No. 15-15098

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUNDUS SHAKER SALEH
on behalf of herself and those similarly situated,

*Plaintiff-Appellant,*

v.

GEORGE W. BUSH, *et al.,*

*Defendants-Appellees.*

Appeal From The United States District Court
For The Northern District Of California,
No. 3:13-cv-01124 JST (Honorable Jon S. Tigar)

# APPELLANT'S OPENING BRIEF

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## INTRODUCTION

At the end of the Second World War, this country, with its allies, empaneled judges at Nuremberg, Germany to adjudicate crimes committed by German leaders in waging war in Europe. The chief proceeding took place in 1946 before the International Military Tribunal at Nuremberg (the "**Nuremberg Tribunal**"), which held that the "supreme" crime committed by the Germans was the waging of wars that contravened international law: the crime of aggression. *United States v. Goering*, 41 AM. J. INT'L L. 172, 218-220 (1946) (the "**Nuremberg Judgment**").

This country sent its brightest legal minds to engage in the historic prosecution of national leaders who had acted against international law, including an Associate Justice of the Supreme Court, Robert Jackson. As Chief Prosecutor before the Nuremberg Tribunal, Jackson argued the American case that German leaders had committed grave breaches of law. He argued, and the Nuremberg Tribunal agreed, that national leaders who commit wars of aggression act outside of the protection of their domestic law. Jackson promised the Nuremberg Tribunal that the "poisoned chalice" of accountability of national leaders would be one from which his own country—our country—would also drink.[1]

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[1] 2 Trial of the Major War Criminals Before the International Military Tribunal 98-155 (Nuremberg: IMT, 1947) ("the Blue Set"); *available at* the Avalon Project at Yale Law School,

In this case, plaintiff-appellant Sundus Shaker Saleh ("Plaintiff"), an Iraqi national, has invoked the jurisdiction of the United States courts through 28 U.S.C. § 1350 (the "**Alien Tort Statute**" or "**ATS**"), asking for damages suffered as a legal consequence of the Iraq War, which she alleges constituted aggression as defined by the Nuremberg Judgment. She has alleged that the conduct of the Defendants in this case—the highest ranking government officials responsible for the planning and execution of the Iraq War[2]—violated rules issued by the Nuremberg Tribunal governing when and how a country may wage war, and that the Defendants breached such rules in their conduct advocating for and instigating war in, and finally invading, Iraq.

The district court erred in dismissing Plaintiff's Second Amended Complaint (the "**Complaint**") when it accepted the Government's position that the acts of the Defendants were within the lawful scope of their authority under the

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http://avalon.law.yale.edu/subject_menus/imt.asp *and* *at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/ (hereinafter "**Jackson Opening Statement**"); *see also* WILLIAM SHAKESPEARE, MACBETH act 1, sc. 7 ("But in these cases We still have judgment here; that we but teach Bloody instructions, which, being taught, return To plague the inventor: this even-handed justice Commends the ingredients of our poison'd chalice To our own lips.").

[2] Plaintiff has sued former President George W. Bush, former Vice President Richard B. Cheney, former Secretary of State Colin Powell, former National Security Advisor Condoleezza Rice, former Secretary of Defense Donald Rumsfeld, and former Deputy Secretary of Defense Paul Wolfowitz, who are the Defendants-Respondents in this case (collectively, "Defendants").

Westfall Act (codified in part at 28 U.S.C. §§ 2671, 2674, 2679) (the "**Westfall Act**"), and substituting the sovereign in the place of the Defendants. The district court was forbidden in so doing by the *jus cogens* norms affirmed by the Nuremberg Tribunal, which forbade the use of domestic laws as shields to allegations of aggression. The Government was further estopped from such arguments because they contradicted those made by the Government before the Nuremberg Tribunal. Finally, even if the district court could properly reach the question of Westfall Act immunity, the allegations in Plaintiff's Complaint raise sufficient questions that would rebut the Government certification, or, at minimum, would call for a further evidentiary hearing under District of Columbia precedent. Because the crime of aggression requires an official act by government leaders (i.e. the commencement of a war while in office), the district court's analysis would preclude a leader from ever being charged with aggression in a civil court, despite its incontrovertible *jus cogens* status.

The central holding of the Nuremberg Judgment was that law would govern the conduct of national leaders in affairs of war and peace. This holding is central to the tenets of liberal democracy and opposes the philosophy of the Germans during World War II, who believed that their leaders could act outside of international law—or any law—when waging war. National leaders, even American leaders, do not have the authority to commit aggression and cannot be

immune from allegations that they have done so. This Court should reverse the judgment below.

## STATEMENT OF JURISDICTION

As stated in the Complaint, the district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiff brought claims arising under federal law, 28 U.S.C. § 1332 because Plaintiff and Defendants are diverse and Plaintiff's damages exceed $75,000, and 28 U.S.C. § 1350 because Plaintiff alleged a tort in violation of the law of nations. Excerpt of Record (hereinafter "ER") 64, ¶ 5. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as the district court's order granting the Defendants' motion to dismiss is an appealable final decision, and the district court's order denying Plaintiff's motion for an evidentiary hearing is an interim order reviewable on appeal from a final judgment. *American Ironworks & Erectors, Inc. v. North American Const. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001); *Hall v. City of Los Angeles,* 697 F.3d 1059, 1070 (9th Cir. 2012)*; Munoz v. Small Business Administration*, 644 F.2d 1361, 1364 (9th Cir. 1981). The district court issued its orders regarding Plaintiff's motion for an evidentiary hearing and granting Defendants' motion to dismiss on December 19, 2014. ER 1-7. Plaintiff timely filed a notice of appeal on January 16, 2015. ER 12-23; Federal Rule of Appellate Procedure 4(a)(1).

## ISSUES PRESENTED FOR REVIEW

1. Whether, as a matter of law, the decision by the International Military Tribunal at Nuremberg in 1946 regarding the prohibition of aggression,[3] as a *jus cogens* norm, prohibited the district court from accepting the Attorney General certification and substituting the United States as the sole defendant in light of the Nuremberg Judgment's rejection of a domestic immunity offense in an underlying action that alleges such aggression. This issue was raised, *inter alia*, at ER 44, 137. The district court accepted the Attorney General's certification as true, substituted the Government in the place of Defendants and dismissed the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). The applicable standard of review for a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) pursuant to a certification of the Westfall Act is *de novo* review. *McLachlan v. Bell*, 261 F.3d 908, 910 (9th Cir. 2001).

2. Whether, as a matter of law, the Government was estopped by judicial estoppel from certifying the Defendants in this case under the Westfall Act and/or arguing to the district court that the Defendants were acting within the scope of their authority, on account of earlier arguments made by the Government before the Nuremberg Tribunal. This issue was raised, *inter alia*, at ER 33 and 35-38. The

[3] As done before the district court, as short-hand Plaintiff refers to both counts in her Complaint—the crime of aggression and conspiracy to commit the crime of aggression—as simply the "crime of aggression." *See* ER 131.

district court accepted the Attorney General's certification as true, substituted the Government in the place of Defendants and dismissed the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). The applicable standard of review for a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) pursuant to a certification of the Westfall Act is *de novo* review. *McLachlan v. Bell*, 261 F.3d 908, 910 (9th Cir. 2001).

3. Whether, the Defendants' alleged actions, assuming their truth, were outside the valid scope of their employment under District of Columbia law and the Westfall Act. This issue was raised, *inter alia*, at ER 44-50. The applicable standard of review for a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) pursuant to a certification of the Westfall Act is *de novo* review. *McLachlan*, 261 F.3d at 910.

4. Whether Plaintiff's Complaint raises sufficient factual allegations to entitle her to an evidentiary hearing challenging the Attorney General's certification pursuant to the Westfall Act. This issue was raised, *inter alia*, at ER 24-31 and 57-62. The Attorney General's decision regarding a scope of employment certification is "subject to *de novo* review in both the district court and on appeal." *Kashin v. Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006); *see also McLachlan*, 261 F.3d at 910 ("We review the dismissal under Federal Rule of Civil Procedure 12(b)(1) and the denial of the challenge to certification *de novo*.").

Where the district court declines to hold an evidentiary hearing, the court of appeal will "accept as true the factual allegations in the complaint." *Id*. at 909.

## STATEMENT OF THE CASE

The Nuremberg, Tokyo and United Nations Charters Prohibiting Aggression

Following World War II, the United States entered into at least three different treaties which affirmed the prohibited nature of the crime of aggression. See Charter Int'l Military Tribunal, art. 6(a), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 (hereinafter the "**Nuremberg Charter**"); Charter of the Int'l Military Tribunal for the Far East, art. 5(a), Jan. 19, 1946, T.I.A.S. No. 1589 (hereinafter the "**Tokyo Charter**") (1946); and U.N. Charter art. 39-51. These treaties, which affirmed the obligations imposed by the Kellogg-Briand Peace Pact that nations are obligated to settle disputes through "pacific means,", 46 Stat. 2343 (1928), created international legal obligations regarding the maintenance of global peace and security. In particular, the Nuremberg and Tokyo Charters referred to the fact that, "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Nuremberg Charter, art. 7; *see also* Tokyo Charter, art. 6.

As alleged in the Complaint (ER 69-72, Complaint ¶¶ 27-34), commencing in 1997, at least three of the Defendants in this case—Defendants

Richard Cheney, Donald Rumsfeld, and Paul Wolfowitz—began advocating for a military invasion of Iraq through a non-profit called the Project for the New American Century. Upon taking office, all of the Defendants immediately commenced looking for ways to attack Iraq. ER 72-73, Complaint ¶¶ 35-39. After the 9/11 attacks, the Defendants used the attacks as a reason for going to war with Iraq. ER 73-78, Complaint ¶¶ 40-60. In so doing, the Defendants engaged in a campaign of making untrue statements, specifically, that (i) Iraq possessed weapons of mass destruction, even though the Defendants knew that it did not, and (2) Iraq was in league with al-Qaida, even though the Defendants knew this was untrue as well. ER 80-87, Complaint ¶¶ 61-95. The Defendants were looking for ways to "fix" the facts about Iraq's weapons program to support a war. ER 79-80, Complaint ¶¶ 61-64. Finally, the Defendants invaded Iraq without proper United Nations authorization, completing the crime of aggression as the war was not authorized by the United Nations or conducted in self-defense. ER 94-95, Complaint ¶¶ 111-121.

Claims of Illegality Following the Invasion of Iraq

After the invasion, several individuals, organizations and governments declared the war illegal. One of the first was the United Nations Secretary-General, Kofi Annan, who plainly labeled the war "illegal". ER 95, Complaint ¶ 118. A former prosecutor at Nuremberg, Benjamin Ferencz, strongly suggested the war

was illegal as well. Benjamin Ferencz, *Forward* to MICHAEL HAAS, GEORGE W. BUSH, WAR CRIMINAL?, at xii (2009) ("The UN Charter, which legally binds all nations, prohibits the use of armed force except in very limited conditions of self-defense, which were inapplicable. Without UN Security Council authorization, a good argument could be made that the U.S. invasion of Iraq was unlawful."). The government of the Netherlands (through its Parliament) has since determined that the Iraq War was a breach of international law. ER 143. Currently, an official inquiry in the United Kingdom headed by Sir John Chilcot is analyzing the role of that government in participating in the Iraq War, the results of which are now expected in 2016. *See generally*, The Iraq Inquiry, http://www.iraqinquiry.org.uk (last visited May 25, 2015).

The Litigation and the Decision Below

On March 13, 2013, Plaintiff filed suit in the Northern District of California alleging that the Defendants in this case had committed the crime of aggression and in a conspiracy to commit the crime of aggression (both as defined by the Nuremberg Judgment) against Iraq, and in so doing, had caused her tort damages. ER 266 (Dkt. No. 1).

On September 10, 2013, Plaintiff filed her First Amended Complaint. ER 211-264, 205 (Dkt. No. 25). On May 19, 2014, the district court granted Defendants' Motion to Dismiss Saleh's First Amended Complaint and permitted

Saleh to file another amended complaint. ER 8-11, 269 (Dkt. No. 35). Saleh filed her Second Amended Complaint on June 8, 2014, (ER 63-119, 270 (Dkt. No. 37)), and her motion requesting an evidentiary hearing the following day (ER 57-62, 270 (Dkt. No. 38)). On June 23, 2014, the Attorney General filed a Notice of Substitution of the United States as Sole Defendant pursuant to the Westfall Act, 28 U.S.C. § 2679(b), and a motion to dismiss the operative complaint for lack of subject matter jurisdiction. ER 51-56, 270 (Dkt. No. 43). On December 19, 2014, the district court issued an order denying Plaintiff's motion for an evidentiary hearing and granting Defendants' motion to dismiss based on the certification filed on June 23, 2014. ER 1-7, 271 (Dkt. No. 53). Saleh timely filed a notice of appeal on January 16, 2015. ER 12-23, 271 (Dkt. No. 54).

## SUMMARY OF THE ARGUMENT

The district court erred in finding the Defendants immune from further proceedings pursuant to the Westfall Act. The prohibition against aggression is a *jus cogens* norm actionable in federal court, which includes a rejection of a defense of domestic law immunity. The district court should have analyzed the *jus cogens* nature of aggression. Had it done so, it would not have immunized the Defendants in this case. *See infra*, 1.a, 1.b.

In addition, the Attorney General was estopped by judicial estoppel from certifying the Defendants under the Westfall Act and arguing to the district

court that the Defendants were acting within the lawful scope of their authority, as the Government argued before the Nuremberg Tribunal that the crime of aggression never falls within the scope of a government leader's lawful duties. *See infra*, 1.c.

In the event the district court could reach the issue of domestic immunity, the district court failed to properly analyze the allegations made in the Complaint under District of Columbia law. Had it done so, it would have held that under District of Columbia law, the Defendants were not acting within the lawful scope of their employment as their conduct (i) took place outside of time and space requirements of their authority, (ii) was done to further personal interests and (iii) was not the kind of conduct that they were hired to perform. *See infra*, 2, 3.

Had there been any doubts as to whether Plaintiff sufficiently alleged facts that brought Defendants' conduct outside the lawful scope of their employment authority, Plaintiff was entitled to further discovery or a jury determination on the issue. *See infra*, 4.

Constitutional checks and balances and principles of classical liberalism weigh heavily in favor of the Court reversing the district court and permitting the lawsuit against the Defendants to proceed. *See infra*, 5.

## ARGUMENT

### 1. The district court erred in substituting the United States as the sole defendant pursuant to the Westfall Act because the Nuremberg Tribunal's prohibition against aggression prohibits a defense of domestic immunity.

#### a. The crime of aggression is a *jus cogens* norm of customary international law incorporated into federal common law

##### i. *A* jus cogens *norm is a unique category of customary international law that binds all civilized nations.*

This Court may review the district court's order substituting the Government in the place of the Defendants and dismissing the Complaint *de novo*. *McLachlan*, 261 F.3d at 910. The district court did not analyze the basis of Plaintiff's ATS claim: the crime of aggression. Instead, the district court leapfrogged directly to the issue of whether the allegations in the Complaint were within the lawful scope of employment of the Defendants. However, resolution of the scope of employment issue under the Westfall Act is impossible without first analyzing the crime of aggression as a *jus cogens* norm, its incorporation into federal common law through the ATS, and the rejection of a domestic immunity defense by the Nuremberg Tribunal as part of such *jus cogens* norm—all of which prohibited the district court from certifying the Defendants in this case.

It has been recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (applying the "customs and usages of civilized

nations" to decide a dispute); *see also Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances...."); *The Nereide,* 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); *Filartiga v. Pena-Irala,* 630 F.2d 876, 886 (2d Cir. 1980) ("It is an ancient and a salutory feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.").

International law that rises to the level of "customary international law" is considered federal common law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporters' notes 2, 3 (1987); *see also id.* at § 111(1) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States"); *id*. at § 702 cmt. c ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts"); *Filartiga*, 630 F.2d 876 at 885; *Banco Nacional de Cuba*, 376 U.S. at 425 (finding international law to be federal law).

Within customary international law is a set of norms identified as "*jus cogens*" norms. A *jus cogens* norm "is a norm accepted and recognized by the

international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (citing Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679); *see also In re Estate of Ferdinand Marcos Human Rights Lit.*, 25 F. 3d 1467, 1471 (9th Cir. 1994); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) ("*Jus cogens* norms are norms of international law that are binding on nations even if they do not agree to them") (citing *Siderman*, 965 F.2d 669, 714-15); *see also Giraldo v. Drummond Co. Inc.,* 808 F.Supp.2d 247, 250, fn. 1 (D.D.C. 2011) ("A *jus cogens* norm 'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" (citing *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C.Cir. 2008)); *see also* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law*," 11 Mich. J. Int'l L., 768, 801-09 (1990).

*Jus cogens* norms are deemed "peremptory" and non-derogable and can be modified only by a subsequent norm of general international law of the same character. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102, com. k (1987); Vienna Convention on the Law of Treaties, art. 53.

"International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable." M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, *in* 59 *Law and Contemporary Problems* 63-74, 63 (Fall. 1996) (hereinafter "International Crimes"). "The term '*jus cogens*' means 'the compelling law' and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles." *Id*. at 67. "[T]he implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes." *Id*. at 65-66 (internal citations omitted).

#### ***ii. Jus cogens norms are binding on domestic courts and are considered "federal common law."***

The United States Supreme Court has classified *jus cogens* norms as part of "federal common law." "For two centuries we have affirmed that the

domestic law of the United States recognizes the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30 (2004).

The evolution of the ATS, part of the Judiciary Act of 1789, powerfully expresses the role of the federal courts in giving power and import to international law. The ATS is "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Kiobel v. Royal Dutch Shell Petroleum*, __ U.S. __ , 133 S.Ct. 1659, 1663 (2013) (citing *Sosa*, 542 U.S. at 724). While enactors of the ATS probably had only a limited number of *jus cogens* violations in mind, such as offenses against ambassadors, violations of safe conduct and piracy, *Sosa,* 542 U.S. at 715, today the ATS recognizes, *inter alia*, claims of torture, summary execution, "disappearance," extrajudicial killing, crimes against humanity, war crimes, genocide, and arbitrary detention as violations of *jus cogens* norms.[4] *See*, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (acts of official torture are *jus cogens* violations); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (recognizing summary execution,

[4] Courts have declined to recognize certain violations as actionable under principles of international law. For example, in *Sosa*, the Supreme Court held that the cause of action for arbitrary arrest was not actionable. *Sosa*, 542 U.S. at 738. Similarly in *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 108 (2d Cir. 2008), the Second Circuit held that the use of Agent Orange during the Vietnam War did not rise to an actionable offense under the ATS, as it was used to "protect United States troops against ambush and not as a weapon of war against human populations."

"disappearance," and arbitrary detention as actionable claims under the ATS); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (recognizing claims of genocide and war crimes as actionable under the ATS); *Mujica v. Occidental Petroleum Corp*., 381 F.Supp.2d 1164 (C.D. Cal. 2005) (recognizing, *inter alia*, extrajudicial killing and crimes against humanity as actionable under the ATS).

### *iii. The Crime of Aggression is a* jus cogens *norm under federal common law.*

The above precedents, combined with Nuremberg Judgment, make clear that the crime of aggression is a *jus cogens* norm of international law at least since 1946 (the date of the Nuremberg Judgment) and probably as early as 1928.

"To determine whether [the alleged prohibition] constitutes a universally accepted norm of customary international law, we examine the current state of international law by consulting the sources identified by Article 28 of the Statute of the International Court of Justice ('ICJ Statute'), to which the United States and all members of the United Nations are parties." *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 175 (2d Cir. 2009). These sources include "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." *Id*.

First, the Nuremberg Tribunal held that the crime of aggression was the "supreme international crime." *The Nuremberg Judgment*, 41 Am. J. Int'l L. at 186. It is the "supreme international crime" because a war of aggression "contains within itself the accumulated evil of the whole." *Id*. "War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world." *Id*. If torture, genocide and war crimes are *jus cogens* norms of international law actionable under federal common law, then it follows *a fortiori* that the "supreme international crime" must also be a *jus cogens* norm actionable under federal common law.

Chief Prosecutor Jackson's first words at Nuremberg were: "The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility." He spoke of the "practical effort . . . to utilize International Law to meet the greatest menace of our times—aggressive war." Jackson Opening Statement.

In *Abdullahi,* the Second Circuit quoted Telford Taylor, assistant to Jackson (and later Chief of Counsel for War Crimes on the Nuremberg Trials held under the authority of Control Council Law No. 10) regarding the modern application of the Nuremberg Judgment. "'Nuremberg was based on enduring [legal] principles and not on temporary political expedients, and the fundamental point is apparent from the reaffirmation of the Nuernberg principles in Control

Council Law No. 10 and *their application and refinement* in the 12 judgments rendered under that law during the 3-year period, 1947 to 1949.'" *Id.* (emphasis in original) (citing Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 107*, 107 (1949); *see also Siderman*, 965 F.2d at 715 ("Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II. The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal."); *Mujica*, 381 F.Supp.2d at 1179-1181 (holding that "The Nuremberg trials imposed enforceable obligations.") (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 559-60 (9th Cir. 2005)).

*Second*, the Nuremberg Tribunal held that the crime of aggression was a *jus cogens* norm as early as the signing of the Kellogg-Briand Peace Pact, 46 Stat. 2343 (1928): nineteen years prior to the Nuremberg Judgment itself. The Kellogg-Briand Peace Pact "condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact." *The*

*Nuremberg Judgment*, 41 AM. J. INT'L L. at 218. The Tribunal held, "[T]he solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing … Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of the general treaty law . . . We denounce them as law breakers." *Id.*

Based on its interpretation of the Kellogg-Briand Peace Pact, the Treaty of Mutual Assistance, a unanimous declaration concerning wars of aggression signed in 1927, a unanimous resolution in 1928 at the Sixth (Havana) Pan-American Conference decrying aggressive war as "an international crime of the human species," and the Versailles Treaty, the Nuremberg Tribunal concluded that "resort to a war of aggression is not merely illegal, but is criminal." *The Nuremberg Judgment*, 41 AM. J. INT'L L. at 218-220.

*Third*, the United States has, itself, recognized the crime of aggression as a *jus cogens* norm. Soon after the Nuremberg Judgment, the United States military code expressly made it a crime for service personnel to commit any of the Nuremberg offenses, including aggression, adding an acknowledgment that "members of the armed forces will normally be concerned only with those offenses constituting [battlefield] 'war crimes.'" Jonathan A. Bush, *"The Supreme…Crime"*

*and Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2388-89 (2002) (quoting Dep't of the Army, Field Manual 27-10, The Law of Land Warfare P 498 (1956); Henry T. King, Jr. *Nuremberg and Crimes Against Peace*, 41 CASE W. RES. J. INT'L L. 273, 274 (2009) (noting adoption by President Roosevelt of the recommendation that individuals be punished for starting aggressive wars). The 2005 version of the United States Army Center for Law and Military Operations, Law of War Handbook (which states that it "should be a start point for Judge Advocates looking for information on the Law of War") recognizes both the Nuremberg Charter and G.A. Resolution 3314's definition of aggression, and acknowledges that "*[v]irtually all commentators agree that the provisions of the [Kellogg-Briand Peace Pact] banning aggressive war have ripened into customary international law*." *See* The United States Army Center for Law and Military Operations, Law of War Handbook 11, 20, 35, 36, 41 (2005) [hereinafter LOW Handbook][5] (emphasis added).

*Fourth*, at least one foreign court of appeal has affirmed that the crime of aggression is part of customary international law. *See R v. Jones* [2006] UKHL 16 (analysis by House of Lords reaching such conclusion).

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[5] The 2010 version of the LOW Handbook contains this same analysis. *See* The United States Army Center for Law and Military Operations, Law of War Handbook 14, 171 (2010)

*Fifth*, legal scholars have concluded that the crime of aggression is a *jus cogens* norm. *See*, e.g., Mary Ellen O'Connell and Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus ad Bellum and the ICC Statute*, 10 (1) J. INT'L CRIM. JUST. 189, 190 (2012); M. Cherif Bassiouni, "International Crimes" at 68; Evan J Criddle and Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 333 (2009). The International Criminal Court in the Hague has also defined the Crime of Aggression and will have jurisdiction over this crime.[6]

### *iv. This Court should adopt the logic of Abdullahi v. Pfizer and find aggression a* jus cogens *norm for purposes of the ATS.*

In *Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009), the Second Circuit provided a cogent framework for analyzing a claim grounded in the Nuremberg Judgment and whether it was actionable under the ATS. The Second Circuit held the essential inquiry as to the actionability of a customary norm of international law under the ATS is "whether the norm alleged (1) is a norm of international character that States universally abide by, or accede to, out of a sense

[6] Amendments to the Rome Statute of the International Criminal Court art 8(2), June 11, 2010, Depository Notification C.N.651.2010.Treaties-8 [hereinafter Rome Statute Amendments] (though the amendment was passed in 2010 by the Assembly of State Parties to the International Criminal Court ("ICC"), the ICC may only exercise jurisdiction over the crime of aggression subject to another vote to be held after January 1, 2017).

of legal obligation: (2) is defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) is of mutual concern to States." *Id*. at 174.

With that as a framework, the Second Circuit analyzed whether claims of nonconsensual medical experimentation reached such a standard. The district court had declined to find such a claim actionable under the ATS; the Second Circuit reversed, holding that the district court had "inappropriately narrowed its inquiry" by only looking at whether "each source of law referencing the norm is binding and whether each source expressly authorizes a cause of action to enforce the term … *Sosa*, as we have seen, requires a more fulsome and nuanced inquiry." *Id*. at 176.

With respect to universality, the Second Circuit found that the prohibition on nonconsensual medical experimentation on human beings was in fact universal as, among other reasons, the prohibition is specific, focused and accepted by nations around the world without significant exception. *Id*. at 177-179. Relying heavily on Nuremberg, *Abdullahi* recognized, "both the legal principles articulated in the trials' authorizing documents and their application in judgments at Nuremberg occupy a position of special importance in the development of bedrock norms of international law. [T]he universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts ...—are the direct ancestors of the universal and fundamental

norms recognized as *jus cogens*," from which no derogation is permitted, irrespective of the consent or practice of a given State. *Abdullahi*, 561 F.3d at 179 (citing *Siderman de Blake*, 965 F.2d at 715).

If the prohibition against medical experimentation is a universal norm, then it must follow *a fortiori* that the prohibition against aggression is similarly universal. The Nuremberg Tribunal held that the crime of aggression was the "supreme international crime," *The Nuremberg Judgement*, 41 Am. J. Int'l L. at 186, and based its holding on its own review of the state of international law in 1946, finding that the Kellogg-Briand Peace Pact, the Treaty of Mutual Assistance, a unanimous declaration concerning wars of aggression signed in 1927, a unanimous resolution in 1928 at the Sixth (Havana) Pan-American Conference decrying aggressive war as "an international crime of the human species," and the Versailles Treaty all identified the ban on wars of aggression as a universal norm. *The Nuremberg Judgment*, 41 AM. J. INT'L L. at 218-220.

With respect to the second prong—specificity—lower courts are permitted to recognize under federal common law only those private claims for violations of customary international law norms that reflect the same degree of definite content and acceptance among civilized nations as those reflected in 18th-century paradigms. *Abdullahi* reasoned that because the war crimes trials at Nuremberg, along with other international sources, uniformly and unmistakably

prohibit nonconsensual medical experiments, they provide concrete content for that norm of international law. *Id* at 184. And just as Nuremberg prohibits nonconsensual medical experimentation, it unmistakably prohibits commission of the crime of aggression. As noted *supra*, the prohibition against aggression has been recognized and codified, *inter alia*, not only by the United States's Army Law Handbook, but also by the International Criminal Court. There is no question that the specificity requirement under the *Abdullahi* test is met. As part of her diligence on the question of specificity, Plaintiff even provided the district court with a complete definition of the crime of aggression and the conspiracy to commit aggression based on her survey of the current state of international law. ER 40-41. Plaintiff proposed that the crime of aggression is:[7]

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

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

[8] Nuremberg Charter, art. 6(b); G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974); Charter of the Int'l Military Tribunal for the Far East, art. 5(a), Jan. 19, 1946, T.I.A.S. No. 1589 (hereinafter Tokyo Charter) (1946); Rome Statute Amendments; LOW Handbook 36, 41 (recognizing that prohibition against aggression is customary international law, and acknowledging both the Nuremberg Charter and G.A. Resolution 3314's definition of aggression).

[9] See Jackson Opening Statement (stating that the Prosecution had 'no purpose to incriminate the whole German people', and intended to reach only 'the

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

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

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

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any

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planners and designers, the inciters and the leaders, without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness ... of this terrible war'.).; *Goering*, 41 AM. J. INT'L L. at 223; *United States v. von Leeb et al*., Military Tribunal XII (hereinafter *High Command* Judgment), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950) at 488-491; *United States v. von Weizsäcker et al*., Military Tribunal XI (hereinafter *Ministries* Judgment), 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1949) at 425; Judgment of the International Military Tribunal for the Far East, reprinted in R. Pritchard (ed), *The Tokyo Major War Crimes Trial* (1998), at 1190-1191; Rome Statute Amendments; LOW Handbook at p. 208.

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

extension of their presence in such territory beyond the termination of the agreement;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein,[11]

and

(4) is in violation of international law, treaties, agreements, assurances,[12] or the Charter of the United Nations.[13]

With respect to Conspiracy to Commit Aggression, Plaintiff proposed the following definition:

Participation in a common plan or conspiracy to commit the crime of aggression.[14]

Finally, the third prong—mutual concern—is met. Mutual concern is evidenced, in part, through states demonstrating "by means of express international accords" that the wrong is of mutual concern. An important, but not exclusive,

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

[12] Nuremberg Charter, art. 6(b); Tokyo Charter, art. 5(a).

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

[14] Nuremberg Charter, art. 6(b); Tokyo Charter, art. 5(a).

component of this test is a showing that the conduct in question is "capable of impairing international peace and security." *Abdullahi*, 562 F.3d at 185. The United States is a party to the UN Charter, the Nuremberg Charter, the Tokyo Charter, and the Kellogg-Briand Peace Pact, which all condemn the crime of aggression and, with respect to the Nuremberg and Tokyo Charters, specifically preclude a defense based on domestic immunity. Indeed, mutual concern was the driving force behind the United States' prosecution of aggression against German leaders. In his report with respect to the Nuremberg Judgment, Chief Prosecutor Jackson observed, "The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order." Jackson to Truman, 25 July 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945* (Washington, D.C.: U.S. Department of State, 1947), pp. 381-84. He further noted, "[O]ur view is that this isn't merely a case of showing that these Nazi Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on the international peace, which to our mind is a criminal offense by common-law tests, at least, and the other atrocities were all preparatory to it or done in execution of it." *Id*., 19 July 1945, p. 299. He concluded his report with the words that "all who have shared in this work have been united and inspired in the belief that at long last the law is now

unequivocal in classifying armed aggression as an international crime instead of a national right." *Id*. at ix, xii.

***b. Domestic immunity is not a defense to allegations of the crime of aggression.***

The Nuremberg Judgment's prohibition of aggression as a *jus cogens* norm carries with it a second, equally important component: the rejection of a defense that a defendant is immunized by domestic law.

The Nuremberg Tribunal held:

- "[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law." *The Nuremberg Judgment*, 41 AM. J. INT'L L. at 221.
- "It was submitted that International Law is concerned with the actions of sovereign States and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both submissions must be rejected." *The Nuremberg Judgment*, 41 AM. J. INT'L L. at 233.

In this case, the district court held that there was no case that "supports [Plaintiff's] position that the proceedings of an international criminal military tribunal can have preclusive or estoppel effect on a subsequent civil case in federal court." ER 6, n.3. However, the district court erred because it failed to analyze the *jus cogens* nature of aggression, as requested by Plaintiff, and to take into account the *jus cogens* nature of the prohibition against domestic immunity. The district court's opinion is, unfortunately, silent with respect to Plaintiff's claims that aggression is a *jus cogens* norm and that defendants are otherwise liable under the Nuremberg Judgment and the ATS. *See Kadic*, 70 F.3d at 239 ("[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."); *id* at 240 ("Individuals may be held liable for offenses against international law, such as piracy, war crimes and genocide.") (internal citation omitted).

***c. Judicial estoppel precludes the Government from certifying Defendants in this case or arguing that they are immunized from proceedings by domestic law.***

The district court also failed to analyze the doctrine of judicial estoppel in prohibiting the United States from certifying the Defendants under the Westfall Act or in arguing that the crime of aggression is within the legitimate scope of a government official's authority. This is because the United States argued before the Nuremberg Tribunal that the crime of aggression was ***not*** within

the legitimate scope of a government official. The United States argued at Nuremberg, *inter alia*, that:

- "[T]he very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defense the law ever gave." Jackson Opening Statement.
- "The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under international law, is old and well established. That is what illegal warfare is. This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace." Jackson Opening Statement.
- "While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity." Jackson Opening Statement.
- "The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states … Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility." Jackson Opening Statement.

- "But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law." Jackson Opening Statement.
- "This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors." Jackson Opening Statement.
- "This Charter and this Trial, implementing the Kellogg-Briand Pact, constitute another step in the same direction and juridical action of a kind to ensure that those who start a war will pay for it personally." Jackson Opening Statement.

The United States also specifically represented that these arguments would apply to itself, arguing forcefully to the Tribunal that, "The law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment." "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well." Jackson Opening Statement.

This circuit has held that judicial estoppel is an equitable doctrine "invoked by a court at its discretion" when it is necessary to "protect the integrity of the judicial process." *Russell v. Rolfs*, 893 F.2d 1033, 1047 (9th Cir. 1990). It is

"intended to protect against a litigant playing 'fast and loose with the courts.'" Id. (internal citations ommitted). The Ninth Circuit has applied judicial estoppel against governmental bodies. *Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886, 891 (9th Cir. 1992); *see also Committee of Russian Fed. On Precious Metals and Gems v. United States*, 987 F.Supp. 1181, 1184 (N.D. Cal. 1997). Here, the United States through the Department of Justice cannot take an inconsistent position regarding the applicability of domestic law as a shield to charges of aggression. The Westfall Act "empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Osborn v. Haley,* 549 U.S. 225, 225 (2007). Based on the principles of estoppel argued above, the United States cannot certify individuals for alleged activities it claimed could never be legitimate government conduct before the Nuremberg Tribunal.

The district court erred in not addressing this claim of judicial estoppel. By not estopping the United States, the district court cheapened the arguments made by the United States before the Nuremberg Tribunal and its subsequent holdings. Indeed, the German defendants were adamant that the exercise of legal authority by the Nuremberg Tribunal was nothing more than

victor's justice.[15] Permitting the United States to play "fast and loose"—argue one thing to the Nuremberg Tribunal, and another thing to the district court—undermines the credibility of the Nuremberg Judgment and revives ghosts of criticisms of the Nuremberg Tribunal that should be left undisturbed. *See*, e.g., Hans Kelson, *Will the Judgment In the Nuremberg Trial Constitute A Precedent In International Law?* 1 INT'L L.Q. 153, 170 (1947) (rejecting Prosecutor Jackson's statement that the Nuremberg Judgment was "incorporated" into "judicial

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[15] See LEON GOLDENSOHN, THE NUREMBERG INTERVIEWS: AN AMERICAN PSYCHIATRIST'S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES (2004) 128 (Hermann Goering to U.S. Army psychiatrist Dr. Leon Goldensohn, May 28, 1946: "I am sure that I will go down in history as a man who did much for the German people. This trial is a political trial, not a criminal one."; 129-130 ("This tribunal fails to realize that accepting orders is a legitimate excuse for doing almost anything. The tribunal is wrong . . . I am very cynical about these trials. The trials are being fought in the courtroom by the world press. Everyone knows that the Frenchmen and the Russians who are judges here have made up their minds that we are all guilty and they had their instructions from Paris and Moscow long before the trial even started to condemn us. It's all but planned and the trial is a farce. Maybe the American and English judges are trying to conduct a legitimate trial. But even in their case I have my doubts"); 33 (Hans Frank to Dr. Goldensohn, July 20, 1946: "[Prosecutors Jackson and Dodd] are politicians not lawyers, as far as this procedure is concerned. Their mission is political. They are mouthpieces of political interests which are directed toward the destruction of National Socialism." ); 152 (Ernst Kaltenbrunner to Dr. Goldensohn, June 6, 1946: "The prosecution conducts this trial for political reasons and has blinders on their eyes. This is necessary for them because of political reasons."); 188 (Joachim von Ribbentrop to Dr. Goldensohn, June 23, 1946: "The Allies should take the attitude, now that the war is over, that mistakes have been made on both sides, that those of us here on trial are German patriots, and that though we may have been misled and gone too far with Hitler, we did it in good faith and as German citizens. Furthermore, the German people will always regard our condemnation by a foreign court as unjust and will consider us martyrs.").

precedent," or that it was "law with a sanction," and instead concluding, "[T]he principle of individual criminal responsibilty for the violation of rules of international law prohibiting war has not been established as a general principle of law, but as a rule applicable only to vanquished States by the victors."). It is well within this Court's discretion to examine the doctrine of judicial estoppel in this instance.

**2. Even if a domestic immunity defense was properly raised, the district court erred in accepting the Attorney General's certification as Plaintiff raised sufficient allegations in her complaint that the alleged conduct was not conducted within any legitimate scope of employment.**

The Attorney General's decision regarding a scope of employment certification is "subject to *de novo* review in both the district court and on appeal." *Kashin*, 457 F.3d at 1036; *see also McLachlan*, 261 F.3d at 910 ("We review the dismissal under Federal Rule of Civil Procedure 12(b)(1) and the denial of the challenge to certification *de novo*."). Where the district court declines to hold an evidentiary hearing, the court of appeal will "accept as true the factual allegations in the complaint." *Id*. at 909. In the event this Court determines that a domestic immunity defense may be properly raised pursuant to the Westfall Act even where a Plaintiff has alleged allegations of aggression, Plaintiff's allegations, if true, would rebut the Attorney General certification. "District of Columbia law concerning the scope of employment is rooted in the Restatement (Second) of

Agency." *Kashin*, 457 F.3d at 1038-1039.[16] Plaintiff disputes the certification under the three of the four prongs of the Restatement test.

**a. The Defendants spent more time planning the war prior to office than executing the war once in office.**

The second prong of the Restatement tests asks whether the conduct "occurs substantially within the authorized time and space limits." This factor weighs heavily in favor of Plaintiff. Assuming a December 1, 1997 start date for the inception of the planning of the war, (ER 70, Complaint ¶¶ 29-30), the Defendants (and in particular Defendants Wolfowitz and Rumseld) spent more time planning the war prior to the inauguration of Defendant Bush (January 20, 2001) than they did from his inauguration to the beginning of the war.[17] The planning for the war explicitly sought to use United States military personnel to

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[16] "The Restatement provides: (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.… Consistent with the Restatement's use of the conjunctive, [any disputed prongs] must favor [the defendant] if we are to find that he acted within the scope of employment." *Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006).

[17] There are 3 years, 1 month and 20 days (including the end date) between December 1, 1997 and January 20, 2001, the date of the inauguration of Defendants Bush and Cheney (the other defendants would have taken office subject to the advice and consent of the Senate). There are 2 years and 2 months (including the end date) between January 20, 2001 and March 19, 2003.

"remove Saddam from power." ER 71, Complaint ¶ 31. Plaintiff further alleges that Defendants implemented their plan immediately upon taking office. ER 72-73, Complaint ¶¶ 35-39.

The district court did not sufficiently address the pre-administration planning of the war. It simply held that "notwithstanding Saleh's claim that Rumsfeld and Wolfowitz had a preexisting plan to invade Iraq, the planning and execution of the war with Iraq 'occur[ed] substantially within the authorized time' of Defendants' employment." ER 4. This is simply not true. The district court appears to have injected its own facts into the Complaint, instead of analyzing Plaintiff's specific allegations, which are heavily tied to the planning and intent by certain of the Defendants to invade Iraq prior to coming into office, and the carrying of that intent through the early days of the administration and through the events of 9/11.

This "planning" element was also the focus of the Nuremberg Judgment, which also focused on pre-government conduct of those defendants and the "unmistakable attitude of aggression revealed" in literature circulated by the Nuremberg defendants prior to taking office. The Tribunal noted that,

> "The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was premeditated and carefully planned, and was not undertaken until the

> moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan."
> *The Nuremberg Judgment*, 41 AM. J. INT'L L. at 186.

Similarly, the pre-government literature from Defendants Rumsfeld and Wolfowitz reveal an "unmistakable attitude of aggression" related to the planning of the Iraq War, plans that were set in motion at the very first national security meeting (ER 72-73, Complaint ¶¶ 37-39), the very first week of Defendants' employment, and then accelerated on and after 9/11, finally leading up to the execution of the war in March 2003. ER 73-95, Complaint ¶¶ 40-121.

**b. The planning and execution of the Iraq War was done to further personal interests.**

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

"The key inquiry is the employee's intent at the moment the tort occurred." *Majano v. United States*, 469 F.3d 138, 142 (D.C. Cir. 2006). An intentional tort by its very nature is "willful and thus more readily suggests

personal motivation." *Jordan v. Medley*, 711 F.2d 211, 215 (D.C. Cir. 1983); *M.J. Uline v. Cashdan*, 171 F.2d 132, 134 (D.C. Cir. 1949); *Boykin v. District of Columbia*, 484 A.2d 560, 562 (D.C. 1984) (employer not liable for educator's sexual assault where assault "appears to have been done solely for the accomplishment of Boyd's independent, malicious, mischievous and selfish purposes.").

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

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

- At least three of the Defendants—Wolfowitz, Rumsfeld and Cheney—were motivated by neoconservative personal beliefs that called for the use of the United States military to further ideological purposes. ER 69-72, Complaint ¶¶ 27-34.

- Defendant Bush was motivated by personal religious beliefs regarding "Gog and Magog" being at work in the Middle East, as reported by former New York Times reporter Kurt Eichenwald. ER 89, Complaint ¶ 100.
- Defendants met in their first week of official employment in what appeared to be a scripted exchange (as described by the former Secretary of the Treasury) to discuss a renewed focus on Iraq and potential military action. ER 72, Complaint ¶ 36.
- Defendants made numerous false statements to the public regarding any threat posed by Iraq, or its connections to al-Qaeda, in order to support a war. ER 80-87, Complaint ¶¶ 65-95.
- Defendant Powell misrepresented facts to the United Nations. ER 87, Complaint ¶¶ 93-94.
- Defendants engaged in pre-employment conduct advocating for a military invasion of Iraq, and were associated with a non-profit whose explicit goal was "showing its muscle in the Middle East." ER 69, Complaint ¶ 28.
- "Outrageous" conduct may indicate that a motivation was "purely personal." *Penn. Cent. Transp. Co.*, 398 A.2d at 31. Certainly, the planning and execution of the crime of aggression would constitute "outrageous" conduct under any civilized legal standard.

The district court held that Plaintiff had "presented no evidence and

alleged no fact that would suggest that Defendants' actions in planning and prosecuting the war in Iraq were not motivated, at least in part, by a subjective desire to serve the interests of the United States." ER 5. The district court erred in significant ways in this holding. In addition to imputing allegations of a "subjective desire to serve the United States" into the Complaint, when no such allegations exist, District of Columbia law clearly states that the "test for scope of employment is an ***objective*** one, based on all the facts and circumstances." *Council on American Islamic Relations*, 444 F.3d at 663 (emphasis added). The district court was required to examine the allegations in the Complaint and determine, *objectively*, whether Plaintiff's allegations, *inter alia,* of a pre-existing plan for war (ER 69-72), the use of 9/11 as the trigger for planning the Iraq War, (ER 73-79), fraudulent and untrue statements regarding the existence of weapons and mass destruction (ER 80-84), fraudulent and untrue statements regarding Iraq's links to al-Qaeda (ER 84-87), and the neo-conservative and religious convictions of Defendants (ER 69-72, 89-90) reflected any partial desire to serve the master, or, personal motivations. The district court declined to undertake this analysis; had it done so, it would have determined that Plaintiff's allegations reflected no desire by Defendants to legitimately serve the master, e.g., the United States government and its people, but only a naked desire to rush to war, whatever the price, however the means, and regardless of the misrepresentations made to justify the war to the

public and to the international community. The district court simply sidestepped this analysis, using its own "subjective" standard instead of an objective standard, and failed to address any of Plaintiff's allegations which show personal, selfish motivations for invading Iraq.

**c. The Defendants were not employed to execute a pre-existing war.**

In determining whether conduct was authorized, District of Columbia law "focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." *Council on American Islamic Relations*, 444 F.3d at 664 (citing *Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981)); *see also In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d 85, 113-114 (Dist. D.C. 2007), *aff'd Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011). Conduct is "incidental" to an employee's legitimate duties if it is "foreseeable." *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995). "Foreseeable in this context does not carry the same meaning as it does in negligence cases; rather, it requires the court to determine whether it is fair to charge employers with responsibility for the intentional torts of their employees." *Id*. While Defendants duties involved military and political affairs, Defendants were not hired to implement a pre-existing plan to invade another country—the underlying act in dispute. This is a key point that places the Defendants' alleged

conduct well outside of their scope of employment under District of Columbia law. Courts finding conduct as within the scope of employment under District of Columbia law are typically presented fact patterns where the allegedly tortious conduct is initiated or is an outgrowth of activity that commences during their employment term. Plaintiff has instead alleged that Defendants ***brought*** into office a preexisting plan to invade, and used their positions to implement the plan.

The fact that an employee's job gives him the opportunity to act on personal motivations does not transform such personal motivations into a desire to serve the master. *See Schecter*, 892 A.2d at 431. Two District of Columbia cases make this distinction abundantly clear. In *Boykin v. District of Columbia*, 484 A.2d 560 (D.C. App. 1984), the court of appeals for the District of Columbia held that a school employee who utilized his position to assault a student acted outside the scope of his employment. The court of appeal rejected the argument that a sexual assault was foreseeable because a teacher's job duties necessarily include physical contact with students. "We do not believe that a sexual assault may be deemed a direct outgrowth of a school official's authorization to take a student by the hand or arm in guiding her past obstacles in a building." *Id*. at 562.

The *Boykin* court relied on *Grimes v. B.F. Saul Co.*, 60 App.D.C. 47, 47 F.2d 409 (1931) in reaching its conclusion. In *Grimes*, an owner of an apartment building was not liable for an attempted rape on a tenant perpetrated by

an employee hired to inspect the building concerning certain needed repairs. That court held that the employer was not liable because the allegations reflected "an independent trespass of the agent, utterly without relation to the service which he was employed to render for the defendant." *Id*. at 48, 47 F.2d at 410.

The point under *Boykin* and *Grimes* is that no employer expects that its employees will enter their job with a pre-existing motivation to use violent, aggressive force against others, whether it is sexually assaulting a student, or using the cover of one's employment to assault innocent tenants: such conduct cannot be said to be "foreseeable" under the Restatement test. Similarly, Plaintiff has alleged that the Defendants in this case were committed to a preexisting intention to invade Iraq, regardless of legitimate national security reasons. This is indicated from their pre-administration statements (ER 69-72) and the observations of the Secretary of the Treasury, who concluded that Defendants were settled on invading Iraq as early as their first week in office (ER 72-73). Terrorism and 9/11 became the justifications for the invasion, but Plaintiff has alleged that these were mere pretexts which Defendants knew would help justify military force (ER 73-79). As with the assaults in *Boykin* and *Grimes*, Defendants used their positions to accomplish personally held, previously motivated conduct—not conduct that arose directly out of legitimate government conduct. *Compare Council on American Islamic Relations*, 444 F.3d at 664-665 (noting that allegedly defamatory statement

directly arose from a conversation with a journalist during regular work hours in response to a reporter's inquiry); *Rasul v. Myers*, 512 F.3d 664, 658-659 (D.C. Cir. 2008) (holding that allegations of torture were protected by the Westfall Act because plaintiffs did not allege "that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence.") On the contrary: Plaintiff has alleged that the war of Iraq had nothing to do with legitimate national security objectives, was on the minds of the Defendants as early as 1997, was justified using knowingly false and fraudulent information to garner support for war, and was undertaken to fulfill personal, ideological and religious purposes. ER 69-72, 89-90. Having received the keys to the company car, Defendants wasted no time in setting off on a "frolic and detour" that had nothing at all to do with legitimate national security considerations related to their duties as high officials of the United States. *Rouly v. Enserch Corp.*, 835 F.2d 1127, 1132 (5th Cir. 1988).

**3. The *Pinochet case* is persuasive authority for rejecting Defendants' scope of employment defense.**

The 1999 opinion from the House of Lords of the United Kingdom relating to the extradition of Augusto Pinochet provides persuasive and compelling authority on the rejection of a "scope of employment" offense where a country has ratified international treaties that prohibit the alleged conduct identified in a complaint. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte*

*Pinochet Ugarte*, 2 All E.R. 97 (H.L. 1999), available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (last visited May 16, 2015) (parallel citation is [2000] 1 A.C. 147) ("*Pinochet*"). In *Pinochet*, the House of Lords held that a valid scope of employment defense could not be raised where a State has ratified international treaties prohibiting such conduct. Six of the seven law lords concluded that Chile's participation in the Convention against Torture treaty forbade Pinochet from arguing that his alleged torture, amounting to an international crime, could be explained as being conducted to further Chile's interests. As noted *supra* the United States is a party to the UN Charter, the Nuremberg Charter, the Tokyo Charter, and the Kellogg-Briand Pact, which all condemn the crime of aggression and which specifically preclude (at least in the case of the Nuremberg and Tokyo Charters) a defense based on scope of employment.[18]

[18] [*Lord Browne-Wilkinson*: "Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function"]; [*Lord Hope of Craighead*: "[W]e are not dealing in this case - even upon the restricted basis of those charges on which Senator Pinochet could lawfully be extradited if he has no immunity - with isolated acts of official torture. We are dealing with the remnants of an allegation that he is guilty of what would now, without doubt, be regarded by customary international law as an *international* crime. This is because he is said to have been involved in acts of torture which were committed in pursuance of a policy to commit systematic

The district court only briefly considered the impact of the *Pinochet* case and its holding that conduct specifically prohibited by a treaty, which a State party has ratified, is excluded from the "scope of employment" analysis, but only to dismiss the analysis as not being consistent with any "U.S. authority in support of this position." ER 5, n.2. However, the logic of *Pinochet* is persusasive. The crime of aggression, by its very nature, requires that the conduct in question be committed by people holding an official position in government. The Westfall Act purports to immunize conduct undertaken by officials within the legitimate scope of their authority. Assuming that the crime of aggression is a *jus cogens* norm that is actionable under federal comon law, the Westfall Act cannot be read to eclipse

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

the elements of the crime in every instance, or else, the purported immunity would effectively repeal or eliminate the *jus cogens* norm. As noted by Lord Millett in the context of torture, "no rational system of criminal justice can allow an immunity which is co-extensive with the offence."[19]

In addition, the *Pinochet* holding maps closely onto the second and third prongs of the Westfall Act analysis. Assuming, *arguendo*, that the planning and execution of the crime of aggression is actionable as a tort, the *Pinochet* case states that the ratification of treaties by a State forbidding specific conduct automatically places such conduct outside the scope of official conduct, *ipso facto*. Thus, commission of the crime of aggression is inherently one for a personal, malicious interest (the second prong of the District of Columbia test) and never "authorized" conduct (the third prong of the District of Columbia test), because the United States has specifically ratified treaties that prohibit the conduct.

**4. The district court erred in denying an evidentiary hearing or in not leaving the scope of employment issue to the jury.**

As argued *supra*, the district court should have rejected the scope of employment certification of the Attorney General in this case. If it had any doubts, the district court should have permitted the evidentiary hearing or left the issue to the jury to decide. In *Stokes*, the plaintiff, a sergeant in the Uniformed Police

[19] American law already fully recognizes that the ATS incorporates principles of international criminal law. *See Sosa*, 542 U.S. at 723-724; *Kadic*, 70 F.3d at 240.

Branch of the United States Government Printing Office, alleged defamation against seven co-workers who he claimed defamed him and who were "orchestrat[ing] a conspiracy to injure, defame, harm or destroy" his professional reputation." *Stokes*, 327 F.3d at 1212. The Attorney General certified the defendants as acting within the scope of their employment, which the district court accepted. The D.C. Circuit reversed, holding that the alleged conduct—"destroying critical evidence, preparing and submitting false affidavits by use of threat and coercion, and engaging in other criminal acts"—was not clearly encompassed by District of Columbia law. *Id*. at 1216. Limited discovery into the defendants' intent was warranted since it would rebut the certification. *Id*.

The general rule is that whether an employee's conduct is within the scope of his employment "is a question of fact for the jury." *Boykin*, 484 A.2d at 562; *Majano*, 469 F.3d at 141. Accordingly, any doubts raised by Plaintiff's allegations with respect to the scope of employment analysis were entitled to either further discovery (as Plaintiff requested in her *Osborn* motion), or to a jury determination.

**5. The Court's failure to overturn the district court would carry grave consequences for the Nuremberg Judgment and for our liberal democratic tradition.**

The Anglo-American legal tradition has soundly committed itself to a clockwork system of checks-and-balances wherein the Executive Branch is subject

to oversight by the other branches, including the Judiciary. This model is a key component of the liberal democratic tradition that underpins the Federal Constitution.

Failure by the Court to overturn the district court would carry significant consequences for this tradition. This court has a duty to "say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), and the warmaking power is subject to judicial review. "The President is no more above the law than is Congress or the courts. Treaties and other aspects of international law apply to, and limit executive power—even in wartime." *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 72 (E.D.N.Y. 2005) *aff'd* 517 F.3d 104 (2d Cir. 2008) *cert denied*, 129 S.Ct. 1524 (2009); *id* at 64 (observing, "In the Third Reich all power of the state was centered in Hitler; yet his orders did not serve as a defense at Nuremberg"). In other contexts, courts are now asking serious, probing questions with respect to the Executive Branch's justification for conduct that is unlawful. *See*, e.g., *American Civil Liberties Union v. Clapper*, No. 14-42-cv (2d Cir. May 7, 2015) (holding that the Executive Branch's interpretation of § 215 of the PATRIOT Act was unwarranted and the Government's bulk collection of metadata unlawful).

Nor would this Court be the first court of appeal to analyze the legality of the Iraq War. In *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003), the First

Circuit considered a request for a preliminary injunction against Defendant Bush from initiating a war against Iraq, mere weeks before the invasion. The First Circuit, noting that the case was a "somber and weighty one," dismissed the case on the basis of ripeness. *Id*. at 135, 140. It held that in order for a court to decide whether military action contravenes law, a court must wait "until the available facts make it possible to define the issues with clarity." *See id*. at 140-141. Should this Court find some rationale to block judicial review of the matters presented herein regarding the legality of the Iraq War and the conduct and potential liability of Defendants, after a sibling circuit could not do so on the basis that the conduct in question had not yet happened, it would be ironic.

Whatever the decision of the Court, an underlying judicial philosophy will be made clear, one way or the other. For example, in the *Pinochet* case, the House of Lords could have conceivably chosen a rationale that would have protected Pinochet from extradition and rendered him immune from prosecution; they did not do so, instead choosing a path of judicial accountability over executives. Similarly, the Court could attempt to resist the weight of the Nuremberg Judgment, its obvious *jus cogens* status, and its rejection of a domestic immunity defense, and instead choose a rationale that will immunize Executive Branch officials from allegations of planning and executing a war that is illegal under international law. But if it does so, the Court will be ignoring this country's

ineffable contributions to international law, beginning with the very enactment of the ATS and continuing through the United States' participation in a variety of international tribunals—including the Nuremberg Tribunal—through the last century and into the present.

The Court cannot shy from its duty to check and balance the other branches. The Framers themselves observed that the Executive Branch's conduct in wartime must be subject to judicial scrutiny. *See* THE FEDERALIST No. 25 (Alexander Hamilton) (In the context of war-making noting that "every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence, which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable."); THE FEDERALIST No. 69 (Alexander Hamilton) (Differentiating the power of the executive from the British Crown in that, "The president of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."). Even John Locke, in his famous *Second Treatise on Government*, a philosophical linchpin of our Federal Constitution, observed, "That the aggressor, who puts himself into the state of war with another, and unjustly invades another man's right, can, by such an unjust war,

never come to have a right over the conquered, will be easily agreed by all men, who will not think, that robbers and pyrates have a right over empire over whomsoever they have force enough to master." JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 91 § 176 (C. B. Macpherson ed., Hackett Publishing Company, Inc. 1980) (1690). In Locke's words: "The injury and the crime is equal, whether committed by the wearer of a crown, or some petty villain." *Id*. Hundreds of years after Locke, former Nuremberg prosecutor Benjamin Ferencz, writing in his nineties, concluded, "The most important accomplishment of the Nuremberg trials was the condemnation of illegal war-making as the supreme international crime. That great step forward in the evolution of international humanitarian law must not be discarded or allowed to wither. Insisting that wars cannot be prevented is a self-defeating prophecy of doom that repudiates the rule of law. Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason." *See* Benjamin Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 289, 290 (2009).

The lesson of the Nuremberg Judgment, as in *Pinochet*, is that courts have a crucial role to play in the democratic and civilizing advancement of law, particularly through the vehicle of human rights. And the Nuremberg Judgment teaches that the supreme violation of human rights that we as a species can do to

each other is the commission of an unlawful war: the crime of aggression. Failure by the Court to recognize the crime of aggression, or to reject a domestic immunity defense, will undermine the legal framework that has governed international relations after the Second World War. It will also mean that Executive Branch officials will have no incentive to stay within the boundaries of law. It cannot be the case that Executive Branch officials who commit the supreme crime may remain free of judicial scrutiny, even when such conduct leads to previously unimaginable and tragic loss of blood and treasure, as it has surely done in the case of the Iraq War—a war that Plaintiff (and others) identify as and argue to be illegal under the Nuremberg Judgment. Without the sanction of law, there is nothing to stop such a tragedy from happening again.[20] The Nuremberg Judgment must mean something more than the victor's justice the condemned Germans argued that it was. If the Nuremberg Judgment cannot find life under United States law, it becomes little more than legalistic propaganda justifying the hanging of a defeated nation's leaders—a cynical, trite exercise full of sound and fury, signifying nothing. Surely, if the Nuremberg Judgment and the actions of American lawyers

[20] "Wherever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate." LOCKE, *supra*, at 103 § 202.

and jurists more than 60 years ago retain any power as law—as they must—this Court will resonate in recognition and reverse the district court.

## CONCLUSION

For the reasons set forth herein, this Court should affirm the actionability of aggression under the ATS, reverse the district court's substitution of the United States in the place of Defendants and remand the case for further proceedings consistent with its opinion.

Respectfully submitted,

Dated: May 27, 2015

COMAR LAW

By /s/ *Inder Comar*
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Attorney for Plaintiff-Appellant
SUNDUS SHAKER SALEH

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I, the under-signed counsel, certify that this Appellant Opening Brief for Plaintiff-Appellant is proportionally spaced, has a typeface of 14 points or more, and contains 13,790 words of text, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii) according to the word count feature of Microsoft Word used to generate this brief.

Respectfully submitted,

Dated: May 27, 2015

COMAR LAW

By /s/ *Inder Comar*
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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant, through the under-signed counsel, confirms there are no known related cases, as defined by 28-2.6(a) through (d), pending in this Court.

Respectfully submitted,

Dated: May 27, 2015

COMAR LAW

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

9th Circuit Case Number(s) 15-15098

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