Spring 2005

The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq

John J. Chung
Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/law_fac_fs

Part of the International Humanitarian Law Commons, International Law Commons, and the Military, War, and Peace Commons

Recommended Citation

This Article is brought to you for free and open access by the Law Faculty Scholarship at DOCS@RWU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.
THE UNITED NATIONS COMPENSATION COMMISSION AND THE BALANCING OF RIGHTS BETWEEN INDIVIDUAL CLAIMANTS AND THE GOVERNMENT OF IRAQ

John J. Chung*

The UN Compensation Commission (the Commission) in Geneva resolved over 2.68 million claims filed by governments, corporations, and individuals seeking more than $350 billion in compensation for losses suffered during Iraq's invasion and occupation of Kuwait in 1990-91. This article focuses on one aspect of the Commission's work that has drawn little attention in the body of commentary describing the work of the Commission: the challenges involved in establishing a fair process and framework for resolving more than 2.67 million claims filed by the individual victims of war.

The Commission struggled to achieve a fine balance between the protection of the rights of individual claimants and the rights of

---

* J.D. Harvard Law School; B.A. Washington University (St. Louis); Associate Professor of Law, Roger Williams University (starting Fall 2006). The author was a lawyer in private practice and later a legal officer with the United Nations Compensation Commission. The views expressed in this article are those of the author and do not necessarily reflect any official position of the Commission.

The author wishes to express his appreciation for the invaluable support and encouragement (as well as the helpful comments on an earlier draft) of Professor Jack Chin, Chester H. Smith Professor of Law, University of Arizona, James E. Rogers College of Law. The author also wishes to thank Mr. Mojtaba Kazazi, Chief of the Governing Council Secretariat of the Commission, for his unique historical insights and thoughtful comments on an earlier draft. The author also wishes to express his appreciation of the thoughtful comments on an earlier draft by Professor Shubha Ghosh of the University of Buffalo Law School.
the Government of Iraq. The difficulty of this task was compounded by the fact that neither the claimants nor the Government of Iraq was in a position to submit a sufficient factual record to support its respective position. This article examines the challenges faced by the individual claimants, the Government of Iraq, and the Commission in addressing these difficulties and describes the framework the Commission ultimately employed.

This article concludes that two inter-related procedural features served to safeguard the rights of the claimants and the Government of Iraq: (1) the use of an inquisitorial process instead of an adversarial process to decide claims, and (2) the use of disinterested third-party fact-finding reports to supply the factual record. This article further concludes that any future commission that addresses the losses of individual victims of war or war-like hostilities will need to adopt these same features.

INTRODUCTION ..............................................................................................143
I. OVERVIEW OF THE COMMISSION ..............................................................144
   A. The Formation and Structure of the Commission ..................................144
   B. The Individual Claims .........................................................................149
II. THE CHALLENGES IN ESTABLISHING AND OPERATING WITHIN A FRAMEWORK FOR THE FAIR RESOLUTION OF INDIVIDUAL CLAIMS .............................................................................................153
   A. The Challenges Faced By Individual Claimants ..................................153
   B. The Challenges Faced by the Government of Iraq .................................156
   C. The Challenges Faced by the Commission ...........................................159
   D. The Results Achieved by the Commission ..........................................160
III. THE FRAMEWORK AND METHODS USED TO PROTECT THE INTERESTS OF THE INDIVIDUAL CLAIMANTS AND THE GOVERNMENT OF IRAQ .......................................................................................161
   A. The Use of an Inquisitorial Process .......................................................162
   B. The Use of Fact-Finding Reports Prepared by Disinterested Third Parties to Establish an Evidentiary Foundation for Individual Claims .........................................................................................167
IV. COMPARISONS TO AND LESSONS LEARNED FROM THE IRAN-UNITED STATES CLAIMS TRIBUNAL ..........................................................171
   A. The Need to Resolve Individual Claims Quickly ....................................173
   B. The Importance of Adopting an Inquisitorial Approach .......................174
CONCLUSION ................................................................................................177
INTRODUCTION

The United Nations Compensation Commission (the "Commission" or "UNCC") in Geneva is historically unprecedented. Since 1991, it has resolved over 2.68 million claims filed by governments, corporations, other entities, and individuals seeking more than $350 billion in compensation for losses suffered during Iraq’s invasion and occupation of Kuwait in 1990-91. As the operation of the Commission nears completion, it is an appropriate time to examine a few of the difficult issues raised by the nature of the claims resolution process and to determine what lessons or precedents can be applied to any similar undertaking in the future. This article focuses in particular on one aspect of the Commission’s work that has drawn little attention in the body of commentary describing the work of the Commission: the challenges involved in establishing a fair and time-sensitive process and framework for resolving over 2.67 million claims for compensation filed by the individual victims of war.

Much has been written regarding the claims submitted by corporate entities and governments, perhaps due to the fact that some of these were multi-billion dollar claims by themselves. At the same time, the treatment of individual claims has been relatively ignored. Nonetheless, the resolution of the individual claims merits close attention due to the sheer number of claims involved (and the billions of dollars sought), and the legal challenges that were addressed in structuring the framework needed to resolve these claims. In this endeavor, the Commission was required to achieve a fine balance between the protection of the rights of individual claimants and the rights of the Government of Iraq. The difficulty of this task was compounded by the fact that neither the claimants nor Iraq were in a position to submit a sufficient factual record to support their respective positions.

Part I of this article presents an overview of the Commission, including a discussion of the circumstances of its formation and the claims resolution process. Part II examines and discusses the procedural and substantive challenges faced by the individual claimants, the Government of Iraq, and the Commission. Part III describes the framework and approach employed by the Commission to balance the competing rights involved. It concludes that two inter-related procedural features served to safeguard the rights of the claimants and the Government of Iraq, and that any future commission that addresses the losses of individual victims of war or war-like hostilities will need to incorporate these same features. In Part IV, this article examines the ways in which the Commission’s framework and approach was informed by the lessons of the Iran-United States Claims Tribunal.
I. OVERVIEW OF THE COMMISSION

A. The Formation and Structure of the Commission

On August 2, 1990, Iraq invaded Kuwait. The UN Security Council ("Security Council") responded on the same day by adopting Resolution 660, in which it "[c]ondemn[ed] the Iraqi invasion of Kuwait" and "[d]emand[ed] that Iraq withdraw immediately and unconditionally all its forces."¹ In November 1990, the Security Council authorized the use of force by its member states to expel Iraqi forces from Kuwait.² Under the leadership of the United States, the military campaign to free Kuwait began in January 1991, and Kuwait was liberated by March 1991.³

During Iraq's invasion and occupation of Kuwait, civilian members of Kuwait's population suffered loss of life, physical injuries, and loss of personal property at the hands of Iraqi forces. With this and other damage in mind, the Security Council approved Resolution 687 in 1991, after the liberation of Kuwait, which reaffirmed that Iraq "is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."⁴ Resolution 687 also authorized the creation of a fund to pay compensation for claims against Iraq and a commission to administer the fund.⁵ Pursuant to this Resolution, the Commission was established.⁶

² See David D. Caron, The United Nations Compensation Commission for Claims Arising out of the 1991 Gulf War: The "Arising Prior To" Decision, 14 FLA. ST. J. TRANSNAT'L L. & POL'Y 309, 310-16 (2005) [hereinafter Caron, United Nations Compensation Commission] (containing a detailed discussion of the Security Council Resolutions leading to the establishment of the Commission; Professor Caron was also a Commissioner on the Category E2 Panel of the UNCC, which decided non-Kuwaiti corporate claims).
³ Id. at 311-12.
⁵ Id. ¶ 18.
the funds for the operation of the Commission and the awards of compensation was Iraq’s oil revenue.\(^7\)

The Commission is “a subsidiary organ of the UN Security Council to process claims and pay compensation” for the direct losses, damages, and injuries caused by Iraq’s 1990 invasion of Kuwait and the ensuing occupation.\(^8\) As stated in a report by the Secretary-General of the UN, “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.”\(^9\) Furthermore, the UNCC does not represent the interests of a single state, such as Kuwait, or the military coalition which liberated Kuwait—it represents “the whole international community.”\(^10\)

The Commission is comprised of three organs: the Governing Council, the secretariat, and the panels of Commissioners.\(^11\) The Governing Council

---

\(^7\) See Letter from Javier Perez De Cuellar, U.N. Secretary-General, to the President of the Security Council, U.N. Doc. S/22661 (May 30, 1991) [hereinafter Letter from Javier Perez De Cuellar]. These funds were part of the proceeds from the “oil for food” mechanism established pursuant to Security Council Resolution 986, which authorized the sale of Iraq’s oil to fund Iraq’s humanitarian needs. S.C. Res. 986, ¶ 8, U.N. Doc. S/RES/986 (Apr. 14, 1995); see also United Nations Compensation Commission (UNCC), Payment Procedure, http://www2.unog.ch/uncc/paymproc.htm (last visited Feb. 10, 2006) [hereinafter Payment Procedure]. The revenues from the sales of oil authorized by Resolution 986 were deposited into a special UN escrow account, and monies from this account were the source of the UNCC’s compensation fund. Id. The amount received by the UNCC’s compensation fund each month depended on the quantity of oil sold and the price of oil. Id. The contribution to the funding of the Commission and awards of compensation was originally set at 30% of the oil revenue. See Letter from Javier Perez De Cuellar, supra, ¶ 7; S.C. Res. 705, ¶ 2, U.N. Doc. S/RES/705 (Aug. 15, 1991). It was later reduced to 25% and then 5% in 2003. S.C. Res. 1330, ¶ 12, U.N. Doc. S/RES/1330 (Dec. 5, 2000); S.C. Res. 1483, ¶ 21, U.N. Doc. S/RES/1483 (May 22, 2003). The “oil for food” program was terminated pursuant to Resolution 1483 in 2003.


\(^11\) Report of the Secretary-General, supra note 9, ¶¶ 5 - 6; see also Wähler, supra note 8, at 253.
sets the Commission's policies and holds the power of final approval of the reports and recommendations setting forth the decisions made by the panels of Commissioners.\textsuperscript{12} The Commissioners evaluate and decide the claims.\textsuperscript{13} They verify the claims, determine whether the claimed losses are the direct result of Iraq's invasion and occupation of Kuwait, assess the amount of loss, and recommend compensation awards to the Governing Council for its approval.\textsuperscript{14} The secretariat is responsible for providing the Governing Council and the Commissioners with legal, technical and administrative support.\textsuperscript{15} In particular, the secretariat provides services to the Governing Council and to the Commissioners relating to the processing of claims and the development of procedures for evaluating the claims.\textsuperscript{16} It also compiles such infor-


The composition of the Governing Council is the same as the U.N. Security Council at any given time. \textit{See} Wühler, supra note 8, at 252.

\textsuperscript{13} \textit{Id.} at 252. The Commissioners worked in panels of three. \textit{Id.} While the Governing Council was empowered with the authority to establish the general rules regarding the disposition of claims, it was the duty of the Commissioners "to identify the applicable principles and apply them to the circumstances of particular cases." \textit{See} U.N. Compensation Commission, Governing Council, \textit{Decision taken by the Governing Council of the United Nations Compensation Commission during resumed Fourth Session, at the 23rd Meeting, held on 6 March 1992; Propositions and Conclusion on Compensation for Business Losses: Types of Damages and Their Valuation}, ¶ 3, U.N. Doc. S/AC.26/1992/9 (June 6, 1992). Although this decision was not made within the specific context of the treatment of individual claims, the quoted statement may be viewed as being generally applicable to the work of the Commissioners. \textit{See} David J. Bederman, \textit{The United Nations Compensation Commission and the Tradition of International Claims Settlement}, 27 N.Y.U. J. INT'L L. & POL. 1, 19 (1994).

The Commissioners were appointed on the basis of their expertise in fields such as "finance, law, accountancy, insurance, and environmental damage assessment," with "due regard to the need for geographical representation, professional qualifications, experience and integrity." \textit{See} Report of the Secretary-General, supra note 9, ¶ 5; \textit{see also} Rules, supra note 12, at 12.

\textsuperscript{14} Wühler, supra note 8, at 252.

\textsuperscript{15} \textit{Id.} at 253.

mation as may be mandated by the Rules or requested by the Commissioners to assist them in their review of the claims, and provides the technical administration of the Fund.\textsuperscript{17} The relative roles of the three organs with respect to one another were summarized by the Secretary-General in the following manner:

Claims will be addressed to the Commission. The Commission will make a preliminary assessment of the claims, which will be carried out by the Secretariat, to determine whether they meet the formal requirements established by the Governing Council. The claims would then be submitted to verification and evaluation by panels normally comprised of three commissioners for this purpose.\textsuperscript{18}

In total, the Commission received over 2.68 million claims from all categories of claimants seeking compensation for more than $350 billion.\textsuperscript{19} The Commission is the largest claims commission in the history of international claims.\textsuperscript{20} Its establishment has been described as "unique" and "unprecedented."\textsuperscript{21} It was certainly unprecedented in that it was the first time the

\textsuperscript{17} Id.

\textsuperscript{18} Report of the Secretary-General, supra note 9, ¶ 26.


\textsuperscript{20} Id.


Some commentators have taken a different view as to whether the Commission is truly unprecedented and have described it as being similar in nature to earlier tribunals such as the reparations scheme established under the 1919 Treaty of Versailles between the victorious Allied powers and Germany. See Bederman, supra note 13, at 6-11; Elyse J. Garmise, Note, The Iraqi Claims Process and the Ghost of Versailles, 67 N.Y.U. L. Rev. 840 (1992). Such comparisons have generally been unflattering in that both compensation schemes have been characterized as coercive and retributive impositions of liability by the winner over the loser. See Bederman, supra note 13, at 6; Garmise, supra, at 856-62, 871. However, the UNCC represented a significant departure from traditional models of claims settlement. The typical model usually involved bilateral negotiations between formerly hostile nations leading to a lump sum settlement out of which claims could be paid. Stanley J. Glod, International Claims Arising from Iraq's Invasion of Kuwait, 25 INT'L L. 713 (1991).

Even if one were to accept the validity of such comparisons between the UNCC and prior tribunals, there are significant and legally material differences between them. For example, the reparations commission under the Treaty of Versailles was comprised exclusively of representatives of the victorious Allied powers. See Bederman, supra note 13, at 7. Perhaps more importantly, prior reparations tribunals have been limited to compensating the nationals of just one state (typically the victor, not surprisingly) or the nationals of the states involved in hostilities (although such instances have been rare). Id. at 3, 14.
Security Council had established a claims commission of its kind.\textsuperscript{22} It was also unprecedented by virtue of the sheer number of claims that it would receive and resolve.\textsuperscript{23} As of September 15, 2005, the total numbers of claims and amounts awarded were as follows.\textsuperscript{24}

Focusing on these features as defining benchmarks of post-war or post-hostilities compensation tribunals, it can be argued that the UNCC is indeed unprecedented in the following sense. The military victors over Iraq can be viewed as the 34 members of the Allied Coalition Armed Forces, which included Afghanistan, Argentina, Australia, Bahrain, Bangladesh, Canada, Czechoslovakia, Denmark, Egypt, France, Germany, Greece, Hungary, Honduras, Italy, Kuwait, Morocco, The Netherlands, Niger, Norway, Oman, Pakistan, Poland, Portugal, Qatar, Saudi Arabia, Senegal, South Korea, Spain, Syria, Turkey, The United Arab Emirates, the United Kingdom and the United States. See CNN.com, \textit{Gulf War Facts}, http://www.cnn.com/SPECIALS/2001/gulf.war/facts/gulfwar/ (last visited Feb. 10, 2006). However, the selection of Commissioners was not limited to nationals of these countries. For example, the Category ‘D1’ Panel included Commissioners from India and Sierra Leone, and the three Category ‘E3’ Commissioners were from Austria, New Zealand and Thailand (the author worked with both of these Panels of Commissioners). More importantly, the individuals who were awarded compensation by the Commission were not exclusively nationals of the 34 coalition members. Successful claimants included nationals from Bolivia, Brazil, Kenya, Malaysia, Nepal, and South Africa. See Category “C” Report, supra note 16, at Annex II.

Indeed, even stateless persons were eligible for, and awarded, compensation, such as the Bedouns (a group of Arabic people who were residents of Kuwait but who were not nationals of any state). See U.N. Compensation Commission, Governing Council, \textit{Decision Concerning the Filing of “Late” Claims of the “Bedoun” Taken by the Governing Council of the United Nations Compensation Commission at its 137th Meeting}, on 2 July 2004, U.N. Doc. S/AC.26/Dec.225 (July 2, 2004) [hereinafter Bedoun Decision] (also containing definition of “Bedoun” which means “without” in Arabic). This fact by itself would seem to dispel any notion that the Commission was formed as a mechanism to reward the victorious nations. Thus, the UNCC was unprecedented in the sense that the compensation scheme was designed with the global community in mind.\textsuperscript{22} See O’Brien, supra note 21, at 4.

\textsuperscript{23} In contrast to the more than 2.68 million claims submitted and resolved by the Commission, the following list sets forth the approximate number of claims received or resolved by a sample of other claims tribunals:

- Tribunal established under Article 7 of the Jay Treaty of 1794: 565. See Bederman, supra note 13, at 17.
- U.S.-Mexico Claims Commission created in 1868: 2,000. \textit{Id.}
- Claims proceeding between Poland and Germany concerning Upper Silesia, as established in the Geneva Convention of May 15, 1922: 10,000. \textit{Id.}

Table 1

<table>
<thead>
<tr>
<th>Number of Claims Resolved</th>
<th>Compensation Sought ($</th>
<th>Number of Claims Awarded</th>
<th>Compensation Awarded ($)</th>
<th>Compensation Paid ($)</th>
<th>Unpaid Balance ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2,686,107</td>
<td>352,531,407,513</td>
<td>1,550,871</td>
<td>52,467,108,060</td>
<td>19,370,249,481</td>
<td>33,096,858,579</td>
</tr>
</tbody>
</table>

B. The Individual Claims

Claims for compensation were filed by individuals, corporate entities, governments and international organizations.25 Claims by individuals were placed into Categories A, B, C, and D.26 Category A was established to compensate those who were forced to depart from Iraq or Kuwait during the period from August 2, 1990, to March 2, 1991 (the date on which Iraq's occupation came to an end).27 Compensation for Category A claims was set in fixed amounts ranging from $2,500 to $4,000 for individuals and from $5,000 to $8,000 for families, and was designed to assist those who were forced to evacuate by providing a lump sum payment as a form of humanitarian assistance.28 Category B was reserved for "claims for the payment of fixed amounts to any person who, as a result of Iraq's unlawful invasion and occupation of Kuwait, suffered serious personal injury, or whose spouse, child, or parent died."29 Category C was reserved for claims by individuals

25 See Wühler, supra note 8, at 253, 256.
26 Id. at 255. Categories E and F were reserved for corporate entities, governments and international organizations. Id. at 255-56.
28 Category "A" Report, supra note 27, at 7-10; Wühler, supra note 8, at 255. The need for this category of claims and the humanitarian urgencies involved resulted from the mass exodus from Kuwait of foreign nationals fleeing the war zone. Before the invasion, there were approximately 1.3 million expatriate workers and their dependents in Kuwait; of this number, approximately 90% fled Kuwait after the invasion. See Category "A" Report, supra note 27, at 10. The vast majority of departees were destitute with little or no means of returning to their home countries. Id. at 25. The claim files revealed that most of the departees were nationals of Bangladesh, Egypt, India, Pakistan, the Philippines and Sri Lanka. Id. at 27.
29 U.N. Compensation Commission, Governing Council, Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), at 6, U.N. Doc. S/AC.26/1994/1 (May 26, 1994) [hereinafter Cate-
for damages up to US$100,000.\textsuperscript{30} Category D was reserved for claims by individuals for damages in excess of US$100,000.\textsuperscript{31} The only categories of individuals who were barred from receiving any compensation from the Commission were citizens of Iraq\textsuperscript{32} and members of the allied military forces that liberated Kuwait (except for certain prisoners of war).\textsuperscript{33}

The number of individual claims that were timely filed with the Commission were as follows: (i) almost 930,000 category A claims seeking an

gory “B” Report]; see also Wühler, supra note 8, at 255. Compensation for Category B claims was set in fixed amounts of $2,500 for individuals and up to $10,000 for families. Id. \textsuperscript{30} Category “C” Report, supra note 16, at 6; see also Wühler, supra note 8, at 255.


Category C and D claims were broken down into the following loss types:

- C1, D1: Departure costs, and damages for being taken hostage, other illegal detention, and forced hiding.
- C2, D2: Damages for personal injury.
- C3, D3: Death claims.
- C4, D4: Personal property claims.
- C5, D5: Loss of bank accounts, stocks and other securities.
- C6, D6: Loss of income.
- C7, D7: Real property losses.
- C8, D8/9: Individual business losses.
- D10: Losses arising from relief payments.

Plus, a “catch-all” in Categories C and D for all other loss types.

\textsuperscript{32} However, citizens of Iraq who also held “bona fide nationality” of another state were eligible. See U.N. Compensation Commission, Governing Council, Criteria for Expedited Processing of Urgent Claims, ¶ 17, U.N. Doc. S/AC.26/1991/1 (Aug. 2, 1991) [hereinafter Criteria for Expedited Processing].

\textsuperscript{33} Members of the Allied Coalition Armed Forces were not eligible for compensation unless the following three conditions were met:

(a) the compensation is awarded in accordance with the general criteria already adopted;
(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).

aggregate amount of approximately $3.5 billion in compensation; (ii) 6,225 category B claims seeking an aggregate amount of approximately $16 million in compensation; (iii) almost 420,000 category C claims seeking an aggregate amount of approximately $9 billion in compensation (plus a consolidated claim submitted by the Government of Egypt on behalf of over 900,000 workers, which comprised 1,240,000 individual claims with an asserted aggregate amount of approximately $490 million); and (iv) approximately 10,570 category D claims seeking an aggregate amount of approximately $10 billion.

The individual claims in Categories A, B, and C were resolved first (before the resolution of claims in the other categories) because they were deemed to be of a more urgent nature in light of the humanitarian needs of the claimants. As Norbert Wühler, the former chief of the Legal Services Branch of the Commission, observed, "[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." All of the individual claims in these categories were resolved, and all of the successful claims were paid, by 2000 (with the exception of certain late-filed claims).

---

34 There were more claims than individuals because individuals had the right to submit claims in more than one category. For example, one person could have submitted a Category A claim for departure, a Category B claim for death of a relative, and a Category C claim for loss of personal property.

35 Wühler, supra note 8, at 255. The deadline for the filing of individual claims was January 1, 1996. See Bedoun Decision, supra note 21, at 1.

36 See David D. Caron & Brian Morris, The UN Compensation Commission: Practical Justice, Not Retribution, 13 EUR. J. INT'L L. 183, 187 (2002). Due to the large number of these claims, "a detailed individual review of these urgent individual claims was neither warranted nor feasible. To deal with these claims in an efficient, fair and impartial manner, the Commission therefore employed a variety of techniques that fall within the concept of 'mass claims processing,' including computerized matching of claims and verification information, sampling and statistical modelling." Wühler, supra note 8, at 261-62. The Category A Panel, for example, applied a sampling methodology to certain groups of claims. See U.N. Compensation Commission, Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims), ¶ 8, U.N. Doc. S/AC.26/1995/4 (Oct. 12, 1995) [hereinafter Fourth Category A Report].

37 Wühler, supra note 8, at 261. The decision to give priority to these claims is reflected in Criteria for Expedited Processing, supra note 32; Rules, supra note 12, arts. 28, 37.

38 See Caron, United Nations Compensation Commission, supra note 2, at 319. After the filing deadline, the Commission accepted an additional 43,806 Category C claims and 2,354 Category D claims, which were filed under the "late-claims programme" for Palestinians who
As of September 15, 2005, the Commission had resolved and awarded the following with respect to all claims in Categories A, B, C, and D:

Table 2

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Claims Resolved</th>
<th>Number of Compensation Sought ($S)</th>
<th>Number of Compensation Claimed ($S)</th>
<th>Compensation Paid ($S)</th>
<th>Unpaid Balance ($S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>923,158</td>
<td>3,455,092,500</td>
<td>859,399</td>
<td>3,212,887,500</td>
<td>9,018,926</td>
</tr>
<tr>
<td>B</td>
<td>5,734</td>
<td>20,100,000</td>
<td>3,941</td>
<td>13,450,000</td>
<td>0</td>
</tr>
<tr>
<td>C</td>
<td>1,736,265</td>
<td>11,503,436,347</td>
<td>672,794</td>
<td>5,198,753,631</td>
<td>6,354,051</td>
</tr>
<tr>
<td>D</td>
<td>13,863</td>
<td>16,539,225,345</td>
<td>10,347</td>
<td>2,747,412,546</td>
<td>602,572,852</td>
</tr>
</tbody>
</table>

II. THE CHALLENGES IN ESTABLISHING AND OPERATING WITHIN A FRAMEWORK FOR THE FAIR RESOLUTION OF INDIVIDUAL CLAIMS

A. The Challenges Faced By Individual Claimants

To a distant observer, the preparation of a claim might appear to be a simple, mechanical process of following the instructions on a pre-printed
form supplied by the Commission. However, the realities of preparing a claim were anything but simple. In fact, the individual claimants were faced with difficult challenges in their attempts to support their claims. There has been little discussion in the commentary surrounding the Commission of these difficulties, but they must be highlighted in order to understand the hard choices the Commission faced in structuring the claims review process.

One significant difficulty was the fact that in many instances the individual claimants, through no fault of their own, did not have the means to support their claims. The individual claimants were civilians who found themselves in an active war zone. The Category C Panel noted the problems that faced these claimants in preparing claims for losses. The invasion took place at the height of summer when many Kuwaitis were on vacation abroad. Such persons would have had no reason to have documentation with them to support their claims for losses. Further, the looting, vandalism, and destruction of property in Kuwait was extensive, and many homes were gutted or left in complete disarray. Thus, some or all of the documents and other forms of proof to substantiate a claim were looted, destroyed, or were lost during the efforts to clean up the damage and debris.

The Category D Panel similarly observed that given the difficult circumstances caused by the invasion and occupation of Kuwait, claimants could not, and could not be expected to, document all aspects of their claims. The Panel acknowledged that in many cases, relevant documents did not exist, had been destroyed, or were left behind by claimants who fled Kuwait or Iraq.

The Category B Panel (death claims) attributed the "scarcity of evidentiary support" to the circumstances in Kuwait and Iraq during the invasion and occupation. Echoing the comments of the other panels, the Category B Panel acknowledged that thousands were forced to flee or hide, or were held captive, while others chose not to or could not return. Given the general emergency conditions, it did not surprise the Panel that individual claimants would not have primary evidence of their losses, damages, or injuries.

---

40 Category "C" Report, supra note 16, at 27.
41 Id.
42 Id.
43 Id.
44 Category "D" Report, supra note 31, ¶ 72.
45 Id.
46 See Category "B" Report, supra note 29, at 33-34.
47 Id.
48 Id.
Of particular significance to the Category B Panel was the absence of medical records in many instances.\(^4\) Large numbers of doctors, nurses and hospital administrative staff had to flee Kuwait in the aftermath of the invasion, and hospital administrative services were forced to operate much below their normal capacity.\(^5\) Accordingly, the contemporaneous preparation of doctor’s reports, medical certificates and records, or death certificates was severely limited, and in a significant number of cases medical reports did not exist or records were lost.\(^6\)

The Category C Panel also discussed the effects of the collapse of the health care system. Like the Category B claimants, many individual claimants in Category C were unable to provide documentation of personal injuries prepared by health care professionals.\(^7\) The Category C Report noted that in many instances, doctors were forced to treat patients outside of the medical facilities because the facilities were inaccessible due to a lack of ambulance services.\(^8\) Under the emergency conditions, few doctors were concerned with preparing medical records.\(^9\) In other instances, the Iraqi authorities had issued arrest warrants for persons who also needed medical attention, and doctors generally did not prepare medical records for such patients.\(^10\) Another set of issues was raised by those who had been injured during the course of detention by Iraqi authorities (including injuries suffered as a result of torture) and by those who had been injured while in hiding.\(^11\) Not surprisingly, such injuries were not the subject of contemporaneous medical documentation.\(^12\)

In addition to the problems of proving death and personal injury claims, individuals also faced difficulty in proving personal property losses. The Category C Panel summarized the situation as follows:

First, to the extent that claimants kept relevant records, in the majority of instances it appears that these records were destroyed or lost during the looting that accompanied the Iraqi invasion of Kuwait. Second, large numbers of claimants left Kuwait and Iraq under urgent circumstances. At the time of their departure it is unlikely that they would have had the foresight, 

\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
wherewithal or concern to collect and carry documentation, to the extent that they possessed any, relevant to establishing their future claim. Third, many claimants were outside of Kuwait and Iraq when the invasion occurred. These persons are unlikely to have had documentation relevant to their claim in their possessions. Fourth, of the expatriates who left Kuwait and Iraq, a very large number have not returned to these countries, and thus, are unable to provide primary evidence in support of their losses. Fifth, Kuwaitis and expatriates who have returned, often could not gather any form of tangible evidence in support of their losses, such evidence having been lost in the massive clean-up effort that took place in Kuwait following the withdrawal of Iraqi troops.58

The Panels’ respective reports describe a situation of wartime chaos in which civilians were thrust into life-and-death situations while the infrastructure of their surroundings was being destroyed. These same civilians would later be given an opportunity to seek compensation for their losses through the Commission’s proceedings. However, in many instances, they would be faced with the challenge of proving losses without primary evidence.

The approval of Resolution 687 reaffirming Iraq’s liability under international law for injuries and loss inflicted relieved claimants “from the otherwise heavy burden of proving the liability of a sovereign state.”59 However, each claimant was still faced with the burden of demonstrating to his or her panel of Commissioners the circumstances surrounding the loss (i.e., whether the loss was a direct result of Iraq’s invasion and occupation of Kuwait) and the actual amount of loss.60 This was undeniably a major problem for the individual claimants—many of whom had lost everything, including the ability to prove their loss.

58 Id. at 141.
59 Kazazi, supra note 19, at 221; see also Bederman, supra note 13, at 19 (Security Council Resolution 687 “obviated the need for claimant countries [and claimants] to litigate whether there had been a predicate act implicating Iraq’s state responsibility”).
60 See Category “C” Report, supra note 16; see also Category “D” Report, supra note 31, ¶ 73; Kazazi, supra note 19, at 221. Although set in the context of discussing a large corporate claim, one commentator’s description of the standards of proof for supporting a claim is also relevant:

There are three preliminary questions of law that the panels must decide prior to moving to the next stage of its inquiry into the compensability of the claims. First, does the claim meet the minimum pleading and evidentiary standards set forth in the Rules? Second, does the asserted loss fall within the Commission’s jurisdictional grant in Resolution 687? Third, does the asserted loss meet the Governing Council’s criteria for compensation?

O’Brien, supra note 21, at 15-16 (the reference to the Rules is to the Provisional Rules for Claims Procedure, see Rules, supra note 12).
B. The Challenges Faced by the Government of Iraq

The individual claimants were not the only parties who found it difficult to prove the facts of their situation. The Government of Iraq faced similar problems. It was charged with liability for millions of individual claims. However, the Government of Iraq was liable for only the damage that it caused, and had no obligation to pay for any other damage. The problem, however, was that it was not in a position to provide evidence in support of its defense. Indeed, according to two observers, "in most cases Iraq [had] no particular knowledge of the loss that was suffered allegedly as a result of its invasion and occupation of Kuwait."61 This contention makes intuitive sense. An official representative of the Government of Iraq would have no way of knowing which particular civilian individuals in Kuwait might have been the subject of Iraqi aggression, or which particular Iraqi military personnel might have been involved in causing injury or damage to any particular civilian. Moreover, it is unlikely that a member of Iraq's armed forces would admit to his government that he was involved in a particular act causing injury or loss to a civilian, especially if a war crime may have been committed. Thus, Iraq was in a situation where it lacked the evidentiary foundation to rebut claims by individuals that its forces caused damage to them.

In addition to these problems of an evidentiary nature, Iraq faced challenges within the framework of the claims resolution process due to its status as the defeated, aggressor nation. As one commentator observed, "[t]he fact is that Iraqi claims will be processed by individuals whom Iraq has had no role in choosing, and whose decisions will be reviewable by an organ that is the alter-ego of the Security Council which waged war against Iraq."62 Moreover, Iraq was not a member of the Governing Council and none of its citizens was appointed as a Commissioner or even as a member of the secretariat.63

61 Caron and Morris, supra note 36, at 192.
62 Bederman, supra note 13, at 15; see also Garmise, supra note 21, at 874 (noting that Iraq had "been excluded from the planning of the claims system.").
Iraq's situation led to pointed criticism that the Commission might serve as a mere "rubber stamp" for the approval of claims. Garmise, supra note 21, at 870; see also Wühler, supra note 8, at 271 (recognizing concern that the Commission might be viewed as an instrument of "victor's justice"). The criticisms were based on concerns that unjust awards would "unjustly punish future generations of Iraqi citizens for the recent actions of its leaders." Garmise, supra note 21, at 842. The Commission and the Commissioners were no doubt aware of such criticisms, which would have heightened the need to achieve the proper balancing of rights between claimants and the Government of Iraq.
63 Bederman, supra note 13, at 10. These apparent concerns were noted by one commentator: "To begin with alleged procedural flaws, the main criticism concerns Iraq's lack of standing
Perhaps of most significance to Iraq’s ability to defend itself was the fact that its involvement in the process for the evaluation of claims was limited. As stated by the Category D Panel: “The Panel is also mindful that the Government of Iraq has, under the Rules, limited procedural opportunities to put its case and make submissions.”64 An examination of the Rules demonstrates this point. Article 35 of the Rules explicitly addresses the nature and type of evidence to be submitted by claimants.65 There is no provision in Article 35, however, that explicitly addresses submission of evidence by Iraq. The only provision that could arguably provide for Iraq’s right in this regard is Article 36, entitled “Additional Information,” which states:

A panel of Commissioners may:

- in unusually large or complex cases, request further written submissions and invite individuals, corporations or other entities, Governments or international organizations to present their views in oral proceedings;

- request additional information from any other source, including expert advice, as necessary.66

in the UNCC. This is obviously a very sensitive matter, as it deals with fundamental values of fairness and due process.” Gattini, supra note 10, at 168. Iraq’s lawyer used stronger language to describe the Commission:

To sum up, the UNCC system is fundamentally flawed: it is a system created by a political body without the consent of the State concerned. It determines the responsibility of a sovereign State by reference to rules fixed by this political body in the absence of the debtor State; it applies these rules in a procedure in which this State has no proper standing and is deprived of its natural rights of defence; and it makes decisions in an obscure process where the responsibilities of the Secretariat, the Panels and the Governing Council are indistinguishably confused.


64 Category “D” Report, supra note 31, ¶ 76.

65 See Rules, supra note 12, art. 35(1), which states: “Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted.”

There are two significant features in the drafting of Article 36. The first is the use of "may" in the opening phrase. The second is that Iraq is not specifically mentioned. In other words, Iraq's right to participate was at the discretion of the Commissioners, and Iraq had no greater rights than other entities or governments.

The silence of the Governing Council in addressing the Government of Iraq's right to submit evidence dictated the practice of the Commissioners. Claims filed in Categories A, B and C were not sent to Iraq for its response. As for Category D claims, only claims that were considered "unusually large or complex" (which were relatively few in number) were sent to Iraq for its response. Thus, the policies governing the work of the Commission and the actual practice demonstrate that the meaning of "limited" involvement by Iraq meant that Iraq did not have an opportunity to review or respond to the vast majority of individual claims.

67 The Governing Council set forth the specific policies and procedures for the review of claims in Categories A, B, and C, and the sending of these claims to Iraq for its response was not required. See Criteria for Expedited Processing, supra note 32; see also Rules, supra note 12, art. 35(2). Pursuant to these guidelines, such claims were not sent to Iraq.

68 See, e.g., U.N. Compensation Commission, Governing Council, Report and Recommendations Made by the "D1" Panel of Commissioners Concerning Part Three of the Nineteenth Instalment of Individual Claims for Damages above USD 100,000 (Category "D" Claims), ¶ 5, U.N. Doc. S/AC.26/2004/11 (Sep. 23, 2004). One example of a Category D claim that was sent to the Government of Iraq for its review and response was a claim for millions of dollars in the 19th instalment. See U.N. Compensation Commission, Governing Council, Report and Recommendations Made by the "D1" Panel of Commissioners Concerning Part Two of the Nineteenth Instalment of Individual Claims for Damages above USD 100,000 (Category "D" Claims), ¶¶ 25-38, U.N. Doc. S/AC.26/2004/6 (July 2, 2004). This claim demonstrates that it is not universally true that Iraq was unable to provide a specific response to every individual claim. In this instance, Iraq was given an opportunity to review and respond to the claim, and was invited to appear at an oral proceeding on the claim. Id. Iraq responded to the claim and appeared at the oral proceeding. Id. The claim was awarded nothing by the Panel. Id. The claim arose out of a commercial relationship with Iraq prior to the invasion of Kuwait. Thus, Iraq apparently had knowledge of the facts underlying the claim by virtue of its status as a commercial counter-party. The fact that this claim arose out of a contractual relationship puts it in a different posture from the vast majority of other claims, which arose out of conduct that can be characterized as criminal or tortious on Iraq's part. Cf. Merritt B. Fox, Imposing Liability for Losses from Aggressive War: An Economic Analysis of the UN Compensation Commission, 13 EUR. J. INT'L L. 201 (2002) (U.K.) (suggesting the relevance and applicability of an analytical framework designed for intentional torts to the conduct of Iraq).

69 There were claims, however, where Iraq's participation was much more involved, including the claim described in note 68. Such claims were more typically found in the categories reserved for corporations and governments. For example, several governments of neighboring countries filed claims for environmental damage seeking compensation in the aggregate amount of almost $50 billion, and Iraq actively participated in the process through responsive
C. The Challenges Faced by the Commission

As outlined above, before the first claim was even decided, the Commission was confronted, on the one hand, with cases in which numerous individuals who had suffered undeniable losses might not be able to prove their claims, and, on the other hand, the situation of the Government of Iraq, which was not in a position to rebut the claims before a commission that had been imposed on it. Thus, the Commission was required at the outset to define a procedure that would achieve a balance in the claims review procedure that would adequately protect the respective rights involved. According to Professor David Caron, a former Commissioner, the Commission "knew that delivering individualized due process on two million claims would not be possible. It also knew that a deliberative process was required. Its challenge thus was to find neither rough justice nor perfect justice, but rather practical justice."

The Security Council was aware from the outset of the need for a deliberative process, as reflected in the May 2, 1991, report of the Secretary-General to the Security Council, in which he stated that "[g]iven the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element." The Commissioners themselves were also mindful of and expressly recognized the balance they would need to achieve:

The Panel views its role as balancing the interests of claimants fleeing a war zone often under difficult circumstances and who are there-

---

70 One commentator described the issue as "the question of how much participation in the process that adjudicates such claims need be given a state guilty of aggressive war for the standards of minimal procedural fairness to be met." Fox, supra note 68, at 202. Another commentator described the situation in the following manner:

[T]he establishment of the UNCC did not have as a goal the sanctioning of Iraq, but rather the effective handling of millions of claims by establishing a regime which could at one and the same time do justice to the rights of the injured and take into account the needs of Iraq's people.

Gattini, supra note 10, at 164.

71 The Commissioners also had to develop their approach with due regard to time. They were required to strike the proper balance "between the search for individual justice and fairness and the requirement of an expedient process that resolves the whole claims population within a reasonable time period." Wüßler, supra note 8, at 265-66.

72 Caron, United Nations Compensation Commission, supra note 2, at 316.

73 Report of the Secretary-General, supra note 9, ¶ 20, at 7.
fore in many cases unable to submit extensive evidence to document legitimate claims, with the interests of the Government of Iraq, which is only liable for damage and loss caused as a direct result of the invasion and occupation of Kuwait.\textsuperscript{74}

D. \textit{The Results Achieved by the Commission}

By many accounts, the Commissioners deciding the individual claims were able to balance the rights of the individual claimants and the Government of Iraq to accomplish the goal of compensating losses that were the direct result of Iraq’s invasion and occupation of Kuwait. Professor Caron has remarked that:

The first phase of the UNCC’s work is one of the most significant and underreported success stories of the United Nations. Over two and a half million A, B and C claims were filed. The merits of all of these claims were determined and all the monies awarded were paid to the individual claimants within less than 10 years after the liberation of Kuwait. The guiding principle to the approach taken by the UNCC to the A, B and C claims was one of ‘practical justice:’ that is, a justice that would be swift and efficient, yet not rough. The Commission placed these claims on a fast track, resolving them through ‘mass claims processing’ techniques, including clearly defined evidentiary standards and fixed amounts of damage for various forms of injury. Large numbers of individuals suffered the greatest and most direct losses as a result of Iraq’s invasion and occupation of Kuwait and the dire situation in which many of those individuals found themselves demanded swift action. The Commission’s response was appropriate and is an unparalleled success in the history of claims resolution.\textsuperscript{75}

Professor Caron more recently noted: “The UNCC’s resolution of humanitarian claims in Phase One was a major accomplishment. Just about every person seriously hurt by the conflict in the region received some assistance in getting back on their feet. It was a huge success for the U.N. and is what the organization is all about.”\textsuperscript{76}

With regard to Category A claims in particular, the first Executive Secretary of the Commission observed:

\textsuperscript{74} Category “D” Report, supra note 31, ¶ 76.
\textsuperscript{75} Caron and Morris, supra note 36, at 187-88.
\textsuperscript{76} Caron, \textit{United Nations Compensation Commission}, supra note 2, at 320.
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.  

He went on to state that the awarded 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.”

Given the significant challenges in constructing a fair and time-sensitive framework for the resolution of the individual claims, it is worth focusing attention on the features of the framework that enabled the results. The results were achieved through deliberate policy choices regarding basic issues of procedure and proof. The next section examines two key features of the Commission’s framework.

III. THE FRAMEWORK AND METHODS USED TO PROTECT THE INTERESTS OF THE INDIVIDUAL CLAIMANTS AND THE GOVERNMENT OF IRAQ

The Commission could have proceeded down a variety of paths as it established its framework, but it had to make crucial choices to achieve a result that was fair, both substantively and procedurally. In order to protect the interests of the individual claimants and the Government of Iraq, the Commission needed to resolve the following issues: (1) whether the Commission’s procedures would be based on an inquisitorial or adversarial model; (2) the extent to which the claimant and the Government of Iraq would be involved in the procedure; (3) to what extent the process would rely on evidence beyond the submission of documents by the claimants and Iraq; and (4) the establishment of the appropriate level of evidentiary standards and rules. This article concludes that in assessing the merits of the procedures and framework implemented by the Commissioners in deciding individual claims, two

78 Id.
79 Wühler, supra note 8, at 267.
important and interrelated features deserve particular attention: (A) the use of an inquisitorial process to resolve the claims, as opposed to an adversarial process, and (B) the reliance on fact-finding reports prepared by disinterested third parties to establish an evidentiary foundation for individual claims.

A. The Use of an Inquisitorial Process

One of the crucial choices the Commission made was to employ an inquisitorial process instead of an adversarial one. Dr. Wühler explained: "There is no adversarial process; rather it is the responsibility of the Commission, and in particular the Commissioner panels, to establish the facts and evaluate the claims, and it is up to the panels to seek the information and documentation required. As such, the process is inquisitorial." In this process, the Commissioners assumed an active investigative and fact-finding role in reviewing and verifying claims that went beyond the role of judges in traditional types of adversarial proceedings. The Category D Panel described its role by noting that "the Commission is not an arbitral tribunal before which parties appear; rather it performs an essentially fact-finding function of examining and verifying claims and evaluating the quantum of losses." The use of an inquisitorial type of procedure for the claim resolution process has been described as the "signal distinction" of the Commission. Clearly, given the large number of claims, the use of an adversarial process would have been impractical. Even putting to one side the logistical impracticalities, an adversarial process would not have been able to achieve fundamental fairness for the individual claimants or Iraq. An adversarial system would have likely resulted in patently unfair outcomes due to decisions based primarily on technical grounds, rather than the substantive merit of the claims.

80 Id. "With Iraq's legal responsibility and liability established by the Security Council and accepted by Iraq, the UNCC is not a court or tribunal with an elaborate adversarial process. And considering the number of claims, it could not perform such a function in a reasonable time and at justifiable cost." Id. at 261.
81 Mojtaba Kazazi, Environmental Damage in the Practice of the UN Compensation Commission, in ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW – PROBLEMS OF DEFINITION AND VALUATION, 114 (Michael Bowman & Alan Boyle eds., 2002).
82 Category "D" Report, supra note 31, ¶ 71, at 21.
83 Bederman, supra note 13, at 15.
84 Caron and Morris, supra note 36, at 191 (noting that case-by-case adjudication would be impractical given the number of claims). This point is especially true in light of the Commission's need to act with a "due regard to time." See supra note 71.
An adversarial system could have resulted in the denial of individual claims due to the failure of individual claimants to provide evidence to support their claims. This point can be illustrated by the following hypothetical scene in an adversarial proceeding:

_A Kuwaiti claimant testifies in a judicial tribunal that she fled to her sister’s house on August 2, 1990 upon hearing of the invasion, and hid there for 30 days. Upon returning to her house, she found that it had been set on fire and all her personal property was missing. She seeks compensation for her losses._

_Iraq’s Lawyer begins his cross-examination._

_Iraq’s Lawyer:_ “Were you at your house when it was allegedly set on fire?”

_Claimant:_ “No. As I said, I was hiding at my sister’s house.”

_Iraq’s Lawyer:_ “Were you at your house when your property was allegedly stolen?”

_Claimant:_ “No. I just told you why.”

_Iraq’s Lawyer:_ “So you didn’t see who set fire to your house, correct?”

_Claimant:_ “Yes, that’s right.”

_Iraq’s Lawyer:_ “And you didn’t see who stole your property, correct?”

_Claimant:_ “Yes.”

_Iraq’s Lawyer:_ “More specifically, you didn’t see any Iraqi troops set fire to your house, isn’t that correct?”

_Claimant:_ “Yes, but we all know they did it.”

_Iraq’s Lawyer:_ “Please, it’s a simple yes or no question. Did you see any Iraqi troops set fire to your house?”

_Claimant:_ “No.”
Iraq’s Lawyer: “Did you see any Iraqi troops steal your property?”

Claimant: “No.”

Iraq’s Lawyer: “Have you brought anyone here with you today who is going to testify that they saw Iraqi troops set fire to your house or steal your property?”

Claimant: “No. My neighbors fled like me or were killed by your client.”

Iraq’s Lawyer: “Move to strike everything after ‘no,’ Your Honor.”

Court: “Granted.”

Iraq’s Lawyer: “Your Honor, at this time, we move to dismiss these claims for failure to establish an essential element of the claim—namely, that Iraq caused the loss.”

Court: “Granted. Claim dismissed.”

85 Section III.B, infra, discusses how the Panels actually addressed this problem of proving causation.

Admittedly, this hypothetical is an oversimplified example of the claimant’s burden. It does not reflect that Iraq was liable for damages resulting from “the breakdown of civil order in Kuwait” following the invasion. See Criteria for Expedited Processing, supra note 32, ¶ 18, at 4; see also John R. Crook, The United Nations Compensation Commission – A New Structure to Enforce State Responsibility, 87 AM. J. INT’L L. 144, 149 (1993) (“[a] belligerent has particular duties to maintain law and order in territory it occupies.”) (citing Hague Convention (No. IV) Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631). Thus, returning to the hypothetical, it could be argued that the claimant need not establish that it was Iraqi troops who were the cause of her losses. It could be argued that the specific identity of the culprits is immaterial because it was all due to a breakdown in civil order under Iraqi occupation.

However, even if this were the case, how would the claimant prove the breakdown of civil order? Would she need to provide evidence of the situation in her neighborhood before the invasion? Would she need to show the condition of her neighbors’ houses to demonstrate that her losses were the result of a breakdown of general civil order, as opposed to a targeted attack on her house? Would she need to prove Iraqi authorities made no effort to stop the destruction? If the answer is yes to these questions, how would an individual claimant go about doing so? These issues demonstrate that the burdens imposed by an adversarial system may have been too onerous to overcome by an individual claimant, despite the merits of the claim.
As this hypothetical shows, even though the parties may have “known” that the damage was caused by Iraq, in an adversarial system “knowing” something and “proving” it are two entirely different matters. In an adversarial procedure, individuals’ claims might have been rejected on grounds unrelated to the substantive merits. Moreover, Iraq might have prevailed due to its destruction of the claimants’ ability to prove their claims, thus unjustly benefiting from the acts that gave rise to its liability in the first place.

An alternative hypothetical scenario might have unfairly prejudiced Iraq. In recognition of the plight of the individual claimants, the tribunal in an adversarial system could have decided that the issue of causation was a rebuttable presumption in favor of the claimants, with the burden on Iraq to show that it did not cause the claimed losses. The likely result would have been that Iraq would be unable to respond in any meaningful way because it would have no evidence that its troops were either involved or not involved in any particular act of destruction, with respect to any particular individual. Thus, Iraq’s inability to defend itself would have been the basis for liability—again, a ground for decision unrelated to the substantive merits.

This hypothetical also does not take into account the possibility of an American-style class action suit or the possibility of findings based on representative samplings of claimants (which were discussed by the Category A Panel in the context of precedential examples of sampling methodologies to be applied to certain Category A claims). See Fourth Category A Report, supra note 36, ¶¶ 11-34. However, the need for a class action or a representative sampling to remedy the plight of an individual claimant emphasizes the fact that any given individual would not be able to establish the necessary factual record.

This need also highlights the benefits of an inquisitorial system over an adversarial system in this instance. The adversarial system would need a well-organized claimants’ bar motivated by monetary compensation with significant resources (both financial and logistical) to document events in a war zone. Iraq, in turn, would have to be given the opportunity to prepare its own documentation of events in response. Such a situation would either result in a tremendous incurring of expenses by both sides, or the inability of one side or the other to prepare an adequate documentation—thereby leading to a decision based on a party’s inability to prosecute or defend, a non-substantive result. The combination of UN fact-finding and the inquisitorial process of the Commission was able to supply this documentation and lead to decisions based on the merits (as further discussed below).

Additionally, in an American-style class action, how would a class be defined and how many classes would there be? One for people who hid, another for people who fled, another for those taken hostage, another for Kuwaitis who were specifically targeted by Iraq, another for those with personal injuries, and yet another for those whose relative was killed? What would be the plight of an individual claimant if he or she did not fit into a class? Any use of an adversarial type of proceeding would raise a multitude of thorny issues that are beyond the scope of this article—not least of which is the fact that class action-styles of lawsuit have been rejected by many of the world’s advanced legal systems. See generally Michele Taruffo, Some Remarks on Group Litigation in Comparative Perspective, 11 DUKE J. COMP. & INT’L L. 405, 413 (2001) (discussing resistance to group litigation and its possible sources).
In contrast to this hypothetical situation, the Panels in fact regularly acted in a manner to protect Iraq’s interests and denied non-meritorious claims on the merits. Furthermore, Iraq’s inability to respond was never a factor in the actual practice of the Panels. For example, the Category D Panel rejected numerous claims on the merits as a matter of ordinary practice, even though Iraq was not in a position to contest the merits. As noted by Professor Caron, such decisions by the Commissioners exemplify “the important function the UNCC has played in both identifying unsubstantiated claims and reducing the amount of damages sought by particular claims.”

This observation is supported by the statistics. Over 1 million Category C claims received no compensation. The amount awarded for Category C claims was approximately $6 billion less than the amount sought, or, to put it another way, the award was approximately 45% of the amount sought. The amount awarded for Category D claims was approximately $13 billion less than the amount sought, and was approximately 20% of the amount sought.

In reality, neither the claimants nor Iraq were in a position to present a complete factual showing in support of their positions due to the chaos and destruction of the wartime circumstances. The inquisitorial type of process remedied the situation by empowering the Commissioners to engage in their own fact-finding. The panels had the authority to develop the factual record through the hiring of experts, and they exercised that authority. The Categories A, B, and C Panels sought and received expert advice from medical doctors, labor law experts, statisticians and other experts. The Commissioners also authorized technical fact-finding missions to Kuwait and other countries to investigate individual claims. By using this authority to engage

---

88 See Table 2 supra p. 152. Claims received no compensation for numerous reasons, such as the failure to establish causation or the fact of loss.
89 Id.
90 Id.
91 See Kazazi, supra note 19, at 224.
92 Id. See, e.g., Category “C” Report, supra note 16, at 272, which lists some of the experts who advised the Panel. In Category B, the Panel hired a medical doctor to conduct a preliminary examination of the claims. See Category “B” Report, supra note 29, at 9.
93 See, e.g., U.N. Compensation Commission, Governing Council, Report and Recommendations Made by the “D1” Panel of Commissioners Concerning Part One of the Nineteenth Installment of Individual Claims for Damages above USD 100,000 (Category “D” Claims), ¶
in fact-finding, the Commissioners were able to supplement the factual record and develop facts that the claimants and Iraq were unable to provide.

This inquisitorial type of process served the interests of both the individual claimants and the Government of Iraq. Professor Gattini summed up this view by stating: "Until now, it has not been sufficiently noted that the UN management of Iraqi war reparations is as much a guarantee of Iraq’s interests as of those of the claimants, in that it deals with masses of potentially disruptive claims in an impartial and orderly manner." 94

B. The Use of Fact-Finding Reports Prepared by Disinterested Third Parties to Establish an Evidentiary Foundation for Individual Claims

Shortly after the liberation of Kuwait but before any claims were submitted, the UN commissioned several fact-finding studies ("Background Reports") to report on the conditions in Kuwait in the aftermath of war. 95 Few, if any, commentators have discussed the importance of these reports in establishing the factual record for the Commission. Nonetheless, the studies constituted an essential part of the record and provided the necessary factual foundation that enabled the Panels to reach their decisions.

The Background Reports have been singled out in this article because they were heavily and repeatedly relied upon by the Panels for Categories A,

94 Gattini, supra note 10, at 164.

The Background Reports include:

(a) ‘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. Martti Ahtisaari, Under-Secretary General for administration and management’ (S/22409) (the ‘Ahtisaari Report’); (b) ‘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’ (S/22535) (the ‘Farah Report’); (c) ‘Interim Report to the Secretary-General by the United Nations mission led by Mr. Abdulrahim A. Farah, former Under-Secretary General, assessing the losses of life incurred during the Iraqi occupation of Kuwait as well as Iraqi practices against the civilian population in Kuwait’ (S/22536) (the ‘Interim Farah Report’) . . . . (e) ‘Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kalin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67’ (E/CN.4/1992/26) (the ‘Kalin Report’).

Id. at 72 n.6.
B, C, and D to establish the factual record for their decisions.\textsuperscript{96} They established the factual and evidentiary foundations for the claims for departure costs,\textsuperscript{97} deaths,\textsuperscript{98} personal injuries\textsuperscript{99} and loss of personal property.\textsuperscript{100} The Category C Panel cited the Kalin Report as "the principal source of facts for the Panel's deliberations" for claims involving hostage taking, illegal detention and forced hiding.\textsuperscript{101} In reviewing claims for personal injury, the same Panel stated that the "lack of specific information characterizing such [per-

\textsuperscript{96} See Category "A" Report, supra note 27, at 24 n.26; Category "B" Report, supra note 29, at 11 n.17; Category "C" Report, supra note 16, at 60 n.129, 98 n.172.

\textsuperscript{97} See Category "A" Report, supra note 27, at 23 & n.26.

\textsuperscript{98} See Category "C" Report, supra note 16, at 116 & n.221.

\textsuperscript{99} "Even if the exact number may not be certain, the injuries suffered as a result of Iraq's invasion and occupation of Kuwait have been extensively documented in United Nations-sponsored reports . . . ." Id. at 98 (citing each of the Background Reports). Moreover, according to the Commissioners:

Thousands of civilians were arrested during the occupation, a substantial number of whom were taken to Iraq. Many detainees suffered injuries as a result of torture. Noting that 35 of the 47 detention sites throughout Kuwait were used for torture, the Kalin Report concludes that 'torture and cruel, inhuman and degrading treatment were systematically used during interrogations of those arrested during the ongoing occupation.'

\textsuperscript{100} The Commissioners noted:

According to several reports, the main causes of personal property losses in Kuwait were the looting and vandalism of personal and real property by members of the Iraqi occupying forces, pursuant to official orders, as well as unofficially. The [Background Reports] state that the seizure and destruction of private and public property -- particularly from warehouses, government ministries, public buildings, factories, plant sites and private residences of well-known Kuwaitis -- was carried out under specific plans and orders issued by the Iraqi authorities.

The more indiscriminate looting and vandalism of property, accounting for the bulk of personal property losses, is reported to have taken place at the 'unofficial' level. According to the [Background Reports], Iraqi soldiers on patrol and conducting door-to-door searches systematically ransacked entire neighbourhoods.

\textsuperscript{101} Id. at 82 n.138.
sonal injury] claims is placed in context by the findings in the Kalin Report," which "lends additional credibility to the assertions made by the claimants." For personal property losses, the Category C Panel stated that "[r]egarding the facts relevant to the main causes of personal property losses in Kuwait and Iraq as a result of Iraq’s invasion and occupation, the Panel relied principally on the following United Nations-sponsored reports: Ahtisaari Report, Kalin Report, [and the] Farah Report. The importance of the Background Reports was also highlighted by the Category D Panel, which stated that "the Background Reports . . . represent in themselves significant documentary evidence of the circumstances of the losses claimed and also provide the background within which to consider the evidence for the amount claimed." Indeed, the Category D Panel expressly stated that they were of "critical importance."

An important feature of the Background Reports was their preparation under the authority of the UN. They were not prepared by Kuwait, the direct object of the aggression, or on behalf of any other nation. They were the product of fact-finding missions by disinterested third parties. In addition, the reports were prepared contemporaneously with the underlying events—in the time immediately after the expulsion of Iraqi forces, when the destruction was being documented and catalogued.

The Background Reports established key portions of the factual foundation for the individual claims that the claimants were unable to provide themselves. As reflected by the Commissioners’ own statements in their reports, a particularly significant effect of the Background Reports was that they established the factual foundation for the finding of causation between the individuals’ losses and Iraq’s invasion and occupation of Kuwait.

More specifically, the Background Reports enabled the Commissioners to relax the evidentiary standards for individual claimants on a principled basis, a necessary feature of mass claims processing. The need for the relaxation of the standards was specifically discussed by the Category C Panel:

---

102 Id. at 109.
103 Id. at 132 n.258.
104 Category “D” Report, supra note 31, ¶ 73, at 22.
105 Id. ¶ 21, at 10.
106 The Background Reports were not the only reports that the Commissioners relied upon. See, e.g., Category “C” Report, supra note 16, at 59 n.129 (listing other reports, including reports prepared by the International Labour Office and the International Organisation for Migration). However, the Background Reports were singled out by the Commissioners for their significance.
The scarcity of evidentiary support where massive numbers of claims are involved is not a phenomenon without precedent in international claims programmes, in particular if the events generating responsibility have taken place in abnormal circumstances such as those prevailing in Kuwait and Iraq during the conflict. As one authority summarized:

An analysis of the practice of international tribunals regarding issues of evidence shows that tribunals often had to decide claims on the basis of meagre or incomplete evidence. It has been observed that the lowering of the levels of the evidence required occurs especially ‘in the case of claims commissions, which have to deal with complex questions of fact relating to the claims of hundreds or even thousands of individuals.’

The Panel finds that this observation is particularly apposite in connection with category ‘C’ claims, in light of the hundreds of thousands of claims to be resolved, the diversity of these claims and the claimant population, as well as the evidentiary considerations and questions of valuation involved.\(^\text{107}\)

The Background Reports provided the necessary contextual background for the claims, and filled in the gaps that could not be addressed by the claimants.\(^\text{108}\) By doing so, the claimants were thereby relieved of proving every essential element of their claims, such as causation. In the absence of such reports, the lowering of evidentiary standards would have led to decisions being made (for or against the claimants) on a materially incomplete factual record—an arbitrary outcome at best.

Despite the meager attention that has been paid to the Background Reports, this article contends that the resolution of individual claims could not have been accomplished in a principled way without them. Without the Background Reports, any given individual claimant would have had the difficult, if not impossible, task of establishing the complete factual record for his or her claim. For example, how would an individual seeking compensation for personal injuries be able to explain the absence of contemporaneous medical reports (which would be probative of the time and cause of injury)? How would this person be able to prove the collapse of the health care system to the point where such documentation was not prepared? At the time of

\(^{107}\) Id. at 28-29 (quoting DURWARD VALDAMIR SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 22 (rev. ed. 1975).

\(^{108}\) Id. at 27, 29.
the injuries, the claimant would certainly not have been in the frame of mind to start documenting the reasons for the absence of contemporaneous records. The difficulty, if not impossibility, of the situation would have been aggravated if the claimant had been one of the many uneducated and unskilled laborers in Kuwait at the time of the invasion. Such a claimant would have difficulties under the best of circumstances.109

It is not evident whether the Secretary-General or the Security Council (the ones who requested the Background Reports), or the authors themselves, specifically contemplated that the reports would ultimately provide crucial parts of the factual foundation for the resolution of individual claims. Whether the utility of the reports as factual support for the Commissioners was a result of deliberate design or a happy accident, one lesson was made clear: Any future proceeding or commission like the UNCC will need to engage in similar fact-finding to establish a foundation for the factual record and address the needs of individual claimants. The Background Reports eliminated the need for claimants to overcome such evidentiary hurdles, and enabled the humanitarian process of individual compensation to proceed. They also gave the Commissioners the confidence to act with the knowledge and assurance that there was a reliable record for their decisions. Documenting the contextual facts and urgencies of war is a task that is ill-suited to the individual victims of war, and the Background Reports served to remedy that limitation.

IV. COMPARISONS TO AND LESSONS LEARNED FROM THE IRAN-UNITED STATES CLAIMS TRIBUNAL

The structure and procedures of the UNCC were the result of deliberate choices designed to achieve a fair and principled resolution of millions of claims. Thus, it seems worthwhile to examine how and why the choices were made. To this end, it is instructive to review the lessons drawn from the Iran-United States Claims Tribunal (the “Iran Tribunal”).

Several commentators have drawn comparisons between the UNCC and the Iran Tribunal.110 Such comparisons are natural. Prior to the existence of

109 It should also be noted that at the time the losses were suffered, the individual claimants would have had no way of knowing that the UNCC would be formed to compensate them for their losses. They would have had no reason to engage in any effort to gather evidence to support their losses (even assuming they had an opportunity to do so amidst the circumstances).

110 See, e.g., Caron, United Nations Compensation Commission, supra note 2, at 317-18; Bederman, supra note 13, at 15-17; Crook, supra note 85, at 145, 148; Garmise, supra note 21, at 847-48; Glod, supra note 21, at 719 (noting that Iran Tribunal is probably the “closest
the UNCC, the Iran Tribunal had been the most recent attempt at the resolution of a large number of international claims.\textsuperscript{111} More importantly, the senior staff of the UNCC was drawn from lawyers who had worked with the Iran Tribunal, and "as generals are said to focus on fighting the last war, so too did these and other alumni of the [Iran] Tribunal arrive at the UNCC seeking to improve on the issues that had confronted them at the [Iran] Tribunal."\textsuperscript{112} The significance of this link between the staff of the UNCC and the Iran Tribunal is that the choices made in structuring the UNCC were influenced by direct, first-hand experience of the strengths and weaknesses of the Iran Tribunal. As noted by Mr. Wührer, the experience of the Iran Tribunal "informed a number of aspects of the UNCC's structure and procedure, both in a positive and negative way," and "the relationship between the two is a good example of how lessons from one institution may be useful for another."\textsuperscript{113} Hence, the work of the UNCC embodies and represents a significant part of the accumulated knowledge of international claims resolution, and its lessons should guide any future attempts.

The Iran Tribunal was established in 1981 to resolve claims involving the United States and Iran following the 1979 Iranian revolution.\textsuperscript{114} It grew out of the resolution of the Iranian hostage crisis in which more than 50 Americans were held hostage in Tehran from November 1979, to January 1981, by representatives of the Iranian government.\textsuperscript{115} Extensive negotiations between the United States and Iran, largely brokered by Algeria, led to an international executive agreement in January 1981. The results of the negotiations were embodied in two declarations, collectively known as the Algiers Accords.\textsuperscript{116}

The Iran Tribunal was established as an arbitration panel with nine arbitration judges—three from the United States, three from Iran, and three nationals from other states.\textsuperscript{117} The panel was empowered to hear claims brought by U.S. citizens against Iran, claims brought by Iranian citizens

\footnotesize{\textsuperscript{111} See Bederman, supra note 8, at 250.}  
\footnotesize{\textsuperscript{112} See Caron, United Nations Compensation Commission, supra note 2, at 317.}  
\footnotesize{\textsuperscript{113} Wührer, supra note 8, at 250.}  
\footnotesize{\textsuperscript{114} See Caron, United Nations Compensation Commission, supra note 2, at 313.}  
\footnotesize{\textsuperscript{117} See generally Tribunal Background Information, supra note 116.}
against the United States, and claims between the two countries.\textsuperscript{118} Approximately 4,000 claims were filed.\textsuperscript{119} Of these, 2,780 were small claims brought by individuals, which were settled in one lump sum.\textsuperscript{120}

Based on the commentary of those who were personally involved in the work of the Iran Tribunal, it appears that two important lessons were drawn from the tribunal and applied to the UNCC: (A) the need to resolve individual claims quickly, and (B) the importance of adopting an inquisitorial approach rather than an adversarial approach as was used by the arbitration proceedings of the Iran Tribunal.

A. The Need to Resolve Individual Claims Quickly

The treatment of individual claims before the Iran Tribunal provided a strong lesson in how not to handle individual claims. Approximately 1,500 of the individual claims before the Iran Tribunal were brought by Americans who had been expelled from Iran.\textsuperscript{121} The individual claims, however, were given a lower priority than corporate claims and were set aside while the corporate claims were resolved first.\textsuperscript{122} With the benefit of hindsight, one commentator openly acknowledged that the resolution of corporate claims before individual claims was a regrettable mistake:

Clearly, in humanitarian terms, these [individual] cases are of the most compelling type, since they typically involve individuals who have lost many, if not all, of their possessions, have been summarily deprived of employment and whose lives thus may in fact be devastated.

Perhaps the greatest failure of the Iran-United States Tribunal was that prior to the lump sum settlement of most of these "wrongful expulsion" cases by the two governments in 1990—nine years after the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Brower, supra note 115, at 422.
\item \textsuperscript{120} Caron, United Nations Compensation Commission, supra note 2, at 314.
\item \textsuperscript{121} Brower, supra note 115, at 426. Brower notes that:
  During a period of four months, beginning November 1, 1978 and ending February 28, 1979, virtually all of the 40,000 American citizens who prior to that time had been in Iran left that country, never to return. This was due, it seemed, not merely to revolutionary upheaval, but to the policy of the Khomeini forces as reflected in the Ayatollah's pronouncement on the day the Shah left Iran (January 16, 1979) that the U.S. government was the enemy of the Iranian people.
  \textit{Id.} at 426. The 1,500 individual American claims came from this group of 40,000.
\item \textsuperscript{122} \textit{Id.} at 427; see also Caron, United Nations Compensation Commission, supra note 2, at 318.
\end{enumerate}
\end{footnotesize}
Tribunal was formed and a dozen years or so after the losses were incurred—the Tribunal had adjudicated only six such cases and had awarded damages in only one.\(^{123}\)

The lower priority given to individual claims failed to reflect the fact that individual claimants needed a prompt resolution of their claims. "The individuals—small businessmen who were injured or lost their goods—often desperately needed relief," notes Professor Caron. "But for corporations," he continues, "the claim resided in their books as a potential credit, and thus lacked the equivalent urgency."\(^{124}\) By the time the individual claimants received their compensation from the Iran Tribunal, their immediate needs had been unmet for years—thus degrading the value of the awards.\(^{125}\)

The work of the Commission, of course, placed a different priority on individual claims. The UNCC staff with Iran Tribunal experience saw the need to move the individuals with small claims to the front of the docket.\(^{126}\) Clearly, the decision by the Governing Council to give first priority to the individual claimants in Categories A, B, and C was influenced in some measure by the experience of the Iran Tribunal as it was still fresh in the minds of international observers.\(^{127}\)

B. The Importance of Adopting an Inquisitorial Approach

The slow pace at which claims were processed and the difficulty of proving causation for individual claims in the Iran Tribunal demonstrated the need to adopt an inquisitorial approach for claims processing. A clear lesson from the Iran Tribunal was that an adversarial approach is slow.\(^{128}\) While most of the claims before the Iran Tribunal were settled, approximately 250 claims were arbitrated to a decision. It took ten years to arbitrate these 250 claims to conclusion.\(^{129}\) It would have been manifestly obvious at the outset

---

\(^{123}\) Brower, supra note 115, at 427.

\(^{124}\) Caron, United Nations Compensation Commission, supra note 2, at 318.

\(^{125}\) Brower, supra note 115, at 427.

\(^{126}\) Caron, United Nations Compensation Commission, supra note 2, at 318.

\(^{127}\) With respect to those involved in the Iran Tribunal, this article should not be viewed as a criticism of the choices or procedures adopted by that tribunal. It would be unfair to suggest that the Iran Tribunal and the UNCC can be compared on a like-for-like basis. The Iran Tribunal was not confronted with a humanitarian crisis in the form of millions of individuals who had suffered personal injuries and property losses in a war zone. It may be presumed that the Iran Tribunal might have approached individual claims in a different manner if it have found itself in the same situation as the UNCC.

\(^{128}\) Id. at 313-14.

\(^{129}\) Id.
that the UNCC would not be able to accomplish its mandate to resolve over 2.6 million individual claims if it were to proceed on the same pace as the Iran Tribunal. This fact alone would have led the original senior leadership of the Commission away from the model of the Iran Tribunal.

There was another lesson to be drawn from the Iran Tribunal with respect to individual claims. The individual American claimants before the Iran Tribunal were unable to prove that they had been wrongfully expelled by agents of the Iranian government because of the difficulty of determining whether losses were in fact caused by the Iranian Government, by revolutionary forces which became the Iranian Government, or by "popular movements" or other random or independent agents. The plight of these American claimants is exactly the situation that the individual claimants before the UNCC would have faced if an adversarial process had been employed (as illustrated by the hypothetical above of the Kuwaiti claimant who was unable to prove that it was Iraqi forces and no one else who destroyed and stole her property). Again, it seems reasonable to conclude that the senior leadership of the UNCC was aware of the problems that would be faced by civilians fleeing a war zone (in the case of Kuwait) due to their experience with civilians fleeing political upheaval (in the case of Iran).

In sum, the Iran Tribunal provided "real world" experiences and lessons to guide the shaping of the UNCC. Such experiences and lessons undoubtedly put the UNCC's leadership in a position of strength to resist calls from critics to adopt a different approach. As mentioned earlier, one of the harshest critics of the Commission was Iraq's lawyer, who asserted that the adversarial process was superior to the inquisitorial approach of the UNCC and that the UNCC was "fundamentally flawed." In fairness to these comments, they were expressed in the context of describing an almost $1 billion corporate claim submitted by the Kuwait Oil Company and may not have been directed at the process for individual claims. Nonetheless, the criticisms are instructive to this analysis because they underscore the virtues of the procedure adopted by the UNCC for the treatment of individual claims.

A central focus of the criticism was that Iraq was at a disadvantage in the proceedings against the Kuwait Oil Company, "an immensely rich company, which retained for the preparation of its claims one of the largest and

\[^130\] Brower, supra note 115, at 428; see also Crook, supra note 85, at 148.
\[^131\] Schneider, supra note 63, at 25. A disinterested observer might point out that the critic's views are colored by the fact that he was Iraq's lawyer, in a limited manner, before the Commission. To balance out this observation, however, it is readily acknowledged that several of the authors cited in this article, who are more supportive of the Commission, were or are affiliated with the Commission, including the author of this article.
The type of proceeding, however, makes a significant difference to an individual claimant. Given the chaotic and life-threatening circumstances giving rise to the losses, individual claimants would have faced perhaps insurmountable obstacles to proving their claims in an adversarial system. The problem would have been magnified for claimants who were uneducated and unskilled. The Commissioners were mindful of and sensitive to the ability of an individual to assert a claim:

The Panel considered, to the extent available and relevant, the socio-economic characteristics and invasion-related circumstances of claimants from different countries, specifically in relation to their ability to provide evidence in support of their claims. Article 35 of the Rules states that the ‘[d]ocuments and other evidence required will be the reasonable minimum that is appropriate under the particular circumstances of the case.’ The claims themselves reveal a distinct difference in the quality, patterns, relevance and materiality of the evidence submitted by claimants from different countries, and within countries, by education and income level. Thus, consideration was given to the impact that the invasion and the ensuing hostilities had on claimants from particular countries. Further particular socio-economic characteristics such as the education and income

---

132 Id. at 16.
135 See U.N. Compensation Commission, Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of “E2” Claims, at 63-64, U.N. Doc. S/AC.26/2000/17 (Sep. 29, 2000), (seeking more than $11.8 million and $4.6 million, respectively).
level of claimants from different countries and backgrounds were considered. Again, the Panel finds that such background information and factors provide secondary or circumstantial support for the claims and the allegations contained in claimant or witness statements or attached documentation.\(^{136}\)

It is reasonable to conclude that the Governing Council recognized the problems that individual claimants would face in an adversarial process and that this recognition supported the decision to adopt an inquisitorial process. This is not to suggest that the system was somehow tilted in favor of the claimants. In fact, the statistics and the Panel Reports show that the Commissioners took an active role in protecting Iraq’s interests. It would be more accurate to say that because the UNCC would be judged by its ability to achieve substantive fairness for all affected interests, it would have failed had it imposed an adversarial system on the individual claimants. It would have been difficult to defend the fairness of any proceeding which imposed the burdens of an adversarial system on individuals whose lives had been violently disrupted, or even shattered, by war. It would have been even more indefensible to have imposed such burdens on those who occupied the bottom of the socio-economic scale.

**CONCLUSION**

The number of individual claims (in the millions), the amounts involved (in the billions) and the underlying humanitarian urgency (incalculable) created significant challenges for the Commission. The Commission needed to achieve a delicate balance between the rights of individuals, who had suffered undeniable personal losses, and the rights of the Government of Iraq, which had the right not to be treated as the writer of a blank check. This balance also had to be achieved in a reasonable timeframe.

In order to achieve the goal of substantive fairness, the Commissioners needed an adequate factual record to support their decisions. However, neither the individual claimants nor the Government of Iraq were in a position to provide a complete or sufficient factual foundation for resolution of the claims. The combination of the Commissioners’ own fact-finding powers and the Background Reports enabled the Panels of Commissioners to establish the factual foundation and record for their decisions. Indeed, any alternative procedure or framework that relied on the parties alone to establish

\(^{136}\) *Category "C" Report*, supra note 16, at 26-27. Along these lines, the Panel observed that higher income claimants "submitted more substantive statements in support of their losses." *Id.* at 180 n.294.
the factual record would have failed because it would have allowed decisions to be reached on non-substantive grounds unrelated to the merits. The lessons of the Commission suggest that any future claims resolution process involving individual claims arising from war or war-like circumstances must necessarily incorporate such fact-finding and fact-finding procedures in order to remedy the almost certain inability of the parties to supply their own record.