

Humanitarian considerations in the work of the United Nations Compensation Commission

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Introduction and overview of the Commission

The United Nations Compensation Commission (the “UNCC” or “the Commission”) is a subsidiary organ of the United Nations Security Council, and is the first claims commission of its kind to be created by the Security Council. It was established in 1991 to process claims and pay compensation where appropriate for losses resulting from Iraq’s invasion and occupation of Kuwait (1990-91). The aim of this paper is to examine and demonstrate the extent to which humanitarian considerations inform the various aspects of the work of the Commission, as well as the extent to which this feature of the Commission’s work could serve as a model for war reparations institutions in the future.

In paragraph 16 of Security Council Resolution 687 (1991)¹, the Security Council reaffirmed that

“... Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, 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.”

The Security Council decided to create a fund from which compensation will be paid for such losses, damage and injury, as well as a commission to administer that fund.² Pursuant to a request by the Security Council,³ the Secretary-General recommended the establishment of a claims resolution

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body that, under the authority of the Security Council, would verify and value claims and administer the payment of compensation.⁴ In Resolution 692 (1991),⁵ the Security Council established the Commission and the United Nations Compensation Fund ("the Fund") in accordance with Part I of the Secretary-General's report.

As recommended by the Secretary-General, the UNCC is composed of three bodies, namely, the Governing Council, the commissioners and the secretariat. The Governing Council is the main policy-making organ of the Commission. Its membership is the same as that of the Security Council at any given time. It is responsible for the establishment of the criteria for the compensability of claims, the rules and procedures for processing the claims, the guidelines for the administration and financing of the Compensation Fund and the procedures for the payment of compensation. In addition, the Governing Council is charged with taking decisions on the reports and recommendations made by the panels of commissioners concerning claims reviewed by the latter. The commissioners, who sit in panels of three, work in their personal capacities and are chosen for their integrity and expertise in fields relevant to the work of the UNCC, such as law, accounting, loss adjustment and insurance. Within the guidelines established by the Governing Council, they are responsible for reviewing claims to determine whether the alleged losses or injury arose as a direct result of Iraq's invasion and occupation of Kuwait. They also assess the value of

1 UN Doc. S/RES/687 (1991), para. 33.

2 The literature on the Commission's creation and working methods is extensive. See, e.g., D. Caron, "The legitimacy of the collective authority of the Security Council", *American Journal of International Law*, Vol. 87, 1993, pp. 352 ff; F.L. Kirgis, "Claims settlement and the United Nations legal structure" in R.B. Lillich (ed.), *The United Nations Compensation Commission* (Thirteenth Sokol Colloquium), Transnational Publishers, New York, 1995, p. 103 ff; R.C. O'Brien, "The challenge of verifying corporate and government claims at the United Nations Compensation Commission", *Cornell International Law Journal*, Vol. 31, 1998, p. 1 ff; P. Malanczuk, "International business and new rules of State responsibility? – The law applied by the United Nations (Security Council) Compensation Commission for claims against Iraq" in K.-H. Böckstiegel (ed.), *Perspectives of Air Law, Space Law and International Business Law for the Next Century*, 1995, pp. 117 ff; M.E. Schneider, "How fair and efficient is the United Nations Compensation Commission system?", *Journal of International Arbitration*, Vol. 15, 1998, pp. 15 ff; Ch.L. Lim, "On the law, procedures and politics of United Nations Gulf war reparations", *Singapore Journal of International and Comparative Law*, 2000, pp. 435 ff. See the Commission's website <www.uncc.ch> for a full bibliography and for other information and documentation on the Commission.

3 *Op. cit.* (note 1), paras. 18 and 19.

4 *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, UN Doc. S/22559 (1991).

5 UN Doc. S/RES/692 (1991).

compensable losses and make written recommendations to the Governing Council as to compensation. Where appropriate, the commissioners are assisted by expert consultants.⁶ The secretariat services the Governing Council and the panels of commissioners,⁷ and is also responsible for the administration of the Compensation Fund.

The specific and unique mandate of the Commission, as well the circumstances surrounding its creation, have dictated, to a large extent, the way it was set up and the way it functions. Two considerations are significant. On the one hand, there was a need to process an extraordinarily large number of claims with the maximum objectivity, transparency and fairness. At the same time, however, it was important that the claims be processed promptly and efficiently in order to fulfil properly the mandate of the Commission in providing compensation to deserving claimants.⁸ In addition to the need for procedures created with a view to the achievement of these twin aims, other aspects of the nature of the Commission as an institution also reflect these concerns. The Secretary-General, in his recommendations to the Security Council, stated as follows:

“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”.⁹

This recommendation is reflected in the work of the Commission. The proceedings before the Commission are inquisitorial rather than adversarial in nature, given the need to avoid excessive delays in the processing of the claims. The panels of commissioners perform the tasks of fact-finding and evaluation of the claims. This has meant that the Commission’s rules of

6 On the role of the commissioners, see R.C. O’Brien, *op. cit.* (note 2), pp. 14-31.

7 For further description of the role played by the secretariat, see R.C. O’Brien, *Ibid.*, pp. 9-13. See also N. Wühler, “The United Nations Compensation Commission: A new contribution to the process of international claims resolution”, *Journal of International Economic Law*, Vol. 2, 1999, pp. 249-272.

8 It has been written that “[w]hile it is the Commission’s aim to exert maximum objectivity, transparency and fairness in reviewing claims and providing compensation to claimants, the exigencies of processing such a large number of claims within a reasonable time period (...) imposed certain restrictions on the procedures applied by the Commission”; M. Kazazi, “An overview of evidence before the United Nations Compensation Commission”, *International Law Forum*, Vol. 1, 1999, p. 219, pp. 219-220.

9 *Op. cit.* (note 4), para. 20.

procedure for claims processing¹⁰ allow for comparatively limited participation in the proceedings by both the claimants and Iraq than is the case in traditional courts and tribunals.

The role of humanitarian considerations in various aspects of the work of the Commission will now be considered against this background. Before looking at the Commission's claims review and payment processes, the next section will clarify the position of the Commission as one of a number of separate but related organs and programmes that were established in response to Iraq's invasion and occupation of Kuwait

Distinguishing the United Nations Compensation Fund, the "Oil-for-Food" programme and the sanctions regime

Resolution 687 (1991) directed the Secretary-General to recommend an appropriate level of financial contribution by Iraq to the Compensation Fund "taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy".¹¹ Pursuant to this request and further to Resolution 692 (1991) the Secretary-General, in a note to the Council dated 30 May 1991,¹² recommended that Iraq's contribution to the Compensation Fund should not exceed 30 per cent of the annual value of petroleum and petroleum products from Iraq.

On 15 August 1991 the Security Council adopted Resolution 705 (1991)¹³ endorsing the Secretary-General's recommendation and, on the same day, adopted Resolution 706 (1991)¹⁴ authorising the import of Iraqi oil products for a six-month period in order to finance this recommendation and other operations mandated by the Council in Resolution 687 (1991).

¹⁰ Provisional Rules for Claims Procedure ("the Rules"), annexed to Governing Council Decision 10, UN Doc. S/AC.26/1992/10. In many instances claimants are generally permitted only one submission in which to prove their claims. See also: R.C. O'Brien, *op. cit.* (note 2), and "Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of 'E3' Claims", UN Doc. S/AC.26/1999/14, paras. 61-62. More generally, see articles 16 and 36-39 of the Rules. See also the changes introduced to the Commission's rules of procedure by Governing Council Decisions 114 (2000) and 124 (2001), discussed in Ch. L. Lim, *op. cit.* (note 2).

¹¹ *Op. cit.* (note 1), para. 19.

¹² Letter dated 30 May 1991 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/22661 (1991). The note sets out the calculations used by the Secretary-General in order to arrive at this percentage, including the expectation that oil exports would reach US\$21 billion by 1993.

¹³ UN Doc. S/RES/705 (1991).

¹⁴ UN Doc. S/RES/706 (1991).

Resolution 706 (1991) makes particular reference to growing concern over the humanitarian situation in Iraq and the risk of further deterioration. Much of the revenue that was to be realised from the sales of Iraq's oil products pursuant to resolution 706 (1991) was to be used for the purchase of foodstuffs, medicines and materials and supplies for essential civilian needs. These arrangements were reaffirmed by the Council in Resolution 712 (1991)¹⁵ following a report of the Secretary-General recommending procedures for the sale of Iraqi oil and transmitting estimates of humanitarian requirements in Iraq. The Government of Iraq declined to avail itself of the measures provided in resolution 706 (1991) and 712 (1991), which had been put in place to alleviate the humanitarian situation of the Iraqi people while the sanctions imposed under Resolution 661 (1990)¹⁶ following Iraq's invasion of Kuwait remained in place.

On 14 April 1995, acting under Chapter VII of the United Nations Charter, the Security Council adopted Resolution 986 (1995) establishing the "Oil-for-Food" Programme, which was another mechanism for Iraq to sell oil to finance the purchase of humanitarian goods, and various mandated United Nations activities concerning Iraq. The "Oil-for-Food" Programme was intended to be a "temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfillment by Iraq of the relevant Security Council resolutions, including notably resolution 687 (1991) of 3 April 1991". The Programme was not implemented until eight months after the 20 May 1996 signing of the Memorandum of Understanding between the United Nations and the Government of Iraq when, in December 1996, the first oil was exported. The revenue derived from Iraq's oil sales was deposited in a specially-created United Nations escrow account. The funds in the escrow account were used to meet the humanitarian needs of the Iraqi population, the costs of the United Nations Special Commission (UNSCOM)¹⁷, the costs of the United Nations Iraq-Kuwait Observer Mission and to provide income into the Compensation Fund. The first shipment of humanitarian supplies paid for by the "Oil-for-Food" Programme, which was administered by the UN Office of the Iraq Programme, arrived in Iraq in March 1997.¹⁸

¹⁵ UN Doc. S/RES/712 (1991).

¹⁶ UN Doc. S/RES/661 (1990).

¹⁷ UNSCOM was replaced by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC), upon the adoption of Security Council Resolution 1284 on 17 December 1999, UN Doc. S/RES/1284 (1999).

¹⁸ See the website of the Office of the Iraq Programme for further information: <www.un.org/Depts/oip>.

The arrangements in Security Council Resolution 986 (1995) were extended and modified several times by further resolutions.¹⁹ Most important among these were Resolution 1153 (1998),²⁰ which raised to US\$5.256 billion the ceiling on total revenues that Iraq was authorised to generate through the sale of oil during a six-month period. Its provisions came into effect on 30 May 1998 with the Secretary-General's approval of the enhanced plan submitted by the Government of Iraq for the distribution of humanitarian supplies to the Iraqi people. Resolution 1284 (1999)²¹ removed completely the ceiling on total revenues that Iraq was authorised to generate through the sale of oil. Resolution 1330 (2000)²² reduced the percentage of such revenue paid into the UNCC Compensation Fund from 30 per cent to 25 per cent.

It is important to emphasise that the administration and allocation of the use of the balance of the proceeds of Iraqi oil sales, after the relevant percentage was paid into the Compensation Fund, falls under the other programmes and institutions established by the Security Council following Iraq's invasion and occupation of Kuwait, especially the sanctions regime established pursuant to Security Council Resolution 661.²³ The Commission is not involved with the work of these programmes and institutions.

In May 2003, following the recent conflict in Iraq, the Security Council adopted Resolution 1483 (2003),²⁴ which, *inter alia*, lifted the civilian sanctions on Iraq, provided for the termination of the Oil-for-Food Programme within six months and reduced the percentage of the revenue paid into the Compensation Fund to five per cent. Since the removal of President Saddam Hussein's regime, the United Nations is no longer responsible for the monitoring of Iraq's oil sales. The requirement of the payment of the five per cent into the Fund, which "shall be binding on a properly constituted, internationally recognized, representative government

¹⁹ See the Commission's website, *op. cit.* (note 2) (via the link named "Payment Procedure") for further information on these Security Council resolutions.

²⁰ UN Doc. S/RES/1153 (1998).

²¹ UN Doc. S/RES/1284 (1999).

²² UN Doc. S/RES/1330 (2000).

²³ See the website of the Security Council Committee established pursuant to Resolution 661 (1990) concerning the situation between Iraq and Kuwait: <www.un.org/Docs/sc/committees/IraqKuwait/IraqSanctionsCommEng.htm>.

²⁴ UN Doc. S/RES/1483 (2003).

of Iraq and any successor thereto”, is currently made by the Coalition Provisional Authority (CPA), until such time as “an internationally recognized, representative government of Iraq and the Governing Council of the United Nations Compensation Commission, in the exercise of its authority over methods of ensuring that payments are made into the Compensation Fund, decide otherwise”, in accordance with paragraph 21 of Resolution 1483 (2003). The use of the balance of Iraq’s oil sales is also no longer a responsibility of the United Nations and, at the time of writing it is intended that the Oil-for-Food Programme be transferred to the CPA.²⁵

As mentioned earlier, even after the removal of sanctions against Iraq pursuant to Resolution 1483 (2003), the mandate of the Commission remains unaffected, as the work of the UNCC (particularly the transference of a portion of Iraq’s oil income into the Compensation Fund and the need to provide compensation to the victims of Iraq’s invasion and occupation of Kuwait) is not a part of, and does not depend on, the sanctions regime. Indeed, in 1991, when it had been expected that the process of destroying Iraqi weapons of mass destruction would be accomplished within a short period of time and consequently that sanctions would be lifted sooner rather than later, the Governing Council set out arrangements to ensure continuing payments into the Compensation Fund upon the removal of sanctions.²⁶ Had sanctions been lifted, these arrangements would have provided for the Executive Secretary of the UNCC, while reporting to the Governing Council, to oversee the monitoring of Iraqi oil sales and to ensure that the appropriate percentage of the revenue derived was deposited into the Fund.²⁷ Thus, while the humanitarian needs of the Iraqi population have always been at the forefront of the considerations taken into account in all aspects of the various mechanisms for the provision of funds into the Compensation Fund, the Commission’s mandate is limited to the payment of appropriate compensation to the victims of Iraq’s invasion and occupation of Kuwait and is distinct from the administration of the sanctions regime.

²⁵ For further details on the modalities of the transfer and the proposed future role of the United Nations in Iraq see *Report of the Secretary-General pursuant to paragraph 24 of Security Council Resolution 1483 (2003)*, UN Doc. S/2003/715.

²⁶ See Governing Council Decision 6, “Arrangements for Ensuring Payments into the Compensation Fund”, UN Doc. S/AC.26/1991/6.

²⁷ Various forms of these arrangements were later incorporated into the operations of the Oil-for-Food Programme; see note 18 above.

Humanitarian considerations in the Commission's claims review process and payment mechanism

The Commission has received over 2.64 million claims seeking compensation with a total asserted value in excess of US\$340 billion. Ninety-six Governments submitted claims on behalf of their nationals, corporations and/or themselves, while thirteen offices of the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) have also submitted claims for individuals who were not in a position to have their claims filed by Governments. For the purposes of processing of claims and payment of compensation, the Governing Council has grouped the claims submitted to it into six categories, categories "A" to "F". As will be seen below, the humanitarian aspect of the work of the Commission is most clearly illustrated in its treatment of the smaller claims in categories "A", "B" and "C".

Category "A" claims are claims of individuals who had to depart from Kuwait or Iraq between the date of Iraq's invasion of Kuwait (2 August 1990) and the date upon which the Security Council adopted Resolution 686 (1991) which took note of the suspension of combat operations by Kuwaiti forces and the Member States co-operating with Kuwait (2 March 1991). The Governing Council fixed the amount of compensation for successful claims in this category at US\$2,500 for individual claimants and US\$5,000 for families. These figures were later raised to US\$8,000 for families in situations where the claimant(s) agreed not to file claims in any of the other individual claims categories (i.e. categories "B", "C" or "D"). The Commission received approximately 920,000 category "A" claims submitted by 77 Governments and 13 offices of the three international organizations, seeking a total of approximately US\$3.6 billion in compensation.

Category "B" claims are 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. The Governing Council fixed the amount of compensation for successful claims in this category at US\$2,500 for individual claimants and up to US\$10,000 for family claims. Approximately 6,000 category "B" claims were submitted to the Commission by 47 Governments and seven offices of the three international organisations, seeking a total of approximately US\$21 million in compensation.

Category "C" claims are claims of individuals for damages up to US\$100,000 each, and are mainly claims arising from death or personal injury, hostage-taking

and other illegal detention, loss of income, support, housing or personal property, medical expenses and costs of departure, as a result of Iraq's unlawful invasion and occupation of Kuwait. Eighty-five governments and eight offices of the three international organisations submitted approximately 1.7 million category "C" claims, with a total asserted value of approximately US\$9 billion.

Category "D" claims are the approximately 13,000 claims of individuals for damages above US\$100,000 each. Category "E" claims are the approximately 5,900 claims submitted by or on behalf of corporations and other private legal entities, as well as public-sector enterprises. Category "F" claims are the approximately 600 claims filed by Governments and international organizations for losses incurred, *inter alia*, in evacuating citizens and providing relief to citizens, damage to diplomatic premises and loss of, and damage to, other government property and damage to the environment, submitted by 43 governments and six international organisations.²⁸

Claims in categories "A", "B" and "C" and the priority accorded to their processing and payment

In its first decision, entitled "Criteria for the Expedited Processing of Urgent Claims",²⁹ the Governing Council, for humanitarian reasons, classified claims in categories "A", "B" and "C" as "urgent" claims, and accorded priority to their processing and payment over larger individual claims and claims of corporations and Governments. Paragraph 1 of that decision provides as follows:

"The following criteria will govern the submission of the most urgent claims pursuant to resolution '687'(1991) for the first categories to be considered by the Commission. It provides for simple and expedited procedures by which Governments may submit consolidated claims and receive payments on behalf of the many individuals who suffered personal losses as a result of the invasion and occupation of Kuwait. For a great many persons these procedures would provide prompt compensation in full; for others they will provide substantial interim relief while their larger or more complex claims are being processed (...)"

As pointed out earlier, the overwhelming majority of the claims submitted to the UNCC fall into these categories. The importance of the

²⁸ See further: <<http://www.unog.ch/uncc/status.htm>>.

²⁹ UN Doc. S/AC.26/1991/1.

humanitarian concerns in the work of the Commission can be seen in the following quotation, relating to claims in category “A”:

“For the first time in the history of international compensation institutions and procedures, the interest of the individual was given priority over that of businesses or even governments. There is, indeed, a distressing problem here, which affects more than a million people, mostly workers from Egypt, Jordan, Pakistan, India, Sri Lanka, Bangladesh and the Philippines, who had to leave Iraq or Kuwait precipitately, losing all they possessed – personal belongings, savings, work and hope for a better life – and return to their countries of origin, further aggravating those countries’ economic and social problems”.³⁰

This urgency is reflected in the Commission’s Rules, which were designed to allow for the provision of prompt compensation to successful claimants in categories “A”, “B” and “C”.³¹ The Commission had recourse to a variety of mass claims processing techniques for the resolution of these claims, since their individual review (the total number of which exceeds two and a half million) would not have been feasible.³² Such mass-processing

³⁰ C. Alzamora, “The UN Compensation Commission: An overview” in R.B. Lillich (ed.), *op. cit.* (note 2), p. 6. He went on to state, regarding the fixed amounts in categories “A” and “B”, that “[t]hese fixed amounts might appear very small to Western eyes, but may make all the difference when a person has lost everything and has to start from nothing in a small town in Sri Lanka or Bangladesh”.

³¹ Article 28(2) of the Rules (*op. cit.* (note 10)) provides that “[p]riority is to be given to the establishment of panels of commissioners to deal with claims in categories A, B and C”.

³² These procedures, which, in article 37 of the Rules (*ibid.*) the Governing Council urged the panels to use, include sampling, computerised matching and statistical modelling, drawing on the experience in various international and national fora on these matters. See, e.g., on sampling methodologies and statistical methods, the review undertaken in the “Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of Claims for Departure from Iraq or Kuwait”, UN Doc. S/AC.26/1995/4, paras. 9–34. At paragraph 9, the panel stated that: “[f]aced with situations of mass claims and other situations where a large number of cases involving common issues of law and fact arise, courts, tribunals and commissions have adopted methodologies, including that of sampling, recognizing that the traditional method of individualised adjudication if applied to such cases would not be appropriate as it would result in unacceptable delays and substantially increase the burden of costs for such claimants and more so for the respondents. The legal principle involved may be stated as follows: in situations involving mass claims or analogous situations raising common factual and legal issues, it is permissible in the interest of effective justice to apply methodologies and procedures which provide for an examination and determination of a representative sample of these claims”. See also M. Raboin, “The provisional rules for claims procedure of the United Nations Compensation Commission: A practical approach to mass claims processing”, and C. Gibson, “Mass claims processing. Techniques for processing over 400,000 claims for individual loss at the United Nations Compensation Commission”, both in R.B. Lillich (ed.), *op. cit.* (note 2), pp. 119 and 155 respectively.

techniques were used wherever appropriate, but by no means in all cases that fell under these categories. For example, the relatively small number of claims in category “B” permitted the Commission to review the vast majority on a case-by-case basis. Also, the panels of commissioners were allowed a shorter period of time (four months for each instalment) in which to complete the review of urgent claims than is the case for other claims. Furthermore, the evidentiary standard applicable to these claims also reflects the urgency with they were treated. For claims in categories “A” and “B”, simple documentation of the fact and date of departure, serious personal injury or death is all that was required, and given that the claims were for fixed amounts, there was no need to prove the actual amount of loss. If, however, a claimant wished to claim for a higher amount in categories “C” or “D”, the payment of US\$2,500 would be treated as interim relief, and claims for additional amounts could be submitted in other categories which required a greater burden of proof and documentation of the loss.³³ With respect to claims in category “C”, which were for larger amounts that were not generally fixed, the evidentiary requirements were accordingly more elaborate, but not to the extent that would affect the urgency of the review of the claims. Paragraph 15 of Decision 1 provides that these claims must be “documented by appropriate evidence of the circumstances and the amount of the claimed loss. The evidence required will be the reasonable minimum that is appropriate under the circumstances involved, and a lesser degree of documentary evidence would ordinarily be required for smaller claims, such as those below \$20,000”.

The Commission also gave an early priority to the “urgent” claims for hostage-taking, forced hiding and other illegal detention, death and personal injury. These types of claims reflect the importance attached by the Commission to the physical and psychological well-being of individuals affected by Iraq’s invasion and occupation of Kuwait. The panels of Commissioners, in reviewing these claims, identified the principal causes of claimants’ injury and death as the following: military operations or actions; executions; arbitrary arrests and detentions; torture, assault, maltreatment and oppression; sexual assault; lack of medical care especially in Kuwait, arising from reduction in the number of healthcare providers, the closing, dismantling and pillaging of healthcare facilities, and deliberate denial of access to medical care by the occupying Iraqi authorities, and injuries suffered as a

³³ Decision 1, *op. cit.* (note 30), paras. 11 and 12. See also article 35(2) of the Rules, *op. cit.* (note 10).

result of the chaos arising from the invasion and occupation and attempts to flee the war zone across desert areas.³⁴ The Governing Council adopted, at a very early stage in its work, further rules and guidelines on the compensability of claims for hostage-taking and detention, death and personal injury, especially regarding claims for “mental pain and anguish” related to these events.³⁵ With respect to mental pain and anguish arising from hostage-taking and other illegal detention, a claimant could be compensated for mental pain and anguish resulting from being taken hostage or illegally detained for more than three days; for being taken hostage or illegally detained for a period of three days or less in circumstances indicating an imminent threat to the claimant’s life; and for being forced to hide on account of a manifestly well-founded fear for his or her life, or of being taken hostage or illegally detained.³⁶ Decision 8 sets out the ceiling amounts that apply to the compensation of mental pain and anguish. With respect to personal injury, the Governing Council, in adopting the Report of the Panels of Commissioners for the first category “C” instalment, in which the Panel was assisted by expert consultants in fields such as disaster medicine, mass litigation, the psychosocial aspects of health and development, public health aspects of neurology and psychiatry and cross-cultural psychiatry,³⁷ set the limits as

³⁴ See, e.g. the “Report and Recommendations of the Panel of Commissioners Concerning Individual Claims for Damages up to US\$100,000”, UN Doc. S/AC.26/1994/3 (“the First “C” Report”), pp. 82-128. That panel, like other panels, relied on the following United Nations reports documenting the situation following the liberation of Kuwait in 1991 (see p. 270 of the First “C” Report): *Report on the Situation of Human Rights in Kuwait Under Iraqi Occupation*, Prepared by Mr. Walter Kälin, *Special Rapporteur of the Commission on Human Rights*, in Accordance with Commission Resolution 1991/67, UN Doc. E/CN.4/1992/26, 16 January 1992; *Report to the Secretary-General by a United Nations Mission, led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Scope and Nature of Damage Inflicted on Kuwait’s Infrastructure During the Iraqi Occupation of the Country from 2 August 1990 to 27 February 1991*, UN Doc. S/22535, 29 April 1991; *Study Concerning the Right to Restitution, Compensation and Rehabilitation of Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven, Special Rapporteur*, UN Doc. UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993; and *Report to the Secretary-General on Humanitarian Needs in Kuwait in the Immediate Post-Crisis Environment by a Mission to the Area led by Mr. Marti Ahtisaari, Under-Secretary-General for Administration and Management*, UN Doc. S/22409, 28 March 1991.

³⁵ See Governing Council Decisions 3 (“Personal Injury and Mental Pain and Anguish”, UN Doc. S/AC.26/1991/3) and 8 (“Determination of Ceilings for Compensation for Mental Pain and Anguish”, UN Doc S/AC.26/1992/8).

³⁶ See the discussion in the First “C” Report, pp. 82-96. See also the “Report and Recommendations of the Panel of Commissioners Concerning the Seventh Instalment of Individual Claims for Damages up to US\$100,000”, UN Doc. S/AC.26/1999/11 (the Seventh “C” Report), paras. 94-110.

³⁷ See the First “C” Report, *op. cit.* (note 35), pp. 271-272.

follows: US\$15,000 for dismemberment, permanent significant disfigurement, or permanent loss of use or permanent limitation of use of a body organ, member, function or system; US\$5,000 for temporary significant disfigurement or temporary significant loss of use or limitation of use of a body organ, member, function or system, as well as for each incident of sexual assault, aggravated assault, or torture; US\$2,500 for witnessing the intentional infliction of the aforementioned types of injury on the claimant's spouse, child, or parent, with a ceiling of US\$5,000 per family unit. Regarding mental pain and anguish related to claims for death, Decision 8 set the following limits: US\$15,000 for the death of the spouse, child or parent, with a ceiling of US\$30,000 per family unit, and US\$2,500 for witnessing the intentional infliction of events leading to the death of the family member, with a ceiling of US\$5,000 per family unit.³⁸

Between 1993 and 1996 the Commission resolved all category "A" and "B" claims. It also finalized its review of the category "C" claims by June 1999, save for a number of category "C" claims filed by the Palestinian Authority and a number of claims for which filing deadlines were extended, which are discussed in the next sub-section. Claims in categories "D", "E" and "F", in contrast, being larger and more complex, are governed by a different set of rules that do not accord priority to their processing and payment.³⁹ The Rules contain more elaborate procedures, including the provision of a longer time period for the review of these claims by the panels and the discretionary power of the Commissioners to ask for additional written submissions and to hold oral proceedings where it is considered appropriate. The Rules provide also that these claims "must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss".⁴⁰ A higher evidentiary standard therefore has to be met by the claimants in these categories,⁴¹ and this is particularly

³⁸ The processing methodologies and further details of the circumstances of these claims are discussed in the First "C" Report, *op. cit.* (note 35), pp. 97-128. See also the Seventh "C" Report, *op. cit.* (note 37), paras. 113-177, and pp. 241-270 of the First "C" Report ("Report of the Panel of Experts Appointed to Assist the United Nations Compensation Commission in Matters Concerning Compensation for Mental pain and Anguish"), for discussion of further considerations that went into determining the appropriate level of compensation for claims for mental pain and anguish.

³⁹ See Governing Council Decision 7, "Criteria for Additional Categories of Claims", UN Doc. S/AC.26/1991/7/Rev.1, and article 38 of the Rules, *op. cit.* (note 10).

⁴⁰ See article 35(3) of the Rules, *ibid.*

⁴¹ See Governing Council Decision 46, UN Doc. S/AC.26/Dec.46 (1998).

evident in some of the panels' reports and recommendations concerning corporate claims.⁴²

As stated earlier, priority was also accorded to the payment of compensation to claimants in categories "A", "B" and "C". In its Decision 17, the Governing Council established basic principles for the distribution of compensation payments to successful claimants.⁴³ As noted in the Secretary-General's recommendation to the Security Council, it was anticipated that the value of approved awards would far exceed the resources available in the Compensation Fund at any given time. The Governing Council therefore devised a mechanism for the allocation of available funds to successful claimants that gave priority to the three urgent categories of claims. Only when each successful claimant in categories "A", "B" and "C" had been paid an initial amount of US\$2,500 did payments commence for claims in other categories. Accordingly, the first phase of payment involved an initial payment of US\$2,500 to each successful individual claimant in categories "A", "B" and "C". All successful category "B" claims, the processing of which had been completed in early 1996, were paid in full by the end of 1996. It should be pointed out that, in view of the urgent humanitarian needs of the category "B" claimants, and since no income had been received from Iraq at that stage, the secretariat had requested the Governing Council to use a large part of the Commission's budget in order to make these payments, and the Council agreed.⁴⁴

⁴² See, for example, the "Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of 'E3' Claims", UN Doc. S/AC.26/1999/14, paras. 58-60:

"... in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making. (...) Of course, the Panel recognises that in time of civil disturbances, the quality of proof may fall below that which would be submitted in a peace time situation. Persons who are fleeing for their lives do not stop to collect the audit records. Allowances have to be made for such vicissitudes. But the fact that offices on the ground in Kuwait, for example, were looted and/or destroyed would not explain why claimants have not produced documentary records that would reasonably be expected to be found at claimants' head offices situated in other countries (...) The Panel has approached the claims in the light of the general and specific requirements to produce documents noted above. Where there has been a lack of documentation, combined with no or no adequate explanation for that lack, and an absence of alternative evidence to make good any part the Panel has had no opportunity or basis upon which to make a recommendation".

See generally paragraphs 40 and 46-60, as well as articles 35, 36 and 38 of the Rules, *op. cit.* (note 10).

⁴³ "Priority of Payment and Payment Mechanism (Guiding Principles)", UN Doc. S/AC.26/Dec.17 (1994).

⁴⁴ However, later in 1996, the secretariat found itself perilously close to running out of operational funds until income received under Resolution 986 (1995) became available.

A total of US\$3,252,337,997.09 was made available to Governments for distribution to 1,498,119 successful individual claimants in categories “A”, “B” and “C” under the first phase of payments which ended in 1999. In its decision 73,⁴⁵ the Governing Council adopted the mechanism for the second phase of payments. It determined that priority of payment would continue to be provided to the remaining successful claimants in categories “A” and “C”, while “meaningful” compensation would also be provided to claimants in categories “D”, “E” and “F”. The payment of compensation in respect of claims in categories “A” and “C” was completed in this second phase, which came to an end in September 2000.

The Governing Council also established rules and procedures to ensure that the payments were received by the claimants. Pursuant to Governing Council Decision 18⁴⁶ Governments and international organisations may offset their costs of the handling of claims they submitted on behalf of individuals by deducting a small fee from payments made to claimants. In the case of awards payable to claimants in categories “A”, “B” and “C”, the maximum amount deductible was not to exceed 1.5 per cent of the amount awarded. In addition, Governing Council Decision 48⁴⁷ requires that money that is not distributed to a claimant within twelve months, for example where a Government is unable to locate a claimant, be returned to the Commission. Further payments to Governments and international organizations are suspended where Governments and international organizations fail to comply with their reporting obligations to the Commission on the distribution of funds or fail to return undistributed funds on time. Funds returned to the Commission are held until the claimant is located, at which time the money is returned to the Government for payment to the claimant.

The priority accorded to the processing and payment of compensation for urgent claims illustrates the primary humanitarian aspect of the Commission’s work. It has been written that:

“[g]iven the traditional emphasis in previous claims resolution processes on the losses suffered by governments and corporations, this humanitarian decision to focus first on urgent individual claims marked a significant step in the evolution of international claims practice”.⁴⁸

⁴⁵ “Priority of Payment and Payment Mechanism (Phase II)”, UN Doc. S/AC.26/Dec.73 (1999).

⁴⁶ “Distribution of Payments and Transparency”, UN Doc. S/AC.26/Dec. 18 (1994).

⁴⁷ “Return of Undistributed Funds”, UN Doc. S/AC.26/Dec. 48 (1998).

⁴⁸ N. Wühler, *op. cit.* (note 7).

Extension on humanitarian grounds of deadlines for the submission of claims

Final deadlines were established for the filing of the various categories of claims. All of the filing deadlines have now expired with the exception of claims put forward on behalf of missing persons and claims for damage and losses resulting from injuries sustained as a result of landmine or ordnance explosions. However, the Governing Council has, on occasion, exceptionally authorised the submission of claims after the expiration of these final deadlines. The Governing Council established strict criteria for the acceptance of such claims, which further illustrate the humanitarian aspect of the Commission's work. The criteria are (i) that the delay in the submission of the claims had to have been caused by war or a situation of civil disorder, such as the absence of governmental authority, and (ii) there must be evidence of a prior unsuccessful attempt to file the claims within the relevant established deadlines. The claims that have been accepted for filing on the basis of these criteria have been claims of individuals.⁴⁹ One example of the application of these criteria was the decision of the Governing Council to accept the late filing of 223 category "A" claims of individuals in Bosnia and Herzegovina, which it determined to satisfy the above-mentioned criteria.⁵⁰ Another more recent illustration of the role of humanitarian considerations in deciding whether to allow the filing of late claims was the decision of the Governing Council in December 2001 to accept a number of claims of Palestinian individuals who, in the opinion of the Governing Council, may not have had a full and effective opportunity to file their claims within the relevant established deadlines given the conditions prevailing in the relevant areas. As a norm, however, the Governing Council has rarely allowed the filing of late claims, with several thousand requests for late filing having been rejected. Only in exceptional cases such as those mentioned above have humanitarian considerations prevailed in favour of late filing.

⁴⁹ On 15 October 1996, the Governing Council decided that all requests for the acceptance of the submission of late claims in categories "E" and "F" "have to be submitted to the UNCC before 1 January 1997, after which no late claims may be accepted under any circumstances", and directed the secretariat to return any claims received thereafter to the relevant submitting entity upon receipt. See *Documents of the United Nations Compensation Commission*, UN Doc. S/AC.26/Ser.A/1, p. 179. In February of the same year, the Governing Council, while considering a request for the submission of late claims, had stated that its "case-by-case consideration of claims in categories "E" and "F"...would be very strict, considering that most of the claims involved corporations and State entities and were therefore difficult to justify"; *Ibid.*, p. 177.

⁵⁰ See Decision 101, UN Doc. S/AC.26/Dec. 101(2000).

In addition, deadlines for filing were extended for certain kinds of claims. Pursuant to Governing Council Decision 12,⁵¹ these include the following: (i) claims for losses and personal injuries resulting from public health and safety risks (such as injuries caused by landmines) that occur after the expiration of the established filing deadlines; (ii) claims of individuals who have been detained in Iraq until after the expiration of the established filing deadlines. Again, the role of humanitarian considerations is clear from the nature of these types of claim.⁵²

The treatment of prisoners of war

The Commission has also upheld principles of international humanitarian law as laid down in the Geneva Conventions of 1949. In Decision 11, the Governing Council decided that members of the Allied Coalition Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq, except where (a) the compensation is awarded in accordance with the general criteria already adopted for compensability by the Commission, and (b) they were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and (c) the loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949).⁵³ In its second report, the category "B" panel of commissioners considered claims submitted by members of the Allied Coalition Forces who were taken as prisoners of war during coalition military operations against Iraq. As stated by the panel, "[t]hese claims were supported by extensive medical documentation explaining the torture and injuries that were inflicted upon them by Iraqi authorities during their captivity. Many of the personal statements attached to the claim forms explain that beatings were administered to members of the Allied Forces so as to coerce them into releasing information."⁵⁴ The panel accordingly recommended that these

⁵¹ "Claims for which Established Filing Deadlines are Extended", UN Doc. S/AC.26/1992/12.

⁵² See, e.g., the final report and recommendations made by the category "C" panel of commissioners, UN Doc. S/AC.26/1999/11, paras. 17-19.

⁵³ "Eligibility for Compensation of the Members of the Allied Coalition Armed Forces", UN Doc. S/AC.26/1992/11.

⁵⁴ "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Second Installment of Claims for Serious Personal Injury or Death (Category 'B' Claims)", UN Doc. S/AC.26/1999/4, para. 14.

claims be awarded compensation, as they involved, *inter alia*, breaches of international humanitarian law.

The Commission has also upheld and applied international humanitarian law with respect to the obligations of States concerning the treatment of prisoners of war. The Government of Saudi Arabia submitted a claim for expenses incurred in the provision of support to approximately 70,000 Iraqi prisoners of war who were captured by the Allied Coalition Forces, including French, British, American and Saudi Arabian forces, and transferred into Saudi Arabian custody in February 1991.⁵⁵ The claimant government asserted that it detained the prisoners in a camp especially constructed for them, and provided support to them in accordance with articles 12 and 15 of the Geneva Convention relative to the Treatment of Prisoners of War (1949) (the Third Geneva Convention). The prisoners of war remained at the camp until they were repatriated in August 1991. Those prisoners of war (approximately 13,000) who refused to be repatriated became civilians entitled to the protection accorded by Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) (the Fourth Geneva Convention) and were accorded refugee status by Saudi Arabia in August 1991. They remained at the camp until 1992, when the camp was closed and the remaining inmates were transferred to another refugee camp. Iraq argued that the costs of caring for prisoners of war should be borne by the “detention” state in accordance with the terms of the Third Geneva Convention.

In responding to the claims, the panel had to apply the jurisprudence developed by the Commission based on Governing Council Decision 19,⁵⁶ pursuant to which the costs of preparation for, participation in or provision of support in relation to the activities of the Allied Coalition Forces and their military response to Iraq’s invasion and occupation of Kuwait are not eligible for compensation. The panel found that the detention and repatriation of the Iraqi prisoners by the Claimant formed part of Saudi Arabia’s participation in the activities of the Allied Coalition Forces and their military response to the invasion and occupation of Kuwait, and were therefore not eligible for compensation in accordance with the application of Governing Council decision 19.

The part of the panel’s ruling that is significant for present purposes relates to the discussion of the legal position under the Geneva Conventions.

⁵⁵ “Report and Recommendations Concerning the Third Instalment of ‘F2’ Claims, UN Doc. S/AC.26/2002/7, paras. 215-224.

⁵⁶ “Military Costs”, UN Doc. S/AC.26/Dec.19 (1994).

The panel continued and noted that, with a few specific and limited exceptions, the Third Geneva Convention is silent as to the issue of compensation for costs incurred by a detaining power in the maintenance of prisoners of war. It considered that, although the operation of Governing Council Decision 19 excluded the possibility of compensation for all costs incurred in the conduct of military operations against Iraq, including those incurred in complying with the terms of the Geneva Conventions,⁵⁷ this application of the Governing Council Decision 19 did not alter the humanitarian nature of the legal obligation of Saudi Arabia under articles 12 and 15 of the Third Geneva Convention to provide support to the prisoners of war in its care. The panel, however, noted that in cases of other armed conflicts where there is no equivalent of Governing Council Decision 19, “there may be a need for bodies responsible for the implementation of the Geneva Conventions to clarify, as a matter of general interpretation, who is to bear the final cost for complying with the obligations to provide support to prisoners of war established under the Third Geneva Convention, in the light of the nature and purpose of the expenditures made and whether ultimately a claim for reimbursement might be appropriate”.⁵⁸

The panel made a number of other findings in this regard. It found that its analysis applied regardless of the party that captured the prisoners, noting that article 12 of the Third Geneva Convention provides that where custody of the prisoners of war has been transferred by the capturing party to a third party, ultimate responsibility for the treatment of the prisoners of war remains with the party or parties by whom the prisoners of war were captured in the event that the party accepting custody of the prisoners of war fails to carry out the provisions of the Third Geneva Convention in any important respect. The Panel concluded by emphasising that the application of Governing Council Decision 19 to the claim “does not derogate from the humanitarian concerns underlying the Third Geneva Convention as the obligations established in the Convention are to be complied with by both the capturing power and the

⁵⁷ Article 31 of the Rules, *op. cit.* (note 10), on the Commission’s applicable law, provides that the Commissioners “will apply Security Council resolution 687 (1991) and other relevant 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”. Accordingly, it is only where an issue has not been covered in any resolution of the Security Council or in any decision of the Governing Council that the commissioners are to have recourse to “other relevant rules of international law”.

⁵⁸ *Op. cit.* (note 49), para. 220.

power responsible for providing the appropriate treatment of prisoners of war, in both cases independently of the question of eventual compensation”.⁵⁹

Compensability of the costs of provision of humanitarian relief to individuals

As in the case of the Saudi Arabian Government claim discussed in the previous subsection, the Commission’s applicable law provides for compensability of claims for payments made or relief provided to others, and as may be expected, such claims have been submitted primarily by Governments, international organizations and corporations.⁶⁰

Jordan’s situation as the main transit point for individuals who fled from Iraq and Kuwait is well-documented,⁶¹ and its response in providing emergency humanitarian relief to refugees can be taken as an illustration of the Commission’s approach to treatment of claims for the costs incurred in providing such relief. Jordan mounted a massive humanitarian relief effort, which involved the preparation and operation of refugee camps, including the provision of food and clothing, health services, transportation and evacuation of individuals and other costs such as the provision of security and administrative services. The panel of commissioners responsible for the review of claims of the Government of Jordan considered that expenditures incurred by the Government of Jordan in respect of emergency humanitarian relief provided to evacuees (foreign nationals who fled from Iraq or Kuwait and passed through Jordan on the way to their countries) during the period from 2 August 1990 to 2 March 1991 were compensable in principle.⁶²

⁵⁹ Concerning the part of the claim for the costs of support that the Saudi Government continued to provide to those Iraqi prisoners of war who refused to be repatriated to Iraq upon the cessation of hostilities, the panel found that the decision by those prisoners of war not to return to Iraq, as well as the decision by Saudi Arabia to continue to provide support to those prisoners after they refused to be repatriated, were independent decisions on the part of the prisoners of war and Saudi Arabia that broke the chain of causation between the costs of support incurred, on the one hand, and the invasion and occupation of Kuwait on the other. Accordingly, this part of the claim was also found not to be compensable; *ibid.*, para. 223.

⁶⁰ See Governing Council Decision 7, *op. cit.* (note 40), paragraphs 22 and 36. The latter paragraph provides that compensation payments will be provided for, *inter alia* “losses and costs incurred by a Government in evacuating its nationals from Iraq or Kuwait. These payments are also available to reimburse payments made or relief provided by Governments or international organizations to others – for example to nationals, residents or employees or to others pursuant to contractual obligations — for losses covered by any of the criteria adopted by the Council”.

⁶¹ See, e.g. “The Report and Recommendation of the Panel of Commissioners Concerning the First Instalment of ‘F2’ Claims”, UN Doc. S/AC.26/1999/23, paras. 7-12.

⁶² *Ibid.*, paras. 29-31.

However, certain limits were placed on the availability of compensation for relief provided to evacuees. One important limitation was the requirement that such expenditures be “temporary and extraordinary in nature”, as expenditures that do not satisfy this requirement do not result directly from Iraq’s invasion and occupation of Kuwait. For example, while the panel in one claim recommended compensation for the costs of the actual relief provided, it did not recommend compensation for the costs of salaries of regular government employees who were assigned to work on the humanitarian relief effort, because the claimant did not provide any evidence to contradict the panel’s view that such employees were performing their ordinary functions, and therefore that the costs were not “temporary and extraordinary”.⁶³

The panel distinguished between those evacuees who were non-Jordanian nationals, and *returnees*, namely, Jordanian passport holders who had lived in Iraq or Kuwait or other Gulf States and settled in Jordan following Iraq’s invasion of Kuwait.⁶⁴ A number of the claims submitted in respect of returnees related to the provision of services, including health, social, police, housing, electricity, water and sewerage and education services, to them. The Panel also found that these claims were compensable in principle to the extent that the costs incurred were temporary and extraordinary in nature. However, the Panel noted that unlike evacuees, who were repatriated to their home countries following relatively brief stays in Jordan, the returnees resettled in Jordan. Therefore, in addition to the normal jurisdictional period of 2 August 1990 to 2 March 1991, the Panel found that for a six-month transition period thereafter, i.e., 2 March 1991 to 1 September 1991, expenditures incurred in the provision of humanitarian relief to returnees continued to be temporary and extraordinary in nature. The Panel also found that this six-month transition period was a reasonable length of time to enable returnees to resettle and recommence a normal life after the tremendous upheaval that they sustained as a result of Iraq’s invasion and occupation of Kuwait. Thereafter, the panel considered that the obligation to provide for returnees shifted fully to the Government of Jordan; Government expenditures ceased to be temporary and extraordinary in nature and were not losses directly resulting from

⁶³ *Ibid.*, paras. 100-105.

⁶⁴ *Ibid.*, paras. 32-37.

Iraq's invasion and occupation of Kuwait.⁶⁵ In all cases, the need to compensate for the humanitarian relief provided to evacuees and returnees is always circumscribed by the need to limit the extent of Iraq's liability.⁶⁶

Another illustration of the Commission's need to balance out the competing humanitarian concerns is illustrated by the treatment of claims for the costs of providing humanitarian relief by charitable organizations. The category "F1" Panel of Commissioners had determined, in the context of government claims for contributions to relief organizations, that the requirement that the loss suffered be a direct result of the invasion and occupation of Kuwait under paragraph 16 of Resolution 687 (1991) is satisfied under three conditions, namely that a): the purpose of the contribution responds to a "specific and urgent need" that resulted directly from Iraq's invasion and occupation of Kuwait, for example, by an appeal from an international organization for contributions for such a specific purpose; b) the contribution was for losses covered by any of the criteria adopted by the Governing

⁶⁵ See also the treatment of claims of Jordan for the environmental damage and depletion of natural resources (mainly water) alleged to have been caused by the influx of refugees; "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'F4' Claims", UN Doc. S/AC.26/2001/16, para. 297 ff.

⁶⁶ See also, for example, the treatment by the Commission of claims for the costs of humanitarian relief provided to Kurdish refugees. In one such claim, the Iranian Ministry of Interior sought compensation for costs it allegedly incurred in providing assistance from March 1991 to December 1993 to approximately 1.4 million Iraqi nationals, mostly of Kurdish origin, who began arriving in Iran after 15 March 1991. The claimant stated that the majority of the refugees stayed in Iran for several months before returning to Iraq, while some of them stayed in Iran for "several years". The claimant stated that it established reception centers and camps in Iran to accommodate the refugees, and that it provided them with food, shelter, clothing, medicine and other basic necessities "on an emergency basis". It should be borne in mind that the Commission's previous jurisprudence established that alleged losses occurring outside the period of Iraq's invasion and occupation of Kuwait (i.e., 2 August 1990 to 2 March 1991) required a claimant to discharge an extra burden of proof to provide an explanation as to why such loss should be considered a direct result of Iraq's invasion and occupation of Kuwait; see, e.g. "Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of 'F1' Claims", UN Doc. S/AC.2000/13, para. 70. The claimant specifically argued that "the Allied Coalition Forces encouraged civil unrest and rebellion in Iraq as part of their military strategy against Iraq and that they undertook military operations that inevitably led to the breakdown of civil order in Iraq. It alleges that the exodus of the (...) refugees from Iraq to Iran was, therefore, part of a natural sequence of events that was started by Iraq's invasion and occupation of Kuwait and that resulted in a foreseeable manner in the losses claimed in respect of the (...) refugees". The panel ruled as follows: "[t]he Panel recognizes that a considerable effort was exerted by Iran to provide humanitarian relief to the Iraqi nationals. However, the Panel finds that the claim for costs incurred in providing assistance to the (...) refugees is not compensable in principle, as the presence of those refugees in Iran was not a direct result of Iraq's invasion and occupation of Kuwait. Rather, the evidence demonstrates that the (...) refugees arrived in Iran as a direct

Council; and c) the contribution was actually used to respond to such a need.⁶⁷ Again, Iraq's liability for the costs of humanitarian relief was limited by these conditions.

A related issue arose before another panel in the context of the review of a claim by a non-profit organization for the costs of charitable relief provided to refugees. Guided by the precedents established in the Jordanian Government claims and the government claims for donations to charitable organizations just considered, the panel found that the claims were compensable.⁶⁸ The fact that the claimant was established after the invasion of Kuwait did not, in the opinion of the panel, preclude an award of compensation. Furthermore, the claimant's decision to organise and establish a relief facility to assist refugees does not break the chain of causation as it was a reasonable and foreseeable response to Iraq's invasion and occupation of Kuwait. In contrast, the same panel in the same report declined to recommend compensation in respect of a claim by a corporation for compensation for donations of food made to a local chamber of commerce to aid Kuwaiti refugees in Saudi Arabia.⁶⁹ The panel distinguished between charitable organizations, "whose principal mission is to assist people in need such as refugees", and corporate enterprises who "make charitable donations on the basis of independent business decisions for reasons only incidentally related

result of Iraq's suppression of uprisings involving Kurdish people in the north of Iraq, and the Shia population in the south. The Panel does not consider that either the suppression of uprisings or the subsequent exodus of refugees from Iraq was a natural and foreseeable consequence of Iraq's invasion and occupation of Kuwait"; "Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment of 'F1' Claims", UN Doc. S/AC.2002/6, paras. 154-174. Another reason for the non-compensability of such claims is the fact that many of the Kurdish refugees had Iraqi nationality. As the same panel stated in another report in the context of a claim that also involved Kurdish refugees, "[t]he Panel recognizes that the Governing Council in decision 7, para. 11, stated that '[c]laims will not be considered on behalf of Iraqi nationals who do not have bona fide nationality of any other State'. The Panel therefore considers that compensation [is] not be awarded to a Government to reimburse contributions made to persons who would not be eligible to seek compensation from the Commission in their own capacity. Accordingly, the Panel finds that relief contributions made by the Government of Canada to assist Iraqi nationals who do not have bona fide nationality of any other State are not compensable"; "Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of 'F1' Claims", UN Doc. S/AC.2000/13, para. 72.

⁶⁷ "Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of 'F1' Claims", UN Doc. S/AC.26/2000/13, para. 21.

⁶⁸ "Report and Recommendations Made by the Panel of Commissioners Concerning the Ninth Instalment of 'E2' Claims", UN Doc. S/AC.26/2001/17, paras. 155-165.

⁶⁹ *Ibid.*

to the business objectives of the corporation". The same panel had previously recommended compensation for corporations for relief payments in the context of the claimants' contractual relationship with its employees and in the case of transport carriers (airlines and railways) where the relief services had been provided by the claimant in a quasi-governmental capacity or as a public service. In the current case, the panel found no such factors that would have enabled it to rule that the payments constituted a "direct" loss resulting from Iraq's invasion and occupation of Kuwait within the meaning of Security Council Resolution 687 (1991).

Conclusion and outlook

The suffering among the civilian population of Iraq since the imposition of sanctions by the Security Council in 1990 has been commented upon widely. As stated in section 2 above, the mandate of the Commission is to provide compensation to the innocent victims of Iraq's unlawful invasion and occupation of Kuwait (1990-1991), and this mandate is distinct from and independent of the sanctions regime. Within the Commission, the Governing Council, which sets its policy within the framework of relevant Security Council resolutions, has considered carefully the humanitarian impact of their decisions towards both the victims of the conflict and Iraq itself. Humanitarian considerations, which were built into the mandate of the Commission by the Security Council, have been further developed by the Governing Council in setting up the working procedures of the Commission and its claims review process. As was stated by one panel, the "direct loss" limitation on the Commission's jurisdiction in Resolution 687 (1991) is "understandable in view of the magnitude of liability that would result from providing compensation for any detriment wherever felt, by any person, which somehow can be related to the invasion and occupation of Kuwait".⁷⁰

The importance attached to humanitarian considerations can be further illustrated by comparing the success rates for claimants in categories "A", "B" and "C", which were classified as "urgent claims" on the basis of humanitarian considerations, with those of claims of governments and corporations. Claims in categories "A", "B" and "C" have been awarded 93, 67 and 57 percent of the amount claimed, respectively, while the average

⁷⁰ "Report and Recommendations Made by the Panels of Commissioners Concerning the Second Instalment of 'E2' Claims", UN Doc. S/AC.26/1999/6, para. 55.

success rate for corporate and governments claims is 16 percent. In some of the “E” and “F” categories, the success rate is as low as three percent, and the average figure of 16 percent is due to the more successful claims in these categories that had been put forward by Kuwaiti companies. The overall success rate for all categories of claims presently stands at 18 percent, though it is anticipated that this ratio will fall further as the remaining claims are resolved. These success rates bear testimony to the fact that the Commission has not wavered from its primary objective of awarding compensation only for losses caused as a direct result of Iraq’s invasion and occupation of Iraq. Indeed, the Commission has been very conscious to avoid being a punitive body while on the other hand balancing the very serious humanitarian situations that victims of the conflict found themselves in as a result of Iraq’s illegal action. In this sense, the work of the Commission can be considered to have paved the way for the allocation of a central role to humanitarian considerations in future war reparations processes; as noted above, the importance attached to humanitarian considerations by the Commission is a significant departure from previous war reparations practice.⁷¹ The conclusion of the review of claims by the Commission will bring an end to this programme to compensate innocent victims of conflict, a programme which is all the more significant because it is the first of its kind to be established by the United Nations Security Council.

The Commission has faced a number of challenges since it started its work, and its experience indicates a number of factors that should be taken into account for the smooth functioning of a future war reparations regime. One essential issue is that of funding – the political will on the part of the international community and the practical means of securing the funds are prerequisites, as evidenced by the difficulties faced in this respect by the Commission in the earlier part of its existence.⁷² Also, if compensation is to reach all deserving victims of war, it will be necessary to ensure that the existence of any war reparations programme is publicized as widely as possible, as that would facilitate planning and establishment of deadlines, which would in turn enhance fairness with respect to claimants and the compensating party and contribute to the minimization of the need to consider (and create where appropriate) exceptions. In addition, depending on the magnitude of the project, the use of mass claims processing techniques should be consid-

⁷¹ See N. Wühler, *op. cit.* (note 7), and C. Alzamora, *op. cit.* (note 31).

⁷² See text accompanying notes 13-16 above.

ered, with all the resource implications for the procedures for the submission of claims in electronic form.⁷³ Simplicity is also essential in the rules and procedures that govern the submission of claims, given the widely different backgrounds and circumstances of individual claimants. It will be apparent that, particularly in the case of war reparations programmes involving nationals of several countries, the close co-operation with Governments and other authorities is necessary to address these concerns. Again, depending on its workload, any war reparations regime should consider appropriate procedures that will enable it to strike the right balance between the two objectives of speed and accuracy, particularly regarding its rules on the participation of both the claimants and of the compensating party/entity, and distinctions may usefully be drawn between claims on the basis of their size and complexity as was the case at the Commission.⁷⁴ Furthermore, the assistance of experts in the relevant fields is important in order to ensure the appropriateness of compensation particularly with regard to claims related to the physical and psychological well-being of the claimants, as illustrated by the role of the panel of experts assisting the Commission in its review of claims for mental pain and anguish.⁷⁵ Each war reparations programme will have its own specific issues which will have to be addressed on a case-by-case basis, but given the unprecedented magnitude of the Commission's project, lessons such as those mentioned here will almost certainly be of relevance to other programmes.

The Commission has entered the final phase of its mandate and it is scheduled that all remaining claims will be resolved by the panels of Commissioners by the end of 2004. As at 25 July 2003 the Commission had resolved nearly 2.6 million claims totaling over US\$250 billion in asserted value, approximately 98 percent of the total number of claims submitted, and awarded US\$46 billion in compensation. Of the amount awarded over US\$17 billion has been paid to claimants. Only 50,000 claims remain to be resolved, of which 46,000 are claims of individuals (the late-filed Palestinian claims mentioned in section 3.2 above) and the remainder are claims for damage to the environment. When it finishes its review of the last claims the Commission will be last UN programme established under Resolution 687 (1991) to conclude its mandate.

⁷³ See note 32 above.

⁷⁴ See text accompanying notes 8-10 (section 1) and 29-42 (section 3) above.

⁷⁵ See text accompanying notes 37 and 38 above.

Résumé

Les considérations d'ordre humanitaire dans les travaux de la Commission d'indemnisation des Nations Unies

Fred Wooldridge et Olufemi Elias

La Commission d'indemnisation des Nations Unies a été créée par le Conseil de sécurité pour examiner les demandes d'indemnisation et verser des indemnités aux victimes de l'invasion et de l'occupation illicites du Koweït par l'Irak (1990-1991). Cet article examine l'importance que les considérations d'ordre humanitaire revêtent dans le cadre des travaux de la Commission, notamment dans la procédure d'examen des demandes d'indemnisation et dans les mécanismes pour la répartition des indemnités accordées aux requérants dont la réclamation a abouti. L'article examine également les sources des contributions versées au Fonds d'indemnisation des Nations Unies (à partir duquel les indemnités sont versées) dans le contexte de la situation humanitaire qui prévaut en Irak, et il établit une distinction entre le mandat de la Commission et les autres institutions et processus mis en place par le Conseil de sécurité après l'invasion du Koweït en 1990. Finalement, l'article explore brièvement comment les considérations d'ordre humanitaire peuvent jouer un rôle dans des futures procédures de réparation des dommages de guerre.