



Security Council

Distr.
GENERAL

S/AC.26/2005/1
10 March 2005

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS OF THE "D1" PANEL OF COMMISSIONERS
CONCERNING THE SPECIAL INSTALMENT OF DECEASED DETAINEE CLAIMS
FILED PURSUANT TO GOVERNING COUNCIL DECISION 12

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1-10	4
I. BACKGROUND	11-18	6
A. Considerations.....	11-12	6
B. General legal framework.....	13-15	6
C. Applicable evidentiary standards	16-18	6
II. CIRCUMSTANCES GIVING RISE TO THE FILING OF THE DECEASED DETAINEE CLAIMS	19-26	7
A. Disappearance of the deceased detainees.....	19	7
B. The role of the National Committee and the ICRC.....	20-21	7
C. The role of the Tripartite Commission.....	22-26	8
III. GOVERNING COUNCIL DECISION 12.....	27-29	8
IV. DETERMINATIONS OF THE GOVERNING COUNCIL CONCERNING THE FILING OF THE DECEASED DETAINEE CLAIMS.....	30-40	9
A. Introduction.....	30	9
B. Claims of family members for MPA.....	31-34	9
C. Claims of family members for personal losses.....	35-36	10
D. Claims suspended by the Commission.....	37-38	10
E. Claims with both category “C” and category “D” losses	39-40	11
V. REVIEW BY THE PANEL OF THE DECEASED DETAINEE CLAIMS.....	41-64	11
A. Introduction.....	41-43	11
B. Legal determination of death.....	44-45	12
C. Deemed date of death.....	46-48	12
D. D1 (departure) claims.....	49-50	13
E. Failure to prove ownership of real property or a business.....	51	13
F. Deceased detainees with Iraqi nationality.....	52-54	13
G. Competing claims for individual business losses.....	55-58	14
H. Calculation of the pre-invasion income of one deceased detainee.....	59-60	15
I. Category “C” claim filed for the death of a detainee during the regular filing period.....	61-64	15

VI. REVIEW BY THE PANEL OF THE “F3” CLAIM FILED BY KUWAIT ON BEHALF OF THE NATIONAL COMMITTEE	65-81	16
A. History of the “F3” claim	65-70	16
B. The Panel’s review of the original “F3” claim	71-75	17
C. The Panel’s review of and determinations concerning the current “F3” claim.....	76-81	18
VII. REVIEW BY THE PANEL OF TWO CLAIMS FOR PERSONAL INJURIES FILED PURSUANT TO DECISION 12.....	82-85	19
VIII. THE PANEL’S DETERMINATION CONCERNING THE ELIGIBILITY TO FILE ADDITIONAL DECEASED DETAINEE CLAIMS.....	86-93	20
IX. CROSS-CATEGORY ISSUE.....	94	22
X. OTHER ISSUES	95-103	22
A. Exchange Rates	95-96	22
B. Interest.....	97-101	22
C. Claims preparation costs	102-103	23
XI. RECOMMENDED AWARDS	104	24
XII. SUBMISSION OF THE REPORT	105	25
Notes		26

Introduction

1. This is the twenty-third report to the Governing Council of the United Nations Compensation Commission (the “Commission”) submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the “Rules”) by the “D1” Panel of Commissioners (the “Panel”), being one of two Panels appointed to review individual claims for damages above 100,000 United States dollars (USD) (category “D” claims). This report contains the determinations and recommendations of the Panel in respect of the special instalment of deceased detainee claims (the “special instalment”), submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules.
2. At the fiftieth session of the Governing Council held on 16-18 December 2003, the Governing Council considered a request of the Government of Kuwait (“Kuwait”) to file with the Commission claims concerning 605 individuals who were detained by Iraqi forces during the period of Iraq’s invasion and occupation of Kuwait, and while they were believed to be in continuing detention in Iraq, had in fact been executed by the Iraqi regime. Kuwait proposed to file such claims pursuant to Governing Council decision 12 (S/AC.26/1992/12). The Governing Council accepted Kuwait’s request to file these claims, and directed Kuwait to file a single comprehensive claim in respect of each of the 605 detainees, for all losses personally suffered by them, and for the mental pain and anguish (“MPA”) suffered by their families. The Governing Council determined that all of the claims were to be filed with the Commission by 31 March 2004. Further details of the events giving rise to these claims and particulars of the decisions taken by the Governing Council concerning the claims in the special instalment are set out later in this report.
3. The Panel commenced its review of the special instalment in June 2004. Pursuant to Procedural Order No. 48 signed on 23 June 2004, the Panel notified Kuwait and the Government of the Republic of Iraq (“Iraq”) of its intention to complete the review of the special instalment within 180 days.
4. The special instalment initially comprised 605 category “D” claims filed on behalf of the 605 detainees and their families. All of the claims were submitted by Kuwait, in the names of the deceased detainees themselves. Two of the original 605 claims were subsequently withdrawn by Kuwait and the Panel makes no recommendations in respect of these two claims.¹ The Panel’s determinations and recommendations in respect of the remaining 603 claims are set out in this report.
5. By Procedural Order No. 49 signed on 15 December 2004, the Panel also took up for review certain additional claims as part of the special instalment. These claims include two category “D” claims filed by Kuwait pursuant to decision 12 on behalf of two individuals who suffered personal injuries as a result of landmine explosions. In addition, the Panel took up for review one sub-category “F3” claim filed by Kuwait.² This claim was referred back to the Registrar of the Commission by the “F3” Panel of Commissioners (the “F3” Panel”) at the conclusion of its work programme. The claim concerned salary payments made by Kuwait in respect of some of the deceased detainees, and the “F3” Panel determined that it was not appropriate to recommend an award of compensation in respect of the claim while the fate of the detainees remained unknown.³ As the “F3” Panel is no longer in existence, and as the fate of the detainees has now been ascertained, the claim has been taken up by

the Panel for review as part of the special instalment. Further details of these additional claims reviewed by the Panel are set out in this report.

6. In addition to its review of the claims included in this report, at the request of the Governing Council, the Panel also considered whether certain other claims in respect of detainees not included among the 605 deceased detainees comprising the special instalment were eligible for filing under decision 12. The Panel's conclusions on the eligibility of these claims are set out later in this report.

7. In addition to ad hoc communications among the Commissioners and with the secretariat, the Panel held meetings at the Commission's headquarters in Geneva on 17-20 March, 21-23 June, 2-4 August, 4-6 October, 22-24 November and 14-16 December 2004. The March 2004 meeting included a joint meeting with the "D2" Panel of Commissioners (the "'D2' Panel") to discuss issues of relevance to both category "D" Panels of Commissioners (the "'D' Panels").

8. The special instalment comprises claims containing, inter alia, both category "C" and category "D" claims for the personal losses of the deceased detainees, including claims for departure expenses, loss of personal property and motor vehicles, real property losses and business losses.⁴ In addition to the personal losses of the deceased detainees, the family members of the detainees have claimed compensation for the MPA they suffered for a period of nearly 13 years as a result of the fact that they were unaware of the death of their loved ones whom they believed to be in detention and the families expected their return upon their release. Claims for loss of support have also been filed by most families of deceased detainees seeking compensation for the loss of financial support that they would have received from the detainees had they not been detained and subsequently executed. In a number of cases, family members have also claimed for their own personal losses resulting from Iraq's invasion and occupation of Kuwait but following a Governing Council determination referred to hereafter, no awards are being recommended by the Panel for such personal losses of family members.

9. Three of the claims include D8/D9 (individual business) loss claims for losses sustained by Kuwaiti companies, of which the deceased detainees were shareholders.⁵ As the Panel is not mandated to review claims of corporate entities, these losses were severed from the category "D" claims in the special instalment, and transferred to the merged "E4" Panel of Commissioners (the "merged 'E4' Panel") for review.⁶

10. The Panel has not transmitted any of the claims in the special instalment to Iraq for its comments, as the claims did not meet the Panel's established criteria for the transmission of category "D" claims to Iraq.⁷

I. BACKGROUND

A. Considerations

11. In reviewing the claims in the special instalment, the Panel has taken into account the factual background relating to Iraq's invasion and occupation of Kuwait, as set out in detail in its reports on part one and part two of the first instalment of category "D" claims.⁸ In addition, the Panel has referred to information collected by Kuwait and the International Committee of the Red Cross (the "ICRC") in respect of the arrest, detention and subsequent execution of the detainees. This information is set out in greater detail at paragraphs 19-26 of this report.

12. The Panel has also taken into consideration other relevant material, including information accompanying the submission of these claims provided by the Executive Secretary pursuant to article 32 of the Rules.

B. General legal framework

13. The general legal framework for the resolution of category "D" claims is set out in chapter V of the Panel's First "D" Report.⁹

14. The general legal framework for the resolution of category "C" claims is set out in the First "C" Report of the category "C" Panel of Commissioners (the "'C' Panel").¹⁰ The Panel has implemented this legal framework when reviewing the category "C" losses incorporated into the deceased detainee claims.

15. In addition, in reviewing the "F3" claim of Kuwait taken up by the Panel in the special instalment, the Panel referred to previous reports of the "F3" Panel to ensure that its review and recommendations in respect of the "F3" claim was consistent with the "F3" Panel's review of other sub-category "F3" claims.¹¹

C. Applicable evidentiary standards

16. The evidentiary standard to be applied in reviewing category "D" claims has been addressed by the Panel in previous reports.¹² As with earlier instalments, the Panel has reviewed the claims in the special instalment in accordance with article 35 of the Rules, and made its recommendations by assessing documentary and other appropriate evidence, as well as by balancing the interests of claimants who had to flee a war zone with the interests of Iraq, which is liable only for any direct loss, damage or injury as a result of its invasion and occupation of Kuwait.

17. In respect of the category "C" losses incorporated in the deceased detainee claims, the Panel has reviewed these losses in accordance with the evidentiary standard set out in article 35(2) of the Rules.¹³

18. In respect of the "F3" claim, the Panel has reviewed the claim in accordance with the evidentiary standard set out in article 35(3) of the Rules.¹⁴

II. CIRCUMSTANCES GIVING RISE TO THE FILING OF THE DECEASED DETAINEE CLAIMS

A. Disappearance of the deceased detainees

19. The factual circumstances giving rise to the filing of the 603 deceased detainee claims are largely uniform.¹⁵ In all cases, the detainees were arrested or captured by Iraqi forces occupying Kuwaiti territory during the period from 2 August 1990 to 26 February 1991 (the “jurisdictional period”).¹⁶ These detainees were subsequently transported from Kuwait to Iraq, where they were detained for differing periods of time in Iraqi prisons. The Panel has become aware of the fact that the detainees were subsequently executed by the Iraqi regime, with the best information available suggesting that most of these executions took place from October 1990 to October 1991. After the change of the former regime in Iraq in 2003, mass graves were discovered at various locations in Iraq, and many of the bodies of the missing detainees were located, transported to Kuwait, and subsequently identified through DNA and other forensic investigations.

B. The role of the National Committee and the ICRC

20. In May 1991, after the liberation of Kuwait, the National Committee for Missing Persons and Prisoners of War Affairs (the “National Committee”) was established by the Kuwaiti Government. The National Committee performed a number of functions including, *inter alia*, receiving reports of individuals who had disappeared as a result of Iraq’s invasion and occupation of Kuwait, and providing financial support to the families of such missing persons. The National Committee worked in conjunction with the ICRC office established in Kuwait to compile a list of those persons who were officially declared to be missing as a result of Iraq’s invasion and occupation of Kuwait. After initially receiving approximately 11,000 reports of missing persons, the National Committee and the ICRC, through their investigations in both Kuwait and Iraq, compiled an official list of 605 missing persons who were detained by Iraqi forces during the jurisdictional period and subsequently transported to Iraq (the “ICRC list”).

21. The ICRC list includes 598 men and seven women. These detainees are of various nationalities including Kuwaiti, Bahraini, Egyptian, Indian, Iranian, Lebanese, Omani, Saudi Arabian and Syrian. The ICRC list also includes a number of “bedoun” previously resident in Kuwait. The detainees were generally civilians, although some were off-duty military or police personnel when they were detained. Many of the detainees were students, with 42 detainees being under the age of 18 years at the time of capture. All 605 detainees were arrested or captured by Iraqi forces during the jurisdictional period, with the majority being detained sometime from 2 August 1990 to November 1990 when Iraq was attempting to undermine Kuwaiti resistance to the occupation. Based on the ICRC missing person reports, the National Committee has identified the date on which each person was detained. The ICRC list forms the basis of Kuwait’s filing of the original 605 deceased detainee claims. Kuwait has stated that it has a “moral responsibility” for all of the deceased detainees and their families and it has therefore filed all of the deceased detainee claims. In the case of non-Kuwaiti detainees, their national Governments have duly authorised Kuwait to file such claims.

C. The role of the Tripartite Commission

22. Another body that has had an important role in relation to the detainees is the Tripartite Commission. The information obtained by the Panel concerning the activities of the Tripartite Commission has been provided by Kuwait.

23. The Tripartite Commission was established in 1991. This Commission, chaired by the ICRC, comprised representatives of the Governments of Kuwait and Iraq; it also included representatives of the Governments of France, Saudi Arabia, the United States of America and the United Kingdom. The Commission was established for the primary purpose of continuing the investigation into the fate of the detainees identified on the ICRC list.

24. Over 60 meetings of the Tripartite Commission were held from 1991 to 2003. Throughout this time, Iraq maintained that it had no information concerning the fate of the detainees. The last meeting of the Tripartite Commission that was attended by members of the former Iraqi regime took place in Jordan on 22 March 2003 when Iraq reiterated that it had no knowledge of the fate of the detainees.

25. In April 2003, after the change of the regime in Iraq, meetings of the Tripartite Commission resumed in the same format and were attended by the same individuals who had represented the former Iraqi regime, but who were subsequently working with the Coalition Provisional Authority (the "CPA") in Iraq. In May 2003, Kuwait received the first official communication from the CPA concerning the fate of the detainees. This information led to the discovery of the remains of 151 bodies in a mass grave at Samawah, Al Muthanna Governorate in Iraq, with 149 of these bodies being those of detainees included on the ICRC list.

26. As the CPA obtained further information concerning the detainees, it was transmitted to Kuwait. This led to the location of other mass graves in Iraq. The exhumation of bodies is continuing, as is the subsequent work of transporting the bodies to Kuwait and identifying the remains by way of DNA testing and other forensic examinations. This work is laborious and time consuming. While Kuwait has declared all 605 detainees to be legally dead for the purpose of filing claims with the Commission pursuant to decision 12, only about 200 bodies that have been located to date have been positively identified.

III. GOVERNING COUNCIL DECISION 12

27. As noted above, all 603 claims were filed by Kuwait pursuant to decision 12. The operative provision of decision 12 provides as follows:

"1. The established filing deadlines are extended for the following claims:

- b) Claims of individuals under the criteria for expedited processing of urgent claims (S/AC.26/1991/1), and the criteria for processing of claims of individuals not otherwise covered (S/AC.26/1991/7/Rev.1) who have been detained in Iraq until after or within one year prior to the expiration of the established filing deadlines: These claims, including claims for losses and personal injuries resulting from detention in

Iraq, should be submitted to the Commission within one year of the detainee's release or of the death of the detainee, as legally determined by the detainee's Government, but not later than the time limit to be established pursuant to paragraph 2 of this decision."

28. As the detainees were never released from detention in Iraq, the claims were required to be filed "within one year of the ... death of the detainee, as legally determined by the detainee's Government", to come within the scope of decision 12. The Panel notes that the filing deadline set by the Governing Council for the claims in the special instalment was 31 March 2004.

29. At the fifty-second session of the Governing Council held on 29 June – 2 July 2004, the Governing Council set the final filing deadline for other claims, filed pursuant to paragraph 2 of decision 12, as 30 September 2004.

IV. DETERMINATIONS OF THE GOVERNING COUNCIL CONCERNING THE FILING OF THE DECEASED DETAINEE CLAIMS

A. Introduction

30. As noted above, the Governing Council directed that a single comprehensive claim be filed by Kuwait in respect of all of the losses associated with each detainee by 31 March 2004. In addition, the Governing Council made certain other determinations concerning the special instalment that are referred to hereafter.

B. Claims of family members for MPA

31. One request made by Kuwait concerned the amount of compensation that a family could receive in respect of the MPA suffered by it resulting from the capture, detention and death of the detainee. Governing Council decision 8 (S/AC.26/1992/8) sets out the ceiling amounts that may be awarded in respect of all types of MPA claims that may be filed with the Commission. Decision 8 provides that a ceiling amount of USD 15,000 may be awarded to an individual in respect of the death of a spouse, child or parent, and that a ceiling amount of USD 30,000 may be awarded to a family unit in respect of the death of a spouse, child or parent.

32. Kuwait submitted that in addition to suffering MPA as a result of the death of a family member, the families of the 605 deceased detainees had suffered MPA because of the fact that they were unaware of the fate of their loved ones for a period of approximately 13 years. The Governing Council considered Kuwait's submission and recognized that, given the extended period of time during which the Tripartite Commission was unsuccessful in its attempts to obtain information from the former Iraqi regime concerning the fate of the detainees, the families of the deceased detainees had suffered a different and ongoing form of MPA that was not anticipated by decision 8.

33. At its fiftieth session, the Governing Council concluded that, in addition to the ceiling amount set by decision 8 to compensate a claimant for MPA resulting from the death of a family member, a new loss element should be created for the family members of the 605 deceased detainees to reflect

their suffering for an extended period of time during which the fate of their family member remained unknown. The Governing Council determined that the total MPA award recommended pursuant to decision 8 and in respect of the new loss element should comprise a single award made in favour of each family unit, to be distributed in accordance with the domestic laws applicable to the deceased detainee.

34. Having determined at its fiftieth session that the new MPA loss element was to be created, the Governing Council, at its fifty-first session, considered the amount of compensation that was to be awarded for this new loss element. The Governing Council adopted decision 218 (S/AC.26/Dec.218 (2004)) that provides for an amount of compensation to be paid to a family unit for the new MPA loss element of USD 1,100 per month for a period of 13 years, with an overall ceiling of USD 200,000 for the cumulative MPA awards made in favour of each family of a deceased detainee under both decisions 8 and 218. In respect of the claims included in the special instalment, the Panel has made recommendations of awards of compensation to the families of the deceased detainees in respect of the MPA suffered by them in accordance with decisions 8 and 218.

C. Claims of family members for personal losses

35. Kuwait requested permission from the Governing Council to file claims for the personal losses of family members of the deceased detainees that had not previously been filed during the Commission's regular filing period. Kuwait submitted that certain family members had decided not to file claims for their personal losses during the Commission's regular filing period as they were concerned that, because of their relationship to a detainee, harmful consequences might result for the detainee if the claims were filed.

36. At its fifty-first session, the Governing Council considered Kuwait's request. The Governing Council determined that, as a large number of family members of deceased detainees had filed their claims for personal losses during the Commission's regular filing period, claims for personal losses of other family members should not be accepted for late filing as part of the programme established for the deceased detainee claims. The Panel notes that Kuwait had already filed some of the 603 claims, which include personal losses of family members, with the Commission before the Governing Council reached this conclusion. In accordance with the determination of the Governing Council, where claims in the special instalment include such personal losses of family members of the deceased detainees, the Panel recommends no award of compensation for such losses.

D. Claims suspended by the Commission

37. A number of claims were filed by Kuwait during the regular filing period in the names of the deceased detainees in categories "A", "B", "C" or "D". These claims comprised a variety of losses allegedly sustained by the detainees or their families. Most of these claims were suspended from processing by the Commission until the fate of the detainees could be ascertained. The Governing Council has concluded that as the fate of the detainees is now known, the Commission should take up the losses contained in these suspended claims for review.

38. Kuwait has incorporated the losses of the detainees included in the suspended claims that remain appropriate for review within the 603 claims comprising the special instalment. Therefore, in accordance with the determination of the Governing Council, the Panel has reviewed and made recommendations in respect of those eligible losses included in the suspended claims.

E. Claims with both category "C" and category "D" losses

39. As almost all claims filed on behalf of the deceased detainees include losses exceeding USD 100,000, Kuwait filed the claims with the Commission as category "D" claims. In some cases where small personal losses are also claimed on behalf of a deceased detainee, Kuwait has included a category "C" claim form for the particular loss instead of completing the relevant part of a category "D" claim form. This took account of the fact that had the claim for small personal losses been filed during the Commission's regular filing period, it would have been possible for the claim to be filed in category "C" and therefore assessed on the evidentiary standard applicable to category "C" claims. The Governing Council, at its fifty-fourth session on 7-9 December 2004, clarified that this was consistent with its direction that a single comprehensive claim comprising all of the losses associated with each deceased detainee should be filed and such claim may include losses submitted on either category "C" or category "D" claim forms; and that the claim should be processed by the Panel reviewing the losses in accordance with the evidentiary standard applicable to each category of claims.

40. Accordingly, the Panel has made recommendations of awards of compensation for personal losses of the detainees submitted on category "C" claim forms in accordance with the applicable methodologies established by the "C" Panel. Those losses of, or related to, the deceased detainees included on category "D" claim forms have similarly been reviewed by the Panel in accordance with the applicable methodologies established by the "D" Panels.

V. REVIEW BY THE PANEL OF THE DECEASED DETAINEE CLAIMS

A. Introduction

41. During the course of its review of the claims in the special instalment, the Panel has encountered some claims with category "D" losses that raise new factual, legal or valuation issues that have not been dealt with in the Panel's previous reports. To the extent that claims in the special instalment gave rise to such new issues, the Panel has ensured that these claims were resolved so as to be consistent with the established category "D" methodologies. These new issues and the Panel's findings and recommendations are set out below.

42. The Panel did not encounter any new factual, legal or valuation issues in respect of those losses incorporated in the claims comprising the special instalment that were filed on category "C" claim forms.

43. The Panel has recommended a single award of compensation in respect of each of the 603 claims in the special instalment, which award comprises all category "D" losses and any category "C" losses included in each claim.

B. Legal determination of death

44. As noted above at paragraphs 27-28, it is a requirement for the filing of claims pursuant to decision 12 that a legal determination as to the death of a person be made by the Government of the deceased.

45. On 1 November 2003, the Council of Ministers of the State of Kuwait issued Ministerial Order No. 1125 by which it directed the Public Authority for Assessment of Compensation for Damages Resulting from Iraqi Aggression in Kuwait ("PAAC") to file claims with the Commission on behalf of the 605 deceased detainees treating them as martyrs and on the same basis as the claims of the individuals who died or were executed during the jurisdictional period that were filed by Kuwait during the regular filing period.¹⁷ On 6 October 2004, the Council of Ministers issued Ministerial Order No. 1131 by which it declared that the 605 detainees were legally dead. In exercise of the authority provided to Kuwait by the national Governments of the non-Kuwaiti detainees, such detainees were also covered by Ministerial Order No. 1131.¹⁸ Having reviewed both Ministerial Orders, the Panel finds that the requirement of decision 12 concerning the legal determination of the death of the detainees has been met in respect of the 603 deceased detainee claims resolved in the special instalment.

C. Deemed date of death

46. In the First "D" Report, the Panel developed the methodology for the review of D3 (death) claims.¹⁹ The Panel has applied this methodology in its review of the D3 (death) claims included in the special instalment, with one modification that is described below.

47. In the regular claims programme, the age of the deceased and any dependent children was factored into the Panel's calculations for recommendations of awards of compensation for the loss of financial support that a family would be entitled to receive from the Commission. The actual date on which the deceased died, ascertained from a death or burial certificate, was the date from which the age of the deceased and any dependent children was fixed for the purpose of these calculations. In respect of the claims in the special instalment, the precise date of death of the detainees is unknown and, in many cases, death certificates have not yet been issued by Kuwait as the location and identification of the bodies is continuing. Therefore, the Panel has had to consider an appropriate "deemed" date of death for the purpose of the calculation of the loss of support awards.

48. Having considered a number of possible alternatives, the Panel finds that the date that is most analogous to the actual date of death that was applied in the regular claims programme is the official date of a detainee's capture by Iraqi forces during the jurisdictional period, as stated on the ICRC list. Therefore, in making recommendations of awards of compensation for the loss of support that the families of deceased detainees suffered as a result of the death of the detainee, the Panel has undertaken the appropriate calculations using the official date of a detainee's capture as the "deemed" date of that person's death.

D. D1 (departure) claims

49. Most of the claims in the special instalment include a D1 (departure) claim for USD 2,500 in respect of the departure of the detainee from Kuwait during the jurisdictional period. The “D” Panels, meeting jointly in March 2004, considered whether it was appropriate to recommend awards of compensation in respect of these D1 (departure) claims.

50. The information that is available to the “D” Panels indicates that the detainees were forcibly transported out of Kuwait by Iraqi forces and the Panels consider that under the circumstances, an award compensating the detainees for departure related expenses would be inappropriate. Therefore, the Panel recommends no award of compensation in respect of any D1 (departure) claims included in the special instalment.

E. Failure to prove ownership of real property or a business

51. A number of claims in the special instalment include losses allegedly sustained by deceased detainees in respect of real property or businesses that were purportedly owned by them at the time of Iraq’s invasion and occupation of Kuwait. The Panel examined the documentary evidence submitted with these claims that purports to prove the deceased detainees’ ownership of the real property or business in question. In a few cases, the Panel notes that the documentary evidence does not establish that the deceased detainee was the owner of the real property or business. Instead, this evidence actually indicates that the owner of the real property or business was a family member of the deceased detainee who either did not file a claim during the regular filing period, or who filed a claim but did not seek compensation in respect of the real property or business the subject of the claim in the special instalment. In such cases, and in accordance with the determination of the Governing Council set out at paragraph 36 above, the Panel recommends no award of compensation in respect of such asserted losses.

F. Deceased detainees with Iraqi nationality

52. The Panel has identified two claims in the special instalment where evidence on the claim file indicates that the deceased detainees were Iraqi nationals at the time of Iraq’s invasion of Kuwait, although they are referred to on the ICRC list as “non-Kuwaiti”. The Panel is mindful of paragraph 11 of decision 7, which states that “[c]laims will not be considered on behalf of Iraqi nationals who do not have bona fide nationality of any other State”.

53. The Panel notes that these deceased detainees were also treated as martyrs in Kuwaiti Ministerial Order No. 1125, and their death was certified in Ministerial Order No. 1131, as set out in paragraph 45 above; furthermore, in recognition of the services of these two detainees, Kuwait issued an Amiri Decree on 3 September 2003 by which Kuwaiti nationality was conferred on the families of these detainees. In addition, by a letter to the Commission dated 25 November 2004 from PAAC, it was confirmed that Kuwait had recognized the effective Kuwaiti nationality of the two deceased detainees.

54. Having considered the evidence, the Panel finds that the disqualification in paragraph 11 of decision 7 does not apply. Therefore, the Panel recommends awards of compensation in respect of these two claims.

G. Competing claims for individual business losses

55. During the course of its review of claims in the special instalment, the Panel identified one claim that included D8/D9 (individual business) losses in respect of two ready-made clothing businesses that were also the subject of a category “D” claim filed by an Indian claimant in the regular claims programme, which was awarded compensation. Both the Indian claimant and the claim on behalf of the deceased detainee seek compensation for the loss of stock and income of the same two businesses. In addition, compensation is sought in the claim filed on behalf of the deceased detainee for the loss of tangible assets of the businesses. The Indian claimant asserts that prior to Iraq’s invasion and occupation of Kuwait, he was the sole owner of the businesses. Similarly, the family of the deceased detainee asserts that the deceased detainee was the sole owner of the business.

56. The Panel considered the evidence submitted on behalf of the deceased detainee and by the Indian claimant, including additional material submitted by the family of the deceased detainee in response to a request for further information. While documentation was submitted on behalf of the deceased detainee to support the assertion as to his ownership of the businesses, the Panel notes that the Indian claimant submitted two investment contracts dated 1988 and 1989 respectively between himself and the deceased detainee, by which he was permitted to rent the business licences and the business premises from the deceased detainee, and operate the businesses himself.

57. The Panel finds that on the totality of the evidence submitted to the Commission and, in particular, the investment contracts submitted by the Indian claimant, the Indian claimant has proven his asserted ownership of the two businesses as at the time of Iraq’s invasion and occupation of Kuwait.

58. In arriving at this conclusion concerning the ownership of the businesses, the Panel finds that the rental arrangement that existed between the deceased detainee and the Indian claimant has been established. Consequently, the Panel recommends an award of compensation in favour of the deceased detainee in respect of the lost income from the rental agreements, but not for the businesses themselves. The Panel also recommends an award of compensation in favour of the deceased detainee for the loss of tangible assets of the businesses that were lost or destroyed during the period of Iraq’s invasion and occupation of Kuwait that were not the subject of the Indian claimant’s claim. The Panel finds that it is reasonable to expect that in renting the business licences and premises to the Indian claimant, the deceased detainee was responsible for fitting out the premises. The Panel has calculated the recommended award in respect of these two aspects of the deceased detainee’s D8/D9 (individual business) loss claim in accordance with the D8/D9 (individual business) loss methodology. The Panel recommends no award of compensation for the loss of stock claim made by the deceased detainee in respect of the businesses.

H. Calculation of the pre-invasion income of one deceased detainee

59. One of the Kuwaiti deceased detainees was a well-known and respected literary figure before Iraq's invasion and occupation of Kuwait. He was a poet and songwriter with an impressive list of literary works and publications. A claim is included in the special instalment seeking compensation, inter alia, for the loss of financial support that his family would have received from the detainee. In reviewing this claim, the Panel considered the basis on which to calculate the pre-invasion monthly income of the deceased detainee for the purpose of determining a recommended award of compensation for the loss of support suffered by his family. Unlike other deceased detainees who were employed before their capture, this detainee did not receive a fixed, regular salary or income from his profession.

60. The Panel reviewed all of the evidence submitted by the family of the deceased detainee, which includes a list of the various amounts received by the detainee by way of income in respect of each piece of literary work or performance of the detainee for 1988, 1989 and 1990, up to the time of Iraq's invasion of Kuwait. The Panel notes that most, but not all, of the amounts set out on this list are supported by documentary evidence. The Panel finds that it is appropriate to calculate an average pre-invasion monthly income for the deceased detainee on the basis of the income that the detainee received in 1988, 1989 and 1990 for which actual documentary evidence has been submitted. The Panel recommends an award of compensation calculated in accordance with the D3 (death) methodology based on this average monthly income.

I. Category "C" claim filed for the death of a detainee during the regular filing period

61. An unusual situation was considered by the Panel in respect of one deceased detainee claim in the special instalment. According to documentation submitted to the Commission, the parents of the deceased detainee received information from Iraq to confirm the death of the detainee in 1992, and this information was subsequently confirmed by the National Committee. On the basis of this information, the detainee's parents obtained a death certificate from Kuwait in respect of the detainee on 27 April 1993. The death certificate indicates that the date of death of the detainee was 15 September 1990, being the date on which the detainee was captured by Iraqi forces.

62. As the parents of the detainee had knowledge of their son's death in 1992, and had acquired an official death certificate in 1993, the detainee's father filed a category "C" claim with the Commission during the regular filing period. In addition to personal losses of the detainee's father, this claim included a C3 (death) claim for the loss of support that would have been provided by the detainee to his family but for his death, together with a claim for the MPA suffered by the detainee's family resulting from his death. An award was recommended in respect of this claim by the "C" Panel and paid to the detainee's father. Although the total calculated award exceeded USD 100,000, the recommendation of the "C" Panel was capped at the amount of USD 100,000 permitted in category "C".

63. Kuwait filed a category "D" claim in respect of this deceased detainee as part of the special instalment. Upon a consideration of all the facts and circumstances in respect of this claim including

the previously awarded category “C” claim of the detainee’s father, which was capped at USD 100,000, the Panel finds that the deceased detainee’s family is entitled to receive an award of compensation for loss of support calculated in accordance with the applicable category “D” methodology, together with an award of compensation for MPA in accordance with decision 8, less the amount already received by the detainee’s father in respect of these loss elements in category “C”. The Panel recommends an award of compensation accordingly.

64. The Panel further finds that as decision 218 is intended to compensate family members for the extended period during which they were unaware of the fate of their loved one, a situation which is not applicable to this case where the detainee’s family was informed of the death of the detainee in 1992, it is not appropriate to recommend an award of compensation pursuant to decision 218.

VI. REVIEW BY THE PANEL OF THE “F3” CLAIM FILED BY KUWAIT ON BEHALF OF THE NATIONAL COMMITTEE

A. History of the “F3” claim

65. In June 1994, Kuwait filed a claim in sub-category “F3”²⁰ on behalf of the National Committee for the losses allegedly sustained by the Committee arising from payments of relief provided to others, public service expenditure and interest (the “original ‘F3’ claim”). The “payments or relief to others” component of the original “F3” claim comprised two elements; payments made by the National Committee directly to the families of detainees by way of support, and payments made by the National Committee into trust funds of the salaries that those detainees who were employed by Kuwaiti Government Ministries before Iraq’s invasion of Kuwait would have earned had they not been detained.

66. At the time that it filed the original “F3” claim, the National Committee claimed compensation for the losses and amounts set out in table 1 below:

Table 1. Losses claimed by the National Committee in the original “F3” claim

<u>Losses Claimed</u>	<u>Amounts claimed in USD</u>	
1. Payment or relief to others		
a) Family support payments	58,452,768	Plus 22,411 daily from 1 May 1998
b) Salary payments	27,026,147	Plus 10,515 daily from 1 May 1998
Subtotal	85,478,915	
2. Public service expenditure	26,004,514	Plus 10,317 daily from 1 May 1998
3. Interest	43,360,700	
<u>Total</u>	154,844,129	Plus 43,243 daily from 1 May 1998

67. The Panel notes that the “F3” Panel only reviewed the family support payments aspect of the original “F3” claim, together with the public service expenditure and interest components applicable to that loss. At the time that the “F3” Panel made its recommendations in respect of the original “F3”

claim, the claimed amount in respect of the family support payments aspect of the original “F3” claim had risen to USD 69,680,679, plus a daily amount of USD 22,411 into the future. The “F3” Panel recommended a total award of USD 153,462,000 in respect of the family support payments loss, both for payments already made by the National Committee and for ongoing payments to be made into the future.²¹ A further award of USD 23,647,000 was recommended by the “F3” Panel in respect of public service expenditure, being the administrative costs incurred by the National Committee in making support payments to the families of the detainees.²² Therefore, the total recommended award made by the “F3” Panel in respect of the original “F3” claim was USD 177,109,000. To date, USD 65 million of this amount has been paid by the Commission to the National Committee.²³

68. The “F3” Panel deferred its review of the “salary payments” component of the original “F3” claim because it did not have sufficient information available to it to make an appropriate recommendation while the fate of the detainees remained unknown.²⁴ This aspect of the original “F3” claim was remitted to the Registrar of the Commission, allocated a new claim number,²⁵ and set aside for future review (the “current ‘F3’ claim”). As the “F3” Panel is no longer in existence, and as the fate of the detainees is now known, the Panel has taken up the current “F3” claim for review as part of the special instalment.

69. The current “F3” claim concerns certain payments made by the National Committee, after the liberation of Kuwait, into “trust funds” for the benefit of some of the detainees. The National Committee asserts that it continued to pay the salaries of an unspecified number of detainees who had been employed by Government Ministries into these trust funds, pending the fate of the detainees becoming known. The National Committee asserts that it has suffered an ongoing loss equal to the amounts paid into the trust funds. The National Committee further asserts that the deposits into the trust funds continue to be made, at least until such time as a detainee’s body is located and identified.

70. The Panel reviewed both the original “F3” claim and the current “F3” claim, and considered the relevant findings, determinations and recommendations of the “F3” Panel as well as their effect on those category “D” claims for loss of support filed by Kuwait that comprise the special instalment. The Panel also considered jurisprudence from other panels of Commissioners where relevant.

B. The Panel’s review of the original “F3” claim

71. In relation to the family support payments component of the original “F3” claim, the Panel considered what amount, if any, should be accounted for in the recommendations made by the Panel concerning the loss of support claims contained in the claims in the special instalment. The Panel had to ensure that it was not making recommendations that would result in duplicate awards for the loss of support sustained by the families of the deceased detainees.

72. From June 1991 to March 2004, the National Committee distributed family support payments totalling 31,969,438 Kuwaiti dinars (KWD) (USD 110,620,892.73) to the families of 569 of the 605 detainees. A portion of these funds came from the amount of USD 65 million that was received by the National Committee from the Commission in respect of the original “F3” award.²⁶ The balance appears to have been provided by the National Committee directly.

73. The Panel notes that the “F3” Panel found that these payments made by the National Committee were intended as financial support for the families of the detainees. The Panel finds that the loss of support claims in category “D” included in the special instalment have the same purpose. Consequently, the Panel determines that it is appropriate to deduct the amount paid by the National Committee, set out in paragraph 72 above, to the families of those 569 deceased detainees from the loss of support awards proposed by the Panel in respect of those families. Accordingly, the Panel has undertaken the requisite calculations when making its recommendations for these 569 families.

74. The Panel further notes that support payments by the National Committee continue to be made to some of the families of the detainees, primarily in cases where the detainee’s body has not yet been located and identified. However, the Panel finds that it is appropriate to limit the deductions made against the loss of support calculations to those payments made by the National Committee up to 31 March 2004, being the deadline set by the Governing Council for the filing of the claims comprising the special instalment.

75. In relation to the families of those 36 deceased detainees who did not receive any support payments from the National Committee, the Panel finds that no deduction should be made against the loss of support awards recommended in respect of these families.

C. The Panel’s review of and determinations concerning the current “F3” claim

76. The primary issue for the Panel in its review of the current “F3” claim was whether the salary payments were a direct result of Iraq’s invasion and occupation of Kuwait. The Panel also considered whether any amounts withdrawn from trust funds by families of the detainees since the liberation of Kuwait should be taken into account in the Panel’s recommendations concerning the loss of support claims contained in the special instalment.

77. The Panel notes that the National Committee has framed the salary payments as “relief” payments to certain detainees and their families. The Panel also notes that the National Committee has permitted certain family members to access the monies in those trust funds before the fate of the detainees became known. The Panel finds that the salary payments deposited into the trust funds of these detainees were in the nature of *ex gratia* payments made by the National Committee that were in addition to the family support payments that the National Committee was already making to these families. The Panel finds that these salary payments were made by the National Committee pursuant to an independent decision of the Government of Kuwait to continue to pay the salaries of detainees, from whom the Government was receiving no benefit in terms of work for over 13 years, into trust funds during their absence, in order to provide additional financial support to the detainees and their families. As such, the Panel finds that these salary payments are not a direct result of Iraq’s invasion and occupation of Kuwait and are therefore not compensable. Accordingly, the Panel recommends no award of compensation in respect of the salary payments included in the current “F3” claim. It follows that as the underlying loss, being the salary payments, is not compensable, the associated losses concerning public service expenditure and interest are also not compensable.

78. The Panel has taken into account the decision of the “F3” Panel set out in the First “F3” Report²⁷ regarding Government claimants that sought compensation for amounts paid to Government employees who were unable to work during and after the jurisdictional period as “payment of relief to others” to compensate them for their loss of financial support. These payments represented the salaries that the employees would have earned, but did not receive, in respect of the seven-month occupation period and a further three-month period that the Government claimants characterized as a “recovery period”. The “F3” Panel determined that they were in principle compensable under paragraph 36 of decision 7, which provides, *inter alia*, that compensation can be paid to reimburse payments made or relief provided by Governments or international organizations to others, such as employees, for losses covered by any of the criteria adopted by the Governing Council. The Panel notes that the Government claimants only sought, and the “F3” Panel recommended compensation in respect of, these “relief” payments for the 10-month period from 2 August 1990 to 31 May 1991, that is the seven-month jurisdictional period and a three-month “recovery period” immediately thereafter.

79. The Panel notes that in the current “F3” claim, the National Committee seeks compensation for salary payments (over and above compensation for the loss of support paid by it), which are characterized as “relief” payments, deposited into trust funds of detainees from 1 June 1991 to 30 April 1998, plus an estimated amount for each subsequent day until the detainees were released or otherwise accounted for.²⁸ The Panel finds that the “relief” payments found to be compensable by the “F3” Panel for payments made up until 31 May 1991 were in relation to Government employees who were known or presumed to be living during the invasion and occupation and after the liberation of Kuwait. They are thus different in nature to and distinguishable from the “relief” payments claimed by the National Committee in the current “F3” claim in respect of the deceased detainees.

80. The Panel also considered whether any amounts deposited into the trust funds and subsequently withdrawn by the families of deceased detainees should be factored into the Panel’s calculation of recommended awards for the loss of support claims of the family members of the detainees.

81. Given that these withdrawals were out of the *ex gratia* payments into the trust funds, the Panel determines that it is inappropriate to deduct any amounts withdrawn from the trust funds from the Panel’s recommended awards for the loss of support claims in the special instalment. Accordingly, the Panel makes no adjustments to the recommended awards to account for any salary payments made by the National Committee into trust funds for certain deceased detainees or any withdrawals from such trust funds by any of the families.

VII. REVIEW BY THE PANEL OF TWO CLAIMS FOR PERSONAL INJURIES FILED PURSUANT TO DECISION 12

82. Decision 12 enables individuals who suffer “losses and personal injuries resulting from public health and safety risks that occur after or within one year prior to the expiration of the established filing deadlines”²⁹ to file claims with the Commission after the regular filing period. The reference to “public health and safety risks” refers most often to the explosion of landmines or other previously unexploded ordnance related to Iraq’s invasion and occupation of Kuwait that has resulted in the death of or injury to an individual. A number of such claims have been filed, principally by Kuwait, on

behalf of claimants since the end of the regular filing period. In June 2004, the Panel signed a Special Report by which it made recommendations concerning 30 such claims that had not previously been reviewed by the Commission.³⁰

83. Kuwait subsequently filed two further category “D” claims pursuant to decision 12 on behalf of two individual claimants who suffered personal injuries resulting from landmine explosions.³¹ The Panel has taken up these two claims for review as part of the special instalment. The Panel notes that the final deadline set by the Governing Council for the filing of such claims pursuant to decision 12 has now passed.

84. In the first case, the claimant seeks compensation for the MPA he allegedly suffered resulting from his personal injuries following a landmine explosion. The medical and other documentary evidence submitted by the claimant indicates that he sustained a fracture of the neck and injuries to his right elbow and shoulder, resulting in scarring. The Panel finds that the claimant suffered these personal injuries as a direct result of Iraq’s invasion and occupation of Kuwait. Consequently, the Panel recommends an award of compensation in respect of MPA in accordance with decision 8.

85. In the second case, the claimant seeks compensation for the MPA he allegedly suffered resulting from his personal injuries, also following a landmine explosion. In this case, the claimant in addition seeks compensation for his loss of future earnings resulting from his injuries. The medical and other documentary evidence submitted by the claimant indicates that, as a result of the landmine explosion, he suffered a brain injury resulting in epilepsy, a double fracture of his left thigh bone, partial dismemberment of his right hand and arm requiring the fitting of a prosthetic limb, and retention of foreign matter in the brain. The Panel finds that the claimant suffered these personal injuries as a direct result of Iraq’s invasion and occupation of Kuwait. Therefore, the Panel recommends an award of compensation for MPA in accordance with decision 8. In respect of the claim for loss of future earnings, the Panel recommends an award of compensation calculated in accordance with the D2 (personal injury) methodology.

VIII. THE PANEL’S DETERMINATION CONCERNING THE ELIGIBILITY TO FILE ADDITIONAL DECEASED DETAINEE CLAIMS

86. At its fifty-second session, the Governing Council considered requests made by Kuwait, at the request in turn of the Government of the Islamic Republic of Iran (“Iran”), and the Government of the Kingdom of Saudi Arabia (“Saudi Arabia”) to file additional deceased detainee claims with the Commission pursuant to decision 12. Kuwait sought to file two claims on behalf of two Iranian deceased detainees and Saudi Arabia sought to file 10 claims on behalf of 10 Saudi Arabian deceased detainees. These 12 detainees are not included on the ICRC list and therefore, Kuwait has not filed claims in respect of these detainees as part of the original 605 claims comprising the special instalment. The Governing Council referred the two requests to the Panel for a determination as to whether any of the claims were eligible to be filed with the Commission pursuant to decision 12.

87. The Panel reviewed the claim forms submitted on behalf of the 12 deceased detainees and their families and the material and information submitted by Kuwait, Iran and Saudi Arabia in support of

the requests to file the claims. The Panel considered the documentary evidence submitted with a view to identifying the date of and circumstances surrounding the disappearance of each person to determine whether the evidence demonstrated that the disappearance was the direct result of Iraq's invasion and occupation of Kuwait. The Panel also took note of the fact that as required under decision 12, Iran and Saudi Arabia had each provided declarations of death under their domestic laws in respect of each of their nationals who were the deceased detainees.

88. Based on the totality of the evidence submitted by Kuwait and Iran in respect of the two Iranian detainees, the Panel finds that these two claims are eligible for filing under decision 12. In respect of the request of Saudi Arabia, the Panel concludes from the totality of the evidence that eight of the 10 claims concerning Saudi Arabian detainees are eligible for filing under decision 12. The Panel therefore accepted 10 of the 12 claims for filing with the Commission. The Panel's findings and recommendations in respect of the merits of these 10 claims will be included in a subsequent report of the Panel.

89. In respect of the remaining two claims concerning Saudi Arabian nationals, the Panel finds that in one case, the claim is ineligible because the evidence indicates that the deceased was killed while participating in Allied Coalition Forces' operations against Iraq in February 1991. Governing Council decision 11 (S/AC.26/1992/11) provides that "members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in coalition military operations against Iraq." In the second case, the Panel finds that the claim is ineligible because the evidence submitted indicates that the disappearance of the deceased occurred after the jurisdictional period, and is therefore outside the jurisdiction of the Commission.

90. The Governing Council also considered two subsequent requests made by Kuwait and the Government of Bahrain ("Bahrain") to file additional deceased detainee claims with the Commission pursuant to decision 12. Kuwait sought to file one claim on behalf of a "bedoun" deceased detainee and Bahrain sought to file 10 claims on behalf of 10 Bahraini deceased detainees. The Governing Council also referred these two subsequent requests to the Panel for determinations as to whether any of the claims were eligible to be filed with the Commission pursuant to decision 12.

91. The Panel reviewed the material and information submitted by Kuwait and Bahrain in support of the requests to file the claims. The Panel considered the documentary evidence submitted with a view to identifying the date of and circumstances surrounding the disappearance of each person to determine whether the evidence demonstrated that the disappearance was the direct result of Iraq's invasion and occupation of Kuwait. The Panel noted that no legal declaration of death had been made by either Kuwait or Bahrain in respect of its nationals. In addition, no claim forms were submitted in respect of these detainees by Kuwait or Bahrain.

92. In respect of the request of Kuwait, the Panel finds that the single claim of the "bedoun" detainee does not meet the requirements for filing under decision 12. The Panel finds that no legal declaration of death has been made by Kuwait, a requirement of decision 12. In addition, the Panel notes that the evidence submitted in support of this claim does not establish that the detainee was

arrested or subsequently detained by Iraqi forces. Accordingly, the Panel finds that this claim is not eligible for filing under decision 12.

93. In respect of the request of Bahrain, the Panel notes that one of the 10 deceased detainees is included on the ICRC list and therefore, Kuwait has filed a claim on behalf of this detainee and his family as part of the special instalment. As a claim has already been filed for this detainee, the Panel took no further action concerning this request. In respect of the remaining nine detainees, the Panel finds that no legal declaration of death has been made by Bahrain, a requirement of decision 12. In addition, the Panel notes that the evidence submitted in support of these nine claims indicates that the detainees were arrested in Iraq by Iraqi forces in late March 1991, after the end of the Commission's jurisdictional period, probably during the course of the Shiite uprising in southern Iraq. As such, the Panel finds that their arrest and detention was not a direct result of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel finds that these nine claims are also not eligible for filing under decision 12.

IX. CROSS-CATEGORY ISSUE

94. Awards to be paid in respect of claims in the special instalment are net of any category "A", "B" and "C" approved awards made to the same claimants.

X. OTHER ISSUES

A. Exchange Rates

95. For the purpose of calculating recommended amounts, the Panel has converted currencies into United States dollars in accordance with the rates set out in paragraphs 61-63 of the First "D" Report.

96. In its report and recommendations concerning the third instalment of category "D" claims,³² the Panel noted that where losses are claimed for money in currencies other than United States dollars and it is established that the application of the exchange rate approved by the Panel in its First "D" Report would result in either under-compensation or over-compensation of the claimant, the Panel determined that it will select a conversion rate based on the evidence that most closely compensates the claimant for the value of the losses suffered. In particular, this method would be applied in situations where the claimant has submitted evidence that he or she purchased the money at a rate different from the rate adopted by the Panel.³³

B. Interest

97. A number of claimants in the special instalment claim interest on losses contained in their claims either for a specific or an unspecified amount. The total amount asserted for interest is USD 14,169,831.69. Governing Council decision 16 (S/AC.26/1992/16) provides that the methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time. For this purpose, in relation to category "D" losses other than loss of business income, incremental costs and losses relating to personal injuries, the "D" Panels have previously determined that the phrase "the date the loss occurred" in decision 16 should be a single fixed date.³⁴ The "D"

Panels determined that 2 August 1990 (the date of Iraq's invasion and occupation of Kuwait) should serve as the fixed date.³⁵

98. Claims for loss of business income are claims for income that would have been earned over a period of time. As such, a date of loss of 2 August 1990 for such losses would result in over-compensation for claimants. The "D" Panels have therefore adopted the midpoint of the period for which loss of business income claims have been recommended for compensation as the date of loss for the purpose of calculating interest. The "D" Panels also adopted a fixed date of 1 May 1991 as the date of loss for the purpose of calculating interest on awards for claims for incremental costs.³⁶

99. In respect of the two category "D" claims included in the special instalment that result from personal injuries, the Panel finds that the date the loss occurred should be taken to be the date of the physical injury, which is available on record in respect of each claim.³⁷

100. The fixed date of 2 August 1990 has also been adopted as the appropriate date for the calculation of interest payments in respect of recommended awards made in respect of category "C" claims by the "C" Panel.³⁸ Therefore, the Panel also adopts this date for the calculation of interest payments for those losses for which it has recommended amounts of compensation calculated in accordance with the applicable category "C" methodologies.

101. The Panel applies these findings concerning interest to the claims included in the special instalment.

C. Claims preparation costs

102. A number of claimants in the special instalment seek claims preparation costs incurred by them, either for a specific or an unspecified amount. The total amount asserted for claims preparation costs is USD 76,339.12.

103. The Panel has been informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claims preparation costs in the future. Accordingly, the Panel makes no recommendation with respect to compensation for claims preparation costs.

XI. RECOMMENDED AWARDS

104. Table 2 below lists the awards recommended by the Panel for the claims resolved in the special instalment. Kuwait will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from table 2, the total amount claimed is USD 296,575,890.48. Against the net balance of USD 282,329,719.67 claimed, which amount excludes interest and claims preparation costs, the Panel recommends a total award of compensation of USD 161,140,801.39.

Table 2. Summary of recommendations

<u>Submitting entity</u>	<u>Claims category</u>	<u>Number of claims not recommended for payment^a</u>	<u>Number of claims recommended for payment^b</u>	<u>Total amount claimed (USD)^c</u>	<u>Net amount claimed after interest and claims preparation costs (USD)</u>	<u>Amount of compensation recommended (USD)</u>
Kuwait	D	3	604	259,038,112.48	255,303,572.67	161,140,801.39
Kuwait	F	1	0	37,537,778.00	27,026,147.00	0.00
<u>Total</u>		4	604	296,575,890.48	282,329,719.67	161,140,801.39

^a The total number of claims not recommended for payment in the special instalment includes two category "D" claims withdrawn by Kuwait.

^b The total number of claims recommended for payment in the special instalment includes 602 claims originally filed as part of the 605 deceased detainee claims plus two claims for personal injuries resulting from landmine explosions filed pursuant to decision 12.

^c This total amount claimed includes USD 14,169,831.69 for interest and USD 76,339.12 for claims preparation costs.

XII. SUBMISSION OF THE REPORT

105. The Panel hereby submits this report through the Executive Secretary to the Governing Council pursuant to article 38(e) of the Rules.

Geneva, 16 December 2004

(Signed) R.K.P. Shankardass
Chairman

(Signed) G. Abi-Saab
Commissioner

(Signed) M.C. Pryles
Commissioner

Notes

¹ UNCC claim numbers 3013747 and 3013811.

² UNCC claim number 5000459.

³ See paragraphs 567-570 of the “Report and recommendations made by the Panel of Commissioners concerning part three of the third instalment of ‘F3’ claims” (S/AC.26/2003/15) (the “Part Three, Third ‘F3’ Report”).

⁴ In part one of the first instalment of category “D” claims, the Panel developed methodologies for the following loss types: D1 (money); D1 (mental pain and anguish) (“MPA”); D3 (death); D4 (motor vehicles); D6 (loss of income); D10 (payments or relief to others); and D10 (other). A full description of the methodologies is set out at paragraphs 103-380 of the “Report and recommendations made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1998/1) (the “First ‘D’ Report”). The Panel developed methodologies for the following loss types in part one of the second instalment: D2 (personal injury) and D5 (loss of bank accounts, stocks and other securities). These methodologies are described in the “Report and recommendations made by the Panel of Commissioners concerning part one of the second instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1998/11) at paragraphs 41-115. The Panel developed the methodology for D4 (personal property) losses in part two of the second instalment. This methodology is described in the “Report and recommendations made by the Panel of Commissioners concerning part two of the second instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1998/15) (the “Part Two, Second Instalment Report”) at paragraphs 30-57. The Panel developed the methodology for D7 (real property) losses in part two of the fourth instalment. This methodology is described in the “Report and recommendations made by the Panel of Commissioners concerning part two of the fourth instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/2000/11), at paragraphs 9-72. The “D2” Panel of Commissioners developed the methodology for D8/D9 (individual business) loss claims, which is described in the “Report and recommendations made by the Panel of Commissioners concerning the sixth instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)” (S/AC.26/2000/24) (the “Sixth Instalment Report”). The methodologies for resolving all of the loss types in category “D” have now been developed. In respect of those category “C” personal losses claimed on behalf of the deceased detainees in the claims comprising the special instalment, the Panel has made recommendations of awards of compensation in accordance with the applicable methodologies established by the category “C” Panel of Commissioners, as set out in chapter IV of the “Report and recommendations made by the Panel of Commissioners concerning the first instalment of individual claims for damages up to US\$100,000 (category ‘C’ claims)” (S/AC.26/1994.3) (the “First ‘C’ Report”). See also chapter IV of the “Report and recommendations made by the Panel of Commissioners concerning the seventh instalment of individual claims for damages up to US\$100,000 (category ‘C’ claims)” (S/AC.26/1999/11) (the “Seventh ‘C’ Report”).

⁵ UNCC claim numbers 3013784, 3013812 and 3013822.

⁶ The total claimed amount that was severed and transferred to the merged “E4” Panel in respect of these three claims is USD 11,064,903.11. The total claimed amount for the special instalment, as set out in paragraph 104 and in table 2 of this report, is net of this amount of USD 11,064,903.11 that has been transferred to the merged “E4” Panel for review.

⁷ See the First “D” Report for a discussion of the transmittal of claim files to Iraq.

⁸ See in particular chapter II of the First “D” Report and chapter IV of the “Report and recommendations made by the Panel of Commissioners concerning part two of the first instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1998/3).

⁹ See note 4 above for further information on the development of the general legal framework.

¹⁰ See chapter II of the First “C” Report.

¹¹ In particular, the Panel referred to the “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘F3’ claims” (S/AC.26/1999/24) (the “First ‘F3’ Report”) and the Part Three, Third “F3” Report.

¹² See chapter VI of the First “D” Report and chapter II of the Part Two, Second Instalment Report. See also paragraph 8 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1), which provides that “[S]ince...[category ‘D’] claims may be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss”. See also article 35(1) and 35(3) of the Rules.

¹³ See article 35(1) and 35(2) of the Rules and chapter II of the First “C” Report. See also paragraph 15(a) of Governing Council decision 1 (S/AC.26/1991/1), which provides that “[S]uch [category ‘C’] claims must be documented by appropriate evidence of the circumstances and amount of the claimed loss. The evidence required will be the reasonable minimum that is appropriate under the circumstances involved, and a lesser degree of documentary evidence would ordinarily be required for smaller claims, such as those below \$20,000”.

¹⁴ See article 35(1) and 35(3) of the Rules. See also paragraph 37 of decision 7, which provides that “[S]ince...[category ‘F’] claims will be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss”.

¹⁵ The Panel has obtained background information concerning the fate of the detainees as set out in this report from documents and material submitted by Kuwait, prepared by Kuwait and the ICRC. In addition, at the request of the Panel, the secretariat undertook a technical mission to Kuwait in October 2003 to obtain further information from various sources within Kuwait by way of background to the circumstances giving rise to the disappearance and subsequent death of the detainees.

¹⁶ The Panel notes that while the detainees were all arrested from 2 August 1990 to 26 February 1991, the jurisdictional period for the purpose of the mandate of the Commission is from 2 August 1990 to 2 March 1991. The date of 26 February 1991 marks the date on which the last Iraqi forces left Kuwait.

¹⁷ The Commission’s regular filing period was from 1 January 1992 to 1 January 1996.

¹⁸ See the affidavit of Dr. Adel Omar Asem, the Deputy Chairman and Director General of PAAC, dated 15 December 2004, which relevantly provides:

“...In representing the families of the non-Kuwaiti detainees, PAAC exercised the discretionary right granted to Governments under Article 5, paragraph 1 section (a) of the Provisional Rules for Claim Procedure (Governing Council decision 10 of 26 June 1992), which states that a Government “[m]ay submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory.”

PAAC also received letters from the embassies of each non-Kuwaiti detainee, requesting that PAAC file claims on behalf of the detainees. The letters were included in the respective claim files...”

“...I therefore affirm that the Government of Kuwait was duly authorized by the Governments of the non-Kuwaiti detainees to file claims on behalf of their families and carry out all necessary steps to ensure that such claims would be accepted by the UNCC for review, including considering them martyrs.”

¹⁹ See paragraphs 171-244 of the First “D” Report.

²⁰ UNCC claim number 5000169.

²¹ See paragraphs 332-337 of the First “F3” Report.

²² See paragraphs 341-343 of the First “F3” Report.

²³ The amount of USD 65 million paid to the National Committee by the Commission to date in respect of the original “F3” claim can be divided between the family support payments loss and the public service expenditure loss on the following basis: USD 56,321,417.88 in respect of the family support payments loss and USD 8,678,582.12 in respect of the public service expenditure loss.

²⁴ See paragraphs 339-340 of the First “F3” Report.

²⁵ UNCC claim number 5000459.

²⁶ The Panel notes that to date, an amount of USD 65 million has been paid to the National Committee in respect of the total award of USD 177,109,000 recommended by the “F3” Panel in respect of the original “F3” claim. The Panel also notes that USD 56,321,417.88 of the paid amount of USD 65 million relates to family support payments made by the National Committee. The Panel takes no position concerning the balance of the award of USD 153,462,000 recommended by the “F3” Panel for the family support payments loss that remains to be paid by the Commission to the National Committee.

²⁷ See paragraphs 31-48 of the First “F3” Report.

²⁸ See paragraph 338 of the First “F3” Report.

²⁹ See paragraph 1(a) of decision 12.

³⁰ See the “Special report and recommendations made by the ‘D1’ Panel of Commissioners concerning 30 claims filed pursuant to Governing Council decision 12” (S/AC.26/2004/12) (the “Special Decision 12 Report”).

³¹ UNCC claim numbers 3013911 and 3013912.

³² See the “Report and recommendations made by the Panel of Commissioners concerning the third instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1999/9) (the “Third Instalment Report”).

³³ See paragraph 39 of the Third Instalment Report.

³⁴ Paragraph 1 of Governing Council decision 16 states that “[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.”

³⁵ See paragraphs 64-65 of the First “D” Report with respect to category “D” losses other than D8/D9 (individual business) losses and paragraphs 225-226 of the Sixth Instalment Report with respect to claims for D8/D9 (individual business) losses.

³⁶ See paragraphs 227-228 of the Sixth Instalment Report.

³⁷ This is consistent with paragraph 16 of the Special Decision 12 Report.

³⁸ See page 33 of the First “C” Report.
