



# General Assembly

Distr.: General  
6 September 2017

English only

---

## Human Rights Council

Thirty-sixth session

11-29 September 2017

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

**Joint written statement\* submitted by the International  
Organization for the Elimination of All Forms of Racial  
Discrimination (EAFORD), American Association of Jurists,  
Arab Organization for Human Rights, International-  
Lawyers.Org, Union of Arab Jurists, non-governmental  
organizations in special consultative status, International  
Educational Development, Inc., World Peace Council, non-  
governmental organizations on the roster**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[18 August 2017]

---

\* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.17-15492(E)



\* 1 7 1 5 4 9 2 \*

Please recycle The recycling symbol, consisting of three chasing arrows forming a triangle.



## Iraq: Towards Accountability and Justice\*

The focus of this statement relates to the continued impunity enjoyed by Bush Administration officials for their crime of aggression against Iraq and the negative implications on international human rights as a result of such aggression, perpetuated by the decision in the United States of America court case *Saleh, et al. v. Bush, et al. (Saleh)*<sup>1</sup>. The *Saleh* case, decided February 10, 2017 by the United States Court of Appeal for the Ninth Circuit (the “*Ninth Circuit*”), held that U.S. officials were immunized under domestic law from judicial scrutiny even where a party alleged that such officials had violated the *jus cogens* norm against aggression and international treaties prohibiting the crime of aggression.

### The 2003 invasion of Iraq

In March 2003, the United States of America invaded Iraq, overthrew its government, irrevocably changed its political system, dismantled its state institutions, and occupied the country. Despite the official withdrawal of U.S. forces in December 2011, the consequences of the occupation remain, and the U.S. continues to dominate Iraqi political affairs.

The invasion of Iraq was illegal under international law. The war was not conducted in legitimate self-defense by the United States, and the invasion took place without the approval of the United Nations Security Council, as required by the United Nations Charter. Indeed, United Nations Secretary General Kofi Annan concluded that the Iraq War was “illegal” in 2004.<sup>2</sup>

In May 2004, the use of torture at U.S.-operated detention facilities such as Abu Ghraib became headline news with Seymour Hersh’s report in *The New Yorker*, complete with photographs.<sup>3</sup> The torture at Abu Ghraib included physical and sexual abuse, rape and sodomy.

Destruction of Iraq’s cultural heritage as a result of the invasion and occupation has been documented. Immediately after the invasion, widespread looting was reported throughout Baghdad, particularly at the Iraqi National Museum, resulting in the loss of approximately 15,000 items.<sup>4</sup> In a 2009 report, UNESCO noted that the use of the ancient city of Babylon by the United States as a military fort (“*Camp Alpha*”) resulted in “major damage” and a “grave encroachment” to the archeological site, including to the Ishtar Gate and the Processional Way.<sup>5</sup>

The war produced a refugee crisis, which the world continues to manage as best (or as poorly) as it can. In 2008, UNHCR estimated the existence of approximately 4 million Iraqi refugees.<sup>6</sup> As of April 2017, UNHCR continues to estimate approximately 3 million refugees displaced inside Iraq, and 1.2 million displaced in temporary settlements.<sup>7</sup>

### The *Saleh* Case

---

1 *Saleh v. Bush*, 848 F.3d 880, 890 (9th Cir. 2017).

2 *Iraq War Illegal, Says Annan*, BBC NEWS, [http://news.bbc.co.uk/1/hi/world/middle\\_east/3661134.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm) (last updated September 16, 2004, 09:21 GMT).

3 Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

4, *Looted Iraqi Museum in Baghdad Reopens 12 Years On*, BBC NEWS (Feb. 28, 2015), <http://www.bbc.com/news/world-middle-east-31672857>.

5 UNESCO –INT’L COORDINATION COMM. FOR THE SAFEGUARDING OF THE CULTURAL HERITAGE OF IRAQ, FINAL REPORT ON DAMAGES ASSESSMENT IN BABYLON (2009), available at <http://unesdoc.unesco.org/images/0018/001831/183134E.pdf> (last visited August 6, 2017).

6 Andrew Harper, *Iraq’s Refugees: Ignored and Unwanted*, INT’L REVIEW OF THE RED CROSS, Vol. 90, No. 869 (March 2008), available at [https://www.icrc.org/eng/assets/files/other/irrc-869\\_harper.pdf](https://www.icrc.org/eng/assets/files/other/irrc-869_harper.pdf).

7 *Iraq Emergency*, UNHCR, <http://www.unhcr.org/en-us/iraq-emergency.html> (last visited Aug. 6, 2017).

The *Saleh* case was a class action lawsuit<sup>8</sup> involving claims by an Iraqi refugee against Bush-era officials—specifically, former U.S. President George W. Bush, Vice President Richard Cheney, Colin Powell, Condoleezza Rice, Donald Rumsfeld and Paul Wolfowitz—for committing the Nuremberg-era crime of aggression when they invaded Iraq in March 2003. Although the *Saleh* case came to end on February 10, 2017, the case was the first of its kind to be reviewed and considered on appeal by a U.S. federal court of appeal.

Despite allegations that members of the Bush Administration had, among other things, lied to the public,<sup>9</sup> the United States Congress, and the international community,<sup>10</sup> and initial evidence supporting the view that certain Bush Administration officials were committed to carrying out a military overthrow of Iraq as early as 1997,<sup>11</sup> the Ninth Circuit held that these former officials were immune from civil proceedings under a U.S. law passed in 1988 called the “Westfall Act.”<sup>12</sup> The Westfall Act provides former government leaders “official-act” immunity against civil lawsuits if they are found to be acting under the legitimate scope of their authority. The domestic Westfall Act was deemed to supersede and have greater weight than international treaties and customary international law that ban aggression, even though the norm against aggression is a nonderogable *jus cogens* norm.

Saleh argued that since the United States was a signatory to the United Nations Charter, the Nuremberg Charter (which established the legal framework for prosecuting former German leaders for aggression), the Tokyo Charter (Japanese leaders for aggression), and the Kellogg-Briand Pact, which all condemn and outlaw the crime of aggression, government leaders who commit the crime of aggression should be presumed to be acting in a personal capacity—not within the legitimate scope of their authority. She also argued that the Nuremberg Judgment’s prohibition on domestic immunity for government officials who take part in aggression was binding as a matter of U.S. domestic law.<sup>13</sup> The Ninth Circuit rejected both arguments. Instead, the court held that the Westfall Act was designed to provide immunity even to “heinous acts.”<sup>14</sup> The Ninth Circuit further wrote that because the government defendants in the case were attempting to serve the interests of the United States through the war in Iraq—even if doing so was “misguided or in contravention of international norms”<sup>15</sup>—they were nonetheless acting within an official capacity and were protected from lawsuits by the Westfall Act.

The Ninth Circuit took a narrow view of when the official-act immunity provided by the Westfall Act should be denied and a government official subject to a civil lawsuit. The court wrote that “[a] federal official would act out of ‘personal’ motives and not be ‘actuated . . . by a purpose to serve the master’ if, for instance, he used the leverage of his office to benefit a spouse’s business, paying no heed to the resulting damage to the public welfare.”<sup>16</sup> Because the plaintiff in *Saleh* failed to allege a direct personal financial interest of the government defendants in carrying out the war in Iraq, she could not proceed with her claims.

### International Human Rights Implications

<sup>8</sup> In the United States judicial system, a “class action” lawsuit permits a single party to make allegations that a group of people similarly situated to him or her were damaged in a similar manner, and that the court must award relief to the entire class of people. In the *Saleh* case, the proposed class of victims were identified as Iraqi civilians who had been injured as a result of the U.S.-led invasion of Iraq.

<sup>9</sup> *Saleh v. Bush*, No. 15-15098, Appellant’s Opening Brief at 40 (9th Cir. May 27, 2015) (“Defendants made numerous false statements to the public regarding any threat posed by Iraq, or its connections to al-Qaeda, in order to support a war.”).

<sup>10</sup> *Id.* (“Defendant Powell misrepresented facts to the United Nations.”).

<sup>11</sup> *Id.* at 7–8 (“... commencing in 1997, at least three of the Defendants in this case—Defendants Richard Cheney, Donald Rumsfeld, and Paul Wolfowitz—began advocating for a military invasion of Iraq through a non-profit called the Project for the New American Century.”).

<sup>12</sup> See generally 28 U.S.C.A. § 2679.

<sup>13</sup> *United States v. Goering, et al.*, 41 AM. J. INT’L L. 172, 221, 233 (1946).

<sup>14</sup> *Saleh*, 848 F.3d at 892.

<sup>15</sup> *Id.* at 890.

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

The Ninth Circuit decision in *Saleh v. Bush* has clear implications for international human rights.

#### United States Domestic Law Superseding International Law

The *Saleh* decision emphasized U.S. courts' trend of advancing domestic law over international law, regardless of the fact that *jus cogens* norms, such as the crime of aggression, are norms for which no derogation is permitted even by sovereign States or their government officials.<sup>17</sup>

#### Limiting Access to Courts for Victims of U.S. Foreign Policy

The *Saleh* decision continues the current trend in the U.S. whereby federal courts are limiting the ability of victims of U.S. foreign policy to seek redress. In 2011, the United States Court of Appeal for the District of Columbia Circuit (the "*D.C. Circuit*") dismissed lawsuits brought by Afghan and Iraqi civilians who brought suit against former Secretary of State Donald Rumsfeld for redress for the torture they suffered while in detention.<sup>18</sup> As in *Saleh*, the D.C. Circuit looked to the Westfall Act to suggest that Donald Rumsfeld was acting in his official capacity when he allegedly authorized and/or failed to protect against torture taking place in Abu Ghraib and elsewhere. U.S. federal courts have effectively closed their doors to victims of international crimes perpetrated or conducted by American high-ranking officials.<sup>19</sup>

#### Nuremberg Tribunal's Existence as International Precedent

Furthermore, the *Saleh* case casts grave doubts on the weight of the Nuremberg Judgment's prohibition against aggression and rekindles fears that the trials of defeated German and Japanese leaders were little more than victor's justice. Such a notion is particularly unfortunate because the architects of the Nuremberg Tribunal anticipated that the outcome of the judgments would continue to exist as international precedent to prevent leaders of more powerful countries from waging illegal wars against weaker nations. The Chief Prosecutor before the Nuremberg Tribunal, the American Robert Jackson, argued forcefully to the Nuremberg Tribunal, "The law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment." "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."<sup>20</sup>

#### **Recommendations:**

---

17 See generally Victoria Yundt, *Practice of Universal Jurisdiction*, PRACTICE GUIDE TO USING UNIVERSAL JURISDICTION 58–64 (Just Atonement 2017) (discussing the increasingly dualist legal system in the United States).

18 *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

19 Certain war crimes are outlawed in the United States and are subject to criminal prosecution by the U.S. Department of Justice. However, there is no reported decision of a leader in the United States being criminally indicted by the U.S. Department of Justice for international crimes, and in the current political climate, the prospect of such prosecutions is virtually nonexistent. Thus, civil lawsuits, brought by individual victims, are likely the only means of domestic redress in the United States. Because of the expansion of the "official act" immunity under the Westfall Act, such civil lawsuits will never be heard or will be dismissed at an early enough stage to foreclose litigation by victims of international crimes perpetrated by American high-ranking officials.

20 2 Trial of the Major War Criminals Before the International Military Tribunal 98-155 (Nuremberg: IMT, 1947), available at the Avalon Project at Yale Law School, [http://avalon.law.yale.edu/subject\\_menus/imt.asp](http://avalon.law.yale.edu/subject_menus/imt.asp) and at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal>; see also WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 7 ("But in these cases we still have judgment here; that we but teach bloody instructions, which, being taught, return to plague the inventor: this even-handed justice commends the ingredients of our poison' d chalice to our own lips.")

- The United States must take immediate steps to ensure that international customary law remains the law in the United States, and that domestic law does not override nonderogable norms of international law, including the *jus cogens* norm against aggression;
- The United States must take immediate steps to amend its domestic law to ensure that government officials are not provided immunity against allegations that they have committed acts that violate *jus cogens* norms, including the norms against torture, genocide, or aggression;
- The Human Rights Council should urgently endorse an international independent investigation into allegations that the United States committed aggression against Iraq when it invaded in March 2003;
- The United Nations should condemn illegal acts of aggression by member states, including the 2003 invasion and subsequent occupation of Iraq by the United States and its allies.
- The United Nations General Assembly should request an advisory opinion from the International Court of Justice regarding the legality of the U.S. led invasion against Iraq in March 2003.

---

\*Just Atonement Inc., (JAI), Geneva International Centre for Justice (GICJ), The Arab Lawyers Association- UK, The Brussels Tribunal, Euro-Mediterranean Human Rights Monitor, Association of Humanitarian Lawyers (AHL), The Iraqi Commission for Human Rights (ICHR), Association of Human Rights Defenders in Iraq (AHRD), Alliance to Renew Co-operation among Humankind, General Federation of Iraqi Women (GFIW), Organisation for Justice & Democracy in Iraq (OJDI), The Iraqi Centre for Human Rights, International Anti-Occupation Network (IAON), NGOs without consultative status, also share the views expressed in this statement.