

Overcoming the “Logic of Exception”: A Critique of the UN Security Council’s Response to Environmental Damage from the 1990–91 Gulf War

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Abstract

This paper examines the UN Security Council’s [UNSC] response to the environmental impact of the 1990–91 Gulf War and its relevance to ongoing debates on environmental protection during armed conflict. With Resolution 687/91, the UNSC referred to “environmental damage and depletion of natural resources” in the context of war reparations, and established the UN Compensation Commission [UNCC] to process environmental claims. Whilst this is often hailed as a success story, this paper raises questions about certain dimensions of the UNCC: the choice of the applicable law; the decision-making process, particularly in relation to causation and remedies; and its punitive/biased nature. It argues that the successful outcome of the environmental compensation regime cannot be separated from the UNCC’s exceptional application of international legal norms. By drawing attention to this “logic of exception”, I suggest that alternative responses, more attentive to the dynamics of contemporary conflicts and their multiple environmental impacts, should be imagined.

*“L’essentiel est invisible pour les yeux”
A. de Saint-Exupéry, Le Petit Prince*

Oil refineries and fuel tankers have been a priority target since the beginning in September 2014 of the air strikes against the self-proclaimed Islamic State in Iraq and Syria [ISIL or Daesh] in an effort to curb the terrorist group’s main source of revenues.¹ From

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1. Wim ZWIJNENBURG and Annica WALEIJ, “Fire and Oil: The Collateral Environmental Damage from Airstrikes on ISIS Oil Facilities”, blog of the Toxic Remnants of War Project, 13 January 2016.

June 2016 onwards, ISIL itself ignited oil wells, storage tanks, and a sulphur factory in the area of the Iraqi town of Qayyarah, located to the south of Mosul. Efforts to extinguish the fires took nine months, given the complexity of the security and humanitarian situation around Qayyarah, with over one million displaced persons.² Although the military strategy of targeting oil infrastructures is not unprecedented, its detrimental environmental impact and health consequences are a matter of serious concern. Oil fires release toxic substances into the air and surrounding areas (notably, sulphur dioxide and nitrogen dioxide) that may later permeate the soil and underground aquifers, causing severe and long-lasting harm to the environment and human health. The diffusion of such dangerous pollutants increases the risk of respiratory diseases, cancer, and mortality, threatens wildlife and biodiversity, and impairs the capacity of a war-torn country to recover and move forward. These fears have been confirmed by UN Environment in a recent study.³

The targeting of oil infrastructures by ISIL and the forces that oppose ISIL draws attention to the devastating effects of military strategies of this kind on the natural environment, as well as on human wellbeing, and brings (back) to the forefront an issue that is often peripheral to official narratives about conflict. The legal debate on the protection of the environment in armed conflict has indeed regained momentum over the last decade, also thanks to the inclusion of the topic in the International Law Commission's programme of work.⁴ At the risk of oversimplifying, two primary concerns have attracted scholarly attention.

The first is the limited protection enjoyed by the environment in the laws of armed conflict: there is a prevailing consensus in the literature that the present body of law is "unsatisfactory".⁵ Treaty law and customary rules are either too vague or too restrictive.⁶ The special discipline in Additional Protocol I to the Geneva Conventions, which attempts to establish a threshold of "impermissible environmental damage",⁷ appears not to have any practical value. Other norms in international humanitarian

2. See in general, UNEP, *Environmental Issues in Areas Retaken from ISIL: Mosul, Iraq*, September 2017.

3. *Ibid.*

4. Report of the International Law Commission on the Work of its 65th Session, 6 May–7 June and 8 July–9 August 2013, A/68/10, 28 May 2013, para. 130.

5. Richard FALK, "The Environmental Law of War: An Introduction" in Glen PLANT, ed., *Environmental Protection and the Law of War: A "Fifth Geneva" Convention on the Protection of the Environment in Time of Armed Conflict* (London: Belhaven Press, 1992), 78 at 93. In more recent times, this position has been restated by UNEP: Elizabeth Maruma MREMA, Carl BRUCH, and Jordan DIAMOND, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi: UNEP, 2009) at 11; ICRC: Jakob KELLEBERGER, *Strengthening Legal Protection for Victims of Armed Conflict* (Geneva: ICRC, 2013: IIC/11/5.1.1) at 17. In the scholarship, see for example, Carl E. BRUCH and Jay E. AUSTIN, *The Environmental Consequences of War: Legal Scientific and Economic Perspectives* (Cambridge: Cambridge University Press, 2000); Rosemary RAYFUSE, ed., *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Leiden: Brill Nijhoff, 2014); Steven FREELAND, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (Cambridge: Intersentia, 2015).

6. See in general, Michael BOTHE, Carl BRUCH, Jordan DIAMOND, and David JENSEN, "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities" (2010) 92 *International Review of the Red Cross* 569.

7. Liesbeth LIJNZAAD and Gerard J. TANJA, "Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War" (1993) 40 *Netherlands International Law Review* 169 at 181.

law [IHL]⁸ that may offer indirect protection to the environment (e.g. rules protecting enemy property) are subordinate to the doctrine of military necessity, which involves a high dose of subjectivity in assessing the degree of environmental damage that is acceptable in the pursuit of legitimate military objectives. Further, as these rules are not intended to address environmental concerns, doubts arise as to whether they can provide protection to elements of the natural environment that do not strictly qualify as “property”,⁹ or that do not fall entirely within the territory of a belligerent state.¹⁰ The contribution of the principles of the *jus in bello* (i.e. distinction, proportionality, necessity, and humanity) is also limited, given their “indefinite nature”,¹¹ as well as subjectivity in their interpretation and application.

The second, which has featured less prominently in legal debates, relates to the enforcement and implementation of responsibility, including for reparation. The creation of an ad hoc institutional mechanism to monitor the implementation of the law, investigate violations, and redress conflict-related environmental damage is seen by many as a desirable solution.¹² In this regard, the United Nations Compensation Commission [UNCC] created by the United Nations Security Council [UNSC] to respond to, *inter alia*, the environmental damage caused by Iraq’s military offensive in Kuwait,¹³ is considered the successful precedent to look at, as it remains—at present—one of the very few examples of institutional mechanisms that held a state liable for its conduct during warfare and, most essentially, for the environmental damage caused as a result.¹⁴

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8. Whilst acknowledging their different origins, for the purpose of this paper the terms “international humanitarian law”, “laws of war”, “laws of armed conflict”, and “*jus in bello*” are used interchangeably, as indicating the international legal framework governing the rights and duties of belligerents in armed conflict.
 9. See e.g. Michael N. SCHMITT, “Humanitarian Law and the Environment” (2000) 28 *Denver Journal of International Law and Policy* 265 at 296–7.
 10. Adam ROBERTS, “The Law of War and Environmental Damage” in Jay E. AUSTIN and Carl E. BRUCH, eds., *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* (Cambridge: Cambridge University Press, 2000), 47 at 57.
 11. Falk, *supra* note 5 at 79.
 12. E.g. the ICRC pointed to the “lack of mechanisms for addressing the immediate and long term consequences of environmental damage” and suggested giving “extensive thought” to the possible creation of a mechanism or process for assessing the extent of environmental damage, investigating violations of the relevant rules, and deciding on the most appropriate forms of reparation. See ICRC, *supra* note 5 at 18. See also Carl E. BRUCH, “Existing and Emerging Wartime Standards: Introduction” in Jay E. AUSTIN and Carl E. BRUCH, eds., *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives* (Cambridge: Cambridge University Press, 2000), 39 at 42. This paper does not consider the international criminal responsibility of individuals for environmental damage as a possible way of enforcing the obligation to protect the environment in wartime.
 13. The purpose of UNSC Resolution 687/91 was broader, and included resolving the Iraq-Kuwait boundary dispute, establishing a weapons inspection regime, deploying UN observer forces, returning Kuwaiti property, and compensating for damage and loss caused by the illegal invasion. This paper does not address the question of whether the UNSC had the powers under the UN Charter to create a body with quasi-judicial functions—the UNCC. For a discussion on this point, see Luan LOW and David HODGKINSON, “Compensation for Wartime Environmental Damage: Challenges to International Law after the Gulf War” (1995) 35 *Virginia Journal of International Law* 405 at 468–77.
 14. E.g. according to UNEP, “[e]ven though the UN Compensation Commission (UNCC) was established by the Security Council to process compensation claims relating to the 1990–1991 Gulf War, Member States of the United Nations may want to consider how a similar structure could be established as a permanent body, either under the General Assembly or under the Security Council. Such a body could investigate and decide on alleged violations of international law during international and non-international armed

Through an examination of the practice of the UNCC, the overarching purpose of this paper is to draw attention to some problematic dimensions of the compensation regime for the environmental impact of the 1990–91 Gulf War, and thus raise questions on its capacity to influence future responses to environmental damage in the context of contemporary armed conflicts. Conflict-related environmental issues have been rarely addressed in judicial and non-judicial settings.¹⁵ The precedent of the UNCC is a notable exception and generally hailed as a success story. However, as is often the case, the devil is in the details. By challenging the predominant narrative, this paper will shed light on some controversial dimensions of the UNCC's approach vis-à-vis conflict-related environmental damage. The argument made here is that the successful outcome of the UNCC in terms of environmental reparation cannot be separated from its exceptional application of international rules and principles. From its creation to the enforcement of compensation awards, the UNCC has been characterized by a “logic of exception”, which makes its precedential value problematic at least. Eventually, as the international community becomes aware of the importance of safeguarding scarce and critical environmental resources, the time has come to move away from this “logic of exception” and imagine alternatives that are more attentive to the dynamics of present-day armed conflicts and their multiple environmental impacts.

The remainder of the paper proceeds as follows: Part I provides a brief background on the 1990–91 Gulf War and the establishment of the UNCC. Part II draws attention to the unique UNCC's institutional framework and decision-making process, and how these facilitated compensation for environmental damage. Part III interrogates the legacy of the UNCC as an institutional response to conflict-related environmental issues by focusing on three controversial aspects of its work: the normative framework relied upon by the Commission (*jus ad bellum v. jus in bello*); its application of the law of state responsibility, notably in the matters of causation and remedies; and the enforcement of environmental compensation awards, including problems with the punitive or biased nature of UNSC Resolution 687. Part IV concludes.

conflicts, as well as handle and process compensation claims related to environmental damage and loss of economic opportunities.” See UNEP, *supra* note 5 at 6. Similar proposals are made in the scholarship. See e.g. Robin L. JUNI, “The United Nations Compensation Commission as a Model for an International Environmental Court” (2000) 7 *Environmental Lawyer* 53; Carl E. BRUCH, “Institutionalizing Peacebuilding: The UNCC, Conflict Resources, and the Future of Natural Resources in Transitional Justice” in Cymie R. PAYNE and Peter H. SAND, eds., *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford: Oxford University Press, 2011), 221 at 239; Cymie R. PAYNE, “Developments in the Law of Environmental Reparations: A Case Study of the UN Compensation Commission” in Carsten STAHN, Jens IVERSON, and Jennifer S. EASTERDAY, eds., *Environmental Protection and Transitions from Conflict to Peace* (Oxford: Oxford University Press, 2017), 329.

15. Another noteworthy exception is the International Courts of Justice's judgment in the *Armed Activities* case, where the Court found Uganda responsible for the pillaging of natural resources in the Democratic Republic of Congo and ordered reparations. See *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 168, 19 December 2005. Interestingly, in the absence of an agreement after more than ten years since the judgment was rendered, in 2015 the ICJ resumed the proceedings on reparation and became directly involved with the issue of reparation. The approach that would be taken by the ICJ deserves to be monitored closely.

I. THE ENVIRONMENTAL IMPACT OF THE 1990–91 GULF WAR AND THE CREATION OF THE UNCC

The Gulf War began on 2 August 1990 with the invasion and subsequent annexation of Kuwait. At the time, Saddam Hussein’s decision to invade Kuwait appeared as a blatant challenge to the international regime created by the UN Charter, in particular to the prohibition of the use of force as envisaged in Article 2(4).¹⁶ The reaction of the international community was immediate: the UNSC was able to adopt multiple binding resolutions, which condemned the invasion,¹⁷ imposed economic sanctions on Iraq,¹⁸ and authorized the use of force against Iraq by a Coalition of States.¹⁹

After the Coalition Air Force led by the US attacked Iraq on 16 January 1991, Iraq released millions of gallons of Kuwaiti crude oil into the Persian Gulf.²⁰ Further, some of the major Kuwaiti oil refineries were targeted;²¹ it was at the end of February 1991 that the Iraqi army, retreating from Kuwait, started hundreds of fires in oil wells.²² Other actions that contributed to environmental degradation in the region included the release by Iraq of 150 barrels of crude oil into the desert, which generated oil lakes,²³ as well as the mass use of mines and booby traps by both the Coalition Forces and Iraq.²⁴ Evidence collected by the United Nations Environment Programme [UNEP] shows that the environmental impact of Iraq’s military campaign was severe.²⁵ The oil spill in the Persian Gulf damaged a fragile marine habitat, already affected by pollution caused by the oil industry.²⁶ Animal species, such as migratory birds (the image of “oiled birds” was broadcast in all media), marine turtles, whales, and dolphins, as well as their ecosystems, such as coral reef and mangroves, were seriously impacted.²⁷ The explosion of oil wells released a number of pollutants into the atmosphere²⁸ and created thick smoke clouds, the transboundary effects of which, in terms of air pollution, were

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16. Christopher GREENWOOD, “New World Order or Old? The Invasion of Kuwait and the Rule of Law” (1992) 55 *Modern Law Review* 153 at 153.
 17. SC Res. 660, 2 August 1990.
 18. SC Res. 661, 6 August 1990.
 19. SC Res. 678, 29 November 1990. See generally Greenwood, *supra* note 16 at 158–71.
 20. Low and Hodgkinson, *supra* note 13 at 408.
 21. Iraqi oil installations and nuclear facilities were also attacked by the Coalition during the war, with the consequent release of contaminants in the surrounding area. See Adam ROBERTS, “Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War” (1996) 69 *International Law Studies* 222 at 251–3.
 22. *Ibid.*, at 248. The intention to destroy Kuwait’s oilfields was disclosed by Saddam Hussein at the very beginning of the invasion; see Low and Hodgkinson, *supra* note 13 at 410.
 23. Greenpeace, *The Environmental Legacy of the Gulf War* (Amsterdam: Greenpeace International, 1992) at 22.
 24. Ali Mohamed AL-DAMKHI, “Kuwait’s Oil Well Fires, 1991: Environmental Crime and War” (2007) 64 *International Journal of Environmental Studies* 31 at 33.
 25. For a more detailed account of the environmental effects of the Gulf War, see UNEP Rapid Assessment Reports: Surveys on the Impact of the Conflict on Iraq, Kuwait and Saudi Arabia (1991); see also UNEP Updated Scientific Report on the Environmental Effects of the Conflict between Iraq and Kuwait (1993).
 26. Low and Hodgkinson, *supra* note 13 at 410.
 27. Greenpeace, *supra* note 23 at 33; Al-Damkhi, *supra* note 24 at 35; Karen HULME, *War Torn Environment: Interpreting the Legal Threshold* (Leiden: Brill Nijhoff, 2004) at 165–6.
 28. Greenpeace, *supra* note 23 at 17–22.

not limited to the Gulf States, but similarly affected India and Pakistan.²⁹ As a consequence, reduced daylight, acid rain, and a drop in temperature of up to ten degrees Celsius were reported throughout the region.³⁰ The release of the oil in the desert damaged the soil and plants, and further contaminated the underground aquifers.³¹

The war formally ended on 6 April 1991, when Iraq accepted the peace terms set forth by UNSC Resolution 687.³² The UNSC “reaffirmed” that Iraq was “liable under international law for any direct loss, damage, *including environmental damage and the depletion of natural resources*, or injury to foreign Governments, nationals and corporations, as a results of Iraq’s unlawful invasion and occupation of Kuwait”.³³ The same resolution created a fund to pay compensation for claims that fell within the above categories of damage, with the UNCC to administer the fund.³⁴ Following the report issued by the UN Secretary General pursuant to paragraph 19 of Resolution 687, the UNCC and its Governing Council were established, with the duty to decide, *inter alia*, the “requirement for Iraqi contributions” to the fund, “with respect to all Iraqi petroleum and petroleum products exported from Iraq after 3 April 1991, as well as such petroleum and petroleum products exported earlier but not delivered or not paid for as a specific result of the prohibitions contained in resolution 661 (1990)”.³⁵

Although the 1990–91 Gulf War was neither the first armed conflict that resulted in severe environmental harm,³⁶ nor will it be the last,³⁷ the reaction of the international community to the reckless conduct of the Iraqi Armed Forces was unprecedented. For the first time, the UNSC referred to “environmental damage and depletion of natural resources” in the context of war reparations, and put in place an institutional mechanism to award compensation. Yet, one cannot accurately appreciate the legacy of the UNCC in the environmental field without drawing attention to the exceptional

29. E.A. HASSAN, “State Responsibility for Environmental Air Pollution and the Environmental Impact of the Gulf War” (1995) 1 *Eco-notes* 22 at 26.

30. Hulme, *supra* note 27 at 165; Al-Damkhi *supra* note 24 at 34; Hassan, *supra* note 29 at 26.

31. Hulme, *supra* note 27 at 165; Al-Damkhi *supra* note 24 at 36; Greenpeace, *supra* note 23 at 22, according to which the land may remain contaminated for generations.

32. SC Res. 687, 3 April 1991.

33. *Ibid.*, para. 16 (emphasis added). Erik Koppe notes that the Resolution employs the term “liability” and not “responsibility” and argues that the UNSC Resolution gives rise to a form of strict liability, meaning a liability without fault: Iraq is made liable for environmental damage resulting also from conducts not prohibited under the laws of war and for damage caused by the Coalition Force. See Erik KOPPE, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict* (Oxford: Hart Publishing, 2008) at 311. This argument is, however, not convincing: the UNSC Resolution clearly qualifies as “unlawful” the initial conduct of Iraq (the aggressor), which entails Iraq’s liability for all consequential loss and injury resulting from the original breach of international law. Similarly, see Vera GOWLLAND-DEBBAS, “Security Council Enforcement Action and Issues of State Responsibility” (1994) 43 *International and Comparative Law Quarterly* 55 at 65, using the term “original sin” to indicate the grounding of Iraq liability into its unlawful invasion and occupation of Kuwait.

34. SC Res. 687, *supra* note 32 at para. 18.

35. SC Res. 692, 20 May 1991, para. 6.

36. Notably, the Vietnam War, where US forces used chemical herbicides (e.g. Agent Orange) to defoliate forests and techniques to modify the weather; the Iran-Iraq War (1980–88), where oilfields and infrastructures were constantly targeted.

37. E.g. during the 1999 Kosovo campaign, NATO attacked oil industries and chemical factories, with the consequent release of pollutants in the air, water, and soil. The 2006 Israel-Lebanon war is another armed conflict where severe environmental damage caused by the targeting of oil tanks was reported.

circumstances of its creation, which in turned influenced its institutional framework, legal practice, and outcome.³⁸

II. INSTITUTIONAL FRAMEWORK AND ENVIRONMENTAL AWARDS

A. *The Unique Structure of the UNCC*

A point to be immediately noted is the unique institutional framework of the UNCC. International claims and compensation commissions are institutions established by an agreement between two or more states, or by an international organization, to settle interstate claims (or private claims against the respondent state) that, in the majority of cases, arise out of armed conflict, episodes of domestic disturbance, or revolutionary events.³⁹ They are considered by some scholars as a subcategory of international arbitral institutions.⁴⁰ More precisely, international claims/compensation commissions have been described as “an arbitration (1) established by agreement of two or more States, (2) to adjust a class of claims within a specified competence, (3) brought or espoused by nationals of the parties, and which (4) actually rendered an award on some or all of those claims”.⁴¹ The UNCC departs in several ways from this definition of international claims and compensation commissions.

The UNCC was created by the UNSC acting under Chapter VII of the UN Charter and, from the beginning, it was intended as a “subsidiary organ” of the Council with the task of performing a variety of administrative, financial, legal, and policy functions.⁴² The main organ of the UNCC was its 15-member Governing Council, comprising representatives of the members of the UNSC at a given time, whose fundamental functions were to establish guidelines on the major issues (e.g. categories of claims, definition of “direct loss”, requirements for the presentation of claims, procedures to settle disputed claims)⁴³ and take the final decision on the claims brought before them.⁴⁴

38. The unprecedented reaction of the UNSC has been explained by pointing at a number of factors: the gravity of the environmental damage caused by Iraqi forces; the broad condemnation of Saddam Hussein’s reckless conduct of warfare; and the post-Cold War political scenario. This was a time when a broad consensus emerged within the international community that enforcement of international law would be possible. Interestingly, the intention to hold Iraq accountable for any violation of international law emerges from a letter from US President Bush to Saddam Hussein dated 9 January 1991, before the Coalition’s intervention: “The United States will not tolerate the use of chemical or biological weapons, support of any kind for terrorist actions, or the destruction of Kuwait’s oil fields and installations ... You and your country will pay a terrible price if you order unconscionable acts of this sort.” See Roberts, *supra* note 10 at 244.

39. Cesare P.R. ROMANO, “A Taxonomy of International Rule of Law Institutions” (2011) 2 *Journal of International Dispute Settlement* 241 at 264.

40. David J. BEDERMAN, “The United Nations Compensation Commission and the Tradition of International Claim Settlement” (1994) 27 *New York University Journal of International Law and Politics* 1 at 2, *ftn* 2.

41. *Ibid.*

42. Report of the Secretary General to the Security Council pursuant to paragraph 19 of Security Council Resolution 687 (1991), UN Doc. S/2259, 2 May 1991, para. 4.

43. *Ibid.*, at para. 10.

44. *Ibid.*, at para. 26.

The Governing Council was assisted by a number of commissioners, nominated by the UN Secretary General and appointed by the Governing Council, having expertise in strategic areas, such as law, finance, accountancy, and environmental damage assessment.⁴⁵ The commissioners worked in three-member Panels, each dealing with a particular category of claims. The task of the Panels was to review the evidence provided by the claimants, evaluate the validity of the claims, quantify the loss or injury in monetary terms, and issue recommendations for the Governing Council on the amount of compensation to be paid.⁴⁶

Not only did the UNSC play a central role in the administration of the institution, but, contrary to the rule that each party in an arbitral proceeding is entitled to appoint an arbitrator, Iraq was not represented in the Governing Council, nor were Iraqi nationals appointed as Commissioners. It will be seen how these features had an impact on the compensation of conflict-related environmental damage.

B. *The Legal Basis for Iraq's Liability and Impact on Compensation for Environmental Damage*

The legal basis for Iraq's liability is spelled out in UNSC Resolution 687, which "reaffirms" the country's liability under international law for environmental damage and depletion of natural resources resulting from Iraq's invasion and occupation of Kuwait. Whilst the text of the resolution refers generally to liability "under international law",⁴⁷ scholars contend that the wrongful act in Resolution 687 that gives rise to Iraq's liability is a violation of the *jus ad bellum* (i.e. the unlawful invasion and occupation of Kuwait).⁴⁸ Interestingly, there is no express reference to any violation of IHL in Resolution 687, albeit in a number of previous resolutions the UNSC stressed that Iraq was bound by the Fourth Geneva Convention of 1949 and was responsible for any breaches of that instrument.⁴⁹

This interpretation is supported by subsequent decisions of the Governing Council. With Decision 7, the Governing Council held that "payments are available with respect to any direct loss, damage, or injury to governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait".⁵⁰ Although the

45. *Ibid.*, at para. 5.

46. *Ibid.*, at para. 26. See also Cymie R. PAYNE, "Legal Liability for Environmental Damage: The United Nations Compensation Commission and the 1990–1991 Gulf War" in Carl BRUCH, Carroll MUFFETT, and Sandra S. NICHOLS, eds., *Governance, Natural Resources and Post-Conflict Peacebuilding* (Abingdon: Routledge, 2016), 719.

47. While acknowledging that the terms "liability" and "responsibility" may have different meanings, especially in international environmental law, in this paper I will use the term "liability", as this is the term employed by the UNSC.

48. See e.g. Low and Hodgkinson, *supra* note 13 at 412; Christopher GREENWOOD, "State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations" (1996) 69 *International Law Studies* 397 at 406; Marco FRIGESSI DI RATTALMA and Tullio TREVES, *The United Nations Compensation Commission: A Handbook* (The Hague: Kluwer Law International, 1999) at 16–17.

49. SC Res. 666, 13 September 1990; SC Res. 670, 25 September 1990; SC Res. 674, 29 October 1990.

50. Decision Taken by the Governing Council of the United Nations Compensation Commission, S/AC.26/1991/7/Rev.1, 17 March 1992, para. 34 (emphasis added), according to which "direct loss" is "any loss suffered as a result of a) military operations or threat of military action by either side during the period August 2, 1990–March 2, 1991; b) departure of persons from or their inability to leave Iraq or Kuwait

Governing Council was silent on the applicability of the laws of armed conflict, it specifically allowed for compensation of any losses and damage arising out of military operations or threat of military actions “by either side”.⁵¹ As a consequence, Iraq had to pay compensation even if the Iraqi forces did not violate any IHL norms in the specific case, and even if the damage was caused by the Coalition.⁵² By holding Iraq liable also for the damage caused by the Coalition Forces, the Governing Council indirectly confirmed that Iraq was in breach of Article 2(4) of the UN Charter and that such violation of the *jus ad bellum* constituted the legal basis of its international liability.

The impact of Resolution 687 and Governing Council’s Decision 7 on compensation for environmental damage should not be underestimated. The claimants were absolved from demonstrating that the acts of the Iraqi military were in breach of the *jus in bello* and that the specific environmental damage was a direct consequence of this violation.⁵³ Notably, the claimants did not have to prove that the threshold(s) of environmental damage established under the laws of armed conflict had been reached, nor was Iraq allowed to invoke defences under the *jus in bello* (e.g. military necessity). Relying on UNSC Resolution 687 and the Governing Council’s decision, the Panel in charge of environmental claims considered the issue of Iraq’s liability to be outside its mandate, and focused exclusively on the evaluation of the claims and determination of the compensation to be paid.⁵⁴

C. Review of Environmental Claims and Awards

The claims were divided into six categories: categories A, B, C, and D for claims by individuals, category E for claims by corporations, and category F for claims by governments and international organizations. Environmental claims were part of category F, more precisely F4. The Panel in charge of environmental claims began its work in 2000, almost ten years after UNSC Resolution 687 was adopted, and completed the review process in 2005. Some scholars observe that the significant lapse in time, as well as the inclusion of environmental claims into the F category evince the low priority of environmental claims in the overall process.⁵⁵ Undoubtedly, environmental claims represented a small fraction of the total number of claims reviewed by the

during the same period; c) action by Iraqi government officials or agents connected to the invasion or occupation; d) the breakdown of civil order in Kuwait or Iraq during this period; or e) hostage-taking or other illegal detention” [*Decision 7*].

51. *Ibid.* (emphasis added).

52. Veijo HEISKANEN and Nicolas LEROUX, “Applicable Law: Jus ad Bellum, Jus in Bello, and the Legacy of the UN Compensation Commission” in Timothy J. FEIGHERY, Christopher S. GIBSON, and Trevor M. RAJAH, eds., *War Reparations and the UN Compensation Commission: Designing Compensation after Conflict* (Oxford: Oxford University Press, 2015), 51 at 61.

53. Greenwood, *supra* note 48 at 407.

54. José R. ALLEN, “Points of Law” in Cymie R. PAYNE and Peter H. SAND, eds., *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford: Oxford University Press, 2011), 141 at 143. See also Heiskanen and Leroux, *supra* note 52 at 74.

55. See e.g. Meredith DuBarry HUSTON, “Wartime Environmental Damage: Financing the Cleanup” (2002) 23 *University of Pennsylvania Journal of International Economic Law* 899 at 912–13.

UNCC.⁵⁶ Yet, it is the inclusion of environmental claims in the process that makes the approach of the UNCC unprecedented.

Being the first time that conflict-related environmental issues were addressed by a compensation commission, a difficult question to be answered concerns the definition of actionable harm. What types of losses or injuries should be made compensable as “direct environmental damage and [the] depletion of natural resources”? The answer was provided by the Governing Council with Decision 7:

a) abatement and prevention of environmental damage; b) reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment; c) reasonable monitoring and assessment of the environmental damage for the purpose of evaluation and abating the harm and restoring the environment; d) reasonable monitoring of public health and performing medical screenings; and e) depletion of or damage to natural resources.⁵⁷

This list includes both economic losses incurred by states to monitor, assess, mitigate, and restore environmental damage and its health consequences, as well as category (e) which, as we will see, has been interpreted to cover losses of environmental resources without a commercial value (i.e. pure environmental damage). In its first report, the F4 Panel dealt with claims for monitoring and assessing the effects of the Gulf War on the environment and on public health in neighbouring countries; it awarded US\$243 million to Saudi Arabia, Kuwait, Iran, Jordan, and Syria.⁵⁸ In its second report, the Panel focused on claims from countries that provided technical assistance to the Gulf States in responding to and mitigating the environmental impact of the conflict (so-called “environmental solidarity costs”).⁵⁹ The Panel found that neither UNSC Resolution 687, nor Governing Council decisions, limited compensation to loss or expenses incurred by the Gulf States, and that costs resulting from third countries’ assistance to the states in the region could be claimed as well. These countries, including Australia, Canada, Germany, the US, the UK, and the Netherlands, were awarded a total of US \$8.4 million.

The final three reports dealt with claims for remediation of environmental damage and depletion of natural resources. In addition to the costs for restoring damaged environmental resources, in an unprecedented move the F4 Panel recognized that “pure environmental damage” was also compensable.⁶⁰ On the one side, some claimants contended that the temporary loss of the use of natural resources ought to be compensated; Iraq, on the other side, argued that only financially assessable losses are subject to compensation under the law of state responsibility, hence interim loss of

56. The number of environmental claims reviewed (168) and for which compensation was awarded (109) represents a small fraction of the total number of claims reviewed (2,685,963) and for which compensation was awarded (1,543,510). See Payne, *supra* note 46 at 729, Table I.

57. See *Decision 7*, *supra* note 50 at para. 35.

58. Peter H. SAND, “Compensation for Environmental Damage from the 1991 Gulf War” (2005) 35 *Environmental Policy and Law* 244 at 246. See also Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of “F4” Claims, S/AC.26/2001/16, 22 June 2001.

59. Sand, *ibid.*, at 246.

60. Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of “F4” Claims, S/AC.26/2005/10, 30 June 2005, at paras. 44–58.

non-commercial natural resources had to be rejected.⁶¹ The Panel had to solve the issue of whether “claimants who suffer[ed] damage to natural resources that have no commercial value are entitled to compensation beyond reimbursement of expenses incurred or to be incurred to remediate or restore the damaged resources”.⁶² It maintained that nothing in the texts of Resolution 687 and Governing Council decisions restricted compensation to damage to natural resources that have a commercial value.⁶³ The Panel went even further and affirmed that its statement was not inconsistent “with any principle or rule of general international law”. It observed that the fact that some conventions on civil liability exclude compensation for pure environmental damage is a not a “valid basis for asserting that international law, in general, prohibits compensation for such damage in all cases, even where the damage results from an internationally wrongful act”.⁶⁴ Examples of “pure environmental damage” awarded by the F4 Panel include upholding Jordan’s claim for loss of its wildlife habitat (US\$160.3 million) and Saudi Arabia’s allegations of damage to its costal shorelines (US\$46.1 million).⁶⁵

These cases demonstrate that the F4 Panel was able to take innovative approaches on many controversial issues, notably compensation of “environmental solidarity costs” and “pure environmental damage”. Yet, arguably, such developments would have been more difficult to achieve without the support of the Governing Council decisions recalled above and the authority of UNSC Resolution 687.

III. A CRITIQUE OF THE UNCC AS AN INSTITUTIONAL RESPONSE TO CONFLICT-RELATED ENVIRONMENTAL CONCERNS

Accounts of the legacy of the UNCC in the area of compensation for conflict-related environmental damage are, unsurprisingly, positive. By June 2005, the F4 Panel had reviewed 168 environmental claims and recommended awards totalling US\$5.26 billion, of which US\$4.97 billion had actually been paid by January 2011; this sum represents the largest amount of compensation for environmental damage in international law.⁶⁶ Further, as observed above, the UNCC dealt with a variety of technical issues and elaborated principles that may inform future environmental litigation. In terms of actionable harm, with Decision 7 the Governing Council identified a list of categories of losses which constituted “direct environmental damage and depletion of natural resources”, later clarified by the F4 Panel. Additionally, the F4 Panel applied innovative methods borrowed from environmental disciplines to define criteria for the

61. *Ibid.*, at paras. 45–51.

62. *Ibid.*, at para. 52.

63. *Ibid.*, at para. 55.

64. *Ibid.*, at para. 58.

65. Payne, *supra* note 46 at 738.

66. Cymie R. PAYNE, “Environmental Claims in Context: Overview of the Institution” in Cymie R. PAYNE and Peter H. SAND, eds., *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford: Oxford University Press, 2011), 1 at 2.

evaluation and monetary compensation of “pure environmental damage” (e.g. the Habitat Equivalency Analysis).⁶⁷

Yet, any assessment of the UNCC as an institutional response to the environmental impact of armed conflict cannot focus exclusively on the work of the F4 Panel with regard to environmental claims, but equally requires a look at the bigger picture. In what follows, I question of the legacy of the UNCC by focusing on three critical issues: the normative framework applied by the Commission; its application of the law of state responsibility (notably, the rules on causation and remedies); and the enforcement of international liability, including the punitive and biased character of UNSC Resolution 687 and, indirectly, the Commission.

A. *Liability for Environmental Damage Under the Jus ad Bellum: Some Unintended Consequences*

As noted above, UNSC Resolution 687 referred in general terms to Iraq’s liability under international law, without specifying which laws, treaties, or customs Iraq had breached.⁶⁸ Decision 7 of the Governing Council clarified that the legal basis of Iraq’s liability (including for environmental damage) should be found in the international prohibition on the use of force (the *jus ad bellum*).⁶⁹ The F4 Panel followed up and, in its decision-making process did not refer to any additional rules of international law (e.g. the *jus in bello* or international environmental law) to further demarcate the scope of Iraq’s liability for environmental damage.

It should be noted that the UNCC was not conceived as a judicial body, but as a fact-finding/administrative organ in charge of resolving and processing claims, with limited “quasi-judicial functions”.⁷⁰ Nonetheless, Article 31 of the Provisional Rules for Claim Procedure provided that the Commissioners shall apply, in addition to UNSC’s resolutions and Governing Council’s decisions, “other relevant rules of international law”, where necessary.⁷¹ The F4 Panel, however, interpreted “necessary” quite narrowly, as referring to situations “where the Security Council resolutions and the decisions of the Governing Council do not provide sufficient guidance for the review of particular claim”.⁷² In other words, although in principle the Commissioners were not precluded from referring to the *jus in bello* or other international legal frameworks (e.g. international environmental law) while adjudicating environmental claims, such a possibility was not considered.

67. Sand, *supra* note 58 at 247.

68. The preparatory works of Resolution 687 do not help to clarify the legal basis and scope of Iraq’s liability for environmental damage and depletion of natural resources. The draft proposal and the verbatim record of the UNSC session on 3 April 1991 do not provide any indication on the justification and interpretation of Iraq’s liability for environmental damage. See Koppe, *supra* note 33 at 312.

69. E.g. Decision 7, *supra* note 50.

70. Report of the Secretary-General Pursuant to Paragraph 19 of SC Res. 687 (1991), UN Doc. S/22559, 2 May 1991, para. 20.

71. Decision Taken by the Governing Council of the United Nations Compensation Commission, S/AC.26/1992/10, 26 June 1992, art. 31 [Decision 10].

72. Report and Recommendation made by the Panel of Commissioners Concerning the Third Instalment of “F4” Claims, S/AC.26/2003/31, 18 December 2003, para. 34.

What are the implications (if any) of framing Iraq’s liability for environmental damage as a violation of the *jus ad bellum*?

It can be argued that the UNCC contributed to the development of the law on environmental protection in times of armed conflict, as it recognized the *jus ad bellum* as a complementary framework to address wartime environmental wrongs.⁷³ If one considers the flaws and high threshold of damage under the provisions of the laws of war, the *jus ad bellum* offers an easy escape route to hold a state accountable for all environmental damage ensuing from the initial breach (i.e. the illegal use of force).

The intense scholarly debate surrounding the legality of Iraq’s conduct under the laws of armed conflict seems to confirm the advantages of relying on the *jus ad bellum*. With regard to the provisions offering direct protection to the environment in wartime (i.e. the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques [ENMOD] and Articles 35(3) and 55 of Additional Protocol I), commentators observe that Iraq was not party to Additional Protocol I or the ENMOD Convention, and that the two treaties did not reflect customary law at that time.⁷⁴ Had the two treaties been binding, the majority of commentators contend that the environmental damage caused by Iraqi forces did not reach the threshold set in Articles 35(3) and 55 of Additional Protocol I, particularly the long-term requirement. Scholars also maintain that the actions of the Iraqi forces could not strictly qualify as an “environmental modification technique” pursuant to the ENMOD Convention.⁷⁵ Concerning the provisions offering indirect protection to the environment, some scholars claim that Iraq was in breach of the prohibition of unnecessary destruction of enemy property, as the military rationale behind the oil fires was questionable at the very least,⁷⁶ and arguably were not “imperatively demanded by the necessities of war”.⁷⁷ Further, it has been noted that whilst oil refineries may be regarded as military objectives, the oil wells destroyed by Iraq “were mining crude oil, not refining it”,⁷⁸ a difference that may change their nature as legitimate military targets. Other commentators, however, have more nuanced views and argue that the defence of military necessity may have justified some of the actions carried out by the Iraqi military in Kuwait, including some of the oil fires and spill, because they slowed

73. Indeed, some commentators have claimed that “the prohibition against the use of force in Article 2(4) is capable of protecting any object, including the environment, which might be affected by the unlawful use of force”. Low and Hodgkinson, *supra* note 13 at 459.

74. Greenwood, *supra* note 48 at 407. See also Low and Hodgkinson, *supra* note 13 at 427.

75. Hulme, *supra* note 27 at 171–5; Low and Hodgkinson, *supra* note 13 at 427–30; Roberts, *supra* note 10 at 250–1; Yoram DINSTEIN, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004) at 194. Contra, see Lijnzaad and Tanja, *supra* note 7 at 195–6, arguing that the damage caused by Iraq could fall within the scope of Additional Protocol I and the ENMOD Convention.

76. Roberts, *supra* note 10 at 248–9, noting that the reasons behind oil fires and spill seem more “punitive” than “tactical”. See also Dinstein, *supra* note 75 at 192.

77. Low and Hodgkinson, *supra* note 13 at 441, although the authors acknowledge that military necessity should be evaluated based on the information available at the time the choice is made, not in a retrospective way. See also Hulme, *supra* note 27 at 175–85; Lijnzaad and Tanja, *supra* note 7 at 196.

78. Hulme, *supra* note 27 at 179.

down the operation of the Coalition air and ground forces, thus offering some military advantage to Iraq.⁷⁹

Although, at first sight, reference to the *jus ad bellum* may offer a clear advantage in establishing that a state has breached an international obligation, the pitfalls of an expansion of the *jus ad bellum* so as to include liability for wartime environmental damage must also be considered.

First, the *jus ad bellum* and the *jus in bello* are complementary, but separate, bodies of law, with different rationales, beneficiaries, and sanctions.⁸⁰ The *jus ad bellum* is, in general terms, a more rudimentary framework than the *jus in bello*. The scope of the *jus ad bellum* is to regulate and restrain the international use of force, not to identify the rules of behaviour to which belligerents must comply. Thus, the *jus ad bellum* does not and cannot provide clear guidance on what level of environmental damage is permitted and what proscribed in the conduct of hostilities, and what procedural obligations belligerents must observe to ensure adequate protection of the environment.

Related to this point is the critique that the UNCC's preference for the *jus ad bellum* resulted in an insignificant contribution to the clarification of the provisions relevant for the protection of the environment in wartime (e.g. the *jus in bello*, international environmental law).⁸¹ In an area where international practice is almost absent, the creation of an institution explicitly mandated to address conflict-related environmental damage offered a unique opportunity to apply scattered, vague legal concepts and obligations to concrete cases. Such an opportunity was missed.

Second, a distinction ought to be made between the liability arising out of a violation of the *jus ad bellum* as opposed to the *jus in bello*. The approach of the Eritrea-Ethiopia Claims Commission in this regard seems to better reflect the different rationales of the *jus ad bellum* and the *jus in bello*. The Commission took the view that Eritrea (the aggressor) could not bear the "sole legal responsibility for all that happened

79. See e.g. Christopher D. STONE, "The Environment in Wartime: An Overview" in Jay E. AUSTIN and Carl E. BRUCH, eds., *The Environmental Consequence of War: Legal, Economic and Scientific Perspectives* (Cambridge: Cambridge University Press, 2000), 16 at 28–9. See also Greenwood, *supra* note 48 at 407, arguing that it is "far from clear that all those acts of destruction lacked a justification in military necessity"; Schmitt, *supra* note 9 at 297. For an account of the potential military and strategic considerations behind the oil spill and oil fires, see Al-Damkhi *supra* note 24 at 39.

80. The scholarship on the relations between the *jus ad bellum* and the *jus in bello* is vast and cannot be fully addressed in a footnote. Traditionally the concepts of the *jus ad bellum* and the *jus in bello* have been developed to distinguish between two different stages of a conflict and the relative regulatory frameworks: the first includes the rules legitimizing the use of force against another state; the second embraces the norms governing the conduct of hostilities. The distinction has a long history, but it was at the beginning of the twentieth century, with the prohibition of wars of aggression in the Covenant of the League of Nations, the Kellogg-Briand Pact, and the UN Charter, that a legal foundation of the two concepts was established. Common art. 1 to the 1949 Geneva Conventions and the Preamble of Additional Protocol I reaffirm the principle of equal application of the *jus in bello* to all belligerents, without distinctions based on the origins or nature of the conflict. The traditional distinction is facing many challenges in contemporary armed conflict: the cases of humanitarian intervention and the war on terror raise a number of questions on the relationship between the two areas of law. See e.g. Carsten STAHN, "'Jus ad bellum', 'jus in bello' ... 'jus post bellum'?—Rethinking the Conception of the Law of Armed Force" (2006) 17 *European Journal of International Law* 921.

81. See e.g. Phoebe OKOWA, "Environmental Justice in Situations of Armed Conflict" in Jonas EBBESSON and Phoebe OKOWA, eds., *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009), 231 at 243. See also Stahn, *supra* note 80 at 29.

throughout the two years of the conflict”.⁸² In more general terms, the Commission maintained that “[a] breach of the *jus ad bellum* by a State does not create liability for all that comes after”.⁸³ On the basis of the two criteria of proximity and foreseeability, a benchmark was established, against which the Eritrea-Ethiopia Claims Commission assessed whether or not a specific injury or loss was a result of the initial breach of the *jus ad bellum*.

The distinction does not concern only the scope of liability but, according to the Eritrea-Ethiopia Claims Commission, it has some bearing on the amount of compensation as well. In addition to considering claims for violations of the *jus in bello* and the *jus ad bellum* in separate headings, the Commission maintained that “while appropriate compensation to a claiming State is required to reflect the severity of damage caused to that State by the violation of the *jus ad bellum*, it is not the same as that required for violations of the *jus in bello*”.⁸⁴ In particular, in instances where the Commission awarded compensation for violations of the *jus ad bellum*, the amount was lower than what would have been recognised in a case of violation of the *jus in bello*.⁸⁵ If one follows the Eritrea-Ethiopia Claims Commission’s line of argument, compensation for environmental damage caused by a breach of the *jus ad bellum* will be lower than if the same damage was a result of a violation of the *jus in bello*. Considering that significant amounts of money are often required to remedy environmental damage, the consequence of relying on the *jus ad bellum* would be paradoxical in practical terms.

Third, there is a more subtle risk in the decision to ground a state’s liability for environmental damage in a breach of the *jus ad bellum*. According to classical deterrence theories, a way to reinforce the protection of the environment during armed conflict, and to strengthen compliance with international obligations, is to hold a transgressor state liable for its breach(es). The decision to link Iraq’s liability to the illegal use of force against Kuwait may have a positive effect on compliance with the *jus ad bellum*, as it reinforces the mandatory nature of the prohibition in Article 2(4) of the UN Charter. The same cannot be said with regard to the obligations under the *jus in bello*, most notably those pertaining (directly or indirectly) to the protection of the environment. Indeed, these obligations are weakened by the lack of any reference to IHL in the practice of the UNCC. The impression one may get is that environmental damage becomes a serious concern of the international community (and its institutions) only when it arises out of an unlawful use of the force, whereas what happens after the “first fatal blow” is without any legal consequence.

Whilst the proverbial “stick” approach is important to secure compliance with international obligations, the “carrot” approach also has a role to play. As the Eritrea-Ethiopia Claims Commission puts it, “[i]mposing extensive liability for conduct that

82. Eritrea-Ethiopia Claims Commission, Final Award Ethiopia’s Damages Claims between the Federal Democratic Republic of Ethiopia and the State of Eritrea, 17 August 2009, para. 282.

83. *Ibid.*, at para. 289.

84. *Ibid.*, at para. 316.

85. J. Romesh WEERAMANTRY, “Eritrea’s Damages Claims (Eritrea v. Ethiopia), Ethiopia’s Damages Claims (Ethiopia v. Eritrea)” (2010) 104 American Journal of International Law 480 at 487.

does not violate the *jus in bello* risks eroding the weight and authority of that law and incentive to comply with it, to the injury of those it aims to protect”.⁸⁶ To put it differently, why should an unlawful aggressor respect the laws of war, if after the conflict it will not be allowed to invoke compliance with such law to mitigate its liability?⁸⁷

Ultimately, maintaining a distinction between liability ensuing from violations of the *jus ad bellum* and of the *jus in bello* serves a more fundamental goal, that is, to ensure that belligerent parties respect IHL regardless of the legality of their use of force. Otherwise, an armed conflict is transformed into “a struggle which may be subject to no regulation at all”.⁸⁸ In that case, the environmental and human toll of unrestrained conduct of warfare would be dramatic, leaving a post-conflict country with no hope for a future of sustainable peace and development.

In sum, although relying on the *jus ad bellum* to impose liability for wartime environmental damage may appear to offer some advantage, there are several risks associated with giving precedence to such body of law at the expense of the *jus in bello*, which must be exposed as well.

B. *The UNCC and the Law of State Responsibility: Causation and Remedies*

Iraq’s obligation to provide compensation for the damage (including environmental damage) caused by the illegal use of force against Kuwait is often seen as an application of the law of state responsibility. It has been argued that “[t]he Commission is a concrete manifestation of the international community’s commitment to the principles of state responsibility”.⁸⁹ Pursuant to the law of state responsibility, as codified by the International Law Commission [ILC], “every internationally wrongful act of a State entails the international responsibility of that State”.⁹⁰ Two elements are required to give rise to state responsibility: conduct attributable to the state and the breach of a legal obligation binding upon that state.⁹¹

A state responsible for an internationally wrongful act has an obligation to make “full reparation” for the injury caused by its action or omission.⁹² The concept of

86. Eritrea-Ethiopia Claims Commission, *supra* note 82 at para. 316.

87. Heiskanen and Leroux, *supra* note 52 at 77.

88. Hersch LAUTERPACHT, “The Limits of the Operation of the Laws of War” (1953) 30 *British Yearbook of International Law* 206 at 212.

89. John R. CROOK, “The United Nations Compensation Commission—A New Structure to Enforce State Responsibility” (1993) 87 *American Journal of International Law* 144 at 157. A similar argument is made, in more general terms, by Vincent-Joël PROULX, *Institutionalizing State Responsibility: Global Security and UN Organs* (Oxford: Oxford University Press, 2016). See also Payne, *supra* note 14 at 332.

90. Articles on Responsibility of States for Internationally Wrongful Acts [ARSIWA], Report of the International Law Commission on the Work of its 53rd Session, 23 April–1 June and 2 July–10 August 2001, A/56/10, 2001, art. 1.

91. *Ibid.*, art. 2.

92. *Ibid.*, art. 31. As affirmed by the Permanent Court of International Justice in the *Factory at Chorzów*: “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.” Judgment (Jurisdiction), *Case Concerning the Factory at Chorzow (Germany v. Poland)*, PCIJ, 26 July 1927. Pursuant to art. 34 of ARSIWA, reparations take the form of restitution, compensation, and satisfaction.

“injury” is defined by the ILC as including “any damage, whether material or moral, caused by the internationally wrongful act of a State”; Article 31(2) makes it clear that there must be a causal link between the internationally wrongful act and the damage. Briefly, state responsibility requires a violation of an international obligation; the consequential duty to provide reparation arises only in relation to damage that is causally linked to the violation.

This section focuses on the requirement of a causal link between the wrongful act and the injury to the environment, and examines how the UNCC dealt with this aspect. Then, the approach of the UNCC with regard to the question of remedies, and in particular compensation for “pure environmental damage” (or “non-use values”), will be discussed.

The ILC Commentary maintains that the injury should not be “too remote” or “consequential” to be the subject of reparation, although it is recognized that the “requirement of a causal link is not necessarily the same in relation to every breach of an international obligation”.⁹³ As reaffirmed recently by the International Court of Justice [ICJ], establishing a causal connection between a certain conduct and the injury to the environment is particularly problematic.⁹⁴ Difficulties arise from the very nature of environmental damage and include the following factors: the geographical distance between the source of pollution and the damage; the time lapse between the conduct and the effects of the conduct on the environment; and, most significantly, the multifactorial origin of harms to the environment.⁹⁵ Similarly, the Eritrea-Ethiopia Claims Commission raised questions about attribution and co-causation of environmental damage when rejecting Ethiopia’s environmental claims.⁹⁶ As such, the Commission noted that “[t]he Damages Memorial did not address the possibility that Ethiopian forces or civilians may have played some role in environmental degradation during the war”.⁹⁷

93. See James CRAWFORD, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 204–5. Different standards for the causal inquiry have been elaborated in the literature. Ian Browlie, for instance, contends that compensation should cover the losses, which are “proximate” to the acts or omissions. See generally, Ian BROWNLIE, *System of the Law of Nations: State Responsibility* (Part I) (Oxford: Oxford University Press, 1983) at 225–7. Another criterion is “foreseeability”, applied for instance in the *Portuguese Colonies case (Portugal v. Germany)*, 1928, UNRIIAA, vol. II (Sales No. 1949.V.I), at 1031.

94. In its first decision on compensation for environmental damage, the ICJ recognized that “[i]n cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered.” See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Order, 2 February 2018, para. 34 [*Certain Activities Case*]. The Court, in other words, did not elaborate general criteria to establish the existence of causation in cases of environmental damage. This statement potentially opens the door to diverse approaches by different dispute-resolution bodies ruling on environmental matters.

95. Alexandre KISS, “Present Limits to the Enforcement of State Responsibility for Environmental Damage” in Francesco FRANCONI and Tullio SCOVAZZI, eds., *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991), 3 at 5.

96. The Final Award of the Eritrea-Ethiopia Claims Commission briefly dealt with the impact of that conflict on the environment and natural resources. Ethiopia claimed more than US\$1 billion for environmental damages in Tigray, mostly related to the loss of gum Arabic and resin plants. See Eritrea-Ethiopia Claims Commission, *supra* note 82 at para. 421.

The UNCC took a different approach. First, it avoided the problem of co-causation, as Iraq was deemed to bear the sole responsibility for all episodes of environmental damage which had occurred during the conflict. Second, to demarcate the scope of Iraq's responsibility, the Governing Council held that only "direct environmental damage" ensuing from Iraq's invasion of Kuwait was to be compensated. Scholars, however, have criticized the terminology used by the Governing Council (i.e. "direct damage") for being confusing and unclear.⁹⁸ In any event, by listing the categories of environmental damage that were deemed a "direct" consequence of Iraq's wrongful act, Decision 7 of the Governing Council provided clear guidance to the F4 Panel and made the subsequent task of establishing a causal correlation between a particular environmental loss or expense and the war (or better, Iraq's aggression) much easier.

If state responsibility is enforced before a court or arbitral tribunal, evidence of the causal link between the environmental damage and a particular conduct that violates international law must be provided, according to the relevant standards of proof and rules of procedure. This task may be difficult to accomplish, as the case of the Eritrea-Ethiopia Claim Commission suggests. The Commission dismissed Ethiopia's claims for environmental damage, *inter alia*, for "lack of supporting evidence" and for Ethiopia's failure to exclude the possible contribution of its military or civilians to the environmental damage claimed.⁹⁹

The UNCC Governing Council adopted a flexible approach in terms of admission of evidence and its evaluation, as it required that claims "must be supported by documentary and other appropriate evidence *sufficient* to demonstrate the circumstances and the amount of the claimed loss",¹⁰⁰ without specifying any standard of proof. According to the "Provisional Rules for Claims Procedure" formulated by the Governing Council, it was up to each Panel to determine "the admissibility, relevance, materiality and weight of any documents and any other evidence submitted".¹⁰¹ For instance, with regard to claims for the monitoring and assessment of environmental damage (i.e. First Instalment Claims), the Panel maintained that conclusive proof of causation was not "a prerequisite for a monitoring and assessment activity to be compensable".¹⁰² It is not argued here that the F4 Panel awarded compensation for damage that was speculative or without a documented link to the invasion and occupation of Kuwait. In different instances the Panel rejected the claims because of

97. *Ibid.*, at para. 423.

98. Illias PLAKOKEFALOS, "Causation in the Law of State Responsibility and the Problem of Over-determination: In Search of Clarity" (2015) 26 *European Journal of International Law* 471 at 489. Also, in general, Illias PLAKOKEFALOS, "Reparation for Environmental Damage in Jus Post Bellum: The Problem of Shared Responsibility" in Carsten STAHN, Jens IVERSON, and Jennifer S. EASTERDAY, eds., *Environmental Protection and Transitions from Conflict to Peace* (Oxford: Oxford University Press, 2017), 257.

99. Eritrea-Ethiopia Claims Commission, *supra* note 82 at paras. 423, 425.

100. *Decision 7*, *supra* note 50 at para. 37 (emphasis added).

101. *Decision 10*, *supra* note 71.

102. Reports and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F4" Claims, *supra* note 58 at para. 30.

insufficient proof of damage or causation.¹⁰³ The point is that the more flexible evidentiary requirements reflect the *sui generis*, or exceptional nature of the UNCC.

A further problem with state responsibility for environmental damage concerns the nature of remedies. Whilst *restitutio in integrum* may be impossible in most of the cases, compensation requires calculation and monetarization of the damage, which may prove difficult for losses that go beyond clean-up costs and the devaluation of property. The UNCC had to confront this issue when Iraq claimed that only “financially assessable damage”¹⁰⁴ to natural resources could be compensated, meaning only losses to natural resources traded in markets.¹⁰⁵ The UNCC refused such an interpretation and held that the “financially assessable” requirement in the law of state responsibility does not exclude compensation of “pure environmental damage”.¹⁰⁶

In order to quantify the compensation for “pure environmental damage”, in most of the cases the F4 Panel relied on the Habitat Equivalency Analysis [HEA] to estimate the loss of ecological services from the damaged natural resources. Pursuant to this method, the assessment of the damage is done on the basis of the cost of environmental projects to replace ecological services that were provided in the past and that cannot be provided any more due to the irremediable damage to the natural resources.¹⁰⁷ Whilst the recognition that “pure environmental damage” (e.g. loss in biodiversity) can be compensated is a welcome development, the F4 Panel acknowledged that attributing an economic value to non-traded natural resources is a difficult exercise.¹⁰⁸ Likewise, in a recent case, the ICJ maintained that a certain degree of flexibility and approximation is necessary to evaluate in economic terms environmental damage,¹⁰⁹ and rather than attributing values to specific categories of environmental goods and services, it decided to adopt an “overall assessment of the impairment or loss of environmental goods and services prior to recovery”.¹¹⁰

103. Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Fourth Instalment of “F4” Claims, S/AC.26/2004/16, 9 December 2004.

104. ARSIWA, *supra* note 90, art. 36.

105. Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of “F4” Claims, S/AC.26/2005/10, *supra* note 60 at para. 46.

106. *Ibid.*, at para. 58. This position is in line with the Commentaries to ARSIWA; see Crawford, *supra* note 93 at 223, stating that “environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as ‘non use values’) is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.” Recently, the ICJ held that “it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, *in and of itself*, in addition to expenses incurred by an injured State as a consequence of such damage”. See *Certain Activities Case*, *supra* note 95 para. 41 (emphasis added).

107. Payne, *supra* note 46 at 737.

108. Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of “F4” Claims, *supra* note 60 at para. 81. It is equally true, however, that domestic courts have been asked to attribute an economic value to the loss of environmental resources and to do so they have relied on the work done by environmental economists to put a price on ecosystem services.

109. *Certain Activities Case*, *supra* note 94 para. 86.

110. *Ibid.*, para. 78. It is noteworthy that the parties had different views on the UNCC’s valuation practice, with Nicaragua arguing that the ICJ should follow the “ecosystem service replacement costs” adopted by the UNCC, whereas Costa Rica contended that that methodology was outdated and that the “ecosystem services approach” should be preferred: *ibid.*, paras. 48–51. Ultimately, the Court decided not to follow the criteria proposed by the parties and adopted its own approach.

Eventually, a closer look at the UNCC's practice suggests that a departure from a strict reading of the law of state responsibility, particularly on causation and remedies, was essential to ensure compensation for certain categories of conflict-related environmental damage. Undoubtedly, the exceptional institutional nature of the UNCC (not bound by rigid rules of procedure and evidence, as a judicial body) and its political and historical origins helped to achieve this result.

C. *Problems with the Enforcement of International Liability and the Spectre of "Victor's Justice"*

Even if all requirements in the law of state responsibility are satisfied, reparation orders need to be enforced and money collected. And here we face what has been called "the eternal problem of scarce credibility of international law in the matters of the guarantees, or better, the sanctions".¹¹¹ For the UNCC to be replicated in other contexts, the compensating country "must have some form of wealth that has a high degree of liquidity, that was not destroyed during the conflict, that is easily accessible to the UN, and that is not privately owned".¹¹² In the case of Iraq these conditions were exceptionally met. The financial resources for compensation were made available from the country's oil revenues;¹¹³ further, a fundamental condition for the establishment of the UNCC was Iraq's acceptance of its liability for all damage caused by the illegal invasion of Kuwait, as spelled out in the UNSC Resolution. As such, Resolution 687 stated that "upon notification by Iraq to the Secretary General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the member States cooperating with Kuwait in accordance with resolution 678 (1990)".¹¹⁴ The ceasefire was thus subordinated to Iraq's consent to the terms and conditions set forth in Resolution 687.

As noted in the literature, this aspect places the UNCC within the long tradition of international claims institutions established in the aftermath of international armed conflict, which generally excluded claims from citizens of the defeated party.¹¹⁵ Likewise, Iraq was held liable not only for the injuries (including environmental losses) caused by its troops to Kuwait and other neighbouring countries, but also for those caused by the Coalition Forces. In contrast, environmental damage inflicted by the Coalition Forces through the bombing of power stations, oil refineries, and chemical plants in Iraq was not addressed.¹¹⁶

111. Benedetto CONFORTI, "Do States Really Accept Responsibility for Environmental Damage", in Francesco FRANCONI and Tullio SCOVAZZI, eds., *International Responsibility for Environmental Harm* (London: Graham & Trotman, 1991), 179 at 179.

112. Rosemary E. LIBERA, "Divide, Conquer, and Pay: Civil Compensation for Wartime Damage" (2001) 24 *Boston College International and Comparative Law Review* 291 at 301.

113. The UNCC Fund was financed by thirty percent of Iraqi oil export revenues, later reduced to twenty-five percent in 2000 and to five percent in 2003. See Sand, *supra* note 58 at 245.

114. SC Res. 687, *supra* note 32 at para. 33.

115. See in general, Bederman, *supra* note 40.

116. See Report of the United Nations Secretary General to the President of the Security Council, UN Doc. S/22366, 20 March 1991.

Hence, criticisms have been made of the reparation regime created by the UNSC, labelled as “victor’s justice” and “punitive peace”.¹¹⁷ In more general terms, drawing from the experience of the Gulf War, commentators claim that, when it comes to implementing the standards of environmental protection in a particular situation, the result is often influenced by power dynamics and *realpolitik* considerations, and enforcement is generally limited to the defeated party.¹¹⁸ Among others, Richard Falk has strongly criticized the “arbitrary and ad hoc pattern of enforcement” of environmental protection in wartime.¹¹⁹ The scholar compares the case of Iraq with the reaction of the international community vis-à-vis the environmental consequences of the Vietnam War and the NATO intervention in the former Yugoslavia, and concludes that “an impression of double standards is unavoidable”.¹²⁰

The following quote by Michael Schmitt raises concerns as to the capacity of international institutions to deter conflict-related environmental damage, if they are subordinated to the victor-defeated narrative. He cynically observes that

[e]ven if reparations were widely imposed, it is unlikely that they would be an effective deterrent to environmental destruction. States that resort to armed force are unlikely to decide to forgo an act because of the pecuniary risk, for the risk only becomes a reality if the state suffers a military defeat. The desire to avoid possible defeat would certainly outweigh any deterrent effect generated by the possibility that the loser might have to make reparations. After all, in the vast majority of cases, the likelihood of defeat will exceed the likelihood of having to pay reparations; states sometime lose without having to pay, but they never make reparations without having lost.¹²¹

Whether the UNCC should be seen as a successful accountability story¹²² or biased justice, some considerations ensue from the enforcement of liability against Iraq. History shows that liability for damage caused by military operations is intertwined with political considerations, and is inevitably influenced by the results of the conflict,

117. Richard FALK, “The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime” in Jay E. AUSTIN and Carl E. BRUCH, eds., *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives* (Cambridge: Cambridge University Press, 2000), 137 at 147. See also Low and Hodgkinson, *supra* note 13 at 475, observing that para. 16 of SC Res. 687 evokes art. 231 of the Treaty of Versailles, which affirmed the “responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies” (emphasis added).

118. Falk, *supra* note 5 at 80. See also Carson THOMAS, “Advancing the Legal Protection of the Environment in Relation to Armed Conflict: Protocol I’s Threshold of Impermissible Environmental Damage and Alternatives”, in Rosemary RAYFUSE, ed., *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Leiden: Brill Nijhoff, 2014), 109 at 126; Okowa, *supra* note 81 at 243.

119. Falk, *supra* note 117 at 138.

120. *Ibid.*, at 141.

121. Michael SCHMITT, “Green War: An Assessment of the Environmental Law of International Armed Conflict” (1997) 22 *Yale Journal of International Law* 1 at 91.

122. Some scholars claim that the UNCC should not be seen as a form of punitive or retributive justice, but as a form of “practical justice”, an institution that delivered justice to millions of people who suffered damage as a result of Iraq’s invasion of Kuwait. See in particular, David D. CARON and Brian MORRIS, “The UN Compensation Commission: Practical Justice, not Retribution”, (2002) 13 *European Journal of International Law* 183 at 183–99.

thus enforcement often results in unfair and partial responses to the consequences of war, including the adverse environmental consequences. This brings to the fore the tension between the international recognition of environmental protection as a “global goal” or “common concern of mankind”¹²³ and a partisan approach to environmental reparation, or an approach that differentiates between winners and losers. On the one hand, if environmental protection is made dependent upon the victor-defeated narrative, the importance assigned to the environment in the post-conflict phase is attached to who the victor is and how important the environment is for the victor. On the other hand, peace and conflict studies indicate that the environment should be a central component of post-conflict recovery and the transition to peace, and that when environmental degradation caused by warfare is not redressed, it may lead to further grievances, insecurity, and violence.¹²⁴

Building on these arguments, some hard questions arise. What are the implications of leaving the environment of the defeated party out of the remediation efforts? Considering the problems with the enforcement of international obligations, how helpful would be the idea of requiring belligerent states to clean up and restore the environment, even when they formally complied with the *jus ad bellum* and the *jus in bello*? Should a broader notion of international assistance or solidarity be embraced where common/global values are affected? Whilst answering these questions would prove difficult, and perhaps lie beyond the scope of this paper, they draw attention to some of the problems associated with biased responses to the environmental impact of armed conflict, of the kind implemented in Iraq. They also invite us to expand our thinking about the complex nature of the environmental problems considered here and the limitations of current approaches.

IV. CONCLUDING REMARKS

This paper questioned the legacy of the UNCC as an institutional response to establish accountability for conflict-related environmental damage. It drew attention to three

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123. See e.g. the Sustainable Development Goals, in particular Goals 13 (climate action), 14 (life below water), and 15 (life on land), but also Goals 3 (good health and wellbeing) and 6 (clean water and sanitation), endorsed by the UN General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development*, GA Res. A/RES/70/1, 21 October 2015. Further, several IEL principles (e.g. precaution, intra- and inter-generational equity) and treaties require the protection of environmental resources situated within the territory of a state because of their value for the entire community of states (e.g. the UNESCO World Heritage Convention), or because their preservation is qualified as a “common concern of humankind” (e.g. the Convention on Biodiversity). What characterizes those treaties is the assertion that some environmental problems may affect the interests of the international community as a whole. The vision of the environment that underpins IEL is in sharp contrast with the victor-defeated dichotomy that characterized the UNCC’s work.
124. The pivotal work in the field of environmental security is that of Thomas F. HOMER-DIXON, “Environmental Scarcities and Violent Conflict: Evidence from Cases” (1994) 19 *International Security* 5. More recently, see Karen HULME, “Environmental Security: Implications for International Law” (2008) 19 *Yearbook of International Environmental Law* 3; Onita DAS, *Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective* (Cheltenham: Edward Elgar Publishing, 2013) at 68–77; R. FLOYD and R. MATTHEW, eds., *Environmental Security: Approaches and Issues* (Abingdon: Routledge, 2013). For the other side of the coin, i.e. the contribution of the environment to re-establish peace, see e.g. Carl BRUCH, Carroll MUFFETT, and Sandra S. NICHOLS, *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Abingdon: Routledge, 2016).

critical dimensions of the UNCC’s practice: the legal basis for the international liability of Iraq and the applicable framework; the departure from a strict reading of the law of state responsibility (particularly in terms of causation and remedies); and the biased/partial enforcement of liability for conflict-related environmental damage. I claimed that exceptionality has been an essential feature of the UNCC’s work, from its creation to the successful enforcement of environmental awards. At the same time, it is precisely the exceptional application of international rules and principles that makes the precedent of the UNCC problematic. Yet, it seems impossible to separate what is often hailed as a “success story” from its unique political nature and institutional framework. As we move forward, more research is needed so that future approaches to environmental damage would be less driven by this “logic of exception”. In particular, more attention should be given to the dynamics of contemporary armed conflict, including the actors involved, and how these dynamics influence legal responses. It is evident that, in times when wars are no longer fought by the regular forces of two or more states, but by “loose and fluid networks of state and non-state actors that cross borders”,¹²⁵ the model of the UNCC, which follows a state-centric approach to reparation, may be of limited value. In exploring more creative approaches, it may also be good to expand our understanding of the nature of conflict-related environmental harms and why it is important that those wrongs are redressed in the post-conflict phase. Environmental losses or injuries cannot always be repaired or financially assessed, and the time lapse between the ecological harm and its human effects makes its victims less visible. The “slow violence” of conflict-related environmental issues, however, is not less harmful than other forms of violence.¹²⁶ It aggravates the vulnerability of ecosystems on which, as humans, we depend, and of individuals who are already at the margins of society (notably, peoples in war-torn countries in the Global South), and may fuel grievances that, in turn, could result in further conflict. Perhaps it is time to take a broader perspective and rethink how the discipline of international law treats environmental matters in times of peace and war.

125. Christine CHINKIN and Mary KALDOR, *International Law and New Wars* (Cambridge: Cambridge University Press, 2017) at 11.

126. For the concept of “slow violence” in the context of the environmental impact of warfare, see Rob NIXON, *Slow Violence and the Environmentalism of the Poor* (Cambridge: Harvard University Press, 2011) at 225.