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Legal Issues in the United Nations Compensation Commission on Iraq

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Abstract
This article is a comprehensive interrogation of the legality or otherwise of the United Nations Compensation Commission (UNCC) on Iraq; its establishment, operations and manifestations as the very first war reparation facility adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and making it binding on an aggressor State. The paper argued that the UNCC, which is an interesting example of the institutionalisation of the United Nations compensation mechanism, is unprecedented in the UN's compensation experience, in many respect. Although the design of the UNCC, however, fell within the tradition of war reparation facilities, in some respect, its operations, particularly subjecting the whole economy of Iraq to international control violated Iraq's sovereignty. The paper concludes that despite the lacuna, the design of the UNCC would serve as a model for future compensation schemes.
Keywords: Iraq, Compensation, Reparation, United Nations, UNCC, International Law.

1. Introduction

Traditionally, under international law, a State that has violated the right of another is obligated to pay "appropriate compensation" or to make "reasonable reparation" to the victim State, besides providing guarantees against non-repetition and assurances in favour of discontinuance of the wrongful act (Eminue, 1999). According to Article 50 of the 1949 Geneva Convention I, Article 51 of the 1949 Geneva Convention II and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Convention) "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" are grave breaches. Similarly, Article 53 of the Geneva Convention, which concerns occupied territory, stipulates the following:

> *Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.*

Article 23 of the Hague Regulations prohibits, among others, "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war". Under Article 8(2)(a)(iv) of the 1998 ICC Statute, "extensive destruction and appropriation of property, not justified by the military necessity and carried out unlawfully and wantonly" is a war crime in international armed conflict. Under Article 8(2)(b)(xiii), "destroying or seizing the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war" is also a war crime in international armed conflicts. The overall prohibition implies that what is permitted is to destroy enemy property when the destruction is imperatively demanded by the necessities of war. Thus, the United Nations Treaty Series, 75: 287 of 1949, prohibits "extensive destruction and appropriation of property…carried out unlawfully and wantonly", and stipulates that compensation should be paid for the property so requisitioned.

On August 2, 1990 Iraqi forces invaded its Arab neighbour, Kuwait and took control of Kuwaiti city. But not long, on August 25, 1990 President Saddam Hussein announced his annexation and declaration of Kuwait as the 19th Province of Iraq. In an attempt to justify the invasion and annexation of Kuwait, President Saddam Hussein leveled some allegations against Kuwait. First, that it deliberately undermined Iraqi economy and Iraqi post-war economic reconstruction efforts by boosting oil production quotas. Second, Kuwait was accused of exceeding the petroleum production levels set by the organization of Petroleum Exporting Countries (OPEC), thus forcing down the price of crude oil in the international market which considerably reduced Iraq's income. Third, Saddam accused Kuwait of drilling oil from Iraqi territory illegally, particularly from the disputed Bubiyan Island and Rumeilah oil field. Fourth, and more significantly, the Iraqi leader claimed that Iraq and Kuwait were once a nation under Ottoman Empire (1307-1882) but were separated by imperial powers, thus, Kuwait was the 19th Province of Iraq (Ekpe, 2004; Basu, 2005).

Some academic observers have, however, provided alternative explanations for the Iraqi decision. For example, Cockayne and Malone (2008) opined that:

> *Iraq's invasion of Kuwait, in many ways, flowed from Iraq's bloody but inconclusive war with Iran. Saddam Hussein needed to deliver rewards to his long suffering population. The small emirate of Kuwait was an obvious prize, offering both oil and improved access to the Persian Gulf. Long-simmering border disputes provided the pretext, while Kuwaits overproduction of oil depressed prices, raised the stake further.*

Hall and Kirk (2005:877) explained it trenchantly thus:

> *The Iraqi dictator, Saddam Hussein, invaded Kuwait for the same reason that he had invaded Iran in 1980: to established Iraq as the dominant state in the Persian Gulf on the economic basis of petroleum. His decision to invade Kuwait was partially driven by his failure to defeat Iran after an eight-year war, which had ended in 1988 under a UN Resolution that restored the previous Iran-Iraq border, at the cost of over a million Iranian and Iraqi lives.*

Hall and Kirk (2005) argued further that Iraq had concluded the Iran war with a heavy international debt, some of which were held by Kuwait, which had joined other Arab States in backing Iraq against the revolutionary Islamic government of the Ayatollah Khomeini in Iran and that Kuwait had the fourth and third largest oil fields in the world, and Hussein intended to combine these vast resources in order to relieve his debt and consolidate his power in the region. It could be recalled that, on September 22, 1980 Iraq invaded Iran, sending seven divisions deep into Iranian territory along a 500 kilometre front (Tripp, 2004). The war which lasted for about eight years ended in 1988 when both Iran and Iraq had accepted the United Nations Security Council Resolution 598(1998) as the basis for a ceasefire and for the beginning of negotiations. It is important to note that Iran-Iraq war ended with Iraq emerging victorious over Iran. Thus, as Pelletiere (2004) has noted, Iraq's victory over Iran gave the nation the capacity of becoming a regional superpower with a strong say on how the Gulf oil reserves should be managed. Consequently, because the United States could not tolerate an ultra-nationalist state with the potential to destabilize the world's economy, particularly in the Persian Gulf, the US opposition to Iraq invasion of Kuwait and enforcement action against Iraq then became inevitable.

From the above arguments, it could therefore, be deduced that the crises were arguably related to the struggle to control and own oil field in the Gulf. This implies that the primary impetus for the invasion lay in the dynamics of Iraqi strategic and economic concern after Iran-Iraq war. To put it more succinctly, the economic and political relations between Iraq and Kuwait provided the context for the conflict.

Although reasons advanced above appear lofty, sound and cogent to justify the Iraqi act of aggression against Kuwait, the action itself breached a number of established objective rules governing the conduct of nations under international law. For example, Article 2(4) of the UN Charter, Article 23 (g) of the 1907 Hague Regulations, customary international law relating to injury to nationals of Kuwait and of Third countries, and international environmental law. Also, by its invasion, occupation and annexation of Kuwait, the UN Security Council had in Resolutions 665, 667 and 670(1990) adjudged Iraq guilty of … unlawful destruction and seizure of public and private property, environmental damages and other human violations, and therefore, violating international law, including human right law, humanitarian law and diplomatic immunities, among others. However, Iraq's aggression was reversed by an unprecedented international coalition under the aegis of the United Nations codenamed *Operation Desert Storm*. Rattaima and Treves (1991:1) observed that, at that time, nevertheless, the war had already caused significant damage to a large number of individuals, Corporations and States. Hence, there was a need for compensation.

On April 3, 1991 the United Nations Security Council (hereinafter, UNSC) at its 2981st meeting and acting under Chapter VII of the UN Charter adopted Resolution 687 which, in effect, codified or established a formal cease-fire agreement between Iraq and the international coalition. According to paragraph 16 of the resolution, the Security Council:

> *Reaffirmed that Iraq, without prejudice to the debts and obligations of Iraq arising prior to August 2, 1990, which will be addressed through 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.*

From the point of view of common law torts, Rovine and Hanessian (1995) have suggested that the appropriate standard by which to determine what is a "direct" loss is one that is a "foreseeable" consequence of the offending state's breach of international law. This assertion is corroborated by the Report and Recommendations made by the Panel of Commissioners chaired by Professor Lauterpacht, when they averred that, a "direct loss" is one which would have been expected as a "normal and natural" consequence of Iraq's invasion of Kuwait. Consequently, in order to implement Iraq's obligation to compensate losses, damages and injuries arising out of Iraq's unlawful invasion and occupation of Kuwait, the Security Council decided in paragraph 18 of Resolution

687 (1991) to creates "a fund" and to established "a Commission" – (hereinafter "the United Nations Compensation Commission" (UNCC) to administer the fund, which Iraq had no choice, but to accept. Lim (2000) notes that Iraq communicated its acceptance of the provisions of Resolution 687 with identical letters dated April 6, 1991 addressed to the Secretary-General and the President of the Security Council respectively.

This article examined the legal consequences of the United Nations Compensation Commission on Iraq and the extent to which its establishment and its operations approximate or fall within the war reparation facilities.

2. Conceptual Clarifications

This study is premised on war compensation sometimes referred to as reparation. Historically, the payment of compensation or reparation by the vanquished state to the victorious state had been one of the many elements of peace negotiations. It is often demanded at the end of wars, and particularly from a losing side. For instance, after the Franco-Russian War, the Frank-furt Treaty of May 1871 required France to pay Germany an indemnity of 5 billion gold francs over a five-year period (Atkin, Biddis and Tallet, 2011). Thus, compensation, reparation or other form of payments are offered as an indemnity for losses or damages incurred as a result of wrongful act. In 20th century, reparations are payments sought by the victorious nations in war(s) as compensation for material losses and suffering caused by war. Generally, the term "war reparations" refer to money or goods changing hands, rather than such property transfers as the annexation of territory. Thus, some war reparations induced changes in monetary policy, are intended to cover damage or injury during a war (Metzler, 2006). Zeinmali (n.d) observes that in any legal system, reparations are consequent upon loss, damage or injury arising from a violation of the rules of law in force. Therefore, the question of reparations to be paid by one belligerent State to another, or to person or persons' dependent on the latter or to third parties is settled *post bellum* by agreements between the belligerents. Arrangements concerning post-war relations are generally left to a peace treaty which expresses the new balance of power. The peace treaty often includes clauses on reparations and compensation. According to Stone (cited in Agwu, 2011:131-2), peace treaty "is a complex document, which seeks to deal with every concrete question that can possibly affect the past or future relations of victors and vanquished. And the heart of this complex document is the "general clause", which outlines or deals with such issues as the cessation of hostilities, the resumption of peace, the evacuation of territory under occupation, *postliminium* (the restoration or retention of captured property), repatriation of prisoners of war, and the revival or abrogation of the treaties in force before war. In the view of Fassbender, (2000), today, unlike pre-Charter times, a defeated state's consent to a peace treaty cannot be procured by an explicit or implicit threat of force. Therefore, by setting down in Resolution 687 what the Council perceived as the conditions for stable peace in the region and for the re-admittance of Iraq into international community, as well as by prescribing what Iraq accordingly had to do and could not do, the resolution did no less than substitute for what used to be a peace treaty between belligerent parties. As Tomuschat (1998) puts, it is "substitute peace treaty"

As Zemmali (n.d) further argued, it was not the "Law of Geneva" (the body of rules relating to the protection of the victims of armed conflicts and some categories of property) but the "Law of the Hague" (rules relating to the conduct of hostilities) that first enshrined the obligation to make reparations. At the 1970 Conference held in the Hague, the draft Articles by German delegation on indemnification for violations of the laws and customs of war on land stated that "responsibility for any wrongful act committed in violation of the Regulations by members of the armed forces must be incumbent upon the Governments they serve". Article 3 of Hague Convention IV of October 18, 1907 concerning the laws and customs of war on land stated that; "a belligerent party which violates the provisions of the said Regulations [annexed to the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces". The rule according to the Convention is, however, applicable to any party to a conflict, winner or loser, provided that the violation has in effect taken place.

Article 34 of the ILC Articles provide that full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction either singly or in combination. The above view point is corroborated by Gillard (2003) when he asserted that, reparation can take various forms, including restitution, compensation or satisfaction. For the purpose of clarity, let us explain the components and importance of these remedies *seriatim*:

(i) **Restitution**: Restitution in kind is the obvious method of performing the reparation, since it aims is to re-establish the situation which existed before the wrongful act was committed (Annacker, 1994:206). Thus, the aim of restitution is to restore the situation that existed before the wrongful act was committed. Shaw (2003:716) observes that while restitution has occurred in the past, it is rare today, if only because the nature of such disputes has changed. A large number of cases now involve expropriation disputes, where it is politically difficult for the state concerned to return expropriated property to multilateral companies. Shaw (2003) further argued that recognizing some of these problems, Article 35 of ILC on State Responsibility, provides for

restitution as long as and to the extent that it is not materially impossible and does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. Article 35, ILC Articles on State Responsibility,. Principle 22 of the draft Basic Principles and Guidelines give the following examples of restitutions; restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and property. As Gillard (2003) further observes, there may obviously be circumstances in which restitution is materially impossible, for example, if the property in question has been destroyed. Restitution may also not be an appropriate remedy if the benefit to be gained from it by the victim is wholly disproportionate to its cost to the violator.

(ii) **Compensation**: This is a monetary payment for financially assessable damage arising from the violation. Monetary compensation is clearly of importance in reparation and is intended to replace the value of the asset confiscated (Shaw, 2003: 717). It covers material and moral injury. From the point of view of Harris (1983: 397), much more common as a means of "wiping out the consequences of the illegal act" is the award of monetary compensation. Article 36, ILC Articles on State Responsibility, Principle 23 of the draft Basic Principles and Guidelines state that compensation should be provided for any economically accessible damage and gives the following examples of such damage:

> *Physical and mental harm, including pains, suffering and emotional distress; lost of opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services.*

According to Shaw (2003), compensation is usually assessed on the basis of the "fair market value" of the property lost, although the method used to calculate this may depend upon the type of property involved. Loss of profits may also be claimed where, for example, there has been interference with use and enjoyment of unlawful taking of income-producing property or in some cases with regard to loss of future income.

(iii) **Satisfaction**: Satisfaction constitutes a third form of reparation and relates to non-monetary compensation. As a kind of reparation, satisfaction was termed, explicable as an agreed form of redress and alternative to application of reprisals or resort to war. According to Gillard (2003), satisfaction covers non-material injury that amounts to an affront to the injured State or person. It would include official apologies, the punishment of guilty minor officials, formal acknowledgement of the breach, or the unlawful character of an act. Gillard (2003), however, opined that while these remedies can be applied either singly or in combination in response to a particular violation, it is a general principle of public international law that any wrongful act, that is, any violation of an obligation under international law gives rise to an obligation to make reparation. Therefore, the aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.

Harris (1983: 396) explained the relationship between and among these remedies thus:

> *If restitution in kind is not possible, two subsidiary forms of reparation are available: satisfaction and compensation. As international judicial practice permits monetary compensation to be awarded for other than material damage, it appears an unnecessary overcomplication to distinguish from it pecuniary satisfaction. Whether symbolical or excessive, any award of damages is a form monetary compensation. This limits satisfaction to any non-monetary form of reparation which is not restitution in kind. Satisfaction has in common with restitution in kind, and in this differs from compensation, which is of a non-monetary character. It differs from restitution in kind, and shares this feature with compensation, that it cannot lead to actual restoration of the status quo ante. The typical purpose of satisfaction is to repair breaches of international obligations in cases in which such breach do not entail any actual damage or monetary compensation is either inappropriate or insufficient.*

From the above remedies, compensation – monetary compensation which is clearly of importance in reparation and is intended to replace the value of the asset lost, damaged and confiscated is most relevant to this study.

3. Method and Materials

This study is basically *ex-post facto* and historical. As Cohen and Manion (1980) clarify, *ex-post facto* means "after the fact" or "retrospectively", and it refers to those studies which investigate possible cause-and-effect relationship by observing an existing condition and searching back in time for plausible causal factor. Thus, it is a form of descriptive research. On the other hand, a historical research is "a systematic and critical investigation of events, experience and developments of the past and their influencing factors to formulate progressive ideas for the present and future" (Ndiyo, 2005:45). From the point of view of Arikpo (1986:56), a historical research (also called historical method) is essentially "an attempt to understand a phenomenon or determine its process of growth and dynamics of internal changes. Juxtaposing the *ex-post facto* and historical methods, therefore, the study explores the origins of compensation or reparation facilities, with regards to UNCC on Iraq. The method

used is qualitative method, specifically the documentary method. In documentary studies, therefore, information are gathered in the form of words, pictures, descriptions, narratives and numerals from secondary sources such as documentary studies of official documents, library materials, internet (website), etc. In other words, documentary method is a secondary source of data or an indirect method of collecting data. Thus, this study relies on secondary sources of data like documentary evidence, written descriptions, data and information from internet. The method of data analysis for this study is qualitative-descriptive analysis. This method is suitable for analyzing data collected through qualitative method.

4. The Nature Of The UNCC

The United Nations Compensation Commission is a subsidiary organ of the UN Security Council. It was established by the Council in 1991 to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait. As a subsidiary organ of the Security Council, the Commission operates within the framework of the Council's resolutions, particularly resolutions 687 (1991), 692 (1991), 986 (1995) and 1483 (2003). As these resolutions clarify, the Commission was established to process claims and pay compensation for losses and damages suffered by individuals, corporations, governments and international organizations as a direct result of Iraq's unlawful invasion and occupation of Kuwait. The legal responsibility and liability of Iraq for those losses and damages have been established by the Security Council and expressly accepted by the government of Iraq. The Commission was neither a court nor a tribunal with an elaborate adversarial process. Rather, the Commission was created as claims resolution facility that could determine on a large number of claims in a reasonable time. As such, the Commission operates more in an administrative manner than in a litigation format. Xia (2000) shed light on the nature of the UNCC and describe it graphically thus:

> *In its framework, the Security Council, as the creator, supervises the UNCC of which the main organ is its Governing Council. The Governing Council is headed by the Secretariat and composed of the representatives of member states of Security Council and has overall responsibility in deciding policy matters and making final and binding decisions on the amounts of compensation. Appointed by the Governing Council, the Commissioners work in panels to make recommendations on the amounts of compensation. To service the Commission, there is also a Secretariat headed by an Executive Secretary which consists not only of lawyers but also of computer experts, statisticians, and accountants.*

Explaining similarly, Garmise (1992) opined that:

> *Regarding its nature, the UNCC, is an institution that (1) determines the amounts of compensation owing to individuals and entities injured by Iraq's invasion and occupation of Kuwait and (2) when authorized by the UNCC's Governing Council, distributes monies to individuals and entities in satisfaction of the amounts recommended by Panels of Commissioners and subsequently approved by the Governing Council. The monies that are distributed are drawn from the fund.*

From a combine reading of the views of Xia (2000) and Garmise (1992), it is crystal clear that the UNCC had four components. First, a Governing Council composed of all members of the Security Council at a given time. Its roles were to determine policy, established the financing and administration of the fund, approve the process and procedures for determining claims, and to make payment of the funds. Second, a Panel of Commissioners whose duty was to verify claims based on guidelines stipulated by Council decisions. Third, a Secretariat composed of an Executive Secretary and a staff of lawyers, professional consultants, and other support personnel. Its role was to collect and verify "millions of potential claims" received by UNCC. Fourth -the fund for the payment of compensation. Thus, Caron and Morris (2002) summed up the functions of the UNCC to:

(i) effect a speedy, fair and efficient evaluation of the claims against Iraq and to process the claims in accordance with the various resolutions of the UN Security Council.
(ii) to make payments to claimant from the funds obtained from Iraq in accordance with the procedures and priorities decided by the Security Council.

5. Types or Categories of Claims

In its bid to discharge its functions judiciously, the United Nations Compensation Commission created five main types or categories of claims. As Leys (2005) has pointed out, the categories include a broad range of claims types and compensation amounts. It includes such categories as, for example, individual claims capped at a maximum award of $2500; individual claims for losses of over $100,000; claims from international organizations and governments for expenses incurred while evacuating citizens; multi-billion dollar claims filled but Kuwait's oil-sector for loss of revenue and oil resources; and multi-billion dollar claims for damage to the

environment.

However, Leys (2005) and McGovern (2009) have identified five categories of claims prescribed by the UNCC as follow:

Category "A": These are claims submitted by individuals who had to depart from Kuwait or Iraq between the date of Iraq's invasion of Kuwait on August 2, 1990 and the date of the ceasefire March 2, 1991. As McGovern puts it, 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. Thus, the governing Council assigned $2,500 for individual claimants and $5,000 for families. Or $2,500 to $8,000 for each claimant depending on whether there were other family members involved. This implies that where a claimant who had filed claims in category "A" only, he or she was eligible to receive a maximum category "A" payment of $4,000 for individuals and $8,000 for families. The claims were submitted by countries on behalf of their 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 (McGovern, 1995).

Category "B": These are claims submitted by individuals who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq's invasion and occupation of Kuwait. Claims under this category were limited to $2,500 for individuals and up to $10,000 for families and could be processed expeditiously with limited proof requirements. 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.

Category "C": This category of claims is individual claims for damages up to $100,000 each. Category 'C' claims can be made for twenty-one different types of losses, including those relating to departure from Kuwait or Iraq; personal injury; mental pains and anguish; loss of personal property; loss of bank accounts, stocks and other securities; loss of income; loss of real property; and individual business losses. 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. McGovern (1995) reveals that 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.

Category "D": These are individual claims for damages above $100,000 each. The types of losses that can be claimed under category 'D' are similar to those under category "C", with the most frequent being the loss of personal property; the loss of real property; the loss of income and business related losses. Therefore, as stipulated in the *criteria for additional categories of claims,* 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. This is because the elements of the "D" claim were identical to "C".

Category "E": Claims under this category are claims of corporations, other private legal entities and public sector enterprises, except for losses incurred from the trade embargo and related measures. They include claims for construction or other contract losses; losses from the non-payment for goods or services; losses relating to the destruction or seizure of business assets; loss of profits; and oil losses. Of note, the category "E" claims were further divided into four groups. "EI" – oil sector claims; "E2" – claims for other corporate or business entity; "E3" – for non-Kuwaiti construction and engineering claims and "E4" – claims for Kuwaiti private sector other than oil claims (Heiskanen, 2002).

Category "F": This covers claims filed by governments and international organizations for losses incurred in evacuating citizens; providing relief to citizens; damage to diplomatic premises and loss, and damage to, other government property and environmental damages and depletion of natural resources. Claims under this category were further divided into four groups: "FI" – claims for evacuation costs, property losses, and other similar losses; "F2" – strictly for Jordanian and Saudi Arabian claims; "F3" - for Kuwaiti claims, and "F4" – for environmental claims. It is pertinent to states that there was also a mixed E/F category for overlapping claims involving export guarantees and insurance claims.

It is important to clarify, from the outset that given the large numbers of claims in categories "A" and "C", relatively small amount of compensation sought by each claimant and the acceptance by Iraq of legal responsibilities for damage arising directly from its invasion of Kuwait, a detailed individual review of these urgent individual claim was neither warranted nor feasible. To deal with these claims in an efficient, fair and impartial manner, the Commission employed, in addition to individual review of claims where necessary, a variety of international recognized techniques for processing claims; including computerized matching of claims and verification information, sampling, individual review and, for some loss elements in category "C", statistical

modeling. Category "B" claims, on the other hand, being relatively few in number, allowed the panel concerned to resolve them largely through a claim-by-claim review. Also, claims in category "E" - by Corporations and category "F' - by governments and international organizations were complex and sought large amounts of compensation, and because the Rules require that each be reviewed individually, the Commission was limited in the expedited procedures that it can employ for their resolution.

6. Analysis

Pursuant to Resolution 687 (1991), the Security Council acting under Chapter VII of the UN Charter determined that the UNCC would retain 30 (and later 25) percent of Iraq's oil revenue in order to pay the UNCC's operating costs and genuine claims, while the balance of 70 percent was earmarked for the funding of the "Oil-for-food Programme". To put it clearly, Oil-for-food programme concerns the management of the Iraqi sanctions regime in light of the humanitarian needs of the Iraqi population, 70 per cent of the proceeds from Iraqi oil sold under the programme were deposited in a UN escrow account and used to purchase civilian goods to meet the basic needs of the Iraqi people, while 30 per cent were meant for the compensation fund.

It is pertinent to states that the Security Council had in the past, called for reparation in the form of compensation, but had neither linked these decisions to Chapter VII of the UN Charter nor involved itself in the decision relating to the amount. For examples, Resolution 471 (1980) which the Council determined "that Israel, as the occupying power had failed to provide adequate protection to the civilian population in occupied territories" and called upon it "to provide the victims with adequate compensation for the damages suffered as a result of these crimes" (assassination attempts against three Mayors – of Nablus, Ramallah and Al Bireh). In this case, the Security Council merely recalled Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949. Second, Resolution 487 (1981) in which the Security Council considered that Iraq was "entitled to appropriate redress for the destruction it had suffered" as a result of the Israeli premeditated attack on Iraqi nuclear installations on June 7, 1981. In this case, the Security Council:

Considering that, under the terms of Article 2, paragraph 4, of the Charter of the United Nations: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations",

1. *Strongly condemns* the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct;
2. *Calls upon* Israel to refrain in the future from any such acts or threats thereof;
3. *Further considers* that the said attack constitutes a serious threat to the entire IAEA safeguards regime which is the foundation of the non-proliferation Treaty;
4. *Fully recognizes* the inalienable sovereign right of Iraq, and all other States, especially the developing countries, to establish programmes of technological and nuclear development to develop their economy and industry for peaceful purposes in accordance with their present and future needs and consistent with the internationally accepted objectives of preventing nuclear-weapons proliferation;
5. *Calls upon* Israel urgently to place its nuclear facilities under IAEA safeguards;
6. *Considers* that Iraq is entitled to appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel;
7. *Requests* the Secretary-General to keep the Security Council regularly informed of the implementation of this resolution.

Third, Resolution, 386 (1976) and 527 (1982) relating to South Africa's aggression against Angola and Lesotho, respectively called for full compensation for the damage and destruction to life and property without any reference to Chapter VII of the UN Charter. In the case of Libya, while Resolution 748 (1992) was adopted within Chapter VII of the UN Charter, the Council simply refers back to the requests of the US and UK for "appropriate compensation". It is equally instructive to points out that the Iran – United States Claims Tribunal of 1981 was established through an agreement between Iran and the United States. It was a traditional judicial body for the settlement of international claims arising from the damage caused by the Iranian revolution and the American hostage crises.

But, in the case of Iraq, however, the Council went far in establishing for the first time, a compensation mechanism which serves as a comprehensive framework for dealing with Iraqi liability. This mechanism includes the creation of a fund to pay compensation, which was financed out of a determined percentage of Iraqi oil export revenues (Resolutions 705 and 706) (1991) and a compensation Commission to administer the fund. Thus, McGovern (2009) observes, however, that the UNCC was the first compensation system established under the authority of Chapter VII of the UN Charter. And that the UNCC, although not inconsistent with its war reparation ancestry, drew on three more recent models: (i) the Iran-US Claims Tribunals, (ii) a variety of

government-sponsored compensation programmes, and (iii) a broad range of claims resolutions facilities from other contexts.

The UNCC, as Dupuy (1992) has pointed out, is an interesting example of the institutionalization of the mechanism of compensation, which goes beyond a strictly bilateral relationship and one which is defined by a political, not judicial body. Having engaged in evaluating losses, listing claims, verifying their validity and resolving disputed claims, the UNCC is unprecedented in UN's compensation experience in several significant respects. First, in the Iraqi case, the UN Security Council had gone beyond its usual declaration as to which party is entitled to compensation in that the Council had called for reparation in the form of compensation. It is involved in the determination of the value of compensation. Second, unlike in the past, Iraq as the aggressor state has no role to play in the negotiation process; it was obligated to accepting and implementing the dictates of the UN Security Council. Third, the methods of payment and the administration of the compensation were closely supervised by the UN Security Council under Chapter VII of the UN Chapter. Fourth, as one authority has observed, in order to ensure that compensation is paid under watchful eyes of the Security Council, "the whole economy of (Iraq) was subjected to international control" (Graefrath and Mohr, 1992:122-23). It was a situation in which he UN Security Council asserts its competence as Reisman (1993:88-9) pointed out, to sequester what is the natural resource wealth of a country, and to determine, in the final resort, the amount of compensation and its beneficiaries. Therefore, the UNCC has been criticised for imposing victor's justice on Iraq, in particular because liability was imposed on it through a decision of the Security Council, a political organ hardly equipped for this role. This modality of paying compensation, however, fell short of the British suggestion of freezing Iraqi assets in Western capitals for purposes of settling the compensation (Eminue, 1999).

Under this arrangement, the Council prefers to remain within the framework of civil liability in responding to what may be termed an international crime. Yet in the context of, state responsibility, the establishment of the compensation Commission points to a number of interesting developments. In all respects, it is to be distinguished from previous international claim institutions, such as the Iran-United States claims Tribunal. The latter, as an adjudicative body applying principles of international law, was established by negotiation between two sovereign parties, and its task included, in the case, the prior assessment of liability by the Security Council, Iraq had no role to play in the process. Liability of Iraq was also established by the Council resolutions "for any direct loss, damage, including environmental damage and the depletion of any natural resources, or injury to foreign governments, nationals and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait". For Graefrath and Mohr (1992), therefore, these differences are to be explained by the fact that reparation claims in cases of aggression (international crimes) are different from normal reparation claims. Lending credence to the *modus operandi* of the UNCC and drawing from section 'E' of Resolution 687, Graefrath and Mohr (1992) summarised as follows:

- the obligation of restitution and reparation and its size may be determined by decision of the Security Council;
- the obligation is not open to negotiation, it has to be accepted by the aggressor state;
- the methods of payment and the administration of the reparation procedure are under the supervision of the Security Council;
- to ensure that restitution, and payment of damages, is made, the whole economy of the country concerned may be subjected to international control.

It is also worthy to note that the design of the UNCC was, in some respects, fell within the tradition of war reparations facilities and, in other respects unique. Its political governance structure within the UN and the Governing Council ensured that it was responsive to the demands of its founders. Its quasi-judicial elements-rules of procedure, independent commissioners, and evidentiary standards made it a hybrid entity, neither purely political, nor purely adjudicatory. One of the most striking aspects of its procedure was 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 transparency of its proceedings. Notwithstanding the political oversight, the operation of the UNCC was consistent with the well-established tradition of claims resolution facilities.

6. Conclusion

In this article, we have been considering the legality or otherwise of the establishment of the United Nations Compensation Commission on Iraq and its operation. The study also beamed its searchlight on the nature of the UNCC, types or categories of claims, and sources of fund for the Gulf War reparation payment. There is no doubt that by its invasion, occupation and illegal annexation of Kuwait, Iraq was held liable under the international law to pay appropriate compensation for any direct loss to the victim states, individuals, governments and international organizations. This *a priori* establishment of liability had the advantage of enabling the UN to impose upon Iraq an unprecedented civil compensation system under the UNCC and directed

at monetarily recompensing those individuals, entities, and governments that suffered losses during the war. Thus, the UNCC had to, on the one hand, administer the fund and on the other hand organises the procedures for evaluating losses, listing claims, and verifying their validity as well as resolves disputed claims. It was also incumbent on the UNCC to resolve claims within a relatively short period of time. Although the design of the UNCC was, in some respects, fell within the tradition of war reparations facilities, its operations in some respects, violated Iraq's sovereignty, in that the whole economy of Iraq was subjected to international control. Despite the lacuna, as McGovern (2009) earlier pointed out, the design of the UNCC will serve as a model, or at least a yardstick, for future compensation facility designs.

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