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# *Imposing Liability for Losses from Aggressive War: An Economic Analysis of the UN Compensation Commission*

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## **Abstract**

*Through an economic analysis of the work of the United Nations Compensation Commission (UNCC), this Comment seeks to understand better the process by which liability is imposed for losses caused by aggressive war. It concludes that a loss is appropriately compensable by an aggressor state if the war is a “but for” cause of the loss and ex ante the war increased the likelihood that the loss would occur. The loss need not be as foreseeable as in the law of negligence. The total amount of losses appropriately compensable under this standard may, however, exceed the maximum that is desirable or even practical to collect. Iraq involves such a shortfall. Collecting more would hinder its reintegration into the world community. Moreover, any increase in the UNCC tax rate on Iraq’s oil revenues is likely to reduce, not enhance, total revenues because of the added disincentives to export. Because of this shortfall, the practice of denying Iraq formal access to UNCC proceedings involves no procedural unfairness. The UNCC is effectively only deciding who, among all claimants against Iraq, should receive money from a fixed, maximally extractable sum. UNCC decisions also violate no norm of substantive fairness. The money extracted by the UNCC and the economic effect of the more formal sanctions imposed on Iraq, while both burdens on the Iraqi people, do not raise comparable fairness issues. As a general matter, imposing the losses on the people of the aggressor state, even if onerous, is not more unfair than leaving them to be borne by the victims of the aggressive war. Moreover, payments to the UNCC are in essence a tax on Iraq’s oil wealth, not on the fruits of the labour, skills and non-oil resources of the Iraqi people. Unlike the more formal sanctions, the UNCC payments simply deprive the Iraqi people of a portion of the good luck they had to have oil resources in the first place.*

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## 1 Introduction

The work of the United Nations Compensation Commission (UNCC) is an important event in international law-making. As the illuminating articles by Andrea Gattini<sup>1</sup> and David Caron and Brian Morris<sup>2</sup> demonstrate, the decisions made by the Commission and its working panels raise significant issues in at least three regards. First, the decisions grapple with the difficult question of the kind of causal connection that must be established to support a successful claim for damages against a country that has engaged in aggressive war. Second, the decisions raise the question of how much participation in the process that adjudicates such claims need be given a state guilty of aggressive war for the standards of minimal procedural fairness to be met. Third, there is a concern that the decisions of the UNCC are squeezing so much out of the Iraqi people that they violate some norm of substantive fairness. This Comment utilizes economic analysis to help elucidate each of these three interrelated issues.<sup>3</sup> In doing so, it seeks both to evaluate the Commission's work and to help place this work in a larger context that will assist in its interpretation as a source of precedent for future tribunals.

## 2 Causation and the Torts Analogy

Aggressive war violates international law.<sup>4</sup> The Security Council has unambiguously determined that Iraq engaged in aggressive war when it invaded Kuwait.<sup>5</sup> Moreover, as Professor Gattini convincingly argues, under principles of state responsibility,<sup>6</sup> Iraq is responsible to provide compensation for 'the consequences' of this wrong. Thus the key question facing the UNCC has been what these compensable 'consequences' are.

Making this determination involves something more than merely 'examining claims, verifying their validity and evaluating losses'.<sup>7</sup> Those who see the Commission

<sup>1</sup> Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', this issue, at 161.

<sup>2</sup> Caron and Morris, 'The United Nations Compensation Commission: Practical Justice, Not Retribution', this issue, at 183.

<sup>3</sup> While to some extent I try to put this analysis in a larger institutional context that reflects other values in addition to efficient allocation of resources, I make no serious attempt in this short Comment to consider other analytical approaches to these three issues and the extent to which these other approaches and economic analysis can be reconciled or are in conflict. My narrow purpose here is simply to see what light economic analysis can shed on these issues.

<sup>4</sup> See, e.g., Gattini, *supra* note 1, at p. 161 (referring to the development in the twentieth century of principles and rules to address aggression under international law). See also, Caron and Morris, *supra* note 2, at 186, note 8 (citing the United Nations Charter, Art. 2(4), the Hague Conventions, the Geneva Convention, and customary international law).

<sup>5</sup> See, e.g., SC Res. 660, 2932nd mtg., UN Doc. S/RES/660 (1990) ('breach of international peace and security as regards the Iraqi invasion of Kuwait'); and SC Res. 687, 2981st mtg. UN Doc. S/RES/687, para. 16 (1991) ('unlawful invasion and occupation of Kuwait'). See also Resolution on the Definition of Aggression, GA Res. 3314, GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1975), reprinted in 13 *ILM* (1974) 710.

<sup>6</sup> Gattini, *supra* note 1, 162, note 2.

<sup>7</sup> Gattini, *supra* note 1, at p. 167 (quoting then Secretary General Pérez de Cuéllar as to the UNCC's primary purpose). See also, SC Res. 687, *supra* note 4, para. 19 ('evaluating losses, listing claims and verifying their validity, and resolving disputed claims in respect of Iraq's liability').

as exercising only this narrow, technocratic function<sup>8</sup> are missing the fact that its work involves a kind of law-making that can have significant precedential value. A wide range of claims have been asserted against Iraq where there is no real doubt that the alleged act and alleged loss occurred and that the act was the 'but for' cause of the loss. The Commission, however, must decide whether, as a matter of law, the act is properly attributable to Iraq and if so whether it is the legal cause of the loss.

### ***A The Security Council's Standard of 'Direct' Causation***

The Security Council, in Resolution 687, makes Iraq 'liable under international law for any *direct* loss, damage . . . or injury to foreign governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.'<sup>9</sup> As Norbert Wühler has shown, the causal rule that 'direct' losses are the ones to be compensated goes back through many previous claims commissions over the last century.<sup>10</sup> Gattini is correct, however, that 'direct loss' is not very helpful in determining which, among all the 'but for' consequences of the Iraqi invasion and occupation, are the ones that merit compensation.<sup>11</sup> As he observes, the concept of direct loss has historically functioned more as a conclusory label for what a tribunal decides does and does not get compensated than as a workable rationale.<sup>12</sup>

### ***B Foreseeability and Its Limitations***

Borrowing from common law torts, some commentators, for example Arthur Rovine and Grant Hanessian, have suggested that the appropriate standard by which to determine what is a 'direct' loss is one that is a 'foreseeable' consequence of the offending state's breach of international law.<sup>13</sup> In seeming agreement with this approach, the UNCC 'F3' panel, chaired by Professor Lauterpacht, concluded that a 'direct loss' is one which would have been expected as a 'normal and natural' consequence of Iraq's invasion and occupation.<sup>14</sup>

The language of foreseeability gets us on the right track to developing a sensible standard for legal causation in claims for compensation for losses arising out of aggressive war. It does not get us all the way to a satisfactory solution to the problem, however. This is because in tort law, the concept of foreseeability has been developed primarily within the context of negligence. As will be developed below, this causal

<sup>8</sup> See Glod, 'International Claims Arising out of Iraq's Invasion of Kuwait', 25 *Int'l Law* (1991) 713, at 715.

<sup>9</sup> SC Res. 687, *supra* note 5, para. 16 (emphasis supplied).

<sup>10</sup> Wühler, 'Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission', in R. Lillich (ed.), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]* (1995) 207. See also Bedderman, 'Historic Analogues of the UN Compensation Commission', in *ibid.*, 257, at 287–290.

<sup>11</sup> Gattini, *supra* note 1, at 166–168.

<sup>12</sup> *Ibid.* (citing Arangio-Ruiz, 'Second Report on State Responsibility', 2 *Yearbook of the ILC* (1989) 12).

<sup>13</sup> Rovine and Hanessian, 'Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission', in Lillich, *supra* note 10, 235, at 239.

<sup>14</sup> 'Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F3" Claims', UN SCOR, Compensation Comm'n Governing Council, para. 23, UN Doc. S/AC.26/1999/24 (1999).

analysis does not work quite the same way in the case of intentional torts. And engaging in aggressive war is certainly more like an intentional tort than an act of negligence.

### *1 Foreseeability as an Approach to Defining the Scope of Liability in Negligence*

Foreseeability is a concept in the law for defining the scope of liability for a negligent act. Under the common law of negligence, where a loss is a ‘but for’ consequence of a failure to take a precaution but not the ‘foreseeable’ consequence of that failure, the act is not the ‘legal cause’ of the loss and the actor is not liable.<sup>15</sup> The borderline between what is and is not ‘foreseeable’ has been developed in the context of a number of different kinds of cases.<sup>16</sup> Efficiency analysis, with its distinctive mix of normative and positive elements, provides a useful organizing approach to understanding these cases and the extent of their relevance to the problem of causation for losses associated with aggressive war.

*a. Where the act does not increase at all the probability of the loss.* Suppose that the failure to take a precaution is a ‘but for’ cause of a loss, but the failure could not be said, *ex ante*, to have increased at all the likelihood that someone would suffer the loss. This is a circumstance where the loss can be called ‘unforeseeable’. The black letter common law is that the actor is not liable for such a loss.<sup>17</sup> Economic analysis would predict this doctrinal result and approve of it.

The starting point for the economic analysis of any issue in negligence law is the Hand formula,<sup>18</sup> which provides that an actor who fails to take a precaution should be liable for a resulting loss if and only if the cost of taking the precaution is less than the probability of the loss that may result from not taking the precaution multiplied by the magnitude of such loss. Otherwise, it is inefficient for the precaution to be taken because the precaution costs more than the expected loss that results from not taking it. When the Hand formula test is not met, imposing liability for the failure to take the precaution serves no useful social purpose in terms of creating incentives to allocate resources more efficiently since taking the precaution would be an inefficient allocation of resources.<sup>19</sup>

<sup>15</sup> W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* (5th ed., 1984) paras 41–42.

<sup>16</sup> *Ibid.*, para. 42, at 273–274.

<sup>17</sup> Restatement (Second) of Torts, para. 431; Keeton, *supra* note 15, para. 42, at 273–274.

<sup>18</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>19</sup> This statement is not meant to imply that imposing liability will result in the precaution being taken. I am, of course, setting out the simplest model. A more complex efficiency analysis would, among other things, require consideration of a variety of other factors including the differences between the social costs associated with suits in a regime of absolute liability versus negligence, the frequency with which suits would be expected to be brought under each of these two regimes, the effects of an absolute liability regime versus negligence regime on the level of the activity associated with the failure to take precaution and on the level of activity of persons of the type suffering the loss, the potential accident reducing measures that could have been taken by the victim, the accuracy with which actors and courts can apply the Hand formula, and the relative abilities of the actor versus the victim of the loss to absorb or pool the risks involved. Consideration of these additional factors, however, is for the most part unnecessary to make the points that are relevant to what economic analysis can teach us how to determine causation in the case of claims based on losses associated with aggressive war.

Applying the Hand formula, it is easy to see why a failure to take a precaution that *ex ante* does not increase the probability of the loss should not give rise to liability. Such a failure can arise in one of three kinds of cases. The first kind of case, which may exist only in theory, involves a situation in which the loss giving rise to the inquiry is the only kind of loss for which the failure to take the 'precaution' could be a 'but for' cause.<sup>20</sup> A simple application of the Hand formula shows that there should be no liability. The increase in the probability of loss occurring as a result of the failure to take the precaution is zero and so the product of that and the magnitude of the loss will also be zero and hence inevitably lower than the cost of taking the precaution.

The point in this first case is illustrated by the following example. Suppose (quite fantastically) that trolleys have no possibility of colliding with any other vehicles, so that no matter how fast they are driven there is no chance of such an accident. There is only one kind of accidental loss that can arise from operating a trolley: a tree limb may break off and fall on the trolley just as it is passing under a tree, injuring a passenger. Imagine that a passenger is injured when the trolley, operating at 40 mph, passes under a tree just as a heavy limb breaks off. If the trolley had been driven more slowly, the accident would not have occurred since the trolley would not have been under the tree at the time the limb fell. The failure to drive the trolley more slowly is not negligence under the Hand formula because doing so would not reduce the chance of such a loss: it is just as likely *ex ante* that driving at a slower speed would result in the trolley being under a falling branch that would have been avoided by driving at 40 mph.

The second kind of case involves a situation where, in addition to the loss giving rise to the inquiry, there are one or more other kinds of losses for which the failure to take the precaution could be a 'but for' cause, but where the cost of taking that precaution is *greater* than the aggregate of the product of the increase in probability, if any, of each of these *other* losses occurring as a result of the failure to take precaution multiplied by the magnitude of such loss. Imposing liability if any of these other losses occurs does not create a useful incentive from a resource allocation efficiency perspective because the cost of the precaution is less than the expected loss in its absence. Adding into the calculation the loss giving rise to this inquiry does not change this conclusion.

The point in this second case can be illustrated by a revised version of the trolley example above. Now accidents with other vehicles can occur and the trolley's speed affects the possibility of such an accident. Again a passenger is injured when the trolley, operating at 40 mph, passes under a tree just as a heavy limb breaks off. If the trolley had been driven more slowly, the accident would not have occurred since the trolley would not have been under the tree at the time the limb fell. Assume that driving the trolley more slowly than 40 mph, while it would reduce the chance of accidents with other vehicles, does not reduce the chance of these accidents enough to justify the slower speed's wasted passenger time and lower productivity from the

<sup>20</sup> The failure to take the 'precaution' nevertheless does not increase the probability of the loss because, for example, circumstances outside the actor's control make it equally likely *ex ante* that taking the 'precaution' would turn out to be a 'but for' cause of such a loss.

trolley company's equipment and personnel. Thus, just considering the possibility of accidents with other vehicles, driving at 40 mph is not negligence under the Hand formula. Adding in the consideration that a tree limb falling on the trolley might be avoided by driving more slowly serves no useful purpose since it is just as likely that driving at 40 mph would avoid a tree limb accident that would have occurred at the slower speed.

The third kind of case involves a situation where, in addition to the loss giving rise to the inquiry, there are one or more other kinds of losses for which the failure to take the precaution could be a 'but for' cause, but where the cost of taking that precaution is *less* than the aggregate of the product of the increase in probability, if any, of each of these other losses occurring as a result of the failure to take precaution multiplied by the magnitude of such loss. Now imposing liability if any of these other losses occurs *does* create a useful incentive from a resource allocation efficiency perspective because the cost of the precaution is less than the expected loss in its absence. Imposing liability as well if the loss giving rise to the inquiry occurs still does *not* create a useful incentive from a resource allocation efficiency perspective, however, since the possibility that one of the other losses will occur and its attendant liability is enough to create the needed level of incentive for a rational person to take the precaution.

This third case can be illustrated by a further revision of the trolley example, this time so that it closely resembles the actual facts of the well-known case *Berry v. Sugar Notch Borough*.<sup>21</sup> Again a passenger is injured when the trolley, operating at 40 mph, passes under a tree just as a heavy limb breaks off, and again, if the trolley had been driven more slowly, the accident would not have occurred since the trolley would not have been under the tree at the time the limb fell. Now assume, however, that driving the trolley slower than 40 mph reduces the chance of accidents with other vehicles sufficiently that it would justify the resulting wasted time of the passengers and the lower productivity of the trolley company's equipment and personnel. Thus, just considering the possibility of accidents with other vehicles, driving at 40 mph is negligence under the Hand formula.

Adding into this calculation a consideration of the fact that a tree limb falling on the trolley might be avoided by driving more slowly still serves no useful purpose, however. It is just as likely *ex ante* that driving more slowly would have placed the trolley under a falling limb. The knowledge that liability will be imposed if the trolley is operating at 40 mph and an accident with another vehicle occurs will provide a rational actor with sufficient incentive to drive at the slower speed called for by the Hand formula. Thus, consistent with the court's decision in *Berry*,<sup>22</sup> there is no need to impose liability for the injury resulting from the fallen tree limb. Indeed, if we enlarge the model to take account of considerations such as the effect of imposing liability for tree limb accidents on the level of trolley operations in society or the possibility of even unbiased error in court determinations of what speed would constitute negligence, imposing liability for tree limb accidents can have negative effects from an allocational

<sup>21</sup> *Berry v. Sugar Notch Borough*, 191 Pa. 345, 43 Atl. 240 (1899).

<sup>22</sup> *Ibid.*

point of view by leading to too few trolleys and/or too slow trolley speeds.<sup>23</sup>

*b. Where the act increases the probability of the loss but by only a small amount.* Suppose that the failure to take a precaution is a 'but for' cause of a loss and that *ex ante* the failure had increased the likelihood that someone would suffer the loss, though by only a small amount. This is a second kind of case where the loss *may* also be called 'unforeseeable' with the result again that the actor is not liable for the loss according to the black letter common law. How small does the increase in the likelihood of the loss need to be, however, for the loss to be considered unforeseeable? The three kinds of cases discussed above are helpful in answering this question.

The first kind of case, it will be remembered, involves a situation in which the loss giving rise to the inquiry is the only kind of loss for which the failure to take the precaution could be a 'but for' cause. If the probability of the loss is increased only a small amount by the failure to take the precaution, then the act would not be negligent under the Hand formula unless, relative to the cost of taking the precaution, the potential loss is very large. Consider the first version of the trolley hypothetical above, where trolleys have no possibility of colliding with other vehicles and so no matter how fast they are driven there is no chance of such an accident. Suppose, however, that the faster the trolley is driven, the more vibrations it makes in the ground and so the chance that a tree limb falls on the trolley just as the trolley passes underneath is ever so slightly increased. Again a passenger is injured when the trolley, operating at 40 mph, passes under a tree just as a heavy limb breaks off. The failure to drive the trolley more slowly is almost certainly not negligence under the Hand formula because driving more slowly would not *ex ante* reduce the chance of such a loss enough to justify the wasted time of the passengers and the lower productivity of the trolley company's equipment and personnel.

The second kind of case involves a situation where, in addition to the loss giving rise to the inquiry, there are one or more other kinds of losses for which the failure to take the precaution could be a 'but for' cause, but where the cost of taking that precaution is *greater* than the aggregate of the product of the increase in probability, if any, of each of these other losses occurring as a result of the failure to take precaution multiplied by the magnitude of such loss. Thus just looking at these other losses, the failure to take the precaution is *not* negligence under the Hand formula. Adding in the loss that is giving rise to this inquiry into the calculation will likely not change this conclusion, again unless, relative to the cost of taking the precaution, the potential loss is very large. Consider, modifying to fit these facts, the second version of the trolley example in the subsection above, where accidents with other vehicles can occur and driving the trolley at a speed below 40 mph reduces the chance of such an accident but not by enough to justify the wasted time of the passengers and the lower productivity of the trolley company's equipment and personnel. Adding into the Hand formula

<sup>23</sup> See *supra* notes 19–20. See also Landes and Posner, 'Causation in Tort Law: An Economic Approach', 12 *J. Legal Studies* (1983) 109, at 162, 236.

calculation the fact that driving more slowly reduces ever so slightly the chance of a tree limb falling on the trolley is unlikely to change the conclusion that driving at 40 mph is not negligence.

The third kind of case also involves a situation where, in addition to the loss giving rise to the inquiry, there are one or more other kinds of losses for which the failure to take the precaution could be a 'but for' cause and where the cost of taking that precaution is *less* than the aggregate of the product of the increase in probability, if any, of each these other losses occurring as a result of the failure to take precaution multiplied by the magnitude of such loss. Thus, just looking at these other losses, the failure to take the precaution is negligence under the Hand formula. Adding into the calculation the loss giving rise to this inquiry will obviously just reinforce this conclusion. More to the point, however, at least in a transaction cost free world, the fact that the failure to take the precaution increases the chance of this loss means that the actor *should* be liable for damages if the loss occurs, *no matter how slight the increase in risk and how small the loss*.

Modifying the third version of the trolley example discussed in the subsection above, again a passenger is injured when the trolley, operated at 40 mph, passes under a tree just as a heavy limb breaks off. In contrast to the modified second version, driving the trolley slower than 40 mph reduces the chance of accidents with other vehicles sufficiently that it would justify the wasted time of the passengers and the lower productivity of the trolley company's equipment and personnel. Thus, just considering the possibility of accidents with other vehicles, driving at 40 mph is negligence under the Hand formula. In this case, adding into this calculation a consideration of the fact that a tree limb falling on the trolley might be avoided by driving more slowly does serve a useful purpose. There are now additional gains from driving more slowly. This means that the break point below which the speed is not negligent is not only below 40 mph, it is lower than it would have been if only vehicular accidents were considered. Unless liability is imposed for the injury resulting from the fallen tree limb, the trolley operator will not have sufficient incentives to drive at this further reduced rate of speed.

This third case may look different, however, in a world with transaction costs. Specifically consider two kinds of costs that imposing liability for fallen tree limbs would entail. One is the costs that the trolley operator would need to incur to take account of the potential liability. The other is the cost of the additional litigation generated by such a liability rule. Take our example where the vibrations from a higher rate of speed increase ever so slightly the chance of a tree limb falling on the trolley. There is likely to be only a small improvement in resource allocation from trolleys operating at the slightly slower speed that the Hand formula would call for when the fallen tree limb risk is included in its calculation. Assume that the rule is that the actor is liable for the damages that result from fallen tree limbs if the trolley is driven above this slightly slower speed. It is quite possible that despite this rule, trolley operators, in determining how fast to drive, would not take the tree limb risk into account at all because the risk is so remote, so 'unforeseeable'. In essence, because it is costly for the actor to inform herself about the remotely possible consequences of her



act, she will not do so and so she will be unaware of them. Since incentives depend on perceived, not actual, risks, the trolley operators will not have any incentive to drive any more slowly than what the Hand formula would call for if the tree limb risk is not included in its calculation.<sup>24</sup> In that event, the rule imposing liability for such accidents is undesirable because it will not lead to any improvement in resource allocation, but will increase the administrative costs associated with the resulting increase in litigation.<sup>25</sup>

Alternatively, it is also quite possible that a rule that such remote risks are included in the Hand formula calculation may result in trolley operators searching for the existence of such unobvious risks. As a result, they become aware of the risks and do have an incentive to drive more slowly. The cost of the search, however, may equal most or all of expected reduction in accident losses from the slower driving. In this event, the rule imposing liability for such accidents is also likely to be undesirable. The resulting gains from improved resource allocation will be largely or totally cancelled out by the trolley operators' search costs, leaving only the resulting increase in administrative costs from increased litigation.

Common law tort is consistent with the results called for by this kind of reasoning: liability is typically not imposed on the actor in a case where the actor is negligent but where the act barely increases the likelihood of the kind of loss that actually occurred. The most famous example is the *Palsgraf* case,<sup>26</sup> where the railroad was found not liable for injuries to Mrs Palsgraf. These injuries were alleged to have occurred when a conductor helped a passenger onto a moving train — a clearly negligent act — and as a result of the push the passenger dropped a package of fireworks that then exploded causing some weights on a scale on the far end of the platform to fall, injuring Mrs Palsgraf. Certainly the push increased the likelihood of such an accident, but only by a very tiny amount. Thus, if transaction costs are taken into account, such an 'unforeseeable' loss should not lead to liability.

<sup>24</sup> Consider also a variation of this scenario. Again, because of the costs, the actor will not inform herself concerning the remotely possible consequences of her act but, unlike the scenario in the text, she will be aware that there are a variety of remotely possible consequences for which she could be liable. She will just not engage in the costly search to find out what they are or exactly what they add up to in terms of expected losses. The rule's improved resource allocation benefit will still be reduced compared to what it would be in a transaction cost free world. Even if her estimate as to the expected losses from these consequences is unbiased, her estimate is likely to be inaccurate. If the estimate is inaccurately high, it will lead to overprecaution; if inaccurately low, it will lead to underprecaution. This reduced resource allocation benefit may not be great enough to be worth the administrative costs resulting from the increase in litigation arising from imposing liability for such remotely possible consequences.

<sup>25</sup> See Shavell, 'An Analysis of Causation and the Scope of Liability in the Law of Torts', 9 *J. Leg. Studies* (1980) 463, at 490–492. One might argue that if the increase in the risk of tree limb accidents due to higher trolley speed vibrations is very small, there would be only a comparably small increase in expected administrative costs since suits would be very rare. This is not necessarily true, however. It confuses the fast trolley speed induced *increase* in the risk of accident, which we assume is very small, with size of the overall risk of such accidents, which may be many times as great. If the rule imposes liability for tree limb accidents, then every tree limb accident that occurs when the trolley is driven at a rate over the Hand formula speed that includes tree limb accidents will give rise to a cause of action even though only a few of the accidents would actually be caused by the vibrations.

<sup>26</sup> *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

*c. Summary.* The foregoing discussion suggests the following principles concerning the role that the ‘foreseeability’ of a loss has in determining negligence liability. If the failure to take a precaution does not increase at all the likelihood of the loss occurring, it should not give rise to liability. If the failure does increase the likelihood of the loss occurring but only by a very small amount, the desirability of imposing liability for the loss depends on the circumstances. Where the Hand formula would not call for the imposition of liability in the event of the other kinds of losses that the failure to take precaution increases the likelihood of occurring, adding the small likelihood loss giving rise to this inquiry into the calculation will probably not change this conclusion and so the loss should not give rise to liability. Where, in a transaction cost free world, the Hand formula *would* call for the imposition of liability in the event of the other kinds of losses that the failure to take the precaution increases the likelihood of occurring, the loss *should* give rise to liability. This is true no matter how little the failure to take the precaution adds to the likelihood of the loss occurring. When we take into account the costs that the actor would have to incur to discover the risk and the costs of additional litigation that imposing liability would generate, this conclusion may again need to be reversed, however. Where the increase in likelihood is very low, no liability should be imposed unless, relative to the cost of taking the precaution, the potential loss is large. This in fact appears to be the rule in common law tort.

## *2 Foreseeability as an Approach to Defining the Scope of Liability for Intentional Torts*

Foreseeability, as an approach to defining the scope of liability for losses that are the ‘but for’ result of a wrongful act, has been primarily developed in the area of negligence. This Comment, however, concerns claims for losses arising out of aggressive war, and so the closer torts analogy is intentional tort, not negligence. The foregoing analysis of the role of foreseeability in negligence provides a useful framework for a comparable analysis for intentional torts, but its conclusions do not transfer over wholesale.

*a. Distinctions between the analysis of accidental losses and intentional torts.* Unlike the failure to take a precaution in negligence, the act in intentional tort that is the ‘but for’ cause of a loss is inherently wrongful. Thus the act in intentional tort generally has no social value; indeed it is often morally condemned. This distinction between intentional torts and negligence takes on real importance given two critical values that lie behind an economic analysis of foreseeability in negligence.

The first critical value behind the economic analysis of negligence is that any costs incurred by the actor in taking precautions to reduce the likelihood of accidents are counted into the resource allocation calculation. Thus, in a negligence inquiry, the benefit that would accrue to the actor from avoiding the cost of taking the precaution is considered a social benefit, which is then weighed against the resulting expected costs of accidents. The comparable concern in intentional tort — the private benefit

that would be forgone by the actor if she does not undertake the act that causes the loss — is much less compelling because there is a very strong argument that this private benefit to the actor has no social value.<sup>27</sup>

This second critical value behind the economic analysis of negligence is that the primary object of imposing liability is to improve the efficiency with which resources are allocated. This value may also be less compelling for intentional torts. An action for damages in the case of an intentional tort may provide the community with an occasion not just to provide incentives for efficient resource allocation, but also to express its moral condemnation of the act. Thus, the criteria used to decide whether a loss is within the scope of liability may need to account for more than just its resource allocation incentive effects.

*b. Where the act does not increase at all the probability of the loss.* Suppose that an intentional tort is a ‘but for’ cause of a loss, but the act did not *ex ante* increase at all the likelihood that someone would suffer the loss. What makes the tort intentional, the conscious awareness that the act will likely injure someone else in an impermissible way, means that the act can be the ‘but for’ cause of at least one other kind of loss — the impermissible injury — and that the act almost certainly greatly increases the likelihood of this other kind of loss. Under the assumption that the tortious act has no social value, having the actor not undertake the act clearly involves a superior allocation of resources. Thus, as in the negligence analysis, a rule imposing liability for compensatory damages upon the occurrence of the impermissible injury creates a useful incentive from a resource allocation efficiency perspective.<sup>28</sup> However, also just as in the negligence analysis, from the point of view of forcing the actor to internalize the expected consequences of his acts, it is not necessary to impose liability as well for the loss giving rise to this inquiry, the one that the act did not *ex ante* increase the likelihood of occurring.<sup>29</sup>

Intentional torts differ from negligence in important ways, however, and maybe these differences call for a different liability rule. Unlike in negligence, a liability scheme imposing compensatory damage liability only for the impermissible injury may not provide a sufficient incentive for a rational actor not to undertake the intentional tort. Society does not put a value on the act, but the actor does, perhaps a larger value than the expected damages he will have to pay if the impermissible injury occurs. This problem raises the issue of whether, to add to the actor’s incentive not to undertake the act, liability should be imposed as well for the loss whose probability the act *ex ante* does not raise? My answer would be no. To start, there is the possibility of

<sup>27</sup> See, Landes and Posner, *supra* note 23, at 133. This argument is strongest where the actor’s only object appears to be to inflict harm on another person. Even when the tort only involves conversion, the forced transfer means that there is no presumption, the way there is with voluntary transfers, that resources are being transferred to one who values them more. There are a number of social costs associated with such a forced evasion of the market such as encouraging protective expenditures and the need to use the court system to value the resource.

<sup>28</sup> See *supra* Section 1B1a.

<sup>29</sup> *Ibid.*

unlimited damages if we impose liability for every loss for which the act is a ‘but for’ cause but does not *ex ante* increase the probability of. This is because, as a matter of logic, every act has, over time, an infinite number of ‘but for’ consequences, approximately half of them bad. There seems no rational way of selecting for compensation some out of all such losses. Any method of selection would be entirely random and arbitrary in terms of its effects on both the actor and the persons suffering the losses. A better approach to increasing the incentive for the actor not to undertake the intentional tort is to impose liability only for losses that the act increases the likelihood of, but include punitive damages on top of compensatory ones. This same reasoning would suggest a negative answer to the question of whether, in order to provide an opportunity for society to morally condemn the actor, losses for which an intentional tort is a ‘but for’ cause but that the tort does not increase the likelihood of should give rise to liability.

The common law of intentional torts is consistent with this analysis. The Restatement (Second) of Torts, for example, provides an exception for losses even of the kind that are intended by an intentional tortfeasor if the tortious act did not increase the likelihood of the loss.<sup>30</sup>

*b. Where the act increases the probability of a loss of a small amount.* Suppose that an intentional tort is a ‘but for’ cause of a loss that is different than the impermissible injury that makes the act an intentional tort. The act *ex ante* increases the likelihood that someone would suffer such a loss, but only by a small amount. As analysed just above, since the tortious act is assumed to have no social value, imposing liability for compensatory damages upon the occurrence of the impermissible injury creates a useful incentive from a resource allocation efficiency perspective. The prospect of such liability forces the actor to internalize the expected consequences of his acts. The same is true for any other loss for which the act *ex ante* increases the likelihood, even, at least in a transaction cost free world, a loss for which the act increases the likelihood only very slightly.

Now, as we did in the negligence analysis, add in transaction costs, specifically the costs that an actor contemplating an intentional tort would need to incur to become aware of the remotely possible consequences of her act and the costs of the additional litigation generated by a remote risk liability rule. Does inclusion of these transaction costs in the analysis call in case of intentional torts for a modification of the conclusion

<sup>30</sup> The Restatement provides an exception from liability for a harm resulting from ‘an outside force the risk of which is not increased by the defendant’s act’. Restatement (Second) of Torts, para. 435A. In Comment a. to this section, the Reporters state ‘even where the harm would not have occurred but for the tortious act, there is no liability if . . . the defendant’s act did not increase the risk of harm through the means by which it occurred’; *ibid.* One commentator states that the cases suggest that ‘liability [for intentional torts] should be extremely broad, and perhaps limited only by actual cause’, Comment, ‘The Tie That Binds: Liability of Intentional Tort-Feasors for Extended Consequences’, 14 *Stanford L. Rev.* (1962) 362, at 363, but the actual facts in each of the cases cited by the commentator suggest that the intentional tort — a trespass — did increase the risk of harm at least very slightly, not just that it was the ‘but for’ cause of the loss. In each case, if the plaintiff had had the opportunity to give permission, he might have taken precautions to lessen the chance of the possible injury.

that liability should be imposed for remote risk losses the way it does with regard to negligence? My answer is no, at least not to the same degree.

It is again quite possible that because of the costs, the potential intentional tortfeasor would not search for the existence of the remotely possible consequences of her act even if there were a rule imposing liability for the occurrence of losses that the intentional tort only slightly increases the risk of. If she does not engage in the search, she would not be aware of these remotely possible consequences and thus would not take them into account in deciding whether or not to undertake the act. Again, therefore, a rule imposing liability would not lead to any improvement in resource allocation but would increase the administrative costs arising from the resulting increased litigation. Even assuming this is the situation, however, there is a stronger argument for a rule imposing liability in the case of intentional torts than in negligence. This is because the rule would provide an additional opportunity for society to morally condemn the actor. And, unlike the case where the intentional tort does not *ex ante* increase the likelihood of loss, the rule would not lead to the potential for unlimited damages and would not be random or arbitrary in its impact.<sup>31</sup>

The alternative possibility, as we saw in the negligence discussion, is that a rule imposing liability for remote risks may cause an actor contemplating an intentional tort to incur the search costs necessary to become aware of the remotely possible consequences of her act. If this is the case, the rule would cause the actor to more fully internalize the consequences of her contemplated action and therefore lead to an improvement in resource allocation. In the earlier discussion of negligence, our concern was that the cost of the search might equal the gain from the improved allocation of resources so that the rule's increased administrative costs of litigation might not be justified. In essence, when the costs of searching for risks is counted as part of the cost of further precaution, the failure to take the further precaution is no longer negligence.<sup>32</sup> Here, however, if the cost to the actor of giving up his private gains from the contemplated intentional tort is not a social cost, then neither is the cost of such a search in contemplation of undertaking such an act. Put another way, it is hard to argue that the costs of the search for the remotely possible consequences of an intentional tort by a person contemplating such an act are social costs arising from a rule imposing liability for these consequences. In sum, unlike negligence, there is no

<sup>31</sup> The conclusion that there is a stronger argument for a rule imposing liability for remote consequences than was the case with negligence also applies under the variant of this scenario where, like in the text, the cost to the actor of informing herself as to the remotely possible consequences of her act will lead her to not inform herself, but where, unlike in the text, she will be aware that there are a variety of remotely possible consequences for which she could be liable. See *supra* note 24. The effects of the inaccuracy in her estimate of the expected losses associated with these remotely possible consequences are more benign than in the case of negligence. If the estimate is inaccurately high, it may provide a desirable supplement to punitive damages to give the needed extra incentive not to undertake the intentionally tortious act. If the estimate is inaccurately low, it will lead to no more lessening of the incentive not to undertake the act than if the rule was that no liability would be imposed for remotely possible consequences of the act. Thus the administrative costs resulting from the increase in litigation arising from imposing liability for such remotely possible consequences are more likely to be worthwhile than in the case of negligence.

<sup>32</sup> R. A. Posner, *Economic Analysis of Law* (5th ed. 1998), at 203.

search cost reduction in the resource allocation benefit from imposing liability for remote risks, and so the rule is more likely to be worth the increased administration costs from the rule's resulting increase in litigation.

Consistent with this analysis, under the common law, losses need not be as foreseeable to lead to liability when they are the 'but for' result of an intentional tort rather than negligence. Thus the Restatement provides for a person committing an intentional tort that 'the degree of his moral wrong, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting *unintended* harm'.<sup>33</sup> The Reporters make clear in their Comments that 'the principle that underlies [the rule is] that responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent'.<sup>34</sup>

### 3 Applying the Tort Analogy to Losses from Aggressive War

#### *A Application of the Tort Analogy to the Scope of Liability*

Claims for losses arising from aggressive war are closely analogous to claims for losses arising from intentional torts. The analysis above thus suggests that all the kinds of damage that the UNCC has found to be 'direct' are clearly appropriately compensable. This includes the attribution to Iraq of damages caused by the military actions of the Allies in liberating Kuwait<sup>35</sup> since Iraq's acts clearly enhanced the risk that this kind of damage would occur. The same is true of Iraq's liability for environmental damage.<sup>36</sup>

Equally interesting, the analogy to intentional torts also suggests that some of the items that the UNCC has found *not* to be 'direct' losses would be appropriately compensable. These would include the UNCC's decision that the costs of the allied war effort and damages to the individuals making up the allied forces are not compensable.<sup>37</sup> These costs and damages would be appropriately compensable because Iraq's decision to invade Kuwait certainly increased the probability that these

<sup>33</sup> Restatement (Second) of Torts, Sec. 435B (emphasis added).

<sup>34</sup> *Ibid.* Comment a. See also Landes and Posner, *supra* note 23, at 133 ('the general approach of the courts seems to be to allow a greater scope of liability in intentional-tort cases'); Comment, *supra* note 30 (collecting cases to this effect).

<sup>35</sup> 'Criteria for Expedited Processing of Urgent Claims', UN Compensation Commission Governing Council, 1 Dec. UN SCOR, 1st Sess., & 18(a), UN Doc. S/AC.26/1991/1 (1991); 'Criteria for Additional Categories of Claims', UN Compensation Commission Governing Council, 7 Dec./Rev. 1, UN SCOR, 5th Sess., 24th mtg., 6(a), 21(a), 34(a), UN Doc. S/AC.26/1991/7/Rev.1 (1992).

<sup>36</sup> SC Res. 687, *supra* note 5, para. 16 (1991); 'Well Blownout Control Claim', UN Doc. S/AC 26/1996/5/Annex (1996).

<sup>37</sup> 'Military Costs', UN Compensation Commission Governing Council, 19 Dec. UN SCOR, 41st mtg., at 1, UN Doc. S/AC.26/Dec.19 (1994).

losses would be incurred.<sup>38</sup> Some of the 'embargo' losses denied by the UNCC<sup>39</sup> are appropriately compensable as well. 'Embargo' losses are those that result from the operation of the UN sanctions, which were also certainly made more likely by the war. Typical embargo claims involve the consequences of increases in oil prices or decreases in tourism that have resulted from the sanctions. In many cases, the UNCC may have understandably steered clear of these claims, despite their meeting the minimum standards of foreseeability, because the losses of the individual claimants tend to hugely exaggerate the overall social losses. This exaggeration is due to the fact that other persons, for example sellers of oil or providers of tourism services in other parts of the world, enjoy substantial gains as a result of the same factors. It is important to realize, however, that this counterbalancing gain is not an inevitable feature of an embargo type loss.

## **B A Perspective on the Precedential Value of Decisions to Deny Compensation**

### *1 Denials of Compensation Explained by the Inadequacy of Available Funds*

Some important losses denied compensation by the UNCC as insufficiently direct would, as we have just seen, be appropriately compensable under the foregoing intentional torts analysis. In determining the precedential value of the decisions to deny compensation, it is important to determine whether they represent an authoritative rejection of the reasoning of this analysis or whether there is another, more compelling explanation. There are good reasons to believe the second. Almost everything about the UNCC procedure seems to be shaped by the fact that the resources available from Iraq to provide compensation are substantially less than the aggregate of appropriately compensable claims. Thus there is an unavoidable need to prioritize among worthy claimants. This need is illustrated by the decision to process mass claims of needy individuals injured or dislocated by the war before the larger commercial claims.<sup>40</sup>

<sup>38</sup> Under this theory, the damages owned by the aggressor state could presumably be reduced to the extent that it could show that the forces against it did not use the least cost method of liberating the conquered territory.

<sup>39</sup> 'Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation', UN Compensation Commission Governing Council, UN SCOR, 9 Dec., 4th Sess., 23rd mtg., & 6, UN Doc. S/AC.26/1992/9 (1992); 'Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause', UN SCOR, Compensation Commission Governing Council, 15 Dec., 8th Sess., 31st mtg., & 9, U.N. Doc. S/AC.26/1992/15 (1993). See also Gattini, *supra* note 1, at 169.

<sup>40</sup> For descriptions and rationale for UNCC mass claims processing, see Raboin, 'The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing', in Lillich, *supra* note 10, 119; see also, Gibson, 'Mass Claims Processing: Techniques for Processing Over 400,000 Claims for Individual Loss at the United Nations Compensation Commission', *ibid.*, 155.

## 2 *Reasons for Inadequate Funds*

The limits on the resources available to provide compensation relate to multiple concerns about the maximum amount of funds that can be drawn out of Iraq.

*a. The need to reintegrate Iraq into the world community.* The first concern relates to the desirability of reintegrating Iraq into the world community in the longer run.<sup>41</sup> There is a general perception that an important cause of World War II was the domestic reaction within Germany to the huge burden of reparations imposed by the Allies at the end of World War I. This perception constitutes a serious warning with regard to Iraq. Thus, regardless of the current debate concerning the justice of forcing the citizens of Iraq to pay for the consequences of their leaders' misdeeds, placing too great a burden on Iraq is contrary to the interests of the rest of the world. There is no comparable concern in the case of an individual torts defendant.

*b. The compensation burden on the level of Iraqi economic activity.* Equally important, perhaps, is the practical concern of collection. Collection is more complex in the international system than the domestic one because in the domestic system the defendant often has insurance or a stock of assets easily seizable by the authority ordering compensation. The primary potential source of funds for compensation from Iraq is revenues from the export of oil somewhat like, in the domestic system, wages that must be gathered. Iraq has no reason to pump and export oil just to pay compensation, it needs some incentive. The analogies here are to a ruinous rate of taxation or a self-defeatingly high price charged by a monopolist: there is some rate or price above which the disincentives created outweigh the increased revenue per unit. Increasing the rate or price above that limit actually decreases total revenues.

Simple mathematics shows that the maximum amount that can be extracted from Iraq will be well below the amount of appropriately compensable damages. At Iraq's pre-war export level<sup>42</sup> and the current price of oil,<sup>43</sup> Iraq's maximum gross export revenues are about \$21 billion. Even after sanctions are lifted, Iraq's willingness to pump and export oil will depend on the fraction it must give up to pay into UNCC funds. The fraction that will maximize the revenues that the UNCC can collect is unlikely to be much above the 25 or 30 per cent that has been the fraction imposed so far. This suggests that the maximum amount of funds available for compensation probably does not exceed \$7 billion a year. Given the amount of losses appropriately

<sup>41</sup> Gattini, *supra* note 1, at 161.

<sup>42</sup> Iraq's oil production quota, as agreed to within OPEC in July 1990, was 3.14 million barrels per day, 2.85 million barrels to be exported. With a market price of \$21 for crude oil less a \$1 adjustment for quality, expected revenues from Iraqi oil exportation would be \$21 billion. Letter dated 30 May 1991 from the Secretary-General Addressed to the President of the Security Council, Annex, para. 4, UN Doc S/22661.

<sup>43</sup> At the time of this writing the price of IPE crude oil was roughly \$21. See BLOOMBERG7 Energy Price Chart, <<http://www.bloomberg.com/energy/index.html>>, visited on 9 November 2001.



attributable to Iraq are probably at least \$100 billion,<sup>44</sup> \$7 billion per year does not even cover interest on the amount.

## 4 Procedural Fairness

The UNCC's procedures give Iraq at best a very circumscribed ability to participate in the adjudication of claims against it. The fairness of denying Iraq a full right of participation has sparked considerable debate.<sup>45</sup> On the surface at least, it seems manifestly unfair that Iraq, as defendant in the case, not be given a right of full participation in the proceedings against it.<sup>46</sup> A more careful analysis, however, shows otherwise. The Security Council has already found Iraq guilty of undertaking aggressive war and has held Iraq to be responsible for the losses that directly resulted from this war.<sup>47</sup> Thus, with regard to any particular claim, the only question before the UNCC in which Iraq potentially can have an interest is whether the claim validly represents an appropriately compensable loss. But the facts of the situation demonstrate that Iraq does not even have this interest. As established just above, sufficient funds cannot be extracted from Iraq to pay all the claims for which it appropriately should provide compensation, probably not enough funds even to pay interest on the total amount of such losses. Given this fact, Iraq's lack of a right of full participation should not offend our sense of procedural fairness.

The analogy here is to bankruptcy. Since there are not enough funds to pay off all that is owed, the true purpose of the adjudication is to settle a fight among the claimants. Iraq will need to pay the maximum amount that can be extracted from it in any event. The only decision that needs to be made is which claimants get the available funds.

The recognition that the true purpose of UNCC adjudication is to decide who, among all the claimants against Iraq, should receive payment from a fixed pot of money is the most compelling answer to critics of the UNCC's procedural fairness. Arguments that UNCC procedures are fundamentally fair, despite the lack of Iraq's formal participation because of the indirect or informal ways Iraq has been able to provide input, may be correct.<sup>48</sup> Their proponents will have a hard time convincing

<sup>44</sup> See 'Status of Claims Processing' on the UNCC website: <<http://www.unog.ch/uncc/status.htm>>, visited on 9 November 2001 (current unresolved claims total about \$219 billion). See also, Whitaker, 'Iraqi Reparations Could Take a Century to Pay', *The Guardian*, 16 June 2000, Guardian Foreign Pages at 19. While, of course, not all of these claims have merit, these numbers do not include many claims that according to the intentional torts analysis above would be appropriately compensable but that were ruled out early by the UNCC, for example the cost of the allied war effort to liberate Kuwait. See Section 2A *infra*.

<sup>45</sup> See Gattini, *supra* note 1 at 164–166.

<sup>46</sup> This is the position of Iraq as well as of some commentators. For a discussion of these criticisms of UNCC procedures, see Crook, 'The UNCC and Its Critics: Is Iraq Entitled to Judicial Due Process?', in Lillich, *supra* note 10, 77, at 92–98.

<sup>47</sup> See 1 and 1A *supra*.

<sup>48</sup> Caron, 'The UNCC and the Search for Practical Justice', in Lillich, *supra* note 10, 367, at 369–371; Crook, *supra* note 46, at 98–100; Carver, 'Dispute Resolution or Administrative Tribunal: A Question of Due Process', in Lillich, *supra* note 10, 69, at 73–76.

sceptics, however, without succeeding at the almost impossible task of demonstrating that these other avenues have in fact been just as effective as full participation. Similarly, the fact that the damages awarded by the UNCC only equal 9 or 10 per cent of the amounts claimed may testify less to the fundamental fairness of the system, as Caron and Morris argue,<sup>49</sup> than to the creativity of the claimants and their lawyers.

The ‘just a fight among creditors’ position advanced here is open to at least one criticism. Professor Caron points out that claims made through the UNCC process are not the exclusive remedy for losses suffered as a result of Iraq’s decision to engage in aggressive war.<sup>50</sup> Thus, if the UNCC decides to grant the claim of a party who would not have been able to get money from Iraq pursuing any other remedy and denies the claim of another party who can get money pursuing some other remedy, Iraq is negatively affected. This is because the opposite decision — granting the claim of the second party in preference to the first — would reduce or eliminate what Iraq would have to pay should the second party pursue its other remedy. Thus, Caron argues, it cannot be said that Iraq has no interest in UNCC decisions and that therefore the fairness of the limits on Iraq’s participation is a non-issue. This is a fair point at a theoretical level, but I am not convinced it is important at a practical level. Potential claims based on these other remedies will need to be resolved in any event before Iraq can be genuinely reintegrated into the world economic community. The amounts paid to resolve them are probably going to have to come out of the same maximum extractable pot of money that is currently funding the UNCC claims. In the meantime, Iraq’s current piecemeal economic contact abroad leaves it fairly invulnerable to these other remedies.

## 5 Substantive Fairness

Is the UNCC violating some international law norm of substantive fairness by squeezing too much out of the Iraqi people? Caron and Morris suggest that some critics lump the UNCC in with the formal sanctions regime against Iraq and conclude that the total impact on the people of Iraq is unjustly harsh.<sup>51</sup> Caron and Morris disagree, insisting that the UNCC regime does not involve economic sanctions as that term has been understood in international relations and law. Rather they see it simply as a mechanism established to provide practical justice to those who suffered damage.<sup>52</sup> I agree with them that the UNCC can be distinguished from the formal sanctions mechanism directed against Iraq and that the amounts collected from Iraq to fund payment of UNCC claims are not unjust. I disagree, however, that UNCC payments are not sanctions, at least as that term is understood in the larger legal literature.

<sup>49</sup> Caron and Morris, *supra* note 2, at 194 (referring to E2 claims).

<sup>50</sup> Caron, *supra* note 48, at 370; see also, Caron, ‘The Gulf War, the United Nations Compensation Commission and the Search for Practical Justice’, 24 *The Transcript* (Fall 1991) 26.

<sup>51</sup> Caron and Morris, *supra* note 2, at 184.

<sup>52</sup> *Ibid.*

## **A *The UNCC as a Sanction***

Caron and Morris argue that 'the UNCC was not created to punish Iraq or to encourage certain changes in its leadership'.<sup>53</sup> According to them, the UNCC just concerns compensation and does not involve a sanction.<sup>54</sup> It is true that the UNCC does not appear to be designed to encourage a change in Iraq's current government or its policies. The UNCC is, however, providing a torts type of remedy to victims of the war, as detailed in Sections 1 and 2 above. Like any other torts type of remedy, the UNCC's purpose is obviously both deterrence and compensation. The deterrence aspect is a sanction imposed on Iraq designed to put others on notice of what will be required of them if, in the future, they engage in aggressive war. This forces states contemplating wrongdoing to internalize the expected costs of their actions. This idea is inherent in the concept of state responsibility, which is, in the view of most commentators, an important basis for the legality of the UNCC.<sup>55</sup> If the UNCC were just about compensation, it would be more appropriately funded by general contributions from the world community rather than by the currently rather impoverished nation of Iraq.

## **B *Distinguishing the UNCC from Other Sanctions***

While the UNCC does involve a sanction, it is inappropriate to lump it in with the formal regime of sanctions that are explicitly aimed at a change in the policies of the existing government and that have gained political backing from states hoping they will bring about a change in the government itself. Several features distinguish the UNCC payments from these other more formal sanctions. These features strongly argue against any claim that the amount the UNCC is extracting from Iraq is unfairly large, whatever can be said about the impact of the more formal sanctions regime.

### *1 Basis is State Responsibility*

The UNCC sanctions rest on the legal foundation of state responsibility. This is a different and less controversial legal foundation than the ones claimed for the more formal sanctions. Consequently, there is a stronger authoritative basis for applying the traditional international law concept that the people of a country are bound by the actions of their agents — the country's political leaders — and thus must suffer the legal consequences of their agents' acts even when these leaders are unrepresentative.

### *2 UNCC Payments are Purely Redistributive*

Someone is going to have to bear the burden of the losses created by Iraq's wrongful act: the victims of the losses, the world community through some broad-based scheme to compensate these victims, or Iraq. As a result of the UNCC, at least a portion of these losses will be borne by Iraq. There is no obvious reason why it is more unfair that they

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> Gattini, *supra* note 1, at 161–164; Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *ICLQ* (1994) 55, at 57; Kirgis, 'Claims Settlement and the United Nations Legal Structure', in Lillich, *supra* note 10, 103, at 103–109.

be borne by the Iraqi people than by the victims of Iraq's aggressive war. This is very different from the more formal sanctions imposed on Iraq. These more formal sanctions are imposed simply to create pain that is threatened to continue until there is a change in policy. The losses borne by the Iraqi people as a result of the more formal sanctions would, in absence of the sanctions, be borne by no one.

### 3 *UNCC Payments as a Form of Tax on Iraq's Oil Wealth*

UNCC payments do not impoverish Iraq in the sense of depriving the Iraqi people of the fruits of their labour, skills and non-oil resources. The payments are in essence a tax on Iraq's oil wealth. If Iraq did not have this oil wealth, the UNCC regime would have no impact at all on Iraq. Iraq still finds it is worthwhile to pump and export the oil, despite the fact that it has needed to give up 30 per cent of its revenues (now 25 per cent) to fund the UNCC claims process. Thus, despite this tax, devoting labour, skills and other non-oil assets to the pumping of oil is still more profitable than devoting them to their next best use. In essence, the UNCC payments simply deprive the Iraqi people of a portion of the good luck they had to have these oil resources in the first place. Moreover, it is not necessary for a country to have any oil resources at all to avoid poverty, as Japan amply testifies.<sup>56</sup>

This analysis shows that to the extent that the poverty, ill health and starvation occurring in Iraq over the last 10 years are properly attributable to sanctions of any kind, it is not due to the UNCC type of sanctions. Rather, they would be due to the more formal sanctions that limit the ability of Iraq to sell more oil and to freely engage in other commerce with the rest of the world.

## 6 Conclusion

Economic analysis suggests, using an analogy to intentional tort, that if an act of aggressive war is a 'but for' cause of a loss and *ex ante* the act increased the likelihood that the loss would occur, the loss is appropriately compensable by the offending state. To be compensable, the loss need not be as foreseeable as it would need to be in negligence.

The total amount of appropriately compensable losses resulting from an aggressive war may, however, exceed the amount that is desirable or even practical to collect from the offending state. The interests of other states will likely call for the reintegration of the offending state into the world community. Requiring full compensation may impede this process by putting too heavy a burden on the

<sup>56</sup> The argument in the text somewhat overstates the point, since the skills of many Iraqis were developed in expectation of a continuation of the business of oil exporting and are not as useful in other lines of work. Thus the UNCC payments are a tax to some extent on these specialized skills as well. After 10 years of the UNCC regime and generally lower production, however, this factor must be less important than earlier.

offending state's domestic politics. Moreover, the only way to collect substantial funds for compensation is to tax exports of the offending nation. Given the offending state's increasing disincentive to export as the tax rate increases, there is some maximum collectable amount which may be less than full compensation.

For both these reasons, the amount of funds available from Iraq falls short of the total amount of appropriately compensable claims. This shortfall has important implications. One is that the UNCC decision to deny compensation for certain categories of claims should, in terms of precedential value, be read in light of the limited funds available rather than as an authoritative decision that claims in these categories inherently are not appropriately compensable. Second, there is no procedural unfairness in denying Iraq formal access to UNCC proceedings. Given the shortfall, the true purpose of UNCC adjudication is to decide who, among all claimants against Iraq, should receive money from a fixed, maximally extractable sum of money.

The amount that is being extracted from Iraq does not squeeze the Iraqi people in a way that violates a norm of substantive fairness. There is no obvious reason why it is more unfair that the losses caused by Iraq's aggressive war be borne by the Iraqi people than by the victims of this war. Moreover, these payments are in essence a tax on Iraq's oil wealth, not on the fruits of the labour, skills and non-oil resources of the Iraqi people. Thus, unlike the more formal sanctions against Iraq, the effect of the UNCC payments is simply to deprive the Iraqi people of a portion of the good luck they had to have oil resources in the first place.