THE GULF WAR,
THE U.N. COMPENSATION
COMMISSION AND THE SEARCH
FOR PRACTICAL JUSTICE

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In the summer of 1990, the cold war appeared over and the world looked ahead
with hope. But such thoughts were postponed as war came unannounced and
events swept us along. The Iraqi invasion of Kuwait was reversed through an
international effort that breathed new life into a United Nations hobbled by years
of cold war and revealed how widely shared is the norm prohibiting aggression in
the modern world. But the aggression and its forceful reversal left their imprint on
the lives of many. A little more than a year later hundreds of thousands lie dead,
the lives of millions of others are altered beyond their wildest imagining, hun-
dreds of billions of dollars have been consumed, and some return to normalcy still
lies years distant.

The costs of cataclysmic events such as war have often simply been left where
they fell, perhaps out of desire to look forward rather than back, perhaps because
the complexity of doing anything else is daunting. At other times, the victor in
war has imposed a very rough justice.
In an unprecedented manner, the United Nations at the end of the Gulf War has been charged to seek some justice for those Iraq injured. With tens of nationalities and languages involved for hundreds of thousands, if not millions, of claims, the question has been how to seek a justice, that is swift and efficient, yet not rough. The task has been to find a practical justice. The following comments outline the evolving structure of this effort and the challenges that lie ahead.

Historical examples of international claims settlement generally have followed an adjudicative model. But there are costs to according the due process inherent in the adjudicative model. Such costs may not be tolerable in the current context. A brief comparison to the operation of the recent Iran-United States Claims Tribunal illustrates how formidable the Gulf War claims process could be.

The Iran-United States Tribunal, established in 1981, had a docket of close to 4000 claims. Even with 2,780 smaller of these settled en masse, another 420 bank claims dismissed on jurisdictional grounds, and probably another 250 claims settled on an individual basis, the Tribunal operating in three Chambers of three arbitrators is only now, ten years later, nearing the end of its work. In contrast, the Gulf War incident raises the specter of hundreds of thousands, if not millions of claims. Case-by-case adjudication in the case of the Gulf War claims likely would lead to justice greatly delayed and consequentially justice denied.

An additional problem is that there is not, cannot be, enough money to satisfy all likely claims. Kuwait’s reconstruction has been estimated at $100 billion; the damage to its nationals by one account is estimated at $70 billion, and the value of its lost oil and the amount of damage to the environment are unknown. Other categories of claims potentially include displaced persons such as the one million Egyptian guest workers that fled Kuwait and Iraq when the invasion occurred and the burdens borne by the twenty-one states that plead special hardship under Article 51 of the U.N. Charter. The claims range from several thousand dollars for a displaced guest worker to hundreds of billions of dollars for lost resources.

Iraq’s prewar debt was already $80 billion; its prewar yearly oil income, $18 billion. Even if Iraq’s oil income level were to return quickly to earlier levels and the international community were to attach 30% of that income for 10 years, those monies would only be slightly in excess of $50 billion. Does the international community have the will to hold Iraq accountable in that way for so long? How long should the Iraqi people collectively pay for the decisions of a ruler such as President Hussein? Which claimants will wait? Since any amount collected will not be enough, how will the potential pool of monies be allocated even while the claims of some remain unresolved?
Thus the problems are twofold: (1) to be fast but fair and (2) to collect and then divide a clearly inadequate pie. The consequence has been to seek alternatives to a solely adjudicative model.

In April shortly after the cease fire, the U.N. Security Council, in Resolution 687, reaffirmed that Iraq is liable "for any direct loss, damage, (including environmental damage and the depletion of natural resources) or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." The Resolution also provided for the creation of a Fund with Iraq's contribution to be based upon a percentage of Iraq's oil exports.

In response to mandates in Resolution 687, the Secretary General in May recommended, and the Security Council later approved, a unique approach to international claims settlement. Organizationally, the U.N. Compensation Commission, a subsidiary organ of the Security Council, will administer the U.N. Compensation Fund, whose source of monies will be a percentage of Iraqi oil revenues (set at a maximum of 30% by the Security Council, concurring with the recommendation of the Secretary General). The Commission, located in Geneva, will have a two level structure. There will be a council of state representatives to decide on policy while teams of commissioners both suggest and implement such polices. More specifically, the Commission has within it: (1) a Governing Council of fifteen persons, these persons being representatives of the fifteen members at any given time of the Security Council; (2) a Secretariat headed by an Executive Secretary that will administer the Commission and the Fund; and (3) Commissioners performing a variety of tasks, but primarily resolving the claims presented to the Commission in accordance with the directives of the Governing Council. The Commissioners are to be drawn from a register of experts to be maintained by the Secretary General, covering five fields: law, accounting, insurance, finance and the environment.

Governments will submit consolidated claims on behalf of themselves, their corporations and their nationals. The consolidation of claims by governments raises issues of government capacity or discretion. Will some countries preoccupied with internal problems at this time be able to consolidate claims? Will some countries refuse to claim on behalf of certain of their nationals? At least in regard to
certain urgent claims, the Governing Council has decided that “the Commission may request an appropriate person, authority or body to submit claims on behalf of persons who are not in a position to have their claims submitted by a Government.”

Consolidation ultimately will take place not only along the lines of the type of claimant, but also in accordance with further categories of claims to be determined by the Governing Council. This categorization is important because it may allow for differentiation as to which claims move faster or perhaps receive a larger percentage share of the assets potentially available to satisfy judgments.

At present it is envisioned that once the consolidated claims are received, the Secretariat will screen them for basic compliance with guidelines for submitting claims. The Commissioners then will review the claims substantively and recommend disposition to the Governing Council, which has ultimate authority for authorizing payment from the Fund to the state involved for distribution to individual claimants.

At its first session during the summer of 1991, the Governing Council explored various means for collecting the Iraqi oil contribution to the Fund. In the meantime, the Security Council authorized oil sales of up to $1.6 billion to meet humanitarian needs in Iraq, to finance the bodies implementing the cease fire, and to provide some funding for the Compensation Fund. To date, however, Iraq has not been willing to sell oil under this authority.

The Governing Council also has issued criteria for the expedited processing of certain urgent claims, a praiseworthy humanitarian initiative. An ironic circumstance of the Iran-United States Claims Tribunal is that the claims of individuals, rather than corporations, for rather complex reasons, generally came last. Indeed, these individuals some twelve years after the Iranian revolution still wait adjudication of their claims, now before the Foreign Claims Settlement Commission in the United States. It is therefore significant that the Governing Council will allow some compensation to reach persons in need quickly, in particular, involving three categories of claims: (1) departure from Iraq or Kuwait, (2) personal injury and (3) death. The aim of these procedures is the quick granting of some immediate relief. To do this the proof required from the claimant has been kept to a minimum, the means of review of such claims has been streamlined (including the possibility of review on a sample basis), and the damage question has been avoided by fixing a set level of compensation (for example, $4000 for a claim based upon departure). Meanwhile, this expedited process will not prejudice greater claims where such loss can be documented.

Boalt Alumni and the Iran-United States Claims Tribunal

Boalt Hall alumni have played an active role in the establishment and work of the Iran-United States Claims Tribunal. The Tribunal was a creation of the 1980 Algiers Accords, which secured the release of the 52 American hostages in Iran. Professor Stefan Riesenfeld ’37 and Michael Kozak ’71 (then with the State Department Legal Adviser’s Office and now Ambassador to El Salvador) helped in the preparation of the Accords, while then-Secretary of the Treasury G. William Miller ’52 oversaw many of the resulting financial transactions. Jamison Selby ’77 represented the State Department before the Tribunal as Deputy Agent from 1981 to 1984, while Professor Riesenfeld and Henry “Hank” Lerner ’77 (then with the State Department Legal Adviser’s Office, now in private practice in San Francisco) represented the United States Government before the Tribunal on a number of important intergovernmental cases. Within the Tribunal, Boalt holds a record for alumni Legal Assistants to the three American arbitrators. Over the past 10 years, seven of the Legal Assistants have been Boalt graduates: David D. Caron ’83, Douglas Reichert ’85, Charles L.O. Buderi ’83, James Castello ’86, Christopher Gibson ’88, Carroll Dorgan ’88, and Jeffrey Bleich ’89.

Six of Boalt’s Legal Assistants to the American arbitrators at the Iran-United States Claims Tribunal gathered for a reunion at The Hague in 1990: (left to right) Christopher Gibson, James Castello, Charles Buderi, David Caron, Douglas Reichert, and Carroll Dorgan. Jeffrey Bleich (not pictured) currently is a Legal Assistant to Judge Howard M. Holzmann of the Tribunal.
Even without such greater claims, the interim payments will be considerable. Continuing the departure example, with as many as 1.8 million potential claimants, the aggregate amount of compensation under the expedited process could reach $7.2 billion. Submission of consolidated claims under these criteria should begin in mid-1992.

Even as the Commission moves forward with urgent individual claims, its own structure continues to evolve and many difficult questions remain. Some are substantive (e.g., the valuation of environmental damage). Others are procedural (e.g., the coordination of parallel actions attaching frozen assets in national courts). All these issues will be resolved in a framework of practical justice — that is, by seeking justice in ways appropriate to the context and question presented.

One of the most significant changes in international dispute settlement has been the recognition that adjudication is only one model for the resolution of claims. The Iran-United States Claims Tribunal in its design followed the case-by-case adjudicative model. In practice, however, it was found that the Tribunal played a very significant role in facilitating settlement. From the beginning, it has been recognized that the U.N. Compensation Commission must embody this shift. As the Secretary General stated in his May 1991 report outlining the Compensation Commission structure:

The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payment and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.

The Commission’s task is to divide up a limited pool of assets among a very large group of claimants. It is among those claimants that the due process concerns are greatest, and it seems eminently reasonable that they should seek a practical rather than perfect justice.