STUART F. DELERY
Assistant Attorney General
RUPA BHATTACHARYYA
Director, Torts Branch, Civil Division
MARY HAMPTON MASON
Senior Trial Counsel
GLENN S. GREENE
Senior Trial Attorney
U.S. Department of Justice, Civil Division
Constitutional and Specialized Tort Litigation
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4143 (phone)
(202) 616-4314 (fax)
Glenn.Greene@usdoj.gov
ATTORNEYS FOR THE UNITED STATES AND
GEORGE W. BUSH, RICHARD B. CHENEY,
CONDOLEEZZA RICE, COLIN POWELL,
DONALD RUMSFELD, AND PAUL WOLFOWITZ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

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

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

Dated: June 23, 2014

Respectfully Submitted,

STUART F. DELERY
Assistant Attorney General

RUPA BHATTACHARYYA
Director, Torts Branch

MARY HAMPTON MASON
Senior Trial Counsel

/s/Glenn S. Greene
GLENN S. GREENE
Senior Trial Attorney
U.S. Department of Justice, Civil Division
Constitutional and Specialized Tort Litigation
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4143 (phone)
(202) 616-4314 (fax)
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(202) 616-4143 (phone)
(202) 616-4314 (fax)
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SUNDUS SHAKER SALEH, et al., Plaintiffs, v. GEORGE W. BUSH, et al., Defendants.	No. 3:13-cv-01124 JST **BRIEF IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS** **DATE: September 11, 2014** **TIME: 2:00 PM**

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INTRODUCTION

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

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

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

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

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

FACTUAL ALLEGATIONS

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

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

Saleh invokes the jurisdiction of the Alien Tort Statute, 28 U.S.C. § 1350, to assert claims that the named individuals conspired to wage (Count I), and did in fact wage (Count II) a war of aggression against Iraq in violation of international law. *Id.* ¶¶ 138-57. Saleh further alleges that the individuals' actions violated the United Nations Charter and the Kellogg-Briand Pact, a 1928 treaty to which the United States is a signatory. *Id.* Saleh alleges that she lost her home and property when she was forced to flee from Iraq to Jordan in 2005 because of the Iraq War and the ensuing occupation. *Id.* ¶¶ 122-31. Saleh seeks to bring her suit as a putative class action for herself and on behalf of "innocent Iraqi civilians who, through no fault of their own, suffered damage as a but-for and proximate cause of [the] Defendants' international legal torts." *Id.* ¶ 134.[3]

SUMMARY OF ARGUMENT

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

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

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

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

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

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

LEGAL FRAMEWORK

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

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

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

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

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

[4] Certification of scope of employment under the Westfall Act is not a discretionary action by the Department of Justice. Federal employees who are sued for their actions have a right to receive a scope of employment certification whenever their alleged conduct satisfies the requirements of the Act. If a scope certification is not provided, federal employees may petition 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").

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

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

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

In any event, the Second Amended Complaint, which does not differ in any material respect from the first Amended Complaint,[6] does not allege facts which even could establish by a preponderance of the evidence that the defendants' alleged conduct was outside the scope of their employment. District of Columbia law recognizes an especially "expansive" view of scope of employment. *Greene v. Nguyen*, CIV.A. 05-0407 RMU, 2005 WL 3275897, *4 (D.D.C. Sept. 7, 2005). District of Columbia scope of employment law, which is drawn from the Restatement (Second) of Agency, provides that the conduct of a servant is within the scope of employment if: (1) it is of the kind he is employed to perform; (2) it occurs substantially within the authorized time and space limits; and (3) it is actuated, at least in part, by a purpose to serve the master. 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).[7] All of these factors are clearly satisfied.

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

[6] The Second Amended Complaint covers no new factual ground. Saleh merely offers additional allegations that are substantially similar to those already asserted in the Amended Complaint with respect to various categories of alleged conduct by the defendants. *See* 2d Am. Compl. ¶ 2 (purported planning for an invasion of Iraq that predated the Bush Administration); *id.* ¶¶ 36-39 (implementation of a plan to invade Iraq once in office); *id.* ¶¶ 76-77 (false claims 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.

- The high level positions the defendants held in the U.S. government – President, Vice President, Secretary of State, Secretary of Defense, National Security Advisor, and Deputy Secretary of Defense – clearly have some involvement with and/or responsibility for foreign relations. This would necessarily (and constitutionally) include responsibilities related to the circumstances under which the United States would conduct military operations against a foreign enemy. Thus 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 the kind of conduct they were employed to perform because it was "of the same general nature as th[e] [conduct] authorized" or at least "incidental to the conduct authorized" for their offices. *Harbury v. Hayden*, 444 F. Supp. 2d 19, 33 (D.D.C. 2006) (quoting Restatement § 229), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008). In fact, it was due solely to their federal employment that the individuals even could authorize or help plan military action by the United States. At the very least, the conduct alleged had "some nexus" to that authorized by each defendant's position in the government. *Id.* at 35 (citation omitted).[8]
- 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. All of the actions alleged with respect to the determination of whether the United States should conduct military operations and the conduct of those operations clearly took place substantially within the "authorized time and space limits" of the defendants' employment. *See* 2d Am. Compl. ¶¶ 35-121.[9]

[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").

[9] To the extent that Plaintiff attempts to evade this indisputable fact by citing alleged "planning" for military action against Iraq that predated the Bush Administration, that attempt fails. 2d Am. Compl. ¶¶ 27-34. 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 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

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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

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

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

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

[12] *See Rasul v. Rumsfeld*, 414 F.Supp.2d 26, 31-36 (D.D.C. 2006) (alleged torture of Guantánamo Bay detainees), *aff'd in part*, 512 F.3d 644 (D.C. 2008), *vacated*, 555 U.S. 1083 (2008), *reinstated in relevant part*, *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 7-8 (D.D.C. 2004) *aff'd*, 445 F.3d 427 (D.C. Cir. 2006) (alleged genocide, torture, forced relocation, and cruel, inhuman, and degrading treatment of indigenous 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).

States, 331 F.3d 604, 631 (9th Cir. 2003), *rev'd on other grounds*, 542 U.S. 692 (2004), is directly on point. In *Alvarez-Machain*, the Ninth Circuit affirmed the district court's determination that an ATS action based upon customary international law did not fall within the exception to the Westfall Act for suits brought for a violation of a statute of the United States, and that "a claim under the AT[S] is based on a violation of international law, not of the AT[S] itself." *Id*; *see also Sosa*, 542 U.S. at 713-14 (holding that the ATS is a jurisdictional statute only and creates no new causes of action). As the Ninth Circuit recognized, the United States is the proper defendant for ATS claims based upon customary international law – the type of claims Saleh asserts here. 2d Am. Compl. ¶¶ 5, 129-48.[13]

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

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[13] Plaintiff's allegation that the War Crimes Act qualifies as a statutory exception to the exclusive remedy provided by the Westfall Act is flatly wrong. 2d Am. Compl.¶ 7. In order to qualify as an exception to the Westfall Act remedy a statute must authorize a civil action for money damages against an individual. 28 U.S.C. § 2679(b)(1)-(2). The War Crimes Act is a *criminal* statute which provides for the imposition of fines and/or imprisonment as criminal penalties for the commission of certain "war crimes" defined in the statute. 18 U.S.C. § 2441 (a). Nowhere within the text of the War Crimes Act is there *any* authorization for a civil action for money damages against an individual. While courts have used definitions found within the 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).

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

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

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

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

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

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

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

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

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

Hamad, 2011 WL 6130413, at *9; *Bansal*, 513 F. Supp. 2d at 280.[17] Thus, Saleh's claims for alleged violations of customary international law are barred by sovereign immunity.

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

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

4) Saleh's claims are barred by the combatant activities exception to the FTCA.

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

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

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

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

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

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

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

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

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

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

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

369 U.S. 185, 217 (1962). A nonjusticiable political question is present if *any one* of these factors is "inextricable from the case." *Id.* However, the Ninth Circuit has observed that

> these tests are more discrete in theory than in practice, with the analyses often collapsing into one another. . . This overlap is not surprising given the common underlying inquiry of whether the very nature of the question is one that can properly be decided by the judiciary.

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

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

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

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

implicated policy decision by United States government not to prosecute former regime and defendants for war crimes).

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

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

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

Even under Saleh's construction of the question at issue, addressing the purported crime of aggression involves answering questions barred by the political question doctrine, including

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[19] The War Powers Resolution of 1973 is a federal law intended to:

> fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations 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.

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

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

Plaintiff Saleh's claims are not saved by *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). In *Koohi*, the Ninth Circuit held that the political question doctrine did not bar FTCA claims for the shooting down of a civilian aircraft by a United States warship. *Id.* at 1332.[20] *Koohi*, however, is easily distinguishable from this case. The plaintiffs in *Koohi* sought judicial review of a single action by the United States military, alleging the negligent operation of a naval vessel. *Id.* at 1330-31. In contrast, Saleh asks the Court to review the *entire basis* for the Executive (particularly the President) and Legislative Branches' decision to go to war in Iraq, a

[20] *But see Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009) (finding that political question doctrine barred suit that would require "reexamination" of military judgments regarding the planning and execution of a military convoy in which plaintiff was injured during the Iraq War).

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

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

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

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

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

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[21] *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function 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.").

[22] The political question doctrine would bar litigation of this case whether the United 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.

[23] As far as the Defendants are aware, no federal court has even considered an ATS claim 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 aggressive war has been recognized by *international war crimes tribunals* as a "crime against the

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

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 to be recognized as a cause of action under the ATS.[24] Indeed, it still lacks such definite content and sufficient acceptance. The absence of clear definition accepted by the United States and others in the international community was evident in the negotiations leading to the adoption of the Rome Statute of the International Criminal Court. The United States was clear about its concern that the crime of aggression was too ill-defined to be included in the Rome Statute and the Rome Statute itself

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peace." 548 U.S. 557, 610 (2006). However, the Court did not address the viability of a civil cause of action under the ATS for conspiracy to wage aggressive war as a violation of the law of nations. One federal district court has stated that "liability under the ATS for participation in a 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*.

[24] *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.").

reflected that there was no agreed definition when it was adopted in 1998.[25] While the United Nations General Assembly had adopted resolution 3314, containing what it labelled a definition of "aggression," it was in fact adopted only as "guidance" for the Security Council to take into account, as appropriate, in "determining, in accordance with the Charter, the existence of an act of aggression;" and in any event resolution 3314 only describes the State act of aggression, as opposed to the "crime of aggression" for which an individual could be criminally prosecuted. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974). There have been no developments since then to establish a "crime of aggression" as specifically defined and accepted within the international community, as were the "historical paradigms" the Supreme Court recognized in *Sosa* as being actionable when the ATS was enacted.

Moreover, the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), is fatal to Counts I and II. In *Kiobel*, the Supreme Court held that 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.[26] *Kiobel* rests upon the principles underlying the "presumption against extraterritorial application," a canon of statutory interpretation which provides that if a statute gives no clear indication of an extraterritorial application, it has none. 133 S. Ct. at 1664-65. Both Counts I and II are based upon the alleged actions of the United States government and United States government actors in connection with the war in Iraq. However, this connection to the United States is not of "sufficient force to displace the presumption against extraterritorial application" of the ATS in this case.[27] The

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[25] *See* Rome Statute, Article 5(2), prohibiting the International Criminal Court from exercising jurisdiction over the crime of aggression pending the adoption of a definition.

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

[27] Even if Counts I and II arguably "touch and concern the territory of the United States," *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

decision to engage in military operations in Iraq in 2003 and the subsequent conduct of those operations were both inherently intertwined with the conduct of the foreign relations of the United States government. Matters of foreign relations are textually committed to the political branches. *See infra*, § III. As the Supreme Court recognized in *Kiobel*, the danger of unwarranted judicial interference in the conduct of foreign policy – one of the principles upon which the presumption against extraterritorial application is based – constrains courts considering causes of action that may be brought under the ATS. 133 S. Ct. at 1664. Here, recognizing an ATS claim based upon the 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. *See infra*, § III.[28]

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

As shown above, *see infra*, §§ II-IV, this Court lacks subject matter jurisdiction over Plaintiff's Saleh's claims against the United States. However, even if this Court determines it

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> It is a rare case of prohibited extraterritorial application that lacks *all* contact with 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.

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

[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 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 ("28 U.S.C. § 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims 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 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, 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 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, 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.").

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

CONCLUSION

For the reasons stated above, 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.

[29] Plaintiff's reliance upon 28 U.S.C. § 1391(b)(3) to establish venue, *see* 2d Am. Compl. ¶ 6, is misplaced. Section 1391(b)(3) covers venue generally and applies "[e]xcept as otherwise provided by law." 28 U.S.C. § 1402 specifically addresses venue in cases such as this where the 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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Respectfully Submitted,

STUART F. DELERY
Assistant Attorney General

RUPA BHATTACHARYYA
Director, Torts Branch

MARY HAMPTON MASON
Senior Trial Counsel

/s/Glenn S. Greene
GLENN S. GREENE
Senior Trial Attorney
U.S. Department of Justice, Civil Division
Constitutional and Specialized Tort Litigation
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4143 (phone)
(202) 616-4314 (fax)
Glenn.Greene@usdoj.gov

ATTORNEYS FOR THE UNITED STATES AND GEORGE W. BUSH, RICHARD B. CHENEY, CONDOLEEZZA RICE, COLIN POWELL, DONALD RUMSFELD, AND PAUL WOLFOWITZ