

Legal Liability for Environmental Damage: The United Nations Compensation Commission and the 1990-1991 Gulf War

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Abstract

The United Nations Security Council gave the United Nations Compensation Commission (UNCC) environmental claims program a mandate that resulted in an innovative program to restore damaged natural systems. On April 6, 1991, the National Assembly of the Republic of Iraq formally accepted the ceasefire agreement offered by the Security Council, thus ending the 1990-91 Gulf War. Conflict over shared oil deposits had led Iraq and Kuwait into war. But what was truly exceptional was the extent of the role of natural resources, not just as a pretext for war, but also as the instrument and victim of aggression. The processes of war tore the desert surface with tank treads; the passage of refugees depleted water supplies; the retreating army ignited over 600 oil wells, spewing sooty smoke and liquid oil, and dumped millions of barrels of oil into the sea. The ceasefire included a package of measures, amongst them the UNCC. The goal was for the UNCC to bring the Government of Iraq to account for its invasion and occupation of Kuwait: the UNCC created a record of the damage and made monetary awards to be paid by Iraq in reparation for the injury caused by the invasion and occupation.

Claims for damage to the environment, depletion of natural resources, and related matters amounting to \$US85 billion were brought by governments. The environmental claims team began its formal review of the claims in 2000 and completed it with the creation of a tracking program to oversee the expenditure of the environmental compensation awards in 2005. Of the 168 claims brought, 109 were awarded compensation totaling US\$5.3 billion. The UNCC completed its review of claims and issued final awards in 2005.

The UNCC shared common goals of reestablishing a culture of reconciliation, truth and justice with war crimes tribunals and truth and reconciliation commissions elsewhere, but it is important to understand from the outset that the UNCC was established within the international law frame of state responsibility to provide financial reparations. It did not levy punitive damages nor was it considered to have a retributive purpose.

The Security Council established the Commission under the authority granted to it by the United Nations Charter “to decide what measures shall be taken [...] to maintain or restore international peace and security”. By resolution 687, the Security Council directed the Secretary-General to establish the UNCC, “[b]earing in mind its objective of restoring international peace and security in the area ... Conscious of the need to take the following measures acting under Chapter VII of the Charter.” The nature of the UNCC was not exactly that of a judicial body such as the International Court of Justice or the International Criminal Tribunal for the Former Yugoslavia, yet it was more judicial than administrative.

The UNCC Governing Council was designated the policy-making body with the ultimate authority to approve recommendations of compensation, disburse and manage the compensation fund, appoint commissioners, and establish procedural rules. Its membership was composed of representatives of members of the Security Council at a given time. The awards were paid by a fixed percentage of Iraq's oil revenues.

UNCC's task was to decide whether the factual statements of the claimants were supported by the evidence, to determine whether the losses supported by the evidence were directly caused by Iraq's invasion and occupation of Kuwait, and to value the amount of the loss. Although international law, and particularly the law of state responsibility, was applied by the environmental compensation program, UN Security Council resolutions and UNCC Governing Council decisions provided most of the legal rules needed to resolve the claims. Paragraph 16 of Security Council resolution 687 (1991) recognized that Iraq was:

“liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait”.

Governing Council decision 7 provided examples of “direct loss” for which Iraq was liable. The non-exclusive list of criteria for direct loss for the environmental claims included:

“34. ... any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991; ...

35. These payments are available with respect to direct environmental damage and the depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include losses or expenses resulting from:

(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.”

Significant aspects of the UNCC environmental decisions highlighted the focus on the goal of environmental integrity. These included the valuation of pure environmental damage, tracking environmental effectiveness of the projects funded by awards, and compensation for “environmental solidarity costs”. The UNCC also made awards for environmental monitoring and assessment costs that both recognized the need for information to inform the substantive claim review and acknowledged the precautionary

need to identify potential risks in order to inform future interventions, especially to protect human health. Even injured States were held to have a duty to mitigate environmental damage that is “a necessary consequence of the common concern for the protection and conservation of the environment, and entails obligations towards the international community and future generations.”

In the words of the UNCC’s first Executive Secretary, “the Security Council sought to restore a legal order that had been broken and to make good the damage caused by the conflict.” As Peter Sand and others point out, the UNCC moved beyond the bilateral state-to-state relationship that is the norm in international law, and particularly with regard to the environment acknowledged Iraq’s obligations to the community of nations.

The experience of the Iraq-Kuwait conflict points to the need for several measures to advance peacebuilding, environmental integrity and respect for international law. The very high cost of environmental damage, over US\$5 billion verified and valued by the Commission, is a strong argument for preventive measures. These should include: more stringent legal rules prohibiting attacks on environment and natural resources, stronger social norms of stewardship, and more effective prevention and response mechanisms. Consistent use should be made of international compensation institutions to ensure post-conflict environmental assessment and remediation takes place. An international standing fund should be established to finance timely response and clean-up measures, which would be replenished by levies on the belligerents through the compensation institutions.

Environmental restoration is long-term and it relies on complex ecological mechanisms that may have no apparent relation to human needs. The emphasis in peacebuilding is, for good reasons, on the short to medium term and on human livelihoods and human basic needs. This is appropriate as a step in the triage of traumatized nations. However, the seeds of long-term, broad scope environmental planning and restoration must be part of the basic peacebuilding model.
