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 9 GEORGE W. BUSH, RICHARD B. CHENEY,
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11 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

13 SUNDUS SHAKER SALEH, et al.,)
)
 14 Plaintiffs,)
)
 15 v.)
)
 16 GEORGE W. BUSH, et al.,)
)
 17 Defendants.)
)
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 22)
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No. 3:13-cv-01124 JST
THE UNITED STATES'
MOTION TO DISMISS
DATE: September 11, 2014
TIME: 2:00 PM

1 PLEASE TAKE NOTICE that on September 11, 2014, at 2:00 pm, or as soon thereafter
2 as counsel may be heard, Defendant the United States, which has substituted itself for named
3 defendants former President George W. Bush, former Vice-President Richard B. Cheney, former
4 Secretary of Defense Donald H. Rumsfeld, former National Security Advisor Condoleezza Rice,
5 former Secretary of State Colin Powell, and former Deputy Secretary of Defense Paul
6 Wolfowitz, will present its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) before the
7 Honorable Jon S. Tigar, United States District Court Judge for the Northern District of
8 California.

9 The United States' motion seeks dismissal of all of the claims asserted in the Second
10 Amended Complaint filed by Plaintiff Sundus Shaker Saleh. Because Plaintiff has had ample
11 opportunity to replead her claim, and further pleading in any event would be futile, that dismissal
12 should be with prejudice.

13 Dated: June 23, 2014

14 Respectfully Submitted,

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**BRIEF IN SUPPORT OF
THE UNITED STATES'
MOTION TO DISMISS**

**DATE: September 11, 2014
TIME: 2:00 PM**

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1
2 INTRODUCTION

3 In her Second Amended Complaint (“2d Am. Compl.”), Sundus Shaker Saleh, the
4 plaintiff in this lawsuit, continues her quest to litigate the United States’ decision to go to war
5 with the nation of Iraq in 2003. Saleh, a citizen of Iraq who allegedly lived in that country at the
6 inception of Operation Iraqi Freedom (the “Iraq War”) in 2003 but now resides in Amman,
7 Jordan, has again sued former President George W. Bush, former Vice-President Richard B.
8 Cheney, former Secretary of Defense Donald H. Rumsfeld, former National Security Advisor
9 Condoleezza Rice, former Secretary of State Colin Powell, and former Deputy Secretary of
10 Defense Paul Wolfowitz, for damages she allegedly suffered as a result of the United States’
11 conduct of the war in Iraq. In response to Saleh’s first Amended Complaint, which was filed on
12 September 9, 2013, *see* Dkt. No. 25, the United States substituted itself as the sole defendant for
13 Saleh’s claims on the grounds that the former government employees Saleh sued were acting
14 within the scope of their employment at the time of their alleged wrongful conduct. Dkt. No. 30.
15 Saleh’s sole remedy for such claims is a suit against the United States under the Federal Tort
16 Claims Act (the “FTCA”). The United States then moved to dismiss the Amended Complaint on
17 the basis of lack of subject matter jurisdiction for three independent reasons: 1) the United States
18 has not waived sovereign immunity under the FTCA for the conduct alleged; 2) the claims raise
19 nonjusticiable political questions; and 3) the Alien Tort Statute, which Saleh cited as the
20 jurisdictional basis for her claims, does not provide jurisdiction for Saleh’s claims. *See* Dkt. No.
21 31 at 7-20.¹

22 The Court granted the United States’ motion to dismiss, finding that Saleh failed to
23 exhaust the administrative remedies that are a prerequisite to a suit under the FTCA. Dkt. No.
24 35. The Court rejected Saleh’s challenge to the substitution of the United States for the
25 individual defendants. *Id.* at 3-4. The Court found that Saleh failed to present any evidence
26 challenging the government’s certification that the named defendants were acting within the

27 ¹ The United States also argued that venue does not lie in this Court. Dkt. No. 31 at 20-
28 21.

1 scope of their employment with respect to the allegations of the Amended Complaint. *Id.* at 3;
2 *see Kashin v. Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006) (“[T]he party seeking review bears the
3 burden of presenting evidence and disproving the Attorney General's decision to grant or deny
4 scope of employment certification by a preponderance of the evidence.”) (quoting *Green v. Hall*,
5 8 F.3d 695, 698 (9th Cir. 1993) (per curiam)). Instead, “Saleh relie[d] upon allegations in the
6 complaint, which are not evidence, to argue that Defendants’ conduct was motivated by personal
7 goals and not by the duties of the offices they held.” *See* Dkt. No. 35 at 3.

8 Saleh’s Second Amended Complaint suffers from the same fatal flaws as her Amended
9 Complaint, and thus, as shown below, must meet the same fate. And because Saleh has had
10 ample opportunity to replead her claim, that dismissal should be with prejudice.

11 FACTUAL ALLEGATIONS

12 In the Second Amended Complaint, Saleh repeats her allegation that Bush, Cheney,
13 Rumsfeld, Rice, Powell, and Wolfowitz, conspired to and did use the terrorist attacks of
14 September 11, 2001, as a pretext for taking the United States to war against Iraq.² 2d Am.
15 Compl. ¶¶ 1-2. Saleh again claims that Rumsfeld and Wolfowitz advocated for the military
16 overthrow of Saddam Hussein and the invasion of Iraq during the presidency of William Clinton.
17 *Id.* ¶¶ 30-34. According to Saleh, once George Bush was elected President, and after the
18 September 11 attacks, defendants Bush, Cheney, Wolfowitz, and Rumsfeld conspired to use
19 those attacks as a justification for going to war with Iraq. *Id.* ¶¶ 35-60. Saleh again contends
20 that the named individuals planned to “fix” the intelligence related to the invasion of Iraq and to
21 scare the American people into supporting the Iraq War. *Id.* ¶¶ 61-80. This plan, which also
22 allegedly involved actions by defendants Rice and Powell, included providing the public with
23 purportedly false information about Iraq’s nuclear capabilities and its ties to the al-Qaeda
24 terrorist organization. *Id.* ¶¶ 61-95.

25
26 ² For purposes of this Motion to Dismiss, only Plaintiff’s well-pled allegations of fact are
27 presumed to be true. Conclusory allegations of fact and allegations which assert legal
28 conclusions are not entitled to a presumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-
82 (2009).

1 Saleh invokes the jurisdiction of the Alien Tort Statute, 28 U.S.C. § 1350, to assert claims
 2 that the named individuals conspired to wage (Count I), and did in fact wage (Count II) a war of
 3 aggression against Iraq in violation of international law. *Id.* ¶¶ 138-57. Saleh further alleges that
 4 the individuals' actions violated the United Nations Charter and the Kellogg-Briand Pact, a 1928
 5 treaty to which the United States is a signatory. *Id.* Saleh alleges that she lost her home and
 6 property when she was forced to flee from Iraq to Jordan in 2005 because of the Iraq War and
 7 the ensuing occupation. *Id.* ¶¶ 122-31. Saleh seeks to bring her suit as a putative class action for
 8 herself and on behalf of "innocent Iraqi civilians who, through no fault of their own, suffered
 9 damage as a but-for and proximate cause of [the] Defendants' international legal torts." *Id.* ¶
 10 134.³

11 SUMMARY OF ARGUMENT

12 As with her first Amended Complaint, Saleh's Second Amended Complaint should be
 13 dismissed because the Court lacks subject matter jurisdiction over the claims she asserts.
 14 Because Saleh's claims are based upon the alleged wrongful conduct of government employees
 15 acting within the scope of their employment, the Westfall Act requires that the United States be
 16 substituted in place of the named individuals and the claims brought as FTCA claims against the
 17 United States. None of the few "new" allegations change that fact. Once the United States is
 18 substituted for the named individuals the resulting claims must be dismissed because:

- 19 • Saleh failed to exhaust her administrative remedies, which is a jurisdictional
 20 prerequisite, prior to filing her suit;
- 21 • The United States has not waived its sovereign immunity for claims based upon
 22 customary international law;
- 23 • Saleh's claims are barred by the FTCA's foreign country exception; and
- 24 • Saleh's claims are barred by the FTCA's combatant activities exception.

25
 26 ³ This matter has not been certified as a class action. Any consideration of certification is
 27 premature at this point because the United States' Motion to Dismiss may resolve this case in its
 28 entirety, or, if not, may limit further proceedings in ways that might affect the propriety of class
 certification.

1 As was the case with Saleh’s first Amended Complaint, the Court need look no further
 2 than the requirements of the FTCA for the basis to dismiss the Second Amended Complaint.
 3 However, although the Court need not reach these issues, the claims in the Second Amended
 4 complaint also fail for lack of subject matter jurisdiction because:

- 5 • Saleh’s claims raise non-justiciable political questions that would require the Court to
 6 make determinations that are properly committed to the political branches of the
 7 government; and
- 8 • Saleh’s claims cannot be brought under the Alien Tort Statute.

9 Finally, even if the Court has subject matter jurisdiction over Saleh’s claims, venue is
 10 improper in this district.

11 LEGAL FRAMEWORK

12 A federal district court is a court of limited jurisdiction. *Cook v. City of Pomona*, 70 F.3d
 13 1277 (9th Cir. 1995) ((citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-
 14 183 (1936)). Under Federal Rule of Civil Procedure 12(b)(1), if a district court determines that it
 15 lacks subject matter jurisdiction over the claims raised in a complaint, the complaint must be
 16 dismissed. Fed. R. Civ. P. 12(b)(1); *see also* Fed. R. Civ. P. 12(h)(3) (“If the court determines at
 17 any time that it lacks subject matter jurisdiction, the court must dismiss the action.”). Plaintiff
 18 Saleh, as the party seeking to invoke the court’s jurisdiction, bears the burden of establishing
 19 subject matter jurisdiction. *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495,
 20 499 (9th Cir. 2001), *abrogated on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

21 I. THE UNITED STATES MUST BE SUSTITUTED AS THE PROPER DEFENDANT 22 FOR COUNTS I AND II

23 In Counts I and II, Saleh invokes the jurisdiction of the Alien Tort Statute (the “ATS”),
 24 28 U.S.C. § 1350, to assert tort claims based upon the named individuals’ alleged conspiracy to
 25 commit, and actual commission of, the “crime of aggression.” 2d Am. Compl. ¶¶ 143-46, 152-
 26 56. Saleh asserts that the crime of aggression and conspiracy to commit the crime of aggression
 27 are “violation(s) of international law that rest[] ‘on a norm of international character accepted by
 28

1 the civilized world and defined with a specificity comparable to the features of the 18th-century
2 paradigms [the United States Supreme Court has] recognized.” *Id.* ¶¶ 144, 154 (quoting *Sosa v.*
3 *Alvarez-Machain*, 542 U.S. 692, 725 (2004)). However, because Counts I and II assert claims
4 that are based upon the alleged wrongful conduct of government employees acting within the
5 scope of their government employment, both counts are barred by the Federal Employees
6 Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563
7 (codified in part at 28 U.S.C. §§ 2671, 2674, 2679) (the “Westfall Act”). The Westfall Act
8 makes clear that the exclusive remedy for a claim based upon the alleged “negligent or wrongful
9 act or omission” of a government employee acting within the scope of his or her employment is a
10 suit against the United States under the Federal Tort Claims Act (“FTCA”). 28 U.S.C. §
11 2679(b)(1). The Westfall Act expressly precludes any other “civil action or proceeding for
12 money damages” arising out of the same subject matter against the employee. 28 U.S.C. §
13 2679(b)(1). The exclusivity of the FTCA remedy is applicable even if a plaintiff cannot recover
14 against the United States under the FTCA. *See United States v. Smith*, 499 U.S. 160, 166 (1991)
15 (“Congress recognized that the required substitution of the United States as the defendant in tort
16 suits filed against Government employees would sometimes foreclose a tort plaintiff’s recovery
17 altogether.”).

18 Upon certification by the Attorney General or an appropriate designee that the defendant
19 individual employee acted within the scope of his employment, the United States is substituted in
20 the employee’s place and becomes the sole defendant by operation of law. 28 U.S.C. §
21 2679(d)(1); *Jackson v. Tate*, 648 F.3d 729, 735 (9th Cir. 2011).⁴ In this case, a designee of the
22 Attorney General has certified that the named individuals – Bush, Cheney, Rumsfeld, Powell,
23

24 ⁴ Certification of scope of employment under the Westfall Act is not a discretionary
25 action by the Department of Justice. Federal employees who are sued for their actions have a
26 right to receive a scope of employment certification whenever their alleged conduct satisfies the
27 requirements of the Act. If a scope certification is not provided, federal employees may petition
28 the court to compel certification. 28 U.S.C. § 2679(d)(3); *see also Gutierrez de Martinez v.*
Lamagno, 515 U.S. 417, 431 (1995) (finding that “the Act specifically allows employees whose
certification requests have been denied by the Attorney General, to contest the denial in court”).

1 Rice and Wolfowitz – each acted within the scope of his or her employment with respect to the
2 allegations in the Second Amended Complaint. *See* United States’ Notice of Substitution, Ex. 1
3 (certification). This certification is “prima facie evidence” that the named individuals indeed
4 acted within the scope of their employment. *Jackson*, 648 F.3d at 735 (“[I]f the Attorney
5 General makes such a certification, then ‘the United States must be substituted as the
6 defendant.’”) (*quoting Osborn v. Haley*, 549 U.S. 225, 240-41 (2007)). The effect of this
7 substitution is that each of the named individuals is absolutely immune from suit for the alleged
8 tort(s) that gave rise to the Second Amended Complaint. *See* 28 U.S.C. § 2679(b)(1) (“civil
9 action[s] or proceeding[s] . . . against the employee or the employee’s estate [are] precluded”).

10 As this Court has recognized, should Plaintiff Saleh challenge the Attorney General’s
11 decision to grant scope of employment certification, under Ninth Circuit law she “bears the
12 burden of presenting *evidence* and disproving [that] decision . . . by a *preponderance of the*
13 *evidence.*” *Jackson*, 648 F.3d at 735 (italics added) (*quoting Kashin*, 457 F.3d at 1036) (internal
14 quotation marks omitted). The defendants were previously certified by a designee of the
15 Attorney General as having acted within the scope of their employment with respect to the
16 allegations in the first Amended Complaint, *see* Dkt. No. 30, Exh. 1, and the United States was
17 substituted as the sole defendant in this matter by operation of law. *Id.* Then, pursuant to a
18 motion to dismiss filed by the government, *see* Dkt. No. 31, the Court properly dismissed Saleh’s
19 Amended Complaint because she relied upon the *allegations* of her complaint, as opposed to
20 actual evidence, to refute the scope of employment certification filed by the United States. *See*
21 Dkt. No. 35 at 3 (*quoting Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995)). Thus to
22 the extent Saleh challenges the certification of scope of employment filed with respect to the
23 Second Amended Complaint relying solely upon the allegations of the complaint, that challenge
24 must also fail as a matter of law. *See id.*; *see also Gutierrez de Martinez v. Drug Enforcement*
25 *Admin.*, 111 F.3d 1148, 1155 (4th Cir. 1997) (“If the plaintiff does not come forward with any
26 evidence, the certification is conclusive. Moreover, the plaintiff’s submission must be specific
27 evidence or the forecast of specific evidence that contradicts the Attorney General’s certification
28

1 decision, not mere conclusory allegations and speculation.”); *Clamor v. U.S.*, 240 F.3d 1215,
2 1219 (9th Cir. 2001) (“[W]here the United States has assumed the benefits and burdens of
3 defending its employee, we will not disturb that decision unless presented with substantial
4 evidence requiring us to do so.”) (Tallman, J., dissenting).⁵

5 In any event, the Second Amended Complaint, which does not differ in any material
6 respect from the first Amended Complaint,⁶ does not allege facts which even could establish by a
7 preponderance of the evidence that the defendants’ alleged conduct was outside the scope of
8 their employment. District of Columbia law recognizes an especially “expansive” view of scope
9 of employment. *Greene v. Nguyen*, CIV.A. 05-0407 RMU, 2005 WL 3275897, *4 (D.D.C. Sept.
10 7, 2005). District of Columbia scope of employment law, which is drawn from the Restatement
11 (Second) of Agency, provides that the conduct of a servant is within the scope of employment if:
12 (1) it is of the kind he is employed to perform; (2) it occurs substantially within the authorized
13 time and space limits; and (3) it is actuated, at least in part, by a purpose to serve the master.
14 Restatement (Second) of Agency § 228 (1958) (“Restatement”); *Moseley v. Second New St. Paul*
15 *Baptist Church*, 534 A.2d 346, 348 n. 4 (D.C. 1987).⁷ All of these factors are clearly satisfied.

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19 ⁵ *Cf. Amos v. I.R.S.*, No. 98-56694, 1999 WL 638455, at *1 (9th Cir. Aug. 17, 1999)
20 (Table) (“[Plaintiff’s] unsupported allegations regarding the motivation of the individual
21 defendants failed to meet his burden of disproving the U.S. Attorney’s certification by a
22 preponderance of the evidence.”).

23 ⁶ The Second Amended Complaint covers no new factual ground. Saleh merely offers
24 additional allegations that are substantially similar to those already asserted in the Amended
25 Complaint with respect to various categories of alleged conduct by the defendants. *See* 2d Am.
26 Compl. ¶ 2 (purported planning for an invasion of Iraq that predated the Bush Administration);
27 *id.* ¶¶ 36-39 (implementation of a plan to invade Iraq once in office); *id.* ¶¶ 76-77 (false claims
28 about Iraq’s nuclear program); *id.* ¶ 100 (President Bush being “on a mission from God”); *see*
also id. ¶ 60 (citing third party’s conclusory characterization of defendants’ actions as “war
crimes”).

⁷ The parties agree that District of Columbia law governs the scope of employment
determination in this case. *See* Dkt. No. 32 at 32-33. 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 – is not implicated because Plaintiff’s claims are not based upon a use
of force by any of the defendants individually. To the extent war necessarily includes the use of
force, such use of force is wholly expected and thus complies with the Restatement criteria.

- 1 • The high level positions the defendants held in the U.S. government – President, Vice
2 President, Secretary of State, Secretary of Defense, National Security Advisor, and
3 Deputy Secretary of Defense – clearly have some involvement with and/or responsibility
4 for foreign relations. This would necessarily (and constitutionally) include
5 responsibilities related to the circumstances under which the United States would conduct
6 military operations against a foreign enemy. Thus the conduct attributed to each of the
7 defendants, which involved determining whether the United States should or would
8 conduct military operations against Iraq and the manner in which those operations were
9 conducted, was clearly the kind of conduct they were employed to perform because it
10 was “of the same general nature as th[e] [conduct] authorized” or at least “incidental to
11 the conduct authorized” for their offices. *Harbury v. Hayden*, 444 F. Supp. 2d 19, 33
12 (D.D.C. 2006) (quoting Restatement § 229), *aff’d*, 522 F.3d 413 (D.C. Cir. 2008). In
13 fact, it was due solely to their federal employment that the individuals even could
14 authorize or help plan military action by the United States. At the very least, the conduct
15 alleged had “some nexus” to that authorized by each defendant’s position in the
16 government. *Id.* at 35 (citation omitted).⁸
- 17 • All of the defendants were federal employees when the Iraq War began with the invasion
18 of Iraq in 2003. *See* 2d Am. Compl. ¶¶ 10-14; 112. All of the actions alleged with
19 respect to the determination of whether the United States should conduct military
20 operations and the conduct of those operations clearly took place substantially within the
21 “authorized time and space limits” of the defendants’ employment. *See* 2d Am. Compl.
22 ¶¶ 35-121.⁹

23
24 ⁸ *See Allaithi v. Rumsfeld*, No. 13-5096, 2014 U.S. App. LEXIS 10696, at *12 (D.C. Cir.
Jun. 10, 2014) (describing the “of the kind of conduct” test as “not [] particularly rigorous”).

25 ⁹ To the extent that Plaintiff attempts to evade this indisputable fact by citing alleged
26 “planning” for military action against Iraq that predated the Bush Administration, that attempt
27 fails. 2d Am. Compl. ¶¶ 27-34. The only defendants who are specifically alleged to have
28 engaged in any actions related to Iraq prior to their federal employment are defendants Rumsfeld
and Wolfowitz. *See id.* And Plaintiff’s allegations against Rumsfeld and Wolfowitz amount to
nothing more than her contention that during the Clinton Administration they publicly expressed

- The nature of the defendants' positions in the Bush Administration also necessarily included involvement in decisions by the United States to engage in military action against a foreign sovereign and the conduct of those operations. Whatever actions they allegedly took vis-à-vis the United States' actions in Iraq were clearly taken in the course of performing their job duties, and undertaken, *at least in part*, on behalf of the United States.¹⁰ *See Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (“[T]he proper inquiry [for purposes of determining scope of employment] . . . focuses on the underlying dispute or controversy, not on the nature of the tort.”) (quoting *Weinberg v. Johnson*, 518 A.2d 985, 992 (D.C. 1986)).

Courts applying District of Columbia law have repeatedly recognized that employees act within the scope of their employment even when they allegedly commit egregious intentional torts well beyond the type of conduct alleged here so long as those torts are a “direct outgrowth” of their legitimate employment responsibilities.¹¹ It is of particular relevance to Saleh’s claims

their personal views that it was in the United States’ strategic interest to take military action against Iraq. *See, e.g.*, 2d Am. Compl. ¶¶ 30-33. District of Columbia law only requires that an employee’s actions occur “substantially” (as opposed to entirely) within the authorized time and space limits to be within the scope of employment. It is clear that despite the alleged pre-employment views of Rumsfeld and Wolfowitz, the only actions that can arguably be characterized as having a direct connection to the Iraq War substantially occurred while they were federal employees. *Compare* 2d Am. Compl. ¶¶ 30-34 (signed letter sent to President Clinton, published article, and congressional testimony concerning Iraq policy) *with id.* ¶¶ 66-80 (alleged “fixing” of intelligence to justify invasion of Iraq). Plaintiff has not offered a single allegation that Rumsfeld or Wolfowitz (or any of the defendants) were in a position as private citizens to control or direct the political or military action of the United States to a degree that would justify holding them personally liable for the entirety of the Iraq War.

¹⁰ *See Allaithi*, 2014 U.S. App. LEXIS 10696, at *16 (“[District of Columbia] law requires an employee be *solely* motivated by his own purposes for consequent conduct to fall outside the scope of employment.”) (italics in original) (citation omitted); Restatement (Third) Agency § 7.07(2) (2008) (employee does not act outside the scope of employment unless he embarks on an independent course of conduct and there is a complete absence of employment purpose).

¹¹ *See Wilson v. Libby*, 535 F.3d 697, 712 (D.C. Cir. 2008) (alleged unlawful disclosure of covert agent’s identity which threatened national security); *Allaithi*, 2014 U.S. App. LEXIS 10696, at *17 (alleged abuse of Guantánamo Bay detainees); *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976) (assault and rape of store customer by deliveryman); *Johnson v. Weinberg*, 434 A.2d 404 (D.C. 1981) (employee’s shooting of laundromat customer during dispute over missing shirts); *Howard Univ. v. Best*, 484 A.2d 958, 987 (D.C. 1984) (“[T]he master may be liable for

1 that courts considering tort claims against federal officials for their alleged violation of
 2 international law norms, including “*jus cogens*” norms, have repeatedly and consistently found
 3 that the officials were acting within the scope of their employment.¹² In fact, the United States is
 4 not aware of a single case in which *any* federal court has found a federal official to have been
 5 acting outside the scope of his or her employment with respect to an alleged violation of
 6 international law. In light of the expansive definition of scope of employment recognized by
 7 District of Columbia law, and the extensive and consistent body of caselaw construing that
 8 definition, it is clear that Saleh cannot meet her burden to overturn the government’s certification
 9 that the named defendants were acting within the scope of their employment with respect to the
 10 relevant allegations of the Second Amended Complaint. This is particularly true since the
 11 conduct Saleh challenges – warmaking – is a quintessential act of a sovereign.

12 There are only two exceptions to the exclusive remedy mandated by the Westfall Act:
 13 claims brought for 1) “a violation of the Constitution” or 2) “a violation of a statute of the United
 14 States.” 28 U.S.C. § 2679(b)(2). Neither exception is applicable here. Saleh does not allege any
 15 constitutional violation. And the ATS itself cannot be “violated” because it is not a statute that
 16 creates substantive rights. As the Supreme Court recognized in *Sosa v. Alvarez-Machain*, “the
 17 ATS is a jurisdictional statute creating no new causes of action.” 542 U.S. at 724. It merely
 18 affords the jurisdictional basis for the assertion of rights conferred elsewhere, namely by the law
 19 of nations or a U.S. treaty. *Id.* The Ninth Circuit’s decision in *Alvarez-Machain v. United*

20
 21 an assault arising out of and committed in the course of employment even though the assault is
 22 motivated in part by passion, savagery or personal revenge.”) (citing *Lyon*, 533 F.2d at 654).

23 ¹² See *Rasul v. Rumsfeld*, 414 F.Supp.2d 26, 31-36 (D.D.C. 2006) (alleged torture of
 24 Guantánamo Bay detainees), *aff’d in part*, 512 F.3d 644 (D.C. 2008), *vacated*, 555 U.S. 1083
 25 (2008), *reinstated in relevant part*, *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *Bancoult v.*
 26 *McNamara*, 370 F. Supp. 2d 1, 7-8 (D.D.C. 2004) *aff’d*, 445 F.3d 427 (D.C. Cir. 2006) (alleged
 27 genocide, torture, forced relocation, and cruel, inhuman, and degrading treatment of indigenous
 28 population); *Schneider v. Kissinger*, 310 F.Supp.2d 251, 264-66 (D.D.C. 2004) (alleged
 kidnapping and death of Commander-in-Chief of the Chilean army), *aff’d on other grounds*, 412
 F.3d 190 (D.C. Cir. 2005), *Harbury v. Hayden*, 444 F.Supp.2d 19, 35-36 (D.D.C. 2006), *aff’d*, *In*
re OCA, Inc., 552 F.3d 413, (D.C. Cir. 2008) (alleged torture and extrajudicial execution of
 Guatemalan rebel leader); *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 113-15
 (D.D.C. 2007) *aff’d sub nom. Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (alleged torture and
 abuse of military detainees).

1 *States*, 331 F.3d 604, 631 (9th Cir. 2003), *rev'd on other grounds*, 542 U.S. 692 (2004), is
 2 directly on point. In *Alvarez-Machain*, the Ninth Circuit affirmed the district court's
 3 determination that an ATS action based upon customary international law did not fall within the
 4 exception to the Westfall Act for suits brought for a violation of a statute of the United States,
 5 and that "a claim under the AT[S] is based on a violation of international law, not of the AT[S]
 6 itself." *Id*; *see also Sosa*, 542 U.S. at 713-14 (holding that the ATS is a jurisdictional statute only
 7 and creates no new causes of action). As the Ninth Circuit recognized, the United States is the
 8 proper defendant for ATS claims based upon customary international law – the type of claims
 9 Saleh asserts here. 2d Am. Compl. ¶¶ 5, 129-48.¹³

10 To the extent that Plaintiff Saleh relies upon the Kellogg-Briand Pact as the basis for the
 11 claims brought in Counts I and II against the Defendants, *see* 2d Am. Compl. ¶¶ 141, 151, those
 12 claims are still barred by the Westfall Act. While treaties such as the Kellogg-Briand Pact may
 13 be part of the "law of the land," 2d Am. Compl. ¶¶ 141, 151, they are not part of the
 14 Constitution.¹⁴ Nor are treaties federal statutes for Westfall Act purposes.¹⁵

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 17 ¹³ Plaintiff's allegation that the War Crimes Act qualifies as a statutory exception to the
 18 exclusive remedy provided by the Westfall Act is flatly wrong. 2d Am. Compl. ¶ 7. In order to
 19 qualify as an exception to the Westfall Act remedy a statute must authorize a civil action for
 20 money damages against an individual. 28 U.S.C. § 2679(b)(1)-(2). The War Crimes Act is a
 21 *criminal* statute which provides for the imposition of fines and/or imprisonment as criminal
 22 penalties for the commission of certain "war crimes" defined in the statute. 18 U.S.C. § 2441
 23 (a). Nowhere within the text of the War Crimes Act is there *any* authorization for a civil action
 24 for money damages against an individual. While courts have used definitions found within the
 25 War Crimes Act to determine whether particular conduct amounted to a violation of customary
 international law redressable under the Alien Tort Statute, *In re Agent Orange Product Liability
 Litigation*, 373 F.Supp.2d 7, 113-14 (E.D.N.Y. 2005), no court has recognized a private action
 for civil liability under the War Crimes Act. *See Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C.
 Cir. 2009) (no private right of action under War Crimes Act); *Ford v. Artiga*, No. 2:12-CV-
 02370 KJM-AC, 2013 WL 3941335, at *8 (E.D. Cal. Jul. 30, 2013) (same); *Hopson v. Secret
 Service*, No. 3:12CV-770-H, 2013 WL 504921, at *2 (W.D. Ky. Feb. 8, 2013) (same); *Swift v.
 Bush*, No. CIV.A. 10-7388, 2011 WL 2517143, at *2 (E.D. Pa. Jun. 23, 2011) (same); *Mujica v.
 Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1183 (C.D. Cal. 2005) (same).

¹⁴ The Constitution expressly recognizes a distinction between federal constitutional,
 statutory, and treaty provisions. The Supremacy Clause states: "This Constitution, and the Laws
 of the United States which shall be made in pursuance thereof; and all Treaties made, or shall be
 made, under the Authority of the United States, shall be the Supreme Law of the Land . . ." U.S.
 Const. art. VI, cl. 2 (emphasis added).

1 In sum, upon substitution, the United States is now once again, by operation of law, the
2 sole defendant in this matter.¹⁶

3 II. SALEH’S CLAIMS MUST BE DISMISSED BECAUSE THEY CANNOT BE
4 BROUGHT UNDER THE FEDERAL TORT CLAIMS ACT

5 A. The Court Lacks Subject Matter Jurisdiction Over The Claims Asserted In Counts
6 I and II

7 1) Saleh failed to exhaust her administrative remedies before filing suit.

8 When the United States is substituted for an individual federal defendant, the resulting
9 claim is fully “subject to the limitations and exceptions applicable to” FTCA claims. 28 U.S.C.
10 § 2679(d)(4). As this Court recognized in dismissing Saleh’s first Amended Complaint, *see* Dkt.
11 No. 35, one of those limitations is the requirement that a plaintiff must exhaust all administrative
12 remedies before pursuing an FTCA claim against the United States. Specifically, 28 U.S.C. §
13 2675(a) states that “[a]n action shall not be instituted upon a claim against the United States for
14 money damages . . . unless the claimant shall have first presented the claim to the appropriate
15 Federal agency and his claim shall have been finally denied by the agency in writing” or the
16 agency “fail[s] . . . to make final disposition of a claim within six months after it is filed . . .”
17 *See also McNeil v. United States*, 508 U.S. 106, 112 (1993) (“The FTCA bars claimants from
18 bringing suit in federal court until they have exhausted their administrative remedies.”). This

19 ¹⁵ As the Seventh Circuit has observed, “every court to consider the issue has determined
20 that the Westfall Act’s exemption for statutory claims does not include claims brought pursuant
21 to a treaty.” *Sobitan v. Glud*, 589 F.3d 379, 386 (7th Cir. 2009); *see also Ameur v. Gates*, No.
22 1:12-cv-823 (GBL/TRJ), 2013 WL 3120205, at * 8 (E.D. Va. June 20, 2013) (finding Westfall
23 Act exception inapplicable to claims brought pursuant to a treaty because “[t]reaties are not
24 statutes, as they do not invoke the bicameral legislative process required for what is commonly
25 understood to be a statute”); *Hamad v. Gates*, No. C10-591 MJP, 2011 WL 6130413, at *9
26 (W.D. Wash. Dec. 8, 2011) (finding that claims under the Geneva Conventions and customary
27 international law did not fall under Westfall exception), *vacated*, 732 F.3d 990 (9th Cir. 2013);
28 *Bansal v. Russ*, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007) (claim under Vienna Convention on
Consular Relations does not fall under Westfall Act exception).

¹⁶ Because the United States has substituted itself by operation of law as the only proper
defendant to this suit, the named individuals are not required to respond to the complaint in their
individual capacities. The United States notes, however, that each of those individuals would
have any number of personal defenses that could be raised, including but not limited to absolute
immunity for the former President, qualified or other common law immunities, lack of personal
jurisdiction, and the like.

1 exhaustion requirement is jurisdictional. 28 U.S.C. § 2675(a); *see Vacek v. U.S. Postal Service*,
2 447 F.3d 1248, 1250 (9th Cir. 2006) (“We have repeatedly held that the exhaustion requirement
3 is jurisdictional in nature and must be interpreted strictly . . . particularly [] since the [FTCA]
4 waives sovereign immunity [and] [a]ny such waiver must be strictly construed in favor of the
5 United States.”) (citations omitted). Saleh makes no new allegations in her Second Amended
6 Complaint with respect to exhaustion; in fact she has not satisfied the exhaustion requirement.
7 Therefore, the Court lacks subject matter jurisdiction over Saleh’s FTCA claims and need go no
8 further to dismiss this complaint. *See* 28 U.S.C. § 2675(a); *McNeil*, 508 U.S. at 112; *Vacek*, 447
9 F.3d at 1250.

10 2) The United States has not waived its sovereign immunity for suits based
11 upon customary international law.

12 The United States, as a sovereign, is immune from suit except to the extent it waives its
13 immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *McGuire v. United States*,
14 550 F.3d 903, 910 (9th Cir. 2008). Such a waiver must be “unequivocally expressed” and
15 “cannot be implied.” *Mitchell*, 445 U.S. at 538 (citation and quotation omitted). Through the
16 FTCA, as amended by the Westfall Act, the United States has waived its immunity for tort
17 claims arising from the negligent or wrongful acts or omissions of federal employees that
18 occurred within the scope of their employment. *See* 28 U.S.C. § 1346(b)(1). This waiver,
19 however, is limited to circumstances where the United States, if a private person, would be liable
20 “in accordance with the law of the place” where the act or omission occurred. *Id.* Courts have
21 repeatedly held that “the law of the place” refers to state law only. *See, e.g., FDIC v. Meyer*, 510
22 U.S. 471, 478 (1994) (“[W]e have consistently held that § 1346(b)’s reference to the “law of the
23 place” means law of the State—the source of substantive liability under the FTCA) (citing
24 cases); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1024-25 (9th Cir. 2001) (barring
25 FTCA claim brought under federal law because FTCA action must be based on violation of state
26 law). As such, an FTCA claim cannot be based on alleged violations of customary international
27 law or international treaties. *See Sobitan*, 589 F.3d at 386; *Ameur*, 2013 WL 3120205, at *8;

1 *Hamad*, 2011 WL 6130413, at *9; *Bansal*, 513 F. Supp. 2d at 280.¹⁷ Thus, Saleh’s claims for
 2 alleged violations of customary international law are barred by sovereign immunity.

3 3) Saleh’s claims are barred by the foreign country exception to the FTCA.

4 As stated above, the waiver of sovereign immunity embodied by the FTCA is limited to
 5 circumstances where the United States, if a private person, would be liable “in accordance with
 6 the law of the place” where the act or omission occurred. 28 U.S.C. § 1346(b)(1). The FTCA
 7 explicitly excludes from its coverage “[a]ny claim arising in a foreign country.”
 8 28 U.S.C. § 2680(k). Claims arising in foreign countries are exempted from the FTCA because
 9 Congress sought “to avoid application of substantive foreign law” in claims against the United
 10 States. *Sosa*, 542 U.S. at 707-08; *see also United States v. Spelar*, 338 U.S. 217, 221 (1949)
 11 (noting that Congress “was unwilling to subject the United States to liabilities [under the FTCA]
 12 depending upon the laws of a foreign power”). The Supreme Court has held that this “foreign
 13 country exception” bars all claims based on any injury suffered in a foreign country, *regardless*
 14 *of where the tortious act or omission occurred*. *Sosa*, 542 U.S. at 712; *see also Agredano v. U.S.*
 15 *Customs Service*, 223 Fed.Appx. 558, 559 (9th Cir. 2007). Since all of the injuries Plaintiff
 16 Saleh claims she suffered as a result of the named individuals’ conduct occurred outside of the
 17 United States and principally in Iraq, *see* 2d Am. Compl. ¶¶ 114-24, her claims are barred by the
 18 FTCA’s foreign country exception. *Sosa*, 542 U.S. at 712.

19 4) Saleh’s claims are barred by the combatant activities exception to the
 20 FTCA.

21 The FTCA’s waiver of sovereign immunity contains an exception for “[a]ny claim arising
 22 out of combatant activities of the military or naval forces, or the Coast Guard, during time of
 23 war.” 28 U.S.C. § 2680(j). Plaintiff Saleh alleges that her injuries were the result of “the chaos
 24 that enveloped Iraq” following the initiation of the Iraq War of 2003. 2d Am. Compl. ¶ 132.
 25 Since any connection between this purported “chaos” and the United States was the result of the
 26

27 ¹⁷ *See also Koohi*, 976 F.2d at 1333 n.4 (noting that ATS does not constitute a waiver of
 28 sovereign immunity).

1 combatant activities of the United States military during the Iraq War, Saleh's claims are barred
2 by the FTCA's combatant activities exception.¹⁸

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

5 Even if the claims asserted in Counts I and II of the Second Amended Complaint could
6 be brought under the ATS, the claims raise non-justiciable political questions. As such, the
7 Court lacks subject matter jurisdiction to consider Counts I and II because the resolution of these
8 counts would require the Court to make determinations that are properly committed to the
9 political branches of the government.

10 The roots of the political question doctrine extend as far back as *Marbury v. Madison*, 5
11 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall observed that “[q]uestions, in their
12 nature political, or which are, by the constitution and laws, submitted to the executive, can never
13 be made in this court.” *Id.* at 170. The “political question doctrine” is “primarily a function of
14 the separation of powers.” *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). It is the “relationship
15 between the judiciary and the coordinate branches of Federal Government” that gives rise to a
16 political question. *Id.* at 210. Such questions arise in “controversies which revolve around
17 policy choices and value determinations” that are constitutionally committed to the Executive or
18 Legislative Branches of our system of government. *Japan Whaling Ass'n v. Am. Cetacean*
19 *Soc'y*, 478 U.S. 221, 230 (1986).

20 To evaluate whether a case raises political questions, a court must first “identify with
21 precision” the issues it is being asked to decide. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1434
22 (2012) (Sotomayor, J., concurring). “[T]he presence of a political question . . . turns not on the
23 nature of the government conduct under review but more precisely on the question the plaintiff
24 raises about the challenged action.” *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836,
25 842 (D.C. Cir. 2010) (en banc). This requires “a discriminating analysis of the particular

26 ¹⁸ See *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) (Scope of FTCA's
27 combatant activities exception includes “not only physical violence, but activities both necessary
28 to and in direct connection with actual hostilities.”).

1 question posed, in terms of the history of its management by the political branches, of its
2 susceptibility to judicial handling in the light of its nature and posture in the specific case, and of
3 the possible consequences of judicial action.” *Baker*, 369 U.S. at 211-12.

4 In *Baker v. Carr*, the Supreme Court identified six independent tests for determining
5 whether courts should defer to the political branches on an issue:

6 Prominent on the surface of any case held to involve a political question is found
7 [1] a textually demonstrable constitutional commitment of the issue to a
8 coordinate political department; or [2] a lack of judicially discoverable and
9 manageable standards for resolving it; or [3] the impossibility of deciding without
10 an initial policy determination of a kind clearly for nonjudicial discretion; or [4]
11 the impossibility of a court's undertaking independent resolution without
12 expressing lack of the respect due coordinate branches of government; or [5] an
13 unusual need for unquestioning adherence to a political decision already made; or
14 [6] the potentiality of embarrassment from multifarious pronouncements by
15 various departments on one question.

16 369 U.S. 185, 217 (1962). A nonjusticiable political question is present if *any one* of these
17 factors is “inextricable from the case.” *Id.* However, the Ninth Circuit has observed that
18 these tests are more discrete in theory than in practice, with the analyses often
19 collapsing into one another. . . This overlap is not surprising given the common
20 underlying inquiry of whether the very nature of the question is one that can
21 properly be decided by the judiciary.

22 *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005) (citing *Nixon v. United States*, 506
23 U.S. 224, 228-29 (1993)).

24 The Ninth Circuit has held that where a case presents a political question, courts lack
25 subject matter jurisdiction to decide the question. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982
26 (9th Cir. 2007). This is in accord with the Supreme Court’s recognition that disputes involving
27 political questions lie outside the Article III power of federal courts. *Schlesinger v. Reservists*

1 *Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (“[T]he concept of justiciability, which
2 expresses the jurisdictional limitations imposed upon federal courts by the ‘case or controversy’
3 requirement of Art. III, embodies . . . the political question doctrine [].”) (citing *Flast v. Cohen*,
4 392 U.S. 83, 95 (1968)); *see also No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d
5 1380, 1382 (9th Cir.1988) (“[T]he presence of a political question precludes a federal court,
6 under [A]rticle III of the Constitution, from hearing or deciding the case presented.”).

7 When the *Baker* formulation is applied to the claims presented by Plaintiff Saleh it is
8 clear that the claims are non-justiciable under the political question doctrine. The very first
9 *Baker* factor – whether there is a “textually demonstrable constitutional commitment of the issue
10 to a coordinate political department” – proves as much. It is beyond question that there is a
11 “textually demonstrable constitutional commitment” of war powers and national defense issues
12 to the Executive and Legislative branches. *See Doe v. Bush*, 323 F.3d 133, 143 (1st Cir. 2003)
13 (“War powers, in contrast to ‘all legislative power,’ are shared between the political branches.”)
14 (emphasis in original). The Constitution identifies the President as “Commander in Chief of the
15 Army and Navy of the United States, and of the Militia of the several states, when called into the
16 actual Service of the United States.” U.S. Const. art II, § 2. The Constitution gives Congress the
17 powers to “provide for the common Defence and general Welfare of the United States . . . [t]o
18 “declare War . . . [t]o raise and support Armies . . . [t]o provide and maintain a Navy . . . to make
19 Rules for the Government and Regulation of the land and naval forces . . . [and] provide for
20 calling forth the Militia to . . . repel Invasions.” *Id.* art.I, §8. Clearly the question of whether the
21 United States should have gone to war with Iraq in 2003, which is the crux of Saleh’s Complaint,
22 *see* 2d Am. Compl. ¶¶ 129-48, is wholly encompassed by this “textually demonstrable
23 commitment.” *See El-Shifa*, 607 F.3d at 845 (“Whether the circumstances warrant a military
24 attack on a foreign target is a ‘substantive political judgment[] entrusted expressly to the
25 coordinate branches of government.”) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973)); *cf.*
26 *Alperin*, 410 F.3d at 558-62 (finding that political question doctrine barred ATS claim which
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1 implicated policy decision by United States government not to prosecute former regime and
2 defendants for war crimes).

3 Moreover, the decision to go to war with a foreign nation is inherently entangled with the
4 conduct of the foreign relations of the United States government. Like war powers and national
5 defense, matters of foreign relations are textually committed to the political branches. Article II
6 of the Constitution states that the President “shall have Power, by and with the Advice and
7 Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors,” and also “shall receive
8 Ambassadors and other public Ministers.” *Id.* art. II, §§ 2-3. Article I gives Congress the power
9 to “regulate Commerce with foreign Nations.” *Id.* art. I, § 8. As the Supreme Court has
10 recognized, “[t]he conduct of the foreign relations of our government is committed by the
11 Constitution to the executive and legislative – ‘the political’ – departments of the government,
12 and the propriety of what may be done in the exercise of this political power is not subject to
13 judicial inquiry or decision.” *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (citations
14 omitted); *see also Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign
15 policy and national security are rarely proper subjects for judicial intervention.”) (citations
16 omitted); *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)
17 (“[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such
18 decisions are wholly confided by our Constitution to the political departments of the government,
19 Executive and Legislative.”); *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d
20 1142, 1144 (9th Cir. 1999).

21 Plaintiff Saleh’s claims are also inextricably tied to the fourth *Baker* factor – the
22 impossibility of the court undertaking independent resolution without expressing lack of the
23 respect due coordinate branches of government. The question of whether the United States
24 should have gone to war with Iraq is not only a decision that was committed by the Constitution
25 to the political branches, it is a decision those branches have already made. In October 2002, the
26 United States Congress passed a joint resolution authorizing the use of military force against
27 Iraq. *See Authorization for Use of Military Force Against Iraq Resolution of 2002*, Pub.L. 107–
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1 243, 116 Stat. 1498, enacted October 16, 2002, H.J.Res. 114. The Resolution cites a long list of
2 factors as justification for the use of force against Iraq, beginning with the Iraq war against, and
3 illegal occupation of, Kuwait in 1990 and continuing through various subsequent United Nations
4 Security Council resolutions regarding Iraq. *Id.* The Court could not consider Plaintiff Saleh’s
5 claims without questioning Congress’ judgment with respect to each of these factors –
6 determining whether the particular judgment was correct and if not, the effect of the incorrect
7 judgment(s) on the validity of the Authorization as a whole.

8 The Court would also have to question the Resolution’s recognition that “the President
9 has authority under the Constitution to take action in order to deter and prevent acts of
10 international terrorism against the United States” and that “it is in the national security interests
11 of the United States to restore international peace and security to the Persian Gulf region.” *Id.*
12 The Court would have to consider the authorization given to the President “to use the Armed
13 Forces of the United States as he determines to be necessary and appropriate in order to – (1)
14 defend the national security of the United States against the continuing threat posed by Iraq; and
15 (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.” *Id.* The
16 Court would have to determine whether the Resolution, as Congress declared, “constitute[d]
17 specific statutory authorization within the meaning of section 5(b) of the War Powers
18 Resolution.”¹⁹ *Id.* And the Court would have to examine former President Bush’s subsequent
19 policy determination that the use of military force against Iraq was “necessary and appropriate.”

20 Even under Saleh’s construction of the question at issue, addressing the purported crime
21 of aggression involves answering questions barred by the political question doctrine, including
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24 ¹⁹ The War Powers Resolution of 1973 is a federal law intended to:
25 fulfill the intent of the framers of the Constitution of the United States and insure
26 that the collective judgment of both the Congress and the President will apply to
27 the introduction of United States Armed Forces into hostilities, or into situations
28 where imminent involvement in hostilities is clearly indicated by the
circumstances, and to the continued use of such forces in hostilities or in such
situations.

50 U.S.C. § 1541(a); *see also* 50 U.S.C. §§ 1541-48.

- 1 • Whether the authorization of the United Nations Security Council was needed
- 2 before the United States could go to war against Iraq, 2d Am. Compl. ¶¶ 113-14;
- 3 • Whether there was an “imminent humanitarian disaster or event” in Iraq that
- 4 required the intervention of a foreign power, *id.* ¶ 115;
- 5 • Whether Iraq posed an “imminent military threat” that required the United States
- 6 to act in self-defense, *id.* ¶ 116-17; and
- 7 • Whether the invasion of Iraq was reasonably related or proportionate to the threat
- 8 posed, *id.* ¶ 117.

9 There can be little doubt that if the Court were to undertake the extensive review
 10 described above, which would be necessary for the resolution of Saleh’s claims, it would
 11 constitute a clear lack of respect for the role of the political branches in determining the
 12 circumstances under which this nation went to war against Iraq in 2003. In addition, there is
 13 great potential for embarrassment – the sixth *Baker* factor – if a federal court were to consider
 14 ten years after the fact whether the Iraq War was undertaken by the United States without legal
 15 justification. *See Corrie*, 503 F.3d at 984.

16 Plaintiff Saleh’s claims are not saved by *Koohi v. United States*, 976 F.2d 1328 (9th Cir.
 17 1992). In *Koohi*, the Ninth Circuit held that the political question doctrine did not bar FTCA
 18 claims for the shooting down of a civilian aircraft by a United States warship. *Id.* at 1332.²⁰
 19 *Koohi*, however, is easily distinguishable from this case. The plaintiffs in *Koohi* sought judicial
 20 review of a single action by the United States military, alleging the negligent operation of a naval
 21 vessel. *Id.* at 1330-31. In contrast, Saleh asks the Court to review the *entire basis* for the
 22 Executive (particularly the President) and Legislative Branches’ decision to go to war in Iraq, a
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26 ²⁰ *But see Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1281
 27 (11th Cir. 2009) (finding that political question doctrine barred suit that would require
 28 “reexamination” of military judgments regarding the planning and execution of a military
 convoy in which plaintiff was injured during the Iraq War).

1 far more expansive and intrusive foray into the war powers that are the quintessential province of
2 the political branches than the limited inquiry permitted by the Ninth Circuit in *Koochi*.²¹

3 Notwithstanding the express command of the Constitution, Saleh would have this Court
4 substitute its judgment on the proper exercise of war powers and the conduct of foreign affairs
5 for the judgment of the political branches to which those matters have been entrusted. The
6 political question doctrine compels the rejection of this invitation and thus bars the Court's
7 consideration of Saleh's claims.²²

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9 **IV. ALTHOUGH THE COURT NEED NOT REACH THE ISSUE, SALEH'S CLAIMS
CANNOT BE BROUGHT UNDER THE ALIEN TORT STATUTE**

10 Given the *clear* applicability of the FTCA to Plaintiff Saleh's claims and the absence of
11 any waiver of sovereign immunity, as well as the applicability of the political question doctrine,
12 the Second Amended Complaint should be dismissed on those grounds. In addition, the United
13 States has not waived immunity from suit for claims brought under the Alien Tort Statute (the
14 "ATS"). Even putting aside these clear grounds for dismissal, Saleh's claims must still be
15 dismissed because the claims cannot be brought under the ATS.

16 The claims asserted under the ATS in Counts I and II of Saleh's Second Amended
17 Complaint are based upon the allegation that the named defendants conspired to wage and did
18 wage a war of aggression against Iraq in violation of international law. No federal court has ever
19 recognized an ATS claim for either a conspiracy to commit or the commission of the "crime of
20 aggression."²³ The Supreme Court warned in *Sosa* that federal courts should not recognize new

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22 ²¹ Cf. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function
23 of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality,
the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or
to any particular region.").

24 ²² The political question doctrine would bar litigation of this case whether the United
25 States was a defendant or whether the named individuals were defendants. Thus, Plaintiff's
claims are barred whether or not the United States is substituted as the sole defendant in this
matter.

26 ²³ As far as the Defendants are aware, no federal court has even considered an ATS claim
27 against any person for a conspiracy to wage, or the actual waging of, a war of aggression. In
Hamdan v. Rumsfeld, the Supreme Court noted that conspiracy (or "common plan") to wage
28 aggressive war has been recognized by *international war crimes tribunals* as a "crime against the

1 claims under the ATS for “violations of any international law norm with less definite content and
2 acceptance among civilized nations than the historical paradigms familiar when § 1350 [the
3 ATS] was enacted.” *Sosa*, 542 U.S. at 732; *see also In re Estate of Ferdinand Marcos, Human*
4 *Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) 1994) (“Actionable violations of international
5 law must be of a norm that is specific, universal, and obligatory”). The Court also noted that one
6 factor in determining whether a norm of international law is “sufficiently definite to support a
7 cause of action” is whether international law holds the particular perpetrator being sued, if the
8 defendant is a private actor such as a corporation or an individual, liable for a violation of the
9 norm. *Sosa*, 542 U.S. at 732-33 & n.20. Saleh’s claims fail these tests because at the time of the
10 events alleged, there was no sufficiently specific and defined norm of customary international
11 law enforceable in United States courts under the ATS which recognized that an individual may
12 be held personally liable for the “crime of aggression.”

13 At the time of the events alleged, the crime of aggression did not have the “definite
14 content and acceptance among civilized nations” required under *Sosa* to be recognized as a cause
15 of action under the ATS.²⁴ Indeed, it still lacks such definite content and sufficient acceptance.
16 The absence of clear definition accepted by the United States and others in the international
17 community was evident in the negotiations leading to the adoption of the Rome Statute of the
18 International Criminal Court. The United States was clear about its concern that the crime of
19 aggression was too ill-defined to be included in the Rome Statute and the Rome Statute itself

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22 peace.” 548 U.S. 557, 610 (2006). However, the Court did not address the viability of a civil
23 cause of action under the ATS for conspiracy to wage aggressive war as a violation of the law of
24 nations. One federal district court has stated that “liability under the ATS for participation in a
25 conspiracy may [] attach where the goal of the conspiracy was . . . to commit aggressive war.”
Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F.Supp.2d 633, 664-65 (S.D.N.Y.
2006). However, there was no ATS claim for conspiracy to commit aggressive war actually at
issue in *Talisman*.

26 ²⁴ *See, e.g.*, Harold Hongju Koh, Legal Adviser, Department of State, Statement at the
27 Review Conference of the International Criminal Court, June 4, 2010, available at
28 <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.”).

1 reflected that there was no agreed definition when it was adopted in 1998.²⁵ While the United
2 Nations General Assembly had adopted resolution 3314, containing what it labelled a definition
3 of “aggression,” it was in fact adopted only as “guidance” for the Security Council to take into
4 account, as appropriate, in “determining, in accordance with the Charter, the existence of an act
5 of aggression;” and in any event resolution 3314 only describes the State act of aggression, as
6 opposed to the “crime of aggression” for which an individual could be criminally prosecuted.
7 G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974). There have been no
8 developments since then to establish a “crime of aggression” as specifically defined and accepted
9 within the international community, as were the “historical paradigms” the Supreme Court
10 recognized in *Sosa* as being actionable when the ATS was enacted.

11 Moreover, the Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.
12 Ct. 1659 (2013), is fatal to Counts I and II. In *Kiobel*, the Supreme Court held that causes of
13 action under the ATS for violations of the law of nations occurring within the territory of a
14 sovereign other than the United States are barred. *Id.* at 1669.²⁶ *Kiobel* rests upon the principles
15 underlying the “presumption against extraterritorial application,” a canon of statutory
16 interpretation which provides that if a statute gives no clear indication of an extraterritorial
17 application, it has none. 133 S. Ct. at 1664-65. Both Counts I and II are based upon the alleged
18 actions of the United States government and United States government actors in connection with
19 the war in Iraq. However, this connection to the United States is not of “sufficient force to
20 displace the presumption against extraterritorial application” of the ATS in this case.²⁷ The
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22 ²⁵ See Rome Statute, Article 5(2), prohibiting the International Criminal Court from
23 exercising jurisdiction over the crime of aggression pending the adoption of a definition.

24 ²⁶ The inapplicability of the ATS to conduct outside of the United States bars litigation of
25 this case whether the United States is the defendant or whether the named individuals are
26 defendants.

27 ²⁷ Even if Counts I and II arguably “touch and concern the territory of the United States,”
28 *Kiobel*, 133 S. Ct. at 1669, this does not save Saleh’s claims. The focus of the claims Saleh
asserts under the ATS in Counts I and II is an alleged war of aggression against Iraq – a war that
took place entirely on foreign soil. 2d Am. Compl. ¶ 112. The presumption against the
extraterritorial application of statutes is not lost just because some of the conduct at issue
happens in the United States. The Supreme Court has observed that

1 decision to engage in military operations in Iraq in 2003 and the subsequent conduct of those
 2 operations were both inherently intertwined with the conduct of the foreign relations of the
 3 United States government. Matters of foreign relations are textually committed to the political
 4 branches. *See infra*, § III. As the Supreme Court recognized in *Kiobel*, the danger of
 5 unwarranted judicial interference in the conduct of foreign policy – one of the principles upon
 6 which the presumption against extraterritorial application is based – constrains courts
 7 considering causes of action that may be brought under the ATS. 133 S. Ct. at 1664. Here,
 8 recognizing an ATS claim based upon the actions of U.S. officials for a conspiracy to wage
 9 and/or the waging of a war of aggression against Iraq would clearly impinge on the discretion of
 10 the Legislative and Executive Branches with respect to matters of foreign affairs. *See infra*, §
 11 III.²⁸

12
 13 V. EVEN IF THE COURT HAS SUBJECT MATTER JURISDICTION OVER COUNTS I
 AND II, VENUE IS IMPROPER IN THIS DISTRICT

14 As shown above, *see infra*, §§ II-IV, this Court lacks subject matter jurisdiction over
 15 Plaintiff’s Saleh’s claims against the United States. However, even if this Court determines it
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17 It is a rare case of prohibited extraterritorial application that lacks *all* contact with
 18 the territory of the United States. But the presumption against extraterritorial
 application would be a craven watchdog if it retreated to its kennel whenever
 some domestic activity is involved in the case.

19 *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2884 (2010) (emphasis in original).

20 ²⁸ Saleh cannot rely upon federal question or diversity jurisdiction as a basis for the Court
 to hear her claims in the absence of jurisdiction under the ATS. 2d Am. Compl. ¶¶ 5, 133. The
 21 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
 22 norms. *Sosa*, 542 U.S. at 731 n.19 (“28 U.S.C. § 1350 was enacted on the congressional
 understanding that courts would exercise jurisdiction by entertaining some common law claims
 23 derived from the law of nations; and we know of no reason to think that federal-question
 jurisdiction was extended subject to any comparable congressional assumption.”). While the
 24 Ninth Circuit has recognized that a claim brought under the ATS “arises under” federal law for
 Article III purposes and calls for the exercise of federal question jurisdiction, *Sarei v. Rio Tinto,*
 25 *PLC*, 671 F.3d 736, 754 (9th Cir. 2011) *cert. granted, judgment vacated sub nom. Rio Tinto PLC*
v. Sarei, 133 S. Ct. 1995 (U.S. 2013), the circuit has never held that federal question jurisdiction
 26 can be exercised over a tort claim by an alien for a violation of international law that is not
 cognizable under the ATS. *Id.* at 751 (“[28 U.S.C.] § 1331 did not make the ATS superfluous,
 27 because only the ATS carries with it the Congressional assumption that the judiciary would use it
 to develop the common law in an area of particular federal interest: international relations.”).

1 has subject matter jurisdiction, the claims must be dismissed because venue does not lie in this
2 Court. Under 28 U.S.C. § 1402(b), venue for tort claims against the United States lies only in (1)
3 the district where the plaintiff resides, or (2) the district where the complained of acts or
4 omissions occurred. Saleh does not reside in this district. See 2d Am. Compl. ¶ 9. Nor did any
5 of the complained of acts or omissions occur in this district. *Id.* ¶¶ 27-131. Therefore, venue for
6 Saleh’s tort claims does not lie in this district and the Court should dismiss the claims. *See* 28
7 U.S.C. § 1406(a).²⁹

8 CONCLUSION

9 For the reasons stated above, Plaintiff Saleh’s Second Amended Complaint, like her first
10 Amended Complaint, should be dismissed in its entirety. Because Saleh has had ample
11 opportunity to replead her claim, and further pleading in any event would be futile, that dismissal
12 should be with prejudice.
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25 ²⁹ Plaintiff’s reliance upon 28 U.S.C. § 1391(b)(3) to establish venue, *see* 2d Am. Compl.
26 ¶ 6, is misplaced. Section 1391(b)(3) covers venue generally and applies “[e]xcept as otherwise
27 provided by law.” 28 U.S.C. § 1402 specifically addresses venue in cases such as this where the
28 United States is the defendant, and requires that a tort claim against the United States under the
FTCA be brought in the judicial district in which the plaintiff resides or where the act or
omission complained of occurred. *See* 28 U.S.C. § 1402.

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