



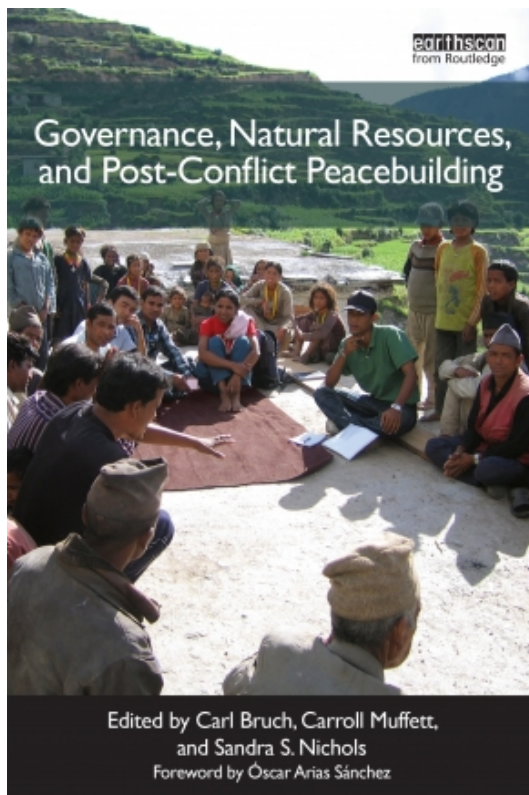
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Reflections on the United Nations Compensation Commission Experience

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Reflections on the United Nations Compensation Commission experience

Lalanath de Silva

Resolving and reconciling natural resource–related conflicts present special challenges. In particular, it calls for approaches and options that are interdisciplinary in nature and often transboundary in scope. By placing the United Nations Compensation Commission (UNCC)¹ and its environmental claims in a broader political context, one can draw some lessons about peacebuilding for the future. First, the UNCC did not unfold in a vacuum. Rather, it took place in a dynamic international political climate. These political dynamics influenced the UNCC and were, in turn, influenced by the UNCC. Second, planting and nurturing the seeds of fair play and engendering a sense of justice on all sides—between victor and vanquished, or offender and victim—supports peacebuilding. Although the processing of the environmental claims produced a greater sense of fairness in Iraq and neighboring claimant countries, that was not necessarily the case for the rest of the claims processed by the UNCC. Third, international rule of law is upheld and supported when states and the United Nations apply international law consistently. The UNCC is unique in many ways and has not been replicated, even though there have been other international conflicts after the 1990–1991 Gulf War where principles of state liability were arguably applicable.

POLITICAL DYNAMICS AND THE UNCC

The 1990–1991 Gulf War commenced when Iraq, under Saddam Hussein’s rule, invaded and occupied Kuwait. This invasion was motivated by a number of economic, political, and military interests. In an effort to liberate Kuwait, the

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¹ For an overview of the UNCC, including discussion of its interdisciplinary and transboundary approach, see Cymie R. Payne, “Legal Liability for Environmental Damage: The United Nations Compensation Commission and the 1990–1991 Gulf War,” in this book.

United Nations Security Council (Security Council) took unprecedented action by authorizing the use of force. The defensive operation that began soon after Iraq's invasion of Kuwait in 1990—Operation Desert Shield—evolved into Operation Desert Storm, culminating in the liberation of Kuwait and the eviction of Iraqi forces. UN sanctions had been imposed on Iraq previous to the liberation of Kuwait, and these were kept in force after the liberation. Before the end of the 1990–1991 Gulf War, the declared purpose of these sanctions was to force Iraq to withdraw from Kuwait without bloodshed. Subsequent to the liberation of Kuwait, a number of reasons were given by the Security Council for maintaining the sanctions (UNSC 1991a). Some of these reasons included persuading Iraq to release prisoners, to cease provocative acts, and to desist from its declared intent to use chemical weapons (UNCC 1992). These sanctions were lifted only after the U.S.-led invasion of Iraq in 2003 and the resulting regime change.

The United States and other Western powers, including the United Kingdom, played a major role in the 1990–1991 Gulf War. There is ample material to support the view that the UNCC's rules and claim outcomes, including the environmental claim outcomes, were influenced by these political dynamics.

IRAQ'S PARTICIPATORY SPACE AT THE UNCC

The best example, among many, of how political dynamics influenced UNCC rules and outcomes is the evolution of Iraq's participatory space in the UNCC. Cymie R. Payne notes that “[o]ver the life of the institution, the relationship between Iraq and the UNCC evolved.”² With the environmental claims, that relationship evolved from minimal participatory space to one where Iraq had considerable space, similar to that of a defendant in a civil suit or party to an arbitration. The evolution of that relationship was influenced by key political actors in the UNCC.

At the time the F4 Panel of Commissioners (the Panel)—the body responsible for dealing with environmental claims—was first convened in 1999, the UNCC had been operating under procedural rules adopted in 1992 (UNCC 1992). These rules had been adopted after extensive debate and negotiations in the UNCC Governing Council (Governing Council). Under these rules, Iraq's participatory space in the individual loss claims was confined to responses to article 16 reports and selected sample cases. (Article 16 reports were presented to the Governing Council by the Executive Secretary of the UNCC and contained brief summaries of legal and factual issues on claims or groups of claims, and Iraq and other UN member states could provide feedback on the issues.)³ The rules provided for an expanded participatory space for Iraq in the large corporate and government claims, which were processed later. For example, the rules gave panels of commissioners processing the corporate and government claims discretion to hold

² Payne, page 734, in this book.

³ For a further discussion of article 16 reports, see Payne, in this book.

oral proceedings. Panels also had discretion to classify corporate and government claims as “large and complex,” resulting in longer response periods for Iraq. Mass claims processing techniques adopted by the UNCC restricted Iraq’s ability to examine and respond to claims individually. However, mass claims techniques may have been justified given the large number of claims, the need to protect individuals from potential Iraqi retaliation, and the humanitarian nature and urgency of such claims. But it should be noted that these procedural restrictions on Iraq have been criticized (especially by legal representatives of Iraq) as an exercise of victor’s justice.⁴

In the first installment of environmental claims, Iraq was provided copies of claim documents, including some of the evidence reviewed by the Panel. In 2000, the Governing Council adopted revisions to the rules of procedure by (1) providing funding from the UNCC to Iraq for hiring international experts for its defense of the environmental claims (UNCC 2000, 2001a, 2004) and (2) making oral proceedings mandatory in the environmental claims (UNCC 1992, 2000). Even prior to this decision, the Panel had used its discretion under the older rules and directed that oral proceedings be held for the first installment of claims. The benefit of funding from the UNCC for hiring legal and other experts did not help Iraq in time for the first and second installments of environmental claims. They did, however, improve Iraq’s capacity to participate during the third to fifth installments of claims. There was a marked improvement in the quality of Iraq’s written responses and oral submissions in the third to fifth installments of claims. This was partly because the Panel and the UNCC legal team dealing with the environmental claims consistently supported expanding Iraq’s participatory space.⁵ The Panel and the UNCC legal team felt that Iraq’s participation would assist in the clarification of legal and factual issues in the claims and that such participation would provide greater credibility and legitimacy to the Panel’s findings.

Iraq initially adopted a hostile attitude toward the UNCC, hampering Iraq’s participation in the claims process.⁶ This attitude changed by the time the environmental claims commenced. But had Iraq’s hostile attitude continued, it is conceivable that even with greater participatory space provided through procedural rule changes, Iraq might not have participated in the claims process. The potential lesson here is that in a post-conflict situation, compensation and reparations claims processes that limit the participatory space of an aggressor or vanquished state may well reinforce and exacerbate self-imposed hostile refusals to participate by such a state.

⁴ See, for example, Graefrath (1995), Malanczuk (1996), and Schneider (1998).

⁵ Thomas A. Mensah, the chairman of the Panel, had served as the first president of the International Tribunal for the Law of the Sea (ITLOS 1996). The other two members of the Panel were Peter H. Sand, a leading legal academic from Germany, and José R. Allen, a legal practitioner from the United States. All three panel members enjoy high standing as legal practitioners.

⁶ Payne, in this book.

The Governing Council decided to give the monitoring and assessment studies priority and mandated that these claims be processed first (UNCC 1998; Elias 2004). As a result, the first installment of claims provided awards to claimants to undertake monitoring and assessment studies to develop material for subsequent claims involving substantive restoration and compensation (UNCC 2001c). Such study materials started pouring into the UNCC in support of environmental restoration and compensation claims in the third to fifth installments, and with prodding by the Panel and the legal team, these materials were made available to Iraq. Additionally, materials submitted by claimants in response to interrogatories were also made available to Iraq. This latter step signaled a major departure from practice in other UNCC panels. A significant number of these steps were taken by the UNCC prior to the 2003 U.S.-led invasion of Iraq.

Table 1 summarizes the expansion of participatory space over each installment of environmental claims. Significant changes in favor of Iraq are obvious before and after the third installment, which roughly coincided with the 2003 invasion. One noteworthy procedural feature, illustrated by table 1, is that Iraq was not accorded the right of inspecting on-site damage to develop its defense

Table 1. The evolution of Iraq's participation in environmental claims processed by the United Nations Compensation Commission (UNCC), 1999–2005

<i>Participatory space for Iraq</i>	<i>1st installment</i>	<i>2nd installment</i>	<i>3rd installment</i>	<i>4th installment</i>	<i>5th installment</i>
Article 16 report and response	X	X	X	X	X
Access to basic claims materials	X	X	X	X	X
Written claims responses	L	L	X	X	X
Granting extensions/ delays to Iraq	L	N/A	X	X	X
Legal and technical aid for Iraq from UNCC fund	NIL	L	X	X	X
Requests for documents by Iraq's counsel	NIL	NIL	X	X	X
Providing monitoring and assessment materials to Iraq	N/A	N/A	X	X	X
Providing claimant responses to Panel interrogatories	NIL	NIL	X	X	X
Meeting Panel's expert consultants	NIL	NIL	L	X	X
Oral proceedings	L	L	X	X	X
On-site inspections	N/A	N/A	N/A	N/A	N/A

Notes: X represents sometimes significant participation, and L represents limited participation. NIL represents very little or no participation. N/A represents not applicable. The Panel is the F4 Panel of Commissioners—the UNCC body responsible for handling environmental claims.

during any of the five environmental claim installments. This is understandable given that sites were in neighboring countries but nevertheless problematic from a due process standpoint.

In 2000, when the environmental claims processing began, there was resistance from the Governing Council and the UNCC management to increasing Iraq's participatory space. The Panel and legal team, however, were vocal and supportive of increasing that space. Additionally, Iraq was demanding greater participatory space in regard to environmental claims as well as other large claims. The political dynamics in the Security Council began changing in favor of Iraq in 1998, when France and Russia opposed Operation Desert Fox—a military operation proposed and executed by the United States and United Kingdom to enforce no-fly zones over Iraq. After the 2003 invasion, the United States and United Kingdom also became supportive of Iraq. The invasion and the oral hearings for the third installment of environmental claims coincided. Before 2003, the favorable attitude toward Iraq was due in part because Governing Council members were concerned about the growing humanitarian crisis in Iraq and partly because there had always been a recognition that Iraq ought to have greater participatory space in the larger corporate and government claims. After the invasion, however, the attitude softened even more, allowing the Panel and legal team to push for and win more participatory space for Iraq for the fourth and fifth installments of claims. Iraq's own lawyers acknowledged the increased participatory space (Schneider 2005; Chung 2005). The Panel was comprised of leading jurists, who had high reputations to protect, and the lawyers on the UNCC legal team mostly came from countries with strong due process rights. Perhaps, these factors contributed to the Panel and legal team pushing for greater participatory space for Iraq.

Another example of the influence of such political dynamics is the varying amount of Iraq's contribution to the UNCC fund. In 1992, the contribution was fixed at 30 percent of Iraq's oil sales (UNSC 1991b). This was reduced to 25 percent in view of humanitarian considerations (UNSC 1999, 2000). However, after 2003, the contribution was reduced to 5 percent at the insistence of the United States (UNSC 2003). As noted by Gerry Gilmore of the American Forces Press Service, the U.S. administration believed that Iraqi oil production would increase after the invasion and regime change and would pay for reconstruction, foreign debt, and other Iraqi financial obligations (Gilmore 2003). The drastic reduction in the Iraqi contribution to the UNCC was presumably also supported on the basis that oil production would significantly increase in Iraq after the removal of Saddam Hussein, offsetting any reductions to the UNCC fund from a higher level of contributions. Other members of the Security Council concurred in this reduction largely because of the desperate humanitarian situation in Iraq and continuing criticism of the sanctions regime (UNSC 2003). Many of the permanent members of the Security Council wanted to resume trading and diplomatic relations with Iraq and help it to rebuild. This, in turn, significantly reduced the income of the UNCC fund. Despite this reduction, it is noteworthy

that by January 2010, Iraq had contributed the full amount of funds required to pay the environmental awards. However, reduced levels of Iraqi contributions have delayed the remediation and compensation projects supported by the UNCC awards, and as a result, the adverse environmental consequences of the 1990–1991 Gulf War still linger.

These two examples—an increase in Iraq’s participatory space in UNCC’s environmental claims processes and a decrease in Iraq’s mandatory contributions to the UNCC fund—show that the UNCC was influenced by international political dynamics. In contrast to the claim outcomes in the first two installments, Iraq’s participation in the environmental claims during the third to fifth installments did influence those claim outcomes. For example, Iraq’s participation allowed it to raise legal objections to claim amendments seeking to increase claim amounts, with some objections upheld by the Panel. In other cases, Iraq’s scientific challenges to some claims coincided with the views held by the Panel’s own expert consultants, leading to Panel findings against claimants on such issues. In short, Iraq’s participation provided feedback to the Panel on evidentiary and legal weaknesses in the claims, resulting in changes to proposed environmental restoration or compensation measures, or reductions in awards. Although the Governing Council delegated the function of investigating and recommending awards to panels of commissioners, its role in shaping the procedural rules (for example, limiting and subsequently broadening Iraq’s participatory space) influenced claim outcomes. The lesson to be drawn here is that peacebuilding and reconciliation of international conflicts are influenced by international political dynamics and can be supported or undermined by those dynamics.

ENGENDERING A SENSE OF FAIR PLAY AND JUSTICE

Beyond the claim outcomes, it is more difficult to assess the impact of the enlarged participatory space provided to Iraq in the latter part of the environmental claims process. As Payne notes, fundamental changes in the government of Iraq have also contributed to shifting international relations with neighboring countries.⁷ Arguably, the enlarged participatory space has made way for more cordial relations between the claimant countries and Iraq, especially with regard to the implementation of the restoration and compensation projects funded by UNCC awards in the third to fifth installments of claims. For example, the UNCC has, with the consent and participation of claimant countries and Iraq, put in place a post-award tracking mechanism for the restoration and compensation claims (UNCC 2001b, 2005, 2009a, 2009b; UNSC 2009). Post-award tracking of restoration and compensatory projects were carried out under a UNCC-supervised framework. The mechanism allowed technical staff at the UNCC, with the help of independent consultants, to track and monitor the implementation of environmental restoration and development of compensatory projects

⁷ Payne, in this book.

funded by the awards from the third to fifth installments. The key lesson is that engendering a sense of fair play and justice between offender and victim are essential to peacebuilding and future reconciliation and cooperation between states. Skewing procedural rules against one party to a dispute does not inspire a sense of fair play and justice, and probably undermines efforts at reconciliation and cooperation between disputing parties.

RULE OF LAW IMPLICATIONS

Before the 1990–1991 Gulf War, Iran and Iraq fought a war from September 1980 to August 1988. On September 22, 1980, Iraq invaded Iran, starting one of the most brutal and deadly wars of the twentieth century. The Security Council and the United Nations General Assembly faulted Iraq for starting the war and demanded the withdrawal of troops and a ceasefire. Hostilities ended on August 20, 1988, and the United Nations passed a resolution asking Iraq to pay compensation to Iran (UNSC 1987). The United Nations Secretary-General (Secretary-General) was mandated to assess the resulting damage to both parties from the war and to investigate and report on liability for such damage. The Secretary-General sent a mission to Iran, which reported back considerable losses to that country (UNSC 1991c). The 1990–1991 Gulf War overtook the possibility of sending a mission to Iraq. As of April 2014, efforts to determine compensation for harms incurred during the 1980–1988 Gulf War have not materialized.

Since the 1990–1991 Gulf War, a U.S.-led coalition of forces invaded Iraq in 2003 and remained in that country until 2011. The last coalition forces left in 2009,⁸ at which point the U.S. forces become the sole external force still in the country until 2011.⁹ That invasion replaced the Saddam Hussein regime with a democratically elected government. Even though Iraq suffered considerable losses in the 2003 invasion, including environmental and other damages, it is highly unlikely that a compensation arrangement similar to the UNCC would ever be mooted to hold the United States accountable, despite some national investigations and pronouncements by UN officials that the initial invasion was unlawful under international law.¹⁰

⁸ The last non-U.S. coalition troops to leave Iraq were the Australians, who left in July 2009 (Associated Press 2009).

⁹ The last convoy of American troops left Iraq on December 18, 2011 (Arango and Schmidt 2011).

¹⁰ Kofi Anan, then–United Nations Secretary-General, in a statement to BBC News on September 16, 2004, stated that the U.S.-led invasion of Iraq “was not in conformity with the UN Charter from our point of view, it was illegal.” http://news.bbc.co.uk/2/hi/middle_east/3661134.stm. See also Davids et al. (2010). The United Kingdom has concluded an inquiry into the Iraq war, but the report has not been finalized as of this writing. These conclusions are supported by a number of international juristic opinions, for example, Davids et al. (2010). In addition, Lord Bingham asserted that the British Attorney General, Lord Goldsmith, was wrong in his advice to the UK government under Tony Blair’s administration and that the invasion was illegal (BBC News 2008).

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Whether the UNCC contributed to the rule of international law remains an open question.¹¹ There have been opportunities to replicate or establish similar compensation and liability mechanisms to respond to environmental damage in other conflicts, but as mentioned above none of these to date have materialized largely because of international political dynamics. While establishing a permanent war compensation regime and commission similar to the UNCC would certainly help affirm the rule of law,¹² it is unlikely that international political dynamics will allow such an innovation in the near future.

CONCLUSION

There are three basic conclusions that can be drawn from this brief exposition based on experiences in adjudicating the environmental claims before the UNCC. First, peacebuilding and reconciliation following international conflict must be conceived and managed in the context of surrounding and ongoing political dynamics. Second, engendering a sense of fair play and justice among disputing parties supports peacebuilding and reconciliation and helps efforts to monitor, assess, and restore environmental damage. Finally, arguments that assert the UNCC established a new rule of law are weak. The better argument is to advocate for a permanent international regime and mechanism to determine liability and compensation for environmental damage arising from international conflicts.

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¹¹ Despite the improbability of a UNCC-like institution being set up again, its practices are being cited as precedents by international bodies and jurists. See, for example, ILC (2001), Gautier (2007), and UNEP (2009).

¹² Proposals for an international environmental court and for a permanent court for victims of war include Juni (2000), Hofmann and Riemann (2004), and Kamminga (2005).

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