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

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

[*Proposed Order filed concurrently*]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

TREATIES

1. Introduction and Issues To Be Decided.

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

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

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

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[1] Plaintiff continues to rely on the Nuremberg Judgment (*United States v. Goering*, 41 AM. J. INT'L L. 172, 186 (1946)) and the Nuremberg Charter (Charter Int'l Military 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.

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

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

(4) Finally, venue is proper in this district. At the time of filing, neither 28 U.S.C §§ 1391(1) or (2) were applicable. 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).

2. Legal Standard.

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

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

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

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

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

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

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

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

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[3] This includes her citations to RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 102(2) and (3) (1987)); 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); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *Ware v. Hylton*, U.S. (3 Dall.) 199, 281 (1796); *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *The Nereide,* 9 Cranch 388, 423, 3 L.Ed. 769 (1815); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporters' note 2 (1987); *see also id.* at § 111(1) (1987); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 236-39 (1996); *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714 (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 Cir. 2002); *Giraldo v. Drummond Co. Inc.*, 808 F.Supp.2d 247, 250, fn. 1 (D.D.C. 2011); *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C.Cir. 2008)); M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law*," 11 Mich. J. Int'l L., 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: Compelling the Law of Human Rights*, 12 HASTINGS INT'L. & COMP. L. REV. 411, 415 (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").

[4] This includes citations to *Goering*, 41 AM. J. INT'L L. at 186, 218; *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (for the continuing application of the Nuremberg Judgment); *Siderman*, 965 F.2d at 715 ("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."); *Regina v. Jones* [2006] UKHL 16 (British House of Lords determining same); 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).

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

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

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

- The "common sense of men after the first World War demanded, however, that the law's condemnation of war reach deeper, and that the law condemn not merely uncivilized

[5] *See also* 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("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*).

ways of waging war, but also the waging in any way of uncivilized wars – wars of aggression."[6]

- The "Briand-Kellogg Pact of 1928, by which Germany, Italy, and Japan, in common with practically all nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means, and condemned recourse to war for the solution of international controversies. This pact altered the legal status of a war of aggression." Jackson Opening Statement.
- That the illegality of the Crime of Aggression "is one of no novelty and is one on which legal opinion has well crystalized." Jackson Opening Statement.
- That "whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions." Jackson Opening Statement.

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

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

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[6] 2 Trial of the Major War Criminals Before the International Military Tribunal 98-155 (Nuremberg: IMT, 1947) ("the Blue Set"); *available at* the Avalon Project at Yale Law School, http://avalon.law.yale.edu/subject_menus/imt.asp *and at* 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").

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

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

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

[7] Admissions by the United States that the Crime of Aggression is a *jus cogens* norm also defeat attempts by the United States to wash its hands of the Crime of Aggression in 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

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

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

d. *Plaintiff's allegations touch on United States conduct.*

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

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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); The United States Army Center for Law and Military Operations, Law of War Handbook 11, 20, 35, 36, 41 (2005) (stating that "[v]irtually all commentators agree that the provisions of the [Kellogg-Briand Pact] banning aggressive war have ripened into customary international law."); The United States Army Center for Law and Military Operations, Law of War Handbook 14, 171 (2010).

[8] This includes her citations to *Sosa*, 542 U.S. at 729-30, 31; *Kiobel v. Royal Dutch Shell Petroleum*, __ U.S. __ , 133 S.Ct. 1659, 1663 (2013); *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).

[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).

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

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

> (1) the planning, preparation, initiation, or execution,[11] (2) by a person in a position effectively to exercise control over or to direct the political or military action of a State,[12] (3) of an act of aggression (whether in a declared or undeclared war[13]) which includes, *but is not limited to,*
>
> (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 invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (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;
> (c) The blockade of the ports or coasts of a State by the armed forces of another 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

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

[11] 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 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).

[12] See Jackson Opening Statement (stating that the Prosecution had 'no purpose to 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 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 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. 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 in R. Pritchard (ed), *The Tokyo Major War Crimes Trial* (1998), at 1190-1191; Rome Statute Amendments; LOW Handbook at p. 208.

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

> 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,[14]
>
> and (4) is in violation of international law, treaties, agreements, assurances,[15] or the Charter of the United Nations.[16]

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.[17]

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

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

- Plaintiff alleges that three of the Defendants – 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. SAC ¶¶ 27-34.
- The SAC alleges that once Defendants came into office, they began planning an invasion in concert with one another at their first national security meeting. SAC ¶¶ 36-39. Upon and after 9/11, the SAC alleges that Defendants used 9/11 as an opportune moment

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[14] 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*

[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)

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

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

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

a. *The United States is estopped from arguing that the Crime of Aggression is "within the scope of an official's employment" or in certifying Defendants' conduct.*

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

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

[18] Alleging a violation of international law hardly makes the Crime of Aggression "political" as argued generally by the United States (Motion at 19-20); it is part and parcel of the cause of action. *See* Benjamin Ferencz [former Nuremberg prosecutor], *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 289, 290 (2009) ("The UN Charter prohibits the use of armed force without Security Council approval") ("The most important accomplishment of the Nuremberg trials was the condemnation of 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.")

Jackson Opening Statement.

- "The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under international law, is old and well established. That is what illegal warfare is. This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace." Jackson Opening Statement.
- "While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity." Jackson Opening Statement.
- "The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states … Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility." Jackson Opening Statement.
- "But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law." Jackson Opening Statement.
- "This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors." Jackson Opening Statement.
- "This Charter and this Trial, implementing the Kellogg-Briand Pact, constitute another step in the same direction and juridical action of a kind to ensure that those who start a war will pay for it personally." Jackson Opening Statement.

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

The Nuremberg Tribunal agreed, and held:

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

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

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

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

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

1. *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." This factor weighs heavily in favor of Plaintiff. Assuming a December 1, 1997 start date for the inception of the planning of the war, (SAC ¶¶ 29-30), 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.[21] The planning for the war explicitly sought to

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[19] Plaintiff specifically incorporates her citations to *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995); *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). Plaintiff acknowledges it is her burden to rebut the certification by a preponderance.

[20] "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 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.

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

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

> "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."
> *Goering*, 41 AM. J. INT'L L. at 186.

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

2. *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 v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006). 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); *Boykin*, 484 A.2d at 562 (employer not liable for educator's sexual assault where assault "appears to have been done solely for the accomplishment of Boyd's independent, malicious, mischievous and selfish purposes.").

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

Plaintiff has alleged that Defendants were *solely* motivated by personal, selfish purposes; and she has also cited numerous instances of alleged fraud and misuse of official channels that make clear (and certainly raise an issue of material fact) as to Defendants' intent to serve themselves and not the United States. 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 further ideological purposes. SAC ¶¶ 27-34.
- Defendant BUSH was motivated by personal religious beliefs regarding "Gog and Magog" being at work in the Middle East, as reported by former New York Times reporter Kurt Eichenwald. SAC ¶ 100.
- Defendants met in their first week of official employment in what appeared to be a scripted exchange (as described by the former Secretary of the Treasury) to discuss a renewed focus on Iraq and potential military action. SAC ¶ 36.
- Defendants made numerous false statements to the public regarding any threat posed by Iraq, or its connections to al Qaeda, in order to support a war. SAC ¶¶ 65-95.
- Defendant POWELL misrepresented facts to the United Nations. SAC ¶¶ 93-94.
- Defendants engaged in pre-employment conduct advocating for a military invasion of Iraq, and were associated with a non-profit whose explicit goal was "showing its muscle

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

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

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

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[22] This conclusion made by the House of Lords is narrower than the argument that alleged violations of *jus cogens* norms are always outside the scope of employment, which Plaintiff recognizes has been rejected. (Motion at 10, fn. 12.) To her knowledge, no Court has considered whether conduct that is specifically prohibited by a treaty, which a State party has ratified, must be excluded from a "scope of employment" analysis. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 All E.R. 97 (H.L. 1999), available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (last visited Jul. 19, 2014) (parallel 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

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

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said to have been involved in acts of torture which were committed in pursuance of a policy to commit systematic torture within Chile and elsewhere as an instrument of government."]; [*Lord Hutton*: "I do not consider that Senator Pinochet or Chile can claim that the commission of acts of torture after 29 September 1988 were functions of the head of state. The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime."] [*Lord Saville of Newdigate*: "So far as the states that are parties to the [Torture] Convention are concerned, I cannot see how, so far as torture is concerned, this [official capacity] immunity can exist consistently with the terms of that Convention." [*Lord Millett*: "The definition of torture, both in the Convention and section 134, is in my opinion entirely 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,

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

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

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

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

a. ***The Crime of Aggression is a legal question and does not implicate the political question doctrine***. The political question doctrine 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) (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).

Here, 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*,

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

132 S. Ct. a 1427. This is a legal question; to suggest otherwise calls into question the legitimacy of the Nuremberg Judgment in a manner that would overturn basic principles of international law.[24] The Nuremberg Charter defined international crimes (art. 6), provided for due process (art. 16) 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. The ***only*** branch with the authority to examine the Nuremberg Judgment is the Judiciary. *See* U.S. CONST. Art. III, § 2, cl. 1.

b. *Notwithstanding the above, the* Baker[25] *factors affirm that the question before this Court is legal, not political.*

1. *The Constitution delegates legal questions to the Judiciary*, and this factor weighs in favor of Plaintiff. The SAC is litigating the conduct of these six Defendants in planning the war prior to entering office; in misleading the public to support their plan; and, finally, in executing that war on March 19, 2013, committing the Crime of Aggression – the issue that was before the Nuremberg Tribunal (in addition to other legal causes of action such as crimes against humanity and war crimes). "The judiciary is the branch of government to which claims based on international law has been committed." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d 7, 69-70 (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) (citing *Kadic v. Karadzic,* 70 F.3d 232, 249 (2d Cir.1995)).[26] The fact that a legal question implicates presidential authority

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

[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

during war is no bar to litigation. *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 Guantanamo Bay, Cuba); *Youngstown Sheet & Tube Co. v. Sawyer*, 242 U.S. 579 (1952) (holding that 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 doctrine where Special Prosecutor issued subpoena to the President for certain tape recordings and documents).

Doe v. Bush, 323 F.3d 133 (1st Cir. 2003) was dismissed "on ripeness rather than the political question doctrine." *Id.* at 139-140. The court noted that it hesitated from intervening in the dispute because it was not clearly framed. "An extreme case might arise, for example, if Congress gave absolute discretion to the President to start a war at his or her will." *Id*. at 143.[27] *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc)), as well, supports Plaintiff's position. That court distinguished "claims requiring us to decide whether taking military action was wise – a policy choice and value

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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 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; "[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).

[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.

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. Plaintiff's claims involve no such counterfactuals, but instead involve past conduct of Defendants in planning and waging the Iraq War, beginning in 1997: conduct she contends was declared illegal by the Nuremberg Tribunal. Her claims relate to the legality of Defendants' conduct and not the wisdom of what they did, or the wisdom of the Iraq War itself.

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 with the United States. *Id*. at 978. 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. 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.[28]

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

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[28] 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.

This second factor favors Plaintiff; she is not asking this Court to recognize any new principles of international law but to apply 60-year old legal precedent. The Nuremberg Tribunal was able to define the scope of the Crime of Aggression and apply those laws to those defendants, weighing their individual liabilities and pronouncing judgments, and even acquittals. 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.

3. This Court will not need to engage in any policy determination. 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 Pact, the Nuremberg, Tokyo and United Nations Charters, and by itself defining The Crime of Aggression in the Nuremberg and Tokyo Charters. "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.

4. *The Judiciary's determination of an issue of international law will not show lack of respect to the other branches of government*. The Motion places heavy reliance on the fourth *Baker* factor, arguing that the Court's determination of the Crime of Aggression would necessarily second guess the decision to go to war with Iraq (including the Authorization passed by Congress in 2002) and would require the Court to determine "whether the particular judgment was correct and if not, the effect of the incorrect judgment(s) on the validity of the Authorization as a whole." (Motion at 19.) 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.[29] This case asks a narrower question: whether Defendants engaged in conduct declared illegal at Nuremberg. Whether the war itself was legal is, in fact, the fourth element of the Crime of Aggression under customary international law. Because the Crime of Aggression only applies to high-ranking officials, a claim that the Crime of Aggression was committed will likely have political implications, even significant ones. But a court is duty bound to answer legal questions even if a court would "gladly avoid" doing so. *Zivotofsky*, 132 S. Ct. at 1427.

Consider, also, that a decision that the Crime of Aggression is barred by the political question doctrine would also carry with it difficult consequences with respect to international law and the Nuremberg Judgment, as well as for future judicial review of the Executive. "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 power – even in wartime." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72-73; *see also Hamdan* (affirming that a court may analyze use of military commissions at Guantanamo Bay); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (issue of torture on US citizens by high ranking officials dismissed on qualified immunity, not political question grounds); *see also Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1281 (11th Cr. 2009) (finding that political question doctrine applies to sensitive military decisions during a time of war)("This is not to say that all cases involving the military are automatically foreclosed by the political question doctrine"); *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1991).

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

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[29] 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.

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

5. *There is no unusual need for not questioning a political decision already mad*e. 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 20), it would be far more embarrassing 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. For the foregoing reasons, Defendants' arguments that the political question doctrine applies are unpersuasive.

7. Venue Is Proper Before This Court.

Venue is governed by 28 U.S.C. § 1391.[31] The "fallback" provision of venue, 28

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[30] Federal courts analyze UN Security Council resolutions in 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).

[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.

U.S.C § 1391(3), provides for venue before the Court. 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. 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 herein, the certification by the United States is not consistent with law and must be rejected.[32]

8. Conclusion.

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

Respectfully submitted,

Dated: July 21, 2014

COMAR LAW

By /s/ *Inder Comar*
D. Inder Comar
Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

[32] Courts in this Circuit have adjudicated 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 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).