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# CIVIL LIABILITY FOR WARTIME ENVIRONMENTAL DAMAGE: ADAPTING THE UNITED NATIONS COMPENSATION COMMISSION FOR THE IRAQ WAR

KEITH P. McMANUS\*

**Abstract:** There is little doubt that war has a deleterious effect on the natural environment of battlegrounds. Customary principles of international law, as well as more formal instruments such as treaties, address wartime environmental protection. An analysis of these mechanisms reveals that they are inadequate to ensure protection and restoration of environmental resources damaged during war. Thus, a mechanism is needed for assessing civil liability against nations for any wartime environmental damage. The United Nations Compensation Commission (UNCC), created to compensate victims of the Persian Gulf War, is a mechanism that if modified could fill this void. This Note focuses on the modifications that could make the UNCC a successful mechanism for assessing civil liability for wartime environmental damage. Further, this Note applies the adapted UNCC to the Iraq War, and examines whether U.S.-led coalition forces should be held civilly liable for damage to Iraq's natural environment.

## INTRODUCTION

The effects of war extend well beyond the destruction of strategic targets; civilian casualties are a devastating byproduct of inaccurate weaponry and military intelligence. Beyond human casualties, however, war also has a significant detrimental effect upon a nation's natural environment. What international law provisions exist to protect the environment from wartime degradation? Can a nation be held civilly responsible when potentially irreplaceable environmental resources are damaged or destroyed during combat? This Note will address these questions, viewing the latter through the lens of the Iraq War, also known as Operation Iraqi Freedom, that commenced in March 2003.

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Part I of this Note will examine historical impacts of warfare on the natural environment, including the current Iraq War. Part II will focus on the customary principles of international law governing war. Part III will address the current international environmental law provisions concerning war and environmental degradation. Part IV will examine the possible civil liability schemes for environmental damage incurred during war. Part V will focus on adapting the United Nations Compensation Commission (UNCC) to create a framework for civil compensation for environmental damage caused by war that can be applied to modern conflicts, particularly the Iraq War. Finally, Part VI will apply the adapted UNCC framework to the Iraq War as a method of holding U.S.-led coalition (Coalition) forces civilly liable for environmental degradation caused during the war.

This Note is not intended to offer a critique of the motives or necessity of the Iraq War, but rather addresses state responsibility for actions during war that damage a nation's valuable natural environment.

## I. THE IMPACT OF WAR ON THE ENVIRONMENT

### A. *Historical Overview of the Impact of War on the Environment*

The effects of war on the environment—whether as an unintentional byproduct of conventional warfare or a deliberate act to gain strategic advantage—are both catastrophic and well-catalogued.<sup>1</sup> In 146 B.C., the Romans salted the fields of Carthage to make the land useless for agricultural production.<sup>2</sup> The United States' use of atomic bombs on the Japanese cities of Hiroshima and Nagasaki at the end of World War II produced widespread environmental devastation,<sup>3</sup> and exposed the environment to high levels of radiation.<sup>4</sup> In the Vietnam War, the United States employed substances such as Agent Orange, which resulted in deforestation and destruction of vegetation.<sup>5</sup>

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<sup>1</sup> Laurent R. Hourcle, *Environmental Law of War*, 25 VT. L. REV. 653, 654–58 (2001) (cataloguing the historical impacts of war on the environment).

<sup>2</sup> See *id.* at 654; Jessica Adley & Andrea Grant, *The Environmental Consequences of War*, THE SIERRA CLUB OF CANADA, Aug. 19, 2003, <http://www.sierraclub.ca/national/postings/war-and-environment.html>. The Romans' actions were part of the Third Punic War. Hourcle, *supra* note 1, at 654.

<sup>3</sup> See Hourcle, *supra* note 1, at 657.

<sup>4</sup> John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection Under the International Law of War*, 15 FLA. J. INT'L L. 481, 487 (2003).

<sup>5</sup> See *id.*

The growth of the environmental movement in the late 1960s and early 1970s expanded public consciousness of the environmental effects of certain warfare techniques.<sup>6</sup> Despite this new awareness, however, war has continued to have disastrous effects on the natural environment.

### B. *The Current Situation: The Persian Gulf War and Beyond*

In 1991, Iraq, under the control of Saddam Hussein, invaded neighboring Kuwait, beginning the Persian Gulf War and a series of environmental catastrophes.<sup>7</sup> Iraq pumped up to 4 million barrels of oil into the Persian Gulf, endangering marine wildlife, migratory birds, and the fishing industry.<sup>8</sup> In addition, Iraq set hundreds of Kuwaiti oil wells ablaze, spewing carcinogenic smoke that lowered temperatures and resulted in "black rain."<sup>9</sup> The total impact of Iraq's military action on the natural environment is difficult to estimate.<sup>10</sup> So far, twelve nations have submitted claims to the United Nations (U.N.), estimating the cost of environmental damage from the Persian Gulf War at \$79 billion.<sup>11</sup>

More recently, U.S.-led air strikes in the former Yugoslavia resulted in environmental damage.<sup>12</sup> Operation Allied Force, under the aegis of the North Atlantic Treaty Organization (NATO), caused environmental degradation through the bombing of industrial fuel and chemical plants.<sup>13</sup> In one instance, air strikes resulted in the release of "2,100 metric tons of ethylene dichloride . . . and 200 kilograms of

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<sup>6</sup> See *id.* at 488.

<sup>7</sup> See Shilpi Gupta, Note, *Iraq's Environmental Warfare in the Persian Gulf*, 6 GEO. INT'L ENVTL. L. REV. 251, 252 (1993).

<sup>8</sup> Stephen L. Kass & Michael B. Gerrard, *The Gulf War*, N.Y. L.J., July 26, 1991, at 3; see Gupta, *supra* note 7, at 252.

<sup>9</sup> Kass & Gerrard, *supra* note 8, at 3; see Hourcle, *supra* note 1, at 657; Gupta, *supra* note 7, at 253.

<sup>10</sup> William A. Wilcox, Jr., *Environmental Protection in Combat*, 17 S. ILL. U. L.J. 299, 300 (1993). "[T]he total impact of Iraqi environmental treachery may not be known for years . . . . The cumulative impact of the oil spills severely damaged Saudi Arabian shrimp beds and inflicted heavy damage on sea birds, turtles, and coral reefs." *Id.* (citing Thomas P. Lippman, *Gulf War Leaves Environment Severely Wounded*, WASH. POST, Mar. 2, 1991, at A1).

<sup>11</sup> Eric Pianin, *Environmental Damages a Concern; Experts Fear Effects of War on Persian Gulf Region Could Be "Irreversible"*, WASH. POST, Mar. 20, 2003, at A21.

<sup>12</sup> Nicholas G. Alexander, Note, *Airstrikes and Environmental Damage: Can the United States Be Held Liable for Operation Allied Force?*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 471, 471 (2000).

<sup>13</sup> *Id.*

metallic mercury” which polluted soil, a canal, and the Danube River.<sup>14</sup>

More current and relevant to this analysis is the Iraq War, commenced by forces in March 2003.<sup>15</sup> There is concern that the Iraq War will have a significant effect on Iraq’s environment and water and could result in destruction of endangered species.<sup>16</sup> Furthermore, the use of weapons that contain uranium by U.S. forces could result in widespread environmental contamination.<sup>17</sup> At the beginning of the Iraq War, a group of two hundred lawyers and scholars from fifty-one nations sent a letter to U.N. Secretary-General Kofi Annan, warning of the possibility of “massive . . . environmental destruction.”<sup>18</sup> Former U.N. Chief Weapons Inspector Hans Blix said of the impending Iraq War: “To me the question of the environment is more ominous than that of peace and war.”<sup>19</sup>

Another concern with the Iraq War from an environmental destruction standpoint is the protection of archaeological and culturally significant artifacts, which are often included in a broad definition of “the environment.”<sup>20</sup> Reports have indicated that the Iraq War has caused damage to some of Iraq’s most ancient artifacts, including the Ishtar Gate, which sustained damage when U.S.-led troops were based in the historic city of Babylon.<sup>21</sup>

In March 2003, the U.N. Environment Programme (UNEP) issued the *Desk Study on the Environment in Iraq*.<sup>22</sup> The stated purpose of the *Desk Study* was to aid in “tackling the immediate post-conflict hu-

<sup>14</sup> *Id.* at 472.

<sup>15</sup> David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1. In addition to the Iraq War, U.S. forces also bombed Afghanistan in 2001 as part of Operation Enduring Freedom. See Cohan, *supra* note 4, at 490. The campaign in Afghanistan has resulted in deforestation as well as significant harm to wildlife. *Id.*

<sup>16</sup> Pianin, *supra* note 11.

<sup>17</sup> See Charles Seabrook, *War in the Gulf: On the Front Lines: The Iraqi Environment; Another Casualty of War*, ATLANTA J.-CONST., Apr. 9, 2003, at 16A.

<sup>18</sup> *Experts Warn of Environmental Catastrophe, International Law Violations in Iraq War*, U.S. NEWSWIRE, Mar. 18, 2003, <http://releases.usnewswire.com/GetRelease.asp?id=14009>.

<sup>19</sup> Pianin, *supra* note 11.

<sup>20</sup> See Cohan, *supra* note 4, at 485.

<sup>21</sup> Sue Leeman, *U.S.-Led Troops Inflicting Widespread Damage on Babylon, Museum Warns*, ASSOCIATED PRESS, Jan. 15, 2005, available at 1/16/05 APWORLD 00:18:46 (Westlaw). In addition, this account reported that armored vehicles destroyed “2,600-year-old brick pave[ment] . . . . [The damage] includ[ed] broken bricks stamped by King Nebuchadnezzar II . . . .” *Id.*

<sup>22</sup> UNITED NATIONS ENVIRONMENT PROGRAMME [UNEP], *DESK STUDY ON THE ENVIRONMENT IN IRAQ* (2003), available at [http://www.unep.org/pdf/iraq\\_ds\\_lowres.pdf](http://www.unep.org/pdf/iraq_ds_lowres.pdf).

manitarian situation in Iraq.”<sup>23</sup> Among the “environmental impacts and risks” of the Iraq War discussed in the *Desk Study* were, inter alia, disruption of power and water supplies, waste management and disease, burning oil wells, bomb damage, damage to industrial sites, and physical degradation of ecosystems.<sup>24</sup> In addition, the *Desk Study* indicates that as of April 15, 2003, the U.S.-led “coalition air forces had used 18,275 precision-guided munitions . . . and around 8,975 unguided munitions.”<sup>25</sup> The eight hundred Tomahawk cruise missiles used in the Iraq War as of April 12, 2003 were more than twice the amount used throughout the duration of the Persian Gulf War.<sup>26</sup>

## II. THE CUSTOMARY LAW OF WAR AND ITS RELATIONSHIP TO WARTIME ENVIRONMENTAL DEGRADATION

As shown by the examples listed above, the environment is at risk during wartime.<sup>27</sup> But what international law mechanisms exist to govern the conduct of nations during wartime? How can these mechanisms be applied to determine whether or not the military actions of a nation that result in environmental destruction are lawful?

### A. Customary Principles of the Law of War

The law of war provides four customary principles that can be applied to an environmental analysis: necessity, proportionality, discrimination, and humanity.<sup>28</sup> These general principles are drawn from the Hague Convention, signed in 1907.<sup>29</sup>

Under the customary principle of necessity, a nation may use any amount of force necessary to defeat the enemy, so long as those techniques are legal under the laws of war.<sup>30</sup> One commentator summarizes this principle as “each destructive act must be connected to the submission of the enemy.”<sup>31</sup> This principle would seem to afford na-

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<sup>23</sup> *Id.* at 8.

<sup>24</sup> *Id.* at 70–83.

<sup>25</sup> *Id.* at 71.

<sup>26</sup> *See id.*

<sup>27</sup> *See* discussion *infra* Part I.

<sup>28</sup> *See* Hourcle, *supra* note 1, at 662.

<sup>29</sup> Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention]; Hourcle, *supra* note 1, at 662.

<sup>30</sup> Wilcox, *supra* note 10, at 302.

<sup>31</sup> *Id.* (citing Major Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1, 30 (1992)).

tions a wide degree of discretion for choice of military action, as one could argue that destruction of the natural environment is necessary for the defeat of the enemy.<sup>32</sup> This principle, however, must be balanced against the remaining three customary principles.<sup>33</sup>

The customary principle of proportionality serves to mitigate the principle of necessity by requiring that military actions or weaponry not cause excessive destruction or loss of life when compared to the military advantage sought by the action.<sup>34</sup> The principle of proportionality is perhaps the most effective principle to apply to an environmental analysis. For example, it is obvious that the Roman's salting of fields and the Iraqi's intentionally causing an oil spill would be illegal because the destruction caused by the acts is excessive when compared to the pursued military advantage.<sup>35</sup>

The customary principle of discrimination holds that militaries must distinguish between military and civilian targets, and use appropriate weapons that are capable of this type of discrimination.<sup>36</sup> Under this principle, it is illegal to attack nonmilitary targets, such as environmental resources like forests and bodies of water.<sup>37</sup>

The humanity principle is embodied in the notion that "[m]ilitary forces at war must . . . take all possible measures to avoid unnecessary suffering."<sup>38</sup> Much of the environmental degradation that results from warfare, such as the use of biological weapons or contamination of the natural environment creates unnecessary human suffering.<sup>39</sup> Historically, the humanity principle only applied to human suffering, and therefore, those environmental harms that affected human suffering.<sup>40</sup> Following Iraq's actions in the Persian Gulf War, some have suggested

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Wilcox also points out that this "principle was articulated in writing as early as 1868 in the Declaration of St. Petersburg." *Id.* at 303.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *See Hourcle, supra* note 1, at 667–68. Hourcle points out that Article 51 of Additional Protocol I to the Geneva Convention codifies the principle of proportionality: "[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]).

<sup>35</sup> *See Wilcox, supra* note 10, at 303.

<sup>36</sup> Hourcle, *supra* note 1, at 665–66.

<sup>37</sup> *See id.* at 666.

<sup>38</sup> Wilcox, *supra* note 10, at 303.

<sup>39</sup> *See Cohan, supra* note 4, at 495–96.

<sup>40</sup> *See id.* at 496.

that the international community has shifted to a wider view of unnecessary suffering in applying the humanity principle.<sup>41</sup>

These general customary principles of the law of war were not developed to protect the environment during wartime; however, the breadth of the principles can be applied to evaluate the actions of a nation to determine whether or not a military action that results in environmental degradation is lawful under the international law of war.<sup>42</sup>

### B. *The 1907 Hague Convention*

In addition to the customary principles of the law of war, official treaties that codify general laws of war can be applied to the area of wartime environmental protection.<sup>43</sup> First among these treaties is the Hague Convention of 1907, which is an early example of a binding law of war.<sup>44</sup> The provision of the Hague Convention that seems most applicable to environmental protection is Article 23(g), which states that it is unlawful “[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>45</sup> There are many legal traditions, including the public trust doctrine,<sup>46</sup> and old English cases like *Keeble v. Hickeringill*, that consider natural resources to be property.<sup>47</sup> Under this viewpoint, Article 23(g) would stand as a strong, binding international law prohibiting the destruction of the environment during war unless imperatively necessary.<sup>48</sup>

However, it is this very clause that makes Article 23(g) somewhat problematic in affording protection against environmental destruction.<sup>49</sup> The clause requires that military conduct be balanced against the principle of necessity, which could trump environmental concerns in many instances.<sup>50</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> See Wilcox, *supra* note 10, at 304.

<sup>43</sup> See *id.*; Alexander, *supra* note 12, at 475–76.

<sup>44</sup> Alexander, *supra* note 12, at 476.

<sup>45</sup> Hague Convention, *supra* note 29, art. 23(g); see Wilcox, *supra* note 10, at 304–05.

<sup>46</sup> For a general discussion of the public trust doctrine’s history and modern application, see Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421 (2005).

<sup>47</sup> See, e.g., (1707) 103 Eng. Rep. 1127 (K.B.).

<sup>48</sup> Sharp, *supra* note 31, at 11; see Wilcox, *supra* note 10, at 304.

<sup>49</sup> See Stephanie N. Simonds, Note, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 STAN. J. INT’L L. 165, 171 (1992).

<sup>50</sup> See *id.*



### C. *The Geneva Convention of 1949*

The Geneva Convention of 1949<sup>51</sup> is very similar to the 1907 Hague Convention in scope and application to environmental protection.<sup>52</sup> Like the Hague Convention, Article 53 of the Geneva Convention forbids an occupying force from destroying any type of property, except when “absolutely necessary.”<sup>53</sup> In terms of environmental protection, the Geneva Convention has the same limitation as the Hague Convention, in that there is a built-in recognition of military necessity.<sup>54</sup> The Geneva Convention is even less useful for environmental protection because its stated purpose is “to protect a strictly defined category of civilians from arbitrary action on the part of the enemy,” which tends to limit the expansion of Article 53.<sup>55</sup>

## III. INTERNATIONAL ENVIRONMENTAL LAW AND WAR

### A. *International Instruments Respecting War and the Environment*

The customary principles of the law of war and the two binding conventions discussed above are important because they represent the basic underpinnings of the law of war.<sup>56</sup> However, these principles are limited in application to environmental protection during wartime because they were not drafted with the intention of being applied to the environment.<sup>57</sup> In 1977, this all changed with the introduction of the word “environment” into the international law of war.<sup>58</sup>

#### 1. Protocol I to the Geneva Convention

Protocol I to the Geneva Convention<sup>59</sup> was the first formal international law of war document to use the word “environment.”<sup>60</sup> Although Protocol I has not been ratified by the United States, its provisions concerning the environment “have been officially cited by the

<sup>51</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Geneva Convention].

<sup>52</sup> See Simonds, *supra* note 49, at 171–72.

<sup>53</sup> Geneva Convention, *supra* note 51, art. 53; Simonds, *supra* note 49, at 171–72.

<sup>54</sup> See Geneva Convention, *supra* note 51, art. 53.

<sup>55</sup> Simonds, *supra* note 49, at 172 (quoting COMMENTARY ON THE IV GENEVA CONVENTION 301–02 (Jean S. Pictet ed., 1958)).

<sup>56</sup> Hourcle, *supra* note 1, at 660–61.

<sup>57</sup> See Alexander, *supra* note 12, at 478.

<sup>58</sup> Hourcle, *supra* note 1, at 670.

<sup>59</sup> Protocol I, *supra* note 34.

<sup>60</sup> Hourcle, *supra* note 1, at 670.

United States.”<sup>61</sup> The relevant portions of the document specifically address wartime environmental degradation and the associated weaponry.<sup>62</sup> The three relevant sections of Protocol I are Articles 35(3), 55, and 56.<sup>63</sup>

Article 35(3) states that “[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”<sup>64</sup>

Article 55, entitled “Protection of the Natural Environment,” states that “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage” and “includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment . . . .”<sup>65</sup>

Article 56, though not aimed specifically at environmental protection, could help to avoid significant environmental damage.<sup>66</sup> Article 56 seeks to protect public works and installations that could have disastrous environmental results if destroyed, “namely dams, dykes and nuclear electrical generating stations.”<sup>67</sup> Article 56, however, is limited because it does not include industrial facilities, and therefore, does not prohibit the kind of environmental destruction that occurred during Operation Allied Force in the former Yugoslavia.<sup>68</sup>

Although the use of the term “natural environment” is a promising and noteworthy development in the body of the law of war,<sup>69</sup> other phrases in these articles of Protocol I have proven troublesome.<sup>70</sup> Both Articles 35(3) and 55 only prohibit damage to the natural environment that is “widespread, long-term and severe.”<sup>71</sup> The Department of Defense has stated that “[d]uring . . . negotiation [of Protocol I], there was general agreement that one of its criteria for determining whether a violation had taken place (“long term”) was

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<sup>61</sup> *Id.* at 672.

<sup>62</sup> Andy Rich, *The Environment: Adequacy of Protection in Times of War*, 12 PENN ST. ENVTL. L. REV. 445, 451 (2004).

<sup>63</sup> See Protocol I, *supra* note 34, arts. 35, 55, 56; Hourcle, *supra* note 1, at 672–73.

<sup>64</sup> Protocol I, *supra* note 34, art. 35.

<sup>65</sup> *Id.* at art. 55.

<sup>66</sup> See Rich, *supra* note 62, at 452.

<sup>67</sup> Protocol I, *supra* note 34, art. 56.

<sup>68</sup> Hourcle, *supra* note 1, at 658, 674.

<sup>69</sup> See Simonds, *supra* note 49, at 173.

<sup>70</sup> See Hourcle, *supra* note 1, at 673.

<sup>71</sup> Protocol I, *supra* note 34, at 28; see Hourcle, *supra* note 1, at 673.

measured in decades.”<sup>72</sup> Based on this definition of “long-term” the Department concluded that it was unclear whether the environmental damages caused by Iraq in the Persian Gulf War “would meet the technical-legal use of that term in Protocol I.”<sup>73</sup> The Defense Department’s interpretation is in spite of the fact that the damage was “severe in a layman’s sense of the term.”<sup>74</sup>

Another phrase of concern is “intended or may be expected” in Article 55.<sup>75</sup> The inclusion of these terms means that there is no prohibition on collateral environmental damage when it is not intended or expected—the most likely kind of damage to occur during war.<sup>76</sup> This narrow reading on the prohibition of environmental damage in Protocol I is supported by a Department of Defense report which states that “[t]he prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations . . . .”<sup>77</sup>

Protocol I to the Geneva Convention represents an important development for the recognition of the need for environmental protection during war, but it is greatly limited in its application and “lack[s] strength due to vague and uncertain wording.”<sup>78</sup>

## 2. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

Another international law mechanism that makes explicit reference to environmental protection during war is the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).<sup>79</sup> The purpose of ENMOD—which was drafted in response to the use of deforestation chemicals by the United States in Vietnam<sup>80</sup>—is to prohibit environmental

<sup>72</sup> Department of Defense, Report to Congress on the Conduct of the Persian Gulf War-Appendix on the Role of the Law of War [hereinafter DOD Report], *reprinted in* 31 I.L.M. 612, 636–37 (1992).

<sup>73</sup> *Id.* at 637.

<sup>74</sup> *Id.*

<sup>75</sup> Protocol I, *supra* note 34, art. 55; *see* Hourcle, *supra* note 1, at 673.

<sup>76</sup> *See* Hourcle, *supra* note 1, at 673.

<sup>77</sup> DOD Report, *supra* note 72, at 637.

<sup>78</sup> Hourcle, *supra* note 1, at 674.

<sup>79</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 151 [hereinafter ENMOD].

<sup>80</sup> Cohan, *supra* note 4, at 511.

modification for hostile purposes.<sup>81</sup> The significance of ENMOD is apparent when compared to the wording of Protocol I.<sup>82</sup> Article I of ENMOD prohibits any party to the treaty from “hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury . . . .”<sup>83</sup>

While ENMOD contains the same adjectives—“widespread,” “long-lasting,” (“long-term” in Protocol I) and “severe”—as Protocol I, ENMOD uses “or” instead of “and” in connecting these terms.<sup>84</sup> This creates a more stringent prohibition, since any environmental modification that results in widespread, long-lasting, or severe effects would be prohibited, as opposed to Protocol I, which requires that all three criteria be met.<sup>85</sup> Also of importance is the fact that ENMOD does not provide an exception for military necessity.<sup>86</sup>

Despite these important differences between ENMOD and Protocol I, critics suggest that ENMOD is not likely to curtail environmental degradation caused by war.<sup>87</sup> One major criticism is that ENMOD is limited by the fact that it prohibits environmental modification techniques only, and does not forbid conventional warfare tactics that damage the environment as a byproduct.<sup>88</sup> Critics have suggested that ENMOD, therefore, prohibits “the kinds of methods used by villains in science fiction rather than conventional warfare,”<sup>89</sup> since the environmental modification must be a “deliberate manipulation of natural processes—the dynamics, composition or structure of the earth . . . .”<sup>90</sup>

Therefore, ENMOD’s significance is rooted in the fact that it is the first international treaty to come into existence for the sole purpose of environmental protection during war, rather than for its practical effect on the wartime conduct of nations.<sup>91</sup>

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<sup>81</sup> ENMOD, *supra* note 79, art. 1.

<sup>82</sup> Hourcle, *supra* note 1, at 675–76; Rich, *supra* note 62, at 453.

<sup>83</sup> ENMOD, *supra* note 79, art. 1.

<sup>84</sup> Protocol I, *supra* note 34, arts. 35, 55; ENMOD, *supra* note 79, art. 1; *see* Hourcle, *supra* note 1, at 675–76; Rich, *supra* note 62, at 453.

<sup>85</sup> Hourcle, *supra* note 1, at 675–76.

<sup>86</sup> Rich, *supra* note 62, at 452–53.

<sup>87</sup> Hourcle, *supra* note 1, at 675–76; Rich, *supra* note 62, at 453.

<sup>88</sup> *See* Hourcle, *supra* note 1, at 675.

<sup>89</sup> *Id.*

<sup>90</sup> ENMOD, *supra* note 79, art. 2.

<sup>91</sup> *See* Hourcle, *supra* note 1, at 675; Rich, *supra* note 62, at 453.

### 3. Rio Declaration

Another international document that addresses environmental degradation that results from war is the Rio Declaration on Environment and Development of 1992.<sup>92</sup> The Rio Declaration was a followup to the Stockholm Conference on the Human Environment of 1972,<sup>93</sup> which was the first U.N. Conference that dealt solely with the environment.<sup>94</sup> Unlike Protocol I and ENMOD, the Rio Declaration is a nonbinding document.<sup>95</sup> Nevertheless, it was negotiated and agreed to by 176 nations, and represents an “important example of the use of soft law instruments in the process of codification and development of international law.”<sup>96</sup>

Most applicable to the issue of war and the environment are Principles 23 and 24 of the Rio Declaration.<sup>97</sup> Principle 23 states, “[t]he environment and natural resources of people under oppression, domination and occupation shall be protected.”<sup>98</sup> Principle 24 states, “[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”<sup>99</sup>

Although these principles are nonbinding, some commentators consider them to be valuable instruments.<sup>100</sup> Most noteworthy about Principle 23 is that it establishes “an absolute right to environmental protection and not one balanced by the needs of the belligerent parties.”<sup>101</sup> In this way, it sidesteps the pitfall of military necessity that so dominates customary principles of the law of war and the early treaties.<sup>102</sup> Furthermore, Principle 23 recognizes oppression and domina-

<sup>92</sup> Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (June 14, 1992) [hereinafter Rio Declaration], *reprinted in* 31 I.L.M. 814, *available at* <http://www.unep.org/Documents/Default.Print.asp?DocumentID=78&ArticleID=1163>.

<sup>93</sup> Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 June 16, 1972 [hereinafter Stockholm Declaration], *reprinted in* 11 I.L.M. 1416, *available at* <http://www.unep.org/Documents/multilingual/Default.asp?DocumentID=97&ArticleID=1503>.

<sup>94</sup> PATRICIA W. BIRNIE & ALAN BOYLE, *BASIC DOCUMENTS ON INTERNATIONAL LAW AND THE ENVIRONMENT I* (1995).

<sup>95</sup> *See id.* at 9.

<sup>96</sup> *Id.*

<sup>97</sup> Hourcle, *supra* note 1, at 677–78; Rich, *supra* note 62, at 454.

<sup>98</sup> Rio Declaration, *supra* note 92, princ. 23.

<sup>99</sup> *Id.* princ. 24.

<sup>100</sup> *See* BIRNIE & BOYLE, *supra* note 94, at 9; Hourcle, *supra* note 1, at 678.

<sup>101</sup> Hourcle, *supra* note 1, at 678.

<sup>102</sup> *See* discussion *supra* Part II.

tion—likely the predominant nature of hostilities in the modern age.<sup>103</sup> Principle 24 is significant because it recognizes the need to further develop international wartime environmental protection law, although it does not give any specific guidance.<sup>104</sup>

#### 4. Red Cross *Guidelines*

Another nonbinding international wartime environmental protection document that could be useful in determining breaches of international law is published by the International Committee of the Red Cross.<sup>105</sup> Entitled *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, the publication states that wartime environmental degradation which is not necessary is a breach of international humanitarian law and is punishable as such.<sup>106</sup> The *Guidelines* list a series of prohibited acts within environmental degradation, including deforestation, and destruction of civilian objects or historic monuments.<sup>107</sup> The *Guidelines* are a compilation of existing international environmental laws.<sup>108</sup> This is noteworthy because the *Guidelines* “translate often vague international norms into daily practice.”<sup>109</sup> As a result, the bulk of international environmental protection law should be incorporated into the military operations manuals of all nations, raising the possibility that environmental war crimes could be successfully enforced at law.<sup>110</sup>

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<sup>103</sup> Rich, *supra* note 62, at 454.

<sup>104</sup> See Hourcle, *supra* note 1, at 678.

<sup>105</sup> Int'l Comm. of the Red Cross, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, 311 INT'L REV. OF THE RED CROSS 230–37 (1996) [hereinafter ICRC Guidelines], available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/9ABFD815FB1E7D73C1256B660059F59C#a3>; see Mark A. Drumbl, Essay, *Waging War Against the World: The Need to Move From War Crimes to Environmental Crimes*, 22 FORDHAM INT'L L.J. 122, 131 (1998).

<sup>106</sup> Drumbl, *supra* note 105, at 132 (quoting SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995)).

<sup>107</sup> ICRC Guidelines, *supra* note 105, art. III.

<sup>108</sup> *Id.* art. I(1).

<sup>109</sup> Drumbl, *supra* note 105, at 132.

<sup>110</sup> See *id.* Drumbl argues that the ICRC Guidelines “could constitute the level of objective knowledge imputed to all military and civilian leaders and agents for purposes of culpability under international criminal legislation.” *Id.*

## 5. Draft Articles on State Responsibility

In 1996, the International Law Commission adopted Draft Articles on State Responsibility.<sup>111</sup> The purpose of the Draft Articles is to codify rules on state responsibility for wrongful acts, beginning with the principle that “every internationally wrongful act of a State entails the international responsibility of that State.”<sup>112</sup> Most applicable to an environmental analysis is Article 19(3)(d) of the Draft Articles that states “an international crime may result . . . from . . . a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.”<sup>113</sup> The importance of this provision is rooted in the fact that it “is one of the few international agreements . . . that demonstrated a willingness to criminalize environmental degradation.”<sup>114</sup>

### B. Possible Criminal Enforcement Mechanisms for War-Related Environmental Damage

As evidenced from the discussion of international law, enforcement is a difficult proposition, especially given the limited number of courts that would hear “environmental war crimes” cases.<sup>115</sup> For example, despite the well-documented environmental harm committed by Iraq in the Persian Gulf War, no international tribunal took any steps to prosecute the acts as environmental war crimes.<sup>116</sup>

## 1. International Court of Justice

One possible enforcement mechanism is the International Court of Justice (ICJ), established as the judicial body of the U.N. through its charter.<sup>117</sup> Under Article 93 of the U.N. Charter, all members of the U.N. are automatically parties to the Court.<sup>118</sup> Although the ICJ is equipped to hear environmental war crimes cases, it is unlikely that it

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<sup>111</sup> INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON STATE RESPONSIBILITY (1996) [hereinafter ILC Draft Articles], available at <http://www.un.org/law/ilc/reports/1996/chap03.htm#doc37>. The International Law Commission (ILC) was established by the U.N. in 1947 for the purpose of developing and codifying international law. International Law Commission, Introduction (1998), <http://www.un.org/law/ilc/introfra.htm>.

<sup>112</sup> ILC Draft Articles, *supra* note 112, art. 1.

<sup>113</sup> *Id.* art. 19(3).

<sup>114</sup> Drumbl, *supra* note 105, at 139–40.

<sup>115</sup> See Hourcle, *supra* note 1, at 687.

<sup>116</sup> *Id.*

<sup>117</sup> U.N. Charter art. 92, available at <http://www.un.org/aboutun/charter/>.

<sup>118</sup> *Id.* art. 93, para. 1.

ever will.<sup>119</sup> Under the rules that govern the ICJ, no claims can be heard or adjudicated unless the nation against which the claim is being brought consents to the jurisdiction of the ICJ.<sup>120</sup> Therefore, the ICJ is not an effective mechanism for enforcing environmental war crimes because it is unlikely that any nation would consent to jurisdiction.<sup>121</sup>

## 2. International Criminal Court

Another possible enforcement mechanism for liability for wartime environmental degradation is the newly formed International Criminal Court (ICC).<sup>122</sup> Organized pursuant to the Rome Statute, the ICC is the first international criminal tribunal.<sup>123</sup> Though not organized with the intention of prosecuting environmental crimes, the Rome Statute includes a reference to environmental degradation in its list of justiciable offenses.<sup>124</sup> Specifically, Article 8 of the Rome Statute includes “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental . . . widespread, long-term and severe damage to the natural environment” among its catalog of “war crimes.”<sup>125</sup>

Similar to the ICJ, it is unlikely that the ICC will be an effective tribunal for prosecuting environmental crimes.<sup>126</sup> Despite the inclusion of environmental damage in the list of war crimes, the Rome Statute has “either a high threshold for the crime or incorporates a military necessity balancing test.”<sup>127</sup> Therefore, it is unlikely that environmental damage caused by conventional warfare would be punishable, although some of Iraq’s actions in the Persian Gulf War may fall within the ambit of the Rome Statute.<sup>128</sup> The unlikelihood of the ICC

<sup>119</sup> See Hourcle, *supra* note 1, at 687–89; Alexander, *supra* note 12, at 485.

<sup>120</sup> International Court of Justice, Rules of Court art. 38(5) (1978, amended 2005) [hereinafter ICJ Rules], available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasic\\_text/ibasicrulesofcourt\\_20050929.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasic_text/ibasicrulesofcourt_20050929.htm); Alexander, *supra* note 12, at 485–86.

<sup>121</sup> See Hourcle, *supra* note 1, at 687–88. Yugoslavia attempted to enjoin the conflict in Kosovo by bringing a claim before the International Court of Justice, but it was dismissed for lack of jurisdiction. *Id.*

<sup>122</sup> See Peter Sharp, Note, *Prospects for Environmental Liability in the International Criminal Court*, 18 VA. ENVTL. L.J. 217, 218–19 (1999).

<sup>123</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute], available at [http://www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf); see Sharp, *supra* note 122, at 217–18.

<sup>124</sup> Rome Statute, *supra* note 123, art. 8(2)(b)(iv); Drumbl, *supra* note 105, at 124.

<sup>125</sup> Rome Statute, *supra* note 123, art. 8(2)(b)(iv).

<sup>126</sup> See Hourcle, *supra* note 1, at 688.

<sup>127</sup> *Id.*

<sup>128</sup> Sharp, *supra* note 122, at 241–42.



as an enforcement mechanism for wartime environmental damage “runs counter to the thinking that international humanitarian law may offer the possibility of an effective response to wartime environmental destruction.”<sup>129</sup>

The ICC is also hampered by the fact that not all nations are, or will likely ever be, parties to the Court—including the United States—for failing to ratify the Rome Statute.<sup>130</sup>

#### IV. CIVIL LIABILITY FOR WARTIME ENVIRONMENTAL DEGRADATION: POSSIBLE ENFORCEMENT MECHANISMS

The current customary law and treaty system is inadequate for protection of the environment from damage caused by conventional warfare.<sup>131</sup> Civil liability, which has been utilized in past conflicts, may be a more appropriate remedy and could serve as a possible deterrent to methods of warfare that cause environmental damage.<sup>132</sup> This Part will look at various civil liability systems by comparing possibilities and limitations for recouping environmental damage caused by war.

##### A. *United Nations Security Council Enforcement*

In response to Iraq's actions in the invasion of Kuwait during the Persian Gulf War, the U.N. passed Resolution 687, cataloguing Iraq's actions and detailing reparations.<sup>133</sup> Paragraph 16 of Resolution 687 states “Iraq . . . is 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.”<sup>134</sup> As a member of the U.N., Security Council resolutions are binding upon Iraq.<sup>135</sup> Thus, it would seem that Security Council enforcement is an effective way to enforce civil liability for environmental damage inflicted during war, since such damage was explicitly

<sup>129</sup> Drumbl, *supra* note 105, at 124.

<sup>130</sup> A full list of nations that have ratified the Rome Statute can be found at the ICC website at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (last visited Feb. 2, 2006).

<sup>131</sup> See discussion *supra* Parts II–III.

<sup>132</sup> Rosemary E. Libera, Note, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291, 309–10 (2001).

<sup>133</sup> S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991) [hereinafter Resolution 687], available at <http://www.fas.org/news/un/iraq/sres/sres0687.htm>.

<sup>134</sup> *Id.* para. 16.

<sup>135</sup> Gupta, *supra* note 7, at 269.

included in Resolution 687.<sup>136</sup> The Security Council, however, has had problems with enforcing resolutions; therefore, the U.N. created the UNCC through Resolution 687.<sup>137</sup>

### B. *United Nations Compensation Commission*

Paragraph 18 of Resolution 687 “create[s] a fund to pay compensation for claims that fall within paragraph 16 . . . and . . . establish[es] a Commission that will administer the fund.”<sup>138</sup> The UNCC is not a court, but rather is an administrative body that processes claims and determines proper amounts of payment from the fund.<sup>139</sup> Setting up and funding the UNCC turned out to be two very different projects, as a lack of cooperation by Iraq turned a projected \$6 billion compensation fund into a mere \$21 million by 1993.<sup>140</sup> However, this was sufficient to compensate all those who filed valid personal injury claims.<sup>141</sup> The UNCC set up a series of categories based on the different types of losses that were suffered by individuals.<sup>142</sup> Those who suffered injury due to Iraq’s actions could then submit claims within the categories and receive compensation from the UNCC.<sup>143</sup>

The UNCC represents a novel and potentially powerful tool for civil liability, because unlike the ICJ or ICC, the UNCC can operate without consent from the sanctioned party.<sup>144</sup> As such, the UNCC as it exists could be adapted to future conflicts to recoup the cost of environmental damage, and also to create a deterrent to any environmentally destructive action because of potential civil liability.<sup>145</sup>

There has been extensive critical commentary in this area, discussing the strengths and weaknesses of the UNCC as a mechanism

<sup>136</sup> See Resolution 687, *supra* note 133, para. 16.

<sup>137</sup> Resolution 687, *supra* note 133, at para. 18; Libera, *supra* note 132, at 295; see Gupta, *supra* note 7, at 267–69.

<sup>138</sup> Resolution 687, *supra* note 133, para. 18.

<sup>139</sup> Libera, *supra* note 132, at 295–97. For more on the UNCC, see The United Nations Compensation Commission, <http://www2.unog.ch/uncc/> (last visited Jan. 29, 2006).

<sup>140</sup> See Libera, *supra* note 132, at 297–98. Iraq refused to cooperate by scaling back oil production, as the UNCC was to receive thirty percent of all oil production profits. *Id.*

<sup>141</sup> *Id.* at 298.

<sup>142</sup> United Nations Compensation Commission, The Claims, <http://www2.unog.ch/uncc/theclaims.htm> (last visited Jan. 29, 2006) [hereinafter The Claims]; Libera, *supra* note 132, at 299–300.

<sup>143</sup> Libera, *supra* note 132, at 299–300.

<sup>144</sup> See *id.* at 308–09.

<sup>145</sup> See *id.* at 309.

for civil compensation for wartime environmental damage.<sup>146</sup> The limitations of the UNCC involve the cooperation of the sanctioned nation, as well as the presence of public wealth that could be seized by the UNCC.<sup>147</sup> Although the UNCC has jurisdiction without the consent of the sanctioned party, that nation—like Iraq after the Persian Gulf War—could impede funding of the UNCC by failing to cooperate with sanctions.<sup>148</sup> In addition, critics have cited the low priority status of environmental claims in the UNCC claims category hierarchy as another weakness.<sup>149</sup> UNCC claims are divided into six categories, running A through F; claims for environmental damage are included in category F4, the “second from the bottom of all ‘F’ claims.”<sup>150</sup>

### C. *The Alien Tort Claims Act*

The Alien Tort Claims Act<sup>151</sup> (ATCA) is a U.S. federal law that grants the federal courts jurisdiction over tort claims filed by aliens.<sup>152</sup> The full text of ATCA reads “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>153</sup> Use of ATCA for filing suit for environmental damage was shown in *Beanal v. Freeport-McMoRan, Inc.*<sup>154</sup> In *Beanal*, an Indonesian citizen filed suit against a U.S. corporation for environmental damage.<sup>155</sup> Although the plaintiff’s claims were dismissed, the existence of the case establishes the potential of ATCA and the federal courts as a means and venue to find civil liability for environmental damage to other nations.<sup>156</sup>

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<sup>146</sup> See generally Robin L. Juni, *The United Nations Compensation Commission as a Model for an International Environmental Court*, 7 ENVTL. LAW. 53 (2000); Tiffani Y. Lee, Note, *Environmental Liability Provisions Under the U.N. Compensation Commission: Remarkable Achievement with Room for Improved Deterrence*, 11 GEO. INT’L ENVTL. L. REV. 209 (1998).

<sup>147</sup> See Libera, *supra* note 132, at 297–98, 301–07. “Public wealth” is defined as “wealth that is not privately owned”—governmental assets or income like Iraq’s oil reserves. *Id.* at 306.

<sup>148</sup> See *id.* at 297–98.

<sup>149</sup> Lee, *supra* note 146, at 215–16.

<sup>150</sup> *Id.* at 215.

<sup>151</sup> 28 U.S.C. § 1350 (2000).

<sup>152</sup> Alexander, *supra* note 12, at 492.

<sup>153</sup> 28 U.S.C. § 1350.

<sup>154</sup> 969 F. Supp. 362, 366 (E.D. La. 1997); Alexander, *supra* note 12, at 492.

<sup>155</sup> *Beanal*, 969 F. Supp. at 366.

<sup>156</sup> See *id.* at 382–83.

However, the potential adaptability of ATCA is limited when applied to environmental damage caused by war.<sup>157</sup> Commentators have recognized that the “Foreign Sovereign Immunities Act . . . supersedes the ATCA when the defendant state was acting in its official capacity,” which is likely to be the case in any act of war.<sup>158</sup> In addition, the United States cannot be a defendant under ATCA, limiting any possible recovery for environmental damage in the Iraq War.<sup>159</sup> If a creative plaintiff sought to sidestep the government’s immunity by filing suit against officers of the United States, the case would likely fail as a non-justiciable political question.<sup>160</sup>

V. ADAPTING THE UNITED NATIONS COMPENSATION COMMISSION:  
A PROPOSAL FOR A CIVIL COMPENSATION SCHEME FOR  
WARTIME ENVIRONMENTAL DAMAGE

Despite the numerous international law provisions that serve to protect the environment from degradation during war,<sup>161</sup> there exists a gap between the growing international concern for the environment and the mechanisms that can actually curtail environmental damage caused by war.<sup>162</sup> The gap exists for practical reasons, such as the lack of clearly defined violations and methods of enforcement.<sup>163</sup> In addition, there are political reasons, such as the reluctance of some nations to consent to jurisdiction of international courts.<sup>164</sup> Some commentators also believe that there is a lack of adequate scientific information concerning the effects of war on the environment.<sup>165</sup>

Closing this gap requires the development of a mechanism that clearly defines wartime environmental damage and has the ability to enforce its judgments—both to compensate those affected by war and to serve as a deterrent from future unnecessary environmental degra-

<sup>157</sup> See Alexander, *supra* note 12, at 492.

<sup>158</sup> Alexander, *supra* note 12, at 493; see Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 (2004).

<sup>159</sup> See Alexander, *supra* note 12, at 493 (citing Canadian Transp. Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980)).

<sup>160</sup> *Id.* (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

<sup>161</sup> See discussion *supra* Parts I–IV.

<sup>162</sup> See Drumbl, *supra* note 105, at 123–24; George Black, *Is Environmental Destruction a War Crime?*, ONEARTH, Winter 2005, at 6, 7 available at <http://www.nrdc.org/onearth/05win/briefings.asp> (“The Iraq occupation has shown again that international law remains a dead letter as far as the environment is concerned.”).

<sup>163</sup> Drumbl, *supra* note 105, at 123; see Alexander, *supra* note 12, at 485–86.

<sup>164</sup> See Alexander, *supra* note 12, at 485–86.

<sup>165</sup> Hourcle, *supra* note 1, at 689.

ation.<sup>166</sup> In developing such a mechanism, it is instructive to look at some of the successes of domestic environmental law. For example, the Clean Air Act,<sup>167</sup> and Clean Water Act,<sup>168</sup> have had “teeth,” and thus a degree of success, due to the statutes’ provisions for citizen participation.<sup>169</sup> The current international law and warfare mechanism that has the most citizen participation is the UNCC, since individuals and corporations were given the ability to make claims and be awarded damages.<sup>170</sup> This is noteworthy as UNCC awards are distributed to individual claimants through their governments, rather than directly to governments to use as it chooses.<sup>171</sup>

The major issue for any environmental protection that is only magnified when dealing on an international level is enforcement.<sup>172</sup> If citizens of an affected nation are going to successfully recover damages for environmental degradation from a foreign nation, they will need a body that has the authority to collect those damages. While the ICJ and the ICC are hamstrung by limited jurisdiction based on consent and membership,<sup>173</sup> the U.N. has a wide membership, and the support of the majority of the world’s nations.<sup>174</sup> As discussed above, the U.N. has already established the UNCC for dealing with claims arising against Iraq from the Persian Gulf War.<sup>175</sup> Given its widespread international support, “[t]he Commission is a concrete manifestation of the international community’s commitment to the principles of state responsibility.”<sup>176</sup>

<sup>166</sup> See Drumbl, *supra* note 105, at 123–24.

<sup>167</sup> Clean Air Amendments of 1970 (Clean Air Act), 42 U.S.C.A. §§ 7401–7671q (2003 & Supp. 2005).

<sup>168</sup> Clean Water Act, 33 U.S.C. § 1251 (2003 & Supp. 2005).

<sup>169</sup> See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY, 1027–28 (3d ed. 2004).

<sup>170</sup> See Libera, *supra* note 132, at 295.

<sup>171</sup> Andrea Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*, 13 EUR. J. INT’L L. 161, 170 (2002). The UNCC supervises the distribution of awards by governments and can sanction them if they fail to turn over the awards to the individual claimants. See *id.*

<sup>172</sup> See Juni, *supra* note 146, at 72.

<sup>173</sup> See ICJ Rules, *supra* note 120, art. 38(5); discussion *supra* Part III.B.2.

<sup>174</sup> The United Nations currently has 191 member states. Press Release, United Nations, List of Member States, U.N. Press Release ORG/1360/Rev.1 (Feb. 10, 2004), available at <http://www.un.org/Overview/unmember.html>.

<sup>175</sup> See discussion *supra* Part IV.B.

<sup>176</sup> John R. Crook, Current Development, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT’L L. 144, 157 (1993); see Gattini, *supra* note 171, at 165.

The citizen participation aspect of the UNCC and its position as part of the U.N. make it particularly suited for adaptation to create a permanent body for imposing civil liability for environmental damage caused by war.<sup>177</sup> In fact, in December 2004, the UNCC approved \$2.9 billion in awards based on claims of environmental damage resulting from the Persian Gulf War.<sup>178</sup> Kuwait received \$2.27 billion, Saudi Arabia received \$625 million, and Iran received a small amount.<sup>179</sup> Interestingly, Saudi Arabia's award was compensation for environmental damage caused by the international coalition forces that liberated Kuwait, who used the Saudi desert for military installations.<sup>180</sup> Furthermore, the explicit reference to "environmental damage and the depletion of natural resources" as a cognizable claim in Resolution 687, which created the UNCC, is additional evidence of how the UNCC is suited for adaptation to ensure civil compensation for wartime environmental harm.<sup>181</sup>

#### A. *Structure of the United Nations Compensation Commission*

In terms of structure, the "UNCC is a subsidiary branch of the [U.N.] Security Council . . . composed of the Governing Council, the Commissioners, and the Secretariat."<sup>182</sup> The report of the U.N. Secretary-General, which detailed the structure of the Commission stated:

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.<sup>183</sup>

Thus, the Commission is an administrative, not judicial, body that serves to review and fill claims.<sup>184</sup> The Commissioners' duty is to re-

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<sup>177</sup> Libera, *supra* note 132, at 295.

<sup>178</sup> *Iraq Digest*, SEATTLE TIMES, Dec. 10, 2004, at A22.

<sup>179</sup> *Id.* The Kuwaiti award was for "damage caused by Iraqi troops, who used trenches and lakes filled with crude oil to defend their positions." *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See discussion *supra* Part IV.A; Resolution 687, *supra* note 133, para. 16.

<sup>182</sup> Libera, *supra* note 132, at 296.

<sup>183</sup> The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687*, para. 20, delivered to the Security Council, U.N. Doc. S/22559 (May 2, 1991), available at <http://www2.unog.ch/uncc/resolutio/res22559.pdf>.

<sup>184</sup> *Id.*

view submitted claims.<sup>185</sup> The Secretariat administers the fund, while providing administrative support to the Governing Council.<sup>186</sup>

B. *Weaknesses of the United Nations Compensation Commission*

The UNCC's ability to serve as a civil compensation scheme for wartime environmental damage is hampered by several issues.<sup>187</sup> From a practical standpoint, the UNCC is limited by the fact that the sanctioned nation must have public wealth that can be seized to add monies to the fund and any uncooperative nation can make the collecting of such money difficult.<sup>188</sup> Another problem arising from a lack of money is the fact that the UNCC does not support itself and requires money from the sanctioned nation to cover its high administrative costs.<sup>189</sup> These costs are the result of the need for support staff as well as the high cost of specialists to serve as commissioners.<sup>190</sup> These costs may well continue to be considerable, as commentators have estimated that it may take sixteen to thirty years to settle all claims.<sup>191</sup> Despite this estimate the UNCC reports that claims processing was concluded in June 2005, with only "payment of awards to claimants and a number of residual tasks" remaining.<sup>192</sup>

Another weakness of the UNCC results from the timing of the filing of claims, especially when concerning claims for environmental damage.<sup>193</sup> All environmental damage claims had to be for harms that occurred between August 2, 1990 and March 2, 1991.<sup>194</sup> In addition, environmental damage claims submitted to the UNCC had to be filed by February 1, 1997.<sup>195</sup> Given that the extent of environmental damages are often not known until long after the initial harm occurs, it is likely that many environmental damages will be under-compensated if compensated at all.<sup>196</sup>

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at para. 6.

<sup>187</sup> See discussion *supra* Part IV.B.

<sup>188</sup> See Libera, *supra* note 132, at 297-98.

<sup>189</sup> Lee, *supra* note 146, at 216.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 217.

<sup>192</sup> United Nations Compensation Commission, The UNCC at a Glance, <http://www2.unog.ch/uncc/ataglance.htm> (last visited Jan. 29, 2006) [hereinafter UNCC at a Glance]. The claims process took approximately twelve years. *Id.*

<sup>193</sup> See Lee, *supra* note 146, at 221.

<sup>194</sup> Gattini, *supra* note 171, at 177.

<sup>195</sup> *Id.*

<sup>196</sup> See *id.*; Lee, *supra* note 146, at 221.

C. *Strengths of the United Nations Compensation Commission as a Civil Compensation Mechanism for Wartime Environmental Damage*

In addition to the benefits discussed above, another strength of the UNCC as a model for a civil compensation mechanism for wartime environmental damage is its broad definition of “environmental damage.”<sup>197</sup> Decision 7 of the Governing Council of the UNCC details the type of environmental losses that can be submitted as claims.<sup>198</sup> Paragraph 35 of the document lists as compensable claims any “[a]batement and prevention of environmental damage . . . measures already taken to clean and restore the environment or future measures . . . monitoring and assessment of the environmental damage . . . monitoring of public health . . . and [d]epletion of or damage to natural resources.”<sup>199</sup>

The broad definition of environmental damage utilized by the UNCC was informed by a report furnished by the U.N. Environment Programme (UNEP).<sup>200</sup> The purpose of the UNEP report was to “provide[] . . . definitions and guidance for evaluating environmental claims.”<sup>201</sup> Most useful to wartime environmental compensation is the fact that the UNEP report interpreted “environmental damage” in a broad sense to mean “impairment of the environment.”<sup>202</sup> According to the UNEP report, the damage need not be permanent to be a compensable environmental harm.<sup>203</sup> Also of note is the UNEP report’s broad definition of “natural resources,” which the report interpreted as naturally occurring assets that “have a *primarily* commercial use or . . . value.”<sup>204</sup>

Another strength of the UNCC is its efficiency as a clearinghouse for civil compensation for wartime environmental damage. Although twelve years may seem like a long time to process claims, it is efficient

<sup>197</sup> See Juni, *supra* note 146, at 62–63.

<sup>198</sup> Criteria for Additional Categories of Claims, United Nations Comp. Comm’n, Governing Council, 5th Sess., U.N. Doc. S/AC.26/1991/7/Rev.1 (1992) [hereinafter Decision 7], available at [http://www2.unog.ch/uncc/decision/dec\\_07r.pdf](http://www2.unog.ch/uncc/decision/dec_07r.pdf).

<sup>199</sup> *Id.* para. 35.

<sup>200</sup> Juni, *supra* note 146, at 61. The report was entitled *Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities*. *Id.* at 61 n.28.

<sup>201</sup> *Id.* at 61.

<sup>202</sup> *Id.* at 62 (quoting U.N. Env’t Programme, *Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities*, 10, U.N. Doc UNEP/Env.Law/3/Inf.1 (May 17, 1996) [hereinafter *Working Group*]).

<sup>203</sup> *Id.* at 63 (quoting *Working Group*, *supra* note 202, at 10).

<sup>204</sup> *Id.* (quoting *Working Group*, *supra* note 202, at 10).



when viewed in light of the fact that: (1) there were 2.68 million claims filed; (2) the UNCC was operating with a unique mandate consisting of new procedures; and (3) court proceedings on a single case can sometimes take nearly as long.<sup>205</sup> This level of efficiency could never be achieved using a standard judicial process to adjudicate wartime environmental damage claims.

#### D. *Adapting the United Nations Compensation Commission to Serve as a Civil Compensation Mechanism for Wartime Environmental Damage*

Given the strengths and weaknesses detailed above, it is apparent that the UNCC is a unique international body that has the capacity for filling the gap between existing wartime environmental law and the need for an enforceable civil compensation scheme.<sup>206</sup> However, before it can be utilized to redress environmental wrongs in future conflicts, it must be adapted to increase its effectiveness.<sup>207</sup>

As a threshold issue, the U.N. Security Council must make the UNCC a permanent body with jurisdiction over future conflicts, as the UNCC has reached “completion of 12 years of claims processing . . . and brings to an end the work of the panels of Commissioners, as a whole.”<sup>208</sup> Doing so will ensure, for the sake of efficiency, that this unique mechanism need not be reorganized and reconvened to handle claims arising out of any future military conflicts.

### 1. Increasing the Priority of Environmental Claims

If the UNCC is to be an effective civil compensation mechanism for wartime environmental damage, it is also going to have to increase the priority level of environmental damage claims.<sup>209</sup> During the claims process, the UNCC expedited category A, B, and C claims, while the focus on category D, E, and F claims only occurred “in recent years.”<sup>210</sup> In an adapted version of the UNCC, environmental damage claims

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<sup>205</sup> UNCC at a Glance, *supra* note 192. The UNCC claims that “the resolution of such a significant number of claims with such a large asserted value over such a short period has no precedent in the history of international claims resolution.” *Id.*

<sup>206</sup> Meredith DuBarry Huston, Comment, *Wartime Environmental Damages: Financing the Cleanup*, 23 U. PA. J. INT’L ECON. L. 899, 899 (2002); see Juni, *supra* note 146, at 53; Lee, *supra* note 146, at 214–15.

<sup>207</sup> See Lee, *supra* note 146, at 215–21.

<sup>208</sup> See UNCC at a Glance, *supra* note 192.

<sup>209</sup> Lee, *supra* note 146, at 215–16.

<sup>210</sup> United Nations Compensation Commission, Claims Procedure, <http://ww2.unog.ch/uncc/clmsproc.htm> (last visited Feb. 14, 2006).

must be given a higher priority to ensure timely and successful processing of claims.<sup>211</sup>

## 2. Permanent Funding

Another important change that must be made in adapting the UNCC is to fund the Commission from outside sources, as opposed to the seized assets of the sanctioned nation.<sup>212</sup> The UNCC, as it currently operates, relies upon Iraq's oil sanctions for its existence.<sup>213</sup> If the UNCC is to remain as a permanent, viable entity, it will have to be properly funded and not be at the mercy of potentially uncooperative sanctioned nations.<sup>214</sup> Commentators have suggested voluntary contributions, taxes, and permits as possible revenue streams to support the UNCC.<sup>215</sup>

## 3. Developing a Clear and Precise Definition of Environmental Damage

### a. *Learning from Existing International Environmental Law of War*

Most important to an adaptation of the UNCC that successfully compensates for wartime environmental damage is a clear and precise definition of what constitutes a compensable environmental harm.<sup>216</sup> The framework of Decision 7 and the technical assistance of the UNEP report offer a good starting point because they interpret environmental damage very broadly, enhancing environmental protection.<sup>217</sup> However, these existing UNCC definitions can be bolstered by incorporating the strengths and weaknesses of the existing environmental law of war instruments and customs previously examined.<sup>218</sup>

Early environmental law of war provisions, such as the Hague Convention (1907) and the Geneva Convention (1949), are inadequate to protect the environment because they contain a military necessity exception derived from customary principles of war.<sup>219</sup> In addition, Protocol I contains environmental provisions that are hampered by imprecise wording—for example, “long-term” harm—which can be interpreted to

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<sup>211</sup> *See id.*

<sup>212</sup> *See Lee, supra* note 146, at 216–18.

<sup>213</sup> Gattini, *supra* note 171, at 181.

<sup>214</sup> *See Lee, supra* note 146, at 216.

<sup>215</sup> *See Huston, supra* note 206, at 923–29.

<sup>216</sup> *See Juni, supra* note 146, at 63.

<sup>217</sup> *See id.* at 61–64.

<sup>218</sup> *See discussion supra* Parts II–IV.

<sup>219</sup> *See supra* Part II.

make certain environmental damage noncompensable.<sup>220</sup> Furthermore, Protocol I is hindered by not taking collateral damage into account and only prohibiting wartime environmental damage that is intended or expected to occur.<sup>221</sup>

The shortcomings in the language of preexisting international environmental law of war provisions can be avoided by drafting clear and precise definitions of environmental harms.<sup>222</sup> The definition must not contain any military necessity exceptions, in order to cut down on the ability of nations to use the customary law of war to avoid liability.<sup>223</sup> The definitions should also follow the UNEP report in its broad interpretation of environmental damage, and not get trapped by the “widespread, long-term, and severe” language contained in Protocol I and ENMOD.<sup>224</sup> Rather, the definition of environmental harm should allow for a wide variety of claimants and latitude for those who evaluate the claims.

#### b. *Geographic Limitations*

There should be some limitation in the definition of compensable environmental harm, however, especially in the area of geographic limitation.<sup>225</sup> The UNCC definitions, as applied to the Persian Gulf War, did not “set[] any limit on the geographical location of losses, a circumstance which could have given rise to difficult issues of proof of causation and of evidence.”<sup>226</sup> Any future definitions of compensable environmental damage should include reasonable geographical limitations to ensure that sanctioned nations are not held responsible for unrelated environmental problems in remote regions, where there is a tenuous chain of causation.<sup>227</sup>

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<sup>220</sup> See DOD Report, *supra* note 72.

<sup>221</sup> See Protocol I, *supra* note 34, arts. 55, 56.

<sup>222</sup> See Simonds, *supra* note 49, at 171.

<sup>223</sup> See *id.* Despite the military necessity exception in Article 53 of the Geneva Convention, “contemporary international law does permit, if not demand, the *post bellum* liability of the aggressor, as the ‘unjust’ belligerent, by denying him the exculpatory ground of military necessity.” Gattini, *supra* note 171, at 177.

<sup>224</sup> See discussion *supra* Part III.

<sup>225</sup> See Gattini, *supra* note 171, at 177.

<sup>226</sup> *Id.*

<sup>227</sup> See *id.*

#### 4. The Timing of Claims

Another important change to make is the implementation of more liberal filing deadlines for environmental claims.<sup>228</sup> There should be a deadline so that the sanctioned nation need not fear the filing of claims indefinitely.<sup>229</sup> However, this deadline should extend longer than the six years allowed under the current UNCC system.<sup>230</sup> Although the February 1, 1997 deadline for environmental claims is extended over a year beyond the deadlines for other categories of claims, this seems insufficient.<sup>231</sup> Wartime “environmental damage of such magnitude will most probably have long-term, widespread and at present not yet fully apparent negative effects.”<sup>232</sup>

#### 5. Studying the Effectiveness of the Size of Environmental Awards

Another important factor that should be considered is whether the size of the environmental damage awards of the UNCC were adequate to rehabilitate or compensate for environmental damage.<sup>233</sup> A study comparing prewar and post-UNCC award Persian Gulf environmental quality would be helpful in determining whether the environmental damage awards from the UNCC were too small.<sup>234</sup> If such a study were to find that the environmental awards were insufficient to rehabilitate the wartime environmental damage, then the size of the awards should be increased when the UNCC is made a permanent body. Appropriate award sizes will also lead to greater efficiency, as those satisfied with awards will be less likely to pursue compensation through national courts.<sup>235</sup> Recovery through the UNCC does not preclude the use of traditional legal methods to pursue remedies, and “[t]he risk of flooding national courts with lawsuits or other proceed-

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<sup>228</sup> All category A, B, C, and D claims had a filing deadline of January 1, 1995; category E and F claims had a deadline of January 1, 1996, with the exception of category F environmental claims, which had a deadline of February 1, 1997. *The Claims*, *supra* note 142.

<sup>229</sup> *See* Gattini, *supra* note 171, at 177.

<sup>230</sup> *See* *The Claims*, *supra* note 142.

<sup>231</sup> *See id.*

<sup>232</sup> Gattini, *supra* note 171, at 177.

<sup>233</sup> *See* Huston, *supra* note 206, at 918.

<sup>234</sup> Such a study should be limited to the regional environmental damages claimants: Iran, Jordan, Kuwait, Saudi Arabia, Syria, and Turkey. *See* U.N. Comp. Comm'n Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "F4" Claims*, 6, U.N. Doc. S/AC.26/2001/16 (June 22, 2001), available at <http://www2.unog.ch/uncc/reports/r01-16.pdf>.

<sup>235</sup> *See* Gattini, *supra* note 171, at 181.

ings against Iraq is inversely proportional to the degree of ‘customer satisfaction’ provided by the UNCC.”<sup>236</sup>

## VI. SHOULD U.S.-LED COALITION FORCES BE HELD CIVILLY LIABLE FOR ENVIRONMENTAL DAMAGE IN THE IRAQ WAR UNDER A MODIFIED UNITED NATIONS COMPENSATION COMMISSION COMPENSATION SCHEME?

### A. *Legality of the 2003 Iraq War*

There has been heated debate on both sides of the political spectrum about whether or not the U.S.-led coalition (Coalition) should have gone to war in Iraq, and this debate is still raging today.<sup>237</sup> The purpose of this Note is not to comment on the moral, ethical, or political justifications for the Iraq War. As such, the following section will focus on the legality of the war and whether or not the Coalition<sup>238</sup> should be open to claims for environmental damage caused during the War.

U.N. Resolution 687 predicated Iraq’s liability on the fact that its invasion and occupation of Kuwait, which started the Persian Gulf War, was “unlawful.”<sup>239</sup> Therefore, the legality of the military conduct is a determining factor as to whether or not liability should be assessed.<sup>240</sup>

The Iraq War was not predicated on self-defense, but rather on a doctrine of preemptive military action, unauthorized by the U.N. Security Council and, thus, “without the cloak of legality and legitimacy that clear Security Council authority would have provided.”<sup>241</sup> Critics have argued that preemptive military action is a “dangerous doctrine . . . so patently lacking in any basis in international law that . . . it needs the most searching scrutiny.”<sup>242</sup>

<sup>236</sup> *Id.*

<sup>237</sup> The depth of public sentiment on both sides of this debate was especially apparent during the 2004 presidential campaign when the Iraq War became a central issue. Jodi Wilgoren & Elisabeth Bumiller, *In Harsh Critique Yet, Kerry Attacks Bush Over War in Iraq*, N.Y. TIMES, Sept. 21, 2004, at A1.

<sup>238</sup> This Note defines “Coalition” as those nations that contributed militarily to the Iraq War. For a list of these nations, as of the March 2003 invasion of Iraq, see <http://www.whitehouse.gov/news/releases/2003/03/20030327-10.html> (last visited Feb. 14, 2006).

<sup>239</sup> Resolution 687, *supra* note 133, para. 16.

<sup>240</sup> *See id.*

<sup>241</sup> Nigel White, *The Future of Arms Control Law: An Overview of the Workshop*, 9 J. CONFLICT & SECURITY L. 299, 299 (2004); *see* Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 INT’L & COMP. L.Q. 859, 865 (2003).

<sup>242</sup> Lowe, *supra* note 241, at 865.

A less policy-based and more international law-based justification for the Iraq War was U.N. Resolution 1441, which stated that Iraq was in breach of Resolution 687.<sup>243</sup> Critics have argued that basing justification on a “revival” of the authorization of a coalition to use force against Iraq that existed from the Persian Gulf War is flawed in many ways.<sup>244</sup> Most significantly, there is no doctrine of revival in Security Council proceedings, any “revival” would have to be in coalition with Kuwait, and “Resolution 1441, on its face, quite patently does not authorise the use of force against Iraq and does not indicate that the authorization to the 1991 States acting in coalition with Kuwait could possibly be revived.”<sup>245</sup> Despite political, humanitarian, and national security arguments supporting the Iraq War, it is clear that a justification for war grounded in international law is tenuous.

B. *Scope of Coalition Responsibility Under a Modified United Nations Compensation Commission Scheme*

If the Security Council were to determine that the Iraq War was an illegal use of force, then Coalition nations could be held liable for broad categories of damages under the UNCC precedent.<sup>246</sup> As discussed above, U.N. Resolution 687 established Iraq’s liability for damage—specifically environmental damage—incurred during the Persian Gulf War.<sup>247</sup> However, Iraq is liable for damage beyond the actions of its own military.<sup>248</sup> Iraq is also liable for damages resulting from the actions of both sides of the conflict; though this provision has drawn criticism, it is grounded in a norm of international law that holds aggressors responsible for “damage arising from the legitimate exercise of a self-defence by the state that is the victim of the aggression.”<sup>249</sup> In addition, Iraq is liable to the UNCC for damage resulting “from the breakdown of civil order in Kuwait and Iraq.”<sup>250</sup>

Given that Iraqi forces fought to repel Coalition troops, and that civil unrest has resulted in two years of violence by insurgents, the

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<sup>243</sup> *See id.*

<sup>244</sup> *See id.* at 865–66.

<sup>245</sup> *Id.* at 865.

<sup>246</sup> *See Gattini, supra* note 171, at 173.

<sup>247</sup> Resolution 687, *supra* note 133, para. 16.

<sup>248</sup> Gattini, *supra* note 171, at 173.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* “[T]he UNCC’s decision to attribute such losses to Iraq is [not] unprecedented in international law.” *Id.* Rather, this type of liability was attached in the Somoan Claims case (1902) and the Naulilaa case (1928). *Id.*

Coalition could be held civilly liable for environmental damages beyond those caused directly by its own military.<sup>251</sup>

### C. *Should the U.S.-Led Coalition Be Held Civilly Liable?*

The documented and potential damage to Iraq's environment as a result of the Iraq War is widespread and hard to dispute.<sup>252</sup> The Iraq War has been very expensive for the United States, and it is unclear how much of the reconstruction costs the United States will pay.<sup>253</sup> Senator Joseph Biden has stated that the United States "typically covers about 25% of the post-conflict reconstructions costs," but that strained relations with foreign nations as a result of the conflict will probably lead to reduced international contributions.<sup>254</sup> In addition, Iraq, at the end of 2004, had amassed \$200 billion in debt and reparations.<sup>255</sup>

Given the grim financial situation in Iraq and the low priority often given to environmental damage—as evidenced by the category system of the UNCC—it is likely that there will not be adequate funding for environmental rehabilitation in postwar Iraq.<sup>256</sup> Holding Coalition nations civilly liable through an adapted UNCC will force the wealthier nations who engaged in military activity—without the imprimatur of the Security Council or international law—that resulted in environmental degradation throughout Iraq to repay Iraqi citizens for that damage.

In addition to fairness, imposing civil liability on Coalition nations for environmental damage caused during the Iraq War will also perform the important normative function of assessing state responsibility for causing environmental damage, as was the case with Iraq in Resolution 687.<sup>257</sup> Following the invasion of Iraq in March 2003, U.S. forces established an informal system of compensation for aggrieved Iraqis.<sup>258</sup> The program, dubbed "condolence payments," allows Iraqis to file claims for death, injury, and property damage and to receive compen-

<sup>251</sup> James Glanz, *Iraqi Insurgents Step Up Attacks After Elections*, N.Y. TIMES, Feb. 13, 2005, at 1.

<sup>252</sup> See discussion *supra* Part I.

<sup>253</sup> See David D. Caron, *The Reconstruction of Iraq: Dealing with Debt*, 11 U.C. DAVIS J. INT'L L. & POL'Y 123, 126–27 (2004).

<sup>254</sup> *Id.* at 127.

<sup>255</sup> *Id.* at 123 (quoting *Iraq Policy and Issues, Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. (2003) (statement of Ambassador Paul Bremer)).

<sup>256</sup> See The Claims, *supra* note 142.

<sup>257</sup> See Resolution 687, *supra* note 133, at para. 16.

<sup>258</sup> David Zucchino, *U.S. Addresses Iraqis' Losses with Payments*, L.A. TIMES, Mar. 10, 2005, at A8.

sation from the U.S. military.<sup>259</sup> The compensation system, however, “does not admit guilt or acknowledge liability or negligence. . . . [But, is rather] a gesture that expresses sympathy in concrete terms.”<sup>260</sup> This type of system is indicative of nations’ reluctance to voluntarily take responsibility for wartime damages.<sup>261</sup> However, assessing UNCC civil liability to Coalition forces, as was done to Iraq in the Persian Gulf War, would express state responsibility in concrete terms.<sup>262</sup> This application of UNCC liability to Coalition forces would act as a deterrent to future conflicts, since the cost of engaging in armed conflict would greatly increase.<sup>263</sup> This precedent would be invaluable in ensuring that aggressive nations include harm to the environment in their calculations when contemplating possible military action.<sup>264</sup>

Over the first year of the program, the United States has paid out about \$2.2 million in the form of condolence payments.<sup>265</sup> This paltry sum makes it apparent that UNCC involvement is required to ensure that Iraqis are sufficiently compensated for their environmental losses.<sup>266</sup> The closest that condolence payments come to recognizing environmental damage is a maximum five hundred dollar payment for property damage.<sup>267</sup> Attaining condolence payments is difficult for Iraqis as they shoulder the burden of proof and U.S. military commanders make the decisions without any appeals process.<sup>268</sup> Major John Moore, an Army legal officer, described the condolence payments “as a public relations tool—sort of a no-hard-feelings type of payment’ . . . . ‘It’s not designed to make them whole again, only to alleviate their hardships.’”<sup>269</sup> As the full extent of the damage to Iraq’s environment becomes apparent, there are certain to be justified “hard feelings” on the part of Iraqi citizens. Regardless of the sympathetic nature of the condolence payment program, Iraqi citizens—like the citizens of Kuwait following the Persian Gulf War—deserve a pro-

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *See id.*

<sup>262</sup> *See* Resolution 687, *supra* note, 133, para. 16 (“Iraq . . . is 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.”).

<sup>263</sup> *See* Libera, *supra* note 132, at 310.

<sup>264</sup> *See id.*

<sup>265</sup> Zucchini, *supra* note 258, at C5.

<sup>266</sup> *See id.*

<sup>267</sup> *See id.* The maximum payment for death is \$2500 and for injury \$1500. *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* (quoting Major John Moore, U.S. Army Legal Officer).



gram that will aim to make their degraded environment whole again through adequate payments and an accessible, fair claims process. The UNCC is such a mechanism, and the U.N. should build upon the Persian Gulf War precedent by imposing civil liability for environmental damage on Coalition forces through this mechanism.

#### CONCLUSION

Military history, as well as more current events such as the Persian Gulf War and the Iraq War, makes clear that war causes significant environmental damage. This is a fact that is often overlooked when considering the toll of war. Current international environmental law provisions are inadequate to protect the natural environment from wartime degradation. If effective wartime environmental protection does not yet exist, a civil liability system can act as a substitute, serving as both a deterrent to aggressive nations and as an opportunity for environmental remediation.

Following the Persian Gulf War, the U.N. made a significant step toward such a civil liability system by establishing the UNCC, with jurisdiction to approve claims for environmental damage. However, as it stands now, the UNCC is not fully equipped to effectively assess civil liability for wartime environmental degradation. The UNCC must be adapted to better compensate for environmental harms.

With an adapted UNCC in place, the U.N. should continue its forward progress in the area of compensation for wartime environmental damage by imposing UNCC civil liability against Coalition forces for environmental degradation during the Iraq War. The liability will ensure that Iraq's environment is restored to prewar conditions, but also will extend the valuable UNCC precedent, which will act as a deterrent to future conflicts.

Despite the strong fairness, deterrence, and environmental remediation arguments for imposing UNCC liability on Coalition forces, it is unlikely to occur for political reasons. Given the power that the United States and Great Britain wield in the international community, it is unlikely that the U.N. will risk further fraying an already tense relationship by passing a resolution placing formal blame on Coalition nations.