

International Claims Arising from Iraq's Invasion of Kuwait**

Now that the dust of battle has settled in the Persian Gulf, the first real test of a new world order may indeed come in the form of establishing a regime for the payment of Iraq for damages and losses caused by its invasion and occupation of Kuwait, with all the ensuing consequences of its forcible expulsion. The creation of such a regime may indeed prove more problematical than the creation of an allied coalition to meet the threat, and the formation of an acceptable security arrangement to preserve peace in the region.

In the past, claims settlements usually involved bilateral negotiations between two nations, culminating in a lump-sum settlement agreement against which individual claims would then be adjudicated. Additional funds could be made available from the liquidation of foreign assets in the United States by the Departments of Justice or Treasury, and from public funds when provided by Congress. National claims commissions, such as the Foreign Claims Settlement Commission of the United States (the Commission), operated relatively successfully in the disposition of large numbers of claims representing losses by its citizens, corporate entities, and government institutions. In the United States, for example, this was true for a number of claims programs following World War II involving such nations as Bulgaria, the People's Republic of China, Czechoslovakia, Cuba, Egypt, Ethiopia, the former German Democratic Republic, Hungary, Italy, Panama, Poland, Romania, the Soviet Union, Vietnam, and Yugoslavia, all of which were administered under the International Claims Settlement Act of 1949, as amended.¹ This function also involved twenty-one programs administered under the War Claims Act of 1948, as amended, the Micronesian Claims Act of 1971, as amended, and other statutory authority.

More recently, following the hostage crisis and takeover of the United States embassy in Iran in 1979, the Iran-United States Claims Tribunal was created by

*Chairman, United States Foreign Claims Settlement Commission.

**The views expressed herein are those of the author and do not represent U.S. government policy.

1. 22. U.S.C. §§ 1621-45 (1988).

the Algiers Accords of 1981,² the instrument which also provided for the release of our hostages. As of January 1991 the Tribunal has handled nearly 500 U.S. claims against Iran. Composed of three panels, each consisting of three judges, one each from Iran, the United States, and a third country, usually Western European, the Tribunal was often criticized for internal bickering, protracted delays, and high cost of operation.³ Nevertheless, however one may view the outcome, the contribution of the Tribunal to evolving a structure for international dispute resolution has been both unique and significant.

In this vein, it is also worth noting that in May 1990 both Iran and the United States agreed upon a lump-sum settlement wherein some 3,100 remaining claims, valued at less than \$250,000 per claim, were transferred from the Tribunal to the Commission for adjudication, thus effectively signaling the conclusion of the fiscal dispute between the two nations.

On January 12, 1991, shortly after receiving congressional authorization to launch Operation Desert Storm, President Bush held a press conference during which he not unwittingly focused on the issue of reparations and compensation. In referring to the unprecedented chain of United Nations Security Council Resolutions aimed at condemning Iraq for its invasion and occupation of Kuwait, the President stated that: "One of them relates to reparations, and reparations is a very important part of this. It is a very important part of what the United Nations has done."⁴ Given the presidential emphasis, the issue becomes critical and certainly one for the immediate attention of the leadership in the executive and legislative branches of government.

The President's remarks were not without precedent in that on October 29, 1990, the United Nations Security Council by its Resolution 674, rendered a stunning indictment:

Condemning the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage and to mistreat and oppress Kuwaiti and third-State nationals, and other actions reported to the Security Council, such as the destruction of Kuwaiti demographic records, the forced departure of Kuwaitis, the relocation of population in Kuwait, and the unlawful destruction and seizure of public and private property in Kuwait, including hospital supplies and equipment, in violation of the decision of the Council, the Charter of the United Nations, the Fourth Geneva Convention, and the Vienna Convention on Diplomatic and Consular relations and international law . . .

2. The Iran-United States Claims Tribunal was established in 1981 pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration and the Declaration of the Government of the Democratic and Popular Republic of Algeria) concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), collectively referred to as the Algiers Accords. For the rest of the text of the Algiers Accords, see 1 IRAN-U.S. C.T.R. 3 (1981-82), 75 AM. J. INT'L L. 418 (1981).

3. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104-05 (1990).

4. The President's News Conference, Jan. 12, 1991, 27 Weekly Comp. Pres. Doc. 41 (Jan. 18, 1991).

and further,

reaffirming that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the Commission of grave breaches . . .

Resolution 674 subsequently

Reminds 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;

and points to a future claims process whereby it

invites States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq with a view to such arrangements as may be established in accordance with international law. . . .⁵

The Security Council's action was historically unique in issuing what is tantamount to a summary judgment holding Iraq responsible for a whole series of breaches of international law. Not unlike the United Nations mandate, the Commission historically has performed the function of fact finder and/or loss assessor at various times in the past, and is well equipped to do so in connection with claims against Iraq. In addition, Congress has envisioned this type of role for the Commission in past legislation. In the Hickenlooper Amendment,⁶ enacted in 1963 as an addition to the Foreign Assistance Act of 1961, the President was given the authority to direct the Commission to undertake similar fact-finding tasks with regard to U.S. nationals' claims against foreign governments.

Indeed, as early as October 24, 1990, Congressman Dante B. Fascell, chairman of the House Foreign Affairs Committee, introduced a bill entitled Iraq Claims of 1990,⁷ which provided that:

2. The Foreign Claims Settlement Commission shall be authorized to receive and evaluate claims against Iraq resulting from Iraq's invasion of Kuwait related either to losses directly resulting from Iraq's action or indirectly from steps taken to comply with sanctions imposed in compliance with the United Nations. Such claims may include compensation for increased security efforts required by state and local governments and persons and corporations to counter possible terrorist activities by Iraq.

3. From Iraq funds now frozen by the United States the Foreign Claims Settlement Commission is authorized to pay assistance to the families of hostages held in Iraq such funds as may be judged necessary to permit dependents of such hostages to continue to have funds that otherwise would have been available to pay for activities such as but not limited to: food, housing, education, health, and taxes due. The aggregate money set aside for such payments shall be subject to approval by the President.

Not insignificantly, the bill went on to state that:

6. The Congress approves the efforts of the President to seek United Nations action regarding claims against Iraq and urges the President to seek an international claims

5. U.N. Security Council Resolution 674 (Oct. 29, 1990).

6. 22 U.S.C. § 2370(e).

7. A bill number was not assigned to the proposed legislation.

regime and to press for reparations from Iraq for damage done to Kuwait and to seek indemnity for all United States expenses and claims associated with Iraq's invasion of Kuwait.

Since the bill was introduced in the closing days of the 101st Congress, it proceeded no further in the legislative process. Subsequent language was added, with appropriate citations, by the staff of the Commission.

Similar activity in other western capitals was occurring almost simultaneously. Shortly before the United Nations adopted Resolution 674, the Foreign and Commonwealth Office of the United Kingdom advertised in the British media as follows:

Notification of loss and damage suffered by UK nationals and companies in Kuwait and Iraq. United Kingdom nationals and companies whose property in Kuwait or Iraq has been lost, damaged, or destroyed, or who have suffered personal injury, as a consequence of the illegal invasion and occupation of Kuwait are invited to notify their losses to Her Majesty's Government, so that a list can be opened. (This will not constitute submission of a claim.)

A special claims information form entitled, "Particulars of Property Owned by British Nationals in the State of Kuwait and the Republic of Iraq Which Has Been Lost, Damaged, or Destroyed, and of Any Personal Injury," was made available by the Foreign Office and were disseminated to potential claimants for completion.

With regard to claims by private nationals, the United States conducted a systematic census of potential claims by both natural and juridical persons. On February 11, 1991, the United States published a formal notice of such a census⁸ and has undertaken other appropriate publicity measures to encourage its nationals to provide claims information to the government. Since the beginning of Iraq's invasion and occupation of Kuwait, the Commission and other U.S. government agencies have received countless unsolicited communications from individuals and corporations reporting a wide range of tangible and intangible losses. With the institution of a formal procedure to obtain information on claims, the United States hopes to develop a comprehensive accounting of Iraq's potential liability to private American nationals and corporations.

Specifically, the Office of Foreign Assets Control (OFAC), Department of Treasury, amended the Iraqi Sanctions Regulations⁹ by providing for census of blocked assets of the Government of Iraq and a census of claims against that government.¹⁰ The amendments require that reports be filed: (1) with respect to blocked Iraqi assets held by any U.S. national on or after August 2, 1990, and

8. 31 C.F.R. pt. 575 (1991).

9. 31 C.F.R. pt. 575, 56 Fed. Reg. 2112 (Jan. 18, 1991) (the Regulations), were issued by the Treasury Department in implementation of Executive Order No. 12,722 of Aug. 2, 1990, 55 Fed. Reg. 3183 (Aug. 3, 1990); Executive Order No. 12,724 of Aug. 9, 1990, 55 Fed. Reg. 33,089 (Aug. 13, 1990); and United Nations Security Council (UNSC) Resolution No. 661 (Aug. 6, 1990), and subsequent relevant resolutions.

10. 31 C.F.R. pt. 575 (1991).

(2) with respect to claims held by U.S. nationals against the Government of Iraq as of 5 p.m. January 16, 1991.¹¹ The amendments define a “United States national” as “any United States citizen; any person who, though not a citizen of the United States, owes permanent allegiance to the United States; and any juridical person organized under the laws of the United States or any jurisdiction within the United States.”¹² This term does not include U.S. branches of persons organized under foreign law, or aliens (with or without permanent residency in the United States).¹³

OFAC forms TDF 90-22.40 and TDF 90-22.41 seek information, for planning and administrative purposes, on a one-time basis, regarding blocked Iraqi assets and claims by U.S. nationals against the Government of Iraq. This census responds, in part, to United Nations Security Council Resolution 674 of October 29, 1990, which, as previously mentioned, invited U.N. member states to collect information on claims against the Government of Iraq. Note that submission of a form regarding a claim against the Government of Iraq *does not constitute* the filing of a formal claim for compensation with the United States Government. However, failure to file a complete report with respect to claims in a timely fashion constitutes failure to comply with Regulations as well as prevents the inclusion of the information in U.S. government planning and may be prejudicial to the interests of the claimant and other U.S. claimants.

As for losses sustained by the United States Government itself, preliminary information on certain categories of losses, particularly in the area of agricultural credits, has been developed. As with private losses, the United States has undertaken a systematic survey of its agencies and instrumentalities to determine the full range of losses sustained by the government.

Aside from the claims for losses incurred between August 2, 1990, and January 16, 1991, the outbreak of hostilities with Iraq on January 16, 1991, triggered the involvement of additional statutory authority. Pursuant to title I of the War Claims Act of 1948,¹⁴ and amendments thereto, the Commission and its predecessor, the War Claims Commission, were authorized to administer ten prisoner-of-war and civilian-internee compensation programs, covering World War II, the Korean conflict, and the military and civilian personnel assigned to duty on board the U.S.S. *Pueblo* who were captured, along with the vessel, by the military forces of North Korea on January 23, 1968, and thereafter imprisoned by the Government of North Korea.¹⁵

Further, under the authority of title II of the Act¹⁶ the Commission administered the General War Claims Program. In this program the Commission deter-

11. *Id.* pt. 575.604.

12. *Id.* pt. 575.322.

13. *Id.*

14. Pub. L. No. 80-896, 62 Stat. 1240 (codified at 50 U.S.C. App. § 2001).

15. War Claims Act of 1948, § 6(e), 50 U.S.C. App. § 2005(e).

16. Pub. L. No. 87-846, 76 Stat. 1107 (codified at 50 U.S.C. § 2017).

mined claims of nationals of the United States for loss or destruction of, or physical damage to, property located in certain specified areas of Europe and the Pacific and for certain deaths and personal injuries resulting from military operations during World War II.

It is important to note that the payments of claims and administrative expenses of all but three programs were derived from the liquidation of Japanese and German assets under the control of the Attorney General of the United States, which had been blocked and vested in the United States during World War II under the Trading with the Enemy Act, rather than from monies appropriated from the general revenues of the United States. These funds were deposited in the War Claims Fund, a special fund set up in the Department of the Treasury for this purpose. The three exceptions mentioned above are the prisoner of war and civilian internee claims programs involving the Korean conflict and the U.S.S. Pueblo incident. Funds for payment of claims and expenses of these programs were appropriated by the Congress.

It is envisioned that a similar disposition of claims is warranted in the Iraqi scenario. The macabre parading of obviously maltreated American pilots and other prisoners of war before television cameras in Baghdad certainly gives rise to many claims under this statute. When taken together with other torture and murder inflicted upon innocent civilians both in Iraq and Kuwait, including the taking and use of hostages as human shields against anticipated allied air attacks, the pattern of conduct indicates a gross culpability for war crimes, a subject matter which is not addressed herein. In this instance, each process has its own function, with the accomplishment of one not foreclosing the other. Suffice to say that the pattern of abuse, torture, rape, and murder of innocent victims conjures up the images of atrocities not visited upon the world possibly since World War II, and constitutes the gravest breaches of all accepted standards of international law. It is submitted that the importance attached by President Bush to payment of claims and reparations bespeaks the present necessity of enforcing international law. The situation has gotten significantly out of hand so that any discussion of other options, restitution, or status quo ante simply becomes moot.

The issue for immediate attention is the necessity to update and amend the War Claims Act of 1948 in order to provide compensation for U.S. servicemen maltreated by Iraq while held as prisoners of war. The Commission advised Congress of this need for amendment in late January 1991, and current action by that body is awaited.

Aside from a number of objections that will no doubt ensue, we are left with the one viable option of vigorously pursuing the claims and compensation avenue as a meaningful measure of enforcing international law. Arguments as to Kuwait's wealth versus the relative poverty of Iraq and its consequent inability to pay are immaterial and suggest a misreading of the facts and history itself. One need only point to the number of successful claims programs conducted by the Commission involving war-ravaged and poverty-stricken countries of Eastern

Europe, which made payments over the years in satisfaction of settlement agreements. In addition, to suggest that a claims process places Iraq's reconstruction and financial future in jeopardy is akin to advocating a thesis that tyrants who squander their natural and human resources in pursuit of military adventures gain immunity from any further accounting before international tribunals for their wrongs.

As President Bush has stated on a number of occasions, this is not simply a United States versus Iraq situation. Losses and suffering have been endured by thousands of third-country nationals and corporations, as well as by foreign workers who were expelled from Kuwait by the invasion and consequently harbor serious claims against Iraq. Other states, such as Turkey, the democratizing nations of central and eastern Europe, and indeed most of the civilized world that supported the United Nations sanctions against Iraq, likewise have amassed legitimate claims for substantial losses in both human and economic terms.

The process of rebuilding Iraq with eventual economic assistance even to the extent of a Marshall Plan model, does not exculpate it either from the responsibility for payment, or the determination of an actual payment schedule. Lending credibility and substance to the latter theory is Iraq's considerable oil reserves. It is not an unlikely scenario for the imposition of a surcharge or levy to be applied to each barrel of oil produced for export over a period of years, thereby creating a trust fund or pool against which claims may be adjudicated. Likewise, the vesting of Iraqi frozen assets in the United States for the purpose of paying valid claims would provide an additional source of funds.

Finally, the question of an adequate forum for the disposition of claims remains as an interesting one for lawyers to ponder. The debate largely turns on whether such a tribunal is organized along multilateral (multinational) or bilateral lines. A multinational or international claims tribunal is without precedent and, therefore, difficult to address with specificity. Our closest comparison to a possibly multilateral claims tribunal could probably be made with the Iran-United States Claims Tribunal at The Hague. That experience has taught us that, despite relative success for the scope of claims encountered in the Iranian scenario, a similar tribunal might not meet the needs or expectations following the tragic devastation flowing from Iraq's invasion of Kuwait. This experience further shows that a multilateral tribunal would pose many sensitive legal problems as to its composition by nationality, appointing authorities, funding, classes of cases (government, corporate, and individual claims), priorities of adjudication and payment, form and timeliness of payment, and the like. One could also argue that the delay in payments generated by a multilateral tribunal, given its very nature, and the resulting lack or loss of control, real or perceived, by nations that substantially contributed to bringing an end to hostilities would pose many domestic political problems. Conversely, the creation of a bilateral claims tribunal, although domestically and politically advantageous, could elicit international

criticism as to an inherent inequity and disparity in the treatment of claimants, the concomitant diminution of total funds available for an international claims process, and other unspecified inequities that inevitably ensue from a perceived form of preferential treatment.

The conclusion remains clear in one respect: serious planning for a claims adjudication process, at least in the United States, should begin now. The fact that the United States has a national claims commission, the Foreign Claims Settlement Commission, already in place serves as a basic start in that direction.

It is also clear that any post-war planning such as is under way in several agencies of government, must of necessity consist of a triad of elements, especially given the recent history in the Middle East. These can be conveniently organized as follows:

(a) Establishment of a regional security arrangement to preserve peace and stability in the area.

(b) Provide for the reconstruction of Iraq and Kuwait to include financial assistance modeled on a Marshall Plan.

(c) Commence a process of reconciliation, which incorporates two dominant features, namely: the bringing to justice of responsible perpetrators for their war crimes; and, the creation of a framework for a claims process, which would provide for the payment of compensation and reparations to individuals, entities, institutions, and governments that sustained damages or losses at the hands of perpetrators.

Anything less than the complete implementation of this triad would create a formula for future disaster. Not only would it not promote a lasting peace in the Middle East, it would foster continued unrest for decades to come. Recognizing these pitfalls, President Bush, speaking for all coalition members on February 19, 1991, wisely rejected the Soviet peace initiative as insufficient, stating that: "It falls well short of what may be required."¹⁷ Among other shortcomings, it failed to address Iraq's responsibility for the payment of reparations. In his statement issued shortly before the commencement of the ground war during the evening hours of February 23, 1991, the President succinctly said that: "The liberation of Kuwait has now entered a final phase."¹⁸ With it also came the ultimate enforcement of the principles of international law.

Following the conclusion of the "Hundred Hours War," and the resounding defeat of Iraqi forces, the United Nations Security Council on April 3, 1991, reaffirmed Iraq's liability for war damages under international law and voted to require that Iraq pay economic reparations for any losses and damages inflicted

17. Exchange with Reporters on the Soviet Peace Proposal for the Persian Gulf Conflict, Feb. 19, 1991, 27 Weekly Comp. Pres. Doc. 185 (Feb. 25, 1991).

18. Address to the Nation Announcing Allied Military Ground Action in the Persian Gulf Conflict, Feb. 23, 1991, 27 Weekly Comp. Pres. Doc. 207 (Mar. 4, 1991).

as a result of its unlawful invasion and occupation of Kuwait.¹⁹ A month later, the Secretary General filed his report listing various recommendations for carrying out this resolution.

Chief among these was the creation of a U.N. compensation fund to function under the direct authority of the Security Council and a commission to administer the fund. Composed of a fifteen member governing council representing member nations of the Security Council, the commission's policy decisions would be governed by a majority of at least nine of its members, with no one country having a veto power. If a consensus is lacking, questions could then be referred to the Security Council on the request of any member of the governing council. This council, to be located in Geneva, would appoint commissioners to adjudicate the claims.

The report recommends that governments file claims on their own behalf and on behalf of their nationals and corporations, suggesting, however, that claims concerning individuals be disposed of first. Notably, "It will be for each individual Government to decide on the procedures to be followed internally in respect of the consolidation of the claim having regard to its own legal system, practice, and procedure."²⁰ However, the report concludes that: "It is clear from paragraph 16 of the resolution that the debts and obligations of Iraq arising prior to 2 August 1990 are an entirely separate issue and will be addressed 'through the normal mechanisms'."²¹ Recognizing that individuals will attempt to sue Iraq through their domestic legal systems, the report suggests the establishment of guidelines to coordinate overlapping claims.

Procedurally, it is envisioned that the U.N. secretariat would make a preliminary assessment to determine whether claims meet formal requirements established by the governing council. Panels of three commissioners would hear testimony and render recommendations that are final, subject only to the approval of the governing council. With claims expected to exceed available resources, the governing council would establish criteria for allocating funds, such as distinguishing between Kuwait on one hand, and other countries.

Although the U.N. attempted to tackle a proverbial legal octopus, the task of sorting out, processing, and eventually paying war reparations in the aftermath of the Gulf War will indeed involve a herculean effort. It may be an irony to paraphrase Saddam Hussein in concluding that the U.N., although well intentioned, may have created the "mother of all international arbitration battles."

19. U.N. Security Council Resolution 687 (April 3, 1991).

20. U.N. Doc. S/22559 (2 May 1991).

21. *Id.*

