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Joint written statement* submitted by the International-Lawyers.Org, Arab Lawyers Union, Arab Organization for Human Rights, International Organization for the Elimination of All Forms of Racial Discrimination, IUS PRIMI VIRI International Association, 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.

[30 August 2017]

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

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Continued Impunity for Bush-Era Officials' Crime of Aggression Against Iraq*

Focus

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, perpetuated by the United States court case, *Saleh, et al. v. Bush, et al. (Saleh)*¹. 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 for allegations that such officials had violated the *jus cogens* norm against aggression and international treaties prohibiting the crime of aggression.

Background: The Iraq War

In March 2003, the United States 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 2004.²

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.³ The torture at Abu Ghraib included physical and sexual abuse, rape and sodomy.

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.⁴ As of April 2017, UNHCR continues to estimate approximately 3 million refugees displaced inside Iraq, and 1.2 million displaced in temporary settlements.⁵

The *Saleh* Case

The *Saleh* case was a class action lawsuit⁶ 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 crime of aggression when they invaded Iraq in March 2003.

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 (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 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.

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

6 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.

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 U.S. federal courts.

Despite allegations that members of the Bush Administration had, among other things, lied to the public, the United States Congress, and the international community, and initial evidence supporting the view that certain Bush Administration officials were committed to carrying out a military overthrow of Iraq as early as 1997,⁷ the Ninth Circuit held that these former officials were immune from legal proceedings under a U.S. law called the Westfall Act.⁸ 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.⁹ The Ninth Circuit rejected both arguments. Instead, the court held that the Westfall Act was designed to provide immunity even to “heinous acts.”¹⁰ 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”¹¹—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 exceptions to the official-act immunity provided by the Westfall Act. 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.”¹² 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

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

United States Domestic Law Superseding International Law

The *Saleh* decision emphasizes 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 States or their government officials.

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

⁷ *Saleh v. Bush*, No. 15-15098, Appellant’s Opening Brief at 7-8 (9th Cir. May 27, 2015) (“... 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.”).

⁸ See generally 28 U.S.C.A. § 2679.

⁹ *United States v. Goering, et al.*, 41 AM. J. INT’L L. 172, 221, 233 (1946).

¹⁰ *Saleh*, 848 F.3d at 892.

¹¹ *Id.* at 890.

¹² *Id.*

The *Saleh* decision reinforces the movement of U.S. courts to limit 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 against former Secretary of State Donald Rumsfeld for the torture they suffered while in detention.¹³ As in *Saleh*, the D.C. Circuit looked to the Westfall Act in ruling that 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.¹⁴

Nuremberg Tribunal’s Existence as International Precedent

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. In light of the *Saleh* decision, it is arguable that the United States no longer feels itself tied to international norms regarding aggression, or accords the Nuremberg Judgment its due weight under law.

Recommendations:

- 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 status of the crime of aggression under international law.

*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.

¹³ *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

¹⁴ Certain war crimes are criminally outlawed in the United States. However, in the current political climate, the prospect of such prosecutions is virtually nonexistent.