

## ARAB COURT OF JUSTICE

*Should forbearance or forgiveness be granted to Iraq on its reparations to Kuwait ...?*

### STATE OF IRAQ V. STATE OF KUWAIT

**2004 General List No. 3**

#### COUNTER MEMORIAL

#### OF THE GOVERNMENT OF THE STATE OF KUWAIT

**filed in the Registry of the Court**

**on 26 March 2004**

#### **I. COMMENT ON FACTS STATED IN THE MEMORIAL OF THE STATE OF IRAQ**

Discussion of Iraqi debt prior to the Iraqi invasion of Kuwait on August 2, 1990 is wholly irrelevant to the consideration of this case. The issue at hand is not Iraqi debt incurred through massive loans in the 1980's, but an essentially different question. What is being discussed is the payment of war reparations resulting from an unlawful Iraqi invasion of Kuwait. Reparations are meant to correct direct physical damage to Kuwait caused by Iraq's illegal invasion and occupation. Debt that creditors willingly took on with Iraq and war reparations that are meant to compensate for damages done by Iraq's invasion of Kuwait are very different things and cannot be considered alike.

The condition of pre-existing Iraqi debt was taken into account when the United Nations Compensation Commission (UNCC) was created by the United Nations Security Council (UNSC) for the purposes of handling post-war reparations. In UNSC Resolution 687 (1991), which mandated the commission, there was an exclusionary clause which called for evaluating the meaning of 'arising prior' in the text. This demonstrates that the Security Council clearly recognized the need to differentiate between war reparations arising from Iraq's illegal invasion of Kuwait and Iraq's pre-existing, unrelated debt. The UNCC and the UNSC have taken effective steps to ensure that the money paid out as reparations is merely to compensate for actual damages stemming from Iraq's invasion and occupation of Kuwait.

#### **II. ADDITIONAL FACTS**

The United Nations Compensation Commission (UNCC) determined that Kuwait was owed \$8.26 billion dollars in reparations from Iraq as the result of \$113.9 billion dollars in resolved Kuwait reparations claims. As of the meeting of the UNCC ending December 18, 2003, Kuwait had been paid \$2.15 billion dollars and was still owed \$6.11 billion dollars in reparations payments from Iraq as a result of Iraq's unlawful invasion and occupation of Kuwait in 1990-1991. This money is from claims filed by the Government of Kuwait, excluding environmental

claims. The claims were for compensation for damages incurred in Kuwait as the result of Iraq's unlawful invasion and occupation. Most of the claims include multiple types of loss, such as damage to government buildings, loss of equipment, loss of the value of work carried out by contractors prior to the invasion and relief provided to the Kuwaiti population. The UNCC is merely a mechanism which has been established to provide a matter of practical justice to those who suffered damage as a direct result of the illegal Iraqi invasion of Kuwait.

Kuwait has shown sympathy to the plight of the Iraqi people and understands that money is needed in Iraq to reconstruct the dilapidated infrastructure left from Saddam Hussein. Kuwait Prime Minister Sheikh Sabah has said that the reconstruction of Iraq is a critical issue for the whole world because the security and stability of the whole region may hinge on it. He has stated that Kuwait is willing to work with other creditor nations to try to achieve a substantial reduction in Iraq's debt. The Prime Minister has indicated that "Kuwait is willing to begin negotiations regarding this issue on condition that the results of these talks are accepted by an internationally-recognized Iraqi government." Kuwait has shown its willingness to work on debt reduction alongside Iraq's other major creditors in Europe, Asia and the Middle East are. Kuwait realizes that Iraq needs debt relief and has shown its willingness to assist its neighboring country. The US Special Envoy to negotiate Iraq debt relief, James Baker, has indicated that Kuwait's commitment to debt reduction amounts to, "the same commitment made by other major creditors."

The UNCC has proven throughout its tenure that it is sensitive to the financial situation in Iraq. Originally, the amount paid into the Compensation Fund (to be distributed by the UNCC) by Iraq was set at 30 percent of the value of its exports of petroleum and petroleum products. The UNSC adopted this at the recommendation of the Secretary-General in Resolution 705 (1991). The amount paid into the Fund was adjusted by the UNSC to 25 percent in Resolution 1330 (2000). The obligation of Iraq was altered again on May 22, 2003 when the Security Council adopted Resolution 1483 which reduced the percentage of Iraqi oil revenue to be paid to the Compensation Fund to a mere five percent. The changes and alterations made to the requirements of Iraq by the UNSC (which has authority over the UNCC) shows that it is sensitive to the needs of Iraq. There is no need for the Arab Court of Justice to assert jurisdiction in a situation that falls under the authority of the United Nations Security Council and affiliated organs.

### **III. OBSERVATIONS CONCERNING THE STATEMENT OF RELEVANT LAW IN THE MEMORIAL OF THE STATE OF IRAQ**

The Memorial submitted by Iraq relies upon the Doctrine of Odious Debt, quoting Alexander Nahum Sack, a former minister in Tsarist Russia whom later became a law professor in Paris after the Russian Revolution. What is intriguing about this quote is that Sack's full debt theories, explained in his two books: *The Effects of State Transformations on Their Public Debts and Other Financial Obligations* and *The Succession of the Public Debts of the State*, actually would support Kuwait in this case. Sack, in response to the Bolshevik government not honoring the debts of the previous Tsarist regime, which he had been a part of, argued that liability for public debts should remain intact when there is a change of power in a state. He contended that debts represented the obligation of the state, and the state was to be considered the territory and not the

government ruling it. Sack's ideas would support the government of Kuwait in this particular case. Kuwait should still be paid the money owed to them from Iraq, regardless of which particular Iraqi government incurred the debt.

The Doctrine of Odious Debt, as cited in the Iraq Memorial, is an exception in the argument that Sack forwards. Sack is arguing that debts incurred for reasons ill serving to the public, such as funds to suppress opposition in a dictator's home country, should be considered odious and not transfer to a new government. In no way can the reparation's payments be considered odious debt. The obligation of the reparations was placed on Iraq after the country tried to expand its borders by stealing land that is under the sovereign authority of Kuwait. The payments were not the direct result of Iraq's dictator, Saddam Hussein. Iraqi claims to Kuwait date back to the Anglo-Ottoman Convention of 1913 and there has long been contention over whether or not Kuwait belongs to Iraq. Saddam Hussein is merely the latest Iraqi leader who has made contentions that Kuwait rightfully belongs to Iraq. The debts incurred in Iraq's latest attempt to retake Kuwait for Iraq are the burden of the State of Iraq, which is not exclusive to Saddam Hussein's regime. The reparation payments that are owed to remunerate Kuwait for the damages inflicted upon it by Iraq's 1990-1991 invasion and occupation cannot be considered odious debt and therefore cannot be canceled or delayed.

In addition, the opinions of legal experts provide only a very limited authority for an international court to ground any decision. Article 38 of the International Court of Justice Statute outlines the sources of international law and the gravity of each source. According to Article 38, international courts are to decide cases based first on international conventions (established rules), then on international custom (general practice accepted as law), then on general principles of law, and then finally the "judicial decisions and teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." These same "sources" of law and priorities are reiterated in Article 15.01 of the Statute of the Arab Court of Justice. This means that the legal opinions offered by Sack have little bearing on this case. There are clearly international conventions, in the form of UN Security Council Resolutions, which determine that the reparation payments are the obligation of the State of Iraq.

Finally, at several instances in the Memorial submitted by Iraq reference is made to Kuwait as a creditor or someone who served that function. This is utterly false to assert; to do so would contend that Kuwait willingly wanted Iraq to invade and occupy their land, causing billions of dollars of damage and the loss of Kuwaiti lives. In fact, the invasion was illegal and unwelcome and reparations payments are necessary to relieve the Kuwaiti's of damages inflicted on them by Iraq. Also, in no way, as contended by Iraq in their Memorial to the court, does Kuwait become unjustly enriched because of the payment of these reparations. Reparations are direct compensation for physical damages done to Kuwait, and it is highly illogical to declare that merely being repaid for damages done to their sovereign territory is unjustly enriching Kuwait.

#### **IV. STATEMENT OF RELEVANT LAW**

On August 2, 1990, Iraqi forces crossed an international border into Kuwaiti territory, violating the national sovereignty of Kuwait. On the same day the United Nations Security Council (UNSC) passed resolution 660, condemning the invasion and demanding that Iraq immediately

and unconditionally withdraw its forces to the positions they had occupied the previous day. Four days later, the UNSC passed Resolution 661 which in its preambulator clauses affirmed, “the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter,” and stated the UNSC was, “Determined to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait,”

The United Nations Security Council (UNSC) determined that Iraq was legally responsible for losses as a result of the unlawful Iraqi invasion and occupation of Kuwait from August 2, 1990 to February 26, 1991 in Resolution 687 of April 3, 1991. The resolution reads, “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.” The Resolution was adopted five weeks after the end of military operations with the cease-fire dependent on Iraq’s acceptance of the provisions of the resolution. Resolutions passed by the United Nations Security Council are to be considered binding documents of international law. This means that Iraq has a responsibility to compensate Kuwait for damages inflicted on it.

When Iraq invaded and occupied Kuwait, it breached many basic rules governing the conduct of nations under international law. Iraq violated the United Nations Charter Article 2(4) that says, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,” the Hague Conventions, and the Geneva Conventions. Even the government of Iraq conceded it was at fault and agreed to a mechanism that would establish its liability for the invasion.

In section E of the Resolution 687 (1991), the UNSC created a fund to pay compensation for losses. The United Nations Compensation Commission (UNCC) was established by United Nations Security Council Resolution 692 (1991) to verify and value claims against Iraq resulting from the 1991 Iraqi invasion and occupation of Kuwait. This commission was recommended by the Secretary-General of the United Nations to serve as a claims resolution facility unique in the history of international efforts at post-war resolution. The Secretary-General said, “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.” An essential aspect of the UNCC is that it is non-discriminatory relief-system established by the worldwide governing body. It does not represent the interests of one state or a coalition of states but instead the international community.

The commission is designed always to be mindful of the situation in Iraq. In UNSC Resolution 687, the commission was charged with its mission that included,

“administration of the fund; mechanisms for determining the appropriate level of Iraq’s contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the

requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy;"

Reduction of reparations is not the province of any body but the commission, which is designed to be sensitive to the needs of Iraq. To reduce or delay reparations payments of Iraq to Kuwait by any body other than the UNCC, which has been mandated internationally, would be a violation of international law.

Reparations are an essential aspect of international law. In fact, they are a fundamental principle of any functioning legal system. Reparations are due to Kuwait to repair the damages done by Iraq when it invaded the country.

The right to reparations is firmly established in international law. It was defined by the Permanent Court of International Justice (predecessor to the International Court of Justice) in the *Chorzow Factory Case, Germany v Poland, 1928*, saying,

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.”

There is direct precedent for the payment of reparations from one country to another in international law. In 1952, the Federal Republic of Germany, successor to Hitler's Third Reich reached agreement with Israel for the payment of \$822 million after a claim was made. Austria made payments adding up to \$25 million to survivors of the Jewish Holocaust. Under the British Foreign Compensation Act of 1950, countries such as Bulgaria, Poland, Hungary, Egypt and Romania have received settlements for the expropriation of property. Reparations have been paid between the United States and Iran and between Japan and South Korea. It is clear that reparations are firm part of international law. This means that the reparations owed to Kuwait from Iraq constitute binding international law. It is not within the jurisdiction of the Arab Court of Justice to tamper with international law laid down by the United Nations, the only worldwide intergovernmental body.

A basic rule of international customary law is international responsibility. It recognizes that the breach of any international obligation by a state or organ of a state constitutes an international tort and that the commission of any international tort involves a corresponding duty to make reparations. It the responsibility of Iraq to compensate Kuwait for the damages inflicted on it by Iraq's unlawful invasion from August 2, 1990 to February 26, 1991.

The reparations owed to Kuwait by Iraq resulting from Iraq's unlawful and illegal occupation of Kuwait are an international decision made by the United Nations and are to be considered international law. It is the responsibility of the Arab Court of Justice to uphold international law

and not call into question the United Nations. Article XIV, Section 1 of the Statute for The Arab Court of Justice states The Court's "function is to decide in accordance with international law such disputes as are submitted to it." The Arab Court of Justice must consider UNSC Resolutions 687 and 705 binding documents of international law and respect them as such.

Debt reduction, which Kuwait is very willing to undertake, is a much different issue than the reduction or delay of internationally awarded reparations' payments. They are two very separate things and while Kuwait is committed to reconstructing Iraq, it is not willing to discuss the delay or reduction of reparations' payments. Debt is a bilateral issue that is the result of agreements between Kuwait and Iraq. This is different from reparations, which are owed to Kuwait by Iraq as a matter of international law resulting from an illegal and unlawful invasion and occupation of Kuwait by Iraq. The reparation payments made to Kuwait are meant to compensate for the real, actual damage inflicted upon Kuwait by Iraq. Debt reduction represents a unilateral and political decision that falls within the purview of the sovereign state of Kuwait.

A lender takes a certain risk anytime they offer a loan. They are faced with the possibility that they may not get paid back. This is why debt and reparations are decidedly different matters. Reparations are compensation for damages done to someone or something. The reparations owed to Kuwait are for real, physical losses as the result of Iraq's unlawful invasion. The matters of debt and reparations are clearly separate issues and while Kuwait will discuss debt reduction once there is a fully elected Iraqi government with constitutional accountability, it will not consider reducing or delaying reparations.

The Legal Committee of Kuwait's Parliament has also unanimously passed a draft law that bans the Kuwait government from foregoing reparations payments. No one has the right to reduce Kuwait's debt but the National Assembly of Kuwait.

Kuwait asks the Arab Court of Justice to respect its sovereign rights as a nation-state and views any action by the Arab Court of Justice to delay or reduce the payment of reparations by Iraq as an extra-legal exercise of supra-sovereign authority nowhere enumerated in the Charter of the League of Arab States nor authorized in the Statute of the Arab Court of Justice. Moreover, while regional organizations such as the League of Arab States and its subsidiary, the Arab Court of Justice, may have concurrent authority with the United Nations under Article 52 of the Charter of the United Nations dealing with "regional arrangements", it is not the case that a regional organization such as the Arab League or the Arab Court of Justice may reach out and assume prior jurisdiction over a matter upon which the United Nations Security Council is already seized and upon which it has continued to act through the United Nations Compensation Commission over a period of years. Indeed Article 52 of the United Nations Charter states that, "This article in no way impairs the application of Articles 34 and 35," which articles specifically permit the Security Council and the General Assembly to investigate any dispute and "to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." In this case, actions of the Security Council and its designee, the United Nations Compensation Council, carry the force of international law because under the Charter [Article 25], "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

The question of reparations owed to Kuwait as a result of the extra-legal 1990-1991 invasion and occupation of Kuwait by Iraq is a matter of equity administered under the authority of the United Nations and its designee, the United Nations Compensation Commission (UNCC). For the Arab Court of Justice to intervene in that award process would be to circumvent and undermine established international legal processes and would establish an unfortunate precedent. The question of forgiving Iraqi debt owed to Kuwait – or other entities – is a matter not of law but a question of high policy to be determined through the legitimate policymaking procedures and diplomatic channels of a sovereign state in negotiation with other sovereign states. Kuwait, therefore, cannot be required by the Court to waive its right to reparations legally awarded. The League of Arab States as a matter of consensus opinion may certainly urge the government of Kuwait to recognize the economic needs of the Iraqi people and whatever interim Iraqi authority may be created and may request that the Government of Kuwait give serious consideration to offering Iraq economic assistance in the form of debt relief. In the end, however, any final decision on debt relief is the sovereign right of the State of Kuwait alone and has no bearing on the Iraqi obligation to pay the reparations awarded to Kuwait by the UNCC.

## V. CONCLUSION

Now, therefore, the sovereign State of Kuwait, in full recognition and acceptance of the reparations awards made to it pursuant to UN Security Council resolutions and under the authority of the duly constituted UN Compensation Commission, comes before this Court as a Respondent in the case brought by the State of Iraq.

Accordingly, on the basis of the facts and arguments set forth in this Counter-Memorial, and without prejudice to the right further to amend and supplement these submissions in the future, the State of Kuwait asks the Court to adjudge and declare that:

- 1) **it lacks jurisdiction in the matter before it and thereby to uphold the reparations awards made by the UNCC.**
- 2) **the matter of Iraqi debt forgiveness or reduction, as opposed to the matter of reparations, is a political, not a legal, question and therefore non-justiciable.**

The Government of the State of Kuwait has designated the undersigned as its Agents for the purposes of these proceedings. All communications relating to this case should be directed to this Agent.

Respectfully submitted,

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Agent of the State of Kuwait