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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al.,	)	No. 3:13-cv-01124 JST
Plaintiffs,	)	**REPLY IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS**
v.	)	
GEORGE W. BUSH, et al.,	)	**DATE: September 11, 2014**
Defendants.	)	**TIME: 2:00 PM**

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Plaintiff Sundus Shaker Saleh seeks to hold a group of former government officials – President George W. Bush, Vice-President Richard B. Cheney, Secretary of Defense Donald H. Rumsfeld, National Security Advisor Condoleezza Rice, Secretary of State Colin Powell, and Deputy Secretary of Defense Paul Wolfowitz – personally liable in damages for injuries allegedly caused by the Iraq War of 2003. Saleh alleges that these officials committed the "crime of aggression" against Iraq, which Saleh contends is a violation of customary international law. Saleh brings her suit under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

As with her near-identical Amended Complaint, which has already been dismissed by this Court, *see* Dkt. No. 35, the United States has substituted itself as the sole defendant for Saleh's claims because the former government employees she has sued were acting within the scope of their employment at the time of their alleged wrongful conduct. *See* Notice of Substitution of the United States as Sole Defendant on Counts I and II ("Notice"). Saleh's sole remedy for such claims is a suit against the United States under the Federal Tort Claims Act. The United States has shown in its Motion to Dismiss ("MTD") that the Court lacks subject matter jurisdiction over Saleh's claims for three independent reasons: 1) the United States has not waived sovereign immunity under the FTCA for the conduct alleged; 2) the claims raise nonjusticiable political questions; and 3) the ATS does not provide jurisdiction for the claims. *See* MTD at 4-24. Moreover, venue does not lie in this Court. *Id.* at 24. The arguments Saleh offers in her Response ("Resp.") do not save her claims.[1]

I. SALEH'S CHALLENGE TO THE SUBSTITUTION OF THE UNITED STATES FOR THE NAMED DEFENDANTS FAILS

The exclusive remedy for a claim based upon the alleged "negligent or wrongful act or omission" of a government employee acting within the scope of his or her employment is a suit

[1] Throughout her Response, Saleh repeatedly incorporates by reference arguments from her response to the initial Motion to Dismiss. *See, e.g.*, Resp. at 1. However, parties may incorporate by reference only pleadings or exhibits to pleadings, Fed. R. Civ. P. 10(c), and a brief in opposition to a motion is not a "pleading," Fed. R. Civ. P. 7. Accordingly, the Court should disregard in their entirety the arguments Saleh incorporates by reference. *Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 345 (9th Cir. 1996).

1 against the United States under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 2679(b)(1).
2 Once the defendants named in this matter were certified as having acted within the scope of their
3 employment with respect to allegations in the Second Amended Complaint ("2d Am. Compl."),
4 *see* Notice, Ex. 1, the United States was substituted as the sole defendant by operation of law. 28
5 U.S.C. § 2679(d)(1). The United States *must* remain the defendant in this case unless and until
6 the Court determines that the named defendants "*in fact,* and not simply as alleged by the
7 plaintiff, engaged in conduct beyond the scope of [their] employment." *Osborn v. Haley*, 549
8 U.S. 225, 231 (2007) (emphasis in original). As the party disputing the scope of employment
9 certification, Saleh bears the burden of presenting evidence and disproving that decision by a
10 preponderance of the evidence. *Kashin v. Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006) (quotation
11 omitted). Saleh has not met and cannot meet her burden.

12 A. Saleh's "Judicial Estoppel" And "Issue Preclusion" Arguments Are Without
13 Merit.

14 Saleh claims that the United States' participation in the International Military Tribunal at
15 Nuremberg, which occurred almost sixty years before the alleged conduct in this case, prohibits
16 the argument that the purported crime of aggression can be within the legitimate scope of a
17 government official's authority, and prohibits the certification of the defendants' alleged conduct
18 as having occurred with the scope of their employment. Resp. at 10. The United States is not
19 aware of any case – and Saleh cites none – which recognizes that the proceedings of an
20 international military tribunal such as Nuremberg can have preclusive or estoppel effect on a
21 subsequent civil case in a United States federal court. In any event, Nuremberg has neither
22 estoppel nor preclusive effect here, and is irrelevant to the scope of employment determination.

23 First, even if, as Saleh alleges, the United States took the position at Nuremberg that the
24 crime of aggression is a "clear and definitive prohibition under international law," *see* Resp. at 4,
25 that position was taken in the context of deciding criminal liability under international law and in
26 an international proceeding established pursuant to a treaty following Germany's surrender to the
27 Allies – not civil liability under District of Columbia agency law, to which a different legal
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standard applies.[2] Thus issue preclusion does not apply because the legal issue presented at Nuremberg was not identical to the issue presented here. *See Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011) (stating requirements for issue preclusion). Second, even if issue preclusion applies, Saleh cannot invoke it because Saleh was not a party to the International Military Tribunal at Nuremberg, and the doctrine which permits a nonparty to a prior lawsuit to make "offensive" use of collateral estoppel (or issue preclusion) against a party to the prior suit, does not apply against the government. *United States v. Mendoza*, 464 U.S. 154, 162 (1984). Third, judicial estoppel does not apply because an argument that criminal liability be imposed for particular past conduct is not "clearly inconsistent" with an argument that the conduct occurred within the scope of employment. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). It is well settled that "[a]n act may be within the scope of employment [for purposes of civil liability] although consciously criminal or tortious." Restatement (Second) of Agency § 231 (1958).

Fourth, the contention that the crime of aggression is a "clear and definitive prohibition under international law," *see* Resp. at 4, is irrelevant, as a matter of law, to the government's certification that the conduct of the named defendants in this case was within the scope of their employment. Even in cases where government officials are alleged to have engaged in violations of recognized *jus cogens* norms – such as torture and genocide – federal courts have repeatedly and consistently found that the alleged conduct occurred within the scope of the defendants' employment for purposes of Westfall Act certification. *See* MTD at 9-10. Saleh does not dispute this. In fact, the argument that a violation of customary international law can never be within the scope of employment has been consistently rejected by courts construing District of Columbia scope of employment law.[3] As the United States District Court for the District of Columbia observed in *Schneider v. Kissinger*,

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[2] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 155 (2d Cir. 2010) (Leval, J., concurring) (noting that the Nuremberg tribunal was established with only criminal, and not civil, jurisdiction), *aff'd*, 133 S. Ct. 1659 (2013).

[3] *See Gonzalez-Vera v. Kissinger*, CIVA 02-02240 HHK, 2004 WL 5584378, at *5-6 (D.D.C. Sept. 17, 2004) *aff'd,* 449 F.3d 1260 (D.C. Cir. 2006); *In re Iraq & Afghanistan*

> [the] theory that a violation of international law always falls outside the scope of a federal official's employment [for purposes of Westfall Act certification and substitution] misconstrues 'the scope' of this term. It is well settled that an employee is capable of committing a variety of illegal or tortious acts for which his employer may be held liable, even though the employer did not hire him for that purpose. This is, after all, the predicate of respondeat superior liability. Defining an employee's scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines who may be held liable for that conduct, an employee or his boss.

310 F. Supp. 2d 251, 265 (D.D.C. 2004) (internal citation omitted), *aff'd,* 412 F.3d 190 (D.C. Cir. 2005). Saleh offers no caselaw, or even an argument for why the purported crime of aggression should or would be the exception to this rule, and in fact it is not.

B. Saleh Has Not Established That The Named Defendants Were Acting Outside The Scope of Their Employment.

Saleh argues that the conduct alleged for each defendant was not within the scope of his or her employment because: 1) it was not of the kind the defendant was employed to perform; 2) it did not occur substantially within the authorized time and space limits of the defendant's employment; 3) it was not actuated, at least in part, by a purpose to serve the defendants' employer.[4] Resp. at 12-18; *see* Restatement (Second) of Agency § 228 (1958) ("Restatement"); *Moseley v. Second New St. Paul Baptist Church*, 534 A.2d 346, 348 n. 4 (D.C. 1987).[5] In light

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Detainees Litig., 479 F. Supp. 2d 85, 113-14 (D.D.C. 2007) *aff'd sub nom. Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *Schneider*, 310 F. Supp. 2d, 264-66; *Ali v. Rumsfeld*, 649 F.3d 762, 774-75 (D.C. Cir. 2011); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 7-8 (D.D.C. 2004) *aff'd,* 445 F.3d 427 (D.C. Cir. 2006). This same case law also necessarily rejects Saleh's argument, *see* Resp. at n.22, that conduct prohibited by a treaty which a State party has ratified must be excluded from a scope of employment analysis. *See infra* § I.B.3).

[4] Saleh does not challenge the final element of the Restatement's test – (4) if force is intentionally used by the servant against another, the use of force is not unexpected by the master. *See* Resp. at 13; *see also* MTD at n.7.

[5] The United States agrees that District of Columbia law governs the scope of employment determination. *See* Resp. at 12. While Virginia law might arguably apply to some of the actions of defendants Rumsfeld and Wolfowitz – because their former employer, the

of the extensive and consistent body of caselaw construing District of Columbia scope of employment law, *see* MTD at 7-10, it is clear that Saleh has not met her burden to overturn the government's certification that the named defendants were acting within the scope of their employment.

1) The alleged conduct occurred within authorized time and space limits.

Saleh attempts to evade the indisputable fact that all of the defendants were federal employees when the Iraq War began with the invasion of Iraq in 2003, *see* 2d Am. Compl. ¶¶ 10-14, 112, by citing alleged "planning" for military action against Iraq that predated the Bush Administration. Resp. at 13-14. However, the only defendants who are specifically alleged to have engaged in *any* actions related to Iraq prior to their federal employment are defendants Rumsfeld and Wolfowitz. *See* 2d Am. Compl. ¶¶ 27-34. Plaintiff alleges *not a single action* by Bush, Cheney, Powell, or Rice that predated their federal employment. Thus, Plaintiff's repeated references to pre-employment "planning" that "the Defendants" engaged in are wholly conclusory and not entitled to any presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). And Plaintiff offers no support for the argument that alleged actions Rumsfeld and Wolfowitz took as federal employees were removed from the scope of their employment by mere opinions they held prior to their federal employment about the strategic consequences of military action against Iraq. *See* MTD at n.9.[6]

2) The alleged conduct was of a kind the defendants were authorized to perform.

Department of Defense, is headquartered at the Pentagon in Virginia – the Defense Department's actions are inextricably bound up with the District of Columbia in its role as the nation's capital. *Kashin*, 457 F.3d at 1037.

[6] It would be unusual for high-ranking federal officials such as the named defendants *not* to have expressed public opinions on matters touching their federal employment prior to taking office. Indeed, it is precisely because of their knowledge and experience that they are qualified to hold such critical positions. Under Saleh's theory, however, voicing such knowledge and expertise prior to their federal employment could render them outside the scope of that subsequent employment. That is simply not the law.

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Conduct is considered to be the kind an employee is employed to perform if it is "'of the same general nature as th[e] [conduct] authorized' or 'incidental to the conduct authorized.'" *Harbury v. Hayden*, 444 F. Supp. 2d 19, 33 (D.D.C. 2006) *aff'd,* 522 F.3d 413 (D.C. Cir. 2008) (quoting Restatement (Second) of Agency § 229 (1958)). District of Columbia law categorizes *practically any conduct* as falling within the scope of, or incidental to, that authorized by their employer so long as the action has *some nexus* to the action authorized.[7]

Saleh argues that the alleged conduct was not of the kind that the defendants were employed to perform because "[t]he Defendants were not employed to execute a pre-existing war." Resp. at 17-18. Again, as noted above, only Rumsfeld and Wolfowitz are even alleged to have expressed views concerning Iraq prior to their federal employment. In any event, as the District of Columbia Circuit observed in *Council on Am. Islamic Relations v. Ballenger*, "the proper inquiry [for purposes of determining scope of employment] . . . focuses on the underlying dispute or controversy, not on the nature of the tort." 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting *Weinberg v. Johnson*, 518 A.2d 985, 992 (D.C. 1986)).[8] Thus in *Ballenger* the proper inquiry for determining whether a member of Congress was within the scope of his employment when he made an alleged defamatory statement to a member of the media during a phone call was whether giving statements to members of the media was the kind of conduct that the Congressman had been employed to perform; it was *not* whether the Congressman had been employed to utter the specific defamatory sentence in question. *Id.* at 664-65. The *Ballenger* court concluded that the underlying dispute or controversy was the phone call between the Congressman and the media member. *Id.* Similarly, the question here is whether

[7] *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 33 (D.D.C. 2006) *aff'd sub nom. Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) *cert. granted, judgment vacated,* 555 U.S. 1083 (2008) and *aff'd sub nom. Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *see also Greene v. Nguyen*, CIV.A. 05-0407 RMU, 2005 WL 3275897, at *4 (D.D.C. Sept. 7, 2005) (noting District of Columbia law recognizes an especially "expansive" definition of scope of employment).

[8] District of Columbia law recognizes that employees act within the scope of their employment even when they allegedly commit egregious intentional torts so long as those torts are a "direct outgrowth" of their legitimate employment responsibilities. *See* MTD at n.11.

determinations associated with warfare was the kind of conduct the defendants were employed to perform, not whether they were specifically employed to take the United States into a war with Iraq. The underlying dispute or controversy at issue is not whether to wage a "preplanned" war against Iraq; it is determining whether to use the military force of the United States against another country. Were Plaintiff's contrary construction correct, scope certifications could always be defeated by claims of pre-employment motivation. As explained *infra*, this is simply not the case.

It is clear that the conduct attributed to each of the defendants, which involved determining whether the United States should or would conduct military operations against Iraq and the manner in which those operations were conducted, was clearly "of the same general nature as th[e] [conduct] authorized" or "incidental to the conduct authorized" for the high level positions the defendants held in the U.S. government. At the very least, the conduct alleged had "some nexus" to that authorized by each defendant's position in the government.

3) The alleged conduct was undertaken, at least in part, on behalf of the defendants' employer.

The requirement that actions be undertaken, at least in part, to serve the employer is "broad enough to embrace any intentional tort arising out of a dispute that 'was originally undertaken on the employer's behalf.'" *Weinberg v. Johnson*, 518 A.2d 989, 992 (D.C. 1986) (quoting *Int'l Distrib. Corp. v. Am. Dist. Tel. Co.*, 569 F.2d 136, 139 (D.C. Cir. 1977)). When an employee's actions occur in the course of performing job duties "the employee is *presumed* to be intending, at least in part, to further the employer's interests." *Id.* at 989. The nature of the defendants' former positions in the government – the President and some of the highest ranking federal officials in the country – necessarily included involvement with and/or responsibility for war-making with inevitable consequences in foreign relations. Whatever actions they allegedly

took vis-à-vis the United States' war in Iraq were clearly taken in the course of performing their jobs, and undertaken, at least in part, on behalf of the United States.[9]

Saleh attempts to downplay the import of the United States' interests by arguing that the defendants were motivated by "personal, selfish purposes." Resp. at 15. This argument fails. First, Plaintiff alleges no personal motivation behind the actions of defendants Powell or Rice. Second, it is only when an employee acts *solely* for his or her personal benefit that the actions will fall outside the scope of employment. *Steele v. Meyer*, 964 F. Supp. 2d 9, 19 (D.D.C. 2013); *see Ballenger*, 444 F.3d at 665 ("The Restatement's text reveals that even a *partial* desire to serve the master is sufficient.") (emphasis in original) (citing Restatement (Second) of Agency § 228(1)(c)). Nothing in the Second Amended Complaint can be read as establishing that Bush, Cheney, Rumsfeld, or Wolfowitz were acting *solely* for their personal benefit with respect to the decision to go to war against Iraq and the conduct of that war. While Saleh argues that Cheney, Rumsfeld, and Wolfowitz held "neoconservative personal beliefs that called for the use of the United States military to further ideological purposes," Resp. at 15, the Complaint makes clear that the "personal beliefs" in question related to the national security interests of the *United States*, the defendants' employer. *See*, *e.g.*, 2d Am. Compl. ¶¶ 31-33, 36-37, 44, 46-47.[10] The purported "personally-held neo-conservative convictions which called for American military

[9] That the decision to go to war with Iraq was undertaken on behalf of the United States is underscored by Congress' authorization of the use of military force against Iraq. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107–243, 116 Stat. 1498 (Oct. 16, 2002). "War powers, in contrast to 'all legislative power,' are shared between the political branches." *Doe v. Bush*, 323 F.3d 133, 143 (1st Cir. 2003).

[10] Saleh argues 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." Resp. at 16. Saleh cites no federal caselaw as authority for this proposition. Rather, she relies upon a House of Lords decision which purportedly concluded that Chile's participation in the Convention Against Torture forbade Augusto Pinochet, former President of Chile, from arguing that his alleged torture was conducted in furtherance of Chile's interest. *Id.* at 16 & n.22. However, notwithstanding the fact that the United States is a signatory to the Convention Against Torture, *see Parlak v. Holder*, 578 F.3d 457, 477 (6th Cir. 2009), courts construing District of Columbia scope of employment law have repeatedly and consistently found that federal officials accused of torture were acting within the scope of their employment for purposes of the Westfall Act. *See* MTD at n.12. Saleh offers no argument for why the purported crime of aggression should or would be treated differently by a federal court.

1 dominance of the Middle East," *id.* ¶ 109, as alleged, relate to the interests of the United States,
2 not any defendant's personal interest.[11] Saleh does not allege *any* personal benefit that any
3 defendant sought to achieve through a war with Iraq.[12] Nothing in the Second Amended
4 Complaint is sufficient to defeat the presumption that the President and the other high-ranking
5 federal officials Saleh has sued acted, *at least in part*, to further the interests of the United States.
6 *Weinberg*, 518 A.2d at 992; Restatement (Second) of Agency § 228(1)(c) (1958).[13]

7 II. SALEH'S CLAIMS MUST BE DISMISSED BECAUSE THEY CANNOT BE
8 BROUGHT UNDER THE FTCA

9 Since the United States has been substituted for the named defendants, Saleh's claims are
10 fully "subject to the limitations and exceptions applicable to" FTCA claims. 28 U.S.C. §
11 2679(d)(4). As the United States has explained, Counts I and II cannot be brought under the
12 FTCA because: 1) Saleh failed to exhaust her administrative remedies prior to filing suit; 2) the
13 United States has not waived sovereign immunity for suits based upon customary international
14 law; 3) Saleh's claims are barred by the foreign country exception; and 4) Saleh's claims are
15 barred by the combatant activities exception. *See* MTD at 12-15. Saleh has not disputed *any* of
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18 [11] Again, even the allegations which purport to show a "pre-existing plan" to invade Iraq
19 in fact show nothing more than that *two* of the officials – Rumsfeld and Wolfowitz – held views
as private citizens that it was in the United States' strategic interest to take military action against
20 Iraq. *See*, *e.g.*, 2d Am. Compl. ¶¶ 31-33.

[12] Saleh's reliance upon *Hicks v. Office of the Sergeant at Arms for the U.S. Senate*, 873
21 F. Supp. 2d 258 (D.D.C. 2012), does not save her claims. The alleged false statements at issue in
Hicks were alleged to have been motivated by the defendants' personal desire to harm the
22 plaintiff's husband, as opposed to a desire to serve the interests of the defendants' employer. *Id.*
at 270-271. As alleged, the personal beliefs that allegedly motivated the federal officials Saleh
23 has sued were based upon the national security interests of the United States. Thus, there is no
factual dispute concerning the defendants' alleged motivations.

24 [13] Saleh is not entitled to either discovery or an *Osborn* hearing on the issue of scope of
employment because she has not alleged facts that, if true, would demonstrate that the defendants
25 were acting outside the scope of their employment. *Jacobs v. Vrobel*, 724 F.3d 217, 220-21 &
n.2 (D.C. Cir. 2013); *Wuterich v. Murtha*, 562 F.3d 375, 381 (D.C. Cir. 2009); *Sharratt v.*
26 *Murtha*, 437 Fed. Appx. 167, 173 (3d Cir. 2011) (where plaintiff fails to plead facts sufficient to
rebut Westfall certification district court can rule on scope certification without conducting
27 discovery or a hearing); *see also* Opposition to Osborn Motion (Dkt. No. 46).

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1 these arguments – each of which is an independent reason to dismiss this case, and the Court
2 should do so here.

3 III. ALTHOUGH THE COURT NEED NOT REACH THE ISSUE, THE POLITICAL
4 QUESTION DOCTRINE BARS SALEH'S CLAIMS

5 As a separate basis for dismissal of Saleh's claims, the United States has shown that they
6 raise non-justiciable political questions – namely whether the United States should have gone to
7 war with Iraq and how that war should have been conducted – which would require the Court to
8 make determinations plainly committed to the political branches. MTD at 15-21. Saleh does not
9 dispute that these are non-justiciable political questions. Instead, Saleh argues that her claims
10 "relate to the legality of Defendants' conduct and not the wisdom of what they did, or the
11 wisdom of the Iraq War itself." Resp. at 21. Saleh draws a distinction without a material
12 difference.

13 It is clear that the crux of the Second Amended Complaint is that the Iraq War of 2003
14 was "illegal" under international law. 2d Am. Compl. ¶¶ 139-42, 149-52. Saleh seeks to hold a
15 select group of former government officials individually liable for the entirety of that war. As
16 the basis for this individual liability, Saleh cites certain defendants' alleged long-term "planning"
17 for military action against Iraq, allegedly implemented through the spreading of false
18 information to the American public and the international community about the threat that Iraq
19 posed. *Id.* ¶ 121. Determining whether the stated justifications for the Iraq War were false when
20 they were made, however, would necessarily require the Court to reconsider the merits of the
21 decision to go to war, an inquiry squarely barred by the political question doctrine.

22 With respect to this issue, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836
23 (D.C. Cir. 2010), is directly on point. The plaintiffs in *El Shifa* claimed that the President and
24 other government officials made false statements in order to justify a cruise missile attack that
25 destroyed their pharmaceutical plant in Sudan. *Id.* at 839-40. The D.C. Circuit, sitting en banc,
26 found that the justifications for the attack, *regardless of their truth*, were "inextricably
27 intertwined" with a foreign policy decision constitutionally committed to the political branches,"
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Id. at 846 (quoting *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006)), because determining whether the statements were true would require determining "whether the alleged conduct should have occurred," *Id.* (quoting *Harbury*, 522 F.3d at 420) (emphasis in original). The court explained: "A decision in favor of the plaintiffs would unavoidably involve a rejection of the Clinton Administration's stated justifications for launching a missile strike. A decision against the plaintiffs would affirm the wisdom of the Administration's decision to attack." *Id.* at 846. Because the plaintiffs' defamation claim was "inextricably intertwined with the merits of the actual justifications" for the missile strike, the claim was non-justiciable under the political question doctrine. *Id.* at 848.

Saleh's invocation of international law as the basis for her claims does not alter the fact that her claims inherently call into question the prudence of the political branches' determination that the United States should go to war with Iraq – a matter of foreign policy which the Constitution explicitly commits to the discretion of the political branches. The underlying premise of Saleh's claims is that the Iraq War was initiated through deception in violation of customary international law, treaties, and the United Nations Charter. *See* 2d Am. Compl. ¶¶ 149-52. A decision in Saleh's favor on this point would "unavoidably involve" a rejection of the stated justifications for the Iraq War offered by the political leaders of the United States, which is barred by *El-Shifa*. 607 F.3d at 846. Like the plaintiff in *El-Shifa*, Saleh cannot "clear the political question bar simply by 'recasting [such] foreign policy and national security questions in tort terms.'" *Id.* at 842-43 (quoting *Schneider*, 412 F.3d at 197). This is true whether the duty allegedly breached is rooted in international or other law.

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IV. ALTHOUGH THE COURT NEED NOT REACH THE ISSUE, SALEH'S CLAIMS CANNOT BE BROUGHT UNDER THE ATS[14]

Given the clear applicability of the FTCA to Saleh's claims and the absence of any waiver of sovereign immunity, as well as the political question doctrine, the Court should decline Saleh's invitation to add the "crime of aggression" to the limited list of international law norms for which a cause of action exists under the ATS. Even if the Court elects to wade into this complex and contentious area of international law, Saleh's claims must still be dismissed.

A. Saleh's Claims Are Not Cognizable Under The ATS.

Saleh invites this Court to be the first to recognize an ATS claim for the "crime of aggression," and she requests that the Court do so based upon elements of the "offense" that she herself "proposes." Resp. at 8-9. Saleh's request must be denied because as shown in the Motion to Dismiss, at the time of the events alleged the crime of aggression did not have the "definite content and acceptance among civilized nations" required under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), to be recognized as a cause of action under the ATS. *See* MTD at 21-23. Indeed, it still lacks such definite content and sufficient acceptance.[15]

Saleh suggests that the Judgment of the Nuremberg Tribunal made the "crime of aggression" enforceable under the ATS. Resp. at 2-7. Saleh is wrong. While Article 6(a) of the Nuremberg Charter defined "Crimes Against Peace" as the "planning, preparation, initiation or waging of a war of aggression," the term "aggression" was not defined. *Id.*[16] In 1974 the United

[14] This Court cannot exercise federal question or diversity jurisdiction to hear Saleh's international law claims in the absence of jurisdiction under the ATS. *See* 2d Am. Compl. ¶ 5; Resp. at 7. The Supreme Court has rejected the suggestion that federal question jurisdiction is "equally as good" as jurisdiction under the ATS for the development of common law concerning international norms. *Sosa*, 542 U.S. at 731, n.19.

[15] *See*, *e.g.*, Harold Hongju Koh, Legal Adviser, Department of State, Statement at the Review Conference of the International Criminal Court, June 4, 2010, available at http://www.state.gov/s/l/releases/remarks/142665.htm ("Unlike genocide, war crimes, and crimes against humanity… as yet, no authoritative definition of aggression exists under customary international law.").

[16] The International Law Commission, in its formulation of the "Nuremberg Principles," noted that "The Charter of the Nürnberg Tribunal did not contain any definition of 'war of aggression', nor was there any such definition in the judgment of the Tribunal. It was by reviewing the historical events before and during the war that it found that certain of the

Nations General Assembly adopted Resolution 3314 (XXIX), which contained what it labelled as a definition of "aggression." G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974). However, Resolution 3314 describes only the "state" act of aggression against another "State," and does not purport to define a "crime of aggression" for which an individual could be criminally prosecuted. *Id.* Moreover, rather than serving as a comprehensive and binding principle of international law, Resolution 3314 was specifically submitted to the UN Security Council as only a *recommendation*, "that it should, as appropriate, take account of [] as guidance in determining, in accordance with the [UN] Charter, the existence of an act of aggression." *Id.* (italics added). When the Rome Statute of the International Criminal Court (a treaty to which the United States is not a party) was adopted, although the crime of aggression was one of the four categories of crimes listed as within the jurisdiction of the Court, the Statute itself reflected that there was no agreed definition of the crime of aggression at the time.[17] Against this backdrop, the fact that Saleh must rely upon a definition of the crime of aggression that she herself proposes, Resp. at 8, in itself refutes any argument that the crime of aggression is even now as specifically defined and accepted within the international community as were the "historical paradigms" recognized in *Sosa* as being actionable when the ATS was enacted.[18]

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defendants planned and waged aggressive wars against twelve nations and were therefore guilty of a series of crimes." Report of the International Law Commission to the General Assembly, Covering its Second Session, 5 June – 29 July 1950, Doc. A/1316, at ¶ 113, in Yearbook of the International Law Commission 1950, VOL. II, at 364 (1957). The absence of a definition for the term "aggression" in the Nuremberg Charter and in the Tribunal's Judgment refutes Saleh's argument that Nuremberg precludes or estops the United States from arguing that the crime of aggression does not have the definite content and acceptance among nations to be recognized under the ATS. *See* Resp. at 3-6. Moreover, the Nuremberg Tribunal was a court created by treaty following the surrender of Germany to the Allies, and it focused solely on criminal culpability for the particular acts committed by Nazi leaders during World War II. There is no inconsistency in the crime of aggression being sufficiently defined to support criminal liability for those acts before that international military tribunal while not being sufficiently defined to support private causes of action for an individual suing under a federal statute.

[17] *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), Article 5(2) (prohibiting the International Criminal Court from exercising jurisdiction over the crime of aggression pending the adoption of a definition).

[18] One element of Saleh's "proposed" definition of the crime of aggression is: "a person in a position effectively to exercise control over or to direct the political or military action of a

B. Saleh's Claims Are Barred By *Kiobel*.

In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the Supreme Court recognized that the principles underlying the canon of statutory interpretation known as the "presumption against extraterritorial application," which provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," also constrain courts considering causes of action that may be brought under the ATS. *Id.* at 1664 (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010)). For this reason, causes of action under the ATS for violations of the law of nations occurring within the territory of a sovereign other than the United States are barred. *Id.* at 1669. And even where ATS claims "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* This is in accord with the Supreme Court's warning that "the potential implications for the foreign relations of the United States of recognizing [new ATS] causes [of action] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727.[19] Saleh relegates her entire discussion of *Kiobel* to a single citation and footnote. *See* Resp. at 7-8. This is wholly insufficient to defeat the presumption against the extraterritorial application of the ATS.

Even though Saleh's claims are based upon the alleged actions of United States government actors, this connection to the United States is not of "sufficient force to displace the presumption against extraterritorial application" of the ATS. The decision to engage in military

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State." Resp. at 8. In the United States, a constitutional democracy with a robust system of checks and balances rooted, among other things, in constitutional separation of powers, no individual or group has ever exercised the complete control over its political, economic, and military components as that exercised over Germany by the Nazi Party. Thus Saleh's repeated invocation of Nuremberg is hyperbolic and inapt. Scholars have observed that since Nuremberg, no government official has been prosecuted for the crime of aggression. Michael Walzer, *The Crime of Aggressive War*, 6 Wash. U. Global Stud. L. Rev. 635 (2007).

[19] *Kiobel*'s rationale is not dependent upon the political question doctrine. Rather, *Kiobel* recognizes that the separation of powers considerations that are but one aspect of the political question inquiry are "magnified" in the context of the ATS and should govern whether the Court recognizes any claim under the ATS. 133 S. Ct. at 1664-65 (citing *Sosa*, 542 U.S. at 727-28).

operations in Iraq in 2003 and the conduct of those operations were inherently intertwined with the United States' conduct of foreign relations. As *Kiobel* recognized, the danger of unwarranted judicial interference in the conduct of foreign policy – one of the principles underlying the presumption against extraterritorial application – constrains courts considering potential ATS causes of action. 133 S. Ct. at 1664. Here, recognizing an ATS claim based upon actions of U.S. officials for a conspiracy to wage and/or the waging of a war of aggression against Iraq would clearly impinge on the discretion of the Legislative and Executive Branches with respect to matters of foreign affairs.[20] *See* MTD at 22-24. Further, it is undisputed that all of Saleh's alleged injuries occurred in Iraq. *See* 2d Am. Compl. ¶¶ 112, 122-31. Thus *Kiobel* applies in full force.

V. VENUE IS IMPROPER IN THIS DISTRICT

Because Saleh's challenge to the Westfall certification has failed, the United States remains the sole defendant. Saleh does not reside in this district, see 2d Am. Compl. ¶ 9, and none of the alleged acts or omissions occurred in this district, *id.* ¶¶ 27-131. Therefore, venue for her tort claims does not lie in this district. 28 U.S.C. § 1402(b). To the extent any of the acts or omissions alleged took place within the United States, they took place in the District of Columbia. Thus the savings provision of 28 U.S.C. § 1391(e) does not apply.

CONCLUSION

For the many reasons stated above, and in the United States Motion to Dismiss, Plaintiff Saleh's Second Amended Complaint, like her first Amended Complaint, should be dismissed in its entirety. Because Saleh has had ample opportunity to replead her claim, and further pleading in any event would be futile, that dismissal should be with prejudice.

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[20] Neither *Mwani v. Laden*, 947 F.Supp.2d 1 (D.D.C. 2013), nor *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013), *see* Resp. at n.9, present the separation of powers issues inherent in Plaintiff's claims. It is not obvious that judicial consideration of the claims at issue in either case would "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727.

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