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Cover Page Footnote

Professor David D. Caron is a C. William Maxeiner Distinguished Professor of Law at Boalt Hall School of Law at the University of California at Berkeley. This article is drawn in part from an address given as the inaugural Richard B. Lillich Memorial Lecture at the Florida State University College of Law on October 23, 2003.

THE UNITED NATIONS COMPENSATION COMMISSION FOR CLAIMS ARISING OUT OF THE 1991 GULF WAR: THE “ARISING PRIOR TO” DECISION

DAVID D. CARON*

INTRODUCTION

It is my distinct pleasure to inaugurate the Richard B. Lillich Memorial Lecture at the Florida State University College of Law (FSU). Richard was a great lawyer and scholar in the field of international dispute resolution, an individual committed to the progressive realization of human rights, and a good friend. He had a deep love for FSU; he always spoke glowingly of its faculty and its students.

The questions I address are ones with which I not only have been involved, but ones that also deeply interested Professor Lillich. From the fall of 1996 to the summer of 2003, I served as a Commissioner with the United Nations Compensation Commission (UNCC or the Commission) for claims arising out of the 1990 Gulf War.¹ There are few books addressing the work of that institution.² The first and probably most significant volume was edited by Richard Lillich.³

This article concerns in particular what became known as the “arising prior to” clause of United Nations Security Council Resolution 687⁴ and the decision taken by the “E2 Panel” (the Panel) as to what that clause meant. In terms of effect on the docket of the Commission, probably no other decision had equal significance. It also is particularly noteworthy for its articulation of the proper method for interpretation of a Security Council resolution. Before I

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1. I served as a Commissioner on the UNCC “Precedent Panel” which later became denominated as the “E2 Panel.” The E2 Panel was chaired by Professor Bernard Audit of France. José-María Abascal of Mexico and I served as the other two members. The Panel was deliberative and collegial in its process with all members forming the decisions reached.

2. See Veijo Heiskanen, *The United Nations Compensation Commission*, 296 RECUEIL DES COURS 393, 393-97 (2003), for a general bibliography.

3. See THE UNITED NATIONS COMPENSATION COMMISSION (Richard B. Lillich ed., 1995) [hereinafter UNCC].

4. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. para. 16, U.N. Doc. S/RES/687 (1991) [hereinafter S.C.Res. 687].

examine the Panel's decision and its application by the Commission, I first describe the establishment and working method of the Commission so that the reader may appreciate the all-important context in which this decision was taken. I conclude with observations on the "arising prior to" clause decisions and the workings of the Commission in general.

I. THE ESTABLISHMENT OF THE UNCC

A. *The Immediate Response to the Invasion*

On August 2, 1990, Iraq invaded Kuwait.⁵ On that same day, the United Nations Security Council adopted Resolution 660, which provided that the Council "[c]ondemn[ed] the Iraqi invasion of Kuwait" and "[d]emand[ed] that Iraq withdraw immediately and unconditionally."⁶ It is important to recognize the role that law played in this situation. The resolution was so quickly agreed to because international law established the boundaries of plausible argument. Even if Iraq had had a plausible argument about historic title, that title could not have justified aggression. Since there was no possible justification for the action taken, the discussion was over very quickly.⁷

During the fall of 1990, the Security Council issued a series of resolutions, each pointing to new areas of concern for the international community or issuing new demands on Iraq.⁸ The

5. S.C. Res. 660, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 19, U.N. Doc. S/RES/660 (1990) [hereinafter S.C. Res. 660].

6. *Id.* paras. 1-2 (emphasis omitted).

7. As the United States proposes more complicated fact-contingent tests as to when force in international relations may be used (through the preemptive use of force doctrine and the like), the speed of discussions, such as those that occurred with Iraq's invasion of Kuwait, are likely to change. *Id.* at 585. If Iraq had instead argued that Kuwait posed an immediate threat, for example, the demand to withdraw may have taken much longer to issue. This is not an argument that the resolution would not have been made ultimately in any event, but that the speed and time required for that discussion would change.

8. See S.C. Res. 660, *supra* note 5; S.C. Res. 661, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 19-20, U.N. Doc. S/RES/661 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 20, U.N. Doc. S/RES/662 (1990); S.C. Res. 664, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 21, U.N. Doc. S/RES/664 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 21-22, U.N. Doc. S/RES/665 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 22, U.N. Doc. S/RES/666 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 23-24, U.N. Doc. S/RES/667 (1990); S.C. Res. 669, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 24, U.N. Doc. S/RES/669 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 24-25, U.N. Doc. S/RES/670 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 25-27, U.N. Doc. S/RES/674 (1990) [hereinafter S.C. Res. 674]; S.C. Res. 677, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 27, U.N. Doc. S/RES/677 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 27-28, U.N. Doc. S/RES/678 (1990) [hereinafter S.C. Res. 678].

United Kingdom chaired the Security Council in October.⁹ As Chair, it sponsored Resolution 674, which emphasized the liability of Iraq that grew day by day with Iraq's occupation of Kuwait.¹⁰ Resolution 674 reminded Iraq "that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."¹¹ This resolution created some expectation in the claimant community that liability claims would be satisfied.

For November of 1990, the United States assumed the Chair of the Security Council.¹² It was during this crucial month that the Council adopted Resolution 678 authorizing: "Member States cooperating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the above-mentioned resolutions, to use all necessary means to uphold and implement [R]esolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security . . ."¹³ Resolution 678 is quite subtle. Its authorization "to use all necessary means" extends to Member States "co-operating with the Government of Kuwait."¹⁴ A practical issue with authorizing members to use force is how they are to be coordinated under one command. One can imagine how the United States military planners would have wished neither that other nations independently try to oust Iraq out of Kuwait nor that the United States enter into long negotiations as to the appropriate command structure. In Resolution 678, the authorization was to those members cooperating with Kuwait where it was thought likely that Kuwait would make the United States, the major power involved, head of the coalition. The Resolution thereby created a presumption that nations would participate in the coalition under U.S. command.¹⁵

9. *Provisional Verbatim Record of the Two Thousand Nine Hundred and Forty-Fifth Meeting*, U.N. SCOR, 45th Sess., 2945th mtg. at 1, U.N. Doc. S/PV.2945 (1990).

10. S.C. Res. 674, *supra* note 8.

11. *Id.* para. 8, at 26.

12. *Provisional Verbatim Record of the Two Thousand Nine Hundred and Fifty-Second Meeting*, U.N. SCOR, 45th Sess., 2952d mtg. at 1, U.N. Doc. S/PV.2952 (1990).

13. S.C. Res. 678, *supra* note 8, para. 2, at 27.

14. *Id.*

15. As an aside, the official argument of the United States for going into Iraq in 2003 was not based on the pre-emptive use of force doctrine. Rather, in the view of the U.S. State Department, the international legal authority for the U.S. use of force in Iraq was a continuing one flowing from Resolution 678. In the spring of 1991, there was a cease-fire resolution. The U.S. view was that the cease-fire resolution did not withdraw the authorization to use force contained in Resolution 678, but rather merely suspended it. Through its later actions, argued the State Department, Iraq materially breached the terms of the cease-fire, voiding the cease-fire and reactivating the authorization to use force under Resolution 678. But, even at its best, this argument could only resurrect Resolution 678, and

B. What the Security Council Knew at the End of the War and the Shadow of the Iran-United States Claims Tribunal

After an effective bombing campaign beginning in January of 1991,¹⁶ the land campaign was launched, and the objective of ousting Iraq from Kuwait was obtained.¹⁷ On March 2nd, the war was essentially over.¹⁸ The formal cease-fire emerged from the Security Council in Resolution 687 on April 3rd.¹⁹ Many issues were addressed through the cease-fire resolution. As to the provisions dealing with claims and compensation for damage suffered, the language of those paragraphs was greatly influenced by the

not some no-holds-barred authorization. For example, the United States was not cooperating with Kuwait at this point as presumed by Resolution 678. Indeed, Kuwait was not involved in any way. Thus, the assertion that Resolution 678 authorized the 2003 action in Iraq is more problematic than may first appear to be the case. See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 173-76 (2004), for a valuable analysis of this basis for authority.

16. LAWRENCE FREEDMAN & EPHRAIM KARSH, *THE GULF CONFLICT, 1990-1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER* 312 (1993).

17. *Id.* at 386-406. On a related note, I include this story because it is about Richard Lillich:

In early January 1991, I was in Cairo. Saddam Hussein had been given a deadline of January 15 to withdraw from Kuwait, and the launching of an air war by the coalition seemed imminent. I was there to speak at a conference on Iraq's invasion and to consider with others possible avenues for the resolution of the Iraq-Kuwait border issues. Richard was also at this meeting, although he was there primarily to talk about claims since, as noted already, the momentum for holding Iraq liable for damage done was building.

Richard was warm, but seemed quite taciturn to many. In fact, Richard could smile quite broadly. Both Richard and I had been involved earlier in the claims process that grew out of the 1979 Iranian revolution. When one reads the facts of those claims, one lesson that comes through over and over again is that in many parts of the world it is better to be paid in advance (or at least through an irrevocable letter of credit). Of course, no one had expected the war in Kuwait, and both Richard and I were asked to go to Cairo on very short notice. We would be reimbursed. Despite the lesson mentioned, both Richard and I packed our bags and went to Cairo on that basis. A second lesson from the earlier claims work was that it would be wise to be reimbursed prior to leaving Cairo.

By the last night in Cairo, neither Richard nor I had been reimbursed. The facts of those earlier cases were being repeated. "No one with the authority to make such reimbursements can be found." "One person has been found, but of course two signatures are needed." But at the last moment on the last evening, a young aide from the office of the ambassador-in-exile approached us in the lobby of the Semiramis Hotel and announced that "finally, we were able to get into petty cash, and here is your reimbursement." The young man then pulled out wads of tens and twenties. What stood out at that moment was the beaming smile of relief on Richard's face. And that smile remained as the aide requested it be counted right then, which Richard prudently did; not in the open lobby, but rather in the restroom adjoining the lobby.

18. *Id.* at 407.

19. S.C. Res. 687, *supra* note 4.

estimations circulating as to the extensive scope of the damage and the astonishing number of claims likely to be raised.

First, there were an incredible number of likely claims. Indeed, over 2.6 million claims from some eighty countries were eventually submitted, and this number included over 200,000 claims of businesses (corporate or other), governments, and international organizations.²⁰ Second, the amount sought by these claims was anticipated to be very large. And, indeed, the claims filed seek over \$353 billion in the aggregate.²¹ Iraq had a significant oil industry, with a revenue stream that prior to the war had amounted to approximately eleven billion U.S. dollars per year.²² It was therefore thought that funds used to satisfy the claims would be limited, and that many claims quite possibly would not be paid off fully.

In approaching the challenge of conceiving a system to handle such an extensive number of claims with such a large aggregate amount of damages sought, the then recent experience of many with the Iran-U.S. Claims Tribunal (Tribunal) loomed large. The Tribunal was established in 1981 to handle unresolved claims following the 1979 Iranian revolution.²³ The hostage release was agreed to under President Jimmy Carter,²⁴ and, on the day President Ronald Reagan was inaugurated,²⁵ the hostages were flown out of Iran.²⁶ The Tribunal was established as a part of that resolution of a political crisis, and its operation had, over the decade leading up to the Gulf War, provided a forum in which a significant number of people, either as representatives of claimants or as staff of the Tribunal, gained a great deal of experience with international claims. I was fortunate to serve as a staff member from 1983 to 1985. Richard Lillich, already an authority in the field, was also called upon to serve as an expert for the United States on numerous occasions.

A central lesson from the Tribunal was that it takes time to arbitrate claims. That institution had a docket of roughly 4,000 claims.²⁷ By 1991, its work wasn't over, and, indeed, its work is still

20. See generally UNCC, *supra* note 3.

21. *Id.* at 37.

22. Robert S. Mason, *The Economy, in IRAQ: A COUNTRY STUDY* 143 (Helen C. Metz ed., 4th ed. 1990).

23. See generally David D. Caron et al., *Guide to Sources, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION* 477, 477-99 (David D. Caron & John R. Crook eds., 2000) [hereinafter *THE TRIBUNAL*].

24. Iran-United States: Settlement of the Hostage Crisis, Jan. 1981, U.S.-Iran, 20 I.L.M. 223, 223 [hereinafter *Hostage Settlement Agreement*].

25. President Ronald Reagan was inaugurated on January 20, 1981. The White House, *President Ronald Reagan*, at www.whitehouse.gov/history/presidents/rr40.html.

26. See *Hostage Settlement Agreement*, *supra* note 24.

27. David D. Caron, *The Gulf War, The U.N. Compensation Commission and the Search for*

not over today. Of the original 4,000 claims, 2,780 were small claims brought by individuals. These were settled in one lump sum. Approximately 420 of the claims were a particular type of bank claim and found to be outside the jurisdiction of the Tribunal. These claims were terminated by order. Therefore, only approximately 800 of the remaining claims on the docket were decided by arbitral award over the Tribunal's first decade of work.²⁸ Of those, almost two-thirds actually were settlements for which "Awards on Agreed Terms" were issued.²⁹ It therefore had taken ten years to arbitrate approximately 250 claims to conclusion.³⁰ Many individuals remembering that fact looked to the likely two million claims of the Gulf War and knew the scope of the challenge presented.

All this led the post-Gulf War claims situation to be viewed as presenting two main institutional design challenges. First, the claims system would have to be fast but fair, since that was the only way to ever get through two million claims. But international claims processes were not accustomed to proceeding quickly. Second, there needed to be a plan as how to divide what was likely going to be an inadequate pie among the claimants. This suggested that some claims might receive a priority in payment, and that perhaps some should be excluded from the jurisdiction of the Commission generally.

C. Creation of the Commission

As mentioned, Resolution 687, the "cease-fire" resolution, addressed many issues: it established the weapons inspectors regime, a boundary commission to demarcate the boundary, a group to investigate the search for lost Kuwaiti gold, a group to investigate the circumstances surrounding missing Kuwaitis, and, finally, the UNCC to resolve claims against Iraq.³¹ Paragraph sixteen of the Resolution provided:

Reaffirms that Iraq, without prejudice to its debts and obligations [of Iraq] arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage — including environmental damage and the depletion of natural resources — or

Practical Justice, 24 BOALT HALL TRANSCRIPT 26, 27 (Fall 1991).

28. Caron, *supra* note 37, at 27.

29. David D. Caron & John R. Crook, *The Tribunal at Work*, in *THE TRIBUNAL*, *supra* note 27, at 143-44.

30. Caron, *supra* note 37, at 28.

31. S.C. Res. 687, *supra* note 4.

injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.³²

This clause of Resolution 687 simply affirmed Iraq's liability without saying anything about the process whereby claims based on that liability would be resolved. Two other parts of the Resolution addressed the claims process. First, paragraph eighteen created a fund to pay for the amounts determined to be owed by a claims process and a commission to administer the fund.³³ In other words, there was not only the ascertainment of liability; there was also a mechanism for payment. Second, paragraph nineteen directed the Secretary General of the U.N. to present a plan within thirty days for a process to resolve and pay claims.³⁴

The request that the Secretary General prepare a plan reflected the practical limits on the law-making capabilities of the Security Council. The deliberation process of the Security Council is time consuming and resolutions often are not detailed as a result. At some point, it is easier to turn the question of details over to someone else for the preparation of recommendations. Within the Security Council, one naturally entrusts this task to the head of the U.N. Secretariat. Accordingly, the Secretary General developed the plan with input from Member States as to what this commission might look like.³⁵ The Member States gave him a month to prepare the plan, and he came back in timely fashion with his proposal for a Commission that would be a subsidiary body of the Security Council and have three organs.³⁶

The first organ would be a Governing Council that would serve both a roughly legislative and executive function.³⁷ The Governing Council would be the policy-making body of the Commission and would be composed of the representatives of the Member States of the Security Council who resided in Geneva, where the Commission was headquartered.³⁸ Hence, even as the membership of the Security Council in New York changed, the mirror image of that

32. *Id.* para. 16, at 14.

33. Paragraph eighteen implements paragraph sixteen in part: "*Decides also to create a fund to pay compensation for claims that fall within paragraph 16 and to establish a commission that will administer the fund.*" *Id.*

34. S.C. Res. 687, *supra* note 4, para. 19, at 14.

35. *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, U.N. Security Council, 46th Sess., U.N. Doc. S/22559 (1991) [hereinafter Paragraph 19 Report].

36. *Id.* at 3.

37. *Id.*

38. *Id.* at 3-4.

membership in Geneva would serve as the Governing Council.³⁹ It would make decisions through consensus, elucidating on the scope of Iraq's liability, and eventually approve the resolution of claims recommended by panels of commissioners.⁴⁰

The second organ would be the Panels of Commissioners who would serve a "quasi-judicial" function.⁴¹ The Panels of Commissioners would evaluate claims and submit recommendations as to their resolution to the Governing Council.⁴² The Secretary General's Report was careful to use the term "quasi-judicial" as a partial recognition that a process to resolve over two million claims could not involve individualized adjudication of claims or the expectations of due process that ordinarily accompany such adjudication.⁴³ Yet, although perhaps a necessary term, the Commission, particularly at the outset, struggled with what it would mean to be "quasi-judicial." It 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.

In terms of the Secretary General's Report, the last, and seemingly least significant, organ would be the Secretariat.⁴⁴ Its role would be to support the work of the other two bodies and administer the Fund.⁴⁵

39. *Id.*

40. *Id.* at 4.

41. Paragraph 19 Report, *supra* note 35, at 9.

42. *Id.*

43. *Id.* See also Caron, *supra* note 27, at 30 (quoting Paragraph 19 Report, *supra* note 35) (explaining that "[t]he 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 payment and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.") (emphasis omitted).

44. See Paragraph 19 Report, *supra* note 35, at 2.

45. *Id.* Lastly, the Secretary General made recommendations as to the Fund. *Id.* The Fund was an important and innovative mechanism. Its funding started at 30% of the oil revenues of Iraq. See Caron, *supra* note 27, at 28. Following the 2003 Iraq war, the percentage was dropped to 5%. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. para. 21, U.N. Doc. S/RES/1483 (2003). A good description of the unique interaction of the United Nations and commercial transactions with Iraq, particularly as done under the "Oil for Food" program, may be found in Saleh Majid, *Trading with Iraq*, 17 ARAB L.Q. 398, 398-402 (2002).

II. THE UNCC IN PRACTICE: PHASE ONE

A. *The Influence of Lessons from the Iran-United States Claims Tribunal*

The Secretary General's plan for the UNCC was adopted by the Security Council.⁴⁶ The structure described above, however, was different in practice. Much of the initial leadership of the UNCC came with experience from the Iran-U.S. Claims Tribunal. The U.S. legal representative in Geneva at the time present on the Governing Council had formerly represented the United States as its Agent to the Tribunal. Likewise, at least three high-ranking members of the Secretariat, after the Executive Director, also came in one way or another from that Tribunal. And as generals are said to focus on fighting the last war, so too did these and other alumni of the Tribunal arrive at the UNCC seeking to improve on the issues that had confronted them at the Tribunal.⁴⁷

One issue was how a claims institution is best managed. Virtually all major decisions regarding the Tribunal were taken by the nine arbitrators, and one perception held by at least some of the Tribunal alumni, none of whom had been arbitrators, was that entrusting the management of the institution to the arbitrators was not the best solution. First, it wasn't clear that the set of skills required of a judge were the same as those needed of a manager or leader. Second, although the arbitrators at the Tribunal were asked to reside in The Hague, and serve essentially full-time, the reality was that they, to varying degrees, but increasingly over time, did not in all cases so commit themselves.⁴⁸

In the case of the UNCC, the Governing Council and Secretariat came into being and began operating long before the first Commissioners were appointed. The Council and Secretariat during this period set out to devise policies and processes for the new institution, and, given that no claims would be ready for Commissioners to resolve for some time, this initiative was quite appropriate.⁴⁹ In time, the Governing Council, working closely with the experts within the Secretariat, began adopting "Decisions" that elaborated on the meaning of Resolution 687 and thus on the scope of Iraq's liability.⁵⁰ As time went by, Panels of Commissioners were

46. *Provisional Verbatim Record of the Two Thousand Nine Hundred and Eighty-Seventh Meeting*, U.N. SCOR, 46th Sess., 2987th mtg. at 3, U.N. Doc. S/PV.2987 (1991). See also UNCC, *supra* note 3, at 5.

47. UNCC, *supra* note 3, at 375-76.

48. See generally UNCC, *supra* note 3, at 18-19.

49. *Id.* at 4-9.

50. *Id.*

appointed as part-time bodies entrusted with resolving particular “installments” rather than as full-time Panels of Commissioners with a more general sense of responsibility for the docket.⁵¹ The interesting point is that although the Secretary General’s Report viewed the UNCC Secretariat as a support unit, in fact, the Secretariat became in some respects the most influential unit.⁵² It was the only organ of the UNCC working full-time. The Panels of Commissioners became part-time groupings, convening in Geneva every month or every other month, to resolve a limited set of claims with the assistance of the Secretariat. Similarly, the Governing Council formally would meet on a quarterly basis with working groups, occasionally meeting at other times.

The second lesson involved the fact that the Tribunal had largely resolved the claims of corporations before those of individuals. The Tribunal’s alumni understood the reasons for why this ordering had occurred, but they nonetheless tended to wish it had been done in reverse. In particular, at the beginning of the Tribunal’s work, attention focused first on the large corporate claims in part because it was hoped that the 2,800 claims of individuals would be resolved as a group.⁵³ Indeed, they eventually were settled *en masse*, but it took a decade for that lump sum to come.⁵⁴ This docket ordering failed to reflect the fact that individual claimants arguably need their claims resolved much more promptly than the corporations. The individuals — small businessmen who were injured or lost their goods — often desperately needed relief. But for corporations, the claim resided in their books as a potential credit, and thus lacked the equivalent urgency. Those with Tribunal experience were determined to move the individuals with small claims to the front of the docket.⁵⁵

B. *The Overall Approach of the UNCC*

The structure of the docket became the vehicle to implement the conviction that docket priorities must be identified for different types of claims.⁵⁶ The docket for the UNCC was divided into six categories. These divisions became the basic blueprint for determining the order in which claims would be addressed. The first group to be addressed would be what became known informally as

51. See David D. Caron & Brian Morris, *The United Nations Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT’L L. 183, 187 (2002).

52. See generally UNCC, *supra* note 3, at 3-14.

53. UNCC, *supra* note 3, at 21.

54. See *supra* notes 27-30 and accompanying text.

55. See UNCC, *supra* note 3, at 21.

56. Caron & Morris, *supra* note 51, at 187.

the "humanitarian claims": Claim Categories A, B, and C. These were claims of individuals for departure ("A"), for serious injury or death ("B"), or for claims under \$100,000 ("C"). The second group was claims identified not by the type of claim, but rather the type of claimant. These also fit into three categories: claims of individuals over \$100,000 ("D"), claims of corporations ("E"), and claims of governments or international organizations ("F").

The work of the UNCC can thus be seen as having two broad stages. Categories A, B, and C — the urgent claims — were addressed in phase one. The UNCC used mass claims proceedings and moved vast numbers of claims very quickly.⁵⁷ About 2.5 million claims were involved; all of them resolved by 1996, and all of them paid by 2000.⁵⁸ Of the 923,158 claims for departure, approximately \$3.2 billion was awarded to 856,124 claimants.⁵⁹ For the 5,734 claims of serious injury or death, 3,941 claimants received approximately \$13.5 million.⁶⁰ For the approximate 1.6 million claims under \$100,000, the UNCC awarded over \$5 billion to 636,044 claimants.⁶¹

The UNCC was able to resolve these claims relatively quickly by getting away from an individual assessment of each claimant's precise entitlement. The UNCC had to resolve millions of claims. And although it ended up throwing out hundreds of thousands of claims, it cannot be said that an exaggerated claim could not have snuck through the process. But removing any possibility of an exaggerated claim came to be seen as not worth the inordinate amount of effort and injustice, in terms of delay, that would have been placed on all the other claimants.

The UNCC gained its speed through two decisions. First, it stipulated the amount of damages for similar claims.⁶² For the departure claims, for example, the damages were \$2,500.⁶³ That was it.⁶⁴ It did not matter if the damage was perhaps worth \$10,000

57. *Id.* at 188.

58. *Id.* at 187.

59. U.N. Comp. Comm'n, *Status of Claims Processing*, at www2.unog.ch/uncc/status.htm (last modified Jan. 13, 2005) [hereinafter *Status of Claims Processing*].

60. *Id.*

61. *Id.*

62. *Criteria for Expedited Processing of Urgent Claims*, Governing Council of the U.N. Comp. Comm'n, 1st Sess., 10th mtg., U.N. Doc. S/AC.26/1991/1 (1991) [hereinafter *Expedited Processing of Urgent Claims*].

63. *Id.* at 2-3.

64. It should be noted, however, that additional funds were provided for serious injury and death with proper documentation. These amounts were cumulatively payable with respect to one person, but "no more than \$10,000 w[ould] be paid for death, and no more than \$5,000 for departure, with respect to any one family (consisting of any person and his or her spouse, children and parents)." *Id.*

to a Greek and \$4,000 to a Sri Lankan; both would receive \$2,500.

Secondly, the UNCC specified the evidence required to establish the claim. Rather than consideration of various types of evidence of injury during the review stage, the UNCC specified in advance the documents, such as an airline ticket or a passport with appropriate governmental stamps, that would be regarded as proof of departure during the relevant period.⁶⁵ To aid in uncovering possibly fraudulent claims, there was a massive use of computing power to cross-check claims against airlines registers, for example, to see if the person was actually on the plane.⁶⁶ Law schools and courts accustom the lawyer to focus on the individual case. The UNCC docket presented its staff with system-level problems. The effort here was trying not to think only like a lawyer.

The UNCC's resolution of the 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. In my view, the U.N. missed an important opportunity to heighten global appreciation for it by not making this success more widely known.

There was also one major failing in Phase One: Environmental claims were left out from the urgent and humanitarian side of the docket. In 1992, the Governing Council ruled that "direct environmental damage and depletion of natural resources" included losses or expenses resulting from:

1. Abatement and prevention of environmental damage . . . ;
2. Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
3. Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;
4. Reasonable monitoring of public health and performing medical screenings . . . ; and

65. *See generally id.*

66. *See UNCC, supra* note 3, at 141-42.

5. Depletion of or damage to natural resources.⁶⁷

The environmental claims were placed in Phase Two as part of Category F.⁶⁸ Humanitarian claims were addressed first because they were the most urgent, the most immediate. But much of the environmental damage was ongoing, and, indeed, much of the damage remains unknown.⁶⁹ Had the environmental claims been addressed first in the humanitarian group, the eventual damage may well have been less than it became. Despite the clear early priority placed on the environmental claims, the UNCC's work along these lines did not seriously commence until 1998 when a distinguished panel of commissioners was appointed and a team in the Secretariat was formed to handle these claims. Though those claims arguably started too late, what the Environmental Claims Panel and Team have done since then has been a remarkable achievement.⁷⁰

C. State as Agent, Not as Principal

In international law, states are normally seen as principals.⁷¹ If you travel overseas and are assaulted by a government official, such as a police officer, you might try to attain redress in that country. If you are unsuccessful, you might petition your home state to espouse your claim vis-à-vis the other country. Theoretically, in that situation, the claim belongs to the espousing state.⁷² It is the espousing state that was injured under international law; one of its nationals was hurt without redress.⁷³ And indeed, the espousing state does not have a duty under international law to give any money it receives to its injured national.⁷⁴ This is the sense in which states are principals.

67. *Criteria for additional Categories of Claims*, U.N. Compensation Commission, Governing Council, 5th Sess., para. 35, at 8, U.N. Doc. S/AC.26/1991/7/Rev.1 (1992).

68. *Letter Dated 23 March 1992 from the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., at 9-10, U.N. Doc. S/23765 (1992) [hereinafter *Letter Dated 23 March 1992*].

69. Olufemi Elias, *The UN Compensation Commission and Liability for the Costs of Monitoring and Assessment of Environmental Damage*, in *ISSUES OF SOCIAL RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS* 219, 227-28 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004); David D. Caron, *Finding Out What the Oceans Claim: The 1991 Gulf War, the Marine Environment, and the United Nations Claims Commission*, in *BRINGING NEW LAW TO OCEAN WATERS* 393, 415 (David D. Caron & Harry N. Scheiber eds., 2004).

70. See generally Elias, *supra* note 69; Caron, *supra* note 69.

71. See RESTATEMENT (SECOND) OF THE LAW: FOREIGN RELATIONS LAW OF THE U.S. § 174 (1965).

72. *Id.*

73. *Id.*

74. *Id.*

In the UNCC, the state, outside of its own claims in Category F, was treated as the agent of the claimant.⁷⁵ For example, the claims of nationals and residents of Egypt were for the most part submitted through the Egyptian government.⁷⁶ But this avenue for filing did not mean that they were the claims of Egypt.⁷⁷ Rather, Egypt presented them on behalf of its citizens.⁷⁸ If Egypt refused to present claims for a segment of its population — a major concern for the UNCC being that Palestinians in various countries would not be represented by a government — the UNCC reserved the power to specify an agent to go into the country to get the claims.⁷⁹

Second, once the money was awarded to such claimants, there were very specific regulations. The state receiving the money had to deliver the money, could only skim off a small percentage for the administrative costs of running the claims program, had to spell out such possible costs in a statute, had to show the awarded monies had been delivered to the claimant in fact, and was obligated to return to the UNCC any money that the state could not deliver.⁸⁰

Treating the State as agent rather than principal is a radical and very important transformation. States were charged with doing tasks, and it was the UNCC's mandate to ensure that states followed through with these obligations.

III. THE UNCC IN PRACTICE: PHASE TWO

Phase Two began in 1996 with the second category of claims in Categories D, E, and F. There were far fewer claims, but for much larger amounts.⁸¹ Individual claims over \$100,000 — Category D — contained 13,584 claims totaling over \$16.5 billion.⁸² Category E, the claims of corporations, included over 6,500 claims seeking over \$78.5 billion.⁸³ Category F was the group seeking the largest amount: 497 government and international organization claims seeking a total amount of over \$243 billion.⁸⁴ This last group included environmental claims and the claims of Kuwait.⁸⁵

75. See *Expedited Processing of Urgent Claims*, *supra* note 62, at 4.

76. See generally *id.*

77. *Id.*

78. *Id.*

79. *Letter Dated 21 September 1992 from the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., at 17-18, U.N. Doc. S/24589 (1992).

80. *Distribution of Payments and Transparency*, Governing Council of the U.N. Comp. Comm'n, 12th Sess., 41st mtg., U.N. Doc. S/AC.26/Dec.18 (1994).

81. Caron & Morris, *supra* note 51, at 187.*Id.*

82. *Status of Claims Processing*, *supra* note 59.

83. *Id.*

84. *Id.*

85. *Letter Dated 23 March 1992*, *supra* note 68, at 9-10.

Two basic problems were seen at the outset of this phase. The first was how to interpret the "arising prior to" clause. The second problem was whether the mass claims procedures employed in Phase One would work with the larger claims. In this essay I address the first.

A. The "Arising Prior To" Clause: Historical Background

In January of 1979, I lived in San Francisco, and one bright January day I went to the Iranian consulate to observe this bit of history: Every week there were demonstrations against the Shah of Iran. As I was watching, a woman in a chador approached me and handed me a leaflet that I now wish I had kept. She was an Iraqi, and the leaflet talked about the life of Saddam Hussein. It detailed all of his achievements, explaining how he had just become President of Iraq, and that he was only forty-one. It ended with the sentence: "What more can we expect?"

Mark Bowden paints a much different vision of Saddam Hussein as a person.⁸⁶ He tells, among other things, the story of Hussein's meeting in Havana in 1979 with Iranian representatives.⁸⁷ The Iranians, concerned after their revolution that they had been isolated, reportedly decided that they wanted to settle the Shatt-al-Arab dispute.⁸⁸ Iraq's Ambassador to the U.N. came over to Saddam Hussein following the talks and relayed his happiness that the Iranians appeared ready to settle.⁸⁹ Saddam Hussein turned to his ambassador and indicated that he was ready to take advantage of their weakness.⁹⁰

The Iran-Iraq War, begun by Saddam Hussein shortly thereafter, raged for much of a decade and is the great overlooked war of the last century. Iran, in 1979, took U.S. nationals hostage, ignored the judgment of the International Court of Justice that they be released, and, in general, seemed a threat to regional stability, and, therefore, U.S. interests. When war broke out between Iraq and Iran in 1980, Iran's attempts to invoke the U.N. Charter in response to Iraq's aggression fell on deaf ears. Even though the loss of life was horrific, Iran's own actions made it an outlaw in the eyes of the world community, and its effort to invoke the very machinery it had flaunted was not successful. If there is a lesson of international law, it is that if you shun the international community, you may be shunned in return. Iran was the victim of

86. See Mark Bowden, *Tales of the Tyrant*, THE ATLANTIC MONTHLY, May 2002, at 35.

87. *Id.* at 47.

88. *Id.*

89. *Id.*

90. *Id.*

this war, but it could not get the international community to pay attention to it.

The significance of the Iran-Iraq War for the Iraqi economy and for Iraq's debt situation today cannot be overstated. Most importantly, that conflict increased the external public debt of Iraq astronomically. As we approach the economic effect of that war, it is important to recognize that Iraq had virtually no foreign debt before its war with Iran in 1980.

Iraq's external public debt increased as Iraq borrowed from other nations to finance the war. And, indeed, almost all of the present estimates of Iraq's external public debt find their origin in the period of the Iran-Iraq War. As to the amount of this debt, the Secretary General of the United Nations wrote in 1991 that:

Iraq's total external debt and obligations have been reported by the Government of Iraq at \$42,097 million as of 31 December 1990. However, the exact figure of Iraq's external indebtedness can only be ascertained following discussions between Iraq and its creditors. To estimate debt servicing requirements it is assumed that Iraq reschedules its debts at standard Paris Club terms.⁹¹

Other accounts of the debt are greater. Lawrence Freedman and Efraim Karsh wrote: "[I]t increasingly became evident that Iraq had emerged from the war a crippled nation. From a prosperous country with some \$35 billion in foreign exchange reserve in 1980, Iraq had been reduced to dire economic straits, with \$80 billion in foreign debt and shattered economic infrastructure."⁹²

91. *Letter Dated 30 May 1991 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., para. 6, at 3, U.N. Doc. S/22661 (1991) [hereinafter *Letter Dated 30 May 1991*]. In accordance with paragraph 19 of Security Council Resolution 687, the Secretary General presented a report to the Council on 2 May 1991, see Paragraph 19 Report, *supra* note 35, which contained, at paragraph 13, an undertaking by the Secretary General to suggest to the Security Council a percentage figure of the value of Iraq's petroleum exports that would represent Iraq's contribution to the Fund to serve as the source of monies for satisfaction of decisions of the UNCC. *Letter Dated 30 May 1991, supra*, note 91 at 5. On 30 May 1991, the Secretary-General presented his analysis in the form of a note, annexed to the above cited letter. *Id.* at 2-3. In its letter to the Security Council dated 16 August 1991, the Government of Iraq confirmed the "external debt and financial commitments" figure of more than US\$42,097 million. *Letter Dated 16 August 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., at 3, U.N. Doc. S/22661 (1991).

92. FREEDMAN & KARSH, *supra* note 16, at 39. See also ABBAS ALNASRAWI, *THE ECONOMY OF IRAQ: OIL, WARS, DESTRUCTION OF DEVELOPMENT AND PROSPECTS 1950-2010* 109 (1994).

Iraq has always been one of the few developing countries that managed to stay away from contracting foreign loans. The only significant

In addition, as Iraq's external public debt increased, Iraq found it could not sustain its normal purchases, and its international commercial transactions started to change dramatically.⁹³ Kuwait and other Gulf region countries, for instance, at that time normally paid off a commercial transaction within thirty days.⁹⁴ As Iraq's

exception was a number of loans extended by the Soviet Union and other centrally planned economies, most of which were to be paid in oil.

As the war with Iran continued, the government found itself forced to borrow to finance the war. Three sources of loans were identified. First, loans extended by the Arab Gulf states, mainly Saudi Arabia and Kuwait, soon after the outbreak of the war. The government of Iraq has always maintained that such funds, which amounted to \$40 billion, were supplied as assistance rather than loans to help it in its war with Iran. Another \$35 billion was owed to Western governments and banks. Third, another \$11 billion was owed to the Soviet Union and other Eastern European governments. It should be pointed out that Iraq's debt-service obligations were projected to be \$8 billion, 55 per cent of its oil revenue in 1989.

Id. Cf. Iraq Country Profile 1989-90, THE ECONOMIST INTELLIGENCE UNIT 33 (1990) ("Iraq's balance of payments situation before the war with Iran was such that the government was able to avoid raising loans abroad as a matter of principle for many years. Since 1981, however, in the face of growing current account deficits, the country has taken on enormous overseas borrowing.").

93. Caron & Crook, *supra* note 29, at 131-32.

94. *Report and Recommendations made by the Panel of Commissioners Concerning the First Installment of "E2" Claims*, U.N. Compensation Commission Governing Council, 21st Sess., at 28-29, U.N. Doc. S/AC.26/1998/7 (1998) [hereinafter *Report and Recommendations*].

83. Iraq's substantial foreign debt is a relatively recent phenomenon. Indeed, Iraq's practice with respect to foreign suppliers of goods and services until the late 1970s, or even the early 1980s, appears to have been to pay its debts on a current basis

85. Iraq's foreign debt became significant only during the 1980s. The main factors which contributed to its emergence and rapid growth are generally identified as the decline in oil prices at the end of the 1970s (with the resulting corresponding decrease in Iraq's oil revenues), the adverse effect of the war with the Islamic Republic of Iran on Iraq's economy (in terms of both increased military expenditures and decreased income due to the destruction of assets, including oil exporting facilities), and the maintenance — and in some cases the increase — of public sector spending by Iraq notwithstanding the constraints created by the first two factors.

86. With the rapid growth of its foreign debt, Iraq changed its foreign trade practices and began to request credit from its suppliers, even for ordinary consumer goods and medical supplies, where it had previously incurred foreign credits "only with the greatest of care[.]" The country became increasingly dependent on the willingness of foreign suppliers to finance operations in Iraq through, among other things, extended payment terms. The distortion of normal conditions in Iraq's international trade during the mid- to late 1980s resulting from Iraq's foreign debt was also manifest in the fact that it no longer paid its then existing debts on originally-contracted terms, but required deferments in order to allow it the time needed to gather the funds necessary to make payments that became due and to clear debts that were overdue. As time went on, Iraq continuously renegotiated and rescheduled its debts with

ability to purchase foreign goods and services diminished, Iraq began to default on contractual payments due and commenced renegotiating the terms of contracts to provide for payment after as much as forty-eight months.⁹⁵ In essence, the sellers had begun to provide financing for Iraq's purchases.

The Security Council was quite aware of Iraq's pre-Gulf War debt and its rough magnitude as it moved to establish the UNCC as a part of the cease-fire resolution in 1991.

B. *The "Arising Prior To" Clause Decision*

In Security Council Resolution 687, Iraq was declared to be liable for damages arising from its illegal invasion and occupation of Kuwait.⁹⁶ Paragraph sixteen of the Resolution provides:

Reaffirms that Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage[,] — including environmental damage and the depletion of natural resources — or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.⁹⁷

The precise object of the critical initial decision of the UNCC's Second Phase was the clause "without prejudice to its debts and obligations arising prior to 2 August 1990," a clause that became known as the "arising prior to" clause. Most importantly, by what test would Panels decide if a debt or obligation arose prior to the start of the war?

Although, as noted above, the Governing Council could have issued a decision as to the meaning of the clause, they could not agree on a meaning. They had difficulty deciding on a single meaning because at stake was in essence the repayment of the Iran-Iraq War debt. Moreover, because of the high stakes present, extremely focused legal thinking was applied by the potential claimants and much of the Iran-Iraq War debt described above was argued to have arisen after the war. For example, although a loan

its contracting partners.

Id.

95. *See id.*; Mason, *supra* note 22, at 126 ("in a process of constant negotiation with its creditors, Iraq had deferred payment by rescheduling loans").

96. S.C. Res. 687, *supra* note 4.

97. *Id.*

debt may have had its origin long before the war, it was argued that because a material breach in payments on that debt was occasioned by various actions during the war, that breach had accelerated payments under the loan and a new debt had arisen at that point in time, a point after the start of the war. Therefore, although the original loan may have arisen prior to August 2, 1990, it was argued that a new claim had arisen after the exclusion date and was within the jurisdiction of the UNCC.

There was as much as \$80-90 billion that turned on the meaning given to the "arising prior to" clause. But the Governing Council was divided.⁹⁸ The members of the Council had extensive briefs from their own governments, and at least a dozen countries had submitted extensive legal opinions on the meaning of the clause.⁹⁹ The Council eventually gave the question — reluctantly — to a Panel of Commissioners referred to informally as the Precedent Panel. The question for the Panel was: What is the meaning of the clause? Since the decision of the Panel required the approval of the Governing Council, one unstated question was: Why would one think such a decision would survive the review of the divided Governing Council?¹⁰⁰

The key to the Panel's decision was its recognition that the task before it was to interpret a Security Council Resolution under international law, and that the phrase had an autonomous meaning and was not intended to include a reference to the national law that might govern the debt. Although this might seem readily apparent, it was not the approach employed by the various governments up to that point. The legal briefs of the various governments instead had analyzed the phrase "arising prior to," without exception, by looking at their national laws. The briefs had not focused on the intent of the Security Council in adopting the language and, without discussion, generally assumed the relevance of national law.

The Panel started by ascertaining the applicable rules of legal interpretation stating:

In interpreting Security Council resolution 687 (1991), the Panel takes guidance from the Vienna Convention on the Law of Treaties (the "Vienna Convention"), which provides, in part, that "[a] treaty shall be interpreted in good faith in accordance with

98. See *Report and Recommendations*, *supra* note 94, at 19.

99. *Id.*

100. The Governing Council approves the decisions of Panels. The Panels write recommendations, but unlike a judge's final decision, the Panel's views must be passed onto the Governing Council where they, by vote, approve it.

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[.]” Although a resolution of the Security Council is not a treaty within the meaning of the Vienna Convention, the Panel finds that the Convention when referred to with care is relevant to its task of interpretation. The Panel notes in this regard that other international bodies have looked to the Vienna Convention for guidance in interpreting resolutions of the United Nations Security Council.¹⁰¹

The Panel then turned to what it saw as the two fundamental issues raised by the “arising prior to” clause.

The first, and easier, question for the Panel concerned the meaning of the phrase “without prejudice to” and whether the “arising prior to” clause should be read to have any exclusionary effect.¹⁰² Indeed, a number of governments argued “the position that the ‘arising prior to’ clause was not intended to have any exclusionary effect on the Commission’s jurisdiction.”¹⁰³ The Panel considered the language carefully, looking to official languages of the Resolution other than English as “instructive in ascertaining the Security Council’s intentions,”¹⁰⁴ and concluded:

101. *Report and Recommendations*, *supra* note 94, para. 54, at 19. As to the practice of other bodies, the Panel in particular noted that:

In *Prosecutor v. Dusko Tadic*, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 made use of the Vienna Convention in interpreting its constitutive Statute. The Tribunal in that instance wrote: “Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters’ conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation of the Vienna Convention on the Law of Treaties appear relevant.” *Prosecutor v. Dusko Tadic a/k/a “Dule”* case No. IT-94-1-T (Trial Chamber Decision of 10 August 1995), para. 18.

Id. at n.12.

The law to be applied by the Panel is set out in article 31 of the [Commission’s] Rules, which provides as follows:

“In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.”

Id. para. 43, at 17.

102. *Id.* at 19-21.

103. *Id.* para. 52, at 19.

104. *Id.* para 61, at 21. The Panel closely considered the proper interpretative method for a resolution in several official languages writing:

The Panel finds that the "arising prior to" clause does have an exclusionary effect on the jurisdiction of the Commission, and that the phrase "without prejudice" is at the same time intended to emphasize that the jurisdictional exclusion in no way affects the ability of persons or entities to seek recourse for such debts and obligations "through the normal mechanisms[.]"¹⁰⁵

The second and crucial issue was the meaning of "arising prior to" itself.¹⁰⁶ Finding that the ordinary meaning of the terms did not

As stated in paragraph 54 . . . the Panel takes guidance from the Vienna Convention even though the Convention is not directly applicable in this instance.

The Panel concludes that it should take particular care with article 33 of the Vienna Convention which addresses the interpretation of treaties authenticated in two or more languages. Article 33, paragraph 4, of the Vienna Convention provides that where there are differences between "authenticated" texts, "the meaning which best reconciles the texts having regard to the object and purpose of the treaty shall be adopted[.]" The Panel notes that although the phrase "authenticated text" does not appear within the Security Council's Rules, Arabic, Chinese, English, French, Russian and Spanish are "both the official and the working languages of the Security Council" (rule 41 of the Provisional Rules of Procedure of the Security Council).

Putting aside the question of whether an official text should be regarded as the equivalent of an authenticated text, the Panel believes that the principles of interpretation it employs on critical precedential issues such as those presented by the Claims should reflect the realities of the drafting process. In short, the analogy between treaties and United Nations resolutions "must be treated with considerable caution, bearing in mind that in the law of treaties the status of 'authenticated text' derives from the agreement of the parties, and is not [as with United Nations Security Council resolutions] imposed by mere procedure" The Panel notes also that, prior to conclusion of the Vienna Convention, the International Court of Justice in the South-West Africa voting procedure advisory proceeding, when faced with interpreting a General Assembly resolution, gave a preference to the French version having found that it seemed to "express more precisely the intention of the General Assembly" Thus the Panel finds that article 33, paragraph 4, of the Vienna Convention does not *necessarily* provide an appropriate rule of interpretation given the differences in circumstances between the negotiation of a treaty and the drafting, discussion and passage of Security Council resolution 687 (1991). Rather, the Panel takes notice of the fact that English was the working language used in the drafting and discussion of resolution 687 (1991), and as such, the English language version should be the starting point of any inquiry into the meaning and application of the resolution. The Panel looks to the other official language versions so as to confirm, or where necessary, resolve ambiguities in the meaning suggested by the English text.

Id. at n.14 (citations omitted).

105. *Id.* para. 56, at 20.

106. *Id.* at 21-35.

provide a clear resolution, the Tribunal considered whether there existed a special legal meaning uniform to all legal systems.¹⁰⁷ The Panel noted that the phrase "arising prior to," in the legal sense, does not have a universal specialized meaning.¹⁰⁸ Rather, the Panel stressed that national laws vary not only among each other on the meaning of "arising prior to," but, even more significantly, the phrase can have several meanings even within one system depending upon the context in which it is employed.¹⁰⁹ Therefore, the meaning of the phrase was found to depend heavily on the context of its use.¹¹⁰ The Panel wrote:

The Panel finds that the divergence in views expressed in the article 16 responses [the views of Governments] results not only from the fact that differences exist between legal systems, but also because the Governments often tried to give a single and abstract answer without reference to the particular purpose to be served by the phrase. The responses thereby failed to reflect that significant differences exist even within a given legal system as to when a debt or obligation arises, depending upon the context in which the concept is used. In the light of these various and often conflicting views across and within different jurisdictions, the Panel finds that there is no definite and universal legal concept of when a debt or obligation may be considered to have arisen.¹¹¹

This conclusion led the Panel to seek the intent of the Security Council in adopting the language, and this, in turn, led back to the history leading up to the conflict which has been described above.¹¹² In this context, the intent of the Council was clear to the Panel. It wrote:

[T]he object and purpose of the Security Council's insertion of the "arising prior to" clause was to exclude from the jurisdiction of the Commission Iraq's old debt. The exclusion of this pre-existing

107. *Id.* at 23.

108. *Id.*

109. *Id.*

110. *Id.* para. 70, at 23.

111. *Id.*

112. *Id.* at 23-27.

foreign debt from payment through the Fund is understandable when one considers its sheer size The debt was substantial and known to the public — including the Security Council — before resolution 687 (1991) was adopted. Paying off this debt out of the Fund would have resulted in a significant diversion of the resources available to compensate the victims most directly affected by the invasion of Kuwait. Such a diversion of resources would have greatly undermined the very purpose of the Commission and Fund, and would have created an unanticipated mechanism for the compensation of creditors long unpaid. It was this old debt that the Security Council sought to exclude by the insertion of the "arising prior to" clause.¹¹³

The Security Council intended to exclude the old debt. They knew of the debt generated by the Iran-Iraq War, and they meant to exclude it with the "arising prior to" clause.¹¹⁴ The issue then became for the Panel to devise a mechanism to determine what constituted old rather than new debt. This would be difficult because the issue could not simply involve a reference to the national law which might be said to govern that debt because as already described, such a reference would lead in some instances to old debt being re-characterized as new for purposes of UNCC jurisdiction.

The Panel saw its task as one "to devise an administrable rule for the identification of those debts as opposed to the debts that could be termed truly 'new' as of 2 August 1990; only the latter are within the Commission's jurisdiction." The Panel approached the question keeping the Council's intent in mind. The easily-identified old debt included "the debts that already existed as of the end of the conflict with the Islamic Republic of Iran, i.e., in August 1988." However, as recounted above, the growing Iraqi external debt at that time led to great distortions in commercial practice and to the rescheduling of many of these clearly old debts.¹¹⁵ The Panel observed:

The rescheduling of such old debts perhaps renewed them under applicable law, but did not make them

113. *Id.* para. 72, at 24.

114. S.C. Res. 687, *supra* note 4.

115. *See supra* notes 93-95 and accompanying text.

new debts in the sense of Resolution 687 (1991). In other instances, unusually long payment terms were granted to Iraq, and such terms in this context mask the true age of the debt. These unusually long payment terms as described were a consequence of the magnitude of the old debt; but for those unusually long payment terms, the debts and obligations involved would be a part of the old debt.¹¹⁶

Therefore, the Panel concluded that in order “to distinguish what was ‘old and overdue’ from what was actually new debt as of 2 August 1990,” the Panel must “discount the effects of the foreign debt on Iraq’s ability to make contractual payments owed — i.e., the rescheduling and unusually long payment terms obtained by Iraq from foreign parties in the 1980s.” Moreover, it is not the existence of unusual payment terms and conditions in a contract, in and of themselves, that render a debt “new” or “old” for purposes of Resolution 687.¹¹⁷

The Panel adopted the view that “Iraq’s practice before the rise of its foreign debt is the best indicator of what normal practice would have been in 1990 but for that debt.” In this sense, the significant fact was that “Iraq, before the influence of its foreign debt on its economy and balance of payments, paid its contractual debts on a current basis.” The Tribunal, examining customary practice, concluded that a “foreign party contracting with Iraq therefore reasonably could have expected to have been paid within three months of the . . . relevant document that, according to the underlying contract, evidenced the completion of a particular performance.” The Panel therefore found that “a rule which best implements the Security Council’s intention in [R]esolution 687 (1991) is the following:”

In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990.¹¹⁸

116. *Report and Recommendations*, *supra* note 94, para. 87, at 29.

117. *Id.*

118. *Id.*

The Council discussion concerning this conclusion went much easier than might be expected. The arguments concerning the report were cut short not because the stakes were somehow less, but instead because the Panel, through its finding of an autonomous meaning in the Security Council Resolution, did not actually choose among, or indeed contradict any of, the legal briefs submitted by the various governments.

IV. CLOSING OBSERVATIONS

The "arising prior to" clause decision was, in terms of its effect on the docket, the most significant decision taken by the UNCC. Jurisprudentially, it is particularly significant for its articulation of the proper method for interpretation of a Security Council resolution.

In examining the decisions of the UNCC, two decisional dynamics are important for readers, not a part of the process, to recognize. First, the fact that the Governing Council reviewed the reports and recommendations of the various Panels gave rise to a curious and subtle influence of the style of the Panel's decisions. In other words, the review affected the way some Panels wrote their awards, and readers of these awards need to be aware of this effect. Generally, it will be noted, Panels did not cite to general international law. Instead, they cited to Governing Council policies contained in Council decisions. This practice reflected a judicial tendency to rest a decision on the narrowest ground available. But it also reflected a tendency to indicate to the Governing Council that there was nothing in the Panel's reasoning that went outside of what the Governing Council had already considered. If an issue was particularly difficult, and the Panel spent considerable time deciding it, that difficulty generally can not be easily seen in the Report. Again, the Panels avoided highlighting their early — but later resolved — uncertainty because doing so might only have fostered unnecessary debate in the Governing Council. Second, even though the docket of the UNCC involved a very large number of claims, it still was a closed universe of claims. A consequence of this limited docket was when a Panel was presented with deciding the first of a category of cases or the first impression of a legal issue, the Panel recognized that it needed to do so in anticipation of future like claims. This looking forward was required because a closed docket accentuates the tendency of any judicial body toward a path-dependent jurisprudence. In other words, the fixed nature of the docket led Panels to value consistency within the entire docket over improving its decision but thereby treating parts of the docket differently.

The “arising prior to” decision was a remarkable achievement in that it not only preserved the Security Council’s intended mandate for the UNCC, but that it also, first, gained the prompt unanimous approval of the UNCC’s Governing Council which up to that point had been deeply divided and, second, anticipated extremely well the range of situations that would arise over the course of the Commission’s work and thereby provided lasting guidance to the various Panels.