Environmental Damages and the 1991 Gulf War: 
Some Yardsticks Before the UNCC

Mariano J. Aznar-Gómez*

Keywords: environmental damages; Gulf War; Security Council; state responsibility; United Nations Compensation Commission.

Abstract. Environmental damages caused by Iraqi occupation of Kuwait and its aftermath are to be assessed through the compensation system created by the UN Security Council. The UN Compensation Commission ('UNCC') has scheduled its first decision on environmental claims for the summer of 2001. These claims, however, deserve a particular treatment by the UNCC: problems related to the law applicable, the principle of due process, the principle of causal link, the assessment of damage, the identification of injured subjects, and the type of compensation are particularly addressed in the following pages. Keeping in mind the 'precedent-setting procedure' used by the UNCC, this article tries to explore previous applicable precedents, ordering them into a structured 'legal' framework and exposing existing gaps, if any.

1. INTRODUCTION

Environmental damage in the 1991 Gulf War was mainly caused by the torching and flooding of oil-wells in Kuwait, the spilling of oil from Kuwait and Iraq into the Persian Gulf, and the damage caused by the military action of both sides during the conflict. The accumulated effects were disastrous.1

Although the most serious pollution was caused during the final days of the war, the last oil-well fire was not completely extinguished until 6 November 1991. Damage locations were widespread, affecting not only Kuwait and Iraq but also Saudi Arabia, Iran, and other neighboring countries in the Gulf. Due to the Earth’s rotation and the normal winds on the area, some effects were reported in Afghanistan, Pakistan, India and, even in the Himalayan peaks between China, Tibet and Nepal. To a greater or lesser extent, respiratory infections increased in the zone and new cancer cases were reported. Air pollution affected people directly by reducing sunshine and thus altering their metabolism, and indirectly by contaminating the food chain when settling on land and water (internal or marine).

The extent of oil flooding in the Persian Gulf is still unknown but it has been suggested that four to five million barrels were spilled. Six hundred square miles of the sea surface and three hundred miles of coastline were covered by a dense oil slick. Saudi Arabia, in particular, was affected as well as the general ecosystem of the Gulf – already seriously damaged by years of oil-related activity. Marine life, birds, and underwater coral reefs and submarine systems sustained irreparable harm. In addition, thousands of oil lakes were artificially created by twenty-five to fifty million barrels of oil spilled from the non-fired but destroyed wells in Kuwait. Metals, chemicals, and other poisonous oil components were introduced, again, into the marine and land food chain and subsoil water resources.

Finally, attacks on the chemical and nuclear factories of Iraq’s Nuclear, Biological, and Chemical Weapons Program, and the destruction of conventional weapon stockpiles in Iraq and in the whole combat area allegedly caused environmental damage. Carpet bombings of allied air-to-surface operations as well as heavy off-road vehicles during the Desert Storm operations annihilated vegetation and fauna, and disrupted the soil surface of Kuwait and Iraq. Last but not least, hundreds of mines were deployed (and not recovered) in Kuwait and Iraq, and unexploded munitions still lie...

---


2. In those final days, fires burned close to five million barrels of oil per day, generating more than half a million tons of aerial pollutants daily.


4. In 1967 the Torre Canyon tanker dumped over 100,000 tons of crude oil into the English Channel damaging both French and English coastlines; in 1978 the Amoco Cádiz tanker spilled approximately 230,000 tons of oil, damaging the coastline of Bretagne, France; the 1979 Ixtoc oil-well blowout in the Gulf of Mexico released approximately 3.3 million barrels; and in 1989 the Exxon Valdez tanker dumped only 262,000 barrels of crude oil into the Prince William Sound, Alaska.
dormant in both countries, threatening not only human lives but the fragile environment as well.\(^5\)

Acting under Chapter VII of the UN Charter, the Security Council affirmed in its Resolution 687 (1991) that Iraq

without prejudice to the debts and obligations […] arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct losses, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait (part E, paragraph 16).\(^6\)

To assess damage – including “environmental damage and the depletion of natural resources” – and to receive compensation from Iraq, the Security Council created the United Nations Compensation Commission (hereinafter ‘UNCC’ or ‘Commission’).\(^7\) The procedure before the UNCC allows individuals, corporations, and governments to present consolidated claims, submitted by governments and international organizations, and to receive

5. This could be a preliminary list of direct damages, but there are other incidental damages caused by the construction of massive transport and supply structures for the armies at war, the depleting presence of more than one and a half million soldiers around the war operations theatre, the disturbing navigation of hundreds of vessels and aircraft in the Persian Gulf and abroad, or the displacement of thousands of people and their animals from their natural and historical homelands. As was reported on 28 March 1991 by Mr Martti Ahtisaari, United Nations Under-Secretary-General for Administration and Management, immediately after the visit of his mission to Kuwait, “[F]rom the air, the horizon sometimes comprises only black clouds and pillars of fire, torched in a final deliberate onslaught by retreating troops. The environmental havoc so cannot be authoritatively assessed, but its consequences are already felt by neighboring countries, and may affect yet others still more distant. Rivers, ponds and even lakes of spilling oil lie on the sand edge towards the wadis, the roads and the sea.” See Report to the Secretary-General on Humanitarian Needs in Kuwait in the Immediate Post-Crisis Environment, by a mission to the area led by Mr Martti Ahtisaari, Under-Secretary-General for Administration and Management, UN Doc. S/22409, para. 10.

6. Previous assessments of Iraq’s responsibility were affirmed in Resolutions 666 (13 September 1990), 670 (25 September 1990), 674 (29 October 1990), and 686 (2 March 1991).

7. Resolution 692 (20 May 1991). For a complete legal analysis of the UNCC see M. Frigessi di Rattalma, Nazioni Unite e danni derivanti dalla Guerra del Golfo (1995). See also J.B. Acosta Estévez, La crisis de Irak-Kuwait: Responsabilidad de Irak y respuesta internacional (1994); M. Khadduri & E. Ghareeb, War in the Gulf, 1990–1991: The Iraq-Kuwait Conflict and its Implications (1997); R.B. Lillich (Ed.), The United Nations Compensation Commission, 13th Sokol Colloquium (1995); and UN Department of Public Information, The United Nations and the Iraq-Kuwait Conflict, 1990-1996, The UN Blue Book Series, Vol. IX. All UNCC decisions and reports may be found in the UNCC web site, www.unog.ch/uncc. Unless otherwise stated, once fully cited by its UN official document number (UN Doc. S/AC.26/…), decisions of the Governing Council will be quoted hereinafter by their number title (e.g., Dec. 1). Reports of the different Panels of Commissioners will be quoted in the same way (e.g., Dec. 1, Report 1). Exceptions are the UNCC ‘Rules’ and the Well Blowout Control Decision (‘WBC Decision’) and the Well Blowout Control Report (‘WBC Report’). Page or paragraph numbers of these documents are used when available.
compensation for all the loss, damage, and injury resulting from Iraq’s actions of 2 August 1990 onwards. Environmental claims have been named by the UNCC as ‘F4’ Claims, within the general Category ‘F’ Claims that could only be presented by governments and international organizations. ‘F4’ Claims fall into two broad groups, and had to be filed before 1 February 1997. The first group comprises claims for environmental damage and the depletion of natural resources in the Gulf region, including those resulting from oil-well fires and the discharge of oil into the sea. The second group of ‘F4’ Claims are claims for costs incurred by governments outside of the region in providing assistance to countries that were directly affected by the environmental damage. This assistance included the alleviation of the damage caused by the oil-well fires, the prevention and clean up of pollution, and the provision of manpower and supplies. The verification and valuation of these claims may require extensive and time-consuming research and monitoring, and the first ‘F4’ Panel Report is scheduled for June–July 2001.

In conformity with the provisions on confidentiality in the “Provisional Rules for Claims Procedure” (hereinafter ‘Rules’), unless otherwise provided, all records received and processed by the Commission are confidential. Furthermore, in the decisions of the Governing Council, the identities of individual claimants and other information determined by the panels to be confidential or privileged will be deleted. Only some status reports may be provided by the Secretariat of the UNCC to governments, international organizations or corporations claiming directly to the Commission (Articles 30(1) and 40(5) of the Rules). As a result, all the available information on these claims is confidential. Nevertheless, an analysis of several decisions already adopted by the Governing Council on other claims (particularly the ‘F’ Claims) might be useful to predict the “legal and jurisprudential framework” of the UNCC for environmental claims. Precedents may be seen in those decisions, thus advancing a “precedent-setting procedure” which could ease the forthcoming work of the Commission, allowing it to resolve common issues and to develop

8. Decision on Claims for which established filing deadlines are extended, Dec. 12, UN Doc. A/AC.26/1992/12, 24 September 1992, para. 1(c). It must be noted that in its Decision 30 (UN Doc. S/AC.26/Dec.30, 17 May 1995), the UNCC decided that “except as otherwise provided in Decision 12 […] or for reasons of civil disorder, the Governing Council will not accept the filing of claims of corporations and other entities in Category ‘E’ and claims of governments and international organizations in Category ‘F’ after 1 January 1996.” For environmental claims a specific extended deadline to submit claims has thus been established.

9. The UNCC has received approximately 30 such claims, seeking a total of US$40 billion in compensation; see UNCC web site, supra note 7.

10. The UNCC has received 17 such claims seeking a total of approximately US$23 million in compensation, UNCC web site, supra note 7. The cost of extinguishing the oil-well fires left behind as Iraqi troops retreated from Kuwait is not included in this category but in the WBC Claim – within general Category ‘E’ Claims. In December 1996 the UNCC Governing Council approved the WBC award recommended by the Panel of US$610,048,547.

standard valuation methods for the panels’ review of the first installments of such claims. Such a ‘precedent-setting procedure’ is implied in Article 38 of the Rules.

To extract these precedents, ordering them into a structured ‘legal’ framework and exposing existing gaps, if any, will be the main object of this paper. There will be no attempt, however, to disclose all of the ‘UNCC law.’ Keeping environmental claims in mind, we will only try to highlight the possible options, applying by analogy those already given by the Commission. In any event, we must first outline the general legal framework of the UNCC. Given that extensive information already exists on the Commission, this will be done briefly but will include some of the special legal features relevant to future environmental claims. These are, in particular: to establish the link of causation (in order to confirm responsibility), to ascertain the damage (its verification and extent), to clarify the injured states (either directly or indirectly), and to establish the compensation (its kind and amount). These features – normally the most complex issues in environmental claims – must be examined against all the applicable law sources in order to foresee a legal framework for the UNCC when dealing with environmental claims.

2. APPLICABLE LAW

In all the relevant paragraphs of Security Council Resolutions dealing with Iraq’s responsibility, international law appears several times as the general legal framework and as the basis for the redress of damages for injured states, nationals, and corporations. However, the law of international responsibility appears to be applied obliquely and criticisms have been made of the system to deal with reparations decided upon by the Security Council. It must be said from the outset that, in general, the present writer shares the majority of these criticisms. The legality or legitimacy of all these decisions will not be discussed hereinafter.

12. The term used by the Security Council in these paragraphs to categorize the legal situation of Iraq is liability (responsabilidad in the Spanish version and responsabilité in the French version). In this paper both terms, liability and responsibility, will be employed interchangeably in so far as “[l]iability for international environmental harm encompasses the concept of state responsibility for breaches of international law but also includes liability for harm resulting from an activity permitted under international law.” See A. Kiss & D. Shelton, International Environmental Law 347 (1991).


Article 31 of the Rules provides the general legal framework for the Commission:

In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.

That is, the UNCC has established its own legal sources which include, principally, the UN Security Council resolutions, the decisions of the UNCC Governing Council, and international law. This appears to be a hierarchical list of sources in which, due to the ‘general’ character in casu of the Security Council resolutions and international law, the main part of applicable law will be developed by the UNCC decisions themselves. As we will see, this is partially true.

First, the UNCC is a product of the UN Security Council. It is a subsidiary organ created ex Article 29 of the UN Charter to fulfil the decisions adopted by the Council under Chapter VII of the Charter. As such, those decisions constitute the core part of applicable law for the UNCC, for the claimants (governments and international organizations) and for Iraq, keeping in mind that they are compulsory ex Article 25 of the UN Charter. The Secretary-General’s recommendations pursuant to paragraph 19 of Security Council Resolution 687 (1991) might also be included in this section, as it is an ‘implied text’ of Security Council resolutions dealing with the UNCC system. In fact, by paragraphs 3 and 5 of its Resolution 692 (1991), the Council decided to establish the Fund and the Commission referred to in paragraph 18 of Resolution 687, in accordance with Section I of the Secretary-General’s Report. The Security Council further directed the UNCC Governing Council to implement the provisions of Section E of that resolution, taking into account the recommendations in Section II of the Secretary-General’s Report.

Second, the UNCC Governing Council decisions are the product of a complex procedure, beginning with a preliminary examination by the UNCC Secretariat, followed by an assessment of facts and law by the

15. See the Report by the Secretary-General, UN Doc. S/22559, 2 May 1991.
16. There is, however, a difference between Sec. I and Sec. II of the Report, as the latter is not binding on the Governing Council, which only had to “take into account” its recommendations, whereas Section I is compulsory according to the wording of Res. 692 (1991). See F. Paolillo, Reclamaciones colectivas internacionales: el caso de los damnificados por la crisis del Golfo, in M. Rama-Montaldo (Ed.), International Law in an Evolving World – Liber Amicorum Jiménez de Aréchaga 545 (1994), at 560.
18. In order to verify that the claims meet all the formal requirements, with the possibility of remedying the defects observed (Arts. 14–15 of the Rules).
Panels of Commissioners and their recommendations to the Governing Council, which finally approves “[t]he amount recommended by the panels” (Article 40(1) of the Rules). This final decision, subject only to correction of computational, clerical, typographical or other errors (Article 41 of the Rules), “will be final and [is] not subject to appeal or review on procedural, substantive or other grounds” (Article 40(4) of the Rules).

In declaring the amount that must be awarded, these decisions are normally a short statement by the Governing Council with a common wording. The assessment of facts and law is to be found in the Panels’ reports. As a result, special attention will be given to these reports in this paper and, as a consequence, UNCC ‘decisions’ must be interpreted broadly (i.e., the ‘Decision’ stricto sensu together with the ‘Report’ of the Panels). Some UNCC Decisions are especially interesting for the purposes of our analysis and, therefore, will be those that will mainly be used. First, those establishing ‘general principles’ or ‘main guidelines’; secondly, those focusing on ‘governments and international organizations’ (‘F’) Claims which could also be applied to environmental (‘F4’) claims; and, finally, other decisions governing different categories of claims but complementing the legal

20. Under Art. 40(1)–(2), it must be understood that only the amounts recommended by the Panel – not the fact or law assessments – could be reviewed by the Governing Council. See V. Heiskanen & R. O’Brian, UN Compensation Commission Panel Sets Precedents on Government Claims, 92 AJIL 339, at 343, n. 39 (1998).
21. Neither by the claimants (and, of course, not by Iraq) nor by the Security Council thus applying, par analogie, the principle set down by the ICJ in Effect of Awards of Compensation Made by the UN Administrative Tribunal, Advisory Opinion, 1954 ICJ Rep. 47.
framework of future environmental claims. Nevertheless, all of them will be analyzed jointly and, in any case, as continuously stated by the Governing Council, these guidelines were “not intended to be exhaustive.”

Finally, though international law appears as a subsidiary source of law for the UNCC, it must be kept in mind that UN Purposes and Principles laid down in the UN Charter (Articles 1 and 2) include conformity with “the principles of justice and international law” in the settlement of international disputes. As it has been clearly stated by the International Court of Justice (hereinafter ‘ICJ’),

> [t]he political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.26

Hence, international law and, in particular, international environmental law’s rules and principles must be a core part of the applicable law of the Commission and a term of reference for all UNCC decisions. And, at least theoretically, international law has been applied by the UNCC in different ways. First, all the rules and directives governing the activities of the panels have been interpreted in light of the general principles of international law, and such international legal principles were also applied

---

24. These would be the “pertinent decisions” under Article 31 of the Rules. Two are particularly relevant for our subject: Dec. 9, on Propositions and Conclusions for Business Losses: Types of Damages and Their Evaluation, UN Doc. A/AC.26/1992/9, 6 March 1992; and Dec. 40, concerning the WBC Decision, UN Doc. S/AC.26/Dec.40, 18 December 1996. The most important legal assessment will be found in the WBC Report, UN Doc. A/AC.26/1996/S/Annex, 18 December 1996. Some other decisions, although not apparently connected with environmental harm, will be used henceforth because they are also particularly interesting in that they deal with time-delayed damages (as mental or personal damages); cause-delayed damages (as those provoked by unexploded mines); intangible damages (as intangible assets losses); indirect damages (as diplomatic costs); etc.

25. As stated by the UNCC, “[r]ecourse to ‘other relevant rules of international law’ may be necessary to the extent that the Panel is unable to resolve an issue before it by referring to such relevant Security Council resolutions and Governing Council Decisions.” See Report 25, Report and Recommendations made by the Panel of Commissioners concerning the First instalment of individual claims for damages up to US$100,000 (Category ‘C’ Claims), UN Doc. A/AC.26/1994/3, 21 December 1994, at 9–10.

26. Admission of a State to the United Nations, Advisory Opinion, 1948 ICJ Rep. 57, at 64. As Derek Bowett stated. “[t]here can be no basis for arguing that, as (a-political) organ, the Council is not subject to the ultra vires doctrine.” See D. Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, 5 EJIL 89, at 95 (1994).

by the panels to fill in the gaps when necessary.\textsuperscript{28} Second, conventional rules of general international law – such as the 1961 Vienna Convention on Diplomatic Relations, the 1969 Vienna Convention on the Law of Treaties, or the Hague Regulations on Land Warfare – have also been invoked as a legal reference.\textsuperscript{29} Third, the UNCC has used international jurisprudence, either generally\textsuperscript{30} or by reference to particular tribunals,\textsuperscript{31} in order to apply its findings analogically. Fourth, the Draft Articles on State Responsibility of the International Law Commission have also been evoked\textsuperscript{32} as well as doctrinal opinions.\textsuperscript{33} Finally, the UNCC has applied, when necessary, other sources of private international law.\textsuperscript{34} International law, in its \textit{infinite variety}, has therefore been used with varying intensity and applied flexibly by panels as a general basis of their decisions.

3. \textbf{Responsibility of Iraq and the Link of Causation}

The responsibility of Iraq was established by the Security Council\textsuperscript{35} in its Resolution 687 (1991) and accepted by Iraq\textsuperscript{36} as a condition for \textit{de jure}
cease-fire by letters of 6 and 10 April 1991.37 In its Report, the Secretary-
General had affirmed:

The Commission is not a court or an arbitral tribunal before which the parties
appear; it is a political organ that performs an essentially fact-finding function of
examining claims, verifying their validity, evaluating losses, assessing payments,
and resolving disputed claims. It is only in this last respect that a quasi-judicial
function may be involved. Given the nature of the Commission, it is all the more
important that some element of due process be built into the procedure. It will be
the function of the Commissioners to provide this element (paragraph 20).

That is, only in “resolving disputed claims” might the UNCC appear as a
quasi-judicial organ, mainly because there was no controversy as to Iraq’s
liability, and “the issues remaining for the [Panels of Commissioners] are
to determine the proper scope of causality.”38

Departing from the ‘liability principle’ set down in Resolution 687, in
its first decisions, the Governing Council extended its ‘jurisdiction’ to
those claims for losses and damages directly derived from the occupation
but provoked by either side.39 The ‘liability principle’ was thus expanded
since the claims would include any loss suffered as a result of:

(1) Military operations or threat of military action by either side during the period
2 August 1990 to 2 March 1991;
(2) Departure from or inability to leave Iraq or Kuwait (or a decision not to return)
during that period;
(3) Actions by officials, employees, or agents of the Government of Iraq or its
controlled entities during that period in connection with the invasion and
occupation;
(4) The breakdown of civil order in Kuwait or Iraq during that period; and
(5) Hostage-taking or other illegal detention.40

The lien de causalité (link of causation) was thus established and all sub-
sequent UNCC decisions on particular claims have considered Iraq’s
liability already proven41 with no ‘disputed claims’ having really been

---

37. UN Docs. S/22456 and S/22480. See the reply of the Security Council of 11 April, UN Doc.
S/22485.
39. In its letters of 6 April 1991 Iraq contended that Resolution 687 held Iraq “liable for
environmental damage and the depletion of natural resources, although this liability has
not been established” and that “it [made] no mention of Iraq’s own right to obtain
compensation for the established facts of damage to its environment and the depletion of
its natural resources;” supra note 27.
40. Dec. 1, supra note 22, para. 18; and Dec. 7, supra note 22, para. 6. A special regime was
 created by the UNCC in its Decision on the Elegibility for Compensation of Members
41. See, amongst others, Report 25, supra note 25, at 6, for the ‘C’ Claims; the WBC Report,
supra note 24, para. 68, for WBC Claims; or Report 45, supra note 23, para. 49, for the
‘F’ Claims.
discussed. As John R. Crook has already stated, “[l]iability thus exists even in cases where the individual act of an Iraqi agent, taken in isolation, would not constitute a violation of international law.” True, Iraq’s liability covers all but direct losses, damage and injuries that may derive from the invasion and occupation of Kuwait. However, in the case of environmental harm, particular problems arise in dealing with the link of causation. As with most environmental liability claims, four main challenges to the link of causation can be identified:

First, the distance separating the source from the place of damage may be dozens or even hundreds of miles […] Second, the noxious effects of a pollutant may not be felt until years or decades after the act […] Third, some types of damage occur only if the pollution continues over time […] Finally, the same pollutant does not always produce the same effects, due to the important role played by physical circumstances. 

Accordingly, in order to fulfil the requisites of due process laid down by the UN Secretary-General in his Report quoted above, international law imposes upon the UNCC the obligation to verify carefully and accurately the evidence submitted to it.

3.1. Evidence before the UNCC and international law

The UNCC went on to elaborate further the link of causation by regulating the system of evidence. In its first Decision, the Governing Council realized that

[i]f, as expected, the volume of claims in these categories [of urgent claims] is large, the Commissioners would be instructed to adopt expedited procedures to process them, such as checking individual claims on a sample basis, with further verification only if circumstances warranted.

This idea was elaborated in Article 35 of the Rules: for claims of

42. This was evidenced in 1996 with the ‘Well Blowout Control Claim.’ Iraq had argued that “[i]n the case of Kuwait oil-wells the chain [of causation] was broken by the coalition bombing.” However, the UNCC’s Panel adopted the criteria established by the Governing Council on liability (Decs. 1 and 7, supra note 22) and, consequently, affirmed that “Iraq [was] liable for any direct loss, damage or injury whether caused by its own or by the coalition armed forces. Iraq’s contention that the allied air raids broke the chain of causation therefore cannot be upheld;” WBC Report, supra note 24, at paras. 82–86.
43. J. Crook, The United Nations Compensation Commission: A New Structure to Enforce International Responsibility, 87 AJIL 144, at 154 (1993). There have also been well substantiated claims that, although under general principles of law would be entitled to claim for compensation, have not received the payment of compensation recommended by UNCC Panels because of lack of evidence; see, e.g., Report 20, supra note 28, at 29.
44. Kiss & Shelton, supra note 12, at 352.
46. Art. 35 also states that “[e]ach panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted.”
individuals who were forced to leave Iraq or Kuwait (Category ‘A’) and the claims of those who suffered serious personal injuries or whose spouse, child or parent died (Category ‘B’), “claimants are required to provide simple documentation of the fact” and “[d]ocumentation of the actual amount of loss will not be required.” For the claims of those who suffered personal losses of up to US$100,000 (Category ‘C’), the provisional rules only require “appropriate evidence of the circumstances and amount of the claimed loss. Documents and other evidence required will be the reasonable minimum that is appropriate under the particular circumstances of the case.” The relatively small number of Category ‘B’ Claims allowed the panel concerned to resolve them largely through a claim-by-claim review, but, for Categories ‘A’ and ‘C,’ a detailed individual review of these urgent individual claims was neither warranted nor feasible.

For the larger number of individual claims (Category ‘D’), the claims by corporations (Category ‘E’) and the claims by governments and international organizations (Category ‘F,’ including environmental claims), claims “must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss” (Article 35(3) of the Rules). The Rules require that each of these claims be reviewed individually. However, using the ‘precedent-setting procedure,’ the work of the UNCC Commissioners is almost reduced to the verification of claims, their valuation, and the calculation of final compensation (Article 38 of the Rules).

If we compare this regime of proof with the general regime foreseen, e.g., before the ICJ, some important differences can be found. In the Fisheries Jurisdiction case, the Court stated that

[i]n order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. Such an award must be based on precise grounds and detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each

47. In keeping with this weakening of the required evidence, for these last claims, “[a] lesser degree of documentary evidence ordinarily will be sufficient for smaller claims such as those below US$20,000.”

48. Actually, the Commission concluded the processing of this category in 1995, paying successful claimants US$13,460,000; see UN Press Release, UN Information Service, Geneva, 1 October 1997.

49. Art. 37 of the Rules. To deal with these claims, the UNCC employed a variety of techniques for processing claims such as computerized matching of claims and verification information, statistical modeling, sampling and, when feasible, individual review.

50. Within the UNCC, some problems had already arisen with the assessment of evidentiary documents. See, e.g., Report 47, Report and Recommendations made by the Panel of Commissioners concerning Part One of the first installment of individual claims for damages above US$100,000 (Category ‘D’ Claims), UN Doc. S/AC.26/1998/1, 3 February 1998, esp. para. 75; or the letter of 8 January 1998 from the UNCC Deputy Executive Secretary on behalf of the Governing Council, UN Doc. UNCC/EXE/512/98, concerning the evidence required and the answer of the Panel of 19 January 1998 (UN Doc. S/AC.26/1998/2) in which the Panel consistently required documentary and other appropriate evidence in accordance with established criteria adopted by the Governing Council.
incident and their consequences in the circumstances of the case. It is only after receiving evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law.51

Moreover, as we have seen supra, confidentiality is a typical feature of the work of the UNCC. Thus, evidence – which is the natural proof of the link of causation – moves in a nebula of secrecy and privacy that does not accord with the idea of due process as recognized by general principles of law.

Nevertheless, when the UNCC Governing Council faced for the very first time a case-by-case category of claims – on 15–17 December 1997, a Category ‘F’ Claim52 – it decided that an investigation was necessary in order to determine the law and the facts for every claim. The Panel Report of this Decision furthermore stated that:

In view of the fact that Iraq had limited opportunities to comment on or object to the Claims, the Panel considered that it was under a stringent duty to determine with respect to each Claim whether the alleged loss had occurred, whether it was directly caused by Iraq’s invasion and occupation of Kuwait, and whether the amount of loss was adequately established.53

Therefore, an in-depth assessment of evidence was required generally speaking in order to satisfy due process, and particularly for the ‘F’ Claims that involve a substantial amount of claimed loss and could even be “unusually large or complex.” Thus, a special threshold of evidence had been established that must be fulfilled in order to make a claim admissible. First, as already affirmed in Decision 7,

[s]ince these claims will be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss.54

Second, in order to fulfil this criterion, the Commissioners have reiter-

51. Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgement, 1974 ICJ Rep. 175, at 204, para. 76. In the Trail Smelter case, the Arbitral Award of 11 March 1941 stated that the injuries must be “established by clear and convincing evidence.” See Trail Smelter (United States v. Canada), 3 UNRIAA 1905, at 1965 (1941).
53. Report 45, supra note 23, para. 64 (emphasis added). Dec. 114 has tried to solve this misrepresentation of Iraq before the UNCC giving Iraq access to “full claim files (consisting of the claim form, statement of claim and all of the documents provided by the claimant as attached to the statement of claim)” if “(a) the Government of the Republic of Iraq is a party to a contract forming part of the subject matter of the claim; or (b) if the situs of the alleged loss is in Iraq; or (c) if the Panel determines that the transmission of the claim file will otherwise facilitate the Panel’s verification and valuation of the claim; or (d) the amount claimed is more than USD 100 million.” See Dec. 114, supra note 22, paras. 14–15.
ated the evidentiary requirements in Decisions 9 and 15,\textsuperscript{55} and stated that “the Governing Council’s guidance regarding directness and causation [applied to business losses] is equally applicable to government claims.”\textsuperscript{56} As emphasized by the Commissioners, a minimum standard of evidence should be necessary “not only in accordance with the Rules of the Commission, but is also consistent with the general principles of international procedural law and practice.”\textsuperscript{57}

The UNCC has thus – perhaps influenced by some well-known international scholars acting as Commissioners, particularly in the ‘F’ Claims – adopted stricter evidentiary criteria than those originally foreseen by the UN Security Council’s resolutions and the first Governing Council’s decisions, and developed its law on a case-by-case basis, keeping in mind international law in order to satisfy the minimum requirements of any legal due process and, in particular, the effective verification of the link of causation.\textsuperscript{58}

\subsection*{3.2. Precedent-setting on evidence}

The Commissioners have developed a special set of rules on evidence for the most complex claims, which seek a large amount of compensation (‘D,’ ‘E,’ and ‘F’ Claims). For all these categories – and in general as an analogical way of working – the UNCC has accepted that guidelines established for one particular category may be used in other categories.\textsuperscript{59} These general guidelines, which may be applied as general rules across the entire set of claims’ categories, ease the work of Panels in two ways: first, once the general features on evidence in previous decisions have been settled, they can be referred to as authoritative precedents, being applied as an ancillary source of law; second, they are not obliged to elaborate

\textsuperscript{55} See, in particular, the requisites established Decision 15, Decision on Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait; where the trade embargo and related measures were also a cause; Dec. 15, UN Doc. S/AC.26/1992/15, 4 January 1993, para. 5.

\textsuperscript{56} Report 45, supra note 23, para. 56.

\textsuperscript{57} Report 45, supra note 23, para. 60.

\textsuperscript{58} As the Category ‘C’ Claims Panel recognized, “consideration of logic, fairness and equity must enter into this determination;” see Report 25, supra note 25, at 22). The Panel also recognized this consideration in the Governing Council law-making process “when formulating and issuing certain of its Decisions;” id. As feared in the Secretary-General’s Report, it has been the function of the Commissioners to provide not some but all the elements of due process into the procedure.

\textsuperscript{59} This may be seen, for example, in Report 45, supra note 23, paras. 54 and 56; in the WCB Report, supra note 24, para. 71; or in Report 50, Report and Recommendations made by the Panel of Commissioners concerning Part Two of the first instalment of claims by government and international organizations (Category ‘F’ Claims), UN Doc. S/AC.26/1998/4, 12 March 1998, para. 45. For a general approach to evidence before the UNCC, see M. Kazazi, An Overview of Evidence Before the United Nations Compensation Commission, 1 International Law Forum 219 (1999).
the general framework on evidence for every particular group of claims. They may refer to precedents bearing in mind, however, that this rule must be applied taking due account of the circumstances of each particular case.

Depending also on each particular case, when evidence has been accurately provided, the panels have interpreted the guidelines broadly in order to provide compensation to all well-founded claims. A number of claims, based on this broad interpretation, have been compensated, for example, those relating to the “breakdown of civil order in Iraq and Kuwait.” This ‘breakdown,’ included among the direct links of causation by Decisions 1 and 7, has been used to assess and compensate business property that had been lost “because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait.”

It has also been used to compensate damages to embassies and consulates’ property ‘given the fact that the Claimants’ diplomats, having been evacuated, were unable to protect their real property in Iraq or Kuwait from damage during the invasion and occupation of Kuwait.’

But perhaps the most important features from the precedents already settled by the UNCC in order to frame an appropriate set of evidentiary rules and allow factual and legal assessment, are the different investigative tools that the panels have used up until now. Departure from this *acquis* on verification is the affirmation already quoted of the *stringent duty* of the UNCC to gather all the information necessary in order to identify the facts, to prove the damage and to assess compensation that

60. As said by the Panel on the first instalment of Category ‘C’ Claims, “[t]o the extent that the Governing Council, acting pursuant to its mandate, has provided procedures and guidelines addressing the issues before the Panel, the Panel need only apply these in its review of the claims;” see Report 25, supra note 25, at 9.

61. Report 20, supra note 28, at 19. The claims are grouped by the Secretariat on the basis of factual and legal issues. Some of the groupings are presented to the Panel fully or on a sample basis, but at all times, the Panel retains the option of reviewing the claims on a case-by-case basis; *id.*., at 10.

62. For example, in order to include damages to members of the Kuwaiti Armed Forces for events that occurred during the day of the invasion or during the days immediately following, the Panel concluded that “the exclusion from compensation stated in Decision 11 is not applicable to these claimants because the Allied Coalition Armed Forces did not exist at that time.” In the Panel’s view, “these claims were compensable since the serious personal injury or death was the direct consequence of Iraq’s invasion and occupation of Kuwait;” Report 20, supra note 28, at 15. The Panels also determined that, although Dec. 7 only referred to the costs of evacuating individuals from Iraq and Kuwait, compensation would also be awarded in respect of costs incurred in evacuating individuals from Israel and Saudi Arabia given that military operations or the threat of military action had also been directed against these two states. See Report 56, supra note 23, at 22, para. 100.

63. Dec. 9, supra note 24, para. 13.

64. Report 45, para. 73.
the claimants and Iraq are not in a position to give due to their limited involvement in the process. As has already been stated,

[The]these limitations on the parties’ role in the verification process have, in effect, forced the Commission to assume a more investigative role, at the expense of the adversary process traditionally applied in international claims settlement and arbitration.

Investigation (in a broad sense) by the UNCC includes some activities prescribed in the Rules and others not explicitly foreseen in those Rules. First, verification *sur pièce*, which includes – using the procedural orders – the petition of particular reports not only to the claimants and Iraq but to third parties as well in order to ascertain the facts before the Commission. Second, the use of experts, including the expertise of the UNCC Secretariat in all claims (Article 34 of the Rules) and the help of external advisers in most claims (Article 36 of the Rules). Finally, on-site inspections, that are not explicitly foreseen in the Rules. Nevertheless, Article 45 of the Rules states that

65. It must be said that an imbalanced burden had been established here between the claimants and Iraq. The position of the latter was clearly worsened by the fact that Iraq was deprived of the right to examine carefully the details of the claims and, even worse, to contend them properly. This situation was evident after reading the Fourth Report of the Executive Secretary of the Commission, UN Doc. S/AC.26/1993/R.16, 30 July 1993. Dec. 114 has changed, under some circumstances, that inequality; *supra* note 53.

66. Heiskanen and O’Brian, *supra* note 20, at 349. As established by Art. 36 of the Rules, requests by Commissioners for further written submissions or oral presentations are to be reserved for unusually large or complex cases. Actually, the panels have considered that they “should avoid, except where absolutely necessary, the practice of going back to claimant governments or to claimants for additional information;” *see* Report 25, *supra* note 25, at 11 (emphasis added).

67. Investigation, however, has been carried out by the UNCC with the generic limit of “the nature of the work of the Commission,” and sometimes the panels found no need for further verification of claims upon which agreement had been reached between the claimant and Iraq; *see, generally*, the Final Report and Recommendations of the Panel of Commissioners concerning the Egyptian Workers’ claims; Egyptian Workers’ Report, UN Doc. S/AC.26/1997/3, 2 October 1997, paras. 42 et seq.

68. In the first ‘F’ instalment, the Central Bank of Kuwait was asked to give some information on a claim submitted by Sri Lanka; *see* Report 45, *supra* note 23, at 6. This would also include UN Reports, as they were used by the Commission in Category ‘B’ Claims; *see, e.g.*, Report 20, *supra* note 28, at 11; or in the WBC claims, WBC Report, *supra* note 24, para. 85.

69. Including medical experts in Category ‘B’ Claims; several types of legal, medical, technical experts in Category ‘C’ Claims; actuaries, historians or labor law experts in Category ‘D’ Claims; or expert loss adjusting consultants in Category ‘E’ and ‘F’ Claims. Facing the ‘F4’ Claims, and following the UNCC Executive Secretary’s recommendations, the issue of making funds available to Iraq was discussed, for purposes of hiring experts to assist in preparing Iraq’s responses to claims in general and in particular the environmental claims. Awaiting “acceptable specific recommendations,” in its Dec. 114 the UNCC Governing Council “should urge the ‘F4’ panel to use its experts to ensure the full development of the facts and relevant technical issues, as well as to obtain the full range of views including those of the claimants and Iraq.” *See* Dec. 114, *supra* note 22, para. 22.
As far as the present author knows, the Commissioners have not asked the Governing Council for further guidance on this subject, nor has the Council adopted *ex officio* that guidance. Only the Arbitration Rules of the United Nations Commission on Trade Law (UNCITRAL) might be able to help us in our search for the legal base for on-site inspections. But there is no prescription on verification *sur place* in the UNCITRAL Rules (1976), nor in the Conciliation Rules (1980).70 However, several panels have made additional procedural rulings to use on-site inspections in order to assess alleged damage in different categories of claims.71 It could be supposed that the power to conduct such inspections might be one of the implied powers of the Commission.72

Undoubtedly, these three particular investigative tools are highly appropriate for future environmental claims: as it is well known, reports and information documents are one of the typical features of preventive environmental protection (including all types of techniques on follow up...


71. WBC Report, supra note 24, para. 17; Report 50, supra note 59, para. 7; Report 56, supra note 23, para. 11.

72. Perhaps the quasi-judicial function of the UNCC would be the realm in which to ascertain the power to make a *descente sur les lieux*: most tribunals have used this power, either explicitly given or not. See D.V. Sandifer, Evidence Before International Tribunals (1975), esp. at 343 et seq.; and M. Bedjaoui, *La descente sur les lieux* dans la pratique de la Cour Internationale de Justice et de sa davancière, in G. Hafner (Ed.), Librer Amicorum Professor Ignaz Seidl-Hohen veldern (1998). For a very similar discussion of implied powers on fact-finding by another UN organ, see the reasoning in M.J. Aznar-Gómez, *La determinación de los hechos por el Secretario General de las Naciones Unidas en el ámbito del mantenimiento de la paz y seguridad internacionales (1945–1995)*, 48 REDI 71 (1996). In two related cases – both dealing with environmental issues –, the ICJ has used this power of investigation *sur place*, currently foreseen by Art. 66 of the ICJ Rules: the first occasion was in the Diversion of Water from the Meuse case, 1937 PCIJ (Series A/B) No. 70, at 9; and, more recently, in the Gabčíkovo-Nagymaros case, 1997 ICJ Rep. 7.
and reporting systems).\textsuperscript{73} In our case, technical and more or less sophisticated documents on environmental damage could give the UNCC a complete panorama of facts for each claim. These facts, when feasible or necessary, may also be assessed by the Commission with the help of environmental experts, including expertise from specialized UN Agencies and governmental and non-governmental organizations. Finally, if convenient, the UNCC may dispatch on-site inspection teams – including commissioners and experts – which may complete the ever difficult task of verification and evaluation of environmental harm.

4. **Damage, Injured Subjects, and Compensation**

4.1. **Damage and its verification**

Damage to the environment is not easy to verify and quantify. Both assessments – verification and valuation – bring us to some problems that the UNCC will have to face when dealing with environmental claims. We will now elaborate upon the problems which may arise with the verification of damage, leaving aside the evaluation issues for the next heading (infra 4.2).

In order to verify the damage, two important issues are particularly interesting with respect to environmental claims: the assessment of damage *ratione temporis* and the assessment *ratione loci*, mostly because – as we have seen – environmental harm is typically extended by time and place.

*Ratione temporis*, two main limits have been established by the UNCC: the general time frame for the verification of some damages and the time limit to submit the claims. Both deadlines have important implications that will influence future decisions on environmental claims.

The time frame established to verify the occurrence of loss (2 August 1990 to 2 March 1991) is clearly inaccurate for some forms of environmental damage. It could be understood as the *dies a quo* for the verification of some kinds of damage – mostly the direct damages verifiable during that period: the blow out of oil, the oil flooding into the sea, the destruction of fauna and vegetation by military operations, etc. But most of the damage occasioned has still to be fully assessed given the long-term and widespread effects of these actions on the environment. Hence, some damage could only be verified outside the time frame even though it could be said that it *occurred* within that time frame.

Some analogous issues arose in this context with respect to claims for losses that occurred outside the relevant time period: the first in connection with mine explosions and the second in connection with damage to fetuses and pregnant women. According to a United Nations report, there were several million mines and other pieces of unexploded ordnance in Kuwait at the end of the occupation. Taking into account the long-lasting effects of the problem of mines and other unexploded ordnance, which was qualified as "the most lasting environmental problem facing Kuwait," the Governing Council extended the deadline for the filing of claims for losses and personal injuries resulting from public health and safety risks that occurred after or just prior to the expiration of the established filing deadlines.

Following these criteria, the Panel interpreted this Decision "to mean that a claim for serious personal injury or death resulting from a mine explosion should be compensated even if that explosion occurred after 2 March 1991." Something similar happened with other personal damages verified outside the time frame: the death or malformation of fetuses and damage to pregnant women during the invasion, although verified later than 2 March 1991 could be considered compensable if the link was established, either 'directly' or even 'indirectly.' In the first case, as stated by the Category ‘B’ Claims' Panel,

a pregnant woman was more vulnerable than other people to the difficult conditions resulting from the Iraqi invasion and occupation of Kuwait and their traumatizing effects, including the lack of medical care during this period, and the difficulty in receiving specialized care. Such conditions could well have severely impacted on the health of a pregnant woman or of a new-born.

An example of ‘indirect link,’ on the other hand, could be a serious personal injury or a death attributed to the lack of medical care, equipment or medicine [that] must be the consequence of an acute deterioration, or of a very severe exacerbation, of the health condition of a person, and not just of an aggravation arising from the normal course and development of a preexisting illness or injury.

We have considered these personal damages in particular because, normally, they also imply intangible damages that, though not the same,
could be assimilated into environmental harm which typically includes not only material losses but immaterial damages as well.\textsuperscript{80} The Commission has already faced this type of problem. When dealing with personal damages in Category ‘C’ Claims, it realized that

The occurrence of loss, such as a serious personal injury or death, outside that time frame imposes, in general, an extra burden on a claimant to provide an explanation as to why such loss occurring outside this time-period should be considered a direct result of Iraq’s invasion and occupation of Kuwait.\textsuperscript{81}

Therefore, damages that occurred outside the time frame could be considered by the UNCC, but claims must be accompanied by an \textit{extra burden} of evidence in order to clarify the direct link with the invasion and occupation of Kuwait. Technical reports, expertise, and on-site inspections, as discussed above, will prove very useful in verifying this link of special causation.

But the problem is not only the time frame for the occurrence of loss but also the time limit established by the UNCC to file the claims: 1 February 1997.\textsuperscript{82} Due to the special characteristics of environmental harm, injured subjects might only be aware of damage after that time limit. For these cases, Decision 12 may be useful since it says that “[t]he Governing Council may consider the extension of established filing deadlines […] if, in the future, additional situations are identified.”\textsuperscript{83} In Category ‘C’ Claims, although discussing currency exchange rates, the Panel affirmed that

In many cases, damages are incurred over a period of time, rather than on one specific date. For example, an injury may require long-term treatment, with expenses stretching over time. A related aspect is that compensable damages may arise even after the date on which the claim has been submitted.\textsuperscript{84}

This particular case arose, for example, when dealing with persons either detained or missing. Decision 12 tried to solve cases in which damage affected individuals who had been detained in Iraq until after or within one year prior to the expiration of the established filing deadlines. The Governing Council decided that claims for losses and personal injuries resulting from such detentions “should be submitted to the Commission

\textsuperscript{80} There are also examples of material damages which occurred outside the time frame but were included as compensable; see, e.g., Report 66, supra note 23, paras. 116–117.

\textsuperscript{81} Report 25, supra note 25, at 12.

\textsuperscript{82} Supra note 8. See also Dec. 7, supra note 22, para. 42.

\textsuperscript{83} Dec. 12, supra note 8, para. 5.

\textsuperscript{84} Report 25, supra note 25, at 31 (emphasis added). Bearing this in mind, and for this particular issue, the Panel decided to adopt a conversion standard “rather than subtle, practical than theoretical, and mass-oriented rather than aimed at individual particulars;” id., at 31–32.
within one year of the detainee’s release […] but not later than the time limit to be established pursuant to paragraph 2 of this decision.\footnote{Dec. 12, \textit{supra} note 8, para. 2 provides: “When the Executive Secretary determines that the processing of all remaining claims before the panels of Commissioners is likely to take no more than one year to complete, he should so notify the Governing Council. The Governing Council should thereupon establish the final time limit for the submission of claims covered by paras. 1(a) and 1(b) of this decision. The Governing Council should establish the final time limit at its next meeting after receiving such notification and should allow at least three additional months from the date of its decision for the filing of the claims.”}

The Governing Council also foresaw the possibility that these persons may in fact be deceased. In this case, and according to the same Decision, the claims

should be submitted to the Commission within one year […] of the death of the detainee, as legally determined by the detainee’s Government, but no later than the time limit to be established pursuant to paragraph 2 of this decision.\footnote{Dec. 12, \textit{supra} note 8, para. 1(b).}

Taking this into account, the different reports on Category ‘C’ Claims have considered compensation for this damage, even when claims were submitted out of their time limits.\footnote{See, \textit{e.g.}, Report 25, \textit{supra} note 25, at 15–16.}

It could therefore be said that, following the criteria adopted by subsequent decisions of the UNCC, damage which occurred or was verified outside the time frame established by Resolution 686 (1991), could be compensable when a particular standard of evidence, in a case-by-case assessment, has been provided by the claimant. And it may also be said that, following Decision 12 and taking into account the precedent settled in other categories of claims, the UNCC could identify environmental claims as a category which deserves the extension of established filing deadlines if, in the future, unknown environmental damage emerged and the direct link with the Iraqi invasion and occupation of Kuwait could be accurately proved. Notwithstanding, the UNCC procedures could not be opened \textit{ad calendas graecas}: a final and definitive deadline must be decided by the Governing Council following action by the Security Council with respect to Iraq. Once the door to compensation was closed under Resolution 687 (1991), would the ‘normal mechanisms’ invoked in this resolution still be used?\footnote{The Secretary-General’s warning must be remembered: ‘Resolution 687 (1991) could not, and does not, establish the Commission as an organ with exclusive competence to consider claims arising from Iraq’s unlawful invasion and occupation of Kuwait;’ and that it was “entirely possible, indeed probable, that individual claimants will proceed with claims against Iraq in their domestic legal systems.” See Secretary-General’s Report, \textit{supra} note 15, para. 22; see also Crook, \textit{supra} note 43, at 157.}

This question invites discussion that goes beyond the scope of this paper\footnote{See questions on delay in the Third Report on International Responsibility by the current Special Rapporteur, Professor James Crawford, UN Doc. A/CN.4/507 and \textit{Addenda} 1–4, paras. 257–259 (hereinafter ‘Third Report (Crawford)’).} but, at the very least, it could be said that the
shadow of principles like non bis in idem, proportionality or unjust enrichment, should be kept in mind. If not, “[t]he reparation claim would thus degenerate into an instrument for managing the difficult dilemma between ruining Iraq and milking her for an unlimited period of time.”

Ratione loci problems have also been dealt with by the UNCC. UN Security Council Resolution 687 does not specify where the “any direct loss, damage” should have occurred. Decisions 1 and 3 supposedly establish a limit on the location of losses: Paragraph 18 of Decision 1 provides as a cause of damage the “[d]eparture from or inability to leave Iraq or Kuwait (or a decision not to return)” during the relevant period (subparagraph b, emphasis added), or the “breakdown of civil order in Kuwait or Iraq during that period” (subparagraph d, emphasis added). Decision 3 provides that “all references to detention and hiding are understood to mean detention and hiding within Iraq or Kuwait.”

These precedents would limit, ratione loci, the UNCC’s jurisdiction. Nevertheless, when solving the particular claims – particularly Category ‘B’ and ‘C’ Claims –, panels have adopted a more extensive approach that could be fruitful for environmental harm. In the First installment of Category ‘B’ Claims, the Panel stated that

the Commission has jurisdiction over a claim irrespective of where the serious personal injury or death occurred. The place of the event is not in itself a basis to determine whether the Commission is competent or not. However, the Panel finds that where a serious personal injury or death occurred in Iraq or Kuwait, this can more easily be attributable to Iraqi actions, whereas a claim based on an incident occurring outside Kuwait or Iraq needs to be more fully substantiated.

From this it could also be deduced that the fact that an event occurred in Kuwait or Iraq might be considered by the Panel to be a positive element, but was not sufficient in itself to establish the link of causation as such.

In Category ‘C,’ the Panel also adopted this line of reasoning when affirming that

subject to the requirements that must be met for a claimant to be eligible for compensation under particular category ‘C’ losses, the Commission has jurisdiction over a claim irrespective of where the loss occurred.

For Category ‘F’ Claims implicit limits are not to be supposed. Decision 7 does not establish such limits for environmental claims since the losses or expenses included are those resulting from:

90. Graefrath, supra note 13, at 45. On the rule against double recovery, see the Third Report (Crawford), supra note 89, paras. 248–249.
93. Id., at 25.
(a) 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;

(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 purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and

(e) Depletion of or damage to natural resources.\(^{95}\)

Interpreting this Decision in good faith and in accordance with the ordinary meaning to be given to its terms, the actions described above are not reduced to a specific territorial space. Moreover, it includes “coastal and international waters" and, generally speaking, “the environment” and “natural resources.” Therefore, if the particular approach for Categories ‘B’ and ‘C’ is to be maintained, and Decision 7 is plainly interpreted under its terms, environmental harm outside Iraq and Kuwait would be clearly under the UNCC’s jurisdiction, the link of causation having been confirmed. On the other hand, to restrict compensable environmental damage only to damages that occurred – and not originated – within both states would impair, first, part of legitimate claims for harm suffered by other states; and, second, would absolutely impede claims for damages suffered by the environment not subject to national jurisdiction or control. If the ‘liability principle’ enunciated in Resolution 687 is accepted with all its consequences, logically all environmental damage wherever verified might be compensable if it was the direct result of “Iraqi unlawful invasion and occupation of Kuwait.”

Evidence, in any case, must be of such a quality (and not necessarily only of such a quantity)\(^{96}\) to fulfil the special requisite of “the farther, the more evidence” established in the decisions quoted above.

95. Dec. 7, supra note 22, para. 35. For evacuation losses and costs incurred by a government, evacuation must be “from Iraq or Kuwait;” id., at 36. This Decision was, however, amplified by subsequent decisions where panel reports extended compensation to evacuation losses and costs incurred by Israel and Saudi Arabia, both states being targeted by Iraq; see this assertion in Category ‘F’ Claims in Report 45, supra note 23, para. 96. Something similar could be said about damage resulting from a SCUD missile attack against Israel, given that “such attacks [fall] within the provisions of decision 7, paragraph 6, which states that payment is available for losses suffered as a result of, inter alia, ‘Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991.’ Therefore – continues the Panel –, if the loss is direct, it is compensable regardless of the country in which the deceased suffered the attack.” See Report 47, supra note 50, para. 202; see also, supra note 62, in fine.

96. Nevertheless, there is normally a gradation in the requirement of evidence in relation to the amount claimed. As a Category ‘C’ Claims Panel has said, “a lesser quantum of evidence is required for claims that are for smaller amounts.” See Report 25, supra note 25, at 23; see also Decs. 1 and 7, supra note 22.
4.2. Injured states and reparation

Falling within Category ‘F,’ environmental claims can only be claims from governments or international organizations, seeking compensation for damage to the environment (first group of ‘F4’ Claims) and for costs incurred by governments outside of the region in providing assistance to countries that were directly affected by the environmental damage (second group of ‘F4’ Claims). As an obvious—though not plausible—consequence, environmental damage may only be claimed by the traditional subjects of international law.97 No claim has been submitted by an international organization under the ‘F4’ category. Only states around the Persian Gulf (Iran, Jordan, Kuwait, Saudi Arabia, and Syria) have submitted claims for every category of damage. For all types of claims, and in particular for environmental claims, the ‘precedent-setting procedure’ has clarified several useful assumptions. For example, the Governing Council has normally taken into account whether the claimants have alleviated the damage in any way.98 Thus, to know the conduct of Iraq during the conflict might be important in assessing the extent of its responsibility for the environmental damage; but again, until Decision 114 was adopted, the absence of Iraq from the process has had a negative impact on that assessment. The same could be said for the precedent settled by the UNCC which excluded from compensation, even in cases where evidence was properly given, indirect damage such as that deriving from the normal duty of prevention and not arising from the extraordinary measures adopted as a result of the specific circumstances of the conflict.99 The burden of proof of this “duty of prevention” – a typical feature in environmental affairs – has until now been accurately evaluated by the Commissioners; but it would be a good policy to gather comprehensive information not just from the claimants, but also from Iraq, when handling environmental claims.

97. Despite this, damage to individuals linked with environmental damage may also be compensable but under the category of ‘personal injuries’ (‘B’ Claims). As reported by the Commissioners, “[c]laims for serious personal injury caused by the pollution emitted from Kuwaiti oil-wells are compensable as the environmental damage from burning oil-wells was, according to United Nations reports, caused by Iraqi occupying forces.” See Report 20, supra note 28, at 38.
98. See, e.g., Dec. 15, supra note 55, para. 9 in fine; or WBC Report, supra note 24, para. 54.
Two more precedents could also be outlined. First, the UNCC has systematically excluded from compensation those damages that could have originated with or without the invasion and occupation of Kuwait. Therefore – and bearing in mind the existing pollution in the Gulf region (in particular, the Gulf waters) – a precise verification of damage could be influenced by the different threshold of pollution applied to that area. Second, damage resulting from the fulfillment of a right of the claimant, and not necessarily from an obligation created by the circumstances surrounding Iraq’s invasion of Kuwait, has also been excluded from compensation.

In any case, those claims already submitted cover most but not all of the environmental damage caused by Iraq’s unlawful invasion and occupation of Kuwait. Environmental claims submitted only by states and, supposedly, seeking compensation for damage to their environment make it impossible to put in motion all the new consequences arising from the commission of a wrongful act of a state. Awaiting the final decisions of the Commission on environmental claims, we will discuss briefly some of these ‘missing points,’ particularly, some problems with the delimitation of the kind of the ‘injured state,’ the consequences of that delimitation and the extent and nature of compensation.

The first group of F4 Claims – ‘direct’ damage to the environment –

100. Some other precedents – habitually present in compensation controversies – could also be applied to environmental claims such as the adoption of the currency exchange; Report 45, supra note 23, paras. 101–102; or Report 50, supra note 59, para. 74; or the selection of the date from which interest will run; Decision 16 on Awards of Interest, S/AC.26/1992/16, 4 January 1993, para. 1; Report 45, supra note 23, para. 103; or Report 50, supra note 59, para. 76. Likewise, questions such as how to avoid the payment of sums higher than those claimed (Report 50, supra note 59, para. 75) or how to avoid duplications of claims across different categories, should have been on the record of the UNCC when deciding environmental claims (see, e.g., Report 56, supra note 23, para. 5). See, generally, Decision 1, supra note 22, and Decision 13 on Further Measures to Avoid Multiple Recovery of Compensation by Claimants, S/AC.26/1992/13, 25 September 1992. In case of environmental claims, the Panels may consider it to be more appropriate to review a particular loss under a different classification from that under which it had been entered on the claim form; see Report 20, supra note 28, at 22; Report 47, supra note 50, para. 19; and Report 56, supra note 23, para. 15.


102. For example, the mere permanent or temporary closure of a diplomatic mission, even in time of armed conflict, is a right of the state and does not give rise to a claim of compensation before the UNCC. Report 45, supra note 23, para. 58. In this case, the only obligation of the receiving state – for which a violation could be claimed – is to respect and protect the premises of the mission, together with its property and archives; Report 50, supra note 59, paras. 55. See also, generally, Report 50, supra note 59, paras. 53–56; and Report 56, supra note 23, paras. 81, 106–111, 120–121; or Report 66, supra note 23, paras. 77–80.

103. Along with the second group of claims within Category ‘F4,’ i.e., costs incurred by governments outside of the region in providing assistance to countries that were directly effected by the environmental damage.
presents some special difficulties. The extent to which states could invoke the legal consequences of Iraq’s responsibility before the UNCC depends upon how the damage had affected those particular states. However, the ‘liability principle’ established by Resolution 687 (1991) and enshrined by the UNCC, ineluctably affects all of the questions related to the kind of injured state and the legal consequences that each affected subject may invoke. The ‘liability principle’ blurs the clarifying template drawn up by the Special Rapporteur on State Responsibility amongst subjects injured by the violation (1) of bilateral obligations, (2) of obligations erga omnes, (3) of obligations erga omnes partes, or (4) subjects “specially affected.” Whether plausible or not, under the assumption of the Security Council, Iraq’s responsibility stems only from its unlawful invasion and occupation of Kuwait, and not from the violation of particular conventional or general international rules. In the absence of a violated rule of reference (bilateral, erga omnes partes or erga omnes), the five states that have submitted environmental claims can simply be catalogued as “affected States.”

A second lacuna in the entire process is that neither states nor any international organizations have submitted a claim on behalf of the international community for damage suffered by this community. As stated above, thousands of tons of oil and ashes were deposited beyond national sovereignty or control. Parts of the High Seas, of the common atmosphere, and of the seabed were seriously affected by pollution both during and after the Gulf war. It is true that problems still exist on remedies adopted by single states on behalf the international community. The issue is currently under discussion within the ILC in its drafting of the Articles

104. Arguably, the second group will not present special difficulties in the assessment of damage, mainly because: (a) under the general framework of causality established by the UNCC, the link of causation could be easily founded; (b) costs incurred by states other than the Gulf region in providing assistance to alleviate the damage caused by the oil-well fires, the prevention or clean up of pollution and the provision of manpower and supplies are, more or less, easily evaluated; and (c) direct economic compensation is feasible.

105. See Third Report (Crawford), supra note 89, paras. 97–117. See also Aznar-Gómez, supra note 14, at 154.

106. Third Report (Crawford), supra note 89, paras. 99–105 (injured states and bilateral obligations) and 106–108 (injured states and multilateral obligations).


108. See J.I. Charney, Third State Remedies for Environmental Damage to the World’s Common Spaces, in Francioni and Scovazzi, supra note 27, at 149 et seq.
on State Responsibility – in particular, the determination of the scope of the term “injured States.” As the actio popularis has been neglected by the ICJ, might the actio publica established by the UN Security Council through the UNCC be a good solution for the lacuna in current international law in order to make reparation available for environmental damage to the common natural resources?

In Decision 5 it is plainly said that the international community is “represented by the UNCC.” In order to try to resolve the misrepresentation of some individuals with claims before the Commission, the UNCC may act as a trustee on behalf of some claimants who would not be in a position to have their claims submitted by a government. Broadening the interpretation of this decision, it could also be said for certain categories of claims that, because of their object, they could not be submitted by a government: e.g., the environmental claims for damage to common natural resources. Either directly or seeking “advice and any appropriate cooperation from established and experienced international bodies,” the UNCC might have fulfilled the important task of ‘request on appropriate person, authority or body to submit claims’ on behalf of the international community for damage against this community. This damage may occur without the existence of a directly affected state and may derive from any kind of multilateral source of obligations (conventional or customary, erga omnes partes, or erga omnes).

General problems on the institutionalization of the defense of common

109. For the term ‘injured States’ as understood by the ILC, see the résumé included in the Third Report (Crawford), supra note 89, paras. 66–81. See Art. 43 et seq. in their new wording given in 2000 by the ILC Drafting Committee on second reading in UN Doc. A/CN.4/L. 600 (hereinafter ‘2000 ILC Draft Articles’).
110. Too many doubts arose after the Second Phase of South West Africa case, when the Court decided that the actio popularis was ‘not known to international law as it stands at present; South West Africa Case (Second Phase), 1966 ICJ Rep. 47). See, in particular, the separate opinion of Judge Morelli (id., at 57–66) and the commentaries of S. Rossene, 71 RGDIP 853, at 871 (1967). The latter said that “la valeur de l’arrêt comme précédent et comme élément contributif à l’évolution du droit et à la pratique de la Cour est extrêmement limitée;” id., at 874.
112. The UNCC procedure allows the submission of claims by international organizations for individuals who are not in a position to have their claims filed by a government. This was particularly for the benefit of the Palestinians: thirteen offices of the United Nations Development Program (‘UNDP’), the United Nations High Commissioner for Refugees (‘UNHCR’) and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (‘UNRWA’) have all submitted claims; see Dec. 5, supra note 111.
environmental heritage have already been discussed. Neither the UN, in general, nor the Security Council, in particular, could be seen nowadays as the undisputed representative of the international community as a whole, despite the plausible efforts of some scholars. As a general rule the international community continues to be a decentralised community; as a particular trend, progressive communitarisation and institutionalisation flourish in different spheres of international law and international society thus preventing decentralised reactions to an act against the international community.

The creation of new mechanisms of coercive environmental control or adjudication has also been discussed. The Security Council, acting within its general powers under Chapters VI and VII of the UN Charter, might have some (albeit limited) *jus standi* in environmental affairs. First, in cases when situations and disputes involve environmental issues, the Council may have a twofold presence under Chapter VI of the Charter: a preventive action using its investigative powers under Article 34 of the Charter or creating – in collaboration with the General Assembly, UN Specialised Programs and NGOs – permanent watchdogs of environmental threats, and a dispute settlement support action, using its graduated powers under Articles 35–38 of the Charter. Second, as recognised by the Council itself, “[t]he non-military sources of instability in the [...] ecological fields have become threats to peace and security.” Keeping in mind the broad sense that the term 'threats to peace' has in the Security Council’s Report on Peacekeeping Operations, 1993, p. 10.

---

116. Discussing this issue at the ILC, mostly at the drafting of Part Two of State Responsibility Draft Articles, opinions of its different members reveal disagreement as to the meaning of the term *international community*: see, e.g., the opinions of Ago, Riphagen, Reuter, Ogiso, McCaffrey, Malek, Jacovides, Mahiou or Quentin-Baxter in Aznar-Gómez, supra note 14, at 55 et seq.
120. It must be remembered that in June 1991 the International Fact-Finding Commission was established as foreseen in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3. This Commission is competent to “[c]onduct, in accordance with Article 75 of the 1949 Geneva Conventions, any investigation of allegations of violations of the Conventions or of this Protocol;” Art. 90, para. 2(c)(i).
Council’s recent practice,\(^{122}\) ecological instability might be included in the qualification foreseen in Article 39 of the UN Charter only when the environmental threat is real. Then, the Council under Articles 39 and 40 of the Charter might adopt recommendations and provisional measures. Finally, the Security Council might preserve its coercive powers under Chapter VII of the Charter as an \textit{ultima ratio regis}, only to be used when all else fails and in case of threat to peace, breach of peace, or act of aggression. The consequences of the international responsibility of states with respect to environmental claims should, however, be handled by specialised institutions (\textit{e.g.}, UNEP), including dispute settlement or advisory procedures before the ICJ.\(^{123}\) The coercive powers of the Security Council would thus only remain in order to “restore international peace and security” (Article 39 of the UN Charter) in the broad sense in which it is currently used.

The third problem is that, as we have seen, the system created by the UN Security Council is a system of compensation which does not foresee – at least explicitly – the main and primary form of reparation: \textit{restitutio in integrum}.\(^{124}\) Under general international law, a directly injured state might choose between \textit{restitutio} and compensation: sometimes it will prefer to re-establish the \textit{status quo ante} by itself using the economic compensation received from the wrongdoing state.\(^{125}\) But when damage beyond national sovereignty or control has been caused to the environment, \textit{restitutio in integrum} appears to be, at least theoretically, the best method of redress.\(^{126}\) Actually, perhaps this might be the \textit{only} way of redress for


\(^{124}\) Art. 36 of the 2000 ILC Draft Articles.


\(^{126}\) A complete form of \textit{restauration} in the sense used by P.-M. Dupuy, \textit{Le fait générateur de la responsabilité internationale des États}, 188 RCADI 9, at 94 (1984-V).
non-directly injured states. *Restitutio* has been adopted by the UNCC when feasible:

In its review of relevant law on the subject, the Panel has observed that, normally, the object of a civil money judgement is to restore an injured party to a position as close as possible to that in which he or she would have been had the injury not occurred.127

However, being solely a system of compensation, it could be supposed that the claims filed by the claimant states seek compensation for damage through economic reparation. But, normally, reparation has been devoted to covering market prices of lost or non-used resources (economically evaluated)128 and has not compensated for the environmental harm itself.129 Problems arise when we try to establish a *compensation par equivalence*: can environmental harm be translated into economic terms? If damage was measured only quantitatively (to clean a beach, to restore a coral reef) then this would be simple; but when it crosses the threshold of quality (the end of a species, the entire destruction of a forest or any irreversible harm to the environment), can this still be assessed in economic terms? It is true that on occasions “damage will be irreparable because of physical, technical or economic reasons and, therefore, restoration will not be possible. In such cases added criteria will need to be developed for the purpose of measuring damage;” but it *might also be true* that “environmental damage must not remain uncompensated because of its eventual irreparable nature.”130 It has been said that other intangible damage (to human life or dignity or to sovereignty) could be economically compensated.131 But, leaving aside wrongful acts against sovereignty,132 damage to human beings and

---

129. A turning point can be found in the Commonwealth of Puerto Rico v. SS Zoe Colocotroni case, where the claim included “the injury – broadly conceived – that has been caused to the natural environment by the spilled oil;” 628 F.2d. (1980) 652, at 673, as cited in *Orrego Vicuña, supra* note 73, at 337.
130. *Orrego Vicuña, supra* note 73, at 337.
to the environment deserves a different legal regime. The UNCC has already had the opportunity to assess this kind of intangible damage when it assessed such immaterial harm as the loss of lives or the suffering caused by torture and rape. In these cases, however, the Commission did not elaborate upon the different injuries (whether intangible or not) and, in an expeditious way, decided to compensate cases within the established ceiling of US$10,000. Now, in the environmental claims already submitted, the UNCC will compensate the damage suffered to the environment of the five claiming states. Depending on the claims submitted, and without violating the non ultra petita principle, the Commission should be able to evaluate – or, at least, to assess – the damage suffered by the environment beyond national sovereignty or control. This will be a step forward in international environmental law, clarifying obscure zones of this branch of current international law.

5. SOME TENTATIVE CONCLUSIONS

Some of the problems that we have tried to underline in this paper arise from the very particular nature of the case in hand. It could be said at the outset that both the illicit act and the reaction to it were absolutely new: it is true that this has not been the very first time that a state has deliberately committed an act against the environment in a military action in war; but it is also true that this has been the first time that reparation for deliberate environmental harm has been dealt with by an international (quasi) jurisdictional body. The reaction of the Security Council through

133. The right to a safe environment as a human right will not be addressed here. See, generally, R.-J. Dupuy (Ed.), The Right to Health as a Human Right (1979). See also Kiss & Shelton, supra note 12, at 21 et seq.; Birnie & Boyle, supra note 27, at 188 et seq.; and contributions of A. Kiss, R.S. Pathak & A.A. Cançado Trindade in Brown Weiss, supra note 27.

134. Decided by the UNCC within category ‘B’ claims. Compensation for damage to intangible assets is also considered in Dec. 4, Decision concerning business losses of individuals eligible for consideration under the expedited procedures, UN Doc. S/AC.26/1991/4, 23 October 1991.

135. See Third Report (Crawford), supra note 89, paras. 244–247.

136. See, generally, A.H. Westing, Warfare in a Fragile World: The Military Impact on Human Environment (1980). In the Gulf War, acts against the environment were not only alleged acts of self-defense – which might be judged under the general rules of necessity, proportionality, discrimination and, even, humanity – but also as acts of force and deterrence. The environment was the military target in se. Quoting a commentator, “[w]hat made the Gulf War unique, and terrifying, is the fact that Iraq attacked the nature itself;” N.A. Robinson, International Law and the Destruction of Nature in the Gulf War, 21 Environmental Law & Policy 216 (1991). See also R.J. Zedalis, Military Necessity and Iraqi Destruction of Kuwait Oil, 23 RBDI 333 (1990).

137. If we see, for example, the “classical environmental cases” in international adjudication (Trail Smelter, Lac Lanoux, Gut Dam, Nuclear Tests, Phosphate in Nauru, Gabčíkovo-Nagymaros or Fisheries Jurisdiction (Spain v. Canada) – they do not consider intentional environmental harm but solely incidental harm. See Boisson de Chazournes, supra note 118, at 46; cf. Graefrath, supra note 13, esp. at 6.
the UNCC was also completely new. This provides us with relative landmarks and, as a precedent, it is scarcely useful for future normal international claims for environmental harm.

One must also bear in mind that this particular case was governed by a set of rules coming from different albeit linked branches of public international law: in particular, the law of the environment and the law of armed conflict. The truncation of these two branches has led to the assertion made by the ICJ in its 1996 Advisory Opinion on the Legality of Nuclear Weapons:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

And, in spite of the recent efforts of distinguished scholars to provide a general legal framework for the protection of the environment in an armed

---


139. If anything is completely clear after a close reading of the interventions in the session held on 3 April 1991 in which S/RES/687 (1991) was adopted, this is the “singular and historical” character of the situation (United States), “without precedents” (United States and Austria), demanding “extraordinary solutions” (Zaire), “that in ordinary circumstances would have caused us a huge inconvenience” (Zimbabwe). In fact, being “one of the most important proposals ever to be submitted” to the Security Council (United States), because of its “crucial importance” (Ecuador), the Council was requested “to look this resolution at the light of the uniqueness of the situation” (India). “Possibly – as the Soviet representative remarked –, this is not an ideal precedent in all cases.” See UN Doc. S/PV.2981, 3 April 1991.

140. Neither can it be used as a precedent of an international crime of a State: as accurately said by Pierre-Marie Dupuy, it seemed that “la question de la responsabilité étatique pour crime paraît tout à fait présente dans l’affaire du Golfe” but, nevertheless, “les conditions de mise en œuvre de [la] responsabilité internationale par l’ONU n’apparaissent pas forcément comme le premier témoignage contemporain d’un régime de responsabilité pour crimes […].” See P.-M. Dupuy, Après la guerre du Golfe, 95 RGDP 621 (1991), at 634, 637. For a limited appraisal of the potential contribution to international law by the UNCC see S. Boelaert-Suominen, Iraqi War Reparations and the Laws of War: A Discussion of the Current Work of the United Nations Compensation Commission with Specific Reference to Environmental Damage During Warfare, 50 Austrian Journal of Public and International Law 225 (1996), at 312–315.

141. 1996 ICJ Rep. 242, at para. 30. This applies not only to general military actions, but also, because of their well-known long-lasting destructive effects, to particular military decisions such as the use of mines.
conflict, there is still room for new developments in this sensitive sub-branch of international law. In particular, the UNCC might take a further step forward by clarifying some secondary rules.

Nevertheless, the UNCC still has to face the structural problems that current international law has in dealing with responsibility for environmental harm. Moreover, the fact that the unique origin of Iraq’s responsibility – its *fait générateur* – is its unlawful invasion and occupation of Kuwait, does not permit the evaluation of all the legal sinuosities of this case: which rules are applicable (assessing their nature – customary or simply conventional, and binding, character – peremptory or not –); whether and to what extent these rules have been violated (clarifying, for example, the still disputed terms “widespread, long-lasting/long-term and severe” damages); the possible consideration of circumstances precluding wrongfulness (the place of proportionality or *force majeure*), etc. Particularly, in the field of environmental harm, questions such as the admitted threshold of pollution or the attribution of the illicit act are still under discussion. Some of these issues may be relatively clarified by the UNCC in its forthcoming decisions on environmental claims.

At least, it could already be said that the Commission has found, in its ‘precedent-setting procedure,’ a useful tool to tackle problems of every category of claim. Gaps and inconsistencies have also been filled-in by the case-law system of the Commission, applying a set of rules derived from general international law applied *in casu*, although with serious deficiencies resulting from Iraq’s absence in the whole process. As environmental claims are particularly difficult to assess, the due process principle will be *a term of art* if Iraq is deprived of its right to appear more consistently before the UNCC. Decision 114 is, therefore, a plausible effort in preserving the due process principle.

But, generally speaking, this kind of *ad hoc* procedure, mastered by some leading states acting through the Security Council and the UNCC, is not the best way to approach questions of the international responsibility of states. In its future environmental claims decisions, the Commission *must have on record* – as a legal layout – the primary rules already enshrined in current international (environmental) law. And this...

---


143. The minimum standard of due process, as proposed by the UN Secretary-General, has been ensured mainly because of the enormous legal and loyal effort on the part of the UNCC’s Commissioners and Secretariat.

drives us to another final consideration. As it has already been said, the normative regime of international environmental law is still dispersed and not very effective. Efforts to codify a different set of rules typically applicable to environmental liability have been criticized. Most of these efforts have focused on primary rules. For the particular case of protecting the environment from damage during armed conflict, the conclusion of a new ‘Fifth Geneva Convention’ has already been proposed; or, alternatively, the adaptation or reform of current international environmental and humanitarian law. But, perhaps, the problem still is the lack of an adequate array of secondary rules, taking for granted the reluctance of states to accept their responsibility in environmental cases.

---

147. For all of these proposals, see Low & Hodgkinson, supra note 35, at 479 et seq.