

How Fair and Efficient is the UNCC System ? A Model to Emulate?

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I. THE FINANCIAL IMBALANCE : IRAQ IS PREVENTED FROM USING ITS OWN FUNDS FOR ITS DEFENCE AGAINST RICHLY-ENDOWED CLAIMANTS AND THE UNCC.

This article has not been drafted from the viewpoint of a representative of Iraq but as that of a lawyer concerned with the process of the UNCC system. The limitation in our representation of Iraq is precisely due to a particular flaw in this system. This flaw goes right to the core of the entire procedure, the financial means for Iraq to fund its legal defence.

There are many defects in the UNCC system. The defendant Government - which must pay all the sums which have been and will be awarded - is not properly recognised as a defendant party in the proceedings. As a consequence, Iraq is not given the right to be heard as a defendant. Much worse, Iraq does not have the right to dispose of its own funds to avail itself of the very limited opportunities for comments that it has in these proceedings. As the reader will know, Iraq is under an embargo. It may sell its oil only within very strict limits under Security Council Resolution 986 ("food for oil"). The revenue which Iraq earns from the sale of oil under this resolution is allocated to specifically identified purposes and its use is strictly controlled. Thirty percent of this revenue, i.e. 600 million US \$ out of the 2 billion US\$ allowed for every six months period, go to the UNCC; but none of it, not a penny of these 600 million US\$ may be used for Iraq's legal defence. Furthermore, the assets which Iraq has abroad are frozen by UN resolutions. These funds, like all others, are under strict control and, with one small exception, may not be used for Iraq's legal defence.

With our assistance, Iraq has made an application to the UNCC Governing Council, requesting that Iraq be authorised to use its own funds administered or used by the UNCC for its defence in the UNCC proceedings. This concerns essentially the funds made available to the UNCC under Security Council Resolution 986. The least that one could expect under any system of law is that Iraq be authorised to use some of these funds for its legal defence. This could well have been done under the supervision of the UNCC system or in another fashion to verify the use of the funds and to ensure that there would be no abuse. It is most shocking that this request, limited as it was, has been turned down by the Governing Council of the UNCC.

¹ Lalive & Partners Geneva. Mr. Schneider, together with Professor Pierre Lalive and Professor Peter Malanczuk, presented the Republic of Iraq, in a limited manner, before the UNCC. The present article is an adaptation of his presentation at the Geneva Global Arbitration Forum. The comments made in it express his personal opinion and do not engage the Republic of Iraq

Iraq must pay for the war damage for which it has been held responsible under international law - that is the object of the process and has been accepted in principle; a principle which in itself is not objectionable. However, what is extraordinary and indeed *without any precedent in international law* is that Iraq pays every penny of the costs of a procedure in which it has no say; Iraq pays for the entire UNCC proceedings; Iraq, and Iraq alone, pays for the costs of entertaining the Secretariat of the UNCC - and the luxury which the Secretariat enjoys when performing its tasks has been eloquently described in the earlier presentation; Iraq, and Iraq alone, pays for the Panels which investigate the claims; Iraq pays for the consultants which assist the Panels; Iraq pays for the investigations of the Secretariat and the experts that it commissions, but Iraq does not even have access to the results produced by these experts ! The one and only thing for which Iraq does *not* pay, for which it is prevented against its will from paying, is for its own legal defence in this procedure. It goes without saying that it is impossible to organise a proper defence under such circumstances.

The shocking thing - one of the many shocking things in this procedure - is that the Claimants, those companies and Governments which have presented claims for many billions of Dollars against Iraq, were under no restrictions with respect of the funds that they spent on the preparation of their claims. The first of the large and complex claims, for instance, was presented by the Kuwait Oil Company, an immensely rich company, which retained for the preparation of its claims one of the largest and best reputed international law firms, together with major accounting firms and other experts in producing international claims.

To add insult to injury, the Kuwait Oil Company, or its mother company the Kuwait Petroleum Corporation, seems to have made a claim for the cost of this claims preparation. It wants Iraq to pay for the elaboration of a claim *against which Iraq has no means to argue and defend*. I said, that the Kuwait Petroleum Corporation "seems" to have made a claim because we have not seen the claim. This is a point to which I shall revert : it is the UNCC Secretariat that, in its sole discretion, decides *which claims* Iraq will be allowed to see, and *when* it will be allowed to see these claims - with the rare exception of some very few cases where a courageous Panel, of its own initiative once it had been seized of a claim, granted Iraq access.

This situation, lack of funds on the side of the Defendants and affluence on the side of the Secretariat and Claimants, creates an imbalance in the proceedings which flies in the face of elementary concepts of justice.

In addition to the obvious legal and practical disadvantages which this fundamental imbalance in means creates within the procedure, there is another consequence - internationally available and competent resources for processing such claim are monopolised by the wealthy claimants and by the richly endowed UNCC Secretariat.

The following is a small example of how this market domination by the Secretariat and the Claimants works. Some time ago the possibility of obtaining advice from one of the leading accounting firms was examined. It

was learned that the Secretariat of the UNCC had issued a public tender for accountancy services. Admittedly, these are innovative procedures by the Secretariat. Of course, the counsel are familiar with public tenders for the construction of a dam or a road - for advisory services in legal proceedings such tender procedures are perhaps less frequent. In any event, the result of these procedures, and of the prior claims preparation, is that all the major accountancy firms are looking for work from the UNCC Secretariat, if they have not already been engaged by one of the many wealthy claimants in all parts of the world. When, if ever, Iraq is authorised to use its resources for its legal defence, none of these firms will be available any longer and Iraq will have to see if and where it can get the necessary expertise.

This is just a small example of the many practical and serious problems which Iraq faces in the preparation of its legal defence. There are many other problems. They range from difficulties in travel arrangements, telecommunications and resulting problems in lawyer-client communication, to access to resources and information. These difficulties are related to constraints resulting from the blockage of funding, but in their effect they go much beyond it. Of course, the concerns and objections to which the UNCC procedure gives rise are much more serious and much more fundamental, but it seems useful here to point out some of these problems so as to demonstrate how the system operates in practice.

II. THE PROCEDURAL IMBALANCE : IRAQ HAS NO STANDING AS DEFENDANT

The UNCC system raises some quite fundamental issues concerning the international legal order. It raises questions concerning the type of legal order which the international community and we as lawyers wish to have governing international relations. The issues which arise here, of course, cannot be canvassed in the narrow limits available here. I must pay tribute to both Dr. Wühler and Nicolas Ulmer for the kindness with which they have described at least some of the deficiencies of the system. These explanations reflect the embarrassment which any responsible international lawyer must feel when faced with the gross defects of this procedure, an embarrassment which is quite understandable among those who must labour as responsible lawyers under such a regime.

Some of the procedural rulings by some of the Panels should also be mentioned. The members of these Panels must have experienced the same kind of understandable embarrassment due to the unenviable position in which they found themselves when they tried to mend, within the limited means at their disposal, the distorted and quite unfair system which they had to apply.

The obvious and serious objections which must be raised about the UNCC System go both to the procedure and to substantive rules applied in the process.

First, a few comments on the *rules of procedure*: it is a fundamental principle for which we stand as lawyers that the defendant has the right to

be heard. The principle applies in civil, criminal or administrative proceedings no matter how serious his alleged wrong-doings. We stand for this principle domestically in each of the legal orders in which we practice; and we stand for this as a principle in the international community. It is a part of the legal profession to ensure that those who are accused, or those who are confronted with a claim, have the right to defend themselves. Violation of this principle, *in all civilised legal orders*, vitiates the procedure and leads to the nullity of the decision rendered. It is well known that, internationally, awards made in proceedings in which the defendant party has not been given a proper opportunity to defend its case will not be recognised and enforced. Why then should the findings of the UNCC Panels which so grossly violate the Defendant State's right to be heard, be recognised anywhere and given any effect?

In reality, the situation in the UNCC proceedings is even worse. Iraq's right to be heard is not just violated, it has simply not been foreseen. The basic concept on which this system is built assumes that there is no need for Iraq to be heard. As one author, commenting on the system, dared to write: "Iraq has no discernible legal interest to defend". In other words, when Iraq's counsel complain that there is no due process in the UNCC, those who have devised this system reply: there is no need for due process, the decisions against Iraq can be made without Iraq being heard at all! The limited opportunities which are afforded to Iraq to make comments are not considered as applications of the rights that any defendant in any civilised country has, but they are conceived as some kind of acts of grace granted by the Holy Office of a modern Inquisition to the sinner before he is sent to the stake. You may think this is an exaggeration; but listen to some examples of the procedure before the UNCC, and the liberties that it takes with the rights normally granted to a defendant.

2.1 Violation of Iraq's right to be informed of and have access to the claims raised against it

The abuses start with the violations of the *right to be informed* of the charges and claims brought against the defendant. One of the issues with which the Commission is confronted is the question: should Iraq get the claims files? Well, to anyone engaged in court or arbitration proceedings (apart perhaps from those practising before the Holy Inquisition), it is surprising that such a question should even be asked. The answer seems obvious: of course, the defendant should get the files. But in the UNCC system the answer is far from obvious; indeed Iraq's access to the claims is seriously restricted and in many claims altogether denied.

First of all, Iraq is not informed of the claims when they are made. Even today, *years after* the claims have been filed, most of the claims have not been transmitted to Iraq. Many claims have been awarded without Iraq ever having seen them. The only information to Iraq that the Rules foresee are the Article 16 Reports. In these reports, the Secretariat provides some information on the claims filed and indicates "significant legal and factual issues raised by the claims, if any". These reports are far from sufficient for a

serious investigation of the claim; they certainly do not allow a considered defence against them.

Once a Panel for a certain claim or a category of claims has been formed, it examines the claims, relying heavily on the preparatory work of the Secretariat. Extraordinarily enough, the Rules do not contain any provision, which requires the Panels to inform Iraq of the proceedings before them or to provide any information about the claim or the proceedings. Article 38 of the Rules only stipulates that, in "unusually large or complex claims", a Panel "may, in its discretion, ask for additional written submission and hold oral proceedings". It states that "*the entity making the claim* may present the case directly to the panel and may be assisted by an attorney or other representative of choice". Amazingly, but also significantly for this procedure, no mention is made of any comparable rights of Iraq! In other words, the Rules provide expressly for the possibility of the claimants being heard and to appear with their counsel, but not for any right to be heard of the Defendant Government.

Even worse, Article 36 provides that, in these "unusually large or complex cases", a Panel may "request further written submissions and invite individuals, corporations or other entities, Governments or international organisations to present their views in oral proceedings. The UNCC Governing Council, when making these rules, has sought the views of everybody in the world but has not wasted any thought on Iraq as the State most concerned with these proceedings. If Panels should invite the views of Iraq under this provision, the Rules grant to it no other standing than that of any outsider who might be called to add his grain of wisdom to that of the Panel. Compared to such rules, the Holy Inquisition is a model of due process!

Some Panels have felt obliged, rather understandably, to take some liberties with these extraordinary rules. They availed themselves of the opening which Article 36 provided. Interpreting it, in a sense more generous to Iraq than the drafters of the rule probably had in mind, they provided Iraq, in the proceedings before them at least, with some opportunities to comment. One may well see that this is again a sign of the embarrassment which any jurist believing in the Rule of law is bound to feel when having to apply these totally unfair and unprecedented rules. But, obviously, these very limited exceptions do not and cannot compensate for the original defects in the Rules, which practically exclude all rights of the defendant.

2.2 *Violation of Iraq's right to comment and present its defence*

The *second fundamental procedural right* which is seriously violated, after the right to be informed, is the *right of the defendant to comment on the opponent's case and to argue its own case*. It is inherent in the adversarial procedure dear to our friends in the Common law; it is also inherent in the "principe du contradictoire" which rules the French family of laws on civil procedure both before State courts and in arbitration; it is inherent in the principle of "rechtliches Gehör" enshrined in the procedural laws of the

German legal family. It would thus appear to be a principle of general application *in any procedure which meets a minimum standard of law*. Characterising the procedure before the UNCC as "administrative" does not change anything in this respect. Due process and also, to variable degrees, the right to be heard are fundamental principles recognised not only in judicial or arbitral proceedings but, as far as this author knows, also in administrative procedures in all civilised countries.

The denial to the defendant of any real right to present its case is obvious in proceedings where the Rules provide for merely one opportunity of "commenting", *not* the claims themselves but only the explanations which the Secretariat (and not even the Panels concerned) has extracted from them and made available in its "Reports and Views on Claims" under Article 16. Here, too, some timid alleviation of the fundamental injustice in the Rules has been provided by the Panels in "unusually large or complex cases". But these exceptions apply only in these cases and not in other cases for which hundreds of millions of Dollars have been awarded for Claims *which Iraq never saw* and on which it had no proper opportunity to comment.

Even in these "unusually large or complex cases", where Panels have felt bound to afford Iraq some opportunity to comment, Iraq's rights are far from being respected. Apart from the serious constraints resulting from the lack of funding of its legal defence, there are the time limits stipulated in the Rules themselves; they are *very short* and hardly sufficient for cases of such magnitude and complexity, especially if one bears in mind that Iraq is the sole defendant in the vast number of claims before the UNCC.

What is still worse is that the Panels are not even master over their own procedure. They are given time limits which they cannot change themselves; the most they can do is to make some accommodation but at the costs of being themselves then pressed for time in delivering their reports. If the Panel decides that it wishes to give to Iraq a more reasonable period to comment, that extension reduces the times available for the Panel to make its recommendations. This example also shows that some of the particularly offensive aspects of the procedure not only concern the defendant State - or what should in fact be the defendant State if this position were recognised to Iraq, but also the Panels themselves. These Panels labour under very strict rules which they themselves cannot modify, their powers being much more restricted than those of an ordinary court or arbitration tribunal.

2.3 *The use of evidence undisclosed to Iraq*

The violations of due process just mentioned are shocking enough, but there are others : as a *third category of procedural violations*, there are rules *relating to evidence*, in particular the right to produce evidence, the right to inspect evidence and the right to comment on it. In *all* these areas there are violations of due process of law. The following is a particularly striking example.

In the WBC, that is to say the Well Blow-out Control Claim, the accounting evidence was not brought before the Panel but remained in Kuwait. It was a claim by the Kuwait Oil Company and the accounting records were kept in Kuwait. The Panel did not have access to them directly, *nor did Iraq have any access to them*. Then the Panel, in order to provide at least a semblance of scrutiny in this respect, organised an inspection. The Panel did not require the production of the records nor did it go to Kuwait to inspect them there, it delegated its task to a so-called "Verification Team". This Team included only one member of the Panel, i.e. the member who was the accounting specialist on the Panel. This Verification Team, composed of one panel member, two members of the Secretariat and an outside consultant, went to Kuwait to inspect the accounting records. They did so obviously in the presence of the Kuwaiti authorities and obviously in the presence of the claimant, that is to say the Kuwait Oil Company. However, the inspection was conducted, in the absence of any representative of the Defendant, a fact not really surprising, after all we know about the UNCC procedure.

The report of this Verification Team was then produced to the Panel and the Panel based its conclusions on it. These conclusions are not described as an "award", they are called "recommendations" but in fact they closely resemble an award. The report of the Verification Team (compiled in the absence of any Iraqi representative) had *not been given to Iraq*. Therefore, Iraq did not have a possibility even of commenting on this indirect and secondary evidence on which the Panel relied when finding that the claims were substantiated.

This shows the extent to which normal and indeed elementary rules of evidence, and the processing of evidence are deliberately ignored or violated in this strange procedure. There is no doubt whatever that such a Panel "recommendation" and the decision of the Governing Council based on it, for that reason alone, would be considered null and void as an award or a judgement under any system of law recognising the concept of due process. Enforcement would be indisputably denied, for instance under the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards.

III. *THE OBSCURE DECISION MAKING PROCESS*

This leads up to decision making in the UNCC, a diffused and obscure process. It has already been mentioned that the findings of the Panels of Commissioners are not awards or decisions but "recommendations". The decisions are made by the Governing Council, composed, as you know, of the States which are members of the Security Council. According to Article 40 of the Provisional Rules the Governing Council "may review the amounts recommended, increase or reduce them". There is no indication as to the basis on which such review is made, who will be heard in the review procedure. No right for comment, either on the recommendation of the panels or on a proposal for modifying it, is afforded to Iraq.

Another area of obscurity in the decision-making process is the role of the Secretariat. The recommendations are officially made by the Panels of Commissioners. Many distinguished international lawyers and other experts have accepted appointment as Commissioners. Iraq has not been able to nominate any of them nor has it been consulted in the nomination process. These Commissioners, grouped in Panels, make recommendations to the Governing Council. But what is the Commissioners' true input in the recommendations made in their name? The Rules give a critical role to the Secretariat in the evaluation of the claims. Article 34 expressly states that "[i]n considering the claims, the Commissioners will take into account the results of the preliminary assessment of claims made by the Secretariat in accordance with Article 14, as well as other information and views that the Executive Secretary may provide in accordance with Article 32".

Thus, the Secretariat has ample opportunity of influencing the recommendations of the Panels and there can be little doubt that it fully avails itself of this opportunity. Apart from the fact that the communications by the Secretariat to the Panels are not known to Iraq, which has no right nor opportunity to comment on the views expressed, this influence of the Secretariat puts into question the authority of the Commissioners and of their recommendations. In the end, much of what the Governing Council decides on the basis of the Panels' recommendations is likely to be the thoughts of the Secretariat or some unidentified member of it.

Much of the legal content of the recommendations is determined by the Security Council and the UNCC Governing Council, political bodies. Indeed, Article 31 of the Provisional Rules requires the Panels to apply Security Council resolution 687 (1991) which Iraq had to accept as a condition for the cease fire. The Panels must also apply "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". None of these have been accepted by Iraq. As a result of these resolutions and decisions, many of the essential legal points are not subject to the Panels' examinations and recommendations but are binding on them as part of the "applicable law"!

The Five-Year Scheme which the Secretariat has now proposed adds a most serious aggravation to this already most objectionable procedure. There are quite a number of points which call for comment. Perhaps one of the most striking ones concerns the role which "experts" (outside the Panels) will be given in the course of valuation: the whole process of the UNCC has been set up with the assumption that the principle of liability is decided by Security Council Resolution 687 (1991) and that the Panels of Commissioners only have to address quantification and valuation.

This narrow limitation in the scope of the Panels' enquiry, in itself must appear as objectionable; but what is proposed to be done in the Five-Years Scheme, is a further restriction in the role of the Panels. The valuation of the claims is taken away from the Panels, at least in part, and given to some outside experts, retained by the Secretariat and apparently not subject to the Rules applicable to the Panels. In other words, the essence of their

work is removed from the Panels, away from that part of the procedure where there is, at least in the practice with respect to some claims, a timid beginning of an adversarial procedure. As a result, the limited features of adversarial procedure which some Panels have felt in conscience bound to introduce in "unusually large or complex claims" disappears again, since the matters which have to be decided in reality are passed on to the "experts" of the Secretariat.

IV. LACK OF SERIOUS SCRUTINY - THE WBC CLAIMANT LOOSES 0.3% ONLY

There is an important comment to be made on the rules applied in the *valuation of the claims*. The Panels look into questions of causality and that they ascertain the reality of the costs claimed. But we have not heard anything about the *reasonableness of the costs* claimed.

Anybody familiar with cost-claims knows that a major part of an examination of any claim based on cost concerns the question whether the costs were reasonably expended. The American Government for instance, which in the course of its own contracts, has to settle cost claims, certainly looks very carefully at this aspect of reasonableness. It is certain that the American Government would and does refuse any discussion of payment for a claim, if it were not able to inspect or investigate whether the costs for which the claim is made were indeed reasonably engaged.

Now, reading the WBC Report, it will become clear that the reasonableness of the costs has not been examined. In particular the question whether the Kuwait Government, the Kuwait Oil Company and all others involved in this process of extinguishing the oil fires proceeded with reasonable care has not been given any serious attention. No scrutiny has been made by the Panel whether the costs engaged were necessary in the amount now claimed and whether any serious cost control was exercised by the Claimant. This is among the most scandalous parts of the system.

The most striking demonstration of the *lack of serious scrutiny* by the UNCC is given by the decision on the WBC Claim. Consider the amount claimed and compare it to the decision on it. The Claim was for some 950 million US\$. Out of this amount barely over 3 million US\$ have been dismissed. All the rest has either been admitted immediately or was transferred to another claim where, on the basis of the principles accepted in the WBC Recommendation, it stands a good chance of being admitted in full. Only 0.3% of the claim was dismissed. This is a most exceptional result. There are few, if any, international cases where a Claimant has been so successful. Compare this to the results before the Iran-US Claims Tribunal. Before this Tribunal, where claims were scrutinised in an adversarial procedure, the awards almost invariably were below 50% of the sums claimed, sometimes much less, if they were not dismissed altogether.

The difference is not due to the fact that the WBC Claim was better justified than all those presented to the Iran-US Claims Tribunal. Those who are familiar with the oil industry know how the money was spent on the

WBC work, they know about the inefficiencies and delays which occurred in the organisation of the work, they know how the oil fires had become a bonanza for quite a number of companies and individuals. One can well imagine how this claim, like so many others was inflated substantially. It is really quite extraordinary, and indeed scandalous that with all the money that is spent on the UNCC Secretariat, its experts and the Panel, they were able to discover only 0.3% of the inflation in the WBC Claim.

V. *EFFICIENCY COMPARED TO THE IRAN-US CLAIMS TRIBUNAL*

This brings us to the question of efficiency. One of the main reasons that is given for discarding adversarial procedures in the UNCC was efficiency. If this means that the Claimants quickly get what they have claimed, the UNCC procedure may be described as efficient. However, then there would be no need for an elaborate Secretariat, the Panels and the rest of this costly show. Efficiency of a procedure for determining claims must be judged by its capability of reaching valuations which are reasonably close to an just and correct assessment of the claim. An investigation of a claim such as the WBC Claim which is unable to discover more than 0.3% of over-claiming, simply cannot have been efficient. This result demonstrates that the UNCC is *quite inefficient* in its work and incapable of achieving one of the principal objective assigned to it, i.e. to determine the costs which rightly should be allowed for the claims made.

The difference between the results in the two systems is striking. One of these systems was able to detect where claims were excessive and inflated and was able to reduce them to the right size; the other system, despite the high sums spent on its administration, is incapable of doing this. The explanation is easy: The procedure before the Iran-US Claims Tribunal was adversary, and normal, that before the UNCC was not! The comparison is a very eloquent demonstration how much the adversary system is superior to so called "administrative" procedures of the style used in the UNCC. Proceedings which are adversary in nature, which respect "le principe du contradictoire" and afford "rechtliches Gehör" not only provide a higher standard of justice but also are more efficient and effective in reaching the right results!

VI. *SUBSTANTIVE RULES: LAW MAKING IN VIOLATION OF INTERNATIONAL LAW*

There remain some comments to be made on substance - on the *substantive rules*. There is much to be said about this aspect of the UNCC Scheme; I must limit myself to the following points.

Iraq, by accepting the Security Council Resolution 687 (1991), recognised that it "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 of Kuwait". This provision, its acceptance by

Iraq and the conditionality of the Resolution by Iraq has a number of consequences. First of all, it must be emphasised that the passage in question speaks of liability "under international law"; this is a very important qualification. Thus, what needs to be decided in execution of this Resolution is the scope of liability provided by international law in case of an unlawful invasion; it must be decided for which acts liability must be admitted and what type of damage must be considered. Does international law provide for a certain type of responsibility for certain types of damages: for instance war operations. Then the question should be considered whether a distinction must be made between damage caused by Iraq (for which the latter is of course responsible) and other damages, e.g. damage caused by the Allies. Under the rules as they are actually applied by the UNCC, for instance in the WBC decision, no matter who has caused any damage in any relationship with the war, Iraq pays, disregarding even the question whether Allied war operations were necessary, justified or otherwise.

Another point that must be stressed in the context of this Resolution and its acceptance by Iraq is the confirmation of the principle of consent. By requiring Iraq's acceptance of the Resolution, the Security Council has recognised that a sovereign State can be bound only by its consent. This implies, that any modifications and interpretations of Resolution 687 and the procedures foreseen there are subject to Iraq's consent, unless they are part of international law otherwise binding on Iraq.

This principle has been grossly violated. By a series of resolutions and other decisions the Security Council and the UNCC Governing Council have created a system of substantive rules and procedural mechanisms which have no basis in international law and have not been accepted by Iraq. These rules, as mentioned above, are then imposed on the Panels which must give effect to them as "applicable law". Thus the Security Council and the Governing Council have assumed law-making functions which they do not possess; and the Panels have considered themselves bound to follow these rules without serious investigation whether they express international law as it actually exists.

Now, Iraq has consented to the liability under international law, but it has not consented to any future definition of the specific content of international law which might be decided arbitrarily and in a unilateral or discretionary procedure by a political body without its consent. Iraq has not consented to the rules made by these bodies subsequently and it has not consented to such an extraordinary and unprecedented procedure and it has not consented – a very important point – that the Panels apply rules other than those established by international law as it is and not as the Security Council or some of its members would like it to be.

VII. *THE FUTURE OF THE SYSTEM: DISCARD OR TRANSFORM?*

To sum up, the UNCC system is fundamentally flawed: it is a system created by a political body without the consent of the State concerned. It determines the responsibility of a sovereign State by reference to rules fixed by this political body in the absence of the debtor State; it applies these rules in a procedure in which this State has no proper standing and is deprived of its natural rights of defence; and it makes decisions in an obscure process where the responsibilities of the Secretariat, the Panels and the Governing Council are indistinguishably confused.

The question which must be asked is whether the international community and we, as lawyers, can accept that such a procedure can continue to be applied and, even worse, that it should become the rule. At a time when the nations of the world have extended the scope of just and fair procedures for dispute settlement to many areas, including trade and investment, at a time when we discuss, as we did at this Forum, "the globalisation of economic dispute settlement", the UNCC Scheme and its disregard for due process is an atavism, a recurrence of victors' justice. The determination of claims in a procedure where a political organ, without the consent or participation of the debtor State, assumes judicial or arbitral functions is a chimera and a disgrace for the new international legal order. It would be a most dangerous precedent and an extraordinary regression in the History of International Law.

What should be done with this system? In its present form, as a method for determining obligations of a sovereign State, it is completely misconceived and should be discarded as soon as possible. The only acceptable future for such a system which might be conceived is its use as a first step, a preliminary screening of the claims which then are submitted to a consensual or arbitral determination of Iraq's obligations. But the development of such a new structure is another subject, which cannot be discussed here.