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The Viability of the UNCC's Post Conflict Reparation in the Gulf War's Environmental Damages

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**UNIVERSITÉ
DE GENÈVE**

FACULTÉ DE DROIT

**The Viability of the UNCC's Post Conflict Reparation
in the Gulf War's Environmental Damages**

Under the supervision of Professor
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Master's thesis
By Noor ALI

Abstract

This master's thesis aims to review the United Nations Compensation Commission's activity in the compensation of environmental damages, specifically in the circumstances of the Gulf War. This paper was written by dissecting the construction, jurisdiction, applicable law and the application of environmental damages to determine whether the UNCC is a viable *jus post bellum* utensil. Through this course of analysis, the examination of the UNCC's procedure will reveal some irregular procedural practices influenced by the political positions of UN member States. This thesis makes prominent the technical methods used to add a monetary value on environmental damages and its challenges. This study will further set light on how the unique experience of the UNCC can be used as a steppingstone for future reparations. Finally, this paper underlines the extent of the viability of the UNCC as a post conflict reparation institution.

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Abbreviations Table

Art.	Article(s)
HEA	“Habitat Equivalency Analysis”
ILC	International Law Commission
IUSCT	Iran-US Claims Tribunal
M&A	Monitoring and Assessment Claims
OPEC	The Organization of the Petroleum Exporting Countries
UN	The United Nations
UNCC	United Nations Compensation Commission
UN Charter	The United Nations Charter
UNCITRAL	UN Commission on International Trade Law
UNEP	United Nations Environmental Programme
UNSC	United Nations Security Council
UK	United Kingdom
US	United States of America
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I. Introduction

The United Nations Compensation Commission (UNCC) originates from 1991 whereby it was constituted as a subsidiary organ to the UN Security Council to handle the compensation of damages caused by the invasion of the State Kuwait by Iraqi forces¹. Additionally, it has therefore been a post-war institution used to install practical justice in order to compensate for international environmental damage².

Initially Iraq was held liable due to its breach of *jus ad bellum* in violating international peace and security by using force under Art. 2 (4) of the UN Charter. Whilst adopting its Resolution 660³ (1990), the UNSC condemned this invasion and ordered the withdrawal of Iraqi forces from Kuwait. As the presence of the troops persisted, mandatory arms and economic sanctions were adopted by the UNSC with the resolution 678⁴ (1990). A coalition of 35 States used its military forces against Iraq to compel its withdrawal. A formal ceasefire was eventually negotiated with the adoption of resolution 687⁵ (1991).

Iraq's invasion of Kuwait on the 2nd of August 1990 leading to the resulting Gulf War of 1991 has caused extraordinary environmental damages. With more than 700 oil wells set on fire and 6 million barrels of oil flaming each day for about ten months, this spectacle of environmental damages caused the loss of ecological equilibria in the region in addition to the loss of specie habitats and the emission of oil into the Persian Gulf⁶. Inevitably, this also led to grave risks to the public health that could be dressed to Iraq's liability⁷. Claimants formulated claims to restore the numerous environmental damages. After processing these claims and admitting to the need of large-scale environmental restoration, the commission awarded around \$3 billion to the State of Kuwait paid by the Government of Iraq⁸.

Whilst this process of attempting to achieve practical justice as a claims commission in the international context, there was an inevitable impact on both the perceptions of *jus in bello* and *jus post bellum*⁹. The perceptions of these terms therefore evolved. The present paper will analyze the UNCC in order to examine its qualification as a potential *jus post bellum* tool.

The evident and dispersed environmental damages coupled with Iraq's serious breach of the UN Charter are two factors that allowed Iraq's to be held liable¹⁰. Nevertheless, the legal basis of environmental protection was rather weak and fragile given that environmental damages were not a serious concern of the international community in that period¹¹. The integration of

¹ LOW/HODGKINSON, p. 430.

² UNCC, UNCC at a Glance, N 1.

³ UN Doc. S/RES/660

⁴ UN Doc. S/RES/678

⁵ UN Doc. S/RES/687

⁶ UNCC, Follow-Up Programme for Environmental Awards, N 1.

⁷ SCHMITT, p. 19.

⁸ UNCC, Follow-Up Programme for Environmental Awards, N 11.

⁹ LOW/HODGKINSON, p. 456.

¹⁰ AFRIANSYAH, p. 91.

¹¹ SCHMITT, p. 27.

environmental law principles in the reparation and the assessment of damages is an obstacle that the UNCC was able to overcome. This obstacle is characterized by the lack of harmony between peacetime environmental law and armed conflict legislations.

This study aims to assess the effectivity of the UNCC's post conflict reparation in imposing state liability for environmental damages in the Gulf War by analyzing the construction of the UNCC, its jurisdiction, its applicable law, the procedure of reparation, causation, the adoption of reparation and *jus post bellum*.

II. Preface on State Responsibility

Accountability and liability for international law violations is an essential component of establishing the obligatory force of law. In this view, an effective legal apparatus produces deterrence and thus prevents the reoccurrence of similar damages. Despite the importance and centrality of imposing liability, however, it is commonly known that with an absence of an executive body that can guarantee the application of international sanctions within country borders, some States seem to get away with their violations. Moreover, the extensive role that international politics play in the formation of international law causes the production of reluctant and vague legislations when dealing with post-conflict environmental reparation.

In order to introduce State responsibility, it is necessary to examine the relevant dispositions of the International Law Commission (ILC). This is because the ILC develops studies to enhance the development of international codifications. This codification claims that States are responsible for the commitment of wrongful acts¹². The principle of State responsibility and reparation is then set by the ILC.

Nevertheless, there is a politically lead reluctancy that pushes for treating post-conflict reparation dissimilarly than other international reparations. The ILC, in their work on international responsibility, declared that post-conflict responsibility should be treated in the same way as other forms of international conflict responsibility¹³. Legally, just as in other international disputes, according to Art. 31¹⁴ reparation is required when a State is liable. The reparation mentioned pursuant to this Article can be deciphered as full reparation as conceived in its literal terminology¹⁵. This reparation can therefore encompass reparation for environmental damages.

Art. 42 paragraph 3 stated that "*in no case [should] reparation result in depriving the population of a State of its own means of subsistence*"¹⁶. Governments called for the deletion

¹² UNGAOR, Responsibility of States for internationally wrongful acts of GA Res 56/83, UN Doc A/RES/56/83, 12 December 2001, Art. 1.

¹³ GATTINI, p. 162.

¹⁴ UNGAOR, Responsibility of States for internationally wrongful acts of GA Res 56/83, UN Doc A/RES/56/83, 12 December 2001, Art. 31.

¹⁵ GATTINI, p. 163.

¹⁶ ILC, Draft articles on the responsibility of states for internally wrongful acts were adopted by the ILC on second reading at its 53rd session, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001.

of this Article in their political position to protect their interests¹⁷. In the development of the principle of reparation, this constitutes an evident illustration of the intervention of politics in the development of the principle of reparation, in that the second reading was excluded. Although this Article could have been useful for various international practices such as the obligation of reparation of Iraq through the UNCC, the progress of international liability imposition is being halted through the political opinions of States with such modifications.

In this view, several reasons impacted the choice of including environmental damages under Iraq's liability.

a) Violation of the UN Charter

In invading the neighboring state of Kuwait, Iraq breached Art. 2 paragraph 4 of the UN Charter imposing that "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*". In this case, the invasion of Kuwait violates its territorial integrity through war as a means of force. This evident breach of a central disposition of the UN Charter is a factor that makes the inclusion of environmental damages under the liability of Iraq legitimate.

b) Iraq's Oil Generates Sufficient Funding

Iraq has the fifth largest oil reserves in the world as it is the "*second-largest crude oil producer in OPEC*"¹⁸. This amount of oil can produce a large enough amount of money to fund the reparation of the damages caused by Iraq. In this light, holding Iraq financially liable and monetizing the inflicted damages can only be fair, given that it is a damaging State capable of compensation. Indeed, petrol proceedings were used for funding the Compensation Fund.

c) Large-scale Environmental Damage

Iraq intentionally inflicted environmental damages that not only affected Kuwait but neighboring countries as well. These damages resulted in mass pollution of air and water: more than 700 oil reserves combusted and petrol being pumped into the Gulf waters¹⁹. It was unprecedented to witness approximately "*6 million barrels of oil per day burning for nearly ten months*"²⁰. This shocking damage was indeed part of the intentional injuries caused by the invasion of Iraq, which led to Kuwait's environment to suffer for a long period and therefore, could not remain legally unnoticed due to its gravity.

¹⁷ GATTINI, p. 163.

¹⁸ U.S. Energy Information Administration, Iraq, N 1.

¹⁹ UNCC, Follow-Up Programme for Environmental Awards, N 1.

²⁰ UNCC, Follow-Up Programme for Environmental Awards, N 1.

In this light, the UNSC, in dealing with the environmental reparations, constructed the UNCC as an innovative pursuit to institutionalize the reparation system and oblige States to play an active role, setting a new precedent for the liability of environmental damage.

II. The Construction of the UNCC

The UNCC was created by UNSC's resolutions 687 and paragraph 3 of resolution 692²¹ both adopted in 1991 as the unique quasi-judicial system to settle disputes resulting from the Gulf War. In its resolution 692, the UNSC recalls the liability of Iraq and its obligation of reparation of damage, including environmental damage. This liability routes from the "*breach of international peace and security as regards the Iraqi invasion of Kuwait*" according to Resolution 660.

a) The Competence of the UN Security Council

The UNSC finds its competence in Chapter VII of the UN Charter to resort to measures restoring and maintaining peace and security throughout the globe. Particularly, Art. 41 of the UN Charter states that UNSC "*may call upon the Members of the United Nations to apply such measures*". In the case of the Gulf War, parties of the dispute are members of the UN and are therefore bound to apply the awards resulting from the fund and the UNCC.

This competence was criticized by certain doctrines and supported by others²². One of the critics, ARANGIO-RUIZ, a member of the International Law Commission and special Rapporteur on state responsibility, considered that the UNSC had overstepped its domain of competence in adopting such a resolution²³. It was argued that the point of ambiguity is whether the UNSC is entitled to determine the obligation of reparation even in the case of conflict. In his opinion, less controversial methods to repair the damages could have been installed, such as leaving this matter to inter-state negotiations²⁴. However, in our opinion, creating a separate organ for such a cause could be seen as too controversial and innovative since this was done for the first time.

Regardless of the controversial establishment of the UNCC and its fund, the Secretary-General addressed his recommendations regarding technical details such as the administration of the fund, payment arrangements, the composition of the UNCC and the validity of claims²⁵. Moreover, the UNSC had several roles in the UNCC's activity which include:

- The constitution of the UNCC's mandate²⁶
- The reception of reports on the UNCC's activity²⁷
- The observation of the UNCC according to Resolution 687 paragraph 19

²¹ UN Doc. S/RES/692

²² PAYNE, p. 333.

²³ ARANGIO-RUIZ, "Law Making", p. 717.

²⁴ ARANGIO-RUIZ, "Law Making", p. 718.

²⁵ UN Security Council, Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687, UN Doc. S/22559, 2 May 1991 ('Report of the Secretary-General'), p. 5.

²⁶ Resolution 692, N 29 paragraph 3, 5, 10.

²⁷ Resolution 692, N 29 paragraph 8.

- The contribution to decisions regarding the Compensation Fund²⁸.

b) Type of Proceedings

In the establishment of this commission, it was relevant for the UNSC to determine through which type of proceedings shall accountability be sought. The choice of proceedings impacts both the legal dispositions to be referred to and its consequences. Therefore, this unique political body had to be characterized by either environmental, criminal or civil proceedings to further categorize the proceedings.

i. Environmental Proceedings

Although drastic environmental damages were inflicted during the Gulf war, using environmental law in both its customary and conventional branches as a basis for the proceedings of the UNCC would not have been sufficient because at the time environmental damages was not a serious concern of the international community²⁹. It is not until 2013 that environmental protection and war were being discussed in parallel by the ILC³⁰. This lack of consciousness in the extent of the applicability of environmental law in armed conflict – or lack thereof – lead to the exclusion of environmental proceedings as the main source of liability.

ii. Criminal Proceedings

Generally, the imposition of criminal responsibility follows a purpose of being a deterrent to future potential similar acts as those incriminated. It supposes accountability and punishment. The evolution of societal values reflects upon the evolution of criminal law's perception, therefore since environmental damage was not of a serious concern to the international community at the time, it would not be categorized as a grave breach. Whether *jus in bello* environmental damages could be criminally punished, depends on its perception in the international criminal law *stricto sensu*. Notably, no international criminal tribunal was constructed for the purpose of addressing environmental damages as war crimes perhaps due to geopolitical reasons³¹.

In the light of criminal international law, grave breaches indicate the important violations of international humanitarian law of the Geneva Conventions and Additional Protocol I provisions are concerned³². Art. 35 of the Additional Protocol I clearly prohibits the employment of means intended to cause severe damage to the environment. However, this Art. 35 is not considered part of the Protocol's grave breaches.

²⁸ Resolution 692, n 29 paragraph 6-7.

²⁹ SCHAFFER, p. 324.

³⁰ STAHN/IVERSON/EASTERDAY, p. 103.

³¹ GRUNAWALT/KING/MCCLAIN, p. 513.

³² GRUNAWALT/KING/MCCLAIN, p. 473.

In addition, if Art. 147 of the Geneva Convention is used to justify, this Article states that “*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*”. It is important to note that this section does not establish any direct reference to environmental damages³³ and, notably, this is the only grave breach of the convention that does not refer to persons. On the one hand, undeniably, the environmental damage of the oil spills is not justified by military necessity since it was intentionally and unnecessarily done to create financial and environmental damages to the State of Kuwait. On the other hand, the damage is also in the form of air, marine, and desert pollution. Consequently, it is ambiguous if the resulting environmental damages could be interpreted as property according to the provision. Hence, the ambiguity of whether such a damage can be applied under Art. 147 of the Geneva Convention. Consequently, it is not clear if such environmental damages resulting from the Gulf War could qualify as a criminal breach under the Geneva Convention. Given the lack of clarity in this domain, criminal international law was not an adequate proceeding to apply.

iii. Civil Proceedings

Alternatively, civil proceedings regarding liability for environmental damage could be considered for such peacetime obligations³⁴. Although no explicit reference was made to the applicable civil law, it should be reasonable that the right of reparation for environmental damages encompasses state responsibility. According to many doctrines the UNCC is civil compensation system by excellence that was able to apply civil liability on Iraq for damages³⁵.

One of the forms of civil proceedings that was relied on is treaty law. Amongst many Rapporteurs, Dr. P.S. RAO invoked the principle of exception towards the liability for environmental damage through civil law by using examples from the environmental liability towards nuclear damages³⁶. However, it remains unconvincing that post-conflict peacebuilding can occur without good governance of the reparation of environmental damages.

c) The UNCC’s Centralization

Whether or not the UNCC could be categorized as a centralized organ has been a subject of great discussion. To categorize this organ as such, it is relevant to examine its structure, nature and application of forced execution. Taking note of the structural formation of the UNCC, the legitimacy of this body is gained as it is an institutional body of the international community. In this light, the UNCC’s instrument of forced execution is the obligation of funding the Compensation Fund, which is financed by the proceedings of Iraqi petrol³⁷. Therefore, the UNCC as an organ with an instrument of forced execution that is unrelated to Iraq’s consent, can be considered as a centralized organ of reparation. The UNCC’s centralization, allows it to

³³ KELLY, p. 929.

³⁴ STAHN/IVERSON/EASTERDAY, p. 214.

³⁵ LIBERA, p. 367.

³⁶ STAHN/IVERSON/EASTERDAY, p. 214.

³⁷ Cf. *infra* p. 7.

not only impose its competence on States through Chapter VII of the Charter, but also to fix its internal procedures.

However, the temporary and conflict specific nature of this organ does not allow it to qualify as a global and central institution of international law³⁸. Furthermore, the UNCC does not have exclusive jurisdiction, as injured parties were still able to go to national courts and other instances³⁹. In this light, it is crucial to avoid double compensation for the same damage by the government of Iraq. Although the UNCC provides for a centralized procedure on an international level, measures on a national level can still be taken. As an illustration of the non-exclusivity of the UNCC's competence on a national level, the Tribunal of London rejected the objection of incompetence based on the existence of the UNCC by claiming that "there is no suggestion in the Security Council Resolution that the jurisdiction of any municipal Court is excluded"⁴⁰. Therefore, the legal effect of the UNCC's acts is not exclusive.

In this view, the commission can also be viewed as a mere mechanism to penetrate the UN into the process of reparation, that only gained its competence through the UNSC. The UNCC as an organ, can also be viewed as an institution that is used to compensate for the shortcomings of the traditional decentralized approaches used by the UN⁴¹.

Through the analysis of the UNCC as a centralized organ, it is relevant to conclude that it indeed has characteristics of centralization. On the other hand, its non-permanent and unexclusive nature disqualifies it of being a global centralized organ.

IV. The Structure of the UNCC

The structural infrastructure of an organ should be designed based on the function that the organ will be achieving. The institutional structure of the UNCC was said to be inspired by Iran-US Claims Tribunal (IUSCT) but was altered to have a faster claims processing⁴². In this view, the UNCC has a hint of arbitral nature as the UNCC commissioners were guided to apply the UN Commission on International Trade Law (UNCITRAL) rules⁴³. For procedural aspects, the UNCC's structure did not abide by that of the IUST as more efficient and effective means had to be developed. This rather inquisitorial organ is made up of three bodies: the Governing Council, the Secretariat, and the Commission.

a) Governing Council

³⁸ KOLLIPOULOS, p. 4.

³⁹ Cf. *infra* p. 9.

⁴⁰ Queen's Bench Division (judge Evans) arret du 16 avril 1992, transcript by the Financial times, 17 July 1992, available on Lexis.

⁴¹ KOLLIPOULOS, p. 6.

⁴² PAYNE/SAND, p. 10.

⁴³ Cf. *infra* p. 11.

The Governing Council is constituted of fifteen members from the UNSC members⁴⁴. The Council designated its president for a duration of two years. The Council gathered punctually during the year and made decisions with a majority of nine members at least⁴⁵. Their right of veto was explicitly overlooked⁴⁶. It is competent to design the criteria, procedure, and guidelines. The Governing Council recounted the progress of the Commission to the UNSC⁴⁷.

b) Commissioners

Upon recommendation of the UN Secretary General, the Commissioners assigned by the Council were specialists in pertinent domains⁴⁸. Given that the commissioners were adept, they transferred their proficiency to their function at the UNCC⁴⁹. They functioned part time in their function of determining the “admissibility, relevance, materiality, and weight of the evidence”⁵⁰. In this process, the commissioners applied Security Council resolution 687, Governing Council Decisions and rules of international law⁵¹.

c) Panels

The panels consisted of three impartial commissioners, each panel examined a subcategory of a domain, resolving in total claims in 14 different fields⁵² (Art. 20 of Decision 10)⁵³. This division into panels serves as a means to allow groups of commissioners to focus on a certain category of claims. According to Art. 26 of Decision 10, panel members benefited of immunities linked to their function.

d) Secretariat

The Secretariat was made up of approximately 300 members from vastly different types of domains. It is lead by the Executive Secretary assigned by the UN Secretary-General after discussion with the Governing Council⁵⁴. The main function of the secretariat is to administer legal, practical, and administrative assistance and to manage the fund⁵⁵.

e) The Compensation Fund

As a consequence of the awards attributed to the claimants, compensation needs to be integrally paid through a unique fund. Taking note of the Security Council Resolution 692 (1991), the

⁴⁴ UNCC, Governing Council, N 2.

⁴⁵ UNCC, Governing Council, N 4.

⁴⁶ UNCC, Governing Council, N 4.

⁴⁷ UNCC, Governing Council, N 1.

⁴⁸ UNCC, Commissioners, N 2.

⁴⁹ UNCC, Commissioners, N 5.

⁵⁰ Cf. *infra* p. 14.

⁵¹ Cf. *infra* p. 10.

⁵² UNCC, Commissioners, N 4.

⁵³ UN Doc. S/AC.26/1992/10

⁵⁴ UNCC, Secretariat, N 1.

⁵⁵ UNCC, Secretariat, N 2.

Compensation Fund was established. The funding is collected from a portion of the income from Iraq's petroleum export sales. The proceeds' portion has been modified a few times. Initially, Resolution 705⁵⁶ (1991) announced thirty percent of Iraq's petroleum export income⁵⁷. Formerly, the percentage of funding was decreased to twenty-five percent through the Security Council Resolution 1330⁵⁸. Soon after in 2003, the portion was decreased again to five percent through Security Council Resolution 1483⁵⁹. Recently, in 2017 the Governing Council Decision 276 (2017), declared the percentages as "0.5 per cent for 2018, 1.5 per cent for 2019 and 3 per cent for 2020"⁶⁰. The compensations were paid in full through these percentages by 2022.

V. The Jurisdiction of the UNCC

According to Resolution 687, the UNSC constituted the UNCC as an *ad hoc* and non-exclusive reparation organ to examine claims regarding the Gulf War. The Council's decisions adopted under the UN Charter's chapter VII are intended to be final and binding⁶¹. Creating such an *ad hoc* institution that would explore environmental damages and enforce awards was seen as controversial.

The submitted claims concern liability for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations"⁶². Based on this jurisdiction, the UNCC's goals are to "affect a speedy, fair, and efficient evaluation of the claims" and to use the funds to pay claimants in compliance with the UN Security Council's resolution. An exclusion to the competence of resolving environmental damage claims is the costs of "Allied Coalition Forces, including those of military operations against Iraq" is announced by Decision 19⁶³.

a) The Authorized Claimants

In order to further add criteria on the eligibility of participating in the process, defining claimants was crucial. Claimants are the entities that are entitled to use the jurisdiction of the UNCC to create claims. These entities are enlisted in resolution 687 and UNCC Governing Council decisions 7 and 10. The claimants include States, nationals, international organizations, and corporations. The claims are directed against Iraq, who is not permitted to form claims against Coalition Forces for the breach of *jus in bello*⁶⁴. For more organization and guidance, the claimants were filtered into categories that represents the type of damage.

⁵⁶ UN Doc. S/RES/705

⁵⁷ UNCC, Compensation Fund, N 1.

⁵⁸ UNCC, Compensation Fund, N 1.
UN Doc. S/RES/1330

⁵⁹ UN Doc. S/RES/1483

⁶⁰ UNCC, Compensation Fund, N 1.

⁶¹ KOLLIPOULOS, p. 181.

⁶² Resolution 687, N 53 para. 16–19.

⁶³ UN Doc. S/AC.26/Dec.19

⁶⁴ KOPPE, N 45.

Categories A, B and C were specified for humanitarian claims filed by individuals. Categories D and E are specified for larger scale claims formed by individuals, public sector enterprises and corporations⁶⁵. Environmental claims specified for governments were filed under category F⁶⁶.

Environmental claims were only formed by States as the environmental damage caused to the Persian Gulf is situated in national maritime boundaries. The public trust doctrine regards the government as the custodian of environmental aspects⁶⁷. In this case, claims for environmental damages were not formulated by international organizations.

b) Temporal Jurisdiction

When constructing a claim commission, a strategic selection of the temporal jurisdiction must be made to guarantee that all the related claims can be examined. This choice is particularly important to certify that the temporal window does not allow pre-existing damages to be examined as well. The temporal jurisdiction of the UNCC was not explicitly addressed. Therefore, as implied the temporal jurisdiction extends from the period of war, which is the 2nd of August 1990 to the 2nd of March 1991⁶⁸. In this light, damages occurring before the date of the invasion were not examined to eliminate treating non-related damages.

c) Territorial Jurisdiction

Defining territorial jurisdiction is relevant to determine which sovereign States were encompassed by the UNCC's awards. The territorial jurisdiction of the UNCC was not accurately delimited. Nonetheless, the environmental panel vaguely described the territory covered as "loss or damage that may have occurred outside Iraq or Kuwait are, in principle, compensable"⁶⁹. In this view, claims from countries other than Kuwait have been filed for compensation. Given that Iraq was the only adversary in the process the awards were imposed on Iraq to compensate the claimant States.

d) The Legal Effect of the UNCC's Acts

It is central to analyze the legal effect of the UNCC's acts in order to determine their executability and obligatory nature. The Compensation Commission being designated an administrative and investigative approach, influences the legal effect of its acts. In this perspective, this investigative nature can dismantle the decisions of its *res judicata* effect.

⁶⁵ UNCC, Claims, N 4.

⁶⁶ UNCC, Claims, N 4.

⁶⁷ PAYNE/SAND, p. 174.

⁶⁸ UNCC, Report and Recommendations made by the Panel of Commissioners Concerning the First Instalment of 'F4' Claims, UN DocS/AC.26/2001/16, 22 June 2001 ('First 'F4' Report'), N 18.

⁶⁹ UNCC, Report and Recommendations made by the Panel of Commissioners Concerning the Fifth Instalment of 'F1' Claims, UN Doc. S/AC.26/2001/15, 22 June 2001, N 18.

Given that the Commission does not have the quality of a tribunal, its awards produce legal effect within the systems established by the Security Council resolutions⁷⁰.

It is unusual in international law to have directly enforceable awards through compensation funds, which accentuates the binding character of the Commission's decisions. Given that the decision and the awards are binding, the hazard of Iraq interpreting them differently to decrease their legitimacy is excluded. The exclusion of radical interpretation is valuable as it centralizes the power of constraint.

VI. The UNCC's Applicable law

a) Armed Conflict International Law vs. Peacetime International Law

Regardless of the legally binding character of resolution 687, the approach taken towards the applicable law was indeed legally ambiguous. The UNSC was silent about the choice between armed conflict international law and peacetime international law with regards to the UNCC, which gave the governing council a margin of flexibility. Given this gray zone between these fields of international law, the applicable law was approached in a systematic rather than an *ad hoc* manner⁷¹. In this light, the Governing Council and the Commissioner panels mainly applied peacetime international law, the UN Security Council's resolutions, and decisions⁷². The UNCC as a non-exclusive and subsidiary body, was able to establish a compensation criterion that seems to be unprecedentedly remarkable in its framework.

b) Procedural Rules and Substantive Laws

Given the novel character of such an institution, designating the sources of procedural and substantive laws reduces ambiguities. Regarding its procedural rules and substantive laws, the decision issued by the Governing Council further specified the framework in its decision 10⁷³. Art. 2 of this decision applies to the claims submitted to the UNCC and to the UNCC as a mandate. Art. 31 entitled applicable law, declares four broad sources of law. It states that the panels should apply:

i. Resolution 687 and "other relevant Security Council resolutions"

The resolution is impressive in its breadth of measures and mechanisms, whereby the principles of direct environmental damage, the liability of Iraq and causality were set. The innovative nature of the UNSC's measures to Iraq, presupposes and reveals the UNSC's characterization of the situation in which it acted under Chapter VII. In this light, the Resolution aims to eliminate the immediate and tangible causes of armed conflict between states under the form of territorial disputes.

⁷⁰ Report of the Secretary-General, p. 4.

⁷¹ FEIGHERY, p. 78.

⁷² FEIGHERY, p. 75.

⁷³ UNCC Governing Council decision 10, N 52.

- ii. *“The criteria established by the Governing Council for particular categories of claims”*,

One of the competences of the Governing Council is to create the criteria for claims’ compensability⁷⁴. One of the most relevant illustrations is that of Governing Council Decision 7 entitled “Criteria for additional Categories of Claims”. Particularly, paragraph 35 of decision 7 set a non-exhaustive list of environmental compensations⁷⁵. Such criteria have a function of guiding panels through the review of claims.

- iii. *“Any pertinent decisions of the Governing Council”*

A remarkable illustration of such pertinent decisions is that of Decision 124⁷⁶ (2001) entitled “Arrangement to provide Technical Assistance to Iraq in respect of Environmental Claims”, whereby the Governing Council pronounced the decision to “facilitate the promotion of legitimate interests of Iraq with respect to F4 Claims”⁷⁷. This source is particularly useful as it allows the Governing Council to emit decisions with further measures that were not foreseen in the creation of the UNCC.

- iv. *“Other relevant rules of international law”*

This category includes significant UNCITRAL (UN Commission on International Trade Laws) can be used for procedural rulings according to Art. 43 of Decision 10. Practically in processing the environmental claims, the F4 panel did not explicitly refer to general international law to resolve claims⁷⁸. However, the panel made reference to international caselaw when mentioning international law principles as a supplementary resource⁷⁹. For example, the principle of the liberty of appreciation of valuation methodologies was invoked in response to Iraq’s objection to the damage assessment calculations⁸⁰.

The minimal reference to international law by the F4 panel to resolve claims could be explained by several factors. Most importantly, the environmental claims clearly fit into the categories specified in paragraph 35 of Decision 7, therefore there was no room for further interpretation. Additionally, the essence of the interrogations of the F4 panel deliberated around the factual aspects of the claims, such as the feasibility of the compensation methods⁸¹. Consequently, general international law principles were not necessary for the resolution of claims.

⁷⁴ Cf. *supra* p. 6.

⁷⁵ Cf. *infra* p.19.

⁷⁶ UN Doc. S/AC/Dec.124

⁷⁷ Cf. *infra* p. 23.

⁷⁸ PAYNE/SAND, p. 19.

⁷⁹ PAYNE/SAND, p. 147.

⁸⁰ Case concerning the factory at Chorzow (Germany v. Poland), Permanent court of int’l justice series A (No.17) 47 (1928).

⁸¹ PAYNE/SAND, p. 146.

VII. Claims Processing

The UNCC was created in order to review claims and evaluate the appropriate amount of compensation for the damages inflicted by the Gulf War. In this view, the Commission was more similar to a claim's institution rather than an international tribunal. This organ was therefore responsible of reviewing compensation claims in a limited amount of time through a particular claim's procedure set-up by the Security.

The claims processing in the UNCC operates as follows:

1. The claims submitted by claimants are registered and formulated into coded computer files. In this way, claims are classified depending on the kind of damage and the types of juridical, circumstantial and valuation aspects⁸².
2. The Secretariat conducts a formal review of the claims to verify the conformity of the claims with the formal exigencies⁸³.
3. Quarterly reports were formed under "Article 16 reports" by the Executive Secretary to the Governing Council, Iraq and all other claimants. These reports further invited claimants to suggest supplementary information within 90 days on the circumstances invoked⁸⁴.
4. The Secretariat could demand supplementary information that it finds decisive and essential for the review of the claim. This can be requested with the guidance of the panels⁸⁵.
5. Then, the Executive Secretary submits the claims to the appropriate panel through the form of installments. This submission allows the panel to start the process of reviewing the claim. Moreover, this submission is joint with Iraq's responses and those of the claimants to the reports⁸⁶.
6. Exceptionally, if the documentation available is not sufficient for the panel to have a clear review of the claim. Further evidentiary contribution could be required from Iraq or the claimants.
7. Once the review process of an installment is achieved, a report is submitted by the appropriate panels to the Governing Council. Recommendations for the amounts of compensation and their justification are highlighted in these reports⁸⁷.
8. The Governing Council is required to approve the compensation recommended by the panels. Thus, the Governing Council has the competence to modify the amount of compensation recommended. Moreover, the Governing Council is competent for returning a claim for extensive review if it is indispensable⁸⁸.

⁸² UNCC, Claims Processing, N 8.

⁸³ UNCC, Claims Processing, N 9.

⁸⁴ UNCC, Claims Processing, N 9.

⁸⁵ UNCC, Claims Processing, N 10.

⁸⁶ UNCC, Claims Processing, N 11.

⁸⁷ UNCC, Claims Processing, N 17.

⁸⁸ UNCC, Claims Processing, N 18.

9. Finally, the Governing Council makes a final decision on compensation awards. Consequently, these decisions are not subject to contestation. These decisions are made public⁸⁹.

Through these steps the claims were processed by the UNCC by 2005, and in total has compensated USD 52.4 billion to above 1.5 million claimants⁹⁰.

VIII. The Installments of Environmental Claims

To further determine the tasks and functions of the panels and Governing Council, further categorizing each category of claims into installments was required⁹¹. Each panel was given 12 months to assess a claim depending on the intricacy of the claim. In subdividing the environmental claims, it became possible to determine the order of treatment of claims. In this view, the Governing Council required that priority should be given to Monitoring and Assessment claims, therefore it was placed in the First Installment⁹².

After having prioritized certain categories, claims were subdivided into parts of the environment. These parts are public health, terrain environment, maritime environment, groundwater, and cultural heritage⁹³. This resulted in the primary discussions to be approached by sector of environmental damage.

In addition, the ultimate list of installments was categorized based on functional concerns. These concerns include not processing the claims before receiving the expertise reports, increasing efficiency, geographic dispersion, and consistency in awards⁹⁴.

The previous considerations were considered to assemble the following installments:

- The First Installment, as previously mentioned, concerned the Monitoring and Assessment claims as they were prioritized⁹⁵.
- The Second Installment consisted of thirty claims regarding “expenses incurred for measures to abate and prevent environmental damage, and to clean and restore the environment” during or promptly after the dispute⁹⁶.
- The Third installment consisted of three claims regarding “expenses resulting from measures already taken or to be undertaken in the future to clean and restore the environment alleged to have been damaged as a direct result of Iraq’s invasion”⁹⁷.

⁸⁹ UNCC, Claims Processing, N 19.

⁹⁰ UNCC, Claims Processing, N 20.

⁹¹ PAYNE/SAND, p. 37.

⁹² PAYNE/SAND, p. 37.

⁹³ PAYNE/SAND, p. 37.

⁹⁴ PAYNE/SAND, p. 38.

⁹⁵ First ‘F4’ Report, N 12 p. 9.

⁹⁶ UNCC, Report and Recommendations made by the Panel of Commissioners Concerning the Second Instalment of ‘F4’ Claims, UN Doc. S/AC.26/2002/26, 3 October 2002 (‘Second ‘F4’ Report’), p. 6.

⁹⁷ UNCC, Report and Recommendations made by the Panel of Commissioners Concerning the Third Instalment of ‘F4’ Claims, UN Doc. S/AC.26/2003/31, 18 December 2003 (‘Third ‘F4’ Report’), p. 6.

- The Fourth installment consisted of nine claims concerning “expenses resulting from measures already taken or to be undertaken to clean and restored environment alleged to have been damaged as a direct result of the Iraq invasion”⁹⁸.
- The Fifth Installment consisted of nineteen claims regarding “damage to or depletion of natural resources, including cultural heritage resources; measures to clean and restore damaged environment; and damage to public health”⁹⁹.

After analyzing the division of the installments, it is deductible that claims regarding future measures are separated from claims regarding past measures. Furthermore, claims regarding precautionary measures used to preserve the environment, were separated from claims used to repair environmental damages and natural resources’ ruin. These distinctions in the installments are meant to increase efficiency, consistency, and organization in the procedural framework of the environmental panel.

IX. The Due Process of the UNCC

a) Investigative vs. Administrative Body

The process adopted towards environmental claims was unique in its details. This is mainly due to the novelty of the concept of environmental claims and the concern of integrating Iraq as an active participant in this procedure. Some criticism was addressed towards the due process engaged by the UNCC.

Defenders of the UNCC’s due process, argue that the commission was given the unpolitical role of a “fact-finder”¹⁰⁰. This role implies the commission’s investigative approach in “examining claims, verifying their validity, evaluating loss, assessing payments and resolving dispute claims”¹⁰¹. It is notable to highlight that the commission selected by the Governing Council had to be impartial and experts in the field¹⁰². Therefore, in its unpolitical investigative approach, the UNCC provided Iraq and claimants with the relevant communications through periodical reports¹⁰³. As stated by Art. 16 paragraph 3 of Decision 10, these communications included information on the identity of claimants, the categories of claims, the amount of compensation, and other legal or factual issues. Based on these reports, Iraq and other claimants were able to submit their views. This right to comment is closely related to the guarantees of litigation procedures, as the violation of this right leads to depriving Iraq of defending itself, which causes an imbalance in the procedure between the conflicting parties.

⁹⁸ UNCC, Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of ‘F4’ Claims, UN Doc. S/AC.26/2004/16, 9 December 2004 (‘Fourth ‘F4’ Report’), p. 7.

⁹⁹ UNCC, Report and Recommendations made by the Panel of Commissioners Concerning the Fifth Instalment of ‘F4’ Claims, UN Doc. S/AC.26/2005/10, 30 June 2005 (‘Fifth ‘F4’ Report’), p. 8.

¹⁰⁰ WILDE, N 87.

¹⁰¹ UN doc s/22559 para. 20.

¹⁰² Governing Council decision 10 (n 52) Arts. 18–27.

¹⁰³ Art. 16 decision 10.

Some critics argue that there was no room for the UNCC to apply due process and practice its “quasi-judicial” role¹⁰⁴. According to this doctrine, the UNCC was required to implement purely administrative procedures of collecting data and verifying payments, rather than the settlement disputes¹⁰⁵. The only form of dispute permitted was a contestation from the defender that such a claim falls under its liability. Therefore, the role of the UNCC is overlooked, by limiting its competence to only resolving dissatisfied claimants’ claims and excluding Iraq. Consequently, in marginalizing the role of Iraq, the dispute settlement function of the UNCC is marginalized as well. It has been asserted that Iraq did receive the periodical reports but did not have access to the claims themselves¹⁰⁶. Evidently, having access to the factual and legal details of such claims is necessary and would be a window through which due process can be used in this system. Notably, this doctrine does not neglect the efficiency of the UNCC’s fact finding approach, however this does not recompense the insufficiency in due process¹⁰⁷.

Given that the UNCC was attributed the investigative attribute in collecting information regarding the environmental damages, it is insightful to examine the required evidentiary standard. Claimants are responsible to bring forward evidence that supports their eligibility for reparation. As stated by Art. 35 paragraph 1 of Decision 10, the panel determines the “admissibility, relevance, materiality and weight” of the evidence. Therefore, the eligibility for a reparation for a damage relies on the evidence brought forward to the panel. To be able to further its role as a “fact-finder”, the UNCC is accompanied by experts and legal consultants to analyze the evidence¹⁰⁸.

In the light of the above-mentioned shortcomings, there is no legitimate way to prove that the UNCC’s decisions would lead to different conclusions if Iraq was given a more active role. However, due process should be conserved regardless of the probability of receiving a differential outcome.

b) Transparency vs. Confidentiality

In addition, the UNCC’s choice of the principles of transparency and confidentiality in the transmitted communications is an important factor in the role Iraq was given. In general, the UNCC website regularly published panel reports and Governing Council decisions to the public in the official languages. On the one hand, the website publications provide a supply of information to the public on the claims, the claimants’ arguments, and the rationale of the commission. On the other hand, the Governing Council reserved some data under the principle of confidentiality. According to Art. 30 of Decision 19, this data includes “all records received or developed by the commission”, UNCC expertise reports and the original claims.

¹⁰⁴ FEIGHERY, p. 138.

¹⁰⁵ Report of the Secretary-General, p. 6.

¹⁰⁶ FEIGHERY, p. 140.

¹⁰⁷ FEIGHERY, p. 139.

¹⁰⁸ WILDE, N 87.

The choice between confidentiality and transparency relies on conducting the reparation process and preventing prejudice to the claimants and defendants. Transparency allows the public, claimants, and defenders to have confidence in this novel system of the UNCC. On the one hand, it is vital to prevent prejudicing the security of claimants by publishing detailed information regarding the damaged locations¹⁰⁹. On the other hand, since the UNCC is a step towards peacebuilding, highlighting the defender as a felon does not enhance cooperation. The above-mentioned factors should have been the guidelines for the Governing Council's choice between these principles.

X. The Controversies of Causation

Establishing Causation leads to establishing if Iraq's actions lead to the claimed damages and therefore avoids holdings Iraq liable for pre-existent damages. The choice between different degrees of causality and the referential baseline were topics of great doctrinal debate.

a) Proximate and Direct Causality

The UNCC's choice between direct causality and proximate causality has been a subject of dispute and interpretation. The term direct cause or also known as cause in fact refers to "how far a person's responsibility should extend for conduct that in fact caused the harm"¹¹⁰. Whereas proximate cause or also known as legal cause refers to whether "a defendant's conduct is so closely tied to a plaintiff's injury that the defendant should be held legally responsible for it"¹¹¹.

In this view, paragraph 16 of resolution 687 claims Iraq's liability for "direct loss". Thus, international liability for such damages is direct when one of the obligations is breached by one of the parties' organs. It has been argued that this term is intentionally used to insinuate the use of direct causation. Defenders of this opinion, argue that the UNSC would want the UNCC to use direct causation as a method to limit the losses that Iraq could be held liable for¹¹².

On the other hand, a contrary opinion argues that the use of the term "direct loss" is not intended to imply matters regarding causation¹¹³. According to ARANGIO-RUIZ, a rapporteur to the ILC, the term "direct loss" has been repetitively used in former awards without any significance to causation matters¹¹⁴. The significance of this term is to limit submitted claims regarding certain categories¹¹⁵.

The UNCC does not seem to strictly abide by fact or proximate causation. Instead, the UNCC seems to implement causation in a systematic way, which is examined by category¹¹⁶. By doing

¹⁰⁹ PAYNE, p. 345.

¹¹⁰ FEIGHERY, p. 259.

¹¹¹ FEIGHERY, p. 260.

¹¹² PAYNE, p. 172.

¹¹³ ARANGIO-RUIZ, 'Second Report on State Responsibility', p. 12.

¹¹⁴ ARANGIO-RUIZ, 'Second Report on State Responsibility', p. 12.

¹¹⁵ ARANGIO-RUIZ, 'Second Report on State Responsibility', p. 12.

¹¹⁶ GATTINI, p. 178.

so, the commission constructs a global concept of responsibility for the damages Iraq is liable for. Nevertheless, the question of causation is broadened and is examined case by case, to limit excessive and farfetched claims.

b) Causation by Presumption

Causation by presumption consists of transferring the burden of proof from the plaintiff to the appellant. In this view, the concepts of normality and foreseeability are central in determining whether the wrongful act is linked to the production of the damage¹¹⁷. However, given that the UNCC is treating damages related to the Gulf War, an abnormal and unforeseeable situation this can render difficult the presumption of causation. The concept of normality indicates that the damage is deemed to be the consequence of the wrongful act in its natural order of things¹¹⁸. If it can be predicted that this damage could have arisen independently of the wrongful act, but that this prediction an exceptional hypothesis that places elements outside of their natural order of things, the rule of foreseeability remains applicable. The factor of foreseeability renders compensable a damage that Iraq has foreseen or could have foreseen according to the normal course of things. The relationship between foreseeability and normality is obvious because foreseeability refers to the objective criterion of average diligence, which presupposes normality¹¹⁹. This makes both conditions coexist.

In this context, the environmental damages of the Gulf War were a dangerous and unforeseeable situation for both the claimant and Iraq. It was difficult to predict the duration and size of damages caused for example by the burning oil fields. However, Iraq, who is at the origin of the war, must be aware of the catastrophic potential of its acts. Iraq should be held responsible for all the damage caused by the state of war, including that of the state of self-defense¹²⁰. The factors of foreseeability and normality could not be examined with the usual standard used in peacetimes. The concepts of the presumption of causation should be used as a mere guide to the commission in developing the standard of causation when examining claims.

c) Complex Causation

In post-conflict damages, it is rarely only directly caused damages that are required to be repaired. Moreover, the causal chain of environmental damage is even more burdensome to prove. This calls for the analysis of complex causation to be examined by the commission, to determine if an intervening event is qualified to break the chain of causality.

In general, the environmental panel was conservative in its approach of complex causation. In this view, Iraq was not held liable for indirect environmental damage resulting from the

¹¹⁷ KOLLIPOULOS, p. 407.

¹¹⁸ KOLLIPOULOS, p. 407.

¹¹⁹ KOLLIPOULOS, p. 408.

¹²⁰ KOLLIPOULOS, p.409.

inappropriate storage of weaponry or accidental oil spills¹²¹. However, Iran was attributed awards for the environmental damage directly caused by the Gulf War refugees¹²². This is because the UNCC analyzed whether these refugees were present during the period of paragraph 34(b) of Governing Council decision 7, and whether they stayed beyond that period due to factors unlinked to the Gulf war¹²³. Furthermore, it is more useful to encourage parties to reduce the harmful effects of ecological pollution by affirming that mitigation acts are not intervening acts¹²⁴. In this view, mitigation expenses would be considered as an additional direct loss of the damage¹²⁵.

d) Concurrent and Parallel Causation

The final causation related controversy is that of the use of concurrent or parallel causation with regards to the ecological damages. Parallel and concurrent causality implies a “temporal relationship between two or more independent wrong acts that combine to produce a single harm”¹²⁶. This question was not clearly resolved by the panel. The main large scale environmental damages were caused by the exaggerated oil spills. Those that are directly caused by Iraq’s invasion as demonstrated by the claimants’ evidence, must be repaired. In cases of contributory fault whereby, the claimant contributed to the damage through for example already existing contamination, the claims were refused¹²⁷. In this controversy too, the environmental panel continues to preserve its case-by-case approach to examining claims.

e) The Baseline

To be able to distinguish whether the damage was attributable or partly attributable to Iraq’s liability, a valid baseline should have been provided, which was not always the case¹²⁸. If the damage is only partially caused by the invasion, this does not exclude the compensation of the damage¹²⁹. Finding a baseline for environmental damages is complex given the vast number of factors that could influence the environment.

The most accurate ways of determining a baseline are¹³⁰:

- The historical method, which depends on data regarding the state of the ecological habitat shortly before the damaging event. This method presents the difficulty of not having registered information on the state of the environment before the event, as in 1990 not many countries in the region recorded such data.

¹²¹ Fourth ‘F4’ Report, (N 19) paras. 197–218.

¹²² Fourth ‘F4’ Report, (N 19) para. 71.

¹²³ Fourth ‘F4’ Report, (N 19) para. 46.

¹²⁴ PAYNE, p. 349.

¹²⁵ PAYNE, p. 349.

¹²⁶ PAYNE/SAND, p. 161.

¹²⁷ PAYNE/SAND, p. 161.

¹²⁸ First ‘F4’ Report, N 67 para. 34.

¹²⁹ First ‘F4’ Report, N 67 para. 34.

¹³⁰ PAYNE/SAND, p. 76.

- The referential method depends on reference locations that are chosen due to their similarity to the damaged areas. This method presents the difficulty of finding similar enough habitats in the region that have not been affected by the Gulf War.

XI. The Concept of Environmental Damage

With regards to the definition of State responsibility for environmental damage, it is a delicate and complex issue that has raised many disagreements to this day, which has led to emphasized international efforts in order to unify the rules of responsibility. The abstract and widespread features of environmental damage, raises fundamental legal questions regarding both scientific facts and the ability of Iraq to face claims with such massive amounts¹³¹.

a) Definition

For the first time Resolution 687 clearly mentioned the principle of environmental damage on an international level. Although the UNSC in its resolution specifically mentioned the category of environmental damages, it is not until 1998 that the UNCC started to treat these claims¹³². This comes to show the hesitancy and caution of the UNCC in evolving its traditional perspective to a perspective that emphasizes public health and environmental sustainability.

Given the vagueness of this notion, Iraq amongst others attempted to argue that environmental damages are not “financially assessable” because they are not traded in the market, to escape such compensation¹³³. Parties were convinced that it was reasonable to argue the illegitimacy of liability for environmental damages¹³⁴. However, the condition that a damage needs to be “financially assessable” is not meant to exclude environmental damages as justified by the panel¹³⁵.

In addition, the Working Group of the UN Environment Programme clarified environmental damage as “damage to components of the environment whose primary value is non-commercial”¹³⁶. Moreover, the Working Group admitted that the notion of environmental damage has not been previously established in international law, therefore references to state practice and international treaties can be made¹³⁷.

b) Illustrations

Once the principle of environmental damage has been constructed additional criteria had to be detailed. The UNSC detailed exemplary claims to be covered in paragraph 35 of decision 7.

¹³¹ KOLLIPOULOS, p. 26.

¹³² UNCC, Claims, N 5.

¹³³ Fifth ‘F4’ Report, N 14 para. 46.

¹³⁴ GRUNAWALT/KING/MCCLAIN, p. 515.

¹³⁵ Fifth ‘F4’ Report, N 14 para. 58.

¹³⁶ UNEP, N 29.

¹³⁷ PAYNE, p. 153.

Firstly, claims can cover the “abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters”. This criterion concerns the necessary measures used to contain the consequences of the harm¹³⁸.

Secondly, expenses related to “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” are covered.

Thirdly, “reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment” can be covered. To fit into this category a series of *prima facie* criteria must be considered¹³⁹:

- If the pollutant could credibly cause the indicated damage?
- Whether a legitimate probability of the location to be affected?
- Is there proof of the environmental damage?
- The likelihood that a Monitoring and Assessment process would lead to clearly reviewing a claim.

In addition, monitoring for public health consequences that are related to the ecological damage could be covered as well. The reference made to public health in paragraph 35 is the sole definitive reference made to this topic for the F4 claims. Therefore, public health here is implied as an extension to environmental damages¹⁴⁰. For example, under this disposition, Kuwait submitted four claims for the damage of public health¹⁴¹. Kuwait’s claims for medical treatment expenses for injured victims of mines were evaluated by the panel for a sum of USD 2,354,903¹⁴², those regarding PTSD were evaluated for USD 5,909,343. The claim concerning an increase in mortality was refused for a lack of precision in evidence¹⁴³. Lastly, the claim concerning long-term epidemiological study and medical screen programmes was refused as well as the scope of the programme was superficially described¹⁴⁴.

Lastly, the harm to natural resources could be covered as well. In this context, the “depletion of natural resources” includes the contamination of oil, oil wastage and the decrease in the price of fish and water¹⁴⁵. As an illustration, Kuwait filed three claims for the loss of natural resources concerning “terrestrial resources”, “marine and coastal resources” and the “loss of groundwater resources”¹⁴⁶.

¹³⁸ KOLLIPOULOS, p. 262.

¹³⁹ First F4 Report, para. 31.

¹⁴⁰ Fifth ‘F4’ Report, para. 67.

¹⁴¹ Fifth ‘F4’ Report, para. 491.

¹⁴² Ibid para. 502.

¹⁴³ Ibid para. 524.

¹⁴⁴ Ibid para. 530.

¹⁴⁵ UNEP, N 28.

¹⁴⁶ Fifth ‘F4’ Report, para. 414.

The examples given in paragraph 35 are not exclusive and losses that are not included in this list can be examined¹⁴⁷.

c) The Impact of the Applicable Law

Conforming with the caution that is used in addressing environmental reparation, paragraph 35 does not explicitly address the notion of the applicable law¹⁴⁸. However, it is implied from the criteria that they mirror general international law¹⁴⁹. In any case, the relevance of the law of armed conflict was not addressed by the Commission. Notably, the main distinction between the regime of general international law and that of armed conflict, is the brink of reparable damage and not its type. Nevertheless, the panel did not refer to this distinction in its approach, which indicates its irrelevance¹⁵⁰.

XII. Quantifying Environmental Damage

The United Nations Compensation Commission is the committee responsible for assessing losses and determining amounts that should be compensated as the result of the damages caused by Iraq's occupation of Kuwait. One of the challenges faced by the Panel was attempting to quantify the environmental damage claims into a monetary worth. All things considered, monetary compensation is one of the most common reparation methods used in civil proceedings, therefore it is an appropriate measure for this case study's circumstances. Although necessary, the Panel declares that "there are inherent difficulties in attempting to place a monetary value on damages natural resources, particularly resources that are not traded in the market"¹⁵¹.

a) "Habitat Equivalency Analysis"

The method recognized by the Panel is the "Habitat Equivalency Analysis" (HEA). This calculation method considers the value of the restoration project equivalent to the amount resulting from the environmental damage¹⁵². Nevertheless, the Panel admits that "there are uncertainties in HEA calculations, especially for establishing a metric that appropriately accounts for different types of services losses, and for determining the nature and scale of compensatory restoration measures that are appropriate for damage to particular resources"¹⁵³. In this light, the Panel will only accept claims using the HEA method after examining if the compensation is reasonable¹⁵⁴.

b) The Estimation of Expenses

¹⁴⁷ Second F4 Report, para. 22.

¹⁴⁸ FEIGHERY, p. 72.

¹⁴⁹ FEIGHERY, p. 73.

¹⁵⁰ Third 'F4' Report, para. 33-36.

¹⁵¹ Fifth 'F4' Report, para. 81.

¹⁵² Fifth 'F4' Report, para.73.

¹⁵³ Fifth 'F4' Report, para. 81.

¹⁵⁴ Fifth 'F4' Report, para. 81.

For a portion of claims, the environmental damages were quantified as the approximate sum of “expenses of the proposed remediation program”¹⁵⁵. In the example of the damage to coast resources filed by Saudi Arabia, the Panel recommended a compensation of USD 463,319,284¹⁵⁶. This sum is the approximate cost of expenses of the remediation programme that encompasses:

- “Reduction in the total area and volume of materials to be remediated”
- “Emphasis on *in situ* treatment methods”
- “Elimination of high temperature thermal desorption treatment of excavated material”
- “Landfilling of excavated material”¹⁵⁷

This illustration provides a vision of how the damage itself was dissected into portions and based on that the expenses of each portion was estimated.

XIII. The Environment as a Collective Interest

The F4 panel in its examination of environmental claims, took into account the global and transboundary characteristics of the environment. Taking into consideration the nature of the environment allowed it to apply environmental notions in order to achieve compensation rather than sanctions. This compensation is a form of allowing Iraq to be held responsible for the environmental damages which form a collective interest amongst the international community. In this light, the panel highlights the concept of “common concern” with regards to sustaining ecological habitats¹⁵⁸. This principle implies the obligation towards future generations, as the interest here surpasses that of a State’s sole interest¹⁵⁹. The interest of conserving the environment is the interest of the whole international community, which encompasses responsibilities on the UNCC.

a) Diligence in Investigation

Firstly, this transboundary characteristic gives the UNCC’s F4 panel a superior and diligent role of “fact-finding”¹⁶⁰ to conserve a public interest rather than to resolve a bilateral dispute¹⁶¹. Given the responsibility that the UNCC’s F4 panel holds, it cannot merely be satisfied with a passive function of proof examination, but rather have an active function of having its own impartial legal and environmental expertise¹⁶². The justice and impartiality required to achieve compensation lead to offering Iraq with funds to compile relevant proof of the damages caused according to Decision 114¹⁶³. This also gave Iraq the opportunity to clarify and provide its view on the size and causation of the damage.

¹⁵⁵ Third ‘F4’ Report, para. 185.

¹⁵⁶ Third ‘F4’ Report, para.187.

¹⁵⁷ Third ‘F4’ Report, para. 185 p. 33.

¹⁵⁸ Third ‘F4’ Report para. 42.

¹⁵⁹ PAYNE/SAND, p. 173.

¹⁶⁰ Cf. *supra* p. 13.

¹⁶¹ MENSAH, p. 809.

¹⁶² PAYNE/SAND, p. 175.

¹⁶³ UN Doc. S/AC.26/114

b) Prioritization and Precaution

Secondly, the Governing Council prioritized environmental claims in its decision in 1998¹⁶⁴. This prioritization resulted from the UNCC to lead a “precautionary approach” by allowing for precautionary programs to be examined as “monitoring and assessment claims”¹⁶⁵. The F4 panel held Iraq liable for compensating relevant monitoring programs, despite the absence of indisputable evidence¹⁶⁶. Although compelling evidence was not required for the review of such claims, plainly theoretical risks were excluded¹⁶⁷.

c) Alliance Expenses

In addition, given that that coalition forces were joined in the Gulf war, the question of environmental alliance costs rises. Particularly, claims from the United States and the United Kingdom were filed for the compensation of costs in helping Gulf countries to prevent further environmental damage. The commission approved these claims under the term “environmental solidarity costs”, which further shows the implication of such a transboundary damage¹⁶⁸.

d) Mitigation

Moreover, as demonstrated States should be engaged in mitigating environmental damages¹⁶⁹. As environmental preservation is a public interest, inappropriately handling the damaged territories can be sanctioned by not attributing awards for the claim. The F4 panel portrayed the importance of mitigation in refusing the claim of Kuwait for insufficient handling of the damaged site¹⁷⁰.

e) Surveillance

Given that compensation awards are awarded to claimants as means to rebuild the environment, it is central to then monitor how the funds were spent¹⁷¹. In this view, the claimant is an agent for the reparation of the collective environmental interests¹⁷². Tracking means such as the Follow-up Programme and the M&A Programme were used to ensure that the funds would be used solely for their allocated purpose according to decision 132¹⁷³. Chosen claimants could return the surplus sum from the compensation, if the UNCC judges the sum unnecessary¹⁷⁴.

¹⁶⁴ First F4 Report, para. 17

¹⁶⁵ First F4 Report, para. 29, 61 and 503

¹⁶⁶ First F4 Report, para. 523-28

¹⁶⁷ First F4 Report, para. 30

¹⁶⁸ Second F4 Report, para. 347.

¹⁶⁹ Cf. *supra* p. 17.

¹⁷⁰ Fourth ‘F4’ Report, part 1, para. 206-216.

¹⁷¹ Third ‘F4’ Report, para. 42.

¹⁷² PAYNE, p. 189.

¹⁷³ UN Doc. S/AC.26/Dec.132

¹⁷⁴ Fifth ‘F4’ Report, para. 782.

Governments showed a willingness to rebuild the environment through the Environmental Remediation Advisory Group (RERAG), funded by Kuwait, Jordan, Iraq, Iran, and Saudi Arabia¹⁷⁵. Parties of the RERAG lead discussions implying serious concern for ecological sustainability and future generations¹⁷⁶.

XIV. Iraq's Engagement in the Claim Process

It is notable to examine Iraq's engagement in the procedural facet of the environmental claims process. The role that Iraq's defense has been given in the process has been highly criticized as minimal and unjust. Given the sophistication of the environmental notions both scientifically and legally, Iraq's defense unit had to confront the obstacle of dealing with such a novel system. The UNCC's procedure of the environmental claims seems to provide Iraq with an opportunity for a more active role in the process¹⁷⁷.

a) Consent to the Composition of the UNCC

Given that Iraq violated the sovereignty of Kuwait and caused large scale damage, the system was composed in the absence of Iraq's deliberation¹⁷⁸. The structural stages of the composition of the UNCC were carried out without informing Iraq's defense unit, which can bring up the question of consent. The notion of state consent is central in interstate matters to protect state sovereignty. On the one hand, Iraq's consent to Resolution 687 encompasses its liability for environmental damages resulting from the war. Moreover, the UNCC is "not a court or an arbitral tribunal" but a "fact-finding" instrument, making the weight of consent lighter¹⁷⁹.

On the other hand, as demonstrated the design of the UNCC evolved and diverged from the resolution, and a consent regarding these diversions should be required¹⁸⁰. It could be argued that Iraq's consent could not have included the applied procedural rules used by the UNCC, especially since this commission applied unprecedented rules to international law. Iraq's approval of Resolution 687 does not imply its approval of any future arbitrary procedural framework. Iraq's consent is evident as the model of the UNCC as an organ will be used to directly address heavy claims against Iraq. Overstepping consent due for efficiency purposes or presumed consent is not justifiable.

b) The Procedural Framework

The procedural framework of the claims did not attribute to Iraq the benefits of being in the role of the defendant state. Iraq received communication about the claims through reports that

¹⁷⁵ KAZAZI, N 1127.

¹⁷⁶ PAYNE, p. 364.

¹⁷⁷ FEIGHERY, p. 136.

¹⁷⁸ FEIGHERY, p.135.

¹⁷⁹ UN Document S/22559, para. 20.

¹⁸⁰ FEIGHERY, p. 137.

the Executive Secretary submitted, which only provided a limited amount of information¹⁸¹. This implies that within the procedural framework of the environmental claims, Iraq was only able to defend itself in a very limited and fragmented way.

c) Technical Assistance

In 2001, to compensate for the marginalization of Iraq in the claims process, assistance was provided with respect to environmental claims (“F4 claims”). This support was only limited to environmental claims. The explicit aim of this technical assistance is to “facilitate the promotion of the legitimate interests of Iraq with respect to F4 claims” and to ensure the “full development of the facts and relevant technical issues, and in obtaining the full range of views including those of Iraq”¹⁸².

This form of assistance will be attributed to Iraq through experts. In order to facilitate further cooperation, the experts are chosen by Iraq and approved by the Executive Secretary¹⁸³. Through this method, Iraq will submit to the Executive Secretary the tasks that it would propose to the experts to carry out¹⁸⁴.

The task of the assisting experts is to assist in¹⁸⁵:

- The preparation of the “responses to Article 16 reports”
- The arrangement of “written submissions and oral proceedings before the panel in accordance with Art. 36 of the Provisional Rules for Claims Procedure”
- The composition of “any other communication with the UNCC on F4 claims”

Although reducing Iraq’s opportunities to engage in the process could have occurred to increase procedural efficiency and eliminate Iraq’s attempts to disturb the system, the defendant should always be guaranteed an active participation in the procedure. Moreover, the UNSC’s decision to attribute technical support to Iraq, assisted in the comprehension of the nature of environmental claims and their procedure.

XV. The Engagement of States

On the contrary to the marginal role that Iraq was given, States had a larger role in the process. Their active role is proven through the vast number of claims submitted. States were engaged in the claim process under two circumstances. The first circumstance is that of being a member of the Security Council that constructed the UNCC. The second circumstance is that of being a Claimant State.

a) Involvement in the UN Security Council

¹⁸¹ Cf. *supra* p. 11.

¹⁸² Annex of Security council decision S/AC/Dec.124 (2001), para. 2.

¹⁸³ Annex of Security council decision S/AC/Dec.124 (2001), para. 3.

¹⁸⁴ Annex of Security council decision S/AC/Dec.124 (2001), para. 5.

¹⁸⁵ Annex of Security council decision S/AC/Dec.124 (2001), para. 4.

As previously explained, the UN Security Council established the UNCC through its Resolution 687¹⁸⁶. Therefore, in essence dominant States in the UNSC such as the US played a role in the UNCC's construction and preliminary structure. This type of engagement in the process can seem dangerous as members of the UNSC are biased and have political and economic concerns in this dispute. This biased involvement could have contributed to the procedural marginalization of Iraq in the preliminary phases and the favoritism and inclusion of claimants in the process¹⁸⁷.

b) Involvement as Claimants

State claimants varied from different geographical territories. Instinctively, a group of claimants are Middle Eastern States that have been injured by the Gulf War such as Kuwait, Iran, and Saudi Arabia. Nonetheless, there were claimants that were not of proximity such as the US and the UK. In this light, claimants regardless of their geographical dispersion all had the same target which is to be fully compensated for the damages. Thus, claimants actively gathered proof and submitted the claims it found relevant.

Claimants have shown involvement through the formation of opportunities to contribute. Neighboring States such as Kuwait and Saudi Arabia filed similar claims as they were environmentally damaged in a similar way. The cooperation of neighboring countries allowed these States to better contribute such as the instance of the creation of the RERAG¹⁸⁸.

Claimants were also favored compared to the role of Iraq in the absence of funding constraints. States were not under embargo like Iraq was and therefore they had more financial facility in collecting evidence. This leads to an imbalance in the period of the process before Iraq was provided with funding.

XVI. Adoption of Reparation and *Jus Post Bellum*

The UNCC's active role in seeking environmental reparations after an armed conflict is an illustration of *jus post bellum*. *Jus post bellum* can be defined as the regime of post-conflict reconstruction¹⁸⁹. This analysis will examine how the UNCC's adoption of reparation can fit into the theorization of post-war conflict.

a) The Features of *jus post bellum*

The features of *jus post bellum* as described by Larry May, an American philosopher, are "retribution, reconciliation, rebuilding, restitution, reparations, and proportionality"¹⁹⁰.

¹⁸⁶ Cf. *supra* p. 5.

¹⁸⁷ Cf. *supra* p. 24.

¹⁸⁸ Cf. *supra* p. 24.

¹⁸⁹ BOON, p. 285.

¹⁹⁰ STAHN/IVERSON/EASTERDAY, p. 16–18.

Therefore, to qualify as a measure of *jus post bellum* the portrayal of these six functions must be evident.

In this view, the features of restitution, rebuilding and reparation are present in the obligation of compensating the damage to the claimants through the funds directed to environmental claims. It is relevant to emphasize that in order to increase the chance of environmental reconstruction, a swift response to the environmental peril is crucial. As demonstrated, the UNCC ensures that the sums compensated are being used to target the rehabilitation of the environment.

With regards to proportionality, claimants used “Habitat Equivalency Analysis” to establish “the nature and extent of compensatory restoration that is necessary to compensate for the loss of ecological services that were provided by the resources before they were damaged”¹⁹¹. Although, Iraq argued that the techniques used for the valuation of the damage’s cost are unacceptable as the environmental damages are not financially assessable and international law has not legislated such valuation methodologies, the panel reserved its right to the liberty of appreciating calculation methodologies¹⁹². Nevertheless, Iraq was required to compensate less than the actual sum of environmental damages caused. The feature of proportionality is therefore covered.

Moreover, reconciliation is shown through the lack of hostility between parties during and after the environmental program. This commitment to rebuild peace is demonstrated by the parties’ consent to the Follow-up Programme for Environmental Awards. Through this analysis, it is confirmed that the UNCC is a direct example of *jus post bellum* as the six features are portrayed in the UNCC’s mechanisms.

b) The Role of *jus post bellum*

The role of *jus post bellum* in the adoption of reparation is evident in the emergence of the environment as a subject of reparation. One of the revolutionary gestures in seeking peacebuilding is the recognition of environmental integrity as a unit worthy of claims¹⁹³. The domain of reparation is therefore, broadened to encompass the environment as an independent principle subject to damage. In this context, *jus post bellum* did not invent the principle of environmental reparation, but rather emphasized it as a peacebuilding tool¹⁹⁴.

The implementation of *jus post bellum* as a predominant tool in reparation to transition from an armed conflict phase to a peacebuilding phase, has influenced post war legal regimes. Once a reparation is oriented towards building peace, the questions of legal expectations of due process, and the valuation of damages are brought up¹⁹⁵. Additionally, this creates a setting of

¹⁹¹ Fifth ‘F4’ Report, para. 73.

¹⁹² Fifth ‘F4’ Report, p. 74.

¹⁹³ BORCHARD, p. 382.

¹⁹⁴ PAYNE, p. 126.

¹⁹⁵ PAYNE, p. 114.

cooperation to rebuild the environment, rather than the punishment of adversaries. Although the punishment of liable actors may bring a feeling of justice, it does not contribute to reconstructing the ecological harms.

Another legal function that *jus post bellum* plays in the context of the UNCC is the function of organization. In other words, this term can bring together the various fields included in peacebuilding after war to put them in one category¹⁹⁶. The fields concerned can include environmental law, international humanitarian law applicable during armed conflict. Since these fields have very little areas of overlap when kept distinct, their joint application in the context of peacebuilding and restoration can be complex¹⁹⁷. The benefit of such organization is to be able to create coherency between the various fields concerned. This creates a bridge of communication between the experts of these fields as they are connected through *jus post bellum*.

c) The Security Council: An Organ of *jus post bellum*

The UNCC's creation is an unprecedented example of the interference of the UNSC in the implementation of international responsibility through its competence. Chapter VII measures on their own cannot be forms of international responsibility because the nature of these measures does not qualify into the traditional vision of the system of responsibility, which is mainly targets reparation.

However, although international responsibility is a legal category that was not integrated into the logic of the Charter. The UNSC's primary objective is the maintenance of international peace and security¹⁹⁸. Despite the Council not having the role of the punishment of law violations, the elastic qualification of the UNSC's legal competence allows it to assume such a role on an *ad hoc* basis. In this case, Iraq's obligation to repair imposed by the UNSC does not pose any incompatibility with its competence.

The Commission quantifies and materializes the classical obligation that derives from the concept of wrongful acts. In its unique regime, the UNCC constitutes a remarkable precedent. However, this does not suppose the configuration of the UNCC as a permanent regime. In this light, the progress of the law of international responsibility depends on the structural evolution of the organized international community and the emancipation of its organs¹⁹⁹.

Consequently, the ambitious will of the UNSC, allowed it to contribute to the evolution of the law of international responsibility. The current state of practice notably shows that regimes of responsibility are feasible using chapter VII of the UN Charter. The design of the constructed regime of *jus post bellum* usually depends on the confronted political conflict.

¹⁹⁶ STAHN/IVERSON/EASTERDAY, p. 542.

¹⁹⁷ PAYNE, p. 365.

¹⁹⁸ UN Peacekeeping, Role of the Security Council, N 1.

¹⁹⁹ KOLLIPOULOS, p. 436.

XVII. Using the UNCC to Impact the Future

The viable experience of the UNCC in implementing international responsibility for environmental damages, has allowed experts to reflect upon numerous legal questions as demonstrated in this case study. These questions should be noted and used for the construction of similar commissions in the future. In order to increase the degree of justiciability of international law, it is important to take note of the relevant challenges that should be overcome if the same political conditions for its realization are reproduced.

a) Inconclusiveness of Central Notions

As demonstrated in the previous chapters, central notions related to the review of claims were left vague. These notions include the definition of environmental damages, the choice between civil and criminal proceedings, the calculations used to achieve the amount of compensation and the possibility of using other forms of causality. Such ambiguity created preliminary confusion on which claims are authorized and what evidence is needed. In this context, to increase the viability of future compensation commissions, central notions need to be explicitly defined.

b) Procedural Transparency

A delicate choice between transparency and confidentiality had to be made²⁰⁰. Rendering the claim processes public, creates a feeling of public justice and confidence in novel commissions. Moreover, the amount of documentation published on the UNCC website is minimal, therefore experts studying the UNCC as a case study would not have sufficient and detailed information on the records and justification of expertise. Being knowledgeable of the claimants' arguments, and the rationale of the commission made public is not adequate to gain a global image of the UNCC's experience.

c) Procedural Guarantees

As demonstrated, it is not until 2001 that technical assistance was offered to Iraq to help support its communication regarding the F4 claims. Offering technical assistance to the aggressor State eases the comprehension of the violations and represents a step towards cooperation and peacebuilding. Marginalizing the aggressor State and excluding it from the reparation process only further emphasizes the conflict and results in an unjust procedure that reflects merely one perspective.

XVIII. Conclusion

²⁰⁰ Cf. *supra* p. 14.

Through its contemporary method, the UNCC was able to lead as a neutral administrator to solve post war environmental damages. Ultimately, through its structure and its expedited claims processing, the UNCC breaks new ground in environmental reparation in international law. Its goal to set the next steppingstones towards peacebuilding and reparation was achieved as Iraq called for the creation of a Follow-up Programme for Environmental Awards²⁰¹. This request was supported by the participating claimants.

In essence, the UNCC through its environmental program was able to bring forward innovative legal and procedural solutions. However, the UNCC and the Governing Council could have taken more pronounced positions in the application of environmental regulations. The simple implication of international law principles (environmental integrity, precaution, obligation to future generations) in a restrained manner created zones of ambiguity²⁰². There is a clear hesitancy in the implementation of international law principles for the resolution of claims, as implied by the use of international law as a supplementary means.

Since environmental protection during conflict supposes the application of international laws from various fields, the prohibition of environmental damage should be accentuated. With a lack of emphasis and clarity in such legislations, transboundary environmental protection during armed conflict can be narrow. Furthermore, such ambiguity can lead to a delay in the international community's reaction time, which can cause the environmental damages to aggravate.

The construction of the UNCC allowed the international community to witness a proliferation of quasi-judicial bodies, although due to the ambiguity in legislations a strict application of international laws was impossible. Consequently, the commission had to favor the resolution of disputes compromising some parties' interests. Besides, the UNCC transposes the evolution in the role of the judge in the treatment of liability for wrongful acts. The massive treatment of claims calls for a balance between the settlement of individual claims and rebuilding the transboundary environmental damages.

The construction of the preliminary phases of the procedure by the UNSC, a politically biased group, could have led to the marginalization of Iraq in the procedure. The environmental claims portrayed some promising effort to reintegrate Iraq in the process by providing it with funds and technical assistance. Such marginalization can be dangerous as it deprives the defender from having his procedural guarantees. In this view, impartial procedural guarantees should be set in future arbitral or administrative procedures.

Lastly, although highly required, legal evolution is also fraught with risks. The risks are particularly evident in the Gulf war claims as the conflict is in the interface between the legal and the political domains. Nevertheless, it is through these developments that the international community can experience the revelation of potential implementation of international

²⁰¹ UNCC, Follow-Up Programme for Environmental Awards, N 5.

²⁰² PAYNE, p. 366.

responsibility through international institutional mechanisms. The impact of the UNCC extends to the commission's endorsement of the precautionary approach in addressing the need to strategize for the environment and human health's protection²⁰³.

In this regard, the UNCC's experience has a futuristic impact by contributing to shedding light on undermined environmental damages and war inflicted natural disasters. The viability of the UNCC's post conflict reparation was not only effective in the given case study but also in it being a reference for future armed conflict related environmental disasters. The highlighted flaws in the construction of the UNCC does not abolish the viability of the commission's performance.

²⁰³ PAYNE, p. 366.

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