEL: All Variables
DECIDER: Legislature
SIZE: 1,300-6,000
IMPLEMENTATION: Multiple Special Masters
FUNDING: Limited/Public
PARADIGM: Welfare/Tort

Black Lung Statute

MODEL: Selected Variables/Grid
DECIDER: Legislature
SIZE: 100,000+
IMPLEMENTATION: Multiple Administrators
FUNDING: Limited/Employer
PARADIGM: Welfare/Tort

Workers' Compensation

MODEL: Grid
DECIDER: State Legislatures
SIZE: 100,000's
IMPLEMENTATION: Multiple Administrators
FUNDING: Limited/Employer
PARADIGM: Welfare/Tort

Private First Party Insurance

MODEL: Flat/ Grid/ Surrogate/ All
DECIDER: Parties
SIZE: Millions
IMPLEMENTATION: Courts/ Juries
FUNDING: Limited/Plaintiff
PARADIGM: Contract

Aid to Dependent Children

MODEL: Flat
DECIDER: Legislature
SIZE: Millions
IMPLEMENTATION: Administrator
FUNDING: Limited/Public
PARADIGM: Welfare

