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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 SUNDUS SHAKER SALEH, et al.,
13 Plaintiffs,
14 vs.
15 GEORGE W. BUSH, et al.,
16 Defendants.
17

No. 3:13-cv-01124 JST

**PLAINTIFF’S RESPONSE TO
UNITED STATES’ NOTICE OF
MOTION AND MOTION TO DISMISS**

Date: September 11, 2014
Time: 2:00 P.M.

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

[Proposed Order filed concurrently]

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46 Stat. 2343 (1928).....passim

Vienna Convention on the Law of Treaties, art. 53, May 23, 1969,
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1 **1. Introduction and Issues To Be Decided.**

2 (1) The United States, as a substituted party, is estopped under principles of judicial
3 estoppel and issue preclusion from arguing markedly inconsistent arguments to this Court
4 than its position before the Nuremberg Tribunal: arguments which that Tribunal accepted.
5 Specifically, the United States is estopped from arguing (i) that the Crime of Aggression is
6 not a *jus cogens* norm of international law, or (ii) from arguing – or certifying – that
7 officials who allegedly commit the Crime of Aggression can be acting within the legitimate
8 scope of their authority. The United States also argued, and the Tribunal accepted, that
9 United States officials would be held to such international law standards. The United States
10 cannot now argue the opposite to this Court.¹

11 (2) Should estoppel not apply, the Westfall Act certification over Plaintiff's Second
12 Amended Complaint (Dkt. #37, the "SAC") would still be inappropriate because under
13 District of Columbia law, Defendants' pre-planning of the war, alleged misrepresentations
14 of facts, and levels of unleashed violence indicate that their conduct was (1) done to further
15 personal interests, (2) outside of appropriate time and space boundaries, and (3) not
16 authorized by the Government. Conduct amounting to the Crime of Aggression can never
17 be within a United States official's scope of employment because the United States has
18 made itself a state party to the Nuremberg and Tokyo Charters, which specifically exclude
19 such conduct from legitimate state behavior and exclude an official act defense.²

20 (3) Pursuant to Fed. R. Civ. P. 10(c), Plaintiff incorporates by reference arguments
21 from her response to the initial motion to dismiss (Dkt. #32 (the "Initial Response")) that the
22 Crime of Aggression is a *jus cogens* norm and is actionable before the Court. She also re-

23
24 ¹ Plaintiff continues to rely on the Nuremberg Judgment (*United States v. Goering*,
25 41 AM. J. INT'L L. 172, 186 (1946)) and the Nuremberg Charter (Charter Int'l Military
26 Tribunal, art. 6(a), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279) as the international law
basis of her claims. As further discussed herein, this Court has jurisdiction under 28 U.S.C.
§§ 1331, 1332 and 1350.

27 ² Plaintiff makes related arguments in her concurrently filed motion pursuant to
28 *Osborn v. Haley*, 127 S. Ct. 881 (2007) also pending.

1 argues that the issue before the Court is a legal question and not a political question.

2 (4) Finally, venue is proper in this district. At the time of filing, neither 28 U.S.C §§
3 1391(1) or (2) were applicable. Plaintiff was entitled, and remains entitled to select a venue
4 in which any defendant (in this case Defendant RICE) “is subject to the court’s personal
5 jurisdiction.” 28 U.S.C § 1391(3).

6 **2. Legal Standard.**

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

14 For a motion to dismiss, the Court must accept as true all allegations of material
15 fact contained in the complaint and construe those allegations in the light most favorable to
16 the plaintiff. *Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1130 (9th Cir. 2010). “*Twombly* and *Iqbal*
17 do not require that the complaint include all facts necessary to carry the plaintiff’s burden”
18 and do not allow the court to impose a “probability requirement” at the pleading stage. *Al-*
19 *Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009). Instead, the complaint must simply
20 provide “enough fact to raise a reasonable expectation that discovery will reveal evidence”
21 to prove the claim. *Id.* (quoting *Twombly*, 550 U.S. at 556); *see also Iqbal*, 129 S.Ct. at
22 1949 (holding that complaint must plead sufficient factual matter that, if true, states a claim
23 for relief that is plausible on its face).

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

25 **a. *The Crime of Aggression is a jus cogens norm.***

26 Plaintiff incorporates by reference her arguments with respect to the (i) definition of
27
28

1 *jus cogens*³ and (ii) the Crime of Aggression as a *jus cogens* norm⁴ from her Initial
2 Response, Sections 3.a., p. 4:19-7:28; and 3.c., p. 9:9-14:4. Fed. R. Civ. P. 10(c).

3 **b. The United States is estopped from arguing that the Crime of**
4 **Aggression is not a *jus cogens* norm with sufficient definitiveness to be recognized by**
5 **civilized nations.**

6 The United States argues that the Crime of Aggression does not have the “definite
7 content and acceptance among civilized nations” required to be recognized as a cause of
8 action under 28 U.S.C. § 1350 (the “ATS”). (Motion at 22.). Two forms of estoppel –
9 judicial estoppel and issue preclusion – prevent the United States from so arguing.

10
11 ³ This includes her citations to RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§
12 102(2) and (3) (1987)); William S. Dodge, *Customary Interational Law and the Question*
13 *of Legitimacy*, 120 HARV. L. REV. F. 19, 21 (2007); Stewart Jay, *The Status of the Law of*
14 *Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1989); *Chisholm v.*
15 *Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *Ware v. Hylton*, U.S. (3 Dall.) 199, 281 (1796);
16 *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980); *The Paquete Habana*, 175 U.S.
17 677, 700 (1900); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923,
18 11 L.Ed.2d 804 (1964); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815);
19 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporters’ note 2 (1987); *see also id.*
20 at § 111(1) (1987); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES
21 CONSTITUTION 236-39 (1996); *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714
22 (9th Cir. 1992) (citing Vienna Convention on the Law of Treaties, art. 53, May 23, 1969,
1155 U.N.T.S. 332, 8 I.L.M. 679); *see also In re Estate of Ferdinand Marcos Human*
Rights Lit., 25 F. 3d 1467, 1471 (9th Cir. 1994); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th
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768, 801-09 (1990); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102, com. k (1987);
Vienna Convention on the Law of Treaties, art. 53.); Karen Parker, *Jus Cogens:*
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(1989); 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”).

23 ⁴ This includes citations to *Goering*, 41 AM. J. INT’L L. at 186, 218; *Abdullahi v.*
24 *Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (for the continuing application of the Nuremberg
25 Judgment); *Siderman*, 965 F.2d at 715 (“The legitimacy of the Nuremberg prosecutions
26 rested not on the consent of the Axis Powers and individual defendants, but on the nature of
27 the acts they committed: acts that the laws of all civilized nations define as criminal.”);
Regina v. Jones [2006] UKHL 16 (British House of Lords determining same); Mary Ellen
28 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).

1 First, judicial estoppel prohibits the United States from taking an inconsistent
2 position with its arguments before the Nuremberg Tribunal. “[W]here a party assumes a
3 certain position in a legal proceeding, and succeeds in maintaining that position, he may
4 not thereafter, simply because his interests have changed, assume a contrary position,
5 especially if it be to the prejudice of the party who has acquiesced in the position formerly
6 taken by him.” *New Hampshire v. Maine* 532 U.S. 742, 749 (2001) (holding that New
7 Hampshire could not adopt a litigation position that was “clearly inconsistent” with its
8 position in prior litigation) (citing *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).⁵

9 The purpose of judicial estoppel is to “protect the integrity of the judicial process.”
10 *New Hampshire*, 532 U.S. at 750. A court examining a claim of judicial estoppel should
11 analyze several factors, including whether (1) a party’s later position is “clearly
12 inconsistent” with its earlier position; (2) whether the party succeeded in persuading a court
13 to accept that party’s earlier position, so that judicial acceptance of an inconsistent position
14 in a later proceeding would create the “perception that either the first or the second court
15 was misled”; and (3) whether the party seeking to assert an inconsistent position would
16 derive an unfair advantage or impose an unfair detriment on the opposing party if not
17 estopped. *Id.* at 750-751 (internal citations omitted).

18 The United States is similarly judicially estopped now from taking a position that is
19 clearly inconsistent with its position before the Nuremberg Tribunal, which was that the
20 Crime of Aggression was a clear and definitive prohibition under international law. The
21 United States argued, *inter alia*, that:

22 • The “common sense of men after the first World War demanded, however, that the
23 law’s condemnation of war reach deeper, and that the law condemn not merely uncivilized

24 ⁵ See also 18 Moore’s Federal Practice § 134.30, p. 134-62 (3d ed. 2000) (“The
25 doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding
26 that is inconsistent with a claim taken by that party in a previous proceeding”); 18 C.
27 Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981)
28 (“absent any good explanation, a party should not be allowed to gain an advantage by
litigation on one theory, and then seek an inconsistent advantage by pursuing an
incompatible theory”) (both treatises cited in *New Hampshire*).

1 ways of waging war, but also the waging in any way of uncivilized wars – wars of
2 aggression.”⁶

3 • The “Briand-Kellogg Pact of 1928, by which Germany, Italy, and Japan, in
4 common with practically all nations of the world, renounced war as an instrument of
5 national policy, bound themselves to seek the settlement of disputes only by pacific means,
6 and condemned recourse to war for the solution of international controversies. This pact
7 altered the legal status of a war of aggression.” Jackson Opening Statement.

8 • That the illegality of the Crime of Aggression “is one of no novelty and is one on
9 which legal opinion has well crystalized.” Jackson Opening Statement.

10 • That “whatever grievances a nation may have, however objectionable it finds the
11 status quo, aggressive warfare is an illegal means for settling those grievances or for
12 altering those conditions.” Jackson Opening Statement.

13 The United States went so far as to argue that the Crime of Aggression was a
14 “poisoned chalice” that it would “put to our own lips as well,” clearly arguing that the
15 Crime of Aggression was definitive enough, and accepted enough by civilized countries, to
16 permit the trial of German leaders. This is the opposite of what it is now telling this Court –
17 that the Crime of Aggression lacks the “definite content and acceptance among civilized
18 nations.” (Motion at 22.) Nor is there any doubt that the United States convinced the
19 Nuremberg Tribunal to agree with its position. The Tribunal held that “aggressive war is a
20 crime under international law” constituting the “supreme international crime” and that
21 “resort to a war of aggression is not merely illegal, but is criminal.” *Goering*, 41 AM. J.
22 INT’L L. at 186, 218-220.

23 Finally, permitting the United States to assert that the Crime of Aggression is not
24

25 ⁶ 2 Trial of the Major War Criminals Before the International Military Tribunal 98-
26 155 (Nuremberg: IMT, 1947) (“the Blue Set”); *available at* the Avalon Project at Yale Law
27 School, http://avalon.law.yale.edu/subject_menus/imt.asp *and at*
28 <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/> (hereinafter “Jackson
Opening Statement”).

1 actionable would give it an unfair advantage, as it would permit the United States to
2 effectively overrule the rule of Nuremberg, outside of judicial review, simply because it
3 objects to the application of the Crime of Aggression to its own high ranking officials, and,
4 despite arguing that it would do just that before the Nuremberg Tribunal.

5 *Second*, issue preclusion prevents the United States from arguing its current
6 position, as the status of the Crime of Aggression was decided at Nuremberg. “Issue
7 preclusion . . . bars successive litigation of an issue of fact or law actually litigated and
8 resolved in a valid court determination essential to the prior judgment, even if the issue
9 recurs in the context of a different claim.” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)
10 (citation omitted). Issue preclusion applies when: “(1) the issue necessarily decided at the
11 previous proceeding is identical to the one which is sought to be relitigated; (2) the first
12 proceeding ended with a final judgment on the merits; and (3) the party against whom
13 [issue preclusion] is asserted was a party or in privity with a party at the first proceeding.”
14 *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011) (citing *Hydranautics v. FilmTec Corp.*,
15 204 F.3d 880, 885 (9th Cir. 2000)).

16 The issue of whether the Crime of Aggression is *jus cogens* was fully litigated by
17 the United States as a party before the Nuremberg Tribunal. And there is no question that
18 the Nuremberg Tribunal reached a judgment on the merits: the Tribunal held that the Crime
19 of Aggression was a *jus cogens* norm as early as the signing of the Kellogg-Briand Peace
20 Pact, 46 Stat. 2343 (1928): nineteen years prior to the judgment itself. *Goering*, 41 AM. J.
21 INT’L L. at 218. The United States is thus precluded from arguing that the Crime of
22 Aggression is not a *jus cogens* norm, or (in a related manner) that the Crime of Aggression
23 is too indefinite or not accepted by sufficient nations to constitute a *jus cogens* norm for
24 purposes of the ATS.⁷

25 _____
26 ⁷ Admissions by the United States that the Crime of Aggression is a *jus cogens* norm
27 also defeat attempts by the United States to wash its hands of the Crime of Aggression in
28 this briefing. Fed. R. Civ. P. 10(c); Initial Response at 11:15-12:9; *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

1 **c. Jus cogens norms are binding on domestic courts and are considered**
 2 **“federal common law.”** Plaintiff incorporates her arguments from her Initial Response that
 3 *jus cogens* norms are binding on domestic courts and are considered federal common law.
 4 Fed. R. Civ. P. 10(c). Specifically, she incorporates Section 3.c., p. 8:1-9:8.⁸

5 The Court has jurisdiction of Plaintiff’s claims based on the ATS. The Crime of
 6 Aggression, a *jus cogens* norm of international law, is incorporated into federal common
 7 law and is part of the “law of nations.” Plaintiff has claimed tort damages thereto. In
 8 addition the Court has jurisdiction to hear Plaintiff’s claims under 28 U.S.C. §§ 1331 and
 9 1332. Courts have reached questions of international law separate and distinct from the
 10 Alien Tort Statute. *See, e.g., The Paquete Habana*, 175 U.S. at 686 (reaching international
 11 law based on jurisdiction over prize cases).

12 **d. Plaintiff’s allegations touch on United States conduct.**

13 Plaintiff incorporates her arguments from her Initial Response, that *Kiobel* is not a
 14 barrier to her ATS claims, specifically Section 5.b., p. 18:17- 20:7. Fed. R. Civ. P. 10(c).⁹
 15 The United States argues that recognizing an ATS claim would “impinge on the discretion
 16 of the Legislative and Executive Branches with respect to matters of foreign affairs.”

17 of Land Warfare P 498 (1956); Henry T. King, Jr. *Nuremberg and Crimes Against Peace*,
 18 41 CASE W. RES. J. INT’L L. 273, 274 (2009); The United States Army Center for Law and
 19 Military Operations, Law of War Handbook 11, 20, 35, 36, 41 (2005) (stating that
 20 “[v]irtually all commentators agree that the provisions of the [Kellogg-Briand Pact]
 21 banning aggressive war have ripened into customary international law.”); The United
 22 States Army Center for Law and Military Operations, Law of War Handbook 14, 171
 23 (2010).

24 ⁸ This includes her citations to *Sosa*, 542 U.S. at 729-30, 31; *Kiobel v. Royal Dutch*
 25 *Shell Petroleum*, ___ U.S. ___, 133 S.Ct. 1659, 1663 (2013); *Siderman de Blake v. Republic*
 26 *of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D.
 27 Mass. 1995); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Sarei v. Rio Tinto, PLC*, 671
 28 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).

⁹ This includes her citations to *Mwani v. Laden*, 947 F.Supp.2d 1 (D.D.C. 2013)
 (holding that lawsuit between foreign plaintiffs against foreign defendants, involving a
 foreign group of events that related to the bombing of the U.S. embassy in Kenya, “touches
 and concerns the United States” and could proceed); *Sexual Minorities Uganda v. Lively*,
 Case No. 12-cv-30051-MAP, 2013 WL 4130756 (D. Mass. Aug. 14, 2013).

1 (Motion at 24.) But this is true of any international commitment that the United States, by
 2 law, must recognize – including the Geneva Conventions, and the United Nations Charter;
 3 such commitments may restrict the Executive from (for example) committing genocide,
 4 using slave labor, or disregarding the laws of war. There is no principled distinction
 5 between these prohibitions and the prohibitions against the Crime of Aggression.

6 **e. *Plaintiff proposes the following elements of the offense for the Crime of***
 7 ***Aggression under international customary law.*** The Crime of Aggression is:¹⁰

8 (1) the planning, preparation, initiation, or execution,¹¹ (2) by a person in a position
 9 effectively to exercise control over or to direct the political or military action of a
 10 State,¹² (3) of an act of aggression (whether in a declared or undeclared war¹³) which
 includes, *but is not limited to*,

11 (a) The invasion or attack by the armed forces of a State of the territory of another State,
 12 or any military occupation, however temporary, resulting from such invasion or attack,

13 (b) Bombardment by the armed forces of a State against the territory of another State or
 14 the use of any weapons by a State against the territory of another State;

15 (c) The blockade of the ports or coasts of a State by the armed forces of another State;

16 (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

17 ¹⁰ Nuremberg Charter, art. 6(b) (1945).

18 ¹¹ Nuremberg Charter, art. 6(b); G.A. Res. 3314 (XXIX), U.N. Doc.
 19 A/RES/3314 (XXIX) (Dec. 14, 1974); Charter of the Int'l Military Tribunal for the
 20 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
 aggression is customary international law, and acknowledging both the Nuremberg Charter
 and G.A. Resolution 3314's definition of aggression).

21 ¹² 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
 23 designers, the inciters and the leaders, without whose evil architecture the world would not
 24 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 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; *United States v.*
 25 *von Weizsäcker et al.*, Military Tribunal XI (hereinafter *Ministries Judgment*), 14 Trials of
 War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No.
 10 (1949) at 425; Judgment of the International Military Tribunal for the Far East, reprinted
 26 in R. Pritchard (ed), *The Tokyo Major War Crimes Trial* (1998), at 1190-1191; Rome
 Statute Amendments; LOW Handbook at p. 208.

27 ¹³ Tokyo Charter, art. 5(a).

28

1 for in the agreement or any extension of their presence in such territory beyond the
2 termination of the agreement;

3 (g) The sending by or on behalf of a State of armed bands, groups, irregulars or
4 mercenaries, which carry out acts of armed force against another State of such gravity as
5 to amount to the acts listed above, or its substantial involvement therein,¹⁴

6 and (4) is in violation of international law, treaties, agreements, assurances,¹⁵ or the
7 Charter of the United Nations.¹⁶

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

10 Participation in a common plan or conspiracy to commit the Crime of
11 Aggression.¹⁷

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

14 Plaintiff's SAC states a claim for the Crime of Aggression against Defendants and
15 describes (1) the "planning, preparation, initiation, or execution" by (2) a person in a
16 position effectively to exercise control over or to direct the political or military action of a
17 State who (3) commits "an act of aggression" (4) "in violation of international law, treaties,
18 agreements, assurances, or the Charter of the United Nations." Specifically:

19 • Plaintiff alleges that three of the Defendants – Defendants CHENEY, RUMSFELD,
20 and WOLFOWITZ were founding members of "The Project for the New American
21 Century" (PNAC), a non-profit that publicly and heavily advocated for the military
22 overthrow of Saddam Hussein. SAC ¶¶ 27-34.

23 • The SAC alleges that once Defendants came into office, they began planning an
24 invasion in concert with one another at their first national security meeting. SAC ¶¶ 36-39.
25 Upon and after 9/11, the SAC alleges that Defendants used 9/11 as an opportune moment

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

28 ¹⁵ Nuremberg Charter, art. 6(b); Tokyo Charter, art. 5(a).

¹⁶ G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974); Rome
Statute Amendments.

¹⁷ Nuremberg Charter, art. 6(b); Tokyo Charter, art. 5(a)

1 to implement the plan to invade Iraq. The SAC cites to high-ranking administration
 2 officials and other government witnesses who were told that the invasion of Iraq was
 3 settled. SAC ¶¶ 40-60.

4 • The SAC describes how Defendants implemented a plan to scare the American
 5 people into supporting a war through false and misleading statements regarding Iraq, and in
 6 particular, that (i) Iraq possessed weapons of mass destruction (SAC ¶¶ 65-80) and (ii) that
 7 Iraq was in league with al-Qaeda, when neither of those were true (SAC ¶¶ 81-95). The
 8 SAC describes admissions from Defendants WOLFOWITZ and POWELL. (SAC ¶¶ 94-
 9 95.) Finally, the SAC alleges that this conduct was done in violation of international law,
 10 treaties, assurances, and the United Nations Charter. (SAC ¶¶ 111-121.)¹⁸

11 **5. The Court Must Reject The United States Westfall Act Certification.**

12 a. *The United States is estopped from arguing that the Crime of Aggression*
 13 *is “within the scope of an official’s employment” or in certifying Defendants’ conduct.*

14 The United States is prohibited by judicial estoppel and issue preclusion from arguing that
 15 the Crime of Aggression is within the legitimate scope of a government official’s authority,
 16 or in certifying Defendants’ alleged conduct as legitimate government activity. This is
 17 because the United States argued before the Nuremberg Tribunal that the Crime of
 18 Aggression was *not* within the legitimate scope of a government official. The United States
 19 argued at Nuremberg, *inter alia* that:

20 • “[T]he very minimum legal consequence of the treaties making aggressive wars
 21 illegal is to strip those who incite or wage them of every defense the law ever gave.”

22 ¹⁸ Allying a violation of international law hardly makes the Crime of Aggression
 23 “political” as argued generally by the United States (Motion at 19-20); it is part and parcel
 24 of the cause of action. *See* Benjamin Ferencz [former Nuremberg prosecutor], *Ending*
 25 *Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT’L L. 281, 289, 290 (2009)
 26 (“The UN Charter prohibits the use of armed force without Security Council approval”)
 27 (“The most important accomplishment of the Nuremberg trials was the condemnation of
 28 war-making as the supreme international crime.”); *see also* Benjamin Ferencz, *Can*
Aggression Be Deterred by Law?, 11 PACE INT’L L. REV. 341, 357 (1999) (“One must
 have confidence that highly qualified jurists who have been carefully selected will be able
 to render wise decisions.”)

1 Jackson Opening Statement.

2 • “The principle of individual responsibility for piracy and brigandage, which have
3 long been recognized as crimes punishable under international law, is old and well
4 established. That is what illegal warfare is. This principle of personal liability is a
5 necessary as well as logical one if international law is to render real help to the
6 maintenance of peace.” Jackson Opening Statement.

7 • “While it is quite proper to employ the fiction of responsibility of a state or
8 corporation for the purpose of imposing a collective liability, it is quite intolerable to let
9 such a legalism become the basis of personal immunity.” Jackson Opening Statement.

10 • “The Charter recognizes that one who has committed criminal acts may not take
11 refuge in superior orders nor in the doctrine that his crimes were acts of states ... Under the
12 Charter, no defense based on either of these doctrines can be entertained. Modern
13 civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so
14 vast an area of legal irresponsibility.” Jackson Opening Statement.

15 • “But the ultimate step in avoiding periodic wars, which are inevitable in a system
16 of international lawlessness, is to make statesmen responsible to law.” Jackson Opening
17 Statement.

18 • “This trial represents mankind’s desperate effort to apply the discipline of the law
19 to statesmen who have used their powers of state to attack the foundations of the world’s
20 peace and to commit aggressions against the rights of their neighbors.” Jackson Opening
21 Statement.

22 • “This Charter and this Trial, implementing the Kellogg-Briand Pact, constitute
23 another step in the same direction and juridical action of a kind to ensure that those who
24 start a war will pay for it personally.” Jackson Opening Statement.

25 The United States also specifically represented that these arguments would apply to
26 itself, arguing forcefully to the Tribunal that “The law includes, and if it is to serve a useful
27 purpose it must condemn aggression by any other nations, including those which sit here
28 now in judgment.” Jackson Opening Statement.

1 The Nuremberg Tribunal agreed, and held:

2 • “[T]he very essence of the Charter is that individuals have international duties
3 which transcend the national obligations of obedience imposed by the individual State. He
4 who violates the laws of war cannot obtain immunity while acting in pursuance of the
5 authority of the State if the State in authorizing action moves outside its competence under
6 International Law.” *Goering*, 41 AM. J. INT’L L. at 221.

7 • “It was submitted that International Law is concerned with the actions of sovereign
8 States and provides no punishment for individuals; and further, that where the act in
9 question is an act of State, those who carry it out are not personally responsible, but are
10 protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal,
11 both submissions must be rejected.” *Goering*, 41 AM. J. INT’L L. at 233.

12 As with its position with the underlying cause of action, the United States cannot
13 take such an inconsistent position with respect the Crime of Aggression. The Westfall Act
14 “empowers the Attorney General to certify that the employee ‘was acting within the scope
15 of his office or employment at the time of the incident out of which the claim arose.’”
16 *Osborn*, 127 S. Ct. at 887. Based on the principles of estoppel argued above, the United
17 States cannot certify individuals for alleged activities it claimed could never be legitimate
18 government conduct before the Nuremberg Tribunal.

19 *Second*, issue preclusion also applies: whether a government actor may commit the
20 Crime of Aggression and be protected by domestic law was fully litigated and resolved
21 before the Nuremberg Tribunal, to which the United States was a party. The Nuremberg
22 Judgment held that such activities never constitute lawful conduct under domestic
23 government employment. This further estopps the United States from either arguing an
24 inconsistent position, or certifying Defendants under the Westfall Act.

25 **b. *Plaintiff’s allegations raise material questions of fact under District of Columbia***
26 ***law.*** In the event the Court holds that estoppel does not apply, under District of Columbia
27 law, Plaintiff’s allegations, if true, would rebut the Attorney General certification.
28 Accordingly, Plaintiff requests (here and in her *Osborn* motion) that the Court either

1 provide her a hearing to produce the evidence it has requested, or to treat her allegations as
 2 true in denying the certification. Plaintiff incorporates her references and citations with
 3 respect to this issue from her Initial Response, specifically at p. 31:21-34:2 of the Initial
 4 Response. Fed. R. Civ. P. 10(c).¹⁹ “District of Columbia law concerning the scope of
 5 employment is rooted in the Restatement (Second) of Agency.” *Kashin v. Kent*, 457 F.3d
 6 1033, 1038-1039 (9th Cir. 2006).²⁰ Plaintiff disputes the certification under the three
 7 factors of the Restatement test.

8 1. *The Defendants spent more time planning the war prior to office than*
 9 *executing the war once in office.* The second prong of the Restatement tests asks whether
 10 the conduct “occurs substantially within the authorized time and space limits.” This factor
 11 weighs heavily in favor of Plaintiff. Assuming a December 1, 1997 start date for the
 12 inception of the planning of the war, (SAC ¶¶ 29-30), the Defendants (and in particular
 13 Defendants WOLFOWITZ and RUMSFELD) spent more time planning the war prior to
 14 the inauguration of Defendant BUSH (January 20, 2001) than they did from his
 15 inauguration to the beginning of the war.²¹ The planning for the war explicitly sought to

16 _____
 17 ¹⁹ Plaintiff specifically incorporates her citations to *Gutierrez de Martinez v.*
 18 *Lamagno*, 515 U.S. 417, 434 (1995); *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996);
 19 *see also Haddon v. United States*, 68 F.3d 1420, 1422 (D.C. Cir. 1995). Plaintiff
 20 acknowledges it is her burden to rebut the certification by a preponderance.

21 ²⁰ “The Restatement provides: (1) Conduct of a servant is within the scope of employment
 22 if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially
 23 within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose
 24 to serve the master, and (d) if force is intentionally used by the servant against another, the
 25 use of force is not unexpected by the master. (2) Conduct of a servant is not within the
 26 scope of employment if it is different in kind from that authorized, far beyond the
 27 authorized time or space limits, or too little actuated by a purpose to serve the master...
 28 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 v. Ballenger, 444 F.3d 659, 663 (D.C. Cir. 2006).

²¹ 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 use United States military personnel to “remove Saddam from power.” SAC ¶ 31. Once in
 2 office, Plaintiff alleges that Defendants implemented the plan immediately upon taking
 3 office.

4 In proving the “planning” of the aggressive wars during World War II, the
 5 Nuremberg Tribunal focused on the pre-government conduct of those defendants and the
 6 “unmistakable attitude of aggression revealed” in literature circulated by the Nuremberg
 7 defendants prior to taking office. *Id.* at 188 (emphasis added). The tribunal noted that,

8 “The war against Poland did not come suddenly out of an otherwise clear
 9 sky; the evidence has made it plain that this war of aggression, as well as the
 10 seizure of Austria and Czechoslovakia, was premeditated and carefully
 11 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.”

Goering, 41 AM. J. INT’L L. at 186.

12 Similarly, the pre-government literature from Defendants RUMSFELD and WOLFOWITZ
 13 reveal an “unmistakable attitude of aggression” related to the planning of the Iraq War. The
 14 SAC further describes that the plans for war were set in motion at the very first national
 15 security meeting. SAC ¶¶ 37-39. The SAC thus alleges that this pre-government conduct
 16 was carried through the very *first week* of Defendants’ employment, accelerated on and
 17 after 9/11, and finally leading up to the execution of the war.

18 2. *The execution of the planned Iraq War was done to further personal*
 19 *interests.* Under District of Columbia law, an “employer will not be held liable for those
 20 willful acts, intended by the agent only to further his own interest, not done for the
 21 employer at all.” *Schechter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 428 (D.C.
 22 2006) (citing *Penn. Cent. Transp. Co. v. Reddick*, 398 A.2d 27 (D.C. 1979)). “[W]hen all
 23 reasonable triers of fact must conclude that the servant’s act was independent of the
 24 master’s business, *and solely for the servant’s personal benefit*, then the issue becomes a
 25 question of law.” *Id.* (emphasis in original).

26 “The key inquiry is the employee’s intent at the moment the tort occurred.” *Majano*
 27 *v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006). An intentional tort by its very nature
 28

1 is “willful and thus more readily suggests personal motivation.” *Jordan v. Medley*, 711
2 F.2d 211, 215 (D.C.Cir. 1983); *M.J. Uline v. Cashdan*, 171 F.2d 132, 134 (D.C. Cir. 1949);
3 *Boykin*, 484 A.2d at 562 (employer not liable for educator’s sexual assault where assault
4 “appears to have been done solely for the accomplishment of Boyd’s independent,
5 malicious, mischievous and selfish purposes.”).

6 Additionally, allegations of false statements and misuse of internal procedures can
7 “permit the imputation of a purely personal motivation” and can be viewed as acts “not
8 intended to serve the master.” *Hicks v. Office of the Sergeant at Arms*, 873 F. Supp. 2d
9 258, 270-71 (D.D.C. 2012) (citing *Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003),
10 *Majano*, 469 F.3d at 142; *Hosey v. Jacobik*, 966 F. Supp. 12, 14 (D.D.C. 1997).

11 Plaintiff has alleged that Defendants were *solely* motivated by personal, selfish
12 purposes; and she has also cited numerous instances of alleged fraud and misuse of
13 official channels that make clear (and certainly raise an issue of material fact) as to
14 Defendants’ intent to serve themselves and not the United States. Plaintiff alleges that:

15 • At least three of the Defendants WOLFOWITZ, RUMSFELD and CHENEY –
16 were motivated by neoconservative personal beliefs that called for the use of the United
17 States military to further ideological purposes. SAC ¶¶ 27-34.

18 • Defendant BUSH was motivated by personal religious beliefs regarding “Gog and
19 Magog” being at work in the Middle East, as reported by former New York Times reporter
20 Kurt Eichenwald. SAC ¶ 100.

21 • Defendants met in their first week of official employment in what appeared to be a
22 scripted exchange (as described by the former Secretary of the Treasury) to discuss a
23 renewed focus on Iraq and potential military action. SAC ¶ 36.

24 • Defendants made numerous false statements to the public regarding any threat
25 posed by Iraq, or its connections to al Qaeda, in order to support a war. SAC ¶¶ 65-95.

26 • Defendant POWELL misrepresented facts to the United Nations. SAC ¶¶ 93-94.

27 • Defendants engaged in pre-employment conduct advocating for a military invasion
28 of Iraq, and were associated with a non-profit whose explicit goal was “showing its muscle

1 in the Middle East.” SAC ¶ 28. Plaintiff agrees that Defendants were not “in a position as
2 single private citizens to control or direct the political or military action of the United
3 States,” (Motion at 9, fn. 9) – but pre-employment materials, combined with conduct once
4 in office, are obviously indicative of Defendants’ intent in seeking to invade Iraq.

5 • “Outrageous” conduct may indicate that a motivation was “purely personal.” *Penn.*
6 *Cent. Transp. Co.*, 398 A.2d at 31. Plaintiff argues here and in her *Osborn* motion that her
7 facts as alleged constitute “outrageous” conduct.

8 • Contrary to the arguments that Defendants were motivated to assist the United
9 States, authorities already hold that the “for my country” defense cannot be utilized to
10 defend official acts of employment that amount to international crimes where a State has
11 ***ratified international treaties*** prohibiting such conduct. This was the basis for the House of
12 Lords decision permitting extradition of Pinochet in March 1999: 6 of the 7 law lords
13 concluded that Chile’s participation in the Convention against Torture treaty forbade
14 Pinochet from arguing that his alleged torture, amounting to an international crime, could
15 be explained as being conducted to further Chile’s interests. As noted *supra* the United
16 States is a party to the UN Charter, the Nuremberg Charter, the Tokyo Charter, and the
17 Kellogg-Briand Pact, which all condemn the Crime of Aggression and which specifically
18 preclude a defense based on scope of employment (see Section 5.a. *supra*).²²

19 _____
20 ²² This conclusion made by the House of Lords is narrower than the argument that
21 alleged violations of *jus cogens* norms are always outside the scope of employment, which
22 Plaintiff recognizes has been rejected. (Motion at 10, fn. 12.) To her knowledge, no Court
23 has considered whether conduct that is specifically prohibited by a treaty, which a State
24 party has ratified, must be excluded from a “scope of employment” analysis. See *Regina v.*
25 *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 All E.R. 97
26 (H.L. 1999), available at [http://www.parliament.the-stationery-
27 office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm](http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm) (last visited Jul. 19, 2014) (parallel
28 citation is [2000] 1 A.C. 147) (“*Pinochet*”) [*Lord Browne-Wilkinson*: “Can it be said that
the commission of a crime which is an international crime against humanity and *jus cogens*
is an act done in an official capacity on behalf of the state? I believe there to be strong
ground for saying that the implementation of torture as defined by the Torture Convention
cannot be a state function”]; [*Lord Hope of Craighead*: “[W]e are not dealing in this case -
even upon the restricted basis of those charges on which Senator Pinochet could lawfully
be extradited if he has no immunity - with isolated acts of official torture. We are dealing
with the remnants of an allegation that he is guilty of what would now, without doubt, be
regarded by customary international law as an *international* crime. This is because he is

1 3. *The Defendants were not employed to execute a pre-existing war.* In
 2 determining whether conduct was authorized, District of Columbia law “focuses on the
 3 underlying dispute or controversy, not on the nature of the tort, and is broad enough to
 4 embrace any intentional tort arising out of a dispute that was originally undertaken on the
 5 employer’s behalf.” *Council on American Islamic Relations*, 444 F.3d at 664 (citing
 6 *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981); *see also In re Iraq and Afghanistan*
 7 *Detainees Litigation*, 479 F.Supp.2d 85, 113-114 (Dist. D.C. 2007), *aff’d Ali v. Rumsfeld*,
 8 649 F.3d 762 (D.C. Cir. 2011). Conduct is “incidental” to an employee’s legitimate duties
 9 if it is “foreseeable.” *Haddon*, 68 F.3d at 1424. “Foreseeable in this context does not carry
 10 the same meaning as it does in negligence cases; rather, it requires the court to determine
 11 whether it is fair to charge employers with responsibility for the intentional torts of their
 12 employees.” *Id.* While Defendants duties involved military and political affairs, Defendants
 13 were not hired to implement a pre-existing plan to invade another country – the underlying
 14 act in dispute.²³ No employer expects that its employees will enter their job with a pre-

16 said to have been involved in acts of torture which were committed in pursuance of a
 17 policy to commit systematic torture within Chile and elsewhere as an instrument of
 18 government.”]; [*Lord Hutton*: “I do not consider that Senator Pinochet or Chile can claim
 19 that the commission of acts of torture after 29 September 1988 were functions of the head
 20 of state. The alleged acts of torture by Senator Pinochet were carried out under colour of
 21 his position as head of state, but they cannot be regarded as functions of a head of state
 22 under international law when international law expressly prohibits torture as a measure
 23 which a state can employ in any circumstances whatsoever and has made it an international
 24 crime.”] [*Lord Saville of Newdigate*: “So far as the states that are parties to the [Torture]
 25 Convention are concerned, I cannot see how, so far as torture is concerned, this [official
 26 capacity] immunity can exist consistently with the terms of that Convention.”] [*Lord Millett*:
 27 “The definition of torture, both in the Convention and section 134, is in my opinion entirely
 28 inconsistent with the existence of a plea of immunity *ratione materiae*. The offence can be
 committed *only* by or at the instigation of or with the consent or acquiescence of a public
 official or other person acting in an official capacity. The official or governmental nature of
 the act, which forms the basis of the immunity, is an essential ingredient of the offence. No
 rational system of criminal justice can allow an immunity which is co-extensive with the
 offence.”] (all emphases in original).

²³ The planning distinguishes Defendants alleged conduct from cases cited by the
 United States (Motion at 10 fn. 12), where the Defendants allegedly committed their torts
 while in office and as part of their job functions in responding to crises. For example, these
 cases do not allege that defendant Rumsfeld planned to torture individuals prior to entering
 office, or that Henry Kissinger planned the events in Chile prior to coming into office. See,

1 existing motivation to use violent, aggressive force against others – such conduct cannot be
2 said to be “foreseeable” under the Restatement test. *See Boykin*; *see also Pinochet*
3 (rejecting scope of employment immunity where treaties specifically forbid conduct).

4 For the foregoing reasons, the certification by the United States must be denied as a
5 matter of law. In the alternative, the Court, under District of Columbia law, is required to
6 leave this question to the jury if it cannot resolve this issue as a matter of law. *Majano*, 469
7 F.3d at 141. Should there be any further doubt, Plaintiff requests limited pre-certification
8 discovery, as permitted by law and as argued in her *Osborn* motion.

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

10 The United States argues that Plaintiff’s claims “raise non-justiciable questions.”
11 (Motion at 15.) As argued above, the United States is estopped from making this argument
12 under both judicial estoppel and issue preclusion. However, should the Court decide it
13 should require further analysis, Plaintiff submits the following.

14 a. *The Crime of Aggression is a legal question and does not implicate the*
15 *political question doctrine.* The political question doctrine is a “narrow exception” to the
16 general rule that the Judiciary has a “responsibility to decide cases properly before it, even
17 those it ‘would gladly avoid.’” *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citations
18 omitted). At least since *Marbury v. Madison*, 1 Cranch 137, 177 (1803), the Supreme Court
19 has recognized that it is “emphatically the province and duty of the judicial department to
20 say what the law is.” That duty will sometimes involve the “[r]esolution of litigation
21 challenging the constitutional authority of one of the three branches,” but courts cannot
22 avoid their responsibility merely “because the issues have political implications.” *INS v.*
23 *Chadha*, 462 U.S. 919, 943 (1983).

24 Here, Plaintiff “requests that the courts enforce a specific [federal common law]
25 right”: specifically, a cause of action rooted in the Crime of Aggression. *See Zivotofsky*,

26
27 e.g., *Rasul v. Rumsfeld*, 414 F.Supp.2d 26 (D.D.C. 2006); *Ali v. Rumsfeld*, 649 F.3d 762
28 (D.C. Cir. 2011); *Schneider v. Kissinger*, 310 F.Supp.2d 251 (D.D.C. 2004).

1 132 S. Ct. a 1427. This is a legal question; to suggest otherwise calls into question the
 2 legitimacy of the Nuremberg Judgment in a manner that would overturn basic principles of
 3 international law.²⁴ The Nuremberg Charter defined international crimes (art. 6), provided
 4 for due process (art. 16) to “ensure fair trial for the defendants,” such as the right to receive
 5 the indictment, to have the charges explained, to put on a defense, and to cross-examine
 6 any witness called by the prosecution. The *only* branch with the authority to examine the
 7 Nuremberg Judgment is the Judiciary. *See* U.S. CONST. Art. III, § 2, cl. 1.

8 **b. *Notwithstanding the above, the Baker²⁵ factors affirm that the question***
 9 ***before this Court is legal, not political.***

10 1. *The Constitution delegates legal questions to the Judiciary*, and this factor
 11 weighs in favor of Plaintiff. The SAC is litigating the conduct of these six Defendants in
 12 planning the war prior to entering office; in misleading the public to support their plan;
 13 and, finally, in executing that war on March 19, 2013, committing the Crime of Aggression
 14 – the issue that was before the Nuremberg Tribunal (in addition to other legal causes of
 15 action such as crimes against humanity and war crimes). “The judiciary is the branch of
 16 government to which claims based on international law has been committed.” *In re Agent*
 17 *Orange Product Liability Litigation*, 373 F.Supp. 2d 7, 69-70 (E.D.N.Y. 2005) *aff’d*, 517
 18 F.3d 104 (2d Cir. 2008) *cert. denied*, 129 S.Ct. 1524 (2009) (rejecting political question
 19 doctrine in lawsuit filed by Vietnamese plaintiffs alleging violations of international law
 20 related to the use of Agent Orange during Vietnam War) (citing *Kadic v. Karadzic*, 70 F.3d
 21 232, 249 (2d Cir.1995)).²⁶ The fact that a legal question implicates presidential authority

22 _____
 23 ²⁴ Plaintiff incorporates from her Initial Response, p. 22, fn. 27, statements by the
 24 Nuremberg defendants regarding the “political” nature of the Nuremberg Judgment. Fed.
 25 R. Civ. P. 10(c); LEON GOLDENSOHN, THE NUREMBERG INTERVIEWS: AN AMERICAN
 26 PSYCHIATRIST’S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES (2004) 128,
 27 129-130, 133, 152, 188, 258.

28 ²⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁶ 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

1 during war is no bar to litigation. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004) (holding
2 that district court had jurisdiction to hear claims brought by aliens detained in Guantanamo
3 Bay, Cuba); *Youngstown Sheet & Tube Co. v. Sawyer*, 242 U.S. 579 (1952) (holding that
4 President Truman exceeded his authority in ordering the seizure of steel plants during the
5 Korean War); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the Executive’s use
6 of military commissions violated the common law and the law of nations, including the
7 Geneva Conventions). (“[T]he Executive is bound to comply with the rule of law that
8 prevails in this jurisdiction,” *id.* at 635). The fact that a legal question may embarrass the
9 Executive is, also, not enough to summon the doctrine. *See, e.g., United States v. Nixon*,
10 418 U.S. 683, 692-697 (1974) (rejecting doctrine where Special Prosecutor issued
11 subpoena to the President for certain tape recordings and documents).

12 *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) was dismissed “on ripeness rather than
13 the political question doctrine.” *Id.* at 139-140. The court noted that it hesitated from
14 intervening in the dispute because it was not clearly framed. “An extreme case might arise,
15 for example, if Congress gave absolute discretion to the President to start a war at his or her
16 will.” *Id.* at 143.²⁷ *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir.
17 2010) (en banc)), as well, supports Plaintiff’s position. That court distinguished “claims
18 requiring us to decide whether taking military action was wise – a policy choice and value

19 existed in a state of “partial war,” and as such, France was a “partial enemy; but still she
20 was an enemy,” *id.* at 43, 44); *Fleming v. Page*, 50 U.S. 603, 9 How. 603 (1850) (holding
21 that the President cannot “enlarge the boundaries of this Union, nor extend the operation of
22 our institutions and laws beyond the limits before assigned to them by the legislative
23 power,” *id.* at 615; “[T]here is a wide difference between the power conferred on the
24 President of the United States, and the authority and sovereignty which belong to the
25 English crown,” *id.* at 618); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (holding that
26 while the President may respond to force, the President has “no power to initiate or declare
27 a war against a foreign nation or a domestic State,” *id.* at 668); *Ex parte Milligan*, 71 U.S.
28 (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).

27 ²⁷ “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, (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.” *Id.* at 140.

1 determination constitutionally committed for resolution to the halls of Congress or the
2 confines of the Executive branch – and claims presenting purely legal issues such as
3 whether the government had legal authority to act.” *Id.* at 842 (internal citations omitted).
4 Based on this distinction, El-Shifa’s claim for reparations based on a “mistaken” bombing
5 was one that implicated the wisdom of military action – not its legality. Plaintiff’s claims
6 involve no such counterfactuals, but instead involve past conduct of Defendants in planning
7 and waging the Iraq War, beginning in 1997: conduct she contends was declared illegal by
8 the Nuremberg Tribunal. Her claims relate to the legality of Defendants’ conduct and not
9 the wisdom of what they did, or the wisdom of the Iraq War itself.

10 *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), a pre-*Zivotofsky* decision,
11 is also not relevant for the same reason. There, the Ninth Circuit applied the political
12 question doctrine where a plaintiff sought liability against a defense contractor that sold
13 bulldozers to Israel pursuant to an agreement with the United States. *Id.* at 978. Caterpillar
14 was acting pursuant to a lawful government defense program. The *Corrie* court thus
15 worried that any decision for the plaintiff would “indirectly indict Israel for violating
16 international law with military equipment the United States government provided and
17 continues to provide.” *Id.* at 984. Nothing in *Corrie* prohibits Plaintiff from seeking
18 damages against Defendants for conduct that is expressly prohibited by international law
19 and federal common law, and particularly for conduct that began years before any of the
20 Defendants was in a position to make any foreign policy decision.²⁸

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

22
23 ²⁸ Defendants’ remaining citations are easily distinguished. The questions presented
24 do not ask whether a plaintiff may seek redress for seizure of hides in Mexico during the
25 Mexican revolution (he cannot) (*Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918)),
26 whether the Executive may revoke a passport for national security reasons (it can) (*Haig v.*
27 *Agee*, 453 U.S. 280 (1981)), whether a statute conferring Presidential authority to grant or
28 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.

1 This second factor favors Plaintiff; she is not asking this Court to recognize any new
2 principles of international law but to apply 60-year old legal precedent. The Nuremberg
3 Tribunal was able to define the scope of the Crime of Aggression and apply those laws to
4 those defendants, weighing their individual liabilities and pronouncing judgments, and
5 even acquittals. As with any development in law, this court will face novel questions in
6 need of an answer. But “[w]hile the answers to questions of international law, like those of
7 domestic law, may not always be clear, they are ascertainable and manageable.” *In re*
8 *Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 70.

9 3. *This Court will not need to engage in any policy determination.* The
10 questions in this case relate to the legality of Defendants’ actions under international law,
11 whose limits and provisions have already been defined by the Nuremberg Judgment and
12 subsequent international law. The United States has already created policy determinations
13 by making itself a state party to the Kellogg-Briand Pact, the Nuremberg, Tokyo and
14 United Nations Charters, and by itself defining The Crime of Aggression in the Nuremberg
15 and Tokyo Charters. “This kind of determination is one of substantive international law,
16 not policy. A categorical rule of non-justiciability because of possible interference with
17 executive power, even in times of war, has never existed.” *In re Agent Orange Product*
18 *Liability Litigation*, 373 F.Supp. 2d at 71.

19 4. *The Judiciary’s determination of an issue of international law will not show*
20 *lack of respect to the other branches of government.* The Motion places heavy reliance on
21 the fourth *Baker* factor, arguing that the Court’s determination of the Crime of Aggression
22 would necessarily second guess the decision to go to war with Iraq (including the
23 Authorization passed by Congress in 2002) and would require the Court to determine
24 “whether the particular judgment was correct and if not, the effect of the incorrect
25 judgment(s) on the validity of the Authorization as a whole.” (Motion at 19.) Plaintiff is not
26 asking the Court to determine the wisdom of the Iraq War, or (in contrast to *Doe v. Bush*),
27
28

1 even whether the war was domestically authorized.²⁹ This case asks a narrower question:
2 whether Defendants engaged in conduct declared illegal at Nuremberg. Whether the war
3 itself was legal is, in fact, the fourth element of the Crime of Aggression under customary
4 international law. Because the Crime of Aggression only applies to high-ranking officials, a
5 claim that the Crime of Aggression was committed will likely have political implications,
6 even significant ones. But a court is duty bound to answer legal questions even if a court
7 would “gladly avoid” doing so. *Zivotofsky*, 132 S. Ct. at 1427.

8 Consider, also, that a decision that the Crime of Aggression is barred by the
9 political question doctrine would also carry with it difficult consequences with respect to
10 international law and the Nuremberg Judgment, as well as for future judicial review of the
11 Executive. “The President is no more above the law than is Congress or the courts. Treaties
12 and other aspects of international law apply to, and limit executive power – even in
13 wartime.” *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72-73; *see*
14 *also Hamdan* (affirming that a court may analyze use of military commissions at
15 Guantanamo Bay); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (issue of torture on US
16 citizens by high ranking officials dismissed on qualified immunity, not political question
17 grounds); *see also Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271,
18 1281 (11th Cr. 2009) (finding that political question doctrine applies to sensitive military
19 decisions during a time of war)(“This is not to say that all cases involving the military are
20 automatically foreclosed by the political question doctrine”); *Koohi v. United States*, 976
21 F.2d 1328 (9th Cir. 1991).

22 The United States claims that should the Court reach the fourth prong of the Crime
23

24 ²⁹ The issue of whether the war was domestically authorized is not before the Court as
25 it plays no role in the analysis with respect to The Crime of Aggression. “[T]he very
26 essence of the Charter is that individuals have international duties which transcend the
27 national obligations of obedience imposed by the individual State. He who violates the
28 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.

1 of Aggression – whether the Iraq War was lawful – the Court would show a “clear lack of
 2 respect for the role of the political branches in determining the circumstances under which
 3 the nation went to war against Iraq in 2003.” (Motion at 20.) This is not the case: these
 4 were the very issues confronted by the Nuremberg Tribunal.³⁰

5 5. *There is no unusual need for not questioning a political decision already*
 6 *made.* Defendants’ do not identify this factor, and there is no unusual need for the Judiciary
 7 to avoid adjudicating this issue. *Compare In re Agent Orange Product Liability Litigation*,
 8 373 F.Supp. 2d at 72 (noting that a comprehensive treaty regime governed World War II
 9 era compensation claims).

10 6. *The potential for embarrassment does not weigh in favor of Defendants.*
 11 Contrary to Defendants’ argument with respect to “embarrassment” (Motion at 20), it
 12 would be far more embarrassing that somehow this Court is unable to apply an
 13 international legal precedent from a duly authorized international tribunal – a tribunal
 14 established in large part by the United States. For the foregoing reasons, Defendants’
 15 arguments that the political question doctrine applies are unpersuasive.

16 **7. Venue Is Proper Before This Court.**

17 Venue is governed by 28 U.S.C. § 1391.³¹ The “fallback” provision of venue, 28

18 _____
 19 ³⁰ Federal courts analyze UN Security Council resolutions in determining substantive
 20 law. *See, e.g., United States v. Chalmers*, 474 F.Supp.2d 555, 563 (S.D.N.Y. 2007)
 21 (interpreting and applying effect of S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1994) in
 22 wire fraud case related to the Iraq “Oil-for-Food” program); *United States v. Shibin*, 722
 23 F.3d 233, 241-42 (4th Cir. 2013) (interpreting S.C. Res. 1976, preambular ¶ 8, U.N. Doc.
 24 S/RES/1976 (Apr. 11, 2011) to determine substantive issues of law related to piracy);
 25 *United States v. Ali*, 718 F.3d 929, 936-37 (D.C. Cir. 2013) (interpreting S.C. Res. 2020,
 26 U.N. Doc. S/Res/2020, at 2 (Nov. 22, 2011) to determine substantive law of piracy and
 27 inchoate crimes); *see also Hamilton v. Regents of California*, 293 U.S. 245 (1934) (holding
 28 that California law requiring students to take class on military science and tactics did not
 violate the Kellogg-Briand Pact).

³¹ 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.” 28 U.S.C. § 1391.

1 U.S.C § 1391(3), provides for venue before the Court. As explained in *Fs Photo, Inc. v.*
 2 *PictureVision, Inc.*, 48 F.Supp.2d 442, 448 (D. Del. 1999), this third venue prong may be
 3 “utilized if there is no other district which would have both personal jurisdiction and venue
 4 as to all defendants.” 28 U.S.C. § 1391(1) cannot apply as Defendants are not all located in
 5 any one State. Similarly, 28 U.S.C § 1391(2) cannot apply because at the time of filing, any
 6 one of the Defendants may have argued lack of personal jurisdiction. Accordingly, there is
 7 and remains no district that “would have both personal jurisdiction and venue as to all
 8 defendants,” *Fs Photo, Inc.*, 48 F.Supp.2d at 448, and based on Defendant’s RICE
 9 residency within this judicial district, Plaintiff may bring an action here. It is conceivable
 10 that any of the Defendants will object on jurisdictional grounds to any other district court.
 11 Finally, 28 U.S.C § 1402(b) does not apply as the United States is not a defendant in this
 12 lawsuit. For the reasons discussed herein, the certification by the United States is not
 13 consistent with law and must be rejected.³²

14 **8. Conclusion.**

15 For the reasons set forth above, Plaintiff requests the Court deny the Motion to Dismiss.

16 Respectfully submitted,

17 Dated: July 21, 2014

18 COMAR LAW

19
 20 By /s/ Inder Comar
 21 D. Inder Comar
 22 Attorney for Lead Plaintiff
 23 SUNDUS SHAKER SALEH

24
 25 ³² Courts in this Circuit have adjudicated cases involving allegations of high-ranking
 26 official misconduct (*see, e.g., Padilla v. Yoo*) or cases involving application of D.C. scope
 27 of employment issues under the Westfall Act (*e.g., Wilson*). Venue in this court was and
 28 remains proper. However, should this Court determine that 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).