

INTERNATIONAL COURT OF JUSTICE

YEAR 2011

3 MAY 2011

CASE CONCERNING IRAQ: SOVEREIGNTY & JUS AD BELLUM

**(REPUBLIC OF IRAQ & HASHEMITE KINGDOM OF JORDAN v.
UNITED STATES OF AMERICA, UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND, KINGDOM OF SPAIN and
REPUBLIC OF POLAND)**

JUDGEMENT

Present: President JORIS GROEN; *Judge* BOJAN RADOVANOVIC;

Registrar FRANCISCO JAVIER MENA

In the case concerning Iraq: Sovereignty & Jus ad bellum,

between

the Republic of Iraq,

represented by H.E. Mr. Jonathan Berghuis and H.E. Mrs. Sadia Anwar,

as Agents

the Hashemite Kingdom of Jordan,

represented by H.E. Mr. Daniel Toda Castán and H.E. Mrs. Amuitz Garmendia Madariaga,

as Agents

and

the United States of America,

represented by H.E. Mrs. Deniz Akman and H.E. Mrs. Eda Bicer,

as Agents

the United Kingdom of Great Britain and Northern Ireland,

represented by H.E. Mr. Patrick Leimig

as Agent

the Kingdom of Spain,
represented by H.E. Mrs. Claudine Etavard
as Agent

the Republic of Poland,
represented by H.E. Mrs. Bárbara Sanchís and H.E. Mr. Jaime Cerezuela,
as Agents

with the intervention of

the Human Rights Watch
represented by H.E. Ana Carolina Da Silva Soaeres and H.E. Mr. Gerardo
Beniger Martínez,
as Agents

the Red Cross
represented by H.E. Dmitry Avdeed and H.E. Maryia Niamera
as Agents

THE COURT,
composed as above,
under all claims and submissions by the parties,
after deliberation,
delivers the following Judgement:

Statement of facts

1. The contentious events of this case begin on March 20th 2003, when the armed forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland invade Iraq and the “Iraq War” begins. It has to be mentioned that this intervention was not authorized by the Security Council of the UN.

2. The situation in Iraq was more and more unstable every day due to the conflict. In consequence, some very violent events took place in the country. One remarkable incident occurred on March 21 2003, when the embassy of the United States of America in Bagdad was assaulted and burned by the Iraqi people and armed forces, as a protest against the foreign occupation.

3. As a result of the war in Iraq, about a million of Iraqi citizens were forced to leave Iraq and to move to the small neighbouring country of Jordan. Although this was a priceless help for the Iraqi people, it goes without saying that the consequences of the arrival of such a number of refugees caused to this small country a considerable damage.

4. Another fact that has to be taken into consideration is that during the first two years of the war, the armed forces of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland extracted a large amount of oil from the Iraqi oil wells and that oil extraction was not justified by the countries mentioned above.

5. Apart from all that, it is important to say that from the beginning of the war, the NGOs Human Rights Watch and Red Cross were not only present in Iraq but also in Jordan, helping the victims of the war and the refugees. It cannot be denied that Human Rights Watch and Red Cross have been direct witnesses of the conflict.

6. Bearing all this in mind, in 2011, once the political situation in Iraq is absolutely normal, Iraq and Jordan decide to sue the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland and take them to the International Court of Justice.

7. All the parties accept the competence of the Court.

Findings of law

a) Iraq and *Jus ad bellum*

8. The prohibition against the use of force is a cornerstone of the United Nations Charter, Article 2, paragraph 4, which requires that:

“All Members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”

9. The principle of prohibition against the use of force is the essential principle of international law, that has been ratified by General Assembly Resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, is the most essential principle in international public. The *jus cogens* character of this principle as customary international law can not discussed, and it has been strongly recognized by the Court (*Case concerning the military and paramilitary activities in and against Nicaragua*).

10. The only two exceptions on this principle are the use of force under the authorization of the Security Council acting under the Chapter VII of the UN Charter, and the right to self-defence under the Article 51 of the UN Charter.

11. Concerning the authorization of the Security Council, the resolution 1441 (2002) gave a “final opportunity” to Iraq to comply with its disarmament obligations under relevant resolutions of the Security Council. Even the resolution warned Iraq to face “serial consequences as a result of its continued violations of its obligations”; it does not authorize the use of all necessary means to make Iraq comply with its obligations under international law. A draft resolution of the United States of America, the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, proposing a new time limit for Iraq and recalling for the use of all necessary means against the Republic of Iraq was not adopted by the Security Council.

12. Resolution 1441 did not contain any automatic authorization of use of force, and as a final opportunity to the Republic of Iraq, the Court affirms that not all peaceful

means had been exhausted concerning the situation of the Republic of Iraq. The use of force needed a further resolution to be authorized.

13. Face the arguments of the accused parties, there was no “sleeping authorisation” under Security Council resolutions 678 (1990) and 687 (1991), even if resolution 1441 (2002) recalls these resolutions mentioned above. A material breach of the peace conditions in resolution 687 (1991) would not, in any case, activate the sleeping authorization in resolution 678 (1990). These resolutions applied to a unique and specific situation, the situation concerning Kuwait twelve years before. As all authorizations of the use of force by the Security Council must be restrictively interpreted, the Security Council authorization of the use of force against the Republic of Iraq in resolution 678 (1990) was not a *carte blanche* to use force unlimited in time.

14. The Court rejects the argument of the *ex post* validation of the war by the Security Council resolutions concerning the occupation, 1472 (2003), 1483 (2003), 1511 (2003).

15. The second exception to the principle of prohibition of use of force is the right to individual or collective self-defence under Article 51 of the United Nations Charter.

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”

16. Self-defence is only permissible after an armed attack or an immediate threat, and it has to comply with the requirements of necessity and proportionality. The Court takes into account that there was not a previous armed attack by the Republic of Iraq against the United States of America, and the fact that, even if Iraq had weapons of mass destruction.

17. The Court bears in mind that global terrorism is a threat to global peace. However, the link between the Iraqi regime and terrorist organizations, like Al-Qaida, have not been sufficiently proven and did not caused an immediate threat to the United States of America

18. The Court rejects the legal character of the pre-emptive self-defence. No such right of pre-emptive self defence can be derived from international law.

19. An armed and unauthorized humanitarian intervention has no legal basis in international law. Besides that, the Iraqi regime was going on for years and no new situation occurred which constituted an imminent, grave or massive humanitarian situation that called for the immediate intervention with the use of force in March 2003 against the Republic of Iraq.

20. The Court rejects the legal character of the just war theory claimed by the United States of America. This doctrine is opposed to fundamental principles of international law as sovereignty and equality between states.

21. The Court rejects a legal basis for the armed attack against the Republic of Iraq due to the figure of the reprisals, as these measures can not have an armed character under customary international law.

22. Consequently, the Court concludes that there was no legal basis under international law for the armed attack by the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland against the Republic of Iraq.

23. As stated in the article 1 of the General Assembly Resolution 3314 (XXIX), the definition of an act of aggression is the following:

“*Aggression* is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”

24. Therefore, the armed attack which began at March 2003, by the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland against the Republic of Iraq constituted an act of aggression.

b) Iraq and *Jus in bello*. The occupation and the consequences of Iraq war

25. Not in dispute is that Iraq has been an occupied area from March 2003 by the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland.

26. Regarding the definition of occupying powers in the article 42 of the Hague regulations of 1907 and the Security Council resolution 1483 (2003) concerning the occupation of Iraq the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland are occupying powers.

27. When one country occupies another country is this not an outlaw event. The occupier has duties under international law. For the validity of the international law of *jus in bello* it is of no relevance whether the initial use of violence was just.

28. Article 43 of the Hague Regulations of 1907 states:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

29. Furthermore, article 53 states:

“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

30. These articles are part of International Humanitarian Law and customary law and therefore binding upon states, even if they have made exclusion clauses to the treaties.

31. Regarding the Republic of Iraq, the Court is aware of the leading moral anchor in cases of *jus in bello*, namely strict necessity and proportionality for every action taken. However, the legal anchor is somewhat different. In times of war, it is not

always possible to be absolutely sure about the necessity and proportionality of an action, nor is it always possible to prevent collateral damage.

32. Despite the above stated, by the right choice of weapons and the right choice of goals, many suffering could be prevented. By taking part in the use of prohibited weapons which are inherently indiscriminate such as cluster bombs, white phosphorus, napalm derivative, depleted uranium the United States of America have acted against article 15 sub b of the Geneva Convention IV and customary international law as these weapons cause unnecessary suffering and superfluous injury among combatants as well as civilians. Because the weapons are inherently indiscriminate, there is no possibility to discriminate the enemy or to control the amount of damage. In respect to the United Kingdom of Great Britain and Northern Ireland it has not been proven that they have been using the prohibited weapons mentioned above. In respect to the Kingdom of Spain and the Republic of Poland it has not been claimed that they have been using the prohibited weapons mentioned above.

33. For the *deemed* violation of article 53 of The Hague regulation 1907 and articles 50, 51 and 52 of the Geneva Conventions IV either factual evidence is non-existent or factual evidence has not been sufficiently provided by the Republic of Iraq.

34. The extraction of large amounts of oil by the four occupying countries mentioned above is a violation of article 55 of the Geneva Convention IV and article 53 of The Hague regulation 1907. The extraction was not necessary for the occupying troops and was an illegal exploitation of Iraqi natural Resources, in line with the stated in the "*Case concerning armed activities on the territory of the Congo (Democratic republic of the Congo v. Uganda)*". The occupying powers have failed to take adequate measures to prevent the illegal exploitation of the resources and, even worse, they have participated in this illegal exploitation.

35. The events in Abu Grahیب deeply violated the rights of prisoners of war to a humane treatment laid down in article 13 of the Geneva Conventions III and the right for every man to be free from torture laid down in the Universal Declaration of Human Rights and part of *ius cogens*. The occupying power in the area, the United States of America, is fully responsible for this violation.

36. In respect to Iraq and Jordan, during the war in Iraq, attempts to restore the social disorder by the occupying powers could not prevent approximately one million Iraqi refugees to leave their homes to neighbouring country Jordan, causing first chaos and even worse social disorder in Iraq and second a substantial burden on the people of Jordan.

37. The causality between the occupation of Iraq and the large amounts of refugees has not been disputed by any of the parties.

38. In failing to take all measures necessary to restore social order the occupying powers are in breach of international obligations and responsible for the massive refugees.

c) The incidents occurred on March 21st 2003 in the embassy of the United States of America in Baghdad

39. The basic principle of contain first that every internationally wrongful act of a State entails the international responsibility of that State. This has not only been stated in the draft articles on international state responsibility but is also part of case law and customary law.

40. Two conditions need to be fulfilled for a state to be responsible for an internationally wrongful act. First of all, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time. These two elements have been established in case law, *Phosphates in Morocco*, *United States Diplomatic and Consular Staff in Tehran* and furthermore are recognized as being a part of customary international law.

41. Concerning the *second element*, the breach of an international obligation under article 22 of the 1961 Vienna Convention on Diplomatic Relations it is established that “the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity”.

42. This obligation of a receiving state is a cornerstone of diplomatic inviolability and therefore is of high importance for the peace in the community of states. It is the way back to restoration of peace and negotiations which needs to remain open at all times at a very high cost, especially in times of conflict. Even the occurrence of a deep conflict or even a war cannot justify an exception to this obligation.

43. Concerning the *first element*, the attribution of the above mentioned acts to the Iraqi Government, the Republic of Iraq claims not to be attributable, given that the act has been executed by private persons. The doctrine of state responsibility only allows state responsibility in restricted cases, namely effective control in the organisation (*Case concerning military and paramilitary activities in and against*

Nicaragua (Nicaragua v. United States of America) or post-event affirmation of the act (*United States Diplomatic and Consular Staff in Tehran*). Since neither of these two cases were the case, the act cannot be attributed to the republic of Iraq.

44. However, this argument demonstrates a misunderstanding of the nature of the act itself. The act itself is an omission, the failure to take all appropriate steps to protect the mission. This act of omission is attributable to the Republic of Iraq. The question whether the factual attack was done by citizens or by armed forces is irrelevant in this precise context of the case.

45. The further call on *Force majeure* by Iraq cannot be submitted, given that there was no emergency situation at the moment when the event occurred. On the 21st of March, one day after the beginning of the invasion, Baghdad was not yet occupied. The Iraqi government had effective control over the territory of Baghdad and there was no external cause for their failure to protect the embassy.

46. Therefore, the republic of Iraq is responsible for the assault and the burning of the embassy of the United States in Baghdad.

Final decision

For these reasons,

THE COURT,

(1) Unanimously,

Finds that the use of force by the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland against the Republic of Iraq constitute a breach of international obligations concerning the provisions of the non-use of force and non-intervention.

(2) Unanimously,

Decides that, failing agreement between the Parties, the question of reparation due to the Republic of Iraq and the Hashemite Kingdom of Jordan shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

(3) Unanimously,

Finds that the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Republic of Poland, during their occupation of the Republic of Iraq, have violated their obligations under International Humanitarian Law and the Human Rights International Law having caused serious damage to the Republic of Iraq and having also caused an enormous amount of refugees which caused a substantial burden for the Hashemite Kingdom of Jordan. However, it must be kept in mind that letting in refugees is a responsibility of a neighbouring state, where a part of the costs must be buried by the state itself. Moreover, the international community as a whole has a responsibility to ensure the proper treatment of refugees.

(4) Unanimously,

Decides that, failing agreement between the Parties, the question of reparation due to the Republic of Iraq and the Hashemite Kingdom of Jordan shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

(5) Unanimously,

Finds that the Republic of Iraq has violated their obligations under International Law by failing to take appropriate measures to protect the embassy of the United States of America in Baghdad.

(6) Unanimously,

Decides that, failing agreement between the Parties, the question of reparation due to the United States of America shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

Done in English, the text being authoritative, at the Palau of Congressos, Barcelona, this third day of May, two thousand and eleven, in nine copies, one of which will be placed in the archives of the Court and the others transmitted to the agents of all parties and *amicus curiae*, respectively.

(Signed) Joris Groen,

President,

(Signed) Francisco Javier Mena,

Registrar,