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SUNDUS SHAKER SALEH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al.,

Plaintiffs,

vs.

GEORGE W. BUSH, et al.,

Defendants.

No. 3:13-cv-01124 JST

PLAINTIFF'S RESPONSE TO UNITED STATES' NOTICE OF MOTION AND MOTION TO DISMISS

Date: April 3, 2014
Time: 2:00 P.M.
Dept: Courtroom 5, 17th Floor
Judge: The Honorable Jon S. Tigar

Trial Date: None Set
Action Filed: March 13, 2013

[*Declaration of D. Inder Comar and Proposed Order filed concurrently*]

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***a. Plaintiff alleges that these six Defendants planned the Iraq War prior to entering office and then through 9/11.* 15**

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1 **1. Introduction – "The Poisoned Chalice."**

2 If certain acts of violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.

4 Robert H. Jackson, Associate Justice of the United States Supreme Court, Chief Prosecutor before the International Military Tribunal at Nuremberg, 1949[1]

6 In 1946, the international military tribunal convened in Nuremberg, Germany (the "**Nuremberg Tribunal**") convicted 23 high-ranking military and political leaders of Nazi Germany of various international crimes, and in particular, of "crimes against peace": defined as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of the foregoing."[2] The Nuremberg Tribunal declared the crime of aggression the "supreme international crime," because a war of aggression "contains within itself the accumulated evil of the whole." *United States v. Goering*, 41 AM. J. INT'L L. 172, 186 (1946) (the "**Nuremberg Judgment**"). "War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world." *Id.*

17 Plaintiff Sundus Shaker Saleh ("**Plaintiff**"), an Iraqi refugee living in Jordan, seeks application of the Nuremberg Judgment on six Defendants whom she alleges planned the Iraq War as early as 1997, and then misappropriated the events of 9/11 to scare and mislead the American public into supporting a war against Iraq, which commenced on March 19, 2003. She further alleges that this planning and execution of the Iraq War violated international law and thus constitutes the Crime of Aggression as

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24 [1] *International Conference on Military Trials*, London, 1945, Dept. of State Pub.No. 3080 (1949), p.330.

25 [2] Charter Int'l Military Tribunal, art. 6(a), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 (hereinafter "**the Nuremberg Charter**") was the first legal instrument to recognize the crime of aggression, which was termed "crimes against peace." Unless where legally relevant to make a distinction, Plaintiff will refer to this crime and the conspiracy to commit the crime of aggression (count one of her complaint) collectively as "**the Crime of Aggression**."

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defined in the Nuremberg Judgment. Finally, she alleges that as a but-for and proximate cause of this aggression, she incurred tort damages.[3] *See*, e.g., Am. Compl. ¶¶ 26-33, 59-72, 114-124.

Plaintiff's allegations are founded on the recognition by federal courts that certain international law claims are "federal common law," and are actionable in certain circumstances. *The Paquete Habana*, 175 U.S. 677 (1900); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 730, (2004). The Crime of Aggression is one such claim.

The Crime of Aggression does not ban all wars; rather, as held by the Nuremberg Tribunal, the Crime of Aggression bans ***planned*** wars executed in violation of international law. This is the essence of the Crime of Aggression, and the heart of Plaintiff's allegations against these six Defendants.

In seeking to avoid the prohibition against the Crime of Aggression, Defendants argue application of the political question doctrine. The doctrine does not apply as the Crime of Aggression is an unquestionably legal cause of action, and this Court has a duty to adjudicate questions of law. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). To hold that the Crime of Aggression is a political question – as these Defendants' urge – would not only question the Nuremberg Judgment, it would validate the Nazi defense that they were put on trial before a political body, not a legal body, that acted as a kangaroo court. Such a conclusion would pose troubling ramifications both for the centuries of legal doctrine that require federal courts to apply international law as federal common law and to the Nuremberg Judgment itself.

Defendants also claim this case is barred by the Westfall Act (Motion at 4, citing Pub. L. No. 100-694, 102 Stat. 4563 (codified in part at 28 U.S.C. §§ 2671, 2674, 2679) (the "**Westfall Act**")). Pursuant to the Attorney General's discretion[4], the United States

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[3] As noted in the attached declaration by counsel, other Iraqi victims have come forward who are willing to act as class representatives. Comar Decl., ¶ 15.

[4] The United States Supreme Court has explained the clash of incentives that lurk in every Westfall Act certification. "The impetus to certify becomes overwhelming in a case like this one . . . If the local United States Attorney, to whom the Attorney General

has attempted to substitute itself in place of the Defendants and now seeks their dismissal.[5] This certification is in error. Defendants' alleged planning of the Iraq War years prior to their ever entering office at a private non-profit that advocated for aggressive war, combined with their use of 9/11 as cover to invade Iraq, places their conduct outside the scope of their employment and subjects them to individual liability. The Westfall Act does not permit an employee to avoid liability by blaming an employer for a pre-existing plan or other nefarious purpose: indeed, the cases are to the opposite.

Finally, venue is proper in this district. At the time of filing, neither 28 U.S.C §§ 1391(1) or (2) were applicable. There is no district in which personal jurisdiction or venue are both appropriate for all Defendants. Plaintiff was entitled, and remains entitled to select a venue in which any defendant (in this case Defendant RICE) "is subject to the court's personal jurisdiction." 28 U.S.C § 1391(3).

The questions before the Court are serious and weighty, and Plaintiff approaches these issues with integrity. To Plaintiff's knowledge, this is the first time since the Second World War that the Crime of Aggression will be placed before any court.

> 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. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.
>
> Robert H. Jackson, Opening Statement before the Nuremberg Tribunal.[6]

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has delegated responsibility, refuses certification, the employee can make a federal case of the matter by alleging a wrongful failure to certify. The federal employee's claim is one the United States Attorney has no incentive to oppose for the very reason the dissent suggests: Win or lose, the United States retains its immunity; hence, were the United States to litigate "scope of employment" against its own employee—thereby consuming the local United States Attorney's precious litigation resources— it would be litigating solely for the benefit of the plaintiff. Inevitably, the United States Attorney will feel a strong tug to certify, even when the merits are cloudy, and thereby "do a favor," both for the employee and for the United States as well, at a cost borne solely, and perhaps quite unfairly, by the plaintiff." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427-28 (1995) (internal citations omitted).

[5] As stipulated and ordered by the court, Plaintiff challenges the Attorney General certification in the body of this pleading. *See* Stipulation and Order, Dkt. #27.

[6] 2 Trial of the Major War Criminals Before the International Military Tribunal 98-

1 **2. Legal Standard.**

2 A complaint need contain only a "short and plain statement of the claim showing
3 that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). "To survive a motion to dismiss,
4 a complaint must contain sufficient factual matter, accepted as true, to state a claim to
5 relief that is 'plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937, 1949
6 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Rule 8 contains a
7 "powerful presumption against rejecting pleadings for failure to state a claim." *Gilligan v.*
8 *Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

9 For a motion to dismiss, the Court must accept as true all allegations of material
10 fact contained in the complaint and construe those allegations in the light most favorable
11 to the plaintiff. *Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1130 (9th Cir. 2010). "*Twombly* and
12 *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's
13 burden" and do not allow the court to impose a "probability requirement" at the pleading
14 stage. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009). Instead, the complaint must
15 simply provide "enough fact to raise a reasonable expectation that discovery will reveal
16 evidence" to prove the claim. *Id.* (quoting *Twombly*, 550 U.S. at 556); *see also Iqbal*, 129
17 S.Ct. at 1949 (holding that complaint must plead sufficient factual matter that, if true,
18 states a claim for relief that is plausible on its face).

19 **3. The Crime of Aggression Is A *jus cogens* Norm Actionable In This Court.**

20 **a. *A* jus cogens *norm is a unique category of customary international law***
21 ***that binds the international community.***

22 "Customary international law" is a phrase that refers to the law of the
23 international community that results from a general and consistent practice of nations that

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155 (Nuremberg: IMT, 1947) ("the Blue Set"); Robert H. Jackson, The Nürnberg
25 Case (New York: Alfred A. Knopf, Inc. 1947; republished New York: Cooper Square
Publishers, Inc., 1971); *available on the internet at* the Avalon Project at Yale Law
26 School, http://avalon.law.yale.edu/subject_menus/imt.asp *and also at*
http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-
27 jackson/opening-statement-before-the-international-military-tribunal/ (hereinafter
"Jackson Opening Statement").

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are followed out of a sense of legal obligation (*opinio juris*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 102(2) and (3) (1987)).

During the drafting and ratification of the U.S. Constitution, customary international law was considered an important source of international law for the United States and was referred to as part of the "law of nations." William S. Dodge, *Customary Interational Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 21 (2007); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1989). When Justice Jay stated that "the United States by taking a place among the nations of the earth [became] amenable to the law of nations," he was speaking of customary international law, not merely the treaties the U.S. would one day make. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *see also Ware v. Hylton*, U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence they were bound to receive the law of nations…."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980) ("upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law.")

It has been recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice." *The Paquete Habana*, 175 U.S. at 700 (applying the "customs and usages of civilized nations" to decide a dispute); *see also Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances...."); *The Nereide,* 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); *Filartiga,* 630 F.2d at 886 ("It is an ancient and a salutory feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.").

Customary international law in the United States is considered federal common law, and like treaties and other international agreements, it is accorded supremacy over

1 state law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporters' note 2 (1987);
2 *see also id.* at § 111(1) (1987) (International law and international agreements of the
3 United States are law of the United States and supreme over the law of the several
4 States"); *id*. at § 702 cmt. c ("[T]he customary law of human rights is part of the law of
5 the United States to be applied as such by state as well as federal courts"); *Filartiga*, 630
6 F.2d 876 at 885; *Banco Nacional de Cuba*, 376 U.S. at 425 (finding international law to
7 be federal law). A rule of customary international law is 'self-executing' and does not
8 have to be implemented into domestic legislation in order for a nation to be considered
9 bound by it. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION
10 236-39 (1996).

11 Within customary international law is a small subset of norms known that are
12 identified as "*jus cogens*" norms. A *jus cogens* norm "is a norm accepted and recognized
13 by the international community of states as a whole as a norm from which no derogation
14 is permitted and which can be modified only by a subsequent norm of general
15 international law having the same character." *Siderman de Blake v. Rep. of Argentina*,
16 965 F.2d 699, 714 (9th Cir. 1992) (citing Vienna Convention on the Law of Treaties, art.
17 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679); *see also In re Estate of Ferdinand*
18 *Marcos Human Rights Lit.*, 25 F. 3d 1467, 1471 (9th Cir. 1994); *Doe I v. Unocal Corp.*,
19 395 F.3d 932 (9th Cir. 2002) ("*Jus cogens* norms are norms of international law that are
20 binding on nations even if they do not agree to them") (citing *Siderman*, 965 F.2d 669,
21 714-15); *see also Giraldo v. Drummond Co. Inc.,* 808 F.Supp.2d 247, 250, fn. 1 (D.D.C.
22 2011) ("A *jus cogens* norm 'is a norm accepted and recognized by the international
23 community of states as a whole as a norm from which no derogation is permitted and
24 which can be modified only by a subsequent norm of general international law having the
25 same character.'" (citing *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C.Cir. 2008)); *see*
26 *also* M. Cherif Bassiouni, *A Functional Approach to "General Principles of*
27 *International Law*," 11 Mich. J. Int'l L., 768, 801-09 (1990).

28 Consequently, *jus cogens* norms are deemed "peremptory" and non-derogable

and can be modified only by a subsequent norm of general international law of the same character. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102, com. k (1987); Vienna Convention on the Law of Treaties, art. 53.) *Jus cogens* norms are "those rules which derive from principles that the legal conscience of mankind deems absolutely essential to coexistence in the international community." *See* Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L. & COMP. L. REV. 411, 415 (1989) (quoting statement made by Mexican delegate to the U.N. Conference on the Law of Treaties). A *jus cogens* norm prevails over and invalidates all conflicting international agreements and other rules of international law. *Id*. As a result, *jus cogens* norms are generally regarded to restrict the freedom of nations to contract while voiding any treaty whose object conflicts with norms that have been identified as peremptory. Individual international parties, such as nations, may not contract out of international *jus cogens* norms.

"International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable." M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, *in* 59 *Law and Contemporary Problems* 63-74*,* 63 (Fall. 1996) (hereinafter "International Crimes"). "The term '*jus cogens*' means 'the compelling law' and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles." *Id*. at 67. "[T]he implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes." *Id*. at 65-66 (internal citations omitted).

b. Jus cogens *norms are binding on domestic courts and are considered "federal common law."* The United States Supreme Court has classified *jus cogens* norms as part of "federal common law." As explained in *Sosa*, 542 U.S. at 729-30 (emphasis added):

> *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. ***For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations***. See, *e. g., Sabbatino*, 376 U.S. at 423 ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S. at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C. J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); see also *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (***recognizing that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist***). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

See also id. at 731 ("[F]ederal courts should not recognize private claims under ***federal common law*** for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.") (emphasis added).

The evolution of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, part of the Judiciary Act of 1789, powerfully expresses the role of the federal courts in giving power and import to international law. The ATS is "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Kiobel v. Royal Dutch Shell Petroleum*, __ U.S. __ , 133 S.Ct. 1659, 1663 (2013) (citing *Sosa*, 542 U.S. at 724). While enactors of the ATS probably had only a limited number of *jus cogens* violations in mind, such as offenses against ambassadors, violations of safe conduct and piracy, *Sosa,* 542 U.S. at 715, today the ATS recognizes torture, summary execution, "disappearance,"

extrajudicial killing, crimes against humanity, war crimes, genocide, and arbitrary detention as violations of *jus cogens* norms.[7] *See*, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Sarei v. Rio Tinto, PLC,* 671 F.3d 736 (9th Cir. 2011) *cert. granted, judgment vacated sub nom. Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013); *Mujica v. Occidental Petroleum Corp*., 381 F.Supp.2d 1164 (C.D. Cal. 2005); *Presbyterian Church Of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244 (2d Cir. 2009).

c. *The Crime of Aggression is a* jus cogens *norm under federal common law.* The above precedents, combined with Nuremberg Judgment, make clear that the Crime of Aggression is a *jus cogens* norm of international law at least since 1946 (the date of the Nuremberg Judgment) and perhaps as early as 1928.[8]

First, the Nuremberg Tribunal held that the Crime of Aggression was the "supreme international crime." *Goering*, 41 AM. J. INT'L L. at 186. It is the "supreme international crime" because a war of aggression "contains within itself the accumulated evil of the whole." *Id*. "War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world." *Id*. If torture, genocide and war crimes are *jus cogens* norms of international law actionable under federal common

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[7] Courts have declined to recognize certain violations as actionable under principles of international law. For example, in *Sosa*, the Supreme Court held that the cause of action for arbitrary arrest was not actionable. *Sosa*, 542 U.S. at 738. Similarly in *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 108 (2d Cir. 2008), the Second Circuit held that the use of Agent Orange during the Vietnam War did not rise to an actionable offense under the ATS, as it was used to "protect United States troops against ambush and not as a weapon of war against human populations."

[8] Despite heavy references to the Crime of Aggression in the Complaint (see, e.g., ¶¶ 15-25, 129-148) the Motion to Dismiss is nearly silent with respect to Plaintiff's legal theory. As the underpinning of the Nuremberg Judgment, it would be provocative and even radical for Defendants to argue that the Crime of Aggression does not exist, or is not a *jus cogens* norm. This was the basic argument of the Nazi defendants, and it was rejected by the Nuremberg Tribunal.

1 law, then it follows *a fortiori* that the "supreme international crime" must also be a *jus*
2 *cogens* norm actionable under federal common law.
3 Chief Prosecutor Jackson's first words at Nuremberg were: "The privilege of
4 opening the first trial in history for crimes against the peace of the world imposes a grave
5 responsibility." He spoke of the "practical effort . . . to utilize International Law to meet
6 the greatest menace of our times – aggressive war." Jackson Opening Statement.
7 In *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) the Second Circuit
8 quoted Telford Taylor, assistant to Jackson (and later Chief of Counsel for War Crimes
9 on the Nuremberg Trials held under the authority of Control Council Law No. 10)
10 regarding the modern application of the Nuremberg Judgment. "'Nuremberg was based
11 on enduring [legal] principles and not on temporary political expedients, and the
12 fundamental point is apparent from the reaffirmation of the Nuernberg principles in
13 Control Council Law No. 10 and *their application and refinement* in the 12 judgments
14 rendered under that law during the 3-year period, 1947 to 1949.'" *Abdullahi*, 561 F.3d at
15 179 (emphasis in original) (citing Telford Taylor, *Final Report to the Secretary of the*
16 *Army on the Nuernberg War Crimes Trials Under Control Council Law No. 107*, 107
17 (1949); *see also Mujica*, 381 F.Supp.2d at 1179-1181 (holding that "The Nuremberg
18 trials imposed enforceable obligations.") (citing *Alperin v. Vatican Bank*, 410 F.3d 532,
19 559-60 (9th Cir. 2005)).
20 *Second*, the Nuremberg Tribunal held that the Crime of Aggression was a *jus*
21 *cogens* norm as early as the signing of the Kellogg-Briand Peace Pact, 46 Stat. 2343
22 (1928): nineteen (19) years prior to the judgment itself. The Kellogg-Briand Pact
23 "condemned recourse to war for the future as an instrument of policy, and expressly
24 renounced it. After the signing of the Pact, any nation resorting to war as an instrument of
25 national policy breaks the Pact." *Goering*, 41 AM. J. INT'L L. at 218. The Tribunal
26 continued:
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28 In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that

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> such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:
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> 'War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world . . . an illegal thing. ***Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of the general treaty law*** . . . We denounce them as law breakers.'
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> (*Id.* (emphasis added).)[9]

Based on its interpretation of the Kellogg-Briand Pact, the Treaty of Mutual Assistance, a unanimous declaration concerning wars of aggression signed in 1927, a unanimous resolution in 1928 at the Sixth (Havana) Pan-American Conference decrying aggressive war as "an international crime of the human species," and the Versailles Treaty, the Nuremberg Tribunal concluded that "resort to a war of aggression is not merely illegal, but is criminal." *Goering*, 41 AM. J. INT'L L. at 218-220.

Third, the United States has recognized the Crime of Aggression as a *jus cogens* norm. Soon after the Nuremberg Judgment, the Unites States military code expressly made it a crime for service personnel to commit any of the Nuremberg offenses, including aggression, adding an acknowledgment that "members of the armed forces will normally be concerned only with those offenses constituting [battlefield] 'war crimes.'" Jonathan A. Bush, *"The Supreme…Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2388-89 (2002) (quoting Dep't of the Army, Field Manual 27-10, The Law of Land Warfare P 498 (1956); Henry T. King, Jr. *Nuremberg and Crimes Against Peace*, 41 CASE W. RES. J. INT'L L. 273, 274 (2009) (noting adoption by President Roosevelt of the recommendation that individuals

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[9] The Nuremberg Tribunal made an analogy to The Hague Convention of 1907, which prohibited resort to certain methods of waging war. The Hague Convention does not speak to consequences of breaching such obligations, yet "military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by [The Hague Convention]." *Goering*, 41 AM. J. INT'L L. at 218.

be punished for starting aggressive wars).[10] The 2005 version of the United States Army Center Law (which states that it "should be a start point for Judge Advocates looking for information on the Law of War") recognizes both the Nuremberg Charter and G.A. Resolution 3314's definition of aggression, and acknowledges that "***[v]irtually all commentators agree that the provisions of the [Kellogg-Briand Pact] banning aggressive war have ripened into customary international law***." *See* The United States Army Center for Law and Military Operations, Law of War Handbook 11, 20, 35, 36, 41 (2005) [hereinafter LOW Handbook][11] (emphasis added).[12]

Fourth, at least one foreign court of appeal has affirmed that the Crime of Aggression is part of customary international law. *See R v. Jones* [2006] UKHL 16

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[10] The American position at Nuremberg reflected the primacy of the Crime of Aggression for purposes of prosecuting the Nazis. In his report with respect to the Nuremberg Tribunals, Chief Prosecutor Jackson observed, "The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order." Jackson to Truman, 25 July 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945* (Washington, D.C.: U.S. Department of State, 1947), pp. 381-84. He further noted, "[O]ur view is that this isn't merely a case of showing that these Nazi Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on the international peace, which to our mind is a criminal offense by common-law tests, at least, and the other atrocities were all preparatory to it or done in execution of it." *Id.*, 19 July 1945, p. 299. He wrote that the Nuremberg Judgment "ushers international law into a new era where it is in accord with the common sense of mankind that a war of deliberate and unprovoked attack deserves universal condemnation and its authors condign penalties." He concluded his report with the words that "all who have shared in this work have been united and inspired in the belief that at long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right." *Id.* at ix, xii.

[11] The 2010 version of the LOW Handbook contains this same analysis. *See* The United States Army Center for Law and Military Operations, Law of War Handbook 14, 171 (2010)

[12] At least two federal courts of appeal have affirmed the relevance of the Nuremberg Judgment with respect to international law. *See Abdullahi*, 561 F.3d at 179 ("[B]oth the legal principles articulated in the trials' authorizing documents and their application in judgments at Nuremberg occupy a position of special importance in the development of bedrock norms of international law."); *Siderman*, 965 F.2d at 715 ("Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II. The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal.")

(analysis by House of Lords reaching such conclusion).

Fifth, legal scholars[13] have concluded that the Crime of Aggression is a *jus cogens* norm. *See*, e.g., Mary Ellen O'Connell and Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus ad Bellum and the ICC Statute*, 10 (1) J. INT'L CRIM. JUST. 189, 190 (2012); M. Cherif Bassiouni, "International Crimes" at 68; Evan J Criddle and Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 333 (2009). The International Criminal Court in the Hague has also defined the Crime of Aggression and will have jurisdiction over this crime.[14]

Sixth, international observers, including the former secretary general of the United Nations,[15] a former law lord from the House of Lords, and an official inquiry conducted by the Dutch Parliament, have all concluded that the Iraq War was illegal under international law. Steyn, L., *The Legality of the Invasion of Iraq,* 1 EUR. HUM. RTS. L. Rev., 1-7 (2010) (Originally a lecture by Lord Steyn, arguing that the Iraq War was "plainly illegal" and warning of its "grave consequences" for security, international institutions, the rule of law and human rights); *see also* W.J.M. Davids, Committee of Inquiry on Iraq on behalf of the Kingdom of the Netherlands, *Dutch original available at* http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/01/12/rapport-commissie-davids.html, *English summary beginning on page 519*, January 12, 2010

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[13] Examining the works of international legal scholars is an important part of the survey of international law. *See The Paquete Habana*, 175 U.S. at 700 (noting that courts should look to the "customs and usages of civilized nations" and the "works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."); *see also Filartiga*, 630 F.3d at 881 fn. 8 (citing to the Statute of the International Court of Justice, Art. 38 and its provision that a court interpreting international law should examine "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.").

[14] Amendments to the Rome Statute of the International Criminal Court art 8(2), June 11, 2010, Depository Notification C.N.651.2010.Treaties-8 [hereinafter Rome Statute Amendments] (though the amendment was passed in 2010 by the Assembly of State Parties to the International Criminal Court ("ICC"), the ICC may only exercise jurisdiction over the crime of aggression subject to another vote to be held after January 1, 2017)

[15] Am. Compl., ¶ 110.

1 (finding that Iraq War had "no sound mandate under international law" (531) and that
2 military action could not "reasonably" be justified by United Nations Security Council
3 Resolution 1441 (530)).[16]

4 **d.** ***Plaintiff proposes the following elements of the offense for the Crime of***
5 ***Aggression, based on her survey of international and domestic law.*** The Crime of
6 Aggression is:[17]

7 (1) the planning, preparation, initiation, or execution,[18] (2) by a person in a
8 position effectively to exercise control over or to direct the political or military action of a State,[19] (3) of an act of aggression (whether in a declared or undeclared
9 war[20]) which includes, *but is not limited to,*

10 (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such
11 invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
12 (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
13 (c) The blockade of the ports or coasts of a State by the armed forces of another

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15 [16] *Dutch Inquiry Says Iraq War Had No Mandate*, BBC NEWS, January 12, 2010, *available at* http://news.bbc.co.uk/2/hi/europe/8453305.stm; Afua Hirsch, *Iraq War Was*
16 *Illegal, Dutch Panel Rules*, The Guardian, January 12, 2010, *available at* http://www.theguardian.com/world/2010/jan/12/iraq-war-illegal-dutch-tribunal.

17 [17] Nuremberg Charter, art. 6(b) (1945).

18 [18] Nuremberg Charter, art. 6(b); G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974); Charter of the Int'l Military Tribunal for the
19 Far East, art. 5(a), Jan. 19, 1946, T.I.A.S. No. 1589 (hereinafter Tokyo Charter) (1946); Rome Statute Amendments; LOW Handbook 36, 41 (recognizing that prohibition against
20 aggression is customary international law, and acknowledging both the Nuremberg Charter and G.A. Resolution 3314's definition of aggression).

21 [19] See Jackson Opening Statement (stating that the Prosecution had 'no purpose to
22 incriminate the whole German people', and intended to reach only 'the planners and designers, the inciters and the leaders, without whose evil architecture the world would
23 not have been for so long scourged with the violence and lawlessness ... of this terrible war'.).; *Goering*, 41 AM. J. INT'L L. at 223.; *United States v. von Leeb et al.*, Military
24 Tribunal XII (hereinafter *High Command* Judgment), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950) at 488-491;
25 *United States v. von Weizsäcker et al.*, Military Tribunal XI (hereinafter *Ministries* Judgment), 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under
26 Control Council Law No. 10 (1949) at 425; Judgment of the International Military Tribunal for the Far East, reprinted in R. Pritchard (ed), *The Tokyo Major War Crimes*
27 *Trial* (1998), at 1190-1191; Rome Statute Amendments; LOW Handbook at p. 208.

[20] Tokyo Charter, art. 5(a).

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> State;
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein,[21]
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> and (4) is in violation of international law, treaties, agreements, assurances,[22] or the Charter of the United Nations.[23]

With respect to Conspiracy to Commit Aggression, Plaintiff proposes the following definition:

> Participation in a common plan or conspiracy to commit the Crime of Aggression.[24]

4. Plaintiff Alleges That These Six Defendants Committed The Crime of Aggression In Planning And Waging The Iraq War.

This Court is bound to accept the allegations in the Amended Complaint as true for purposes of a motion to dismiss. The issue then is whether Plaintiff has properly pled allegations that would meet the elements of the alleged international law tort. Plaintiff's Amended Complaint plainly does so.

a. *Plaintiff alleges that these six defendants planned the Iraq War prior to entering office and then through 9/11*. The first element of the Crime of Aggression is that a defendant engage in "planning, preparation, initiation, or execution" of aggression. *See Section 3.d, supra*. Plaintiff plainly alleges that these six Defendants planned,

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[21] G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974); Rome Statute Amendments. *Reprinted and recognized in LOW Handbook at p. 41*

[22] Nuremberg Charter, art. 6(b); Tokyo Charter, art. 5(a).

[23] G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974); Rome Statute Amendments.

[24] Nuremberg Charter, art. 6(b); Tokyo Charter, art. 5(a)

prepared, initiated or executed the Iraq War. For example, the Amended Complaint alleges that Defendants CHENEY, RUMSFELD, and WOLFOWITZ were founding members of "The Project for the New American Century" (PNAC), a non-profit that publicly and heavily advocated for the military overthrow of Saddam Hussein. Am. Compl., ¶¶ 26-29. The Amended Complaint describes a letter written by Defendants RUMSFELD and WOLFOWITZ to then-President Clinton, which advocated the military overthrow of Saddam Hussein and the invasion of Iraq, as well as other letters and testimony by these two defendants in their planning of the Iraq War. Am. Compl., ¶¶ 30-32.[25]

The Amended Complaint then discusses that once these six Defendants came into office, they used 9/11 as an opportune moment to implement their plan to invade Iraq. The Amended Complaint describes how on and shortly after 9/11, Defendants RUMSFELD and WOLFOWITZ advocated for war against Iraq. Am. Compl., ¶¶ 30-42. The Amended Complaint describes how Defendant BUSH spoke with Richard A. Clarke and asked him to examine whether it was possible to blame Iraq for 9/11. Am. Compl., ¶ 43. The Amended Complaint discusses how high-ranking British politicians discussed the American case for war in July 2002 as "inevitable" and that Defendant BUSH "wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD." Am. Compl., ¶ 55. By August 2002, Defendants made the decision to use the term "smoking gun/mushroom cloud" to "persuade the public, the Congress, and the allies of the need to confront the threat from Saddam Hussein," and that Defendants

[25] As a further offer of proof regarding the actions of these Defendants within the 1997-2000 timeframe, Plaintiff submits further materials in the attached declaration by counsel with other materials from the PNAC website. This includes PNAC editorial statements that a "military element" is central to "remov[ing] Saddam and his regime"; that "bombing Iraq isn't enough," and that then-President Clinton should "order ground forces to the gulf. Four heavy divisions and two airborne divisions are available for deployment"; and articles entitled "How to Attack Iraq", and "A Way to Oust Saddam," which supported Defendant WOLFOWITZ's plan to set up a "liberated zone" in Southern Iraq to control the "country's largest oil field" and a "guarantee of military support" wherein the United States would respond with "overwhelming force." (Declaration of D. Inder Comar ("Comar Decl."), Exs. C-J.

waited until after Labor Day because they did not want "to introduce new products in August." Am. Compl., ¶¶ 59-62. The Amended Complaint describes how Defendants BUSH, CHENEY and RICE used "faulty intelligence and 'cherry picked' intelligence facts in order to better market a war with Iraq," Am. Compl., ¶¶ 66-72, and falsely linked Al-Qaeda to Iraq in order to scare the public. Am. Compl., ¶¶ 73-87. This included a statement by Defendant POWELL that defendant WOLFOWITZ was meeting at the "Gestapo office," as well as Defendant POWELL's own statements to the United Nations, in furtherance of the planning of the war. Am. Compl., ¶¶ 83, 85-86. Finally, the Amended Complaint alleges that Defendant BUSH, in concert with the other Defendants, executed the plan by invading Iraq. Am. Compl., ¶ 104.

b. ***Plaintiff alleges that these six Defendants were in a position of control and authority in ordering the Iraq War***. The second element of the Crime of Aggression is that the defendant be "a person in a position effectively to exercise control over or to direct the political or military action of a State." *See Section 3.d, supra*. In contrast to other crimes in international law, the Crime of Aggression, by definition, can only be brought against high-ranking decision-makers responsible for the aggression. Plaintiff has plainly alleged that these six Defendants were high-ranking members in the Bush Administration who planned and waged the Iraq War. Am. Compl., ¶¶ 9-13, 104.

c. ***Plaintiff alleges that these six Defendants committed an act of aggression***. The third element of the Crime of Aggression is that the defendant commit "an act of aggression." *See Section 3.d, supra*. Plaintiff has alleged that the Defendants ordered the invasion of Iraq. Am. Compl., ¶ 104.

d. ***Plaintiff alleges that these six Defendants waged aggressive war, or violated international law, treaties, assurances, or the Charter of the United Nations.*** The fourth and final element of the Crime of Aggression is that the actions of the defendants be "in violation of international law, treaties, agreements, assurances, or the

Charter of the United Nations." *See Section 3.d, supra.*[26] Plaintiff has alleged the Defendants violated the *jus cogens* norm against aggression. Am. Compl., ¶ 140. Relying on the Nuremberg Tribunal's analysis, Plaintiff alleges that the conduct of the defendants violated the Kellogg-Briand Pact, which obligates the United States to resolve all disputes through "pacific means." Am. Compl., ¶ 142. Plaintiff also alleges violations of the Nuremberg Charter, the Tokyo Charter, the United Nations Charter, and United Nations General Assembly Resolution 3314. Am. Compl., ¶ 144.

5. As A *jus cogens* Norm, Plaintiff May Seek Relief In This Court Under the ATS and Through Federal Common Law.

a. ***The ATS provides a cause of action for any tort "committed in violation of the law of nations."*** As noted in *Section 3.a*, *supra*, the ATS incorporates a modest number of violations of international law, and in particular, allegations of international law offenses that are *jus cogens* norms. Accordingly, the Court has jurisdiction to reach the claim under the ATS because Plaintiff alleges a violation of the Crime of Aggression, a *jus cogens* norm of international law that is incorporated into federal common law under two centuries of precedent.

b. ***Plaintiff's allegations plainly touch United States conduct***. In *Kiobel*, the Supreme Court held that the ATS contains a "presumption against extraterritoriality" and dismissed a lawsuit by a group of Nigerian nationals against certain Dutch, British and Nigerian corporations. *Kiobel*, 133 S. Ct. at 1669. Defendants argue that *Kiobel* forbids

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[26] The Nuremberg Judgment defined this last element in the disjunctive. "The Charter defines as a crime the planning or waging of war that is a war of aggression ***or*** a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against 12 nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, ***or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances."*** *Goering*, 41 AM. J. INT'L L. at 214 (emphasis added). In the interest of completeness, Plaintiff has alleged both the waging of an aggressive war, or a war that is in violation of international treaties, agreements or assurances. Am. Compl, ¶¶ 111-113, 129-148. The legal issue of which applies here is left for the Court to decide, as there appears to be no subsequent precedent other than the Nuremberg Judgment regarding this element of the offense.

1 this court from hearing this case because "the crime of aggression for which ATS
2 jurisdiction has been invoked occurred entirely outside the United States." Motion at 8.
3 Defendants also repeat political question arguments. Motion at 9.
4 Defendants are incorrect. The conduct alleged in the complaint does more than
5 simply "touch and concern" the United States: it alleges facts that directly implicate
6 conduct taken on United States soil by United States defendants. At least three of the four
7 elements of the Crime of Aggression occurred in the United States. For example, Plaintiff
8 alleges that the planning of the Crime of Aggression began in 1997 by Defendants
9 RUMSFELD and WOLFOWITZ through the Washington D.C. based non-profit, PNAC.
10 All of the Defendants live in the United States and occupied positions of high
11 government. The order to invade Iraq was presumably given in the United States. It is
12 difficult to imagine how this case could ***not*** "touch and concern" the United States,
13 particularly in light of the role of the United States in establishing the Crime of
14 Aggression and in prosecuting Nazi leaders for this same crime. This is not a case of a
15 foreign plaintiff suing a foreign corporate defendant involving foreign conduct (*Kiobel*)
16 or even a foreign plaintiff suing a mix of foreign and domestic defendants over foreign
17 conduct. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). This is a case
18 involving a foreign plaintiff suing exclusively domestic defendants over conduct taking
19 place in the United States and being felt in Iraq, and involving application of US law.
20 Even Justices Alito and Thomas agreed in *Kiobel* that an ATS cause of action will
21 lie where the "domestic conduct is sufficient to violate an international law norm that
22 satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."
23 *Kiobel*, 133 S.CT. at 1670 (Alito, J., concurring). *See also Mwani v. Laden*, 947
24 F.Supp.2d 1 (D. D.C. 2013) (holding that lawsuit between foreign plaintiffs against
25 foreign defendants, involving a foreign group of events that related to the bombing of the
26 U.S. embassy in Nairobi, Kenya, "touches and concerns the United States" and could
27 proceed); *see also id*. at 5 (limiting *Kiobel* to its facts that "mere corporate presence in the
28 United States," without more, does not suffice); *Sexual Minorities Uganda v. Lively*, Case

No. 12-cv-30051-MAP, 2013 WL 4130756 (D. Mass. Aug. 14, 2013) (permitting lawsuit against United States citizen for "planning and managing a campaign of repression in Uganda from the United States"); ("[T]he restrictions established in *Kiobel* on extraterritorial application of the ATS do not apply to the facts as alleged in this case, where Defendant is a citizen of the United States and where his offensive conduct is alleged to have occurred, in substantial part, within this country.") ("This is not a case where a foreign national is being hailed into an unfamiliar court to defend himself.")

c. ***This Court would still retain subject matter or diversity jurisdiction, even without the jurisdiction conferred by the ATS.*** Even assuming Defendants' argument is correct (which it is not), it is still not enough to defeat jurisdiction. Because the Crime of Aggression is incorporated into federal common law (see *Section 2.b, supra*), the Court would have jurisdiction to hear Plaintiff's case under federal question jurisdiction as well as diversity jurisdiction. *See* 28 U.S.C. §§ 1331, 1332. Plaintiff alleges that she lost her home and employment opportunities as a result of the war (thus suffering more than $75,000 in damages), and with leave to amend, can allege facts that would permit suit under a theory of diversity jurisdiction. Am. Compl., ¶ 114-124.

6. Plaintiff Raises A Legal Question, Not A Political Question.

Defendants argue that Plaintiff's claims "raise non-justiciable questions." (Motion at 11.) Defendants are incorrect. Plaintiff's claims relate to the central holding of the Nuremberg Tribunal, and are unquestionably legal in character.

a. ***The Crime of Aggression is a legal question and does not implicate the political question doctrine***. The political question doctrine is an exception to justiciability. *See*, e.g., *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). It is a "narrow exception" to the general rule that the Judiciary has a "responsibility to decide cases properly before it, even those it 'would gladly avoid." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citing *Japan Whaling Assn.*, 478 U.S. at 230 and quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821). The political question doctrine is only properly invoked when there is "a textually demonstrable

constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 132 S. Ct. at 1427 (internal citations omitted).

At least since *Marbury v. Madison*, 1 Cranch 137, 177 (1803), the Supreme Court has recognized that it is "emphatically the province and duty of the judicial department to say what the law is." That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." *INS v. Chadha,* 462 U.S. 919, 943 (1983).

In *Zivotofsky*, and pursuant to statute (section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350 ("§ 214(d)"), the petitioner sought to have "Bethlehem, Israel," listed as the place of birth on a consular report of birth abroad and a United States passport. The State Department denied the request as its policy prohibited listing "Israel" on these documents. *Zivotofsky*, 132 S. Ct. at 1425-26. Both the District Court and the Court of Appeals for the D.C. Circuit held that the claim was a nonjusticiable political question. The Supreme Court reversed. *Id*. at 1426. The Supreme Court rejected the notion that the courts were being asked "to determine whether Jerusalem is the capital of Israel." Petitioner "instead seeks to determine whether he may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth." The two questions were not "one and the same." *Id*. at 1427. The Court continued:

> The existence of a statutory right … is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. ***Instead, Zivotosfky requests that the courts enforce a specific statutory right***. To resolve his claim, the Judiciary must decide if Zivotosfky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Id. at 1427 (emphasis added).

The Supreme Court continued that the only real issue before the Judiciary was

whether § 214(d) was a valid exercise of Congressional power. If the law "impermissibly intrudes upon Presidential powers upon the Constitution," then it had to be invalidated; if not, then the law had to be followed. "Either way, the political question doctrine is not implicated." *Id*. at 1428. "Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case." *Id*. at 1430.

Similarly, Plaintiff "requests that the courts enforce a specific [federal common law] right": specifically, a cause of action rooted in the Crime of Aggression. *See Zivotofsky*, 132 S. Ct. a 1427. This is, fundamentally, a legal question; to suggest otherwise calls into question the legitimacy of Nuremberg Judgment in a manner that would overturn basic principles of international law.[27] The Nuremberg Charter

[27] This is, in fact, what the Nazi defendants believed. LEON GOLDENSOHN, THE NUREMBERG INTERVIEWS: AN AMERICAN PSYCHIATRIST'S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES (2004) 128 ("I am sure that I will go down in history as a man who did much for the German people. This trial is a political trial, not a criminal one." Hermann Goering to U.S. Army psychiatrist Dr. Leon Goldensohn, May 28, 1946); 129-130 ("The delusion that all men are equal is ridiculous. I feel that I am superior to most Russians not only because I am a German but because my cultural and family background are superior. How ironic it is that crude Russian peasants who wear the uniforms of generals now sit in judgment on me"; "This tribunal fails to realize that accepting orders is a legitimate excuse for doing almost anything. The tribunal is wrong . . . I am very cynical about these trials. The trials are being fought in the courtroom by the world press. Everyone knows that the Frenchmen and the Russians who are judges here have made up their minds that we are all guilty and they had their instructions from Paris and Moscow long before the trial even started to condemn us. It's all but planned and the trial is a farce. Maybe the American and English judges are trying to conduct a legitimate trial. But even in their case I have my doubts"); 133 ("I am fully convinced that this trial is a mockery and that someday when you Americans have your hands full of Russian troublemaking, you will see me and my activities in a different light"); 33 ("[Prosecutors Jackson and Dodd] are politicians not lawyers, as far as this procedure is concerned. Their mission is political. They are mouthpieces of political interests which are directed toward the destruction of National Socialism." Hans Frank to Dr. Goldensohn, July 20, 1946); 152 ("The prosecution conducts this trial for political reasons and has blinders on their eyes. This is necessary for them because of political reasons." Ernst Kaltenbrunner to Dr. Goldensohn, June 6, 1946); 188 ("The Allies should take the attitude, now that the war is over, that mistakes have been made on both sides, that those of us here on trial are German patriots, and that though we may have been misled and gone too far with Hitler, we did it in good faith and as German citizens. Furthermore, the German people will always regard our condemnation by a foreign court as unjust and will consider us martyrs." Joachim von Ribbentrop to Dr. Goldensohn, June 23, 1946); 258 ([Referring to

(established in part by the United States) defined international crimes (art. 6), provided for due process (art. 16), including procedures to "ensure fair trial for the defendants," such as the right to receive the indictment, to have the charges explained, to put on a defense, and to cross-examine any witness called by the prosecution. There is nothing about the Nuremberg Charter or Judgment that reflects a political operation – on the contrary, the issuing of the indictments, due process for the defendants, and an authorized judgment reflects a purely legal process. The only branch of government with the authority to examine the Nuremberg Judgment is, thus, the Judiciary. *See* U.S. CONST. Art. III, § 2, cl. 1.

The fact that a legal question addresses an overseas war is not enough to summon the political question doctrine. *See*, e.g., *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d 7, 64-78 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1524 (2009) (rejecting political question doctrine in lawsuit filed by Vietnamese plaintiffs alleging violations of international law related to the use of Agent Orange during Vietnam War).[28] The fact that a legal question implicates presidential authority during war is also not dispositive. *See*, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that district court had jurisdiction to hear claims brought by aliens detained in

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Chief Prosecutor Jackson] "That's Jacobson. He may call himself Jackson, but to me he is Jacobson and a Jew." Julius Streicher to Dr. Goldensohn, April 6, 1946).

[28] Throughout American history, courts have routinely examined legal issues stemming from the issues related to war and peace, even knotty questions. *See*, e.g., *Bas v. Tingy*, 4 U.S. 37 (1800) (holding that vessel recaptured from the French during the "Quasi-War" with France was an "enemy" vessel and thus entitled to higher salvage value; the United States and France existed in a state of "partial war," and as such, France was a "partial enemy; but still she was an enemy," *id.* at 43, 44); *Fleming v. Page*, 50 U.S. 603, 9 How. 603 (1850) (holding that where the United States conquers additional territory, the President cannot "enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power," *id.* at 615; holding that "[T]here is a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown," *id.* at 618); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (holding that while the President may respond to force, the President has "no power to initiate or declare a war against a foreign nation or a domestic State," *id.* at 668); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that laws and usages of war can never be applied to citizens in states where the civilian courts are open and their process unobstructed).

Guantanamo Bay, Cuba); *Youngstown Sheet & Tube Co. v. Sawyer*, 242 U.S. 579 (1952) (holding that the President Truman exceeded his authority in ordering the seizure of steel plants during the Korean War); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the Executive's use of military commissions violated the common law and the law of nations, including the Geneva Conventions). ("[T]he Executive is bound to comply with the rule of law that prevails in this jurisdiction," *id*. at 635). The fact that a legal question may embarrass the Executive is, also, not enough to summon the doctrine. *See*, e.g., *United States v. Nixon*, 418 U.S. 683, 692-697 (1974) (rejecting application of the political question doctrine where Special Prosecutor issued subpoena to the President for certain tape recordings and documents relating to his conversations with aides and advisors). Because the Crime of Aggression is clearly a legal question – the same legal question presented before the Nuremberg Tribunal – the political question doctrine does not apply and the Court may disregard it. *Zivotofsky*, 132 S.Ct. 1430-31.

b. ***The* Baker *factors affirm that the question before this Court is legal, not political.*** In the event this Court decides it should apply the *Baker* factors,[29] notwithstanding the above, those factors affirm that this case presents a legal question:

1. *The Constitution delegates legal questions to the Judiciary*. The first *Baker* factor asks whether there is a "textually demonstrable constitutional commitment

[29] In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court identified circumstances in which an issue might present a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker* established that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability." *Id.* But *Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication. *Zivotofsky*, 132 S. Ct. at 1431.

1 of the issue to a coordinate political department." As described *supra*, legal questions are
2 the province of the Judiciary and this factor weighs in favor of Plaintiff. Defendants'
3 mischaracterize the Complaint as asking "whether the United States should have gone to
4 war with Iraq in 2003." (Motion at 14). This is ***not*** what Plaintiff's complaint is about.
5 The Iraq War may have been the greatest idea in American history – that is not what is
6 being litigated. What is being litigated is the ***conduct*** of six Defendants in planning the
7 war prior to entering office; in misleading the public to support their plan; and, finally, in
8 executing that war on March 19, 2013, committing the Crime of Aggression.

9 As noted by the district court in the Eastern District of New York's with respect
10 to the use of Agent Orange during the Vietnam War:

11 As for the first *Baker* factor, there is no textually demonstrable
12 commitment of the issues posed in the instant case to a coordinate political department. The judiciary is the branch of government to which claims
13 based on international law has been committed. *Kadic v. Karadzic,* 70 F.3d 232, 249 (2d Cir.1995) ("[W]e have noted in a similar context... that
14 '[t]he department to whom this issue is "constitutionally committed" is none other than our own — the Judiciary.'") (quoting *Klinghoffer v.*
15 *S.N.C. Achille Lauro,* 937 F.2d 44, 49 (2d Cir.1991)). The issues now presented require interpretation of both international law, including
16 treaties, and domestic tort law. Article III explicitly extends judicial power to the domain of treaties. U.S. CONST. art. III, § 2. As put in *Klinghoffer*
17 *v. S.N.C. Achille Lauro,* the instant case can be characterized as "an ordinary tort suit, alleging that the defendants breached a duty of care
18 owed to plaintiffs or their decedents.... This factor alone, then, strongly suggests that the political question doctrine does not apply." 937 F.2d 44,
19 49 (2d Cir.1991).

20 *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 69-70.

21 Defendants' remaining citations are easily distinguished. As an initial matter, *Doe*
22 *v. Bush*, 323 F.3d 133 (1st Cir. 2003) was dismissed "on ripeness rather than the political
23 question doctrine." *Id.* at 139-140. The court noted that it hesitated from intervening in
24 the dispute because it was not clearly framed. "An extreme case might arise, for example,
25 if Congress gave absolute discretion to the President to start a war at his or her will." *Id.*
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at 143.[30] Nowhere does that opinion state that courts are foreclosed from engaging in judicial review of conflicts stemming from wars, or (as in Plaintiff's case) the planning and execution of a war in contravention of firmly established international law.

El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010) (en banc)) supports Plaintiff's position. That court distinguished "claims requiring us to decide whether taking military action was wise – a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive branch – and claims presenting purely legal issues such as whether the government had legal authority to act." *Id*. at 842 (internal citations omitted). Based on this distinction, El-Shifa's claim for reparations based on a "mistaken" bombing was one that implicated the wisdom of military action – not its legality. "Undertaking a counterfactual inquiry into how the political branches would have exercised their discretion had they known the facts alleged in the plaintiff's complaint would be to make a political judgment, not a legal one." *Id*. at 845. Plaintiff's claims here involve no such counterfactuals. Plaintiff instead is litigating the past conduct of Defendants in planning and waging the Iraq War, beginning in 1998: conduct she contends was declared illegal by the Nuremberg Tribunal. Her claims thus relate to the ***legality*** of Defendants' conduct and not the wisdom of what they did, or the wisdom of the Iraq War itself.[31]

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[30] The *Bush* opinion casts heavy doubt on the application of the political question doctrine. As noted by that court, "In the forty years since that case [(*Baker*)] the Supreme Court has found a case nonjusticiable on the basis of the political question doctrine only twice. *See Nixon v. United States*, 506 U.S. 224, 236, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Senate procedures for impeachment of a federal judge); *Gilligan v. Morgan*, 413 U.S. 1, 12, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) (training, weaponry, and orders of Ohio National Guard). Our court has been similarly sparing in its reliance on the political question doctrine." *Bush*, 323 F.3d at 140.

[31] By analogy, the fact that cash found on the Watergate burglars was connected to President Nixon's reelection committee does not turn the legal issue of burglary into a "political question" merely because the burglary was connected to the act of electing a President. Whatever the ***wisdom*** of the Watergate burglars, or the connection to the President, the ***act*** of burglary remains a crime, and under basic principles of criminal law, an individual is guilty of burglary if a factfinder determines that every element of the offense has been proved beyond a reasonable doubt. Similarly, the conduct of these Defendants can be mapped onto the Crime of Aggression, the supreme international

Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007), a pre-*Zivotofsky* decision, is also not relevant for the same reason. There, the Ninth Circuit applied the political question doctrine where a plaintiff sought liability against a defense contractor that sold bulldozers to Israel pursuant to an agreement wherein the United States would finance equipment on a case-by-case basis. *Id.* at 978. One of those bulldozers killed family members of the various plaintiffs. While that complaint alleged that Caterpillar should have known that Israel would violate international law with the sold equipment, Caterpillar was acting pursuant to a lawful government defense program. The *Corrie* court thus worried that any decision for the plaintiff would "indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide." *Id.* at 984. But nothing in *Corrie* prohibits Plaintiff from seeking damages against Defendants for conduct that is expressly prohibited by international law and federal common law, and particularly for conduct that began years before any of the Defendants was in a position to make any foreign policy decision.

Defendants' remaining citations are easily distinguished. The questions presented do not ask whether a plaintiff may seek redress for seizure of hides in Mexico during the Mexican revolution (he cannot) (*Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918)), whether the Executive may revoke a passport for national security reasons (it can) (*Haig v. Agee*, 453 U.S. 280 (1981)), whether a statute conferring Presidential authority to grant or deny overseas and foreign air routes may be subject to judicial review (it is not) (*Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.* (333 U.S. 103 (1948)), or whether Taiwan is a party to the Warsaw Convention (*Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142 (9th Cir. 1999). The fact that courts have answered many of these questions reflects the highly limited application of the political question doctrine.

2. *The Judiciary may ascertain and manage standards for resolving this*

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crime, and assuming the truth of the allegations, every element of this offense can be established through their alleged conduct.

issue. This second *Baker* factor also favors Plaintiff, as she is not asking this Court to recognize any new principles of international law; rather, she is asking this court to apply 60-year old legal precedent. The Nuremberg Tribunal itself was able to define the scope of the Crime of Aggression and apply those laws to the Nazi defendants, weighing their individual liabilities and pronouncing judgments, and even acquittals.[32]

As with any development in law, this court will face novel questions in need of an answer. But "[w]hile the answers to questions of international law, like those of domestic law, may not always be clear, they are ascertainable and manageable." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 70. The Second Circuit has said:

> [O]ur decision in *Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch.

Kadic, 70 F.3d at 249)

3. This Court will not need to engage in any policy determination. Defendants contend that hearing the case would "constitute a clear lack of respect for the role of the political branches in determining the circumstances under which this nation went to war against Iraq in 2003," and would require the Court to "substitute its judgment on the proper exercise of war powers and the conduct of foreign affairs for the judgment of the political branches to which those matters have been entrusted." (Motion at 16, 17). Defendants are wrong. The questions in this case relate to the legality of Defendants' actions under international law, whose limits and provisions have already been defined by the Nuremberg Judgment and subsequent international law. The United States has ***already*** created policy determinations by making itself a state party to the Kellogg-Briand

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[32] "The Charter for the Nuremberg trials authorized prosecution of war crimes and crimes against humanity. Of the twenty-two defendants prosecuted in the 'Major War Criminals' trial, twelve were sentenced to death, seven received prison sentences, and three were acquitted." *Mujica*, 381 F.Supp.2d at 1180.

Pact, the Nuremberg, Tokyo and United Nations Charters, and by ***itself*** defining The Crime of Aggression in the Nuremberg and Tokyo Charters. The author of the law that prohibits aggression cannot now complain that these laws should not apply. "This kind of determination is one of substantive international law, not policy. A categorical rule of non-justiciability because of possible interference with executive power, even in times of war, has never existed." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 71 (referencing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).[33]

4. *The Judiciary's determination of an issue of international law will not show lack of respect to the other branches of government*. Defendants place heavy reliance on the fourth *Baker* factor, arguing that the Court's determination of the Crime of Aggression would necessarily question "Congress' judgment" and would require the Court to "examine former President Bush's subsequent policy determination that the use of military force against Iraq was 'necessary and appropriate.'" (Motion at 15-16). Defendants again mischaracterize the Amended Complaint. Plaintiff is not asking the Court to determine the wisdom of the Iraq War, or (in contrast to *Doe v. Bush*), even whether the war was domestically authorized.[34] This case asks a narrower question: whether the Defendants engaged in conduct declared illegal at Nuremberg in planning and waging the Iraq War. "The President is no more above the law than is Congress or the courts. Treaties and other aspects of international law apply to, and limit executive

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[33] This is an ancient legal principle: *Atque in republica maxime conservanda sunt iura belli*, or, "Something else that must be preserved in public affairs is the justice of warfare." Marcus Tullius Cicero (as quoted in Andrea Keller, *Cicero: Just War In Classical Antiquity*, *in* FROM JUST WAR TO MODERN PEACE ETHICS 9, 13 (Heinz-Gerhard Justenhoven & Willaim A. Barbieri, Jr. eds., 2012).

[34] The issue of whether the war was domestically authorized is not before the Court as it plays no role in the analysis with respect to The Crime of Aggression. "[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law." *Goering*, 41 AM. J. INT'L L. at 221.

power – even in wartime." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72-73. Courts have rejected any implication that they cannot examine legal questions related to Congressional or Executive decisions, even on such sensitive topics as the use of military commissions at Guantanamo Bay (e.g., *Hamdan*) or the authorization of torture on American citizens (e.g., *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (dismissed on qualified immunity, not political question grounds)).

Defendants' also claim that should the Court reach potential international legal issues such as (1) whether the authorization of the United Nations Security Council was needed before the United States could go to war against Iraq, (2) whether there was an imminent humanitarian disaster or event in Iraq that required the intervention of a foreign power, (3) whether Iraq posed an imminent military threat that required the United States to act in self-defense and (4) whether the invasion of Iraq was reasonably related or proportionate to the threat posed, the Court would be involved in political issues. (Motion at 16). This is not the case: these were the very issues confronted by the Nuremberg Tribunal. And federal courts have hardly turned away from analyzing United Nations Security Council resolutions for purposes of determining substantive law. *See*, e.g., *United States v. Chalmers*, 474 F.Supp.2d 555, 563 (S.D.N.Y. 2007) (interpreting and applying effect of S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1994) in wire fraud case related to the Iraq "Oil-for-Food" program); *United States v. Shibin*, 722 F.3d 233, 241-42 (4th Cir. 2013) (interpreting S.C. Res. 1976, preambular ¶ 8, U.N. Doc. S/RES/1976 (Apr. 11, 2011) to determine substantive issues of law related to piracy); *United States v. Ali*, 718 F.3d 929, 936-37 (D.C. Cir. 2013) (interpreting S.C. Res. 2020, U.N. Doc. S/Res/2020, at 2 (Nov. 22, 2011) to determine substantive law of piracy and inchoate crimes); *see also Hamilton v. Regents of California*, 293 U.S. 245 (1934) (holding that California law requiring students to take class on military science and tactics did not violate the Kellogg-Briand Pact).

5. *There is no unusual need for not questioning a political decision already made*. Defendants' do not identify this factor, and there is no unusual need for the

Judiciary to avoid adjudicating this issue. *Compare In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72 (noting that a comprehensive treaty regime governed World War II era compensation claims).

6. *The potential for embarrassment does not weigh in favor of Defendants*. Contrary to Defendants' argument with respect to "embarrassment" (Motion at 16), Plaintiff contends it would be far more embarrassing to accept Defendants' arguments that somehow this Court is unable to apply an international legal precedent from a duly authorized international tribunal – a tribunal established in large part by the United States. A decision from this Court would in fact clarify international law with respect to the Crime of Aggression based on an actual case and controversy presented to it. "The judiciary, as well as the executive and the legislature, are each charged with the interpretation and application of international law. That a decision may touch on foreign relations does not decide the question." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72. For the foregoing reasons, Defendants' arguments that the political question doctrine applies are unpersuasive.

7. The Court Must Reject The United States' Westfall Act Certification As Defendants Are Liable Under The Common Law, Not The United States.

In a final attempt to avoid the Amended Complaint and the rule of Nuremberg, the United States has certified the Defendants under the Westfall Act. (Motion 3-7.) The certification is inappropriate and the Court must deny it.

a. ***This Court may review the Westfall Act certification by the United States***. The United States Supreme Court held in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995), that the Attorney General's certifications under the Westfall Act are judicially reviewable. This Circuit has held that de novo review is appropriate in reviewing the certification. *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996); *see also Haddon v. United States*, 68 F.3d 1420, 1422 (D.C. Cir. 1995). The party seeking review bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence. *Billings v. United States*, 57 F.3d 797,

800 (9th Cir. 1995); *see also Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994); *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003) ("Instead, Stokes' burden was to raise a material dispute regarding the substance of AUS Nagle's determination by alleging facts that, if true, would establish that the defendants were acting outside the scope of their employment.")

A court may permit limited discovery on the issue of certification in order to provide the plaintiff the opportunity to gather evidence to defeat the certification and meet its burden of proof. *Stokes*, 327 F.3d at 1215-16.

"Scope of employment is ordinarily a question for the jury, but it becomes a question of law for the court . . . if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of employment.") *Doe v. Sipper*, 821 F.Supp.2d 384 (Dist. D.C. 2011) (citation omitted); *see also Boykin v. District of Columbia*, 484 A.2d 560, 526 (D.C. 1984) ("As a general rule, whether an employee is acting 'within the scope of his employment' is a question of fact for the jury. It becomes a question of law for the court, however, if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of the employment.")

"On the infrequent occasions when courts have resolved scope of employment questions as a matter of law, either by summary judgment or directed verdict, it has generally been to hold that the employee's action was *not* within the scope of her employment and thus to absolve the employer of any liability." *Majano v. United States*, 469 F.3d 138, 141 (D.C. Cir. 2006).

b. *District of Columbia law governs this determination*. "FTCA scope of employment determinations are made 'according to the principles of *respondeat superior* of the state in which the alleged tort occurred.'" *Wilson*, 87 F.3d at 1076 (citing *Pelletier v. Fed. Home Loan Bank*, 968 F.d 865, 876 (9th Cir. 1992); *see also Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006) ("Under the Westfall Act, courts apply the *respondeat superior* law in the state in which the alleged

tort occurred.") For purposes of claims against high-ranking federal officials, courts apply the law of the District of Columbia in determining scope of employment concerns. *See*, e.g., *Kashin v. Kent*, 457 F.3d 1033 (9th Cir. 2006) (holding that District of Columbia law was appropriate to determine whether a senior foreign service officer was acting within the scope of his employment for an automobile accident that occurred in Russia); *Rasul v. Myers*, 512 F.3d 644, 655 (D.C. Cir. 2008); (looking to the "decisions of the Court of Appeal for the District of Columbia for our guidance on local law" in case involving allegations of torture by British citizens by high ranking U.S. officials); *Council on American Islamic Relations*, 444 F.3d at 663 (holding that "District of Columbia law" applied in defamation action against Congressman who made allegedly defamatory statement on a call from his congressional office during regular business hours to a North Carolina reporter).

"District of Columbia law concerning the scope of employment is rooted in the Restatement (Second) of Agency." *Kashin*, 457 F.3d at 1038-1039; *Rasul*, 512 F.3d at 655 ("As its framework for determining whether an employee acted within the scope of employment, the Court of Appeals for the District of Columbia looks to the Restatement (Second) of Agency (1957)") (quoting *Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995) *overruled on other grounds*, *Osborn v. Haley*, __ U.S. __, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007)).

> "The Restatement provides:
> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.
> … Consistent with the Restatement's use of the conjunctive, [any disputed prongs] must favor [the defendant] if we are to find that he acted within the scope of employment."
>
> *Council on American Islamic Relations*, 444 F.3d at 663.

1 Plaintiff disputes the certification of employment for these six defendants under
2 the first three factors of the Restatement test.
3 1. *The Defendants were not employed to execute a pre-existing war*. In
4 determining whether the conduct at issue was authorized, District of Columbia law
5 "focuses on the underlying dispute or controversy, not on the nature of the tort, and is
6 broad enough to embrace any intentional tort arising out of a dispute that was originally
7 undertaken on the employer's behalf." *Council on American Islamic Relations*, 444 F.3d
8 at 664 (citing *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981)). "To determine
9 whether conduct is of the kind an employee is employed to perform, the conduct either
10 must be of the same general nature as that which he is authorized to perform or be
11 incidental to authorized conduct." *In re Iraq and Afghanistan Detainees Litigation*, 479
12 F.Supp.2d 85, 113-114 (Dist. D.C. 2007), *aff'd Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir.
13 2011). Conduct is "incidental" to an employee's legitimate duties if it is "foreseeable."
14 *Haddon*, 68 F.3d at 1424. "'Foreseeable in this context does not carry the same meaning
15 as it does in negligence cases; rather, it requires the court to determine whether it is fair to
16 charge employers with responsibility for the intentional torts of their employees." *Id.*
17 In *Council on American Islamic Relations*, the "underlying dispute or
18 controversy" was the "phone call between Ballenger and Funk discussing the marital
19 separation. The appropriate question, then, is whether that telephone conversation – not
20 the allegedly defamatory sentence – was the kind of conduct Ballenger was employed to
21 perform." *Council on American Islamic Relations*, 444 F.3d at 664. Similarly, in the Iraq
22 and Afghanistan detainee cases, the question was "whether detaining and interrogating
23 enemy aliens were the kinds of conduct the defendants were employed to perform or
24 were incidental to the conduct the defendants were employed to perform." *In re Iraq and*
25 *Afghanistan Detainees Litigation*, 479 F.Supp.2d at 114. While there is no question that
26 the duties of Defendants in this case involved high-level military and political affairs,
27 Defendants were not hired to implement a pre-existing plan to invade another country –
28 the underlying act in dispute. If they were, then they would have implemented the plan

immediately upon entering office. As alleged by Plaintiff, the Defendants waited until 9/11 to implement their plan for war. It is this ***planning*** that distinguishes Defendants alleged conduct from that in *Rasul*, where the Defendants allegedly committed their torts while in office and as part of their job functions in responding to crises.

2. *The Defendants spent more time planning the war prior to office than executing the war once in office*. The second prong of the Restatement tests asks whether the conduct "occurs substantially within the authorized time and space limits." *See Section 6.b*. This factor weighs heavily in favor of Plaintiff. Assuming a December 1, 1997 start date for the inception of the planning of the war, (Am. Compl. ¶ 29), the Defendants (and in particular Defendants WOLFOWITZ and RUMSFELD) ***spent more time planning the war prior to the inauguration of Defendant BUSH*** (January 20, 2001) than they did from his inauguration to the beginning of the war.[35] The planning for the war explicitly sought to use United States military personnel to "remove Saddam from power." Am. Compl. ¶ 31. Once in office, Plaintiff alleges that Defendants implemented the plan the on and shortly after the 9/11 attack. Am. Compl. ¶¶ 36-54.

Plaintiff has not uncovered any cases under District of Columbia law with respect to this prong and the importance of the timing element in finding conduct outside the scope of employment. But there is another judgment that heavily relies on this factor: the Nuremberg Judgment. Specifically, the Nuremberg Judgment focused on the planning that took place prior to the wars:

> "The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was ***premeditated and carefully planned, and was not undertaken until the moment was thought opportune for it to be carried through*** as a definite part of the pre-ordained scheme and plan."

[35] There are 3 years, 1 month and 20 days (including the end date) between December 1, 1997 and January 20, 2001, the date of the inauguration of Defendants BUSH and CHENEY (the other defendants would have taken office subject to the advice and consent of the Senate). There are 2 years and 2 months (including the end date) between January 20, 2001 and March 19, 2003.

1 *Goering*, 41 AM. J. INT'L L. at 186 (emphasis added).

2 The judgment further noted that *Mein Kampf* (published in 1928) made the plan
3 for aggressive war "quite plain." *Goering*, 41 AM. J. INT'L L. at 187. "The precise
4 objectives of this policy of force are also set forth in detail. *Id*. "*Mein Kampf* is not to be
5 regarded as a mere literary exercise, nor as an inflexible policy or plan incapable of
6 modification. Its importance lies in the ***unmistakable attitude of aggression*** revealed
7 throughout its pages." *Id*. at 188 (emphasis added). The Tribunal examined a series of
8 meetings held by Hitler with his top confederates from November 5, 1937 to November
9 23, 1939, in which he outlined his plans for aggressive war. "If any doubts had existed in
10 the minds of any hearers in November 1937, after March 1939 there could no longer be
11 any question that Hitler was in deadly earnest in his decision to resort to war. *Id*. at 188-
12 192. Based on the evidence, the Tribunal held:

13 "That plans were made to wage war, as early as 5 November 1937, and
14 probably before that, is apparent. And thereafter, such preparations continued in many directions, and against the peace of many countries . . .
15 In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants . . .
16 Continued planning, with aggressive war as the objective, has been established beyond doubt."
17 *Goering*, 41 AM. J. INT'L L. at 225.

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19 Plaintiff submits that the Nuremberg Tribunal's analysis is dispositive. The materials
20 published by PNAC laid out plans for aggressive war against Iraq and plainly contain an
21 "unmistakable attitude of aggression. *Goering*, 41 AM. J. INT'L L. at 188; *see* Comar
22 Decl., Exs. C-J. Once the "moment was thought opportune," *Goering*, 41 AM. J. INT'L L.
23 at 186, Defendants implemented their plan.[36]

24
25 [36] While held in custody, defendant Goering candidly explained why the planning element was so critical to engaging in aggression. "Of course, the people don't want war.
26 Why would some poor slob on a farm want to risk his life in a war when the best he can get out of it is to come back in one piece? The common people don't want war; not in
27 Russia, not in England, not in America, not for that matter in Germany. It's the leaders who determine policy . . . and the people can always be made to do the leaders' bidding.
28 All you have to do is tell them they are being attacked and denounce the pacifists for lack

3. *The execution of the planned Iraq War was done to further personal interests*. Under District of Columbia law, an "employer will not be held liable for those willful acts, intended by the agent only to further his own interest, not done for the employer at all." *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 428 (D.C. 2006) (citing *Penn. Cent. Transp. Co. v. Reddick*, 398 A.2d 27 (D.C. 1979)). "[W]hen all reasonable triers of fact must conclude that the servant's act was independent of the master's business, *and solely for the servant's personal benefit*, then the issue becomes a question of law." *Id*. (emphasis in original).

"***The key inquiry is the employee's intent at the moment the tort occurred***." *Majano*, 469 F.3d at 142 (emphasis added). "The outrageous quality of an employee's [sic] act may well be persuasive in considering whether his motivation was purely personal." *Penn. Cent. Transp. Co.*, 398 A.2d at 31. An intentional tort by its very nature is "willful and thus more readily suggests personal motivation." *Jordan v. Medley*, 711 F.2d 211, 215 (D.C.Cir. 1983); *M.J. Uline v. Cashdan*, 171 F.2d 132, 134 (D.C. Cir. 1949) (holding that even though hockey player who mistakenly hit a spectator did so during a match, the hockey player "may have been, at the moment he struck the blow, completely indifferent to the work he was employed to do and actuated only by anger or hostility toward the man he tried to injure."); *see also Boykin*, 484 A.2d at 562 (employer not liable for sexual assault committed by educator because the assault "appears to have been done solely for the accomplishment of Boyd's independent, malicious, mischievous and selfish purposes.")

Plaintiff has alleged that Defendants were motivated by personal, selfish purposes when they planned and executed the war in Iraq. Plaintiff alleges that at least three of the Defendants – WOLFOWITZ, RUMSFELD and CHENEY – were motivated by neoconservative personal beliefs that called for the use of the United States military to

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of patriotism. It works the same way in any country." Hermann Goering to psychologist G.M. Gilbert, *in* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 324-325 (1994).

1 further ideological purposes. Am. Compl.¶¶ 26-33. She alleges that defendant BUSH was
2 motivated by personal religious beliefs regarding "Gog and Magog" being at work in the
3 Middle East, as reported by former New York Times reporter Kurt Eichenwald. Am.
4 Compl.¶ 92. She alleges how every Defendant took advantage of an unrelated terrorist
5 incident to implement their plan to invade Iraq. Am. Compl.¶¶ 34-54. She alleges how all
6 of the Defendants repeatedly convened to discuss their plan, (Am. Compl. ¶¶ 41, 42, 59,
7 60, 54, 77, 83), came up with marketing buzz words to scare the public (Am. Compl. ¶
8 60) "fixed" facts to set policy, (Am. Compl. ¶ 55), knowingly and falsely made
9 connections between the Hussein regime and al Qaeda, (Am. Compl. ¶¶ 41, 43, 73-87)
10 and made misrepresentations to the United Nations in order to obtain support for the Iraq
11 War (Am. Compl. ¶ 85). Plaintiff has plainly alleged an "independent malicious or
12 mischievous purposes" by these Defendants in their execution of a pre-existing plan to
13 use the United States military to invade Iraq. *See Majano*, 469 F.3d at 142.

14 For the foregoing reasons, the certification by the United States must be denied as
15 a matter of law. In the alternative, the Court, under District of Columbia law, is required
16 to leave this question to the jury if it cannot resolve this issue as a matter of law. *Majano*,
17 469 F.3d at 141. Should there be any further doubt, Plaintiff requests limited pre-
18 certification discovery, as permitted by law.[37] *Stokes*, 327 F.3d at 1215, 1216 ("Because
19 the district court deviated from the *Kimbro* approach by essentially affording conclusive
20 weight to the AUSA's scope-of-employment certifications and failing to consider
21 whether Stokes' allegations entitled him to discovery, we reverse.")

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[37] Plaintiff would request, for example, discovery related to Defendants' involvement with the Project for the New American Century and other materials or documents that might have existed prior to January 20, 2001 (when they entered office) related to the planning of the Iraq War. These materials are unquestionably relevant and not subject to any governmental immunity. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 694 (1997) ("[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity") (holding that sitting President could be subject to suit while in office for conduct that occurred prior to his taking office). Plaintiff would also seek discovery with respect to Defendants' intent in going to war – also unquestionably relevant under the "scope of employment" question.

23 24 25 26 27 28

8. Venue Is Proper Before This Court.

Venue is governed by 28 U.S.C. § 1391. A civil action may be brought in "(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the actions is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such section." *Id.*

The "fallback" provision of venue, 28 U.S.C § 1391(3), permits this Court to adjudicate this case. As explained in *Fs Photo, Inc. v. PictureVision, Inc.*, 48 F.Supp.2d 442, 448 (D. Del. 1999), this third venue prong may be "utilized if there is no other district which would have both personal jurisdiction and venue as to all defendants." 28 U.S.C. § 1391(1) cannot apply as Defendants are not all located in any one State. Similarly, 28 U.S.C § 1391(2) cannot apply because at the time of filing, any one of the Defendants may have argued lack of personal jurisdiction. Indeed, the United States has insisted that Defendants reserve the right to argue lack of personal jurisdiction in the event that the Court rejects its certification. (Motion at 7, fn. 7). Accordingly, there is and remains no district that "would have both personal jurisdiction and venue as to all defendants," *Fs Photo, Inc.*, 48 F.Supp.2d at 448, and based on Defendant's RICE residency within this judicial district, Plaintiff may bring an action here. It is conceivable that any of the Defendants will object on jurisdictional grounds to any other district court. Finally, 28 U.S.C § 1402(b) does not apply as the United States is not a defendant in this lawsuit. For the reasons discussed in *Section 7*, *supra*, the certification by the United States is not consistent with law and must be rejected.[38]

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[38] Courts in this Circuit have had no issue adjudicating cases involving allegations of high-ranking official misconduct (*see, e.g., Padilla v. Yoo*) or cases involving application of D.C. scope of employment issues under the Westfall Act (e.g., *Wilson*). Venue in this court was and remains proper. However, should this Court determine that

9. **Conclusion**.

For the reasons set forth above, Plaintiff requests that this Court deny the Motion to Dismiss, reject the United States Westfall Act certification of Defendants, and permit Plaintiff's cause of action for the Crime of Aggression as defined by the Nuremberg Judgment and international law to proceed towards trial against these six Defendants.

Respectfully submitted,

Dated: January 28, 2014

COMAR LAW

By _/s/ *Inder Comar*_____________
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Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

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venue is not proper, then Plaintiff requests that the Court transfer this case to a proper district in the interests of justice. 28 U.S.C. § 1406(a).