

Gulf War Reparations and the UN Compensation Commission

ENVIRONMENTAL LIABILITY

Edited by **CYMIE R. PAYNE** *and* **PETER H. SAND**



GULF WAR
REPARATIONS
AND THE UN
COMPENSATION
COMMISSION

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This book is one of two volumes exploring the legal, policy and practical issues associated with the UNCC. The companion volume, *GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT*, examines the innovative policy, procedural, institutional and managerial approaches used to handle mass claims and corporate claims at a scale that is unparalleled, as well as the evolution of international jurisprudence in these areas. These two books provide a comprehensive view of the institution and its work.

This project was originally inspired by discussions held in September 2007 at the University of California, Berkeley, School of Law, among the following experts:

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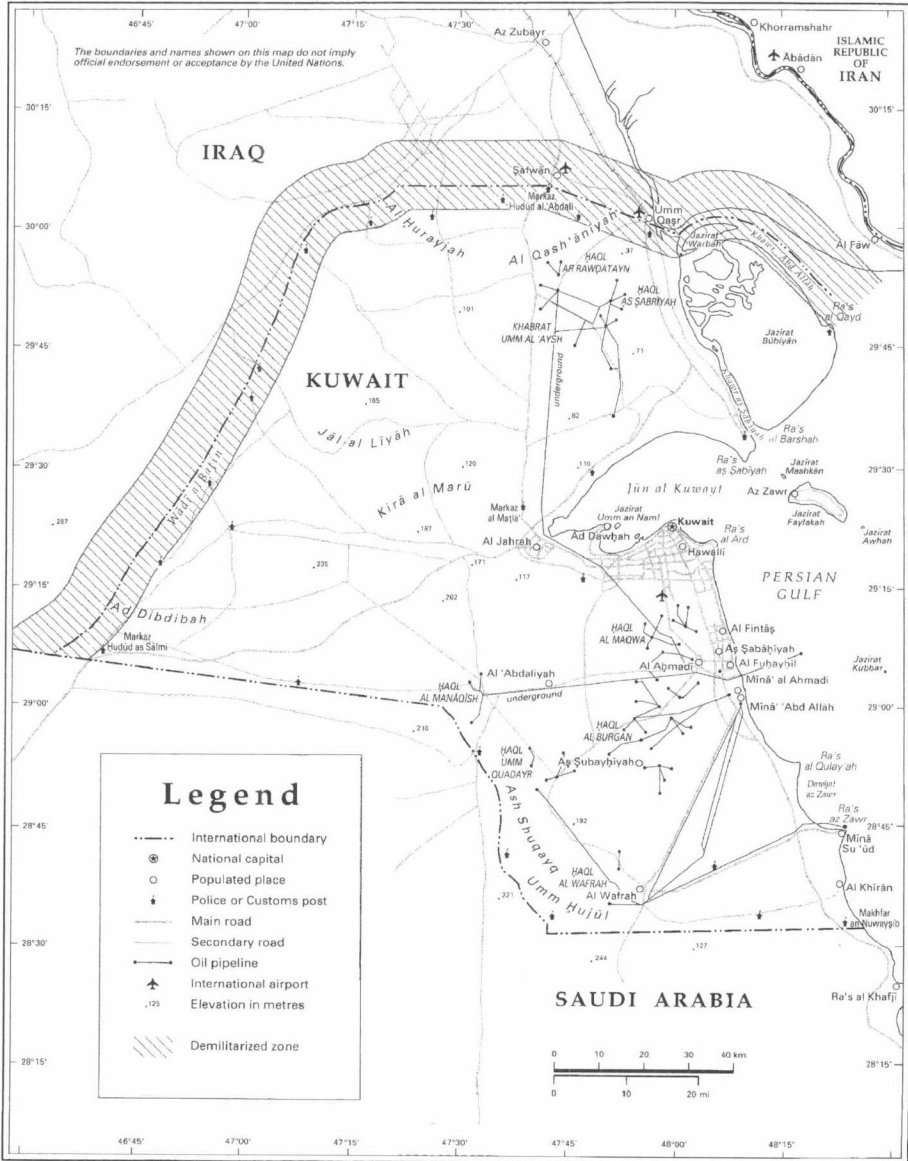
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MAP



FOREWORD

One result of the increased global concern for environmental protection since the 1972 UN Conference on the Human Environment has been a general recognition of the need to place stricter legal constraints on wartime activities that deliberately target the environment. This has led to intensified international efforts to develop legal norms and institutions whose purpose is to prevent or redress adverse environmental consequences of war and other conflicts. In the process, the law has been steadily broadened and clarified in order not only to prevent and reduce the impacts of wartime activities on human beings (such as prisoners of war and noncombatant civilian populations) but also to eliminate or reduce damage to property, to historical and cultural monuments, and to the natural environment. Indeed, it is now generally accepted that the protection of the environment is one of the legitimate objectives of the current international law governing war and warlike activities.

Concern with environmental damage clearly played a key role in the response of the United Nations to the 1990–1991 Gulf War. In establishing the UN Compensation Commission (UNCC), the Security Council set in train a process whose purpose was not merely to mete out international sanctions against Iraq for its illegal attack on and occupation of Kuwait. True, the actions of the Council were in large measure intended to reflect the sense of outrage felt by the international community against the clear act of aggression by Iraq. But another and equally important purpose of the Security Council was to provide a mechanism for compensating governments and other entities that had suffered damage as a result of the activities of Iraqi military personnel as well as the measures taken by the armed forces of other governments, at the invitation of the United Nations, to liberate Kuwait from occupation by Iraq. At the same time the Security Council also sought consciously to contribute to the strengthening of the international law for the protection of the environment from the consequences of war and warlike activities.

This was made clear in the resolutions by which the Security Council authorized the cessation of military activities against Iraq. Thus an essential condition for the cease-fire arrangements as set out in the resolutions of the Security Council was the formal acceptance by Iraq of its responsibility under international law for losses and damages resulting from its aggression against Kuwait. In resolution 687 of April 3, 1991, the Security Council reaffirmed Iraq's liability "under international law for

any direct loss, damage . . . or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." In this regard, the Security Council expressly stated that the loss or damage for which Iraq was liable included "environmental damage and the depletion of natural resources."

It was to enforce the liability of Iraq for loss, damage, or injury suffered as a result of its invasion and occupation of Kuwait that the Security Council decided to create a fund to pay compensation for damage covered by the Council's resolutions. The Council also established a Commission (the UN Compensation Commission, UNCC) to administer the fund. The environmental dimension of the process was further underscored by the decision of the UNCC Governing Council to group all the claims for "direct environmental damage and the depletion of natural resources" together and assign them to a single and separate panel of Commissioners (F4 Panel).

It is thus no exaggeration to say that the mandate and work of the UNCC and the F4 Panel represented a significant aspect of the work of the United Nations for the prevention of environmental degradation and the preservation of the environment as a whole. In this connection, it is interesting to note that the Governing Council considered it desirable to amplify the mandate of the F4 Panel by clarifying that the concept of environmental damage referred to in the Security Council decision included "losses or expenses resulting from abatement and prevention of environmental damage . . . reasonable measures already taken to clean and restore the environment . . . reasonable monitoring and assessment of environmental damage for the purpose of evaluating and abating the harm and restoring the environment . . . reasonable monitoring of public health and performing medical screening for the purposes of investigating and combating increased health risks."

As previously noted, the F4 Panel, with the other panels of Commissioners, was not required to deal with the central issue of Iraq's liability for environmental damage resulting from its invasion and occupation of Kuwait. The terms of reference of all the panels were predicated on the affirmation by the Security Council (and acceptance by the government of Iraq) that Iraq was liable under international law for the damage that resulted directly from the invasion and occupation. Consequently, the function of the panels was essentially fact-finding in nature, involving the review of the evidence submitted for the individual claims before them. However, some of the functions of the panels were clearly judicial in nature, and they were often required to elucidate or apply legal rules and principles. For example, the F4 Panel had to interpret the definition of the concept of environmental damage as used in the Security Council resolutions and in the decisions of the Governing Council. It also had to determine when and to what extent "other rules of international law" could or had to be applied in its consideration of particular claims. And, of course, the Panel had to deal with difficult issues such as the causal nexus between the damage identified and Iraq's invasion and occupation; whether the evidentiary requirements regarding the directness of damage had been satisfied in respect of such damage; the nature and extent of the damage for which

compensation was due; and the appropriate level of compensation to be awarded for damage that was found to be a direct result of the invasion and occupation.

Other important aspects of the work of the Panel worth mentioning include: the conclusions and recommendations relating to the use of environmental monitoring and assessment activities as a means for environmental protection and the basis on which such activities may legitimately be compensated; recognition of the role of “environmental solidarity” and assistance from governments and other entities to victims and potential victims of damage and the justification for compensating for the costs of such assistance; the duty on victims and potential victims of damage to take reasonable measures to prevent or mitigate damage; definition of what objectives are legitimate and realistic when taking measures to restore damaged environment; and what are acceptable methods for evaluating ecological losses with a view to determining the appropriate forms and levels of compensation.

The present publication examines in some detail some of the major aspects of the UNCC project relating to claims for damage to the environment. The contributors include some of the persons who played key roles in the process. The various chapters set out and explain the procedures and approaches adopted by the F4 Panel in reaching its conclusions and the responses of the Governing Council to the Panel’s specific recommendations.

Unlike the other panels, the F4 Panel did more than merely determine the admissibility of claims or assess the appropriate levels of compensation to be awarded. With the approval and encouragement of the Governing Council, the Panel also formulated detailed suggestions on how the funds awarded for some of the claims should be utilized in order, first, to ensure that they are used for reasonable projects and, second, that the projects would achieve the purposes for which the awards were recommended by the Panel and approved by the Governing Council. In the process, both the Panel and the Governing Council articulated and operated on a number of principles and concepts which are likely to be of interest and use to persons and institutions that may be called upon in the future to deal with the aftermath of wars and conflicts with implications for the environment.

It is, of course, true that many of the procedural and substantive rules that were applied in the UNCC process in general, and for the environmental claims in particular, reflected the peculiar circumstances and context of the UNCC and were largely dictated by the special rules adopted by the Security Council and the Governing Council. For that reason it may very well be that many of the rules (and decisions and conclusions based on them) will not necessarily be considered as constituting precedents for general application. Nevertheless, it is not at all unreasonable or unrealistic to expect that at least some of these rules and procedures may be accepted as useful pointers or guidelines by future tribunals and other bodies asked to decide on claims for damage to the environment.

It is also possible that some of the steps and measures taken in the process may find resonance and relevance in future situations. An example is the decision of the Governing Council to track the use of compensation funds awarded to government

claimants with a view to ensuring that the funds would be put to reasonable use and utilized for the purposes for which they were awarded. Similarly, some of the technical recommendations of the F4 Panel, and the decisions and actions taken by the Governing Council and by the participating governments (including the government of Iraq), may provide interesting and useful insights and lessons not only on the emerging principles and procedures for determining compensation to the victims of environmental damage and the use of compensation mechanisms to restore damaged environments, but also on related issues such as the promotion of cooperation between regional states and governments in order to facilitate the taking of effective measures to deal with the environmental effects of wars and conflicts.

For these and other reasons, the description and evaluation of the work and experience of the UNCC and the F4 Panel should be of interest to participants and commentators in the fields of the international law of state responsibility and the international judicial process. The publication will also provide useful material for those who seek to contribute to the international efforts to prevent environmental damage as a result of wars and other conflicts. In giving a chronicle of the performance of the UNCC in an area where there were few precedents, and by exposing the difficulties faced and the solutions adopted, the authors have provided much-needed insights into the problems posed by wars and their adverse effects on the environment. Hopefully, they have also helped to point the way to the possible means and arrangements for dealing with these problems. Unfortunately, these are problems which the international community may need to revisit again in the future.

Thomas A. Mensah
London, April 16, 2010

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CHAPTER 1

Environmental Claims in Context

Overview of the Institution

CYMIE R. PAYNE*

INTRODUCTION

Environmental damage was the last of the losses resulting from Iraq's 1990 invasion of Kuwait and the ensuing occupation and 1991 Gulf War to be awarded reparations by the UN Compensation Commission (UNCC, or the Commission). The UNCC initiated its work by providing humanitarian compensation for nearly 2.7 million people displaced, injured, and otherwise harmed by the war. That large number of urgent claims shaped the initial structure of the UNCC. During the fifteen years from 1991 to 2005 that the UNCC processed claims from over ninety countries, it developed procedures and jurisprudence that may be considered models for dispute, disaster, and conflict compensation. Although ecological destruction was a matter of grave concern, the international community was not yet experienced with legal review and valuation of such losses. Within the UNCC's general framework,¹ the complex, high-value environmental claims resolved in the final phase of the UNCC mandate (2000–2005) occupied a special place, requiring the Commission to further adapt and innovate. The UNCC Governing Council and a small Secretariat continue to oversee implementation

* Former F4 Team Leader. My thanks to Peter Sand and Timothy Feighery for their thoughtful comments on this chapter. Any errors are my own.

1. Addressed more fully in the companion volume to this book *GULF WAR REPARATIONS AND THE UN COMPENSATION: DESIGNING COMPENSATION AFTER CONFLICT* (C. Gibson & T. Feighery eds., Oxford University Press 2011) (hereinafter, Gibson & Feighery).

of environmental projects funded by the environmental awards and the distribution of compensation awarded but not yet fully paid.

Given the staggering amount claimed before the UNCC, over US\$350 billion, doubt that the full measure of compensation awarded would ever be paid was a key factor influencing the design of the Commission and many of the decisions taken by the Governing Council to fairly allocate limited funds.² (See Table 1.1.) While individuals were the most numerous claimants, a small number of corporate and government claims received the lion's share of compensation. For example, the award to the Kuwait Petroleum Corporation of nearly US\$16 billion for commercial losses "arising from the disruption of their businesses and the destruction of oil and gas by fires and spills resulting from the well blow-outs that occurred at the end of the conflict" constituted about 30.4 percent of the total compensation awarded.³ Between the summer of 1991, when the Commission's Governing Council held its first meeting at the UN headquarters in Geneva, and June 2005, the UNCC approved awards amounting to more than US\$52 billion for over 1.5 million claimants.⁴ As of January 2011, the Commission had made US\$31.4 billion available to claimants.⁵ Out of this total, the share of environmental claims awarded was US\$5,261,746,450, of which \$4,976,737,454 had actually been paid by January 2011—which is the largest amount of compensation ever disbursed for environmental damage in the history of international law.⁶

Bearing in mind that individuals composed the most numerous class of claimants, that their losses were relatively small, and that their need was urgent, their

2. See, e.g., Governing Council Decision 7, S/AC.25/1991/7/Rev.1 (Nov. 28, 1991, as revised Mar. 17 1992), para. 4 ("As contributions are made to the Fund, the Council will allocate those funds among the various categories of claims. If resources of the Fund are insufficient with respect to all claims processed to date, pro rata payments would be made to Governments periodically as funds become available. The Council will decide on the priority for payment of various categories of claims."); David. D. Caron, *Introductory Note*, 31 I.L.M. 1009 (1992); Payne, Chapter 5, in this volume, text at note 52; Elyse J. Garmise, *The Iraqi Claims Process and the Ghost of Versailles*, 67 NYU L. REV. 840, 841 (1992) ("The worldwide pool of frozen Iraqi assets . . . amount to only \$4 billion, far less than the estimated \$180 billion worth of claims against Iraq").

3. *Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of "E1" Claims*, U.N. Doc. S/AC.26/2000/16 (Sept. 29, 2000), para. 3, Table 21.

4. UNCC Press Release, Governing Council of United Nations Compensation Commission Has Concluded Its Fifty-Eighth Session, PR/2005/14 (Dec. 8, 2005).

5. UNCC Press Release, United Nations Compensation Commission Pays Out US\$680 Million, PR/2011/1 (Jan. 27, 2011). US\$21 billion is still owed to Kuwait for oil sector and government claims. The UNCC Governing Council, at its November 2010 meeting, recommended to the Security Council that Iraq's payments to the Compensation Fund continue until a successor mechanism should be put in place. Letter dated 12 November 2010 from the President of the Governing Council of the United Nations Compensation Commission addressed to the President of the Security Council, S/2010/587 (Nov. 15, 2010).

6. UNCC, Status of Processing and Payment of Claims (January 27, 2011), available at <http://www.uncc.ch/status.htm>. The remaining difference represents amounts awarded for environmental "invoice claims" that were not given priority for payment, see Klee, Chapter 2, text at notes 45–47; Sand, Chapter 7, note 19, both in this volume. The US\$20 billion fund provided by BP in compensation for losses from the 2010 Deepwater Horizon oil drilling rig blowout in the Gulf of Mexico—the next largest oil spill after the Gulf War oil spill—does not cover the cost of natural resource damages, which have not been calculated at this writing.

Table 1.1. Amount Sought and Awarded in All Claims Categories: Summary

Subject Matter	Number of claims resolved	Number of resolved claims awarded compensation	Compensation sought by claims resolved (US\$)	Compensation awarded (US\$)	Net compensation paid (US\$)
Departure Claims of Individuals (A)	923,158	852,499	3,455,092,500	3,149,692,000	3,116,997,986
Serious Personal Injury or Death of Spouse, Child, or Parent (B)	5,734	3,935	20,100,000	13,435,000	13,377,388
Larger Claims of Individuals (C, D)	1,750,152	682,795	28,043,379,200	8,534,619,773	8,526,995,461
Claims of Corporations (E)	6,571	4,048	78,736,378,996	26,297,554,052	8,065,154,490
Claims of Governments and International Organizations (F)	516	342	242,277,888,207	14,388,055,890	11,580,655,250
Total	2,686,131	1,543,619	352,532,838,903	52,383,356,715	31,303,180,576

Source: <http://www.unecc.ch/status.htm>, January 27, 2011 (explanatory notes omitted)