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

D. INDER COMAR (SBN 243732)
COMAR LAW
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.562.6790
Facsimile: +1.415.513.0445
Email: inder@comarlaw.com

Attorney for Plaintiff-Appellant
Sundus Shaker Saleh

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CASES AND AUTHORITIES

Page(s)

Cases

TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)

TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)

TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)

TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)

TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)

TABLE OF CASES AND AUTHORITIES
(continued)

Page(s)

Rules

Treatises

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]

---

[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

---

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 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 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 Untied States 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).

---

[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,

---

[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

---

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,

---

[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

---

[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

---

[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

---

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 corecison, 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 prelminary 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 baseness 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 juidicial 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*
D. Inder Comar
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*
D. Inder Comar
Attorney for Appellant
SUNDUS SHAKER SALEH

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

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [ ]

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) [ ]

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 5/27/2015 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Glenn S. Greene
DOJ - U.S. DEPARTMENT OF JUSTICE
Civil Division, Torts Branch
P.O. Box 7146, Benjamin Franklin Station
Washington, DC 20044-7146

Signature (use "s/" format) s/ D. Inder Comar

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE No. 15-15098

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

Plaintiff-Appellant,

v.

GEORGE W. BUSH, *et al.,*

Defendants-Appellees.

PLAINTIFF-APPELLANT SUNDUS SHAKER SALEH'S EXCERPTS OF RECORD VOLUME I of II

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

D. INDER COMAR, ESQ.
SBN 243732
COMAR LAW
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: (415) 640-5856
Facsimile: (415) 513-0445
Email: inder@comarlaw.com

Attorney for Plaintiff-Appellant
SUNDUS SHAKER SALEH

TABLE OF CONTENTS

Page:

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUNDUS SHAKER SALEH,

Plaintiff,

v.

GEORGE W. BUSH, et al.,

Defendants.

Case No. 13-cv-01124-JST

ORDER DENYING PLAINTIFF'S MOTION FOR AN EVIDENTIARY HEARING AND GRANTING DEFENDANTS' MOTION TO DISMISS

Re: ECF Nos. 38, 43

Before the Court are Plaintiff Sundus Shaker Saleh's Osborn Motion for an Evidentiary Hearing in Support of her Second Amended Complaint, ECF No. 38, and Defendants' Motion to Dismiss, ECF No. 43. For the reasons set forth below, the motion for an evidentiary hearing is DENIED and the motion to dismiss is GRANTED.

I. BACKGROUND

Plaintiff Saleh brings this action on her own behalf and on behalf of a putative class of Iraqi civilians against former President George W. Bush, former Vice President Richard Cheney, former Secretary of Defense Donald Rumsfeld, former National Security Advisor Condoleeza Rice, former Secretary of State Colin Powell, and former Deputy Secretary of Defense Paul Wolfowitz ("Defendants"). ECF No. 37. Saleh alleges that Defendants "broke the law in conspiring and committing the Crime of Aggression against the people of Iraq" when they engaged the United States in war with Iraq. Id. ¶ 1. She alleges that Defendants' actions violated international law, citing sources of international law including the Kellogg-Briand Pact, the United Nations Charter, and the Nuremberg Charter. Id. ¶¶ 139-44, 149-54.

On May 19, 2014, the Court granted Defendants' Motion to Dismiss Saleh's First Amended Complaint and permitted Saleh to file an amended complaint addressing the deficiencies identified by the Court. ECF No. 35. Saleh filed her Second Amended Complaint on June 8,

2014, ECF No. 37, and her motion requesting an evidentiary hearing the following day, ECF No. 38. On June 23, 2014, the United States filed its Notice of Substitution of the United States as Sole Defendant pursuant to the Westfall Act, 28 U.S.C. § 2679(b), and its motion to dismiss the operative complaint for lack of subject matter jurisdiction. ECF Nos. 42, 43. The Court will address the motion for an evidentiary hearing and the motion to dismiss in turn.

II. PLAINTIFF'S MOTION FOR AN EVIDENTIARY HEARING

On behalf of the Attorney General, the Director of the Torts Branch of the United States Department of Justice has certified that each individual Defendant in this case was acting within the scope of his or her federal office or employment at the time of the incidents out of which Saleh's claims arise. ECF No. 42-1. Plaintiff seeks an evidentiary hearing to challenge the certification of scope of employment or, in the alternative, an Order from the Court that it will assume the truth of the factual allegations in the complaint for the purposes of challenging the certification. ECF No. 38. For the reasons below, the motion is DENIED.

A. The Westfall Act

The Westfall Act confers immunity on federal employees by making a Federal Tort Claims Act ("FTCA") action against the Government "the exclusive remedy for torts committed by Government employees in the scope of their employment." United States v. Smith, 499 U.S. 160, 163 (1991); 28 U.S.C. § 2679(b)(1). The act provides that:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). The exclusivity of the FTCA remedy is applicable even if it bars a plaintiff's recovery. See Smith, 499 U.S. at 166 ("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.").

"Certification by the Attorney General is prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident and is conclusive unless

challenged." Billings v. United States, 57 F.3d 797, 800 (9th Cir. 1995). The party seeking review of the certification "bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence." Id.

B. Legal Standard

A district court has discretion to hold an evidentiary hearing to permit investigation of the Attorney General's certification that a government employee was acting within the scope of his or her employment at the relevant time. Kashin v. Kent, 457 F.3d 1033, 1043 (9th Cir. 2006). However, a court "should not do so if the certification, the pleadings, the affidavits, and any supporting documentary evidence do not reveal an issue of material fact." Id.

C. Discussion

Plaintiff's challenge to the Attorney General's scope of employment certification is based on her allegations that Defendants formed an intent to invade Iraq before they came into office and that their actions were driven entirely by personal motivations, including their ideological and religious convictions, and not by the duties of the offices they held. ECF No. 38 at 3. Defendants contend that Saleh's request for a hearing must be rejected because she has neither presented any evidence nor alleged any facts sufficient to meet her burden of disproving that Defendants were acting within the scope of their employment during the Iraq War. ECF No. 46 at 3.

The Court concludes that an evidentiary hearing would be inappropriate in this case because the certification and pleadings in this case "do not reveal an issue of material fact" as to whether Defendants were acting within the scope of their employment in conjunction with the war in Iraq. Kashin, 457 F.3d at 1043. Under District of Columbia scope of employment law, which is drawn from the Restatement (Second) of Agency:

> (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.

Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 663 (D.C. Cir. 2006).[1]

It is clear that, even taking all of Saleh's factual allegations as true, the scope of employment requirements are satisfied. Defendants were formerly the Commander-in-Chief, the Vice-President, the Secretary of Defense, the National Security Advisor, and the Deputy Secretary of Defense of the United States. With respect to the first and second prongs of the test, engaging in war is without doubt among conduct of the kind the these defendants were employed to perform and, 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. Similarly, because Saleh does not allege that Defendants personally used force and any use of military force they authorized in conjunction with war "is not unexpectable," the fourth prong is satisfied.

The third prong, providing that conduct "is actuated, at least in part, by a purpose to serve the master," requires only "a *partial* desire to serve the master." Council on Am. Islamic Relations, 444 F.3d at 665; see also id. at 664 ("the proper [scope of employment] inquiry 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" (internal quotation marks omitted)); Allaithi v. Rumsfeld, 753 F.3d 1327, 1333 (D.C. Cir. 2014) ("[District of Columbia] law requires an employee be *solely* motivated by his own purposes for consequent conduct to fall outside the scope of employment."); Weinberg v. Johnson, 518 A.2d 985, 989 (D.C. 1986) ("where the employee is in the course of performing job duties, the employee is presumed to be intending, at least in part, to further the employer's interests"). Saleh alleges that "Defendants were not motivated by genuine national security interests" but rather, "*inter alia*, by personally-held neo-conservative convictions which called for American military dominance of the Middle East, and by a religious worldview." ECF No. 37

[1] The parties agree that District of Columbia law governs the scope of employment determination in this case. ECF No. 43 at 7 n.7; ECF No. 47 at 12-13. See also Kashin, 457 F.3d at 1037-39 (applying District of Columbia law).

¶ 109. But these alleged "neo-conservative convictions" relate to the military and political position of Defendants' employer, the United States, not to any personal gain that Defendants sought from a war with Iraq. Saleh has 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.[2]

III. DEFENDANTS' MOTION TO DISMISS

A. Legal Standard

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to Federal Rule of Civil Procedure 12(b)(1). The plaintiff always bears the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

B. Discussion

The United States moves to dismiss the operative complaint on the ground that the Court lacks subject matter jurisdiction over this action. ECF No. 43. The Government argues that the United States must be substituted as Defendant, and that the Court lacks subject matter jurisdiction because (1) Saleh failed to exhaust her administrative remedies before filing suit; (2) the United States has not waived its sovereign immunity for suits based upon customary international law; (3) Saleh's claims are barred by the foreign country exception to the FTCA; and (4) Saleh's claims are barred by the combatant activities exception to the FTCA. Id. at 3. In any event, the Government argues, the political question doctrine bars Saleh's claims, and her claims cannot be brought under the Alien Tort Statute. Id. at 4. Finally, the Government contends that even if this Court does have subject matter jurisdiction over the action, venue is improper in this district. Id.

[2] Saleh acknowledges that the argument that alleged violations of *jus cogens* norms are always outside the scope of employment has been rejected. ECF No. 47 at 16 n.22. She attempts to distinguish her "narrower" argument that such violations are outside the scope of government employment when the United States has ratified a treaty prohibiting the relevant conduct, but she cites no U.S. authority in support of this position. Id.

1. The Westfall Act

As explained above, the Westfall Act makes a Federal Tort Claims Act action against the Government "the exclusive remedy for torts committed by Government employees in the scope of their employment." Smith, 499 U.S. at 163; 28 U.S.C. § 2679(b)(1). "Certification by the Attorney General is prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident and is conclusive unless challenged." Billings, 57 F.3d at 800. The party seeking review of the certification "bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence." Id.

Here, the Attorney General has certified that Defendants were acting within the scope of their federal employment when performing the acts at issue. ECF No. 42-1. For the reasons explained above, the Court concludes that Saleh cannot meet her burden of disproving that Defendants were acting within the scope of their employment during the Iraq War.[3] Accordingly, this action shall be deemed an action against the United States and the United States shall be substituted as the sole Defendant. See 28 U.S.C. § 2679(d)(1).

2. Administrative Exhaustion Requirement

The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States . . . 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 . . . ." 28 U.S.C. 2675(a). Because the operative complaint, like the prior complaint considered by the Court in its May 19, 2014 Order, is devoid of any suggestion that Saleh filed an administrative claim with a federal agency prior to filing this suit, the Court is without jurisdiction to adjudicate her claims. See Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir. 2011) ("The requirement of an administrative claim is jurisdictional. Because the requirement is jurisdictional, it must be strictly adhered to. This is

[3] Saleh argues that the Government is estopped from arguing that the crime of aggression is within the scope of an official's employment or from certifying that Defendants' conduct is within the scope of employment because this position is inconsistent with the United States' statements before the Nuremburg Tribunal following the Second World War. ECF No. 47 at 10-12. But she cites no case, and this Court is aware of none, that supports her position that the proceedings of an international criminal military tribunal can have preclusive or estoppel effect on a subsequent civil case in federal court. See ECF No. 49 at 2-4.

particularly so since the FTCA waives sovereign immunity. Any such waiver must be strictly construed in favor of the United States.") (internal citations and quotations omitted); see also McNeil v. United States, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.").

IV. CONCLUSION

Because the Court concludes that it lacks subject matter jurisdiction over this action, it will not consider the numerous additional arguments presented by the parties. For the reasons above, Plaintiff's motion for an evidentiary hearing is DENIED and the United States' motion to dismiss is GRANTED. The action is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: December 19, 2014

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUNDUS SHAKER SALEH,

Plaintiff,

v.

GEORGE W. BUSH, et al.,

Defendants.

Case No. 13-cv-01124-JST

ORDER GRANTING MOTION TO DISMISS

Re: ECF No. 29

In this putative class action for claims arising out of the United States' involvement in the Iraq War, the United States moves under Federal Rule of Civil Procedure 12(b)(1) to dismiss the operative complaint. For the reasons set forth below, the Court will grant the motion with leave to amend.

I. BACKGROUND

Plaintiff Sundus Shaker Saleh brings this action on her own behalf and on behalf of a putative class of Iraqi civilians against former President George W. Bush, former Vice President Richard Cheney, former Secretary of Defense Donald Rumsfeld, former National Security Advisor Condoleezza Rice, and former Deputy Secretary of Defense Paul Wolfowitz ("Defendants"). First Am. Compl. ("FAC"), ECF No. 25. Saleh alleges that Defendants committed the "crime of aggression" when they engaged the United States in war with Iraq. FAC ¶¶ 2, 8–14, 129–48. Saleh alleges that Defendants' actions violated "accepted customary norms of international law," as well as other established sources of international law, including the Kellogg-Briand Pact, the Nuremberg Charter, and the Charter of the United Nations. Id. ¶¶ 103, 133.

//

//

//

II. LEGAL STANDARD

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff always bears the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

"A Rule 12(b)(1) jurisdictional attack may be facial or factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Id. "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Id.

In considering a facial attack, the court "determine[s] whether the complaint alleges 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" Terenkian v. Republic of Iraq, 694 F.3d 1122, 1131 (9th Cir. 2012) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "If the defendant instead makes a factual attack on subject matter jurisdiction, the defendant may introduce testimony, affidavits, or other evidence" and "[u]nder these circumstances, no presumptive truthfulness attaches to plaintiff's allegations." Id. (citation and internal quotation marks omitted).

III. DISCUSSION

The United States moves to dismiss the operative complaint on the ground that the Court lacks subject matter jurisdiction over it. The United States contends that the Westfall Act requires the substitution of the United States for the individual Defendants because Saleh's claims are premised on the acts of government employees that were performed within the scope of their government employment. The United States further argues that, once this substitution occurs, all claims in the complaint must be treated as arising under the Federal Torts Claims Act ("FTCA"). The United States contends that the Court lacks jurisdiction under the FTCA because Saleh has not shown that she exhausted her administrative remedies prior to filing this action.

//

The Court addresses each of these issues in turn.

A. The Westfall Act

The Westfall Act confers immunity to federal employees "by making an FTCA action against the Government the exclusive remedy for torts committed by Government employees in the scope of their employment." United States v. Smith, 499 U.S. 160, 163 (1991); 28 U.S.C. § 2679(b)(1). The Act provides that:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such a claim in a United district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1).

"Certification by the Attorney General is prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident and is conclusive unless challenged." Billings v. United States, 57 F.3d 797, 800 (9th Cir. 1995). The party seeking review of the certification "bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence." Id. (citation omitted).

Here, the Attorney General has certified that each individual Defendant was acting within the scope of his or her federal employment when performing the acts at issue. Saleh presents no evidence to challenge the certification's conclusion that Defendants were acting within the scope of their employment.[1] Instead, Saleh relies on 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.[2] See Opp'n at 37-38 (citing FAC ¶¶ 26-33, 92, 34-54, 41, 42, 59, 60, 54, 77, 83, 85). Accordingly, because Saleh has failed to challenge the Attorney General's

[1] On behalf of the Attorney General, the Director of the Torts Branch of the U.S. Department of Justice has certified that each individual Defendant in this case was acting within the scope of his or her federal employment with regard to the incidents out of which Plaintiff's claims arise. See Certification of Scope of Employment, ECF No. 19–1.

[2] Saleh devotes the lion's share of her brief to the argument that the complaint cannot be dismissed in light of the purported incorporation of the "crime of aggression" into federal common law.

United States District Court
Northern District of California

certification, this action shall be deemed an action against the United Sates and the United States shall be substituted as the sole Defendant. See 28 U.S.C. § 2679(d)(1).

B. The FTCA's Administrative Exhaustion Requirement

The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States . . . 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 . . . ." 28 U.S.C. § 2675(a). Because the operative complaint is devoid of any suggestion that Saleh filed an administrative claim with a federal agency prior to filing this suit, the Court is without jurisdiction to adjudicate her claims. See Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir. 2011) ("The requirement of an administrative claim is jurisdictional. Because the requirement is jurisdictional, it must be strictly adhered to. This is particularly so since the FTCA waives sovereign immunity. Any such waiver must be strictly construed in favor of the United States.") (internal citations and quotation marks omitted); see also McNeil v. United States, 508 U.S. 106, 113 (1993) (holding that the "FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies").

IV. CONCLUSION

The United States' motion to dismiss for lack of subject matter jurisdiction is GRANTED. Saleh may file an amended complaint within twenty days of the date this order is filed that addresses the deficiencies identified in this order. A failure to do so will result in the dismissal of this action with prejudice.

IT IS SO ORDERED.

Dated: May 19, 2014

JON S. TIGAR
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE No. 15-15098

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

Plaintiff-Appellant,

v.

GEORGE W. BUSH, *et al.,*

Defendants-Appellees.

PLAINTIFF-APPELLANT SUNDUS SHAKER SALEH'S EXCERPTS OF RECORD VOLUME II of II

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

D. INDER COMAR, ESQ.
SBN 243732
COMAR LAW
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: (415) 640-5856
Facsimile: (415) 513-0445
Email: inder@comarlaw.com

Attorney for Plaintiff-Appellant
SUNDUS SHAKER SALEH

TABLE OF CONTENTS

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.562.6790
Facsimile: +1.415.513.0445
Attorney for Lead Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

GEORGE W. BUSH, RICHARD B. CHENEY, DONALD H. RUMSFELD, CONDOLEEZZA RICE, COLIN L. POWELL, PAUL M. WOLFOWITZ, and DOES 1-10, inclusive,

Defendants.

CASE NO. 3:13-cv-01124 JST

PLAINTIFF'S NOTICE OF APPEAL AND REPRESENTATION STATEMENT

CLASS ACTION

Notice is hereby given that SUNDUS SHAKER SALEH, lead Plaintiff in the above named case, (hereinafter "Plaintiff") hereby appeals to the United States Court of Appeals for the Ninth Circuit from an Order Denying Plaintiff's Motion for an Evidentiary Hearing and Granting Defendants' Motion to Dismiss entered in this action on the 19th day of December, 2014, a courtesy copy of which is attached hereto as Exhibit A.

Dated: January 16, 2015

COMAR LAW

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

REPRESENTATION STATEMENT

The undersigned represents SUNDUS SHAKER SALEH, lead Plaintiff-Appellant in the above named case, and no other party. Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Plaintiff-Appellant submits this Representation Statement. The following list identifies all parties to the action, and it identifies their respective counsel by name, firm, address, telephone number, and e-mail, where appropriate.

PARTIES	**COUNSEL OF RECORD**
Plaintiff-Appellant: SUNDUS SHAKER SALEH on behalf of herself and those similarly situated	D. INDER COMAR (SBN 243732) COMAR LAW 901 Mission Street, Suite 105 San Francisco, CA 94103 Telephone: +1.415.640.5856 Facsimile: +1.415.513.0445 Email: inder@comarlaw.com
Defendants-Appellees: THE UNITED STATES AND GEORGE W. BUSH, RICHARD B. CHENEY, DONALD H. RUMSFELD, CONDOLEEZZA RICE, COLIN L. POWELL, PAUL M. WOLFOWITZ	STUART F. DELERY, Assistant Attorney General RUPA BHATTACHARYYA, Director, Torts Branch 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 Telephone: (202) 616-4143 Facsimile: (202) 616-4314 Email: Glenn.Greene@usdoj.gov

Respectfully submitted,

Dated: January 16, 2015

COMAR LAW

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

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUNDUS SHAKER SALEH,

Plaintiff,

v.

GEORGE W. BUSH, et al.,

Defendants.

Case No. 13-cv-01124-JST

ORDER DENYING PLAINTIFF'S MOTION FOR AN EVIDENTIARY HEARING AND GRANTING DEFENDANTS' MOTION TO DISMISS

Re: ECF Nos. 38, 43

Before the Court are Plaintiff Sundus Shaker Saleh's Osborn Motion for an Evidentiary Hearing in Support of her Second Amended Complaint, ECF No. 38, and Defendants' Motion to Dismiss, ECF No. 43. For the reasons set forth below, the motion for an evidentiary hearing is DENIED and the motion to dismiss is GRANTED.

I. BACKGROUND

Plaintiff Saleh brings this action on her own behalf and on behalf of a putative class of Iraqi civilians against former President George W. Bush, former Vice President Richard Cheney, former Secretary of Defense Donald Rumsfeld, former National Security Advisor Condoleeza Rice, former Secretary of State Colin Powell, and former Deputy Secretary of Defense Paul Wolfowitz ("Defendants"). ECF No. 37. Saleh alleges that Defendants "broke the law in conspiring and committing the Crime of Aggression against the people of Iraq" when they engaged the United States in war with Iraq. Id. ¶ 1. She alleges that Defendants' actions violated international law, citing sources of international law including the Kellogg-Briand Pact, the United Nations Charter, and the Nuremberg Charter. Id. ¶¶ 139-44, 149-54.

On May 19, 2014, the Court granted Defendants' Motion to Dismiss Saleh's First Amended Complaint and permitted Saleh to file an amended complaint addressing the deficiencies identified by the Court. ECF No. 35. Saleh filed her Second Amended Complaint on June 8,

2014, ECF No. 37, and her motion requesting an evidentiary hearing the following day, ECF No. 38. On June 23, 2014, the United States filed its Notice of Substitution of the United States as Sole Defendant pursuant to the Westfall Act, 28 U.S.C. § 2679(b), and its motion to dismiss the operative complaint for lack of subject matter jurisdiction. ECF Nos. 42, 43. The Court will address the motion for an evidentiary hearing and the motion to dismiss in turn.

II. PLAINTIFF'S MOTION FOR AN EVIDENTIARY HEARING

On behalf of the Attorney General, the Director of the Torts Branch of the United States Department of Justice has certified that each individual Defendant in this case was acting within the scope of his or her federal office or employment at the time of the incidents out of which Saleh's claims arise. ECF No. 42-1. Plaintiff seeks an evidentiary hearing to challenge the certification of scope of employment or, in the alternative, an Order from the Court that it will assume the truth of the factual allegations in the complaint for the purposes of challenging the certification. ECF No. 38. For the reasons below, the motion is DENIED.

A. The Westfall Act

The Westfall Act confers immunity on federal employees by making a Federal Tort Claims Act ("FTCA") action against the Government "the exclusive remedy for torts committed by Government employees in the scope of their employment." United States v. Smith, 499 U.S. 160, 163 (1991); 28 U.S.C. § 2679(b)(1). The act provides that:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). The exclusivity of the FTCA remedy is applicable even if it bars a plaintiff's recovery. See Smith, 499 U.S. at 166 ("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.").

"Certification by the Attorney General is prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident and is conclusive unless

challenged." Billings v. United States, 57 F.3d 797, 800 (9th Cir. 1995). The party seeking review of the certification "bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence." Id.

B. Legal Standard

A district court has discretion to hold an evidentiary hearing to permit investigation of the Attorney General's certification that a government employee was acting within the scope of his or her employment at the relevant time. Kashin v. Kent, 457 F.3d 1033, 1043 (9th Cir. 2006). However, a court "should not do so if the certification, the pleadings, the affidavits, and any supporting documentary evidence do not reveal an issue of material fact." Id.

C. Discussion

Plaintiff's challenge to the Attorney General's scope of employment certification is based on her allegations that Defendants formed an intent to invade Iraq before they came into office and that their actions were driven entirely by personal motivations, including their ideological and religious convictions, and not by the duties of the offices they held. ECF No. 38 at 3. Defendants contend that Saleh's request for a hearing must be rejected because she has neither presented any evidence nor alleged any facts sufficient to meet her burden of disproving that Defendants were acting within the scope of their employment during the Iraq War. ECF No. 46 at 3.

The Court concludes that an evidentiary hearing would be inappropriate in this case because the certification and pleadings in this case "do not reveal an issue of material fact" as to whether Defendants were acting within the scope of their employment in conjunction with the war in Iraq. Kashin, 457 F.3d at 1043. Under District of Columbia scope of employment law, which is drawn from the Restatement (Second) of Agency:

> (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.

Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 663 (D.C. Cir. 2006).[1]

It is clear that, even taking all of Saleh's factual allegations as true, the scope of employment requirements are satisfied. Defendants were formerly the Commander-in-Chief, the Vice-President, the Secretary of Defense, the National Security Advisor, and the Deputy Secretary of Defense of the United States. With respect to the first and second prongs of the test, engaging in war is without doubt among conduct of the kind the these defendants were employed to perform and, 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. Similarly, because Saleh does not allege that Defendants personally used force and any use of military force they authorized in conjunction with war "is not unexpectable," the fourth prong is satisfied.

The third prong, providing that conduct "is actuated, at least in part, by a purpose to serve the master," requires only "a *partial* desire to serve the master." Council on Am. Islamic Relations, 444 F.3d at 665; see also id. at 664 ("the proper [scope of employment] inquiry 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" (internal quotation marks omitted)); Allaithi v. Rumsfeld, 753 F.3d 1327, 1333 (D.C. Cir. 2014) ("[District of Columbia] law requires an employee be *solely* motivated by his own purposes for consequent conduct to fall outside the scope of employment."); Weinberg v. Johnson, 518 A.2d 985, 989 (D.C. 1986) ("where the employee is in the course of performing job duties, the employee is presumed to be intending, at least in part, to further the employer's interests"). Saleh alleges that "Defendants were not motivated by genuine national security interests" but rather, "*inter alia*, by personally-held neo-conservative convictions which called for American military dominance of the Middle East, and by a religious worldview." ECF No. 37

[1] The parties agree that District of Columbia law governs the scope of employment determination in this case. ECF No. 43 at 7 n.7; ECF No. 47 at 12-13. See also Kashin, 457 F.3d at 1037-39 (applying District of Columbia law).

United States District Court
Northern District of California

¶ 109. But these alleged "neo-conservative convictions" relate to the military and political position of Defendants' employer, the United States, not to any personal gain that Defendants sought from a war with Iraq. Saleh has 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.[2]

III. DEFENDANTS' MOTION TO DISMISS

A. Legal Standard

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to Federal Rule of Civil Procedure 12(b)(1). The plaintiff always bears the burden of establishing subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

B. Discussion

The United States moves to dismiss the operative complaint on the ground that the Court lacks subject matter jurisdiction over this action. ECF No. 43. The Government argues that the United States must be substituted as Defendant, and that the Court lacks subject matter jurisdiction because (1) Saleh failed to exhaust her administrative remedies before filing suit; (2) the United States has not waived its sovereign immunity for suits based upon customary international law; (3) Saleh's claims are barred by the foreign country exception to the FTCA; and (4) Saleh's claims are barred by the combatant activities exception to the FTCA. Id. at 3. In any event, the Government argues, the political question doctrine bars Saleh's claims, and her claims cannot be brought under the Alien Tort Statute. Id. at 4. Finally, the Government contends that even if this Court does have subject matter jurisdiction over the action, venue is improper in this district. Id.

[2] Saleh acknowledges that the argument that alleged violations of *jus cogens* norms are always outside the scope of employment has been rejected. ECF No. 47 at 16 n.22. She attempts to distinguish her "narrower" argument that such violations are outside the scope of government employment when the United States has ratified a treaty prohibiting the relevant conduct, but she cites no U.S. authority in support of this position. Id.

1. The Westfall Act

As explained above, the Westfall Act makes a Federal Tort Claims Act action against the Government "the exclusive remedy for torts committed by Government employees in the scope of their employment." Smith, 499 U.S. at 163; 28 U.S.C. § 2679(b)(1). "Certification by the Attorney General is prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident and is conclusive unless challenged." Billings, 57 F.3d at 800. The party seeking review of the certification "bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence." Id.

Here, the Attorney General has certified that Defendants were acting within the scope of their federal employment when performing the acts at issue. ECF No. 42-1. For the reasons explained above, the Court concludes that Saleh cannot meet her burden of disproving that Defendants were acting within the scope of their employment during the Iraq War.[3] Accordingly, this action shall be deemed an action against the United States and the United States shall be substituted as the sole Defendant. See 28 U.S.C. § 2679(d)(1).

2. Administrative Exhaustion Requirement

The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States . . . 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 . . . ." 28 U.S.C. 2675(a). Because the operative complaint, like the prior complaint considered by the Court in its May 19, 2014 Order, is devoid of any suggestion that Saleh filed an administrative claim with a federal agency prior to filing this suit, the Court is without jurisdiction to adjudicate her claims. See Valadez-Lopez v. Chertoff, 656 F.3d 851, 855 (9th Cir. 2011) ("The requirement of an administrative claim is jurisdictional. Because the requirement is jurisdictional, it must be strictly adhered to. This is

---

[3] Saleh argues that the Government is estopped from arguing that the crime of aggression is within the scope of an official's employment or from certifying that Defendants' conduct is within the scope of employment because this position is inconsistent with the United States' statements before the Nuremburg Tribunal following the Second World War. ECF No. 47 at 10-12. But she cites no case, and this Court is aware of none, that supports her position that the proceedings of an international criminal military tribunal can have preclusive or estoppel effect on a subsequent civil case in federal court. See ECF No. 49 at 2-4.

particularly so since the FTCA waives sovereign immunity. Any such waiver must be strictly construed in favor of the United States.") (internal citations and quotations omitted); see also McNeil v. United States, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.").

IV. CONCLUSION

Because the Court concludes that it lacks subject matter jurisdiction over this action, it will not consider the numerous additional arguments presented by the parties. For the reasons above, Plaintiff's motion for an evidentiary hearing is DENIED and the United States' motion to dismiss is GRANTED. The action is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: December 19, 2014

JON S. TIGAR
United States District Judge

CERTIFICATE OF SERVICE

I am an active member of the State Bar of California and am not a party to this action. My state bar number is 243732. My business address is 901 Mission Street, Suite 105, San Francisco CA 94103.

Case Name: *Saleh, et al. v. Bush, et al.*, No. 3:13-cv-01124-JST

On January 16, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFF'S NOTICE OF APPEAL AND REPRESENTATION STATEMENT

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the laws of the United States the foregoing is true and correct and that this declaration was executed on January 16, 2015 at San Francisco, California.

D. Inder Comar	/s/ D. Inder Comar
Declarant	Signature

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.640.5856
Facsimile: +1.415.513.0445

Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al., Plaintiffs, vs. GEORGE W. BUSH, et al., Defendants.	No. 3:13-cv-01124 JST **REPLY IN SUPPORT OF PLAINTIFF'S *OSBORN* MOTION FOR AN EVIDENTIARY HEARING IN SUPPORT OF SECOND AMENDED COMPLAINT** Date: August 27, 2014 Time: 2:00 p.m. Trial Date: None Set Action Filed: March 13, 2013

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR *OSBORN* HEARING

1. Introduction

Plaintiff agrees that the decision whether to hold an evidentiary hearing is within the court's sound discretion. (Opp. at 3.) However, none of the cases cited either by her of the United States indicates that the Court can simply deny the motion *without* examining the allegations brought forth in a complaint in order to make this determination.

The clear command from the Supreme Court is that Attorney General certifications are subject to some form of judicial review. *Osborn v. Haley*, 127 S. Ct. 881, 897 (2007) ("A plaintiff may request judicial review of the Attorney General's scope-of-employment determination, as Osborn did here"); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) ("[E]xecutive determinations generally are subject to judicial review and … mechanical judgments are not the kind federal courts are set to render.")

Case law reveals this to be a flexible concept depending on the tort alleged and the allegations in the Complaint. In *Osborn*, for example, the only materials before the court were the complaint and a "memorandum of understanding between the LBLA [a private contractor] and the Forest Service, which cautioned Forest Service employees against involvement in LBLA employment decisions." *Osborn*, 127 S. Ct. at 890. Nowhere in *Osborn* did the Supreme Court indicate this was insufficient for purposes of judicial review or for otherwise challenging a certification.

The *Osborn* court also agreed that the Westfall Act mandates that "judges have a greater factfinding role . . . than they traditionally have in other immunity contexts. The Act makes that inevitable. When Westfall Act immunity is in dispute, a district court is called upon to decide who the proper defendants is: the named federal employee, or the United States." *Osborn*, 127 S. Ct. at 901 fn. 18.

Pursuant thereto, Plaintiff has requested either a hearing, or that the Court assume the truth of her allegations.

2. Plaintiff's Second Amended Complaint Raises Serious Questions Of Illegal Conduct Under Law.

The recurring theme in the Response to Plaintiff's motion is that her complaint is too conclusory or speculative to warrant either a hearing, or a presumption of truth in her allegations for purposes of challenging the certification made by the United States. (Opp. at 5, 6.) The Response goes so far as to state that the mere "suggestion" that the Defendants may have committed wrongdoing in the alleged planning and execution of the Iraq War is "specious."[1] (Opp. at 8.) This is little more than a thinly veiled attempt to have the Court simply treat the certification as binding, which the Supreme Court has already stated a district court may not do.

Plaintiff's Second Amended Complaint is not based on her speculation: it is based on the statements of Defendants as well as their colleagues who, while employed by the Government, witnessed conduct which today they say was illegal. The more salient admissions from Defendants as well as from third parties include:

- Statements from Defendants CHENEY, RUMSFELD and WOLFOWITZ, which predate their arrival into government employment arguing for the invasion of Iraq. (Second Amended Complaint, Dkt. No 37 ("SAC") ¶¶ 27-34.)
- An admission from Defendant POWELL that his speech before the United Nations was a "blot" on his record and an admission that there was never any connection between al Qaeda and Iraq, despite giving a presentation to the contrary. (SAC ¶ 95.)

---

[1] The Response fails to cite (indeed cannot cite) any proposition in Anglo-American law that executive branch officials who commit alleged wrongdoing are immune to judicial scrutiny, even with respect to war-making. The American legal tradition is squarely to the opposite. 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.").

• Statements from Richard Clarke, former National Coordinator for Security, Infrastructure and Counter-terrorism, who worked in the Administrations of Ronald Reagan, George H.W. Bush, William Clinton and George W. Bush, now chairman of Good Harbor Consulting in Washington, D.C., including a statement that, "It is clear that things that the Bush administration did, in my mind at least it is clear, that some of the things they did were war crimes." (SAC ¶¶ 41-47, 60.)

• Statements from Paul O'Neill, the 72nd United States Secretary of the Treasury under George W. Bush, former chairman and CEO of Alcoa and chairman of the RAND Corporation, including statements that at the very first meeting of the National Security Council, Defendants were looking for a "way to do it," e.g., invade Iraq. (SAC ¶¶ 36-39.)

• Statements from General Wesley Clark, former Supreme Allied Commander Europe of NATO from 1997 to 2000, including statements that he was told that Defendants made the decision to go to war with Iraq because they "don't know what to do about the terrorists, but we've got a good military and we can take down governments." (SAC ¶¶ 49-50.)

As argued concurrently in her response to Defendants' Motion to Dismiss, Plaintiff's Second Amended Complaint has raised plausible, serious questions of alleged wrongdoing related to the planning and execution of the Iraq War, which if true, would amount to aggression under international and federal common law. For purposes of the Westfall Act, these allegations also reveal that Defendants (1) were committed to invading Iraq as early as 1997; (2) indicated their intent to invade Iraq within the first week they were elected; (3) used 9/11 as the cover to implement their intentions; (4) made numerous alleged false statements to support their effort; and (5) invaded Iraq in violation of law, e.g., without UN Security council authorization and not in self-defense. Such allegations, if true, rebut three of the four prongs of the Restatement test employed under District of Columbia law.

Rather than address any of these allegations, or the related allegations of numerous allegedly false statements made by Defendants in order to execute the war

against Iraq, the United States focuses on the materials with respect to the planning of the war from 1997 through 2000, and minimize these materials as statements made by private citizens with respect to policy positions about the necessity of military action against Iraq. (Opp. at 7.) Of course, taken alone, a statement from any person that the United States should invade another country is neither actionable nor illegal under any cognizable theory. But the statements are indications of *intent* and a pre-existing plan or motivation to execute a war once in office. The same people who made such statements then, once in office, immediately convened to plan a war (SAC ¶¶ 36-39) and who then immediately utilized 9/11 (the very same day) to push for the very same war (SAC ¶¶ 41-47, 60).

4. Plaintiff Is Entitled To Meet Her Burden Through Pre-Certification Discovery.

Plaintiff believes that the materials presented in her Complaint are sufficient (assuming their truth) to determine whether Defendants acted contrary to law. Nonetheless, this Court has indicated that Plaintiff has failed to provide it with evidence under the Westfall Act, and that it is inclined to dismiss her case with prejudice absent such evidence. Accordingly, should the Court not be persuaded by the authorities in this Motion that it can determine these issues on the pleadings and other materials already provided by counsel, Plaintiff would again request that the Court provide her an opportunity to conduct limited discovery into the factual issues that relate to the Westfall Act immunity now in dispute. The following pre-certification discovery would be at least warranted:

- Limited, targeted discovery necessary to authenticate the materials referenced in the Second Amended Complaint so that they would be admissible under the Federal Rules of Evidence;
- Limited, targeted discovery directed to the pre-Government conduct by Defendants related to any intent to invade Iraq prior to Defendants' entering into office.

//

5. Plaintiff's Request For Judicial Review Cannot Be Divorced From Her Underlying Cause of Action Based In The Crime of Aggression.

The Response states that Plaintiff would be unable to meet this burden because even assuming the truth of her allegations, the Defendants were acting "upon their particular beliefs about what was in the *United States*' national security interests." (Opp. at 6 (emphasis in original).) This disagreement reveals an important factual point in dispute, clearly relevant to the Westfall Act immunity analysis under district of Columbia law, that this Court would ordinarily need to weigh in order to fulfill its obligations under *Osborn* and *Gutierrez de Martinez v. Lamagno*. For example, the SAC alleges that Defendants were ***not*** acting in the United States national security interests; rather, they were acting to fulfill their personally held neoconserviative beliefs, or their religious beliefs about the necessity of engaging in Iraq. Allegations of fraudulent conduct can impute a personal motivation. *See*, e.g., *Hicks v. Office of the Sergeant At Arms for the United States Senate*, 873 F.Supp.2d 258, 270-271 (D.D.C. 2012).

The Response states that war-making is a "quintessential act of a sovereign," and that Plaintiff "does not, and cannot allege facts which ever could establish by a preponderance of the evidence that the alleged conduct of the President and other high-ranking Executive Branch officials with respect to the Iraq War of 2003 was outside of the scope of their employment." To the extent the Response is arguing that government leaders who execute wars are immune to judicial review, then the United States appears to be arguing that the Nuremberg Judgment, which held the opposite, is no longer relevant. To the extent the Response is arguing that these facts, as alleged, fail to meet the Restatement test utilized under District of Columbia law, the Response has failed to adequately respond to the facts presented in the SAC which detail pre-Government intentions to invade Iraq, and then an immediate use of the Government infrastructure to implement such a plan upon entering into office.

Assuming that the crime of aggression is actionable as a tort under federal common law (which Plaintiff argues that it is and must be), the Court is confronted with

the fact that *only government officials* may commit aggression as, by definition, it requires someone ***in office*** to commit and order an act of aggression. In other words, acting from a government capacity is an essential element of aggression as the cause of action only applies to a high ranking official. Thus, alleged acts of misstatements of fraud, coupled with evidence of pre-planning prior to taking office, are the only forms of circumstantial evidence that any complainant would ever likely be able to provide to a court regarding the commission of this offense as it is highly unlikely that a defendant charged with aggression would ever admit to acting for his or her own personal interests, or out of a pre-existing motivation.

The consequences of the alleged aggression are also a factor to be taken into account by the Court. "The outrageous quality of an employee's [sic] act may well be persuasive in considering whether his motivation was purely personal." *Penn. Cent. Transp. Co. v. Reddick*, 398 A.2d 27, 31 (D.C. 1979). Millions of people such as Plaintiff, other Iraqis, and Americans were killed, maimed, and displaced by the alleged conduct of Defendants. The Iraq War has cost the United States at least $3 trillion.[2] Plaintiff believes that her allegations in the SAC, combined with the effects of the war on her, other Iraqis and Americans, is certainly "outrageous" for purposes of District of Columbia law related to scope of employment.

5. Conclusion

For the reasons granted herein, Plaintiff respectfully requests that the Court grant her Motion.

---

[2] Joseph E. Stiglitz [Winner of Nobel Prize in Economics] and Linda J. Bilmes, "The true cost of the Iraq war: $3 trillion and beyond," The Washington Post, Sept. 5, 2010, *available electronically at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/03/AR2010090302200.html.

Respectfully submitted,

Dated: July 21, 2014

COMAR LAW

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

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.562.6790
Facsimile: +1.415.513.0445

Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al.,

Plaintiffs,

vs.

GEORGE W. BUSH, et al.,

Defendants.

No. 3:13-cv-01124 JST

PLAINTIFF'S RESPONSE TO UNITED STATES' NOTICE OF MOTION AND MOTION TO DISMISS

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

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

[*Proposed Order filed concurrently*]

1. Introduction and Issues To Be Decided.

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

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

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

---

[1] Plaintiff continues to rely on the Nuremberg Judgment (*United States v. Goering*, 41 AM. J. INT'L L. 172, 186 (1946)) and the Nuremberg Charter (Charter Int'l Military Tribunal, art. 6(a), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279) as the international law basis of her claims. As further discussed herein, this Court has jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1350.

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

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

(4) Finally, venue is proper in this district. At the time of filing, neither 28 U.S.C §§ 1391(1) or (2) were applicable. Plaintiff was entitled, and remains entitled to select a venue in which any defendant (in this case Defendant RICE) "is subject to the court's personal jurisdiction." 28 U.S.C § 1391(3).

2. Legal Standard.

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

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

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

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

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

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

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

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

---

[3] This includes her citations to RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 102(2) and (3) (1987)); William S. Dodge, *Customary Interational Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 21 (2007); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1989); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *Ware v. Hylton*, U.S. (3 Dall.) 199, 281 (1796); *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *The Nereide,* 9 Cranch 388, 423, 3 L.Ed. 769 (1815); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporters' note 2 (1987); *see also id.* at § 111(1) (1987); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 236-39 (1996); *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (citing Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679); *see also In re Estate of Ferdinand Marcos Human Rights Lit.*, 25 F. 3d 1467, 1471 (9th Cir. 1994); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Giraldo v. Drummond Co. Inc.*, 808 F.Supp.2d 247, 250, fn. 1 (D.D.C. 2011); *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C.Cir. 2008)); M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law*," 11 Mich. J. Int'l L., 768, 801-09 (1990); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102, com. k (1987); Vienna Convention on the Law of Treaties, art. 53.); Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L. & COMP. L. REV. 411, 415 (1989); M. Cherif Bassiouni, International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, *in* 59 *Law and Contemporary Problems* 63-74*,* 63 (Fall. 1996) (hereinafter "International Crimes").

[4] This includes citations to *Goering*, 41 AM. J. INT'L L. at 186, 218; *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (for the continuing application of the Nuremberg Judgment); *Siderman*, 965 F.2d at 715 ("The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal."); *Regina v. Jones* [2006] UKHL 16 (British House of Lords determining same); Mary Ellen O'Connell and Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus ad Bellum and the ICC Statute*, 10 (1) J. INT'L CRIM. JUST. 189, 190 (2012); M. Cherif Bassiouni, "International Crimes" at 68; Evan J Criddle and Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 333 (2009).

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

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

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

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

---

[5] *See also* 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory") (both treatises cited in *New Hampshire*).

Case3:13-cv-01124-JST Document47 Filed07/21/14 Page48 of 34

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

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

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

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

---

[6] 2 Trial of the Major War Criminals Before the International Military Tribunal 98-155 (Nuremberg: IMT, 1947) ("the Blue Set"); *available at* the Avalon Project at Yale Law School, http://avalon.law.yale.edu/subject_menus/imt.asp *and at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/ (hereinafter "Jackson Opening Statement").

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

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

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

---

[7] Admissions by the United States that the Crime of Aggression is a *jus cogens* norm also defeat attempts by the United States to wash its hands of the Crime of Aggression in this briefing. Fed. R. Civ. P. 10(c); Initial Response at 11:15-12:9; *The Supreme…Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2388-89 (2002) (quoting Dep't of the Army, Field Manual 27-10, The Law

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

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

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

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

---

of Land Warfare P 498 (1956); Henry T. King, Jr. *Nuremberg and Crimes Against Peace*, 41 CASE W. RES. J. INT'L L. 273, 274 (2009); The United States Army Center for Law and Military Operations, Law of War Handbook 11, 20, 35, 36, 41 (2005) (stating that "[v]irtually all commentators agree that the provisions of the [Kellogg-Briand Pact] banning aggressive war have ripened into customary international law."); The United States Army Center for Law and Military Operations, Law of War Handbook 14, 171 (2010).

[8] This includes her citations to *Sosa*, 542 U.S. at 729-30, 31; *Kiobel v. Royal Dutch Shell Petroleum*, __ U.S. __ , 133 S.Ct. 1659, 1663 (2013); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Sarei v. Rio Tinto, PLC,* 671 F.3d 736 (9th Cir. 2011) *cert. granted, judgment vacated sub nom. Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013); *Mujica v. Occidental Petroleum Corp*., 381 F.Supp.2d 1164 (C.D. Cal. 2005); *Presbyterian Church Of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244 (2d Cir. 2009).

[9] This includes her citations to *Mwani v. Laden*, 947 F.Supp.2d 1 (D.D.C. 2013) (holding that lawsuit between foreign plaintiffs against foreign defendants, involving a foreign group of events that related to the bombing of the U.S. embassy in Kenya, "touches and concerns the United States" and could proceed); *Sexual Minorities Uganda v. Lively*, Case No. 12-cv-30051-MAP, 2013 WL 4130756 (D. Mass. Aug. 14, 2013).

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

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

> (1) the planning, preparation, initiation, or execution,[11] (2) by a person in a position effectively to exercise control over or to direct the political or military action of a State,[12] (3) of an act of aggression (whether in a declared or undeclared war[13]) which includes, *but is not limited to,*
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided

---

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

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

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

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

for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein,[14]

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

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

> Participation in a common plan or conspiracy to commit the Crime of Aggression.[17]

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

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

- Plaintiff alleges that three of the Defendants – Defendants CHENEY, RUMSFELD, and WOLFOWITZ were founding members of "The Project for the New American Century" (PNAC), a non-profit that publicly and heavily advocated for the military overthrow of Saddam Hussein. SAC ¶¶ 27-34.
- The SAC alleges that once Defendants came into office, they began planning an invasion in concert with one another at their first national security meeting. SAC ¶¶ 36-39. Upon and after 9/11, the SAC alleges that Defendants used 9/11 as an opportune moment

---

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

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

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

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

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

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

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

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

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

[18] Alleging a violation of international law hardly makes the Crime of Aggression "political" as argued generally by the United States (Motion at 19-20); it is part and parcel of the cause of action. *See* Benjamin Ferencz [former Nuremberg prosecutor], *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 289, 290 (2009) ("The UN Charter prohibits the use of armed force without Security Council approval") ("The most important accomplishment of the Nuremberg trials was the condemnation of war-making as the supreme international crime."); *see also* Benjamin Ferencz, *Can Aggression Be Deterred by Law?,* 11 PACE INT'L L. REV. 341, 357 (1999) ("One must have confidence that highly qualified jurists who have been carefully selected will be able to render wise decisions.")

Jackson Opening Statement.

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

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

The Nuremberg Tribunal agreed, and held:

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

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

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

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

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

1. *The Defendants spent more time planning the war prior to office than executing the war once in office*. The second prong of the Restatement tests asks whether the conduct "occurs substantially within the authorized time and space limits." This factor weighs heavily in favor of Plaintiff. Assuming a December 1, 1997 start date for the inception of the planning of the war, (SAC ¶¶ 29-30), the Defendants (and in particular Defendants WOLFOWITZ and RUMSFELD) spent more time planning the war prior to the inauguration of Defendant BUSH (January 20, 2001) than they did from his inauguration to the beginning of the war.[21] The planning for the war explicitly sought to

---

[19] Plaintiff specifically incorporates her citations to *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995); *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996); *see also Haddon v. United States*, 68 F.3d 1420, 1422 (D.C. Cir. 1995). Plaintiff acknowledges it is her burden to rebut the certification by a preponderance.

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

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

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

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

> "The war against Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was premeditated and carefully planned, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan."
> *Goering*, 41 AM. J. INT'L L. at 186.

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

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

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

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

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

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

- At least three of the Defendants WOLFOWITZ, RUMSFELD and CHENEY – were motivated by neoconservative personal beliefs that called for the use of the United States military to further ideological purposes. SAC ¶¶ 27-34.
- Defendant BUSH was motivated by personal religious beliefs regarding "Gog and Magog" being at work in the Middle East, as reported by former New York Times reporter Kurt Eichenwald. SAC ¶ 100.
- Defendants met in their first week of official employment in what appeared to be a scripted exchange (as described by the former Secretary of the Treasury) to discuss a renewed focus on Iraq and potential military action. SAC ¶ 36.
- Defendants made numerous false statements to the public regarding any threat posed by Iraq, or its connections to al Qaeda, in order to support a war. SAC ¶¶ 65-95.
- Defendant POWELL misrepresented facts to the United Nations. SAC ¶¶ 93-94.
- Defendants engaged in pre-employment conduct advocating for a military invasion of Iraq, and were associated with a non-profit whose explicit goal was "showing its muscle

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

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

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

---

[22] This conclusion made by the House of Lords is narrower than the argument that alleged violations of *jus cogens* norms are always outside the scope of employment, which Plaintiff recognizes has been rejected. (Motion at 10, fn. 12.) To her knowledge, no Court has considered whether conduct that is specifically prohibited by a treaty, which a State party has ratified, must be excluded from a "scope of employment" analysis. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 All E.R. 97 (H.L. 1999), available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (last visited Jul. 19, 2014) (parallel citation is [2000] 1 A.C. 147) ("*Pinochet*") [*Lord Browne-Wilkinson*: "Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined by the Torture Convention cannot be a state function"]; [*Lord Hope of Craighead*: "[W]e are not dealing in this case - even upon the restricted basis of those charges on which Senator Pinochet could lawfully be extradited if he has no immunity - with isolated acts of official torture. We are dealing with the remnants of an allegation that he is guilty of what would now, without doubt, be regarded by customary international law as an *international* crime. This is because he is

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

---

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

[23] The planning distinguishes Defendants alleged conduct from cases cited by the United States (Motion at 10 fn. 12), where the Defendants allegedly committed their torts while in office and as part of their job functions in responding to crises. For example, these cases do not allege that defendant Rumsfeld planned to torture individuals prior to entering office, or that Henry Kissinger planned the events in Chile prior to coming into office. See,

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

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

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

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

a. ***The Crime of Aggression is a legal question and does not implicate the political question doctrine***. The political question doctrine is a "narrow exception" to the general rule that the Judiciary has a "responsibility to decide cases properly before it, even those it 'would gladly avoid." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citations omitted). At least since *Marbury v. Madison*, 1 Cranch 137, 177 (1803), the Supreme Court has recognized that it is "emphatically the province and duty of the judicial department to say what the law is." That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." *INS v. Chadha,* 462 U.S. 919, 943 (1983).

Here, Plaintiff "requests that the courts enforce a specific [federal common law] right": specifically, a cause of action rooted in the Crime of Aggression. *See Zivotofsky*,

---

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

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 **NOTICE OF SUBSTITUTION OF THE UNITED STATES AS SOLE DEFENDANT ON COUNTS I AND II**

Please take notice that under 28 U.S.C. § 2679(b) (the "Westfall Act"), the United States of America is substituted for 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, with respect to Counts I and II of Plaintiff's Second Amended Complaint ("2d Am. Compl."). The grounds for this substitution are as follows:

1. Plaintiff alleges that former President Bush, former Vice-President Cheney, former Secretary of Defense Rumsfeld, former National Security Advisor Rice, former Secretary of State Powell, and former Deputy Secretary of Defense Wolfowitz, violated international law while they were employed by the United States and that Plaintiff was damaged by their actions. *See* 2d Am. Compl. ¶¶ 9-133.

2. Count I of the Second Amended Complaint alleges that all of the named individuals conspired to wage a war of aggression against Iraq in violation of international law, the United Nations Charter, and the Kellogg-Briand Pact, a treaty signed in 1928, to which the United States is a signatory. *See id.* ¶¶ 138-47. Count II of the Second Amended Complaint alleges that all of the named individuals did in fact wage a war of aggression against Iraq in violation of international law, the United Nations Charter, and the Kellogg-Briand Pact. *See id.* ¶¶ 148-57.

3. The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b); 2671-2680 (the "FTCA"), as amended by the Westfall Act, provides that where an individual claims that federal employees damaged him or her through their negligent or wrongful acts or omissions taken within the scope of their office or employment, a suit against the United States shall be the exclusive remedy for that individual's claim. 28U.S.C. § 2679(b)(1). There are two exceptions to this exclusivity

provision. 28 U.S.C. § 2679(b)(2). Neither exception applies to claims for violations of customary international law, the United Nations Charter, or a treaty. Therefore, Plaintiff's claims for such violations fall within this provision.

4. Under the Westfall Act, where the Attorney General of the United States certifies that a federal employee was acting within the scope of his or her office or employment at the time of the incident giving rise to the claim against the employee, that claim shall be deemed an action against the United States, and the United States shall be substituted as sole defendant for that claim. 28 U.S.C. § 2679(d)(1)-(2). Certification authority has been delegated to Directors of the Torts Branch. 28 C.F.R. § 15.4.

5. Rupa Bhattacharyya, Director, Torts Branch, Civil Division, United States Department of Justice, has certified that at the time of the conduct alleged in Plaintiff's Second Amended Complaint, 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, were each acting within the scope of his or her employment. *See* Ex. 1, Certification.

6. For these reasons, the United States has, by operation of law, been substituted as the sole defendant with respect to all of Plaintiff's claims.

7. The Court is respectfully referred to the Certification filed along with this Notice. Also, a Proposed Order is attached to this notice.

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)
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

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 **CERTIFICATION OF SCOPE OF EMPLOYMENT**

I, Rupa Bhattacharyya, Director, Torts Branch, Civil Division, United States Department of Justice, acting by virtue of the authority vested in me by 28 C.F.R. §15.4, hereby certify that I have read the Second Amended Complaint in this action. On the basis of the information now available with respect to the claims set forth therein and pursuant to the provisions of 28 U.S.C. § 2679(d)(1), I find that 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 were each acting within the scope of their federal office or employment at the time of the incidents out of which Counts I and II of the Second Amended Complaint in this matter arose.

Dated: June 23, 2014

RUPA BHATTACHARYYA
Director, Torts Branch,
Civil Division
U.S. Department of Justice

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.640.5856
Facsimile: +1.415.513.0445

Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al.,

Plaintiffs,

vs.

GEORGE W. BUSH, et al.,

Defendants.

No. 3:13-cv-01124 JST

PLAINTIFF'S *OSBORN* MOTION FOR AN EVIDENTIARY HEARING IN SUPPORT OF SECOND AMENDED COMPLAINT

Date: August 27, 2014
Time: 2:00 p.m.
Dept: Courtroom 9, 19th Floor
Judge: The Honorable Jon S. Tigar

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

PLEASE TAKE NOTICE that on August 27, 2014 at 2:00 p.m., or as soon thereafter as counsel may be heard, Plaintiff will present her motion pursuant to *Osborn v. Haley*, 127 S. Ct. 881 (2007) and *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) before the Honorable Jon S. Tigar, United States District Court Judge for the Northern District of California.

Pursuant to *Osborn* and *Lamagno*, Plaintiff shall request an evidentiary hearing to challenge the certification of the Attorney General made in this case; or, in the alternative, an

order from the Court that it will assume the truth of the factual allegations in her complaint for purposes of challenging the certification.

Respectfully submitted,

Dated: June 8, 2014

COMAR LAW

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

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

Plaintiff Sundus Shaker Saleh ("Plaintiff"), pursuant to *Osborn v. Haley*, 127 S. Ct. 881 (2007) and *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), requests the Court permit an evidentiary hearing in support of her Second Amended Complaint so that she may challenge the Attorney General certification which will likely result from the filing of her Second Amended Complaint. In the alternative, and should the Court not hold a hearing, Plaintiff requests that the Court assume the truth of the factual allegations in her complaint for purposes of challenging the certification. *McLachlan v. Bell*, 261 F.3d 908 (9th Cir. 2001). Under Supreme Court precedent, Plaintiff is entitled to either one or the other as a means of challenging the certification.

Plaintiff seeks application of federal common law, and in particular this country's World War II era prohibition of aggression, on high-ranking members of the Bush Administration related to their alleged planning and waging of the Iraq War. On May 20, 2014, the Court, dismissed Plaintiff's case with leave to amend (Dkt. No. 35, the "**Opinion**"). The Opinion stated:

> Here, the Attorney General has certified that each individual Defendant was acting within the scope of his or her federal employment when performing the acts at issue. Saleh presents no evidence to challenge the certification's conclusion that Defendants were acting within the scope of their employment. Instead Saleh relies on 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. [Citation.] Accordingly, because Saleh has failed to challenge the Attorney General's certification, this action shall be deemed an action against the United Sates [sic] and the United States shall be substituted as the sole defendant.
>
> (Op. at p. 3-4.)

2. Legal Standard.

Pursuant to the Supreme Court's instructions in *Osborn* and *Lamagno*, courts of appeal hold that a plaintiff challenging a scope-of-employment certification is entitled

either to a presumption of truth in her allegations, or an evidentiary hearing. *Kashin v. Kent*, 457 F.3d 1033, 1043 (2006) (holding that denial of an evidentiary hearing regarding Attorney General certification was proper if "the certification, ***the pleadings***, the affidavits, and any supporting documentary evidence do not reveal an issue of material fact.") (emphasis added) (citing to *Gutierrez de Martinez v. DEA*, 111 F.3d 1148, 115 (4th Cir. 1997); *McLachlan*, 261 F.3d at 908 (deciding issue of Westfall Act certification and noting that "[b]ecause no evidentiary hearing was held, ***we accept as true the factual allegations in the complaint***") (emphasis added); *Stokes v. Cross*, 327 F.2d 1210, 1213-1216 (D.C. Cir. 2003) (conducting a review of law and holding that limited discovery was appropriate because plaintiff had alleged sufficient facts, which if true, rebutted scope of employment); *Tripp v. Executive Office of the President*, 200 F.R.D. 140 (D.D.C. 2001) (holding that discovery, briefing and an evidentiary hearing were all proper to determine scope of employment); *Melo v. Hafer* 13, F.3d 736, 747 (3d Cir. 1994) (requiring Attorney General to "state the basis for his or her conclusion" and, if facts differ than found in the complaint, holding that plaintiff "should be permitted reasonable discovery" as if responding to a motion for summary judgment).

In *Osborn*, the Supreme Court, relying on *Lamagno*, reiterated, "just as the Government's certification that an employee 'was acting within the scope of his employment' is subject to threshold judicial review, *Lamagno,* 515 U.S., at 434, 115 S.Ct. 2227, so a complaint's charge of conduct outside the scope of employment, when contested, warrants immediate judicial investigation."

3. Plaintiff's Allegations, If True, Warrant An Evidentiary Hearing On The Issue Of Scope Of Employment

In *Stokes*, *supra*, the Court dismissed the plaintiff's case after the Attorney General certified a defendant without providing the plaintiff the opportunity to contest the issue of scope of employment. Accordingly, "the court essentially afforded conclusive weight to AUSA Nagle's certification and apparently gave no thought to the possibility that the certification may have been in error." *Stokes*, 327 F.3d at 1215. The D.C. Circuit

reversed to permit the plaintiff an opportunity to conduct limited discovery and provide the court with evidence.

Similarly, in *McLachlan*, 261 F.3d at 909-11, the Court noted that an evidentiary hearing was never held. As a result, it "accept[ed] as true the factual allegations in the complaint." *Id*. at 909.

In this case, Plaintiff and Defendants stipulated that Plaintiff could challenge the certification in the body of her response. See Dkt. #27 (Stipulation of counsel). Because the Court declined to review Plaintiff's allegations or to accept their truth for purposes of the Attorney General certification, Plaintiff seeks either an *Osborn* hearing, or, in the alternative, requests that the Court conduct a review her allegations and assume their truth (as in *McLachlan*) for purposes of reviewing the Attorney General certification.

Plaintiff has challenged three of the four prongs of the Restatement test employed under District of Columbia law, and has alleged the following facts, *inter alia*, in support of her case through citations to papers of record and memoirs and other statements from former Bush Administration officials:

(1) Plaintiff alleges that the intent to invade Iraq was formed as early as December 1, 1997, prior to any Defendant holding office (2d Am. Compl. ¶¶ 27-34);

(2) Plaintiff alleges that Defendants began executing the plan to invade Iraq immediately upon coming into office (2d Am. Compl. ¶¶ 35-39);

(3) Plaintiff alleges that Defendants were motivated solely by personal motivations, including ideological and/or religious motives (2d Am. Compl. ¶ 109);

(4) Plaintiff alleges that Defendants ignored all warnings and advice to the contrary and sought to invade Iraq regardless of the cost (2d Am. Compl. ¶¶ 96-102); and

(5) Plaintiff alleges that Defendants undertook an intentional and knowing campaign to mislead the American public and international community to support a war and made untrue statements in order to scare people into supporting military action (2d Am. Compl. ¶¶ 65-95).

Under District of Columbia law, an employee's acts "are not a direct outgrowth of

her assigned duties if those duties merely provide an opportunity for the tortious conduct to occur." *Adams v. Vertex, Inc.,* Case No. 04-1026 (HHK), 2007 U.S. Dist. LEXIS 22850, 2007 WL 1020788, at *7 (D.D.C. Mar. 29, 2007). The core of Plaintiff's complaint is that Defendants were motivated as early as 1997 to invade Iraq, and that they immediately began to use their positions in government beginning in January 2001 to execute such a plan.

Similarly, a plaintiff's allegations of false statements can "permit the imputation of a purely personal motivation." *Hicks v. Office of the Sergeant At Arms for the United States Senate*, 873 F.Supp.2d 258, 270-271 (D.D.C. 2012). While illegal or unauthorized conduct, by itself, may not automatically prevent conduct from "serving the master" to some extent (*Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008)), the nature of the tort, and in particular violent or extreme acts may impute a solely personal motivation. Plaintiff has claimed both repeated acts of allegedly false statements in order to support the run up to the war by Defendants, and the commission of an extremely violent act – a war – that resulted therefrom.

4. Conclusion.

For the reasons set forth above, Plaintiff respectfully requests that this Court hold an *Osborn* hearing, or, that the Court assume the truth of her allegations for purposes of the motion to dismiss and the expected certification of Defendants by the Attorney General.

Respectfully submitted,

Dated: June 8, 2014

COMAR LAW

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

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.640.5856
Facsimile: +1.415.513.0445
Attorney for Lead Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

GEORGE W. BUSH, RICHARD B. CHENEY, DONALD H. RUMSFELD, CONDOLEEZZA RICE, COLIN L. POWELL, PAUL M. WOLFOWITZ, and DOES 1-10, inclusive,

Defendants.

CASE NO. 3:13-cv-01124 JST

SECOND AMENDED COMPLAINT FOR CONSPIRACY TO COMMIT AGGRESSION; AND THE CRIME OF AGGRESSION

DEMAND FOR TRIAL BY JURY

CLASS ACTION

SUNDUS SHAKER SALEH (hereinafter "Plaintiff") on behalf of herself and those similarly situated, alleges against Defendants (1) GEORGE W. BUSH, (2) RICHARD B. CHENEY, (3) DONALD H. RUMSFELD, (4) CONDOLEEZZA RICE, (5) COLIN L. POWELL, (6) PAUL WOLFOWITZ, and (7) DOES 1-10 (collectively, "Defendants"), as follows:

NATURE OF THIS ACTION

1. Defendants GEORGE W. BUSH, RICHARD B. CHENEY, DONALD H. RUMSFELD, CONDOLEEZZA RICE, COLIN L. POWELL, PAUL WOLFOWITZ, and DOES 1-10 broke the law in conspiring and committing the Crime of Aggression against the people of Iraq.

2. Defendants planned the war against Iraq as early as December 1997; manipulated the United States public to support the war by scaring them with images of "mushroom clouds" and conflating the Hussein regime with al-Qaeda; and broke international law by commencing the invasion without proper legal authorization.

3. More than sixty years ago, American prosecutors in Nuremberg, Germany convicted Nazi leaders of the crimes of conspiring and waging wars of aggression. They found the Nazis guilty of planning and waging wars that had no basis in law and which killed millions of innocents.

4. Plaintiff – now a single mother living as a refugee in Jordan – was an innocent civilian victim of the Iraq War. She seeks justice under the Nuremberg principles and United States law for the damages she and others like her suffered because of Defendants' premeditated plan to invade Iraq.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over the claims and causes of action described herein pursuant to 28 U.S.C. §§ 1350, 1331 and 1332.

6. Venue is proper in the Northern District of California because Defendant RICE is subject to personal jurisdiction in this district, and the allegations described in this Second Amended Complaint did not take place in any one judicial

district. 28 U.S.C. § 1391(b)(3).

7. In reference to the Order of this Court, dated May 19, 2014, which dismissed Plaintiff's case with leave to amend based on her failure to challenge the certification of Defendants with respect made pursuant to 28 U.S.C. § 2679(d)(1) and the substitution of the United States as sole defendant, Plaintiff contends the certification is in error and that there is no administrative exhaustion requirement for her to bring her claim:

(a) Plaintiff alleges that Defendants were not acting within the scope of their employment and are thus outside the purview of the certification by the Attorney General. Plaintiff intends to request, and shall request at her earliest opportunity, an evidentiary hearing pursuant to *Osborn v. Haley*, 121 S. Ct. 881 (2007) and *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). *See also Billings v. United States*, 57 F.3d 797 (9th Cir. 1995) (referencing evidence provided by Plaintiff); *McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001) (accepting as true the factual allegations in the complaint as no evidentiary hearing was held); *Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003) (holding that district court should "permit limited discovery and hold evidentiary hearing to resolve a material factual dispute regarding the scope of the defendant's employment."); *Osborn*, 121 S. Ct. at 901 fn. 18 (noting that judges "have a greater factfinding role in Westfall Act cases than they traditionally have in other immunity contexts. The Act makes that inevitable.").

(b) The allegations in the Second Amended Complaint, if true, would constitute a violation of 18 U.S.C. § 2441 (the "War Crimes Act") in that Plaintiff's allegations of the Crime of Aggression committed by these Defendants would constitute "willful killing," "willful[] causing great suffering or serious injury to body or health," and "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," considered "grave breaches" of the Geneva Conventions of 1949, and actionable in a civil capacity under the War Crimes Act. *In re Agent Orange Product Liability Litig*, 373 F.Supp. 2d 7, 113 (E.D.N.Y. 2005)

(finding private right of action for civil liability under War Crimes Act). Accordingly, to the extent the Westfall Act applies, Plaintiff may still pursue her claim pursuant to the statutory exception as the claim would be "a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B).

8. Personal jurisdiction over Defendants is proper in this Court because Defendants are within the jurisdiction of this Court.

THE PARTIES

9. Plaintiff Sundus Shaker Saleh is a citizen of Iraq and resides in Amman, Jordan. She lived in Iraq at the inception of the Iraq War in 2003, lost her home and her property, and was forced to flee to Jordan in 2005 because of the lack of security caused by the war and the occupation that followed. She is currently supporting four dependents by herself in Jordan.

10. Defendant George W. Bush ("BUSH") was the 43rd President of the United States from 2001 and 2009. Defendant BUSH, under his authority as Commander-in-Chief of the United States armed forces, gave the order to invade Iraq on March 19, 2003. In so ordering the invasion, and as further described in this Second Amended Complaint, Defendant BUSH joined the conspiracy and pre-existing plan initiated by Defendants CHENEY, RUMSFELD and WOLFOWITZ to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant BUSH is a resident of Dallas, Texas.

11. Defendant Richard B. Cheney ("CHENEY") was the 46th Vice President of the United States from 2001 to 2009, under Defendant Bush. As further described in this Second Amended Complaint, Defendant Cheney participated in a conspiracy and pre-existing plan in the late 1990s with Defendants RUMSFELD and WOLFOWITZ to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant CHENEY is a resident of Wilson, Wyoming.

12. Defendant Donald H. Rumsfeld ("RUMSFELD") was the 21st Secretary of Defense of the United States from 2001 to 2006, under Defendant BUSH. As further described in this Second Amended Complaint, Defendant Rumsfeld participated in a conspiracy and pre-existing plan in the late 1990s with Defendants CHENEY and WOLFOWITZ to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant RUMSFELD is a resident of Washington DC.

13. Defendant Condoleezza Rice ("RICE") was the 20th United States National Security Advisor from 2001 to 2005, under Defendant BUSH. As further described in this Second Amended Complaint, Defendant RICE joined the conspiracy and pre-existing plan to invade Iraq at least in August 2002, when she joined and participated in the "White House Iraq Group," a group established by the White House in August 2002 for the sole purpose of convincing the American public that the United States had to invade Iraq. Upon information and belief, Defendant RICE is a resident of Stanford, California.

14. Defendant Paul Wolfowitz ("WOLFOWITZ") was the 25th Deputy Secretary of Defense from 2001 to 2005, under Defendant BUSH. As further described in this Second Amended Complaint, Defendant WOLFOWITZ was the prime architect of the Iraq War and initiated a conspiracy and plan in the late 1990s with Defendants CHENEY and RUMSFELD to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant WOLFOWITZ is a resident of Washington DC.

15. Defendants DOES One through Ten, inclusive, are previous high-ranking officials of the Bush Administration who joined in the conspiracy, or otherwise planned and executed, the pre-existing plan to invade Iraq. Plaintiff will fully name these Doe defendants following discovery into their complete identities. Does One through Ten, inclusive, are sued for damages in their individual capacity.

NUREMBERG OUTLAWED THE CRIME OF AGGRESSION:

THE "SUPREME INTERNATIONAL CRIME"

16. At the end of World War II, the United States and its allies put Nazi leaders on trial for their crimes, including crimes against humanity and war crimes. But the chief crime prosecuted against the Nazis was the **crime of aggression**: engaging in a premeditated war without lawful reason.

17. Count One of the Nuremberg indictment charged Nazi leaders with a "Common Plan or Conspiracy" to engage in "Crimes against Peace, in that the defendants planned, prepared, initiated wars of aggression, which were also wars in violation of international treaties, agreements, or assurances."[1]

18. In his opening statement to the Tribunal, Chief Counsel for the United States Robert H. Jackson stated "This Tribunal . . . represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war."[2]

19. Chief Prosecutor Jackson argued, "The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, 'under God and the law.'" (*Id.*)

20. Chief Prosecutor Jackson argued, "Any resort to war – to any kind of a war – **is a resort to means that are inherently criminal**. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property." (Emphasis added).

21. He continued, "The 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, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes**." (*Id.*) (Emphasis added).

---

[1] *See* Judgment, *United States v. Goering et al.*, Int'l Military Tribunal (Oct. 1 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

[2] Robert Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/.

22. Chief Prosecutor Jackson recognized that the crime of aggression applied to the United States. He argued, "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." (*Id.*)

23. The International Military Tribunal at Nuremberg found Nazi leaders guilty of the crimes of conspiracy to engage in a war of aggression and the crime of aggression.[3] The Tribunal stated, "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. **War is essentially an evil thing**. Its consequences are not confined to the belligerent states alone, but affect the whole world." (Emphasis added).

24. The Tribunal held, "To initiate a war of aggression, therefore, is not only an international crime; it is the **supreme international crime** differing only from other war crimes in that it contains within itself the accumulated evil of the whole." (Emphasis added).

25. The Tribunal rejected the defendants' argument that Adolph Hitler was solely to blame for the acts of aggression. "**[T]hose who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it**. Hitler could not make aggressive war by himself." (Emphasis added).

26. High-ranking Nazis, including Hermann Göring, Alfred Jodl and Wilhelm Keitel were sentenced to death for their crimes.

THE PROJECT FOR THE NEW AMERICAN CENTURY

27. In 1997, William Kristol and Robert Kagan formed a think tank in Washington DC called "The Project for the New American Century," or "PNAC." PNAC members included Defendants CHENEY, RUMSFELD and WOLFOWITZ.

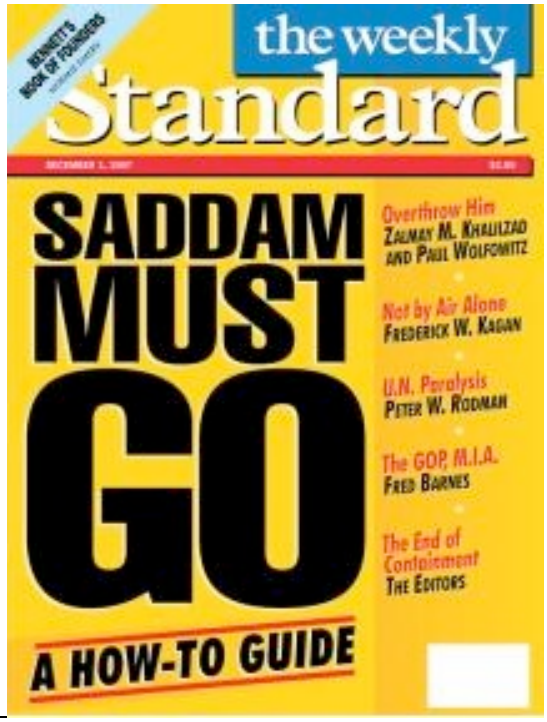
28. PNAC adheres to a neoconservative philosophy regarding the United States' use of its military and its role in international politics. With respect to Iraq, PNAC

[3] Judgment, *United States v. Goering et al.*, Int'l Military Tribunal (Oct. 1 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

had a larger strategic vision of expanding the United States' influence and "showing its muscle in the Middle East."[4] PNAC provided "George Bush with may of his top officials, who ran and wrecked the liberation of Iraq."[5]

29. From 1997 to 2000, PNAC produced several documents advocating the military overthrow of Saddam Hussein.[6]

30. In the December 1, 1997 issue of the neoconservative magazine the *Weekly Standard*, Defendant WOLFOWITZ published an article, which discussed how the United States should overthrow Saddam Hussein. The issue was entitled "Saddam Must Go: A How-To Guide."[7]



[4] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 78-79 (2006).

[5] George Packer, *Kindler, Gentler Neo-Cons*, The New Yorker (Mach 27, 2009), *available at* http://www.newyorker.com/online/blogs/georgepacker/2009/03/kinder-gentler.html.

[6] Project for the New American Century, http://www.newamericancentury.org/iraqmiddleeast2000-1997.htm; Frontline, "Chronology: The Evolution Of THe Bush Doctrine," PBS, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/iraq/etc/cron.html.

[7] Paul Wolfowitz & Zalmay M. Khalilzad, *Overthrow Him*, Weekly Standard, (Dec. 1, 1997), *available at* http://www.weeklystandard.com/Content/Protected/Articles/000/000/008/876iiuqh.asp?page=1.

31. On January 26, 1998, Defendants RUMSFELD and WOLFOWITZ signed a letter[8] to then President William J. Clinton, requesting that the United States implement a "**strategy for removing Saddam's regime from power**," which included a "willingness to **undertake military action** as diplomacy is clearly failing." Removing Saddam from power had to "become the aim of American foreign policy." (Emphasis added). The letter further stated that the United States could not be "crippled by a misguided insistence on unanimity in the UN Security Council."

32. On May 29, 1998,[9] Defendants RUMSFELD and WOLFOWITZ signed a letter to then Speaker of the House Newt Gingrich and Senate Majority Leader Trent Lott in which they advocated that "U.S. policy should have as its explicit goal removing Saddam Hussein's regime from power and establishing a peaceful and democratic Iraq in its place," which included the use of "U.S. and allied military power . . . to help remove Saddam from power."

33. On September 18, 1998,[10] Defendant WOLFOWITZ gave testimony before the House National Security Committee on Iraq in which he stated that the United States had to "liberat[e] the Iraqi people from Saddam's tyrannical grasp and free Iraq's neighbors from Saddam's murderous threats." Defendant WOLFOWITZ advocated that the United States establish a "safe protected zone in the South" and form a provisional government that would "**control the largest oil field in Iraq**." (Emphasis added).

34. Defendant WOLFOWITZ was an avid supporter and believer of other neoconservative theorists such as Laurie Mylroie, and Defendant WOLFOWITZ had been fixated on the overthrow of Saddam's regime in Iraq since the mid-1990s.[11] In

---

[8] Letter to President Clinton (Jan. 26, 1998), *available at* http://www.newamericancentury.org/iraqclintonletter.htm.

[9] Letter to Newt Gingrich and Trent Lott (May 29, 1998), *available at* http://www.newamericancentury.org/iraqletter1998.htm.

[10] Letter by Gary Schmitt regarding Paul Wolfowitz's Statement on U.S. Policy Toward Iraq (Sept. 18. 1998), *available at* http://www.newamericancentury.org/iraqsep1898.htm.

[11] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 68-82 (2006).

fact, in June 2001, Defendant WOLFOWITZ tried to get the CIA to reinvestigate Mylroie's theory that Iraq was involved in the 1993 World Trade Center bombings, which had been disproved by the CIA in 1996.[12]

ONCE IN POWER, DEFENDANTS IMMEDIATELY BEGIN TO IMPLEMENT THEIR PLAN TO INVADE IRAQ

35. In January 2001, Defendant BUSH was sworn in as 43rd President of the United States. Defendant CHENEY was Defendant BUSH's Vice President. Defendant BUSH appointed Defendants RUMSFELD, WOLFOWITZ, RICE and POWELL to high-ranking positions within his administration.

36. On January 30, 2001, ten days after the inauguration, Defendant BUSH met with his principals of his National Security Council for the first time. According to Paul O'Neill, the first Secretary of the Treasury under Defendant BUSH, this first meeting "was about Iraq."[13] Defendant RICE stated that with respect to the Middle East, "Iraq is destabilizing the region," in what O'Neill thought was a scripted exchange.[14]

37. On February 1, 2001, at the next meeting of the National Security Council, Defendant RUMSFELD remarked that the sanctions against Iraq "are fine," but that "what we really want to think about is going after Saddam. Imagine what the region would look like without Saddam and with a regime that's aligned with U.S. interests. It would change everything in the region and beyond it. It would demonstrate what U.S. policy is all about."[15] In January and February of 2001, the occupation of Iraq was openly

---

[12] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 76 (2006); Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 71-73 (2004), *available at* http://www.weeklystandard.com/Content/Protected/Articles/000/000/008/876iiuqh.asp?page=1.

[13] Ron Suskind, *The Price of Loyalty: George W. Bush, the White House and the Education of Paul O'Neill* 75 (2004).

[14] *Id*. at 72.

[15] *Id*. at 85.

discussed.[16]

38. O'Neill states: "There was never any rigorous talk about this sweeping idea that seemed to be driving all the specific actions. From the start, we were building the case against Hussein and looking at how we could take him out and change Iraq into a new country. And, if we did that, it would solve everything. It was all about finding *a way to do it*. That was the tone of it. The President saying, 'Fine. Go find me a way to do this.'"[17]

39. O'Neill, in an interview with the CBS news magazine 60 Minutes said, "From the very first instance, it was about Iraq. It was about what we can do to change this regime. ***Day one, these things were laid and sealed***."[18]

DEFENDANTS USE 9/11 AS COVER TO EXECUTE THEIR PRE-EXISTING PLAN TO INVADE IRAQ

40. On September 11, 2001, Saudi Arabian terrorists with links to an Afghan-based group called "al-Qaeda," and headed by Osama bin Laden, hijacked four planes and committed terrorist acts against the American people.

41. According to British journalist John Kampfner, the day of the 9/11 attacks, Defendants WOLFOWITZ and RUMSFELD openly pushed for war against Iraq – despite the fact that the 9/11 hijackers were Saudi Arabian and had been based out of Afghanistan. Defendant RUMSFELD asked, "Why shouldn't we go against Iraq, not just al-Qaeda?" with Defendant WOLFOWITZ adding that Iraq was a "brittle, oppressive regime that might break easily—it was doable." Kampfner writes, "from that moment on, he and Wolfowitz used every available opportunity to press the case."[19]

---

[16] 60 Minutes, "Bush Sought 'Way' to Invade Iraq?" *interview and transcript available at* http://www.cbsnews.com/news/bush-sought-way-to-invade-iraq/.

[17] *Id*. at 86 (emphasis in original).

[18] 60 Minutes, "Bush Sought 'Way' to Invade Iraq?" *interview and transcript available at* http://www.cbsnews.com/news/bush-sought-way-to-invade-iraq/ (emphasis added).

[19] Jonathan Kampfner, *Blair's Wars* 156 (2003).

42. According to Richard A. Clarke,[20] the former National Coordinator for Security, Infrastructure Protection and Counter-terrorism (and who worked for Presidents George H.W. Bush and William Clinton) Defendants WOLFOWITZ, RUMSFELD and BUSH sought to use 9/11 as an excuse to attack Iraq.

43. On Wednesday, September 12, 2001, the day after 9/11, Richard A. Clarke heard Defendant RUMSFELD state that the United States had to broaden its objectives by "getting Iraq."[21] Defendant POWELL pushed back, urging a focus on al-Qaeda. Richard A. Clarke stated, "Having been attacked by al-Qaeda, for us now to go bombing Iraq in response would be like our invading Mexico after the Japanese attacked us at Pearl Harbor."

44. Later in the day, Richard A. Clarke heard Defendant RUMSFELD complain that there were no decent targets for bombing in Afghanistan and that the United States military should consider bombing Iraq, which, he said, had better targets. At first Richard A. Clarke thought Rumsfeld was joking. But he was serious, and Defendant BUSH did not reject out of hand the idea of attacking Iraq. Instead, Defendant BUSH noted that what the United States needed to do with Iraq was to change the government, not just hit it with more cruise missiles, as Defendant RUMSFELD had implied.

45. During the afternoon of September 11, 2001, Defendant RUMSFELD discussed with his staff the possibility of using the terrorist attacks on the World Trade Center as an "opportunity" to launch an attack on Iraq.[22] On September 11, 2001, an aide to Defendant RUMSFELD quickly scribbled notes regarding the attack and

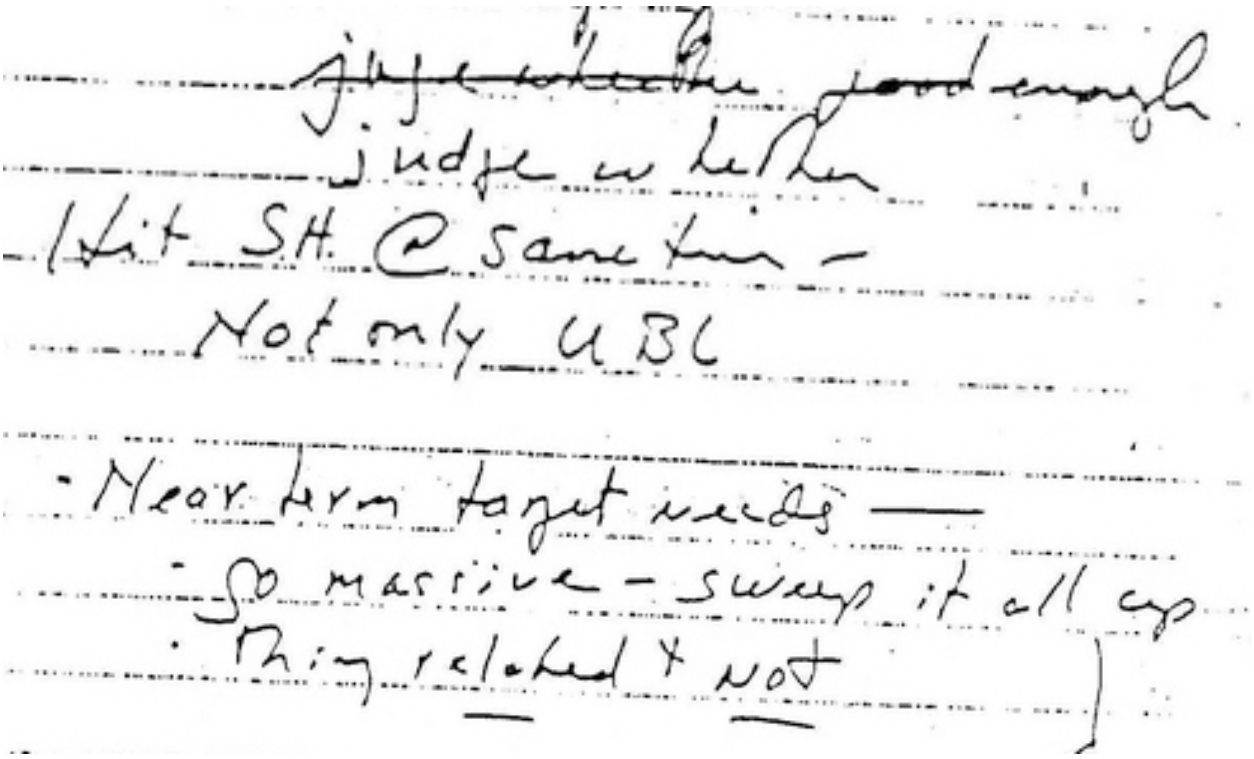
---

[20] This information is lifted from press articles and Richard A. Clarke, *Against All Enemies – Inside America's War On Terror* (Free Press 2004).

[21] Richard A. Clarke, *Against All Enemies*, N.Y. Times (March 28, 2004), *available at* http://www.nytimes.com/2004/03/28/books/chapters/0328-1st-clarke.html?pagewanted=all; *See also* Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 334-35 (2004).

[22] Bob Woodward, *Plan of Attack* 24 (2004); *See also* Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 334-35 (2004).

quoted Defendant RUMSFELD as saying, "Hit S.H. @ same time – Not only UBL." The note referred to Saddam Hussein (S.H.) and Osama bin Laden (UBL). This note also read, "Go massive - Sweep it all up. Thing [sic] related + not."[23] (*See* Exhibit A, incorporated into this Second Amended Complaint hereto).



46. Defendant WOLFOWITZ has stated that during the weekend after 9/11, there was a "long discussion" about the part that Iraq would play in a counterterrorist strategy and the question was "about not whether but when."[24]

47. On September 12, 2001, the day after the 9/11 attacks, Defendant BUSH approached Richard A. Clarke and a few other people and stated, "I know you have a lot to do and all, but I want you, as soon as you can, to go back over everything, everything. See if Saddam did this. See if he's linked in any way." Richard A. Clarke was again incredulous. He responded, "But, Mr. President, Al Qaeda did this." Defendant

---

[23] *See* Joel Roberts, *Plans for Iraq Attack Began On 9/11*, CBS News (Sept. 10, 2009), *available at* http://www.cbsnews.com/2100-500249_162-520830.html; Thad Anderson, Flickr, *available at* http://www.flickr.com/photos/66726692@N00/sets/72057594065491946/.

[24] Sam Tannenhais, *Interview with Paul Wolfowitz*, Vanity Fair (May 9, 2003), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2594.

BUSH responded, "I know, I know, but - see if Saddam was involved. Just look. I want to know any shred-" "Absolutely, we will look-again," Richard A. Clarke answered. "But you know, we have looked several times for state sponsorship of Al Qaeda and not found any real linkages to Iraq. Iran plays a little, as does Pakistan, and Saudi Arabia, Yemen." "Look into Iraq, Saddam," Defendant BUSH responded.

48. On September 18, 2001, Clarke's office sent a memo to Defendant RICE entitled "Survey of Intelligence Information on Any Iraq Involvement in the September 11 Attacks," which found "no compelling case" that linked Iraq to the 9/11 attack.[25]

49. On or around September 20, 2001, General Wesley Clark went to the Pentagon where he saw Defendants RUMSFELD and WOLFOWITZ. A general at the Pentagon told Wesley Clark that "We've made the decision we're going to war with Iraq." General Clark replied, "We're going to war with Iraq? Why?" The general stated, "I don't know, I guess they don't know what else to do." General Clark responded, "Well, did they find some information connecting Saddam to al-Qaeda?" The other general replied, "No, no. There's nothing new that way. They just made the decision to go to war with Iraq. I guess it's like we don't know what to do about terrorists, but we've got a good military and we can take down governments."[26]

50. A few weeks later, after the United States had begun its bombing of Afghanistan, General Clark asked this same general, "Are we still going to war with Iraq?" The general replied, "Oh, it's worse than that." The general pointed to a memo from the office of Defendant RUMSFELD. "This is a memo that describes how we're going to take out seven countries in five years, starting with Iraq, and then Syria,

---

[25] Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 334 (2004).

[26] Amy Goodman, *Gen. Wesley Clark Weighs Presidential Bid: "I Think About It Everyday"*, Democracy Now! (March 2, 2007), *available at* http://www.democracynow.org/2007/3/2/gen_wesley_clark_weighs_presidential_bid.

Lebanon, Libya, Somalia, Sudan and, finishing off, Iran."[27]

51. During a December 9, 2001 appearance on *Meet the Press*, Defendant CHENEY attempted to falsely persuade the American public that Iraq and some connection to 9/11. Defendant CHENEY claimed it was "well confirmed that [Atta, the lead 9/11 hijacker] did go to Prague and he did meet with a senior official of the Iraqi Intelligence service." However, this alleged meeting between Mohamed Atta and the Iraqi Intelligence service was not only unconfirmed, but the CIA and the FBI had already concluded that no such meeting had probably taken place.[28]

52. On November 27, 2001, Defendant RUMSFELD met with U.S. Central Command (CENTCOM) Commander General Tommy Franks in order to discuss the "decapitation of the [Iraqi] government." In the meeting, Defendant RUMSFELD discussed strategies on how to justify a military invasion of Iraq, which included a debate on weapons of mass destruction (WMD) and a "Saddam connection to Sept. 11 attack…"[29] (*See* Exhibit B, incorporated into this Second Amended Complaint hereto).

53. According to Richard A. Clarke, the Bush Administration had been focused on Iraq prior to the attacks of 9/11: so focused that they failed to listen to warnings that al-Qaeda-linked terrorists were planning a spectacular attack.

54. For example, on January 25, 2001, four days after Defendant BUSH was inaugurated, Richard A. Clarke wrote to Defendant RICE and asked for a cabinet-level meeting to discuss the threat posed by al-Qaeda and suggesting how the United States should respond.[30]

---

[27] *Id*.

[28] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 102-105 (2006); *Meet the Press*, Interview by Tim Russert with Dick Cheney (Dec. 9, 2001), transcript *available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/cheneytext120901.html.

[29] The U.S. Prepares for Conflict, 2001, *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB326/.

[30] Bush Administration's First Memo on al-Qaeda- declassified, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB147/index.htm.

55. Defendant RICE downgraded Richard A. Clarke's position so that he no longer had direct access to the president, a privilege he had enjoyed under President Clinton.

56. In April 2001, Richard A. Clarke met with Defendant WOLFOWITZ to discuss the threat posed by al-Qaeda. Defendant WOLFOWITZ responded, "I just don't understand why we are beginning by talking about this one man bin Laden." He told Richard A. Clarke, "You give bin Laden too much credit. He could not do all these things like the 1993 attack on New York, not without a state sponsor. Just because FBI and CIA have failed to find the linkages does not mean they don't exist."[31]

57. Defendant WOLFOWITZ was repeating a discredited theory that Iraq had been behind the 1993 attack, which was not true.

58. On August 6, 2001, Defendant BUSH received a briefing from the CIA entitled, "Bin Ladin [sic] Determined To Strike US."[32] (*See* Exhibit C, incorporated into this Second Amended Complaint hereto).

59. According to Defendant POWELL, Defendant WOLFOWITZ could not justify his belief regarding a link between Iraq and the 9/11 attacks and stated, "[Defendant WOLFOWITZ] was always of the view that Iraq was a problem that had to be dealt with…And he saw this as one way of using this event as a way to deal with the Iraq problem."[33]

60. On June 2, 2014, Richard Clarke stated in an interview that Defendants BUSH and CHENEY engaged in conduct that "probably fall within the area of war crimes." He continued, "It is clear that things that the Bush administration did, in

---

[31] Rebecca Leung, *Excerpt: Against All Enemies* (Sept. 10, 2009), http://www.cbsnews.com/8301-18560_162-607774.html.

[32] The President's Daily Brief (Aug. 6, 2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB116/index.htm.

[33] Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 335 (2004).

my mind at least it is clear, that some of the things they did were war crimes."[34]

IN JULY 2002, THE BRITISH GOVERNMENT LEARNS THAT DEFENDANTS PLAN TO INVADE IRAQ AND "FIX" INTELLIGENCE AROUND THE INVASION

61. In July 2002, high-ranking British politicians, including Prime Minister Tony Blair, Foreign Secretary Jack Straw and Attorney General Lord Goldsmith met to discuss intelligence on Iraq. This meeting was memorialized in a secret memorandum that has since been leaked.[35] (*See* Exhibit D, incorporated into this Second Amended Complaint hereto). During that meeting, head of Secret Intelligence Service Sir Richard Dearlove reported on his recent meetings in the United States. He stated, "There was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. **But the intelligence and facts were being fixed around the policy**." (Emphasis added).

62. The meeting went on to discuss likely American military options, including a "slow build-up of 250,000 US troops, a short (72 hour) air campaign, then a move up to Baghdad from the south."

63. Foreign Secretary Jack Straw stated that it seemed clear that Defendant BUSH had "made up his mind" to take military action, even if the timing was not yet decided. Foreign Secretary Straw noted, "But the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran."

64. The Attorney General of the United Kingdom affirmed that there was no legal justification for the war. "[T]he desire for regime change was not a legal

---

[34] Amy Goodman, *Ex-Counterterrorism Czar Richard Clarke; Bush, Cheney and Rumsfeld Committed War Crimes*, Democracy Now! (June 2, 2014) *available at* http://www.democracynow.org/2014/6/2/ex_counterterrorism_czar_richard_clarke_bush.

[35] This memo has been labeled the "Downing Street Memo" in the United Kingdom, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB328/II-Doc14.pdf.

base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or UN [Security Counsel] authorisation. The first and second could not be the base in this case. Relying on UNSCR 1205 of three years ago would be difficult. The situation might of course change."

DEFENDANTS EXECUTE A PLAN TO SCARE THE AMERICAN PUBLIC SO THAT THEY CAN INVADE IRAQ

65. In August 2002, the White House established a group called the White House Iraq Group ("WHIG"), the purpose of which was to convince the American public into supporting a war against Iraq. Defendant RICE was a member of WHIG, along with Karl Rove, I. Lewis ("Scooter") Libby, and other high-ranking Bush Administration officials. Defendant RICE, along with other members of WHIG continually used fabricated intelligence from unreliable sources in order to prep the public for an invasion of Iraq.[36]

66. At a September 5, 2002 WHIG meeting, the term "smoking gun/mushroom cloud" was unveiled related to the supposed nuclear dangers posed by Saddam Hussein. According to Newsweek columnist Michael Isikoff, "The original plan had been to place it in an upcoming presidential speech, but WHIG members fancied it so much that when the *Times* reporters contacted the White House to talk about their upcoming piece [about aluminum tubes], one of them leaked Gerson's phrase – and the administration would soon make maximum use of it."[37]

67. On September 7, 2002 unnamed White House officials told the New York Times[38] that the Bush Administration was unveiling this strategy to "persuade the

---

[36] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 59 (2006).

[37] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 35 (2006).

[38] Elisabeth Bumiller, *Traces of Terror: The Strategy; Bush Aides Set Strategy to Sell Policy on Iraq*, N.Y. Times (Sept. 7, 2002), *available at* http://www.nytimes.com/2002/09/07/us/traces-of-terror-the-strategy-bush-aides-set-strategy-to-sell-policy-on-iraq.html.

public, the Congress and the allies of the need to confront the threat from Saddam Hussein."

68. The New York Times also reported that White House Chief of Staff Andrew Card, Jr., explained that the Bush Administration waited until after Labor Day to begin this push because "From a marketing point of view you don't introduce new products in August."

69. The New York Times reported that the centerpiece of the strategy would be to use Mr. Bush's "speech on September 11 to help move Americans towards support of action against Iraq, which could come early next year."

70. An August 10, 2003 article in the Washington Post confirmed that during this period from September 2002 to the initiation of the war, Defendants engaged in a "pattern" of "depicting Iraq's nuclear weapons program as more active, more certain and more imminent in its threat than the data they had would support."[39]

71. On September 8, 2002,[40] Defendant RICE told CNN's Late Edition that Saddam Hussein was "actively pursuing a nuclear weapon." "There will always be some uncertainty about how quickly he can acquire nuclear weapons but we don't want the smoking gun to be a mushroom cloud."

72. Additionally, Defendants BUSH, CHENEY, and RICE used faulty intelligence and "cherry picked" intelligence facts in order to better market a war with Iraq to the American people.[41] For example, during an interview with *Meet the Press* on September 8, 2002, Defendant CHENEY stated that the White House knew "with absolute certainty" that "…[Saddam] has been seeking to acquire" aluminum tubes for

---

[39] Barton Gellman & Walter Pincus, *Depiction of Threat Outgrew Supporting Evidence*, The Washington Post (Aug. 10, 2003), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/12/AR2006061200932.html.

[40] CNN *Late Edition*, Interview by Wolf Blitzer with Condoleezza Rice (Sept. 8, 2002), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html

[41] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 16 (2006); *See also* The World According to Dick Cheney (Cutler Productions, 2013).

his nuclear weapons program, even though there was clear dissent over this fact and overwhelming evidence that the aluminum tubes were not suitable for a nuclear centrifuge.[42] Also, on CNN's Late Edition, Defendant RICE said the aluminum tubes "are only really suited for nuclear weapons programs, centrifuge programs." On FOX News Sunday, Defendant POWELL said that "[Saddam] is still trying to acquire…some of the specialized aluminum tubing one needs to develop centrifuges."[43]

73. During an address at the United Nations on September 12, 2002, Defendant BUSH claimed "Iraq has made several attempts to buy high-strength aluminum tubes used to enrich uranium for a nuclear weapon."[44]

74. Although the CIA had rejected the claim, Defendant BUSH declared during his weekly radio address on September 28, 2002 that Saddam "could launch a biological or chemical attack in as little as forty-five minutes."[45]

75. Furthermore, after the White House had been warned that the assertion that Iraq was trying to obtain large quantities of uranium from Africa (specifically Niger) was unconfirmed and highly unlikely, Defendant BUSH used the allegation in his 2003 State of the Union address in order to justify the invasion of Iraq.[46]

76. On March 7, 2003, days before the war, Mohamed ElBaradei, the

---

[42] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 36-42, 86-87, 222-24, 259-60 (2006); *Meet the Press*, Interview by Tim Russert with Dick Cheney (Sept. 8, 2002), *available at* https://www.mtholyoke.edu/acad/intrel/bush/meet.htm.

[43] CNN *Late Edition*, Interview by Wolf Blitzer with Condoleezza Rice (Sept. 8, 2002), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html; FOX *News Sunday*, Interview by Tony Snow with Colin Powell (Sept. 8 2002), *available at* http://www.foxnews.com/story/2002/10/21/transcript-colin-powell-on-fox-news-sunday/.

[44] President Bush, Address to the United Nations General Assembly (Sept. 12, 2002), *available at* http://www.un.org/webcast/ga/57/statements/020912usaE.htm.

[45] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 100 (2006); Radio Address by the President to the Nation, Sept. 28, 2002, transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020928.html.

[46] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 86-87, 222-24, 259-260 (2006).

director general of the UN's nuclear inspection and verification arm the International Atomic Energy Agency (IAEA) stated that the uranium intelligence was not credible and there was "no evidence or plausible indication" that Iraq had revived a nuclear weapons program and that the documents were "not authentic."[47]

77. On May 6, 2003, Nicholas Kristof of the New York Times reported that the C.I.A. and the State Department that the documents were forged and the information about a uranium deal "unequivocally wrong." Kristof quoted a source who said that that intelligence experts were getting "pressure to get product 'right'" and that such pressure was coming "out of the Office of the Secretary of Defense."[48]

78. In 2008,[49] former Bush aide and press secretary Scott McClellan would write that Defendants engaged in a "political propaganda campaign" aimed at "manipulating sources of public opinion." McClellan stated that Defendants CHENEY, RUMSFELD and WOLFOWITZ "were evidently pursuing their own agendas" with respect to Iraq.[50]

79. Defendants BUSH and RUMSFELD manipulated intelligence regarding Iraq's drones and unmanned aerial vehicles (UAV) and their ability to attack the U.S. mainland with biological or chemical weapons in order to justify an invasion in Iraq. The CIA had reported by early 2003 that it had "no definite indications that Baghdad [was] planning to use WMD-armed UAV's against the U.S. mainland." However, on February 6, 2003, Defendant BUSH still claimed an Iraqi UAV containing

---

[47] Statements of the Director General, "The Status of Nuclear Inspections in Iraq: An Update," Director General Dr. Mohamed ElBaradei, *available at* http://www.iaea.org/newscenter/statements/2003/ebsp2003n006.shtml.

[48] Nicholas D. Kristof, *Missing in Action: Truth*, The New York Times (May 6, 2003), *available at* http://www.nytimes.com/2003/05/06/opinion/missing-in-action-truth.html.

[49] Scott McClellan, *What Happened: Inside the Bush White House and Washington's Culture of Deception*, 125, 144 (2008); Michael D. Shear, *Ex-Press Aide Writes That Bush Misled U.S. on Iraq*, The Washington Post (May 28, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052703679.html.

[50] Scott McClellan, *What Happened* at 145.

biological weapons "launched from a vessel off the American coast could reach hundreds of miles inland." And during a news conference on March 12, 2003, Defendant RUMSFELD declared, "We know that [Saddam] continues to hide biological or chemical weapons, moving them to different locations as often as every twelve to twenty-four hours."[51]

80. In an interview given on May 9, 2003, Defendant WOLFOWITZ stated, "For reasons that have a lot to do with the U.S. bureaucracy we settled on the one issue [to justify the war] that everyone could agree on which was weapons of mass destruction as the core reason."[52]

DEFENDANTS FALSELY LINK AL-QAEDA TO IRAQ

81. Despite the fact that there has never been any proof of any operational cooperation between al-Qaeda and Iraq, Defendants engaged in a pattern and practice of deceiving the American public into believing that such a link existed in order to win approval for the crime of aggression against Iraq.

82. On December 9, 2001,[53] Defendant CHENEY alleged that an Iraqi intelligence officer met with one of the 9/11 hijackers (Mohammed Atta) in the Czech Republic. He repeated this allegation again in September 2003.[54]

83. No such meeting took place, and in 2006, Defendant CHENEY

---

[51] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 205-206 (2006); Statement by President Bush from the White House (Feb. 6, 2003), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030206-17.html.

[52] Sam Tannenhais, *Interview with Paul Wolfowitz*, Vanity Fair (May 9, 2003), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2594.

[53] *Meet the Press*, Interview by Tim Russert with Dick Cheney (December 9, 2001), transcript *available at* http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/print/vp20011209.html.

[54] *Meet the Press*, Interview by Tim Russert with Dick Cheney (Sept. 14, 2003), transcript *available at* http://www.nbcnews.com/id/3080244/default.htm#.UTPUdRms1JM.

retracted this statement.[55]

84. In March 22, 2002, UK Director of the Foreign and Commonwealth Office Peter Ricketts wrote a memo to Foreign Secretary Jack Straw (now publicly available) and stated that the "US is scrambling to establish a link between Iraq and Al Aaida [sic]" and that it was "so far frankly unconvincing."[56] (*See* Exhibit E, incorporated into this Second Amended Complaint).

85. In September 2002, Defendant RUMSFELD set up the Office of Special Plans (OSP) in the Pentagon, where raw intelligence regarding Iraq would be assessed and sent directly to Defendant BUSH, prior to being filtered through the proper intelligence channels. Through the OSP, Defendants CHENEY, RUMSFELD, and WOLFOWITZ were able to use intelligence that was uncertain, unverified, and unreliable and turn it into fact.[57] The OSP was active until June 2003.

86. On October 7, 2002, Defendant BUSH told the American Public that "Iraq and al Qaeda have had high-level contacts that go back a decade. Some al Qaeda leaders who fled Afghanistan went to Iraq. These include one very senior al Qaeda leader who received medical treatment in Baghdad this year, and who have been associated with planning for chemical and biological attacks. We've learned that Iraq has trained as Qaeda members in bomb-making and poisons and deadly gases. And we know that after September the 11th, Saddam Hussein's regime gleefully celebrated the terrorist attacks on America."[58]

87. In this same speech, Defendant BUSH claimed that Saddam Hussein

---

[55] *The Tony Snow Show*, Interview of Dick Cheney (March 29, 2006), transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060329-2.html.

[56] Letter from Peter Ricketts to Jack Straw, The Downing Street Memos (March 22, 2002), *available at* http://downingstreetmemo.com/rickettstext.html.

[57] Bob Woodward, *Plan of Attack* 228-229 (2004); Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 109 (2006).

[58] President Bush, Cincinnati Museum Center Speech: Outlines Iraqi Threat (Oct. 7, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html.

had a group of "nuclear mujahaideen – his nuclear holy warriors."

88. On October 14, 2002, Defendant BUSH stated that Saddam Hussein "has had connections with al Qaeda. This is a man who, in my judgment, would like to use al Qaeda as a forward army."[59]

89. Defendant BUSH made these statements despite the fact that ten days after the 9/11 attacks, he was told in his daily brief ("PDB") from the CIA that there was no evidence linking Iraq to 9/11 and scant evidence that Iraq had any collaborative ties with al Qaeda.[60]

90. A Defense Intelligence Agency document from February 2002 confirmed that the source of the intelligence linking Iraq to al Qaeda was a likely fabricator and "intentionally misleading" his interrogators.[61] The report concluded, "Saddam's regime is intensely secular and is wary of Islamic revolutionary movements. Moreover, Baghdad is unlikely to provide assistance to a group it cannot control."

91. According to Defendant POWELL, Defendants CHENEY and WOLFOWITZ feverishly looked for a connection between Saddam Hussein and 9/11. In January 2003, Defendant POWELL privately referred to Doug Feith's office as the "Gestapo office," a place where Defendant WOLFOWITZ, Scooter Libby, and Feith would meet and discuss a strategy to invade Iraq.[62]

92. Defendant CHENEY claimed that Iraq had "direct ties" to al-Qaeda in order to convince individual members of Congress, including Representative Dick

---

[59] President Bush, Thaddeus McCotter for Congress Dinner Speech (Oct.14, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html.

[60] Murray Waas, *Key Bush Intelligence Briefing Kept From Hill Panel,* National Journal, (Nov. 2005, updated May 29, 2013), http://www.nationaljournal.com/whitehouse/key-bush-intelligence-briefing-kept-from-hill-panel-20051122.

[61] Douglas Jehl, *Report Warned Bush Team Against Intelligence Doubts*, New York Times, (Nov. 6, 2005), *available at* http://www.nytimes.com/2005/11/06/politics/06intel.ready.html?pagewanted=all&_r=0.

[62] Bob Woodward, *Plan of Attack* 292-293 (2004).

Armey, that an invasion of Iraq was necessary.[63]

93. During a visit to Cairo in February 2001, Defendant POWELL stated that Iraq "has not developed any significant capability with respect to weapons of mass destruction."[64] However, in February 2003, Defendant POWELL gave a speech to the United Nations Security Council on the issue of Iraq, considered critical to winning approval for military action. In that speech, Defendant POWELL stated[65] that Iraq "harbors a deadly terrorist network headed by Abu Musab Al-Zarqawi, an associated collaborator of Osama bin Laden and his al-Qaeda lieutenants." He stated that Saddam Hussein was "more willing to assist al-Qaida after the 1998 bombings of [US] embassies in Kenya and Tanzania." He alleged that, "From the late 1990s until 2001, the Iraqi Embassy in Pakistan played the role of liaison to the Al Qaeda organization." In a 2005 interview with ABC News, Defendant POWELL admitted he felt "terrible" about this speech and considered it a "blot" on his record.[66]

94. When asked about a specific Iraq and al-Qaeda connection, Defendant POWELL admitted, "I have never seen a connection . . . I can't think otherwise because I'd never seen evidence to suggest there was one." Defendant POWELL thus admitted that the allegations given in his speech were untrue.

95. In 2003, when asked about a specific Iraq and 9/11 connection, Defendant WOLFOWITZ admitted, "I'm not sure even now that I would say Iraq had something to do with it."[67]

---

[63] The World According to Dick Cheney (Cutler Productions, 2013).

[64] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 26 (2006).

[65] Colin Powell, U.S. Secretary of State's Address to the United Nations Security Council (Feb. 5, 2003), *available at* http://www.guardian.co.uk/world/2003/feb/05/iraq.usa3.

[66] ABC News, "Colin Powell on Iraq, Race, and Hurricane Relief," Sept. 8, 2005, *available at* http://abcnews.go.com/2020/Politics/story?id=1105979&page=1

[67] *The Laura Ingraham* Show, Interview by Nancy Collins with Paul Wolfowitz (August 1, 2003), transcript *available at* http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3208.

DEFENDANTS REJECT ALL AVENUES FOR DIPLOMACY AND DISSENTING INTELLIGENCE REPORTS

96. On November 26, 2002, shortly after U.N. Resolution 1441 was passed and even before the new team of UN weapons inspectors entered Iraq, Defendants RUMSFELD and BUSH approved the deployment of 300,000 American troops to the Gulf. Defendant RUMSFELD even decided to "stagger" the order in two-week intervals in order to avoid generating too much attention related to the Defendants' pre-planned invasion of Iraq.[68]

97. Although the CIA sent a memo to the White House and specifically to Defendant RICE on October 6, 2002 which warned that the claims that Saddam Hussein attempted to purchase uranium from Africa were not confirmed and lacked sufficient evidence, Defendant BUSH still claimed that "Saddam Hussein recently sought significant quantities of uranium from Africa."[69] Moreover, Defendant RICE admitted that she failed to heed the warnings of the CIA and took "personal responsibility" for the misrepresentation.[70]

98. On January 31, Defendant BUSH met with Prime Minister Blair and told Prime Minister Blair that the United States still planned to wage a war in Iraq on March 10, 2003 regardless of what happened at the United Nations or with the U.N. inspections in Iraq.[71] Defendant BUSH doubted that WMD would be found during the inspections and Defendant BUSH even admitted to the possibility of provoking confrontation with Iraq in order to justify an attack by the United States.[72]

---

[68] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 158 (2006).

[69] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 299-300 (2006); Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 21.

[70] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 299-300 (2006).

[71] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 179-180 (2006);

[72] *Id.*

99. Even though the National Intelligence Estimate (NIE) concluded it was unlikely that Saddam Hussein would cooperate with terrorists and give WMD to al Qaeda, Defendants BUSH and RICE stated that Iraq had operational ties to al Qaeda and would give terrorists WMD to use against the United States.[73] Defendant RICE stated "[T]here clearly are contacts between Al Qaeda and Iraq…and…there's a relationship there."[74] Defendant BUSH stated, "Evidence…reveal[s] that Saddam Hussein aids and protects terrorists, including members of Al Qaeda…Imagine those 19 hijackers with other weapons and other plans—this time armed by Saddam Hussein."[75]

100. A few weeks after the UN Security Council passed Resolution 1441 on November 8, 2002, Defendant BUSH called French president Jacques Chirac and attempted to persuade him to support the United States' invasion of Iraq. After Chirac informed Defendant BUSH that he needed more concrete evidence that Iraq possessed WMD and that the UN inspectors "need more time," Defendant BUSH stated that a U.S. invasion of Iraq is "willed by God" and that "Gog and Magog are at work in the Middle East." Chirac was bewildered over Defendant BUSH's statement.[76] In October 2005, a senior Palestinian politician revealed that Defendant BUSH claimed in 2003 that he was "on a mission from God" when he launched the invasion of Iraq. Nabil Shaath, then the Palestianian foreign minister, said, "President Bush said to all of us: 'I am driven with a mission from God.' God would tell me, 'George go and fight these terrorists in Afghanistan'. And I did. And then God would tell me, 'George, go and end the tyranny in

---

[73] Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 43.

[74] PBS *NewsHour with Jim Lehrer*, Interview with Condoleezza Rice (September 25, 2002), transcript *available at* http://www.pbs.org/newshour/bb/international/july-dec02/rice_9-25.html.

[75] President Bush, State of the Union (Jan. 28, 2003), *available at* http://whitehouse.georgewbush.org/news/2003/012803-SOTU.asp.

[76] Kurt Eichenwald, *500 Days: Secrets and Lies in the Terror Wars* 458-59 (2012); *see also* New York Times Sunday Book Review, "Fear Factor," *available at* http://www.nytimes.com/2012/10/07/books/review/500-days-by-kurt-eichenwald.html.

Iraq.' And I did."[77]

101. On November 27, 2002, the International Atomic Energy Agency (IAEA) resumed inspections in Iraq. Every site which was identified in overhead satellite imagery as having suspicious activity was also inspected. On March 7, 2003, the IAEA Director General Mohamed ElBaradei reported to the UN Security Council that there was no indication "of resumed nuclear activities," "that Iraq has attempted to import uranium," "that Iraq has attempted to import aluminum tubes for use in centrifuge enrichment."[78]

102. Although the Bush administration claimed that Iraq had large stockpiles of chemical weapons and had covert chemical weapon production facilities, UN Monitoring Verification and Inspection Commission (UNMOVIC) did not find significant stockpiles nor did it find any active production facilities or evidence of hidden chemical weapon production capability. Defendant POWELL stated, "There is no doubt that he has chemical weapons stocks"[79] and Defendant BUSH stated, "We know that the regime has produced thousands of tons of chemical agents, including mustard gas, sarin nerve gas, and VX nerve gas."[80]

DEFENDANTS WERE NOT ACTING WITHIN THEIR SCOPE OF EMPLOYMENT IN PLANNING AND COMMITTING AGGRESSION

103. The systematic manipulation and exaggeration of intelligence in order to convince the American public that an invasion of Iraq was necessary was not the kind of conduct that Defendants' were employed to perform. Defendants were not hired,

---

[77] Ewen MacAskill, *George Bush: 'God told me to end the tyranny in Iraq'*, (October 6, 2005), The Guardian, *available at* http://www.theguardian.com/world/2005/oct/07/iraq.usa.

[78] Mohamed ElBaradei, The Status of Nuclear Inspections in Iraq: An Update, (March 7, 2003), *available at* www.iaea.org/NewsCenter/Statements/2003/ebsp2003n006.shtml (accessed December 4, 2003); Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 23-25.

[79] Secretary of State Powell, Fox "News Sunday" (Sept. 8, 2002), *available at* https://www.mtholyoke.edu/acad/intrel/bush/fox.htm.

[80] President Bush, Address on Iraq (October 7, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html.

inter alia, to falsely link al Qaeda to Iraq, which is what they did.[81] For example, On October 14, 2002, Defendant BUSH stated that Saddam Hussein "has had connections with al Qaeda. This is a man who, in my judgment, would like to use al Qaeda as a forward army."[82] On December 9, 2001,[83] Defendant CHENEY alleged that an Iraqi intelligence officer met with one of the 9/11 hijackers (Mohammed Atta) in the Czech Republic. He repeated this allegation again in September 2003.[84] Through the OSP, Defendants CHENEY, RUMSFELD, and WOLFOWITZ were able to use intelligence that was uncertain, unverified, and unreliable and turn it into fact.[85] Defendant POWELL stated that Iraq "harbors a deadly terrorist network headed by Abu Musab Al-Zarqawi, an associated collaborator of Osama bin Laden and his al-Qaeda lieutenants."[86]

104. Defendants were not hired, *inter alia*, to scare and mislead the public by exaggerating and inflating the threat of the Iraq. For example although most of the intelligence regarding Iraq's nuclear weapons program was unconfirmed and tainted, on September 8, 2002, Defendant RICE told CNN's Late Edition that Saddam Hussein was "actively pursuing a nuclear weapon." She stated, "There will always be some uncertainty about how quickly he can acquire nuclear weapons but we don't want the smoking gun to be a mushroom cloud."

105. Defendants were not hired to execute a pre-existing plan to invade

---

[81] Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 48.

[82] President Bush, Remarks by the President at Thaddeus McCotter for Congress Dinner (Oct. 14, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html.

[83] *Meet the Press*, Interview by Tim Russert with Dick Cheney (Dec. 9, 2001), transcript *available at* http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/print/vp20011209.html.

[84] *Meet the Press*, Interview by Tim Russert with Dick Cheney (Sept. 14, 2003), transcript *available at* http://www.nbcnews.com/id/3080244/default.htm#.UTPUdRms1JM.

[85] Bob Woodward, *Plan of Attack* 228-229 (2004); Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 109 (2006).

[86] Colin Powell, U.S. Secretary of State's Address to the United Nations Security Council (Feb. 5, 2003), *available at* http://www.guardian.co.uk/world/2003/feb/05/iraq.usa3.

another country, whatever the cost, and by using an unrelated terrorist attack as an excuse to execute their plan. "The aggressive intentions present from the beginning" and the "nature of [the] plan"[87] to invade Iraq constitutes premeditated planning and waging of a war that constitutes the crime of aggression against Iraq by the Defendants. The crime of aggression is the "supreme international crime" and thus not within the duty of high-government officials. For example, Defendant BUSH told Prime Minister Tony Blair that the United States would wage war against Iraq in March 2003 regardless of a lack of evidence of WMD and the UN's alternative diplomatic avenues. Defendants' premeditated aggressive actions against Iraq and the manipulative media campaign to rally American public support for the invasion of Iraq do not constitute conduct that is within the scope of the Defendants' employment.

106. The plan to invade Iraq commenced prior to Defendants taking office and thus did not occur substantially within the authorized time and space limits of Defendants' employment. From 1997 to 2000, PNAC produced several documents advocating the military overthrow of Saddam Hussein.[88] On January 26, 1998, Defendants RUMSFELD and WOLFOWITZ signed a letter[89] to then President William J. Clinton, requesting that the United States implement a "**strategy for removing Saddam's regime from power**," which included a "willingness to **undertake military action** as diplomacy is clearly failing." Removing Saddam from power had to "become the aim of American foreign policy." (Emphasis added). The letter further stated that the United States could not be "crippled by a misguided insistence on unanimity in the UN Security Council." On May 29, 1998,[90] Defendants RUMSFELD and WOLFOWITZ

---

87 *The United States of America, et al. v. Hermann Wilhelm Goering, et al.*, Opinion and Judgment (October 1, 1946), reprinted in 41 Am. J. Int'l L. 172, 189.

88 Project for the New American Century, http://www.newamericancentury.org/iraqmiddleeast2000-1997.htm.

89 Letter to President Clinton (Jan. 26, 1998), *available at* http://www.newamericancentury.org/iraqclintonletter.htm.

90 Letter to Newt Gingrich and Trent Lott, (May 29, 1998), *available at* http://www.newamericancentury.org/iraqletter1998.htm.

signed a letter to then Speaker of the House Newt Gingrich and Senate Majority Leader Trent Lott in which they advocated that "U.S. policy should have as its explicit goal removing Saddam Hussein's regime from power and establishing a peaceful and democratic Iraq in its place," which included the use of "U.S. and allied military power . . . to help remove Saddam from power."

107. On September 18, 1998,[91] Defendant WOLFOWITZ gave testimony before the House National Security Committee on Iraq in which he stated that the United States had to "liberat[e] the Iraqi people from Saddam's tyrannical grasp and free Iraq's neighbors from Saddam's murderous threats." Defendant WOLFOWITZ advocated that the United States establish a "safe protected zone in the South" and form a provisional government that would "**control the largest oil field in Iraq**." (Emphasis added).

108. Defendants' conduct in executing this pre-existing plan to invade Iraq was not actuated by a purpose to serve the master. In fact, Defendants RUMSFELD and WOLFOWITZ advocated for the overthrow of Saddam Hussein during the Defendants' involvement with PNAC from 1997-2000. Defendant CHENEY took unusually frequent trips to the Pentagon in order to meet with intelligence officials about Iraq, intimidate intelligence officials, as well as dig through unverified raw intelligence at the OSP.

109. Defendants were not motivated by genuine national security interests but by their pre-existing plan and agenda to invade Iraq, which began as early as 1997. Defendants were motivated, *inter alia*, by personally-held neo-conservative convictions which called for American military dominance of the Middle East, and by a religious worldview that conceived that, "Gog and Magog are at work in the Middle East." Defendants were thus motivated by personal and independent malicious and/or mischievous purposes, and not for purposes related to serving the United States.

---

[91] Letter by Gary Schmitt regarding Paul Wolfowitz's Statement on U.S. Policy Toward Iraq (Sept. 18. 1998), *available at* http://www.newamericancentury.org/iraqsep1898.htm.

110. The use of force by Defendants was unexpected. Defendants were hired to protect the United States and serve its national interests, not to wage war in the interest of a pre-existing plan and personal agenda.

DEFENDANTS INVADE IRAQ IN VIOLATION OF LAW, COMPLETING THEIR CRIME OF AGGRESSION AGAINST IRAQ

111. The crime of aggression is regarded as a violation of law by United Nations General Assembly Resolution 3314, the Kellogg-Briand Pact, Article 6 of the Nuremberg Charter, and Article 5 of the International Military Tribunal for the Far East. Whether aggression has been committed must be determined "in light of all the circumstances of each particular case."[92]

112. On March 19, 2003, the United States, upon the order of Defendant BUSH and in coordination with other Defendants, invaded Iraq.

113. Defendants failed to secure United Nations authorization for the war. Article 39 of the United Nations Charter requires the United Nations Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

114. No such determination was ever or has ever been made by the United Nations Security Council.

115. On March 19, 2003, there was no imminent humanitarian disaster or event in Iraq requiring the intervention of a foreign power.

116. On March 19, 2003, Iraq did not pose an imminent military threat requiring the use of the American military in self-defense.

117. Even had Iraq posed an imminent military threat on March 19, 2003 (which it did not), the invasion of Iraq was not reasonably related or proportionate to the

---

[92] *See* G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974).

threat posed.

118. On September 14, 2004, United Nations Secretary General Kofi Annan stated,[93] "I have indicated it was not in conformity with the UN charter. From our point of view and from the charter point of view it was illegal."

119. Defendants violated international law, treaties and assurances by failing to secure proper United Nations authorization for the war, and in implementing a plan they had devised as early as 1997.

120. Defendants violated international law, treaties and assurances by ignoring all avenues for diplomacy and seeking to invade Iraq, regardless of the cost, and in implementing a plan they had devised as early as 1997.

121. Defendants violated international law, treaties and assurances by attempting to secure domestic and international authorization for the Iraq War through the deception described in this Second Amended Complaint, and in implementing a plan they had devised as early as 1997.

PLAINTIFF IS INJURED AS A RESULT OF THE WAR

122. In 2003, lived in Jalawla, Iraq. She used to teach and work in private galleries. She and her family also had a jewelry store. Plaintiff lived with her husband (from whom she is now divorced) and four children.

123. In 2003, the Kurdish Army allied with the United States forced Plaintiff to leave her home in Jalawla. Masked troops came and threatened Plaintiff and her family, telling Plaintiff she would be killed if they did not leave the house.

124. Plaintiff was not able to take anything from her house except for some clothes.

125. Plaintiff moved to Baghdad, where she found employment working for the independent committee for elections.

---

[93] Ewan MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, says Annan*, The Guardian (Sept. 15, 2004), http://www.guardian.co.uk/world/2004/sep/16/iraq.iraq.

126. In 2005, while in Baghdad, Plaintiff was repeatedly threatened by Shia Muslims over a period of four to five months. Plaintiff is Sabean Mandean, and is considered an "infidel" by some Muslim groups in Iraq.

127. In 2005, Plaintiff went to the police for protection. The police refused to help her because they told her they could not even protect themselves.

128. One day in 2005, as Plaintiff was going home, a group of Shia Muslims tried to kill her by ramming their car into hers on the road.

129. After this attempt, Plaintiff and her family moved in with relatives, where they stayed for 10 days. On the tenth day, Shia Muslims found them again and fired ammunition at them in their home. No one was injured.

130. Following this attack, Plaintiff fled Iraq to Jordan, where she lives today.

131. Since arriving in Jordan, Plaintiff has been unable to secure steady employment.

132. Defendants are the "but-for" and proximate cause of Plaintiff's damages. By launching an illegal war of aggression, Defendants produced the chaos that enveloped Iraq and which led to Plaintiff losing her home, being threatened for her religion, and being forced to flee and live as a refugee in Jordan

133. Defendant has sustained more than $75,000 in damages as a result of the loss of her home and the loss of her income.

CLASS ACTION ALLEGATIONS

Definition of the Plaintiff Class

134. Pursuant to Federal Rule of Civil Procedure 23(a), Plaintiff brings this action for herself and on behalf of a class of persons consisting of all innocent Iraqi civilians who, through no fault of their own, suffered damage as a but-for and proximate cause of Defendants' international legal torts, specifically (1) their conspiracy to commit the crime of aggression and (2) the crime of aggression itself. Plaintiff requests certification pursuant to Federal Rule of Civil Procedure 23(b)(3) (hereinafter referred to

as the "**Iraq Civilian Victims' Class**")

135. The Iraq Civilian Victims' Class, as defined herein, includes all Iraqi civilians (i.e. non-combatants) who were damaged by the Iraq War.

136. Plaintiff and members of the Iraq Civilian Victims' Class may also seek to amend this complaint further in order to establish subclasses including, but not limited to, one or more of the following:

a. A subclass of Iraqi civilian victims who were subject to torture or other war crimes;

b. A subclass of Iraqi civilian victims who were forced to flee Iraq and are now refuges in other countries;

c. A subclass of Iraqi civilian victims who sustained property damage and/or property loss;

d. A subclass of Iraq civilian victims who sustained only emotional harm, such as pain and suffering as defined by law;

e. Any additional subclass or subclasses of Iraqi civilian victims who have suffered injuries necessitating compensatory damages, to be determined at a later stage in these proceedings.

Rule 23(a) Prerequisites

137. The prerequisites to a class action under Rule 23(a) of the Federal Rules of Civil Procedure exist:

a. **Numerosity:** The members of the Iraq Civilian Victims' Class are so numerous that joinder of all class members is impracticable. While the exact number of Iraqi victims is unknown to the Representative Plaintiff at this time, it is likely that hundreds of thousands or even millions of Iraqis may have been subject to damages as a result of Defendants' actions, and would have standing to pursue such claims under 28 U.S.C. § 1350.

b. **Commonality:** Common questions of law and fact exist as to all members of the Iraq Civilian Victims' Class and predominate over questions affecting

individual members of the Iraq Civilian Victims' Class Questions of law and fact common to the Iraq Civilian Victims' Class include, but are not limited to, the following:

(1) Whether the actions of Defendants constituted a conspiracy to engage in a war of aggression, and whether that conspiracy was the cause of damages to Iraqi civilians;

(2) Whether the actions of Defendants constituted a war of aggression, and whether that war of aggression was the cause of damages to Iraq civilians.

c. **Typicality:** The claims of the Representative Plaintiff is typical of the claims of all members of the Iraq Civilian Victims' Class because all members of the proposed class share the common characteristic of being civilian non-combatants who did not take up arms and who were damaged as a result of Defendant's conspiracy and waging of aggressive war, as complained herein.

d. **Adequacy of Representation:** The Representative Plaintiff will fairly and adequately protect the interests of the Iraq Civilian Victims' Class and is represented by counsel competent and experienced in litigation. The Representative Plaintiff is a member of the Iraq Civilian Victims' Class with claims typical of the claims of all class members. The Representative Plaintiff does not have interests that are antagonistic to or in conflict with those persons whom the Representative Plaintiff seeks to represent.

COUNT I

(Conspiracy To Commit the Crime of Aggression Against All Defendants)

138. Plaintiff incorporates herein Paragraphs 1 through 137 of this Second Amended Complaint.

139. Defendants violated the rule of Nuremberg by engaging in a common plan to attack another country. Defendants initiated this plan as early as 1997.

140. Once in positions of power, Defendants attracted co-conspirators in government to plan and commit the crime of aggression against Iraq.

141. Defendants violated the Kellogg-Briand Pact, a treaty signed in 1928, to which the United States is still a signatory. The Kellogg-Briand Pact requires signatory nations such as the United States to "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." The Kellogg-Briand Pact requires signatory nations such as the United States to resolve all disputes or conflicts through "pacific means." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

142. Defendants violated the United Nations Charter by planning to commit the crime of aggression. Article II, Section 4 of the United Nations Charter requires countries to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nation." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

143. The crime of conspiracy to wage an aggressive war is also a violation of customary international law, which creates binding obligations on the United States, its citizens, and its courts. The United States has not only recognized "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice"[94] but it has established that a court may look to customary international law when its own nation lacks any instruction that is on point for a particular matter.[95] The crime of conspiracy to wage an aggressive war has been recognized by the United States, *inter alia*, in the Nuremberg Charter.[96]

---

[94] *Paquete Habana*, 175 U.S. 677, 700 (1900).

[95] *See Paquete Habana*, 175 U.S. at 690-701.

[96] Charter of the Int'l Military Tribunal, article 6(a) (1945) (hereinafter Nuremberg Charter).

144. The crime of a conspiracy to wage an aggressive war is a violation of international law that rests "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." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Conspiracy to engage in aggressive war was a chief crime prosecuted at Nuremberg, and that Tribunal rejected Nazi attempts to claim vagueness with respect to the specific, definitive, and obligatory nature of this crime.

145. Plaintiff is aware of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) in which the United States Supreme Court held in a 5-4 decision that the President of the United States possesses immunity in civil court for actions taken pursuant to his official duties as President. Plaintiff submits that *Nixon* is distinguishable in this case in that the plan to invade Iraq commenced prior to the President taking office. Plaintiff further submits that *Nixon* is distinguishable in that she alleges violations of accepted customary norms of international law. Plaintiff submits that *Nixon* does not prohibit a cause of action against the President or any other Executive official who engages in behavior considered reprehensible in a civilized society, such as torture, crimes against humanity, or the crime of aggression. To the extent that *Nixon* stands for the proposition that the person holding the office of President cannot be held civilly liable for violations of accepted customary norms of international law – such as torture, crimes against humanity or the crime of aggression – then Plaintiff submits that *Nixon* is wrongly decided and in direct contravention of accepted principles of the common law, particularly the principle that rulers are "under God and the law."

146. Defendants, by engaging in a conspiracy to commit the crime of aggression, were the but-for and proximate cause of Plaintiff's damages (and others like her) in the form of property loss, physical pain, shame, humiliation, degradation and emotional stress, entitling her to damages in an amount to be determined at trial.

147. In light of Defendants' willful, knowing and intentional violations of law against Plaintiff and others like her, and in light of their reckless and callous

indifference to the impact their actions would have on innocent Iraqi civilians, their breach of international peace, their deception and fraud to the democratic polity which elected them, and their reprehensible and cowardice use of a terrorist attack to commit the crime of aggression against another a country that posed no threat to the United States, endangering the United States armed forces and millions of Iraqi civilians for their own malicious purposes, Plaintiff and others like her seek an award of punitive and exemplary damages in an amount to be determined at trial.

COUNT II

(The Crime of Aggression Against All Defendants)

148. Plaintiff incorporates herein Paragraphs 1 through 147 of this Second Amended Complaint.

149. Defendants violated the rule of Nuremberg by attacking another country without legal justification, and specifically, by committing the crime of aggression against Iraq on March 19, 2003.

150. Defendants violated the rule of Nuremberg by using fraudulent and untrue statements in an attempt to convince diplomats, world leaders and the American public that Iraq posed a threat to the United States and/or that Iraq was in league with al-Qaeda, when neither of these things was true.

151. Defendants violated the Kellogg-Briand Pact, a treaty signed in 1928, to which the United States is still a signatory. The Kellogg-Briand Pact requires signatory nations such as the United States to "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." The Kellogg-Briand Pact requires signatory nations such as the United States to resolve all disputes or conflicts through "pacific means." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

152. Defendants violated the United Nations Charter by engaging in

aggressive war. Article II, Section 4 of the United Nations Charter requires countries to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nation." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

153. The crime of aggression is also a violation of customary international law, which creates binding obligations on the United States, its citizens, and its courts. The United States has not only recognized "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice"[97] but it has established that a court may look to customary international law when its own nation lacks any instruction that is on point for a particular matter.[98] The crime of aggression has been recognized by the United States in the Nuremberg Charter,[99] the International Military Tribunal for the Far East,[100] the Kellogg-Briand Pact,[101] the United Nations Charter,[102] and United Nations General Assembly Resolution 3314.[103]

154. The crime of aggression is a violation of international law that rests "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." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). The crime of aggression was the chief crime prosecuted at Nuremberg and is the

---

97 *Paquete Habana*, 175 U.S. 677, 700 (1900).

98 *See Paquete Habana*, 175 U.S. at 690-701.

99 Charter of the Int'l Military Tribunal, art. 6(b) (1945) (hereinafter Nuremberg Charter).

100 Charter of the Int'l Military Tribunal for the Far East, art. 5(a) (1946) (hereinafter Tokyo Charter).

101 General Treaty for the Renunciation of War as an Instrument of National Policy, arts. 1-2 (August 27, 1928) (hereinafter Kellogg-Briand Pact).

102 The Charter of the United Nations, art. 2(4) (1945).

103 *See* G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974).

"supreme international crime." The Nuremberg Tribunal rejected Nazi attempts to claim vagueness with respect to the specific, definitive, and obligatory nature of this crime.

155. Plaintiff is aware of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) in which the United States Supreme Court held in a 5-4 decision that the President of the United States possesses immunity in civil court for actions taken pursuant to his official duties as President. Plaintiff submits that *Nixon* is distinguishable in this case in that the plan to invade Iraq commenced prior to the President taking office. Plaintiff further submits that *Nixon* is distinguishable in that she alleges violations of accepted customary norms of international law. Plaintiff submits that *Nixon* does not prohibit a cause of action against the President or any other Executive official who engages in behavior considered reprehensible in a civilized society, such as torture, crimes against humanity, or the crime of aggression. To the extent that *Nixon* stands for the proposition that the person holding the office of President cannot be held civilly liable for violations of accepted customary norms of international law – such as torture, crimes against humanity or the crime of aggression – then Plaintiff submits that *Nixon* is wrongly decided and in direct contravention of accepted principles of the common law, particularly the principle that rulers are "under God and the law."

156. Defendants, by engaging in the crime of aggression, were the but-for and proximate cause of Plaintiff's damages (and others like her) in the form of property loss, physical pain, shame, humiliation, degradation and emotional stress, entitling her to damages in an amount to be determined at trial.

157. In light of Defendants' willful, knowing and intentional violations of law against Plaintiff and others like her, and in light of their reckless and callous indifference to the impact their actions would have on innocent Iraqi civilians, their breach of international peace, their deception and fraud to the democratic polity which elected them, and their reprehensible and cowardice use of a terrorist attack to commit the crime of aggression against another a country that posed no threat to the United States, endangering the United States armed forces and millions of Iraqi civilians for their

own malicious purposes, Plaintiff and others like her seek an award of punitive and exemplary damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants on all alleged claims, as follows:

1. For an order finding that Defendants conspired to, planned and committed the crime of aggression against Iraq.

2. For an award of compensatory damages against Defendants in an amount sufficient to compensate Plaintiff and all members of the Iraq Civilian Victims' Class for damages they sustained as a result of Defendants' illegal actions in planning and mounting a war of aggression against Iraq.

3. To the extent that Defendants' assets do not cover damages of the Iraq Civilian Victims' Class, that Defendants set up, manage and obtain other funding at their expense a restitution fund to provide for proper compensation to any and all Iraqi civilians who were damaged because of Defendants' commission of the crime of aggression against Iraq.

4. For an award of exemplary and punitive damages against Defendants in an amount sufficient to punish and set an example of them in their unconscionable conduct in planning and committing the crime of aggression against another country, in violation of international treaties and assurances.

5. For an order awarding Plaintiff's costs of suit, including litigation expenses (such as costs for depositions and experts), photocopying expenses, and filing fees in an amount which this Court deems just, equitable and proper. Counsel for Plaintiff has no financial interest tied to the outcome of this litigation and is not charging fees for representing the Plaintiff and the proposed class.

6. Such other and further relief as the Court deems just, equitable and proper.

TRIAL BY JURY DEMANDED

Pursuant to Federal Rule of Civil Procedure 38 and Civil Local Rule 3-6, Plaintiff hereby demands a jury trial on all issues so triable.

Dated: June 8, 2014

COMAR LAW

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

EXHIBIT A

TOP SECRET 2:40

Resume Statement:

N.R.

Best info fact
~~judge whether good enough~~
judge whether

Hit SH @ same time -
Not only UBL

Tasks Jim Haynes to talk w/ PW for additional support u/c US's & connection w/ UBL

N.R.,
(b)(1)

- Hard to get a good case

- Need to move swiftly -

- Near term target needs -
- So massive - sweep it all up
- Things related & not

need to do so to get anything useful

TOP SE...

EXHIBIT B

page 1 of 3

UNCLASSIFIED

~~TOP SECRET CLOSE HOLD~~

November 27, 2001

- Focus on WMD.
- Slices (building momentum for regime change): might not have to go all the way
  b(1) 1.4(a), 1 4(c)
  - WMD sites.
  - Seize or destroy offensive missile sites (factories, deployed systems).
  - Seize or destroy Republican Guards.
  - b(1) 1.4(a), 1 4(c) Do in advance?
  - Oil fields in south.
  - Oil fields in north.
  - Seize western desert:
    - Secure Jordanian border,
    - Prevent SCUD missile launches (against Israel).
  - Deploy ground forces in western desert or south of Baghdad:
    - Threaten Baghdad.
    - Force Republican Guards to move and present targets.
  - Cut off Baghdad:
    - Prevent movement of WMD materials.
    - Pressure on regime.
  - Protect Provisional Government, north or south.
  - Regime change.

★ what order to create likelihood of collapse?

★ → what do forces do coming out of Afghanistan?

- How start?
  - Saddam moves against Kurds in north?
  - US discovers Saddam connection to Sept. 11 attack or to anthrax attacks?
  - Dispute over WMD inspections?
    - Start now thinking about inspection demands.
- Surprise, speed, shock and risk. — Power communications, etc.
  - Do *not* reduce footprint now.
  - Be ready to strike from a standing start.

People hate him -- may want to take him out.

Enhance current footprint.

Start military action before moving into place all the force Republican Guards that would be required in the worst case. Larger forces flow in behind.

- Decapitation of government.
  - Do early.
  - Cut off communications too – including television and radio.

EXHIBIT C

Bin Ladin Determined To Strike in US

Clandestine, foreign government, and media reports indicate Bin Ladin since 1997 has wanted to conduct terrorist attacks in the US. Bin Ladin implied in US television interviews in 1997 and 1998 that his followers would follow the example of World Trade Center bomber Ramzi Yousef and "bring the fighting to America."

After US missile strikes on his base in Afghanistan in 1998, Bin Ladin told followers he wanted to retaliate in Washington, according to a [redacted] service.

An Egyptian Islamic Jihad (EIJ) operative told an [redacted] service at the same time that Bin Ladin was planning to exploit the operative's access to the US to mount a terrorist strike.

The millennium plotting in Canada in 1999 may have been part of Bin Ladin's first serious attempt to implement a terrorist strike in the US. Convicted plotter Ahmed Ressam has told the FBI that he conceived the idea to attack Los Angeles International Airport himself, but that Bin Ladin lieutenant Abu Zubaydah encouraged him and helped facilitate the operation. Ressam also said that in 1998 Abu Zubaydah was planning his own US attack.

Ressam says Bin Ladin was aware of the Los Angeles operation.

Although Bin Ladin has not succeeded, his attacks against the US Embassies in Kenya and Tanzania in 1998 demonstrate that he prepares operations years in advance and is not deterred by setbacks. Bin Ladin associates surveilled our Embassies in Nairobi and Dar es Salaam as early as 1993, and some members of the Nairobi cell planning the bombings were arrested and deported in 1997.

Al-Qa'ida members—including some who are US citizens—have resided in or traveled to the US for years, and the group apparently maintains a support structure that could aid attacks. Two al-Qa'ida members found guilty in the conspiracy to bomb our Embassies in East Africa were US citizens, and a senior EIJ member lived in California in the mid-1990s.

A clandestine source said in 1998 that a Bin Ladin cell in New York was recruiting Muslim-American youth for attacks.

We have not been able to corroborate some of the more sensational threat reporting, such as that from a [redacted] service in 1998 saying that Bin Ladin wanted to hijack a US aircraft to gain the release of "Blind Shaykh" 'Umar 'Abd al-Rahman and other US-held extremists.

continued

Declassified and Approved
for Release, 10 April 2004

— Nevertheless, FBI information since that time indicates patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York.

The FBI is conducting approximately 70 full field investigations throughout the US that it considers Bin Ladin-related. CIA and the FBI are investigating a call to our Embassy in the UAE in May saying that a group of Bin Ladin supporters was in the US planning attacks with explosives.

[redacted]
Declassified and Approved
for Release, 10 April 2004

EXHIBIT D

SECRET AND STRICTLY PERSONAL - UK EYES ONLY

DAVID MANNING
From: Matthew Rycroft
Date: 23 July 2002
S 195 /02

cc: Defence Secretary, Foreign Secretary, Attorney-General, Sir Richard Wilson, John Scarlett, Francis Richards, CDS, C, Jonathan Powell, Sally Morgan, Alastair Campbell

IRAQ: PRIME MINISTER'S MEETING, 23 JULY

Copy addressees and you met the Prime Minister on 23 July to discuss Iraq.

This record is extremely sensitive. No further copies should be made. It should be shown only to those with a genuine need to know its contents.

John Scarlett summarised the intelligence and latest JIC assessment. Saddam's regime was tough and based on extreme fear. The only way to overthrow it was likely to be by massive military action. Saddam was worried and expected an attack, probably by air and land, but he was not convinced that it would be immediate or overwhelming. His regime expected their neighbours to line up with the US. Saddam knew that regular army morale was poor. Real support for Saddam among the public was probably narrowly based.

C reported on his recent talks in Washington. There was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy. The NSC had no patience with the UN route, and no enthusiasm for publishing material on the Iraqi regime's record. There was little discussion in Washington of the aftermath after military action.

CDS said that military planners would brief CENTCOM on 1-2 August, Rumsfeld on 3 August and Bush on 4 August.

The two broad US options were:

(a) Generated Start. A slow build-up of 250,000 US troops, a short (72 hour) air campaign, then a move up to Baghdad from the south. Lead time of 90 days (30 days preparation plus 60 days deployment to Kuwait).

(b) Running Start. Use forces already in theatre (3 x 6,000), continuous air campaign, initiated by an Iraqi casus belli. Total lead time of 60 days with the air campaign beginning even earlier. A hazardous option.

The US saw the UK (and Kuwait) as essential, with basing in Diego Garcia and Cyprus critical for either option. Turkey and other Gulf states were also important, but less vital. The three main options for UK involvement were:

(i) Basing in Diego Garcia and Cyprus, plus three SF squadrons.

(ii) As above, with maritime and air assets in addition.

(iii) As above, plus a land contribution of up to 40,000, perhaps with a discrete role in Northern Iraq entering from Turkey, tying down two Iraqi divisions.

The Defence Secretary said that the US had already begun “spikes of activity” to put pressure on the regime. No decisions had been taken, but he thought the most likely timing in US minds for military action to begin was January, with the timeline beginning 30 days before the US Congressional elections.

The Foreign Secretary said he would discuss this with Colin Powell this week. It seemed clear that Bush had made up his mind to take military action, even if the timing was not yet decided. But the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran. We should work up a plan for an ultimatum to Saddam to allow back in the UN weapons inspectors. This would also help with the legal justification for the use of force.

The Attorney-General said that the desire for regime change was not a legal base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or UNSC authorisation. The first and second could not be the base in this case. Relying on UNSCR 1205 of three years ago would be difficult. The situation might of course change.

The Prime Minister said that it would make a big difference politically and legally if Saddam refused to allow in the UN inspectors. Regime change and WMD were linked in the sense that it was the regime that was producing the WMD. There were different strategies for dealing with Libya and Iran. If the political context were right, people would support regime change. The two key issues were whether the military plan worked and whether we had the political strategy to give the military plan the space to work.

On the first, CDS said that we did not know yet if the US battleplan was workable. The military were continuing to ask lots of questions.

For instance, what were the consequences, if Saddam used WMD on day one, or if Baghdad did not collapse and urban warfighting began? You said that Saddam could also use his WMD on Kuwait. Or on Israel, added the Defence Secretary.

The Foreign Secretary thought the US would not go ahead with a military plan unless convinced that it was a winning strategy. On this, US and UK interests converged. But on the political strategy, there could be US/UK differences. Despite US resistance, we should explore discreetly the ultimatum. Saddam would continue to play hard-ball with the UN.

John Scarlett assessed that Saddam would allow the inspectors back in only when he thought the threat of military action was real.

The Defence Secretary said that if the Prime Minister wanted UK military involvement, he would need to decide this early. He cautioned that many in the US did not think it worth going down the ultimatum route. It would be important for the Prime Minister to set out the political context to Bush.

Conclusions:

(a) We should work on the assumption that the UK would take part in any military action. But we needed a fuller picture of US planning before we could take any firm decisions. CDS should tell the US military that we were considering a range of options.

(b) The Prime Minister would revert on the question of whether funds could be spent in preparation for this operation.

(c) CDS would send the Prime Minister full details of the proposed military campaign and possible UK contributions by the end of the week.

(d) The Foreign Secretary would send the Prime Minister the background on the UN inspectors, and discreetly work up the ultimatum to Saddam.

He would also send the Prime Minister advice on the positions of countries in the region especially Turkey, and of the key EU member states.

(e) John Scarlett would send the Prime Minister a full intelligence update.

(f) We must not ignore the legal issues: the Attorney-General would consider legal advice with FCO/MOD legal advisers.

(I have written separately to commission this follow-up work.)

MATTHEW RYCROFT

EXHIBIT E

CONFIDENTIAL AND PERSONAL

PR.121

FROM: P F RICKETTS
POLITICAL DIRECTOR

DATE: 22 MARCH 2002

CC: PUS

SECRETARY OF STATE

IRAQ: ADVICE FOR THE PRIME MINISTER

1 You invited thoughts for your personal note to the Prime Minister covering the official advice (we have put up a draft minute separately). Here are mine.

2 By sharing Bush's broad objective[1] the Prime Minister can help shape how it is defined, and the approach to achieving it. In the process, he can bring home to Bush some of the realities which will be less evident from Washington. He can help Bush make good decisions by telling him things his own machine probably isn't.

3 By broad support for the objective brings two real problems which need discussing.

4 First, the THREAT. The truth is that what has changed is not the pace of Saddam Hussein's WMD programmes, but our tolerance of them post-11 September. This is not something we need to be defensive about, but attempts to claim otherwise publicly will increase scepticism about our case. I am relieved that you decided to postpone publication of the unclassified document. My meeting yesterday showed that there is more work to do to ensuer that the figures are accurate and consistent with those of the US. But even the best survey of Iraq's WMD programmes will not show much advance in recent years ont he nuclear, missile or CW/BW fronts: the programmes are extremely worrying but have not, as far as we know,[1] been stepped up.

5 US scrambling to establish a link between Iraq and Al Aaida is so far frankly unconvincing. To get public and Parliamentary support for military operations, we have to be convincing that:

- the threat is so serious/imminent that it is worth sending our troops to die for;

- it is qualitatively different from the threat posed by other proliferators who are closer to achieving nuclear capability (including Iran).

CONFIDENTIAL AND PERSONAL

We can make the case on qualitative difference (only Iraq has attacked a neighbour'' used CW and fired missiles against Israel). The overall strategy needs to include re-doubled efforts to tackle other proliferators, including Iran, in other ways (the UK/French ideas on greater IAEA activity are helpful here). But we are still left with a problem of bringing public opinion to accept the imminence of a threat from Iraq. This is something the Prime Minister and President need to have a frank discussion about.

6 The second problem is the END STATE. Military operations need clear and compelling military objectives. For Kosovo'' it was: Serbs out, Kosovars back'' peace-keepers in. For Afghanistan, destroying the Taleban and Al Qaida military capability. For Iraq, "regime change" does not stack up. It sounds like a grudge between Bush and Saddam. Much better, as you have suggested, to make the objective ending the threat to the international community from Iraqi WMD before Saddam uses it or gives it to terrorists. This is at once easier to justify in terms of international law'' but also more demanding. Regime change which produced another Sunni General still in charge of an active Iraqi WMD programme would be a bad outcome (not least because it would be almost impossible to maintain UN sanctions on a new leader who came in promising a fresh start). As with the fight against UBL, Bush would do well to de''personalise the objective'' focus on elimination of WMD, and show that he is serious about UN Inspectors as the first choice means of achieving that (it is win/win for him: either Saddam against all the odds allows Inspectors to operate freelyk'' in which case we can further hobble his WMD programmes, or he blocks/hinders, and we are on stronger ground for switching to other methods).

7 Defining the end state in this way, and working through the UN, will of course also help maintain a degree of support among the Europeans, and therefore fits with another major message which the Prime Minister will watn to get across: the importance of positioning Iraq as a problem for the inernational community as a whole'' not just for the US.

PETER RICKETS

CONFIDENTIAL AND PERSONAL

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.640.5856
Facsimile: +1.415.513.0445

Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al.,

Plaintiffs,

vs.

GEORGE W. BUSH, et al.,

Defendants.

No. 3:13-cv-01124 JST

PLAINTIFF'S RESPONSE TO UNITED STATES' NOTICE OF MOTION AND MOTION TO DISMISS

Date: April 3, 2014
Time: 2:00 P.M.
Dept: Courtroom 5, 17th Floor
Judge: The Honorable Jon S. Tigar

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

[*Declaration of D. Inder Comar and Proposed Order filed concurrently*]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATIES

1. Introduction – "The Poisoned Chalice."

> If certain acts of violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.
>
> Robert H. Jackson, Associate Justice of the United States Supreme Court, Chief Prosecutor before the International Military Tribunal at Nuremberg, 1949[1]

In 1946, the international military tribunal convened in Nuremberg, Germany (the "**Nuremberg Tribunal**") convicted 23 high-ranking military and political leaders of Nazi Germany of various international crimes, and in particular, of "crimes against peace": defined as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of the foregoing."[2] The Nuremberg Tribunal declared the crime of aggression the "supreme international crime," because a war of aggression "contains within itself the accumulated evil of the whole." *United States v. Goering*, 41 AM. J. INT'L L. 172, 186 (1946) (the "**Nuremberg Judgment**"). "War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world." *Id.*

Plaintiff Sundus Shaker Saleh ("**Plaintiff**"), an Iraqi refugee living in Jordan, seeks application of the Nuremberg Judgment on six Defendants whom she alleges planned the Iraq War as early as 1997, and then misappropriated the events of 9/11 to scare and mislead the American public into supporting a war against Iraq, which commenced on March 19, 2003. She further alleges that this planning and execution of the Iraq War violated international law and thus constitutes the Crime of Aggression as

---

[1] *International Conference on Military Trials*, London, 1945, Dept. of State Pub.No. 3080 (1949), p.330.

[2] Charter Int'l Military Tribunal, art. 6(a), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 (hereinafter "**the Nuremberg Charter**") was the first legal instrument to recognize the crime of aggression, which was termed "crimes against peace." Unless where legally relevant to make a distinction, Plaintiff will refer to this crime and the conspiracy to commit the crime of aggression (count one of her complaint) collectively as "**the Crime of Aggression**."

defined in the Nuremberg Judgment. Finally, she alleges that as a but-for and proximate cause of this aggression, she incurred tort damages.[3] *See*, e.g., Am. Compl. ¶¶ 26-33, 59-72, 114-124.

Plaintiff's allegations are founded on the recognition by federal courts that certain international law claims are "federal common law," and are actionable in certain circumstances. *The Paquete Habana*, 175 U.S. 677 (1900); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729, 730, (2004). The Crime of Aggression is one such claim.

The Crime of Aggression does not ban all wars; rather, as held by the Nuremberg Tribunal, the Crime of Aggression bans ***planned*** wars executed in violation of international law. This is the essence of the Crime of Aggression, and the heart of Plaintiff's allegations against these six Defendants.

In seeking to avoid the prohibition against the Crime of Aggression, Defendants argue application of the political question doctrine. The doctrine does not apply as the Crime of Aggression is an unquestionably legal cause of action, and this Court has a duty to adjudicate questions of law. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). To hold that the Crime of Aggression is a political question – as these Defendants' urge – would not only question the Nuremberg Judgment, it would validate the Nazi defense that they were put on trial before a political body, not a legal body, that acted as a kangaroo court. Such a conclusion would pose troubling ramifications both for the centuries of legal doctrine that require federal courts to apply international law as federal common law and to the Nuremberg Judgment itself.

Defendants also claim this case is barred by the Westfall Act (Motion at 4, citing Pub. L. No. 100-694, 102 Stat. 4563 (codified in part at 28 U.S.C. §§ 2671, 2674, 2679) (the "**Westfall Act**")). Pursuant to the Attorney General's discretion[4], the United States

[3] As noted in the attached declaration by counsel, other Iraqi victims have come forward who are willing to act as class representatives. Comar Decl., ¶ 15.

[4] The United States Supreme Court has explained the clash of incentives that lurk in every Westfall Act certification. "The impetus to certify becomes overwhelming in a case like this one . . . If the local United States Attorney, to whom the Attorney General

has attempted to substitute itself in place of the Defendants and now seeks their dismissal.[5] This certification is in error. Defendants' alleged planning of the Iraq War years prior to their ever entering office at a private non-profit that advocated for aggressive war, combined with their use of 9/11 as cover to invade Iraq, places their conduct outside the scope of their employment and subjects them to individual liability. The Westfall Act does not permit an employee to avoid liability by blaming an employer for a pre-existing plan or other nefarious purpose: indeed, the cases are to the opposite.

Finally, venue is proper in this district. At the time of filing, neither 28 U.S.C §§ 1391(1) or (2) were applicable. There is no district in which personal jurisdiction or venue are both appropriate for all Defendants. Plaintiff was entitled, and remains entitled to select a venue in which any defendant (in this case Defendant RICE) "is subject to the court's personal jurisdiction." 28 U.S.C § 1391(3).

The questions before the Court are serious and weighty, and Plaintiff approaches these issues with integrity. To Plaintiff's knowledge, this is the first time since the Second World War that the Crime of Aggression will be placed before any court.

> 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. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.
>
> Robert H. Jackson, Opening Statement before the Nuremberg Tribunal.[6]

---

has delegated responsibility, refuses certification, the employee can make a federal case of the matter by alleging a wrongful failure to certify. The federal employee's claim is one the United States Attorney has no incentive to oppose for the very reason the dissent suggests: Win or lose, the United States retains its immunity; hence, were the United States to litigate "scope of employment" against its own employee—thereby consuming the local United States Attorney's precious litigation resources— it would be litigating solely for the benefit of the plaintiff. Inevitably, the United States Attorney will feel a strong tug to certify, even when the merits are cloudy, and thereby "do a favor," both for the employee and for the United States as well, at a cost borne solely, and perhaps quite unfairly, by the plaintiff." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427-28 (1995) (internal citations omitted).

[5] As stipulated and ordered by the court, Plaintiff challenges the Attorney General certification in the body of this pleading. *See* Stipulation and Order, Dkt. #27.

[6] 2 Trial of the Major War Criminals Before the International Military Tribunal 98-

2. Legal Standard.

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

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

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

a. *A* jus cogens *norm is a unique category of customary international law that binds the international community.*

"Customary international law" is a phrase that refers to the law of the international community that results from a general and consistent practice of nations that

---

155 (Nuremberg: IMT, 1947) ("the Blue Set"); Robert H. Jackson, The Nürnberg Case (New York: Alfred A. Knopf, Inc. 1947; republished New York: Cooper Square Publishers, Inc., 1971); *available on the internet at* the Avalon Project at Yale Law School, http://avalon.law.yale.edu/subject_menus/imt.asp *and also 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").

are followed out of a sense of legal obligation (*opinio juris*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 102(2) and (3) (1987)).

During the drafting and ratification of the U.S. Constitution, customary international law was considered an important source of international law for the United States and was referred to as part of the "law of nations." William S. Dodge, *Customary Interational Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 21 (2007); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1989). When Justice Jay stated that "the United States by taking a place among the nations of the earth [became] amenable to the law of nations," he was speaking of customary international law, not merely the treaties the U.S. would one day make. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *see also Ware v. Hylton*, U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence they were bound to receive the law of nations…."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980) ("upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law.")

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. at 700 (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, 84 S.Ct. 923, 11 L.Ed.2d 804 (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,* 630 F.2d at 886 ("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.").

Customary international law in the United States is considered federal common law, and like treaties and other international agreements, it is accorded supremacy over

state law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111 reporters' note 2 (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). A rule of customary international law is 'self-executing' and does not have to be implemented into domestic legislation in order for a nation to be considered bound by it. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 236-39 (1996).

Within customary international law is a small subset of norms known that are 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).

Consequently, *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.) *Jus cogens* norms are "those rules which derive from principles that the legal conscience of mankind deems absolutely essential to coexistence in the international community." *See* Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L. & COMP. L. REV. 411, 415 (1989) (quoting statement made by Mexican delegate to the U.N. Conference on the Law of Treaties). A *jus cogens* norm prevails over and invalidates all conflicting international agreements and other rules of international law. *Id*. As a result, *jus cogens* norms are generally regarded to restrict the freedom of nations to contract while voiding any treaty whose object conflicts with norms that have been identified as peremptory. Individual international parties, such as nations, may not contract out of international *jus cogens* norms.

"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).

b. 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." As explained in *Sosa*, 542 U.S. at 729-30 (emphasis added):

> *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. ***For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations***. See, *e. g., Sabbatino*, 376 U.S. at 423 ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S. at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C. J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); see also *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (***recognizing that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist***). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

See also id. at 731 ("[F]ederal courts should not recognize private claims under ***federal common law*** for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.") (emphasis added).

The evolution of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, 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 torture, summary execution, "disappearance,"

extrajudicial killing, crimes against humanity, war crimes, genocide, and arbitrary detention as violations of *jus cogens* norms.[7] *See*, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Sarei v. Rio Tinto, PLC,* 671 F.3d 736 (9th Cir. 2011) *cert. granted, judgment vacated sub nom. Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013); *Mujica v. Occidental Petroleum Corp*., 381 F.Supp.2d 1164 (C.D. Cal. 2005); *Presbyterian Church Of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244 (2d Cir. 2009).

c. ***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 perhaps as early as 1928.[8]

First, the Nuremberg Tribunal held that the Crime of Aggression was the "supreme international crime." *Goering*, 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

---

[7] 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.*, *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."

[8] Despite heavy references to the Crime of Aggression in the Complaint (see, e.g., ¶¶ 15-25, 129-148) the Motion to Dismiss is nearly silent with respect to Plaintiff's legal theory. As the underpinning of the Nuremberg Judgment, it would be provocative and even radical for Defendants to argue that the Crime of Aggression does not exist, or is not a *jus cogens* norm. This was the basic argument of the Nazi defendants, and it was rejected by the Nuremberg Tribunal.

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 v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) 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.'" *Abdullahi*, 561 F.3d at 179 (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 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 (19) years prior to the judgment itself. The Kellogg-Briand 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." *Goering*, 41 AM. J. INT'L L. at 218. The Tribunal continued:

> In the opinion of the Tribunal, the 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. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:
>
> 'War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world . . . an illegal thing. ***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.* (emphasis added).)[9]

Based on its interpretation of the Kellogg-Briand 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." *Goering*, 41 AM. J. INT'L L. at 218-220.

Third, the United States has recognized the Crime of Aggression as a *jus cogens* norm. Soon after the Nuremberg Judgment, the Unites 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

---

[9] The Nuremberg Tribunal made an analogy to The Hague Convention of 1907, which prohibited resort to certain methods of waging war. The Hague Convention does not speak to consequences of breaching such obligations, yet "military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by [The Hague Convention]." *Goering*, 41 AM. J. INT'L L. at 218.

be punished for starting aggressive wars).[10] The 2005 version of the United States Army Center Law (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 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][11] (emphasis added).[12]

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

---

[10] The American position at Nuremberg reflected the primacy of the Crime of Aggression for purposes of prosecuting the Nazis. In his report with respect to the Nuremberg Tribunals, 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 wrote that the Nuremberg Judgment "ushers international law into a new era where it is in accord with the common sense of mankind that a war of deliberate and unprovoked attack deserves universal condemnation and its authors condign penalties." 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.

[11] 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)

[12] At least two federal courts of appeal have affirmed the relevance of the Nuremberg Judgment with respect to international law. *See Abdullahi*, 561 F.3d at 179 ("[B]oth 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."); *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.")

(analysis by House of Lords reaching such conclusion).

Fifth, legal scholars[13] 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.[14]

Sixth, international observers, including the former secretary general of the United Nations,[15] a former law lord from the House of Lords, and an official inquiry conducted by the Dutch Parliament, have all concluded that the Iraq War was illegal under international law. Steyn, L., *The Legality of the Invasion of Iraq,* 1 EUR. HUM. RTS. L. Rev., 1-7 (2010) (Originally a lecture by Lord Steyn, arguing that the Iraq War was "plainly illegal" and warning of its "grave consequences" for security, international institutions, the rule of law and human rights); *see also* W.J.M. Davids, Committee of Inquiry on Iraq on behalf of the Kingdom of the Netherlands, *Dutch original available at* http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/01/12/rapport-commissie-davids.html, *English summary beginning on page 519*, January 12, 2010

---

[13] Examining the works of international legal scholars is an important part of the survey of international law. *See The Paquete Habana*, 175 U.S. at 700 (noting that courts should look to the "customs and usages of civilized nations" and the "works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."); *see also Filartiga*, 630 F.3d at 881 fn. 8 (citing to the Statute of the International Court of Justice, Art. 38 and its provision that a court interpreting international law should examine "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.").

[14] 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)

[15] Am. Compl., ¶ 110.

(finding that Iraq War had "no sound mandate under international law" (531) and that military action could not "reasonably" be justified by United Nations Security Council Resolution 1441 (530)).[16]

d. ***Plaintiff proposes the following elements of the offense for the Crime of Aggression, based on her survey of international and domestic law.*** The Crime of Aggression is:[17]

> (1) the planning, preparation, initiation, or execution,[18] (2) by a person in a position effectively to exercise control over or to direct the political or military action of a State,[19] (3) of an act of aggression (whether in a declared or undeclared war[20]) which includes, *but is not limited to,*
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockade of the ports or coasts of a State by the armed forces of another

---

[16] *Dutch Inquiry Says Iraq War Had No Mandate*, BBC NEWS, January 12, 2010, *available at* http://news.bbc.co.uk/2/hi/europe/8453305.stm; Afua Hirsch, *Iraq War Was Illegal, Dutch Panel Rules*, The Guardian, January 12, 2010, *available at* http://www.theguardian.com/world/2010/jan/12/iraq-war-illegal-dutch-tribunal.

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

[18] 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).

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

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

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 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,[21]

and (4) is in violation of international law, treaties, agreements, assurances,[22] or the Charter of the United Nations.[23]

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

Participation in a common plan or conspiracy to commit the Crime of Aggression.[24]

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

This Court is bound to accept the allegations in the Amended Complaint as true for purposes of a motion to dismiss. The issue then is whether Plaintiff has properly pled allegations that would meet the elements of the alleged international law tort. Plaintiff's Amended Complaint plainly does so.

a. ***Plaintiff alleges that these six defendants planned the Iraq War prior to entering office and then through 9/11***. The first element of the Crime of Aggression is that a defendant engage in "planning, preparation, initiation, or execution" of aggression. *See Section 3.d, supra*. Plaintiff plainly alleges that these six Defendants planned,

---

[21] 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*

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

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

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

prepared, initiated or executed the Iraq War. For example, the Amended Complaint alleges that Defendants CHENEY, RUMSFELD, and WOLFOWITZ were founding members of "The Project for the New American Century" (PNAC), a non-profit that publicly and heavily advocated for the military overthrow of Saddam Hussein. Am. Compl., ¶¶ 26-29. The Amended Complaint describes a letter written by Defendants RUMSFELD and WOLFOWITZ to then-President Clinton, which advocated the military overthrow of Saddam Hussein and the invasion of Iraq, as well as other letters and testimony by these two defendants in their planning of the Iraq War. Am. Compl., ¶¶ 30-32.[25]

The Amended Complaint then discusses that once these six Defendants came into office, they used 9/11 as an opportune moment to implement their plan to invade Iraq. The Amended Complaint describes how on and shortly after 9/11, Defendants RUMSFELD and WOLFOWITZ advocated for war against Iraq. Am. Compl., ¶¶ 30-42. The Amended Complaint describes how Defendant BUSH spoke with Richard A. Clarke and asked him to examine whether it was possible to blame Iraq for 9/11. Am. Compl., ¶ 43. The Amended Complaint discusses how high-ranking British politicians discussed the American case for war in July 2002 as "inevitable" and that Defendant BUSH "wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD." Am. Compl., ¶ 55. By August 2002, Defendants made the decision to use the term "smoking gun/mushroom cloud" to "persuade the public, the Congress, and the allies of the need to confront the threat from Saddam Hussein," and that Defendants

[25] As a further offer of proof regarding the actions of these Defendants within the 1997-2000 timeframe, Plaintiff submits further materials in the attached declaration by counsel with other materials from the PNAC website. This includes PNAC editorial statements that a "military element" is central to "remov[ing] Saddam and his regime"; that "bombing Iraq isn't enough," and that then-President Clinton should "order ground forces to the gulf. Four heavy divisions and two airborne divisions are available for deployment"; and articles entitled "How to Attack Iraq", and "A Way to Oust Saddam," which supported Defendant WOLFOWITZ's plan to set up a "liberated zone" in Southern Iraq to control the "country's largest oil field" and a "guarantee of military support" wherein the United States would respond with "overwhelming force." (Declaration of D. Inder Comar ("Comar Decl."), Exs. C-J.

waited until after Labor Day because they did not want "to introduce new products in August." Am. Compl., ¶¶ 59-62. The Amended Complaint describes how Defendants BUSH, CHENEY and RICE used "faulty intelligence and 'cherry picked' intelligence facts in order to better market a war with Iraq," Am. Compl., ¶¶ 66-72, and falsely linked Al-Qaeda to Iraq in order to scare the public. Am. Compl., ¶¶ 73-87. This included a statement by Defendant POWELL that defendant WOLFOWITZ was meeting at the "Gestapo office," as well as Defendant POWELL's own statements to the United Nations, in furtherance of the planning of the war. Am. Compl., ¶¶ 83, 85-86. Finally, the Amended Complaint alleges that Defendant BUSH, in concert with the other Defendants, executed the plan by invading Iraq. Am. Compl., ¶ 104.

b. ***Plaintiff alleges that these six Defendants were in a position of control and authority in ordering the Iraq War***. The second element of the Crime of Aggression is that the defendant be "a person in a position effectively to exercise control over or to direct the political or military action of a State." *See Section 3.d, supra*. In contrast to other crimes in international law, the Crime of Aggression, by definition, can only be brought against high-ranking decision-makers responsible for the aggression. Plaintiff has plainly alleged that these six Defendants were high-ranking members in the Bush Administration who planned and waged the Iraq War. Am. Compl., ¶¶ 9-13, 104.

c. ***Plaintiff alleges that these six Defendants committed an act of aggression***. The third element of the Crime of Aggression is that the defendant commit "an act of aggression." *See Section 3.d, supra*. Plaintiff has alleged that the Defendants ordered the invasion of Iraq. Am. Compl., ¶ 104.

d. ***Plaintiff alleges that these six Defendants waged aggressive war, or violated international law, treaties, assurances, or the Charter of the United Nations.*** The fourth and final element of the Crime of Aggression is that the actions of the defendants be "in violation of international law, treaties, agreements, assurances, or the

Charter of the United Nations." *See Section 3.d, supra*.[26] Plaintiff has alleged the Defendants violated the *jus cogens* norm against aggression. Am. Compl., ¶ 140. Relying on the Nuremberg Tribunal's analysis, Plaintiff alleges that the conduct of the defendants violated the Kellogg-Briand Pact, which obligates the United States to resolve all disputes through "pacific means." Am. Compl., ¶ 142. Plaintiff also alleges violations of the Nuremberg Charter, the Tokyo Charter, the United Nations Charter, and United Nations General Assembly Resolution 3314. Am. Compl., ¶ 144.

5. As A *jus cogens* Norm, Plaintiff May Seek Relief In This Court Under the ATS and Through Federal Common Law.

a. ***The ATS provides a cause of action for any tort "committed in violation of the law of nations."*** As noted in *Section 3.a*, *supra*, the ATS incorporates a modest number of violations of international law, and in particular, allegations of international law offenses that are *jus cogens* norms. Accordingly, the Court has jurisdiction to reach the claim under the ATS because Plaintiff alleges a violation of the Crime of Aggression, a *jus cogens* norm of international law that is incorporated into federal common law under two centuries of precedent.

b. ***Plaintiff's allegations plainly touch United States conduct***. In *Kiobel*, the Supreme Court held that the ATS contains a "presumption against extraterritoriality" and dismissed a lawsuit by a group of Nigerian nationals against certain Dutch, British and Nigerian corporations. *Kiobel*, 133 S. Ct. at 1669. Defendants argue that *Kiobel* forbids

---

[26] The Nuremberg Judgment defined this last element in the disjunctive. "The Charter defines as a crime the planning or waging of war that is a war of aggression ***or*** a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against 12 nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, ***or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances."*** *Goering*, 41 AM. J. INT'L L. at 214 (emphasis added). In the interest of completeness, Plaintiff has alleged both the waging of an aggressive war, or a war that is in violation of international treaties, agreements or assurances. Am. Compl, ¶¶ 111-113, 129-148. The legal issue of which applies here is left for the Court to decide, as there appears to be no subsequent precedent other than the Nuremberg Judgment regarding this element of the offense.

this court from hearing this case because "the crime of aggression for which ATS jurisdiction has been invoked occurred entirely outside the United States." Motion at 8. Defendants also repeat political question arguments. Motion at 9.

Defendants are incorrect. The conduct alleged in the complaint does more than simply "touch and concern" the United States: it alleges facts that directly implicate conduct taken on United States soil by United States defendants. At least three of the four elements of the Crime of Aggression occurred in the United States. For example, Plaintiff alleges that the planning of the Crime of Aggression began in 1997 by Defendants RUMSFELD and WOLFOWITZ through the Washington D.C. based non-profit, PNAC. All of the Defendants live in the United States and occupied positions of high government. The order to invade Iraq was presumably given in the United States. It is difficult to imagine how this case could ***not*** "touch and concern" the United States, particularly in light of the role of the United States in establishing the Crime of Aggression and in prosecuting Nazi leaders for this same crime. This is not a case of a foreign plaintiff suing a foreign corporate defendant involving foreign conduct (*Kiobel*) or even a foreign plaintiff suing a mix of foreign and domestic defendants over foreign conduct. *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). This is a case involving a foreign plaintiff suing exclusively domestic defendants over conduct taking place in the United States and being felt in Iraq, and involving application of US law.

Even Justices Alito and Thomas agreed in *Kiobel* that an ATS cause of action will lie where the "domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations." *Kiobel*, 133 S.CT. at 1670 (Alito, J., concurring). *See also Mwani v. Laden*, 947 F.Supp.2d 1 (D. D.C. 2013) (holding that lawsuit between foreign plaintiffs against foreign defendants, involving a foreign group of events that related to the bombing of the U.S. embassy in Nairobi, Kenya, "touches and concerns the United States" and could proceed); *see also id*. at 5 (limiting *Kiobel* to its facts that "mere corporate presence in the United States," without more, does not suffice); *Sexual Minorities Uganda v. Lively*, Case

No. 12-cv-30051-MAP, 2013 WL 4130756 (D. Mass. Aug. 14, 2013) (permitting lawsuit against United States citizen for "planning and managing a campaign of repression in Uganda from the United States"); ("[T]he restrictions established in *Kiobel* on extraterritorial application of the ATS do not apply to the facts as alleged in this case, where Defendant is a citizen of the United States and where his offensive conduct is alleged to have occurred, in substantial part, within this country.") ("This is not a case where a foreign national is being hailed into an unfamiliar court to defend himself.")

c. ***This Court would still retain subject matter or diversity jurisdiction, even without the jurisdiction conferred by the ATS.*** Even assuming Defendants' argument is correct (which it is not), it is still not enough to defeat jurisdiction. Because the Crime of Aggression is incorporated into federal common law (see *Section 2.b, supra*), the Court would have jurisdiction to hear Plaintiff's case under federal question jurisdiction as well as diversity jurisdiction. *See* 28 U.S.C. §§ 1331, 1332. Plaintiff alleges that she lost her home and employment opportunities as a result of the war (thus suffering more than $75,000 in damages), and with leave to amend, can allege facts that would permit suit under a theory of diversity jurisdiction. Am. Compl., ¶ 114-124.

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

Defendants argue that Plaintiff's claims "raise non-justiciable questions." (Motion at 11.) Defendants are incorrect. Plaintiff's claims relate to the central holding of the Nuremberg Tribunal, and are unquestionably legal in character.

a. ***The Crime of Aggression is a legal question and does not implicate the political question doctrine***. The political question doctrine is an exception to justiciability. *See*, e.g., *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). It is a "narrow exception" to the general rule that the Judiciary has a "responsibility to decide cases properly before it, even those it 'would gladly avoid." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citing *Japan Whaling Assn.*, 478 U.S. at 230 and quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821). The political question doctrine is only properly invoked when there is "a textually demonstrable

constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 132 S. Ct. at 1427 (internal citations omitted).

At least since *Marbury v. Madison*, 1 Cranch 137, 177 (1803), the Supreme Court has recognized that it is "emphatically the province and duty of the judicial department to say what the law is." That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." *INS v. Chadha,* 462 U.S. 919, 943 (1983).

In *Zivotofsky*, and pursuant to statute (section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350 ("§ 214(d)"), the petitioner sought to have "Bethlehem, Israel," listed as the place of birth on a consular report of birth abroad and a United States passport. The State Department denied the request as its policy prohibited listing "Israel" on these documents. *Zivotofsky*, 132 S. Ct. at 1425-26. Both the District Court and the Court of Appeals for the D.C. Circuit held that the claim was a nonjusticiable political question. The Supreme Court reversed. *Id*. at 1426. The Supreme Court rejected the notion that the courts were being asked "to determine whether Jerusalem is the capital of Israel." Petitioner "instead seeks to determine whether he may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth." The two questions were not "one and the same." *Id*. at 1427. The Court continued:

> The existence of a statutory right … is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. ***Instead, Zivotosfky requests that the courts enforce a specific statutory right***. To resolve his claim, the Judiciary must decide if Zivotosfky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.
>
> *Id*. at 1427 (emphasis added).

The Supreme Court continued that the only real issue before the Judiciary was

whether § 214(d) was a valid exercise of Congressional power. If the law "impermissibly intrudes upon Presidential powers upon the Constitution," then it had to be invalidated; if not, then the law had to be followed. "Either way, the political question doctrine is not implicated." *Id*. at 1428. "Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case." *Id*. at 1430.

Similarly, Plaintiff "requests that the courts enforce a specific [federal common law] right": specifically, a cause of action rooted in the Crime of Aggression. *See Zivotofsky*, 132 S. Ct. a 1427. This is, fundamentally, a legal question; to suggest otherwise calls into question the legitimacy of Nuremberg Judgment in a manner that would overturn basic principles of international law.[27] The Nuremberg Charter

[27] This is, in fact, what the Nazi defendants believed. LEON GOLDENSOHN, THE NUREMBERG INTERVIEWS: AN AMERICAN PSYCHIATRIST'S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES (2004) 128 ("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." Hermann Goering to U.S. Army psychiatrist Dr. Leon Goldensohn, May 28, 1946); 129-130 ("The delusion that all men are equal is ridiculous. I feel that I am superior to most Russians not only because I am a German but because my cultural and family background are superior. How ironic it is that crude Russian peasants who wear the uniforms of generals now sit in judgment on me"; "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"); 133 ("I am fully convinced that this trial is a mockery and that someday when you Americans have your hands full of Russian troublemaking, you will see me and my activities in a different light"); 33 ("[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." Hans Frank to Dr. Goldensohn, July 20, 1946); 152 ("The prosecution conducts this trial for political reasons and has blinders on their eyes. This is necessary for them because of political reasons." Ernst Kaltenbrunner to Dr. Goldensohn, June 6, 1946); 188 ("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." Joachim von Ribbentrop to Dr. Goldensohn, June 23, 1946); 258 ([Referring to

(established in part by the United States) defined international crimes (art. 6), provided for due process (art. 16), including procedures to "ensure fair trial for the defendants," such as the right to receive the indictment, to have the charges explained, to put on a defense, and to cross-examine any witness called by the prosecution. There is nothing about the Nuremberg Charter or Judgment that reflects a political operation – on the contrary, the issuing of the indictments, due process for the defendants, and an authorized judgment reflects a purely legal process. The only branch of government with the authority to examine the Nuremberg Judgment is, thus, the Judiciary. *See* U.S. CONST. Art. III, § 2, cl. 1.

The fact that a legal question addresses an overseas war is not enough to summon the political question doctrine. *See*, e.g., *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d 7, 64-78 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1524 (2009) (rejecting political question doctrine in lawsuit filed by Vietnamese plaintiffs alleging violations of international law related to the use of Agent Orange during Vietnam War).[28] The fact that a legal question implicates presidential authority during war is also not dispositive. *See*, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that district court had jurisdiction to hear claims brought by aliens detained in

---

Chief Prosecutor Jackson] "That's Jacobson. He may call himself Jackson, but to me he is Jacobson and a Jew." Julius Streicher to Dr. Goldensohn, April 6, 1946).

[28] Throughout American history, courts have routinely examined legal issues stemming from the issues related to war and peace, even knotty questions. *See*, e.g., *Bas v. Tingy*, 4 U.S. 37 (1800) (holding that vessel recaptured from the French during the "Quasi-War" with France was an "enemy" vessel and thus entitled to higher salvage value; the United States and France existed in a state of "partial war," and as such, France was a "partial enemy; but still she was an enemy," *id.* at 43, 44); *Fleming v. Page*, 50 U.S. 603, 9 How. 603 (1850) (holding that where the United States conquers additional territory, the President cannot "enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power," *id.* at 615; holding that "[T]here is a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown," *id*. at 618); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (holding that while the President may respond to force, the President has "no power to initiate or declare a war against a foreign nation or a domestic State," *id*. at 668); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that laws and usages of war can never be applied to citizens in states where the civilian courts are open and their process unobstructed).

Guantanamo Bay, Cuba); *Youngstown Sheet & Tube Co. v. Sawyer*, 242 U.S. 579 (1952) (holding that the President Truman exceeded his authority in ordering the seizure of steel plants during the Korean War); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the Executive's use of military commissions violated the common law and the law of nations, including the Geneva Conventions). ("[T]he Executive is bound to comply with the rule of law that prevails in this jurisdiction," *id*. at 635). The fact that a legal question may embarrass the Executive is, also, not enough to summon the doctrine. *See*, e.g., *United States v. Nixon*, 418 U.S. 683, 692-697 (1974) (rejecting application of the political question doctrine where Special Prosecutor issued subpoena to the President for certain tape recordings and documents relating to his conversations with aides and advisors). Because the Crime of Aggression is clearly a legal question – the same legal question presented before the Nuremberg Tribunal – the political question doctrine does not apply and the Court may disregard it. *Zivotofsky*, 132 S.Ct. 1430-31.

b. ***The* Baker *factors affirm that the question before this Court is legal, not political.*** In the event this Court decides it should apply the *Baker* factors,[29] notwithstanding the above, those factors affirm that this case presents a legal question:

1. *The Constitution delegates legal questions to the Judiciary*. The first *Baker* factor asks whether there is a "textually demonstrable constitutional commitment

[29] In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court identified circumstances in which an issue might present a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (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." *Baker* established that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability." *Id.* But *Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication. *Zivotofsky*, 132 S. Ct. at 1431.

of the issue to a coordinate political department." As described *supra*, legal questions are the province of the Judiciary and this factor weighs in favor of Plaintiff. Defendants' mischaracterize the Complaint as asking "whether the United States should have gone to war with Iraq in 2003." (Motion at 14). This is ***not*** what Plaintiff's complaint is about. The Iraq War may have been the greatest idea in American history – that is not what is being litigated. What is being litigated is the ***conduct*** of six Defendants in planning the war prior to entering office; in misleading the public to support their plan; and, finally, in executing that war on March 19, 2013, committing the Crime of Aggression.

As noted by the district court in the Eastern District of New York's with respect to the use of Agent Orange during the Vietnam War:

> As for the first *Baker* factor, there is no textually demonstrable commitment of the issues posed in the instant case to a coordinate political department. The judiciary is the branch of government to which claims based on international law has been committed. *Kadic v. Karadzic,* 70 F.3d 232, 249 (2d Cir.1995) ("[W]e have noted in a similar context... that '[t]he department to whom this issue is "constitutionally committed" is none other than our own — the Judiciary.'") (quoting *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 49 (2d Cir.1991)). The issues now presented require interpretation of both international law, including treaties, and domestic tort law. Article III explicitly extends judicial power to the domain of treaties. U.S. CONST. art. III, § 2. As put in *Klinghoffer v. S.N.C. Achille Lauro,* the instant case can be characterized as "an ordinary tort suit, alleging that the defendants breached a duty of care owed to plaintiffs or their decedents.... This factor alone, then, strongly suggests that the political question doctrine does not apply." 937 F.2d 44, 49 (2d Cir.1991).

In re Agent Orange Product Liability Litigation, 373 F.Supp. 2d at 69-70.

Defendants' remaining citations are easily distinguished. As an initial matter, *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) was dismissed "on ripeness rather than the political question doctrine." *Id.* at 139-140. The court noted that it hesitated from intervening in the dispute because it was not clearly framed. "An extreme case might arise, for example, if Congress gave absolute discretion to the President to start a war at his or her will." *Id*.

at 143.[30] Nowhere does that opinion state that courts are foreclosed from engaging in judicial review of conflicts stemming from wars, or (as in Plaintiff's case) the planning and execution of a war in contravention of firmly established international law.

El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010) (en banc)) supports Plaintiff's position. That court distinguished "claims requiring us to decide whether taking military action was wise – a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive branch – and claims presenting purely legal issues such as whether the government had legal authority to act." *Id*. at 842 (internal citations omitted). Based on this distinction, El-Shifa's claim for reparations based on a "mistaken" bombing was one that implicated the wisdom of military action – not its legality. "Undertaking a counterfactual inquiry into how the political branches would have exercised their discretion had they known the facts alleged in the plaintiff's complaint would be to make a political judgment, not a legal one." *Id*. at 845. Plaintiff's claims here involve no such counterfactuals. Plaintiff instead is litigating the past conduct of Defendants in planning and waging the Iraq War, beginning in 1998: conduct she contends was declared illegal by the Nuremberg Tribunal. Her claims thus relate to the ***legality*** of Defendants' conduct and not the wisdom of what they did, or the wisdom of the Iraq War itself.[31]

---

[30] The *Bush* opinion casts heavy doubt on the application of the political question doctrine. As noted by that court, "In the forty years since that case [(*Baker*)] the Supreme Court has found a case nonjusticiable on the basis of the political question doctrine only twice. *See Nixon v. United States*, 506 U.S. 224, 236, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Senate procedures for impeachment of a federal judge); *Gilligan v. Morgan*, 413 U.S. 1, 12, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) (training, weaponry, and orders of Ohio National Guard). Our court has been similarly sparing in its reliance on the political question doctrine." *Bush*, 323 F.3d at 140.

[31] By analogy, the fact that cash found on the Watergate burglars was connected to President Nixon's reelection committee does not turn the legal issue of burglary into a "political question" merely because the burglary was connected to the act of electing a President. Whatever the ***wisdom*** of the Watergate burglars, or the connection to the President, the ***act*** of burglary remains a crime, and under basic principles of criminal law, an individual is guilty of burglary if a factfinder determines that every element of the offense has been proved beyond a reasonable doubt. Similarly, the conduct of these Defendants can be mapped onto the Crime of Aggression, the supreme international

Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007), a pre-*Zivotofsky* decision, is also not relevant for the same reason. There, the Ninth Circuit applied the political question doctrine where a plaintiff sought liability against a defense contractor that sold bulldozers to Israel pursuant to an agreement wherein the United States would finance equipment on a case-by-case basis. *Id*. at 978. One of those bulldozers killed family members of the various plaintiffs. While that complaint alleged that Caterpillar should have known that Israel would violate international law with the sold equipment, Caterpillar was acting pursuant to a lawful government defense program. The *Corrie* court thus worried that any decision for the plaintiff would "indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide." *Id*. at 984. But nothing in *Corrie* prohibits Plaintiff from seeking damages against Defendants for conduct that is expressly prohibited by international law and federal common law, and particularly for conduct that began years before any of the Defendants was in a position to make any foreign policy decision.

Defendants' remaining citations are easily distinguished. The questions presented do not ask whether a plaintiff may seek redress for seizure of hides in Mexico during the Mexican revolution (he cannot) (*Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918)), whether the Executive may revoke a passport for national security reasons (it can) (*Haig v. Agee*, 453 U.S. 280 (1981)), whether a statute conferring Presidential authority to grant or deny overseas and foreign air routes may be subject to judicial review (it is not) (*Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.* (333 U.S. 103 (1948)), or whether Taiwan is a party to the Warsaw Convention (*Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142 (9th Cir. 1999). The fact that courts have answered many of these questions reflects the highly limited application of the political question doctrine.

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

---

crime, and assuming the truth of the allegations, every element of this offense can be established through their alleged conduct.

issue. This second *Baker* factor also favors Plaintiff, as she is not asking this Court to recognize any new principles of international law; rather, she is asking this court to apply 60-year old legal precedent. The Nuremberg Tribunal itself was able to define the scope of the Crime of Aggression and apply those laws to the Nazi defendants, weighing their individual liabilities and pronouncing judgments, and even acquittals.[32]

As with any development in law, this court will face novel questions in need of an answer. But "[w]hile the answers to questions of international law, like those of domestic law, may not always be clear, they are ascertainable and manageable." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 70. The Second Circuit has said:

> [O]ur decision in *Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch.

Kadic, 70 F.3d at 249)

3. This Court will not need to engage in any policy determination. Defendants contend that hearing the case 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," and would require the Court to "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." (Motion at 16, 17). Defendants are wrong. The questions in this case relate to the legality of Defendants' actions under international law, whose limits and provisions have already been defined by the Nuremberg Judgment and subsequent international law. The United States has ***already*** created policy determinations by making itself a state party to the Kellogg-Briand

---

[32] "The Charter for the Nuremberg trials authorized prosecution of war crimes and crimes against humanity. Of the twenty-two defendants prosecuted in the 'Major War Criminals' trial, twelve were sentenced to death, seven received prison sentences, and three were acquitted." *Mujica*, 381 F.Supp.2d at 1180.

Pact, the Nuremberg, Tokyo and United Nations Charters, and by ***itself*** defining The Crime of Aggression in the Nuremberg and Tokyo Charters. The author of the law that prohibits aggression cannot now complain that these laws should not apply. "This kind of determination is one of substantive international law, not policy. A categorical rule of non-justiciability because of possible interference with executive power, even in times of war, has never existed." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 71 (referencing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).[33]

4. *The Judiciary's determination of an issue of international law will not show lack of respect to the other branches of government*. Defendants place heavy reliance on the fourth *Baker* factor, arguing that the Court's determination of the Crime of Aggression would necessarily question "Congress' judgment" and would require the Court to "examine former President Bush's subsequent policy determination that the use of military force against Iraq was 'necessary and appropriate.'" (Motion at 15-16). Defendants again mischaracterize the Amended Complaint. Plaintiff is not asking the Court to determine the wisdom of the Iraq War, or (in contrast to *Doe v. Bush*), even whether the war was domestically authorized.[34] This case asks a narrower question: whether the Defendants engaged in conduct declared illegal at Nuremberg in planning and waging the Iraq War. "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

---

[33] This is an ancient legal principle: *Atque in republica maxime conservanda sunt iura belli*, or, "Something else that must be preserved in public affairs is the justice of warfare." Marcus Tullius Cicero (as quoted in Andrea Keller, *Cicero: Just War In Classical Antiquity*, *in* FROM JUST WAR TO MODERN PEACE ETHICS 9, 13 (Heinz-Gerhard Justenhoven & Willaim A. Barbieri, Jr. eds., 2012).

[34] The issue of whether the war was domestically authorized is not before the Court as it plays no role in the analysis with respect to The Crime of Aggression. "[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law." *Goering*, 41 AM. J. INT'L L. at 221.

power – even in wartime." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72-73. Courts have rejected any implication that they cannot examine legal questions related to Congressional or Executive decisions, even on such sensitive topics as the use of military commissions at Guantanamo Bay (e.g., *Hamdan*) or the authorization of torture on American citizens (e.g., *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (dismissed on qualified immunity, not political question grounds)).

Defendants' also claim that should the Court reach potential international legal issues such as (1) whether the authorization of the United Nations Security Council was needed before the United States could go to war against Iraq, (2) whether there was an imminent humanitarian disaster or event in Iraq that required the intervention of a foreign power, (3) whether Iraq posed an imminent military threat that required the United States to act in self-defense and (4) whether the invasion of Iraq was reasonably related or proportionate to the threat posed, the Court would be involved in political issues. (Motion at 16). This is not the case: these were the very issues confronted by the Nuremberg Tribunal. And federal courts have hardly turned away from analyzing United Nations Security Council resolutions for purposes of determining substantive law. *See*, e.g., *United States v. Chalmers*, 474 F.Supp.2d 555, 563 (S.D.N.Y. 2007) (interpreting and applying effect of S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1994) in wire fraud case related to the Iraq "Oil-for-Food" program); *United States v. Shibin*, 722 F.3d 233, 241-42 (4th Cir. 2013) (interpreting S.C. Res. 1976, preambular ¶ 8, U.N. Doc. S/RES/1976 (Apr. 11, 2011) to determine substantive issues of law related to piracy); *United States v. Ali*, 718 F.3d 929, 936-37 (D.C. Cir. 2013) (interpreting S.C. Res. 2020, U.N. Doc. S/Res/2020, at 2 (Nov. 22, 2011) to determine substantive law of piracy and inchoate crimes); *see also Hamilton v. Regents of California*, 293 U.S. 245 (1934) (holding that California law requiring students to take class on military science and tactics did not violate the Kellogg-Briand Pact).

5. *There is no unusual need for not questioning a political decision already mad*e. Defendants' do not identify this factor, and there is no unusual need for the

Judiciary to avoid adjudicating this issue. *Compare In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72 (noting that a comprehensive treaty regime governed World War II era compensation claims).

6. *The potential for embarrassment does not weigh in favor of Defendants*. Contrary to Defendants' argument with respect to "embarrassment" (Motion at 16), Plaintiff contends it would be far more embarrassing to accept Defendants' arguments that somehow this Court is unable to apply an international legal precedent from a duly authorized international tribunal – a tribunal established in large part by the United States. A decision from this Court would in fact clarify international law with respect to the Crime of Aggression based on an actual case and controversy presented to it. "The judiciary, as well as the executive and the legislature, are each charged with the interpretation and application of international law. That a decision may touch on foreign relations does not decide the question." *In re Agent Orange Product Liability Litigation*, 373 F.Supp. 2d at 72. For the foregoing reasons, Defendants' arguments that the political question doctrine applies are unpersuasive.

7. The Court Must Reject The United States' Westfall Act Certification As Defendants Are Liable Under The Common Law, Not The United States.

In a final attempt to avoid the Amended Complaint and the rule of Nuremberg, the United States has certified the Defendants under the Westfall Act. (Motion 3-7.) The certification is inappropriate and the Court must deny it.

a. ***This Court may review the Westfall Act certification by the United States***. The United States Supreme Court held in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995), that the Attorney General's certifications under the Westfall Act are judicially reviewable. This Circuit has held that de novo review is appropriate in reviewing the certification. *Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996); *see also Haddon v. United States*, 68 F.3d 1420, 1422 (D.C. Cir. 1995). The party seeking review bears the burden of presenting evidence and disproving the Attorney General's certification by a preponderance of the evidence. *Billings v. United States*, 57 F.3d 797,

800 (9th Cir. 1995); *see also Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994); *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003) ("Instead, Stokes' burden was to raise a material dispute regarding the substance of AUS Nagle's determination by alleging facts that, if true, would establish that the defendants were acting outside the scope of their employment.")

A court may permit limited discovery on the issue of certification in order to provide the plaintiff the opportunity to gather evidence to defeat the certification and meet its burden of proof. *Stokes*, 327 F.3d at 1215-16.

"Scope of employment is ordinarily a question for the jury, but it becomes a question of law for the court . . . if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of employment.") *Doe v. Sipper*, 821 F.Supp.2d 384 (Dist. D.C. 2011) (citation omitted); *see also Boykin v. District of Columbia*, 484 A.2d 560, 526 (D.C. 1984) ("As a general rule, whether an employee is acting 'within the scope of his employment' is a question of fact for the jury. It becomes a question of law for the court, however, if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of the employment.")

"On the infrequent occasions when courts have resolved scope of employment questions as a matter of law, either by summary judgment or directed verdict, it has generally been to hold that the employee's action was *not* within the scope of her employment and thus to absolve the employer of any liability." *Majano v. United States*, 469 F.3d 138, 141 (D.C. Cir. 2006).

b. ***District of Columbia law governs this determination***. "FTCA scope of employment determinations are made 'according to the principles of *respondeat superior* of the state in which the alleged tort occurred.'" *Wilson*, 87 F.3d at 1076 (citing *Pelletier v. Fed. Home Loan Bank*, 968 F.d 865, 876 (9th Cir. 1992); *see also Council on American Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006) ("Under the Westfall Act, courts apply the *respondeat superior* law in the state in which the alleged

tort occurred.") For purposes of claims against high-ranking federal officials, courts apply the law of the District of Columbia in determining scope of employment concerns. *See*, e.g., *Kashin v. Kent*, 457 F.3d 1033 (9th Cir. 2006) (holding that District of Columbia law was appropriate to determine whether a senior foreign service officer was acting within the scope of his employment for an automobile accident that occurred in Russia); *Rasul v. Myers*, 512 F.3d 644, 655 (D.C. Cir. 2008); (looking to the "decisions of the Court of Appeal for the District of Columbia for our guidance on local law" in case involving allegations of torture by British citizens by high ranking U.S. officials); *Council on American Islamic Relations*, 444 F.3d at 663 (holding that "District of Columbia law" applied in defamation action against Congressman who made allegedly defamatory statement on a call from his congressional office during regular business hours to a North Carolina reporter).

"District of Columbia law concerning the scope of employment is rooted in the Restatement (Second) of Agency." *Kashin*, 457 F.3d at 1038-1039; *Rasul*, 512 F.3d at 655 ("As its framework for determining whether an employee acted within the scope of employment, the Court of Appeals for the District of Columbia looks to the Restatement (Second) of Agency (1957)") (quoting *Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995) *overruled on other grounds*, *Osborn v. Haley*, __ U.S. __, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007)).

> "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*, 444 F.3d at 663.

Plaintiff disputes the certification of employment for these six defendants under the first three factors of the Restatement test.

1. *The Defendants were not employed to execute a pre-existing war*. In determining whether the conduct at issue 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)). "To determine whether conduct is of the kind an employee is employed to perform, the conduct either must be of the same general nature as that which he is authorized to perform or be incidental to authorized conduct." *In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d 85, 113-114 (Dist. D.C. 2007), *aff'd Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011). Conduct is "incidental" to an employee's legitimate duties if it is "foreseeable." *Haddon*, 68 F.3d at 1424. "'Foreseeable in this context does not carry the same meaning as it does in negligence cases; rather, it requires the court to determine whether it is fair to charge employers with responsibility for the intentional torts of their employees." *Id*.

In *Council on American Islamic Relations*, the "underlying dispute or controversy" was the "phone call between Ballenger and Funk discussing the marital separation. The appropriate question, then, is whether that telephone conversation – not the allegedly defamatory sentence – was the kind of conduct Ballenger was employed to perform." *Council on American Islamic Relations*, 444 F.3d at 664. Similarly, in the Iraq and Afghanistan detainee cases, the question was "whether detaining and interrogating enemy aliens were the kinds of conduct the defendants were employed to perform or were incidental to the conduct the defendants were employed to perform." *In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d at 114. While there is no question that the duties of Defendants in this case involved high-level military and political affairs, Defendants were not hired to implement a pre-existing plan to invade another country – the underlying act in dispute. If they were, then they would have implemented the plan

immediately upon entering office. As alleged by Plaintiff, the Defendants waited until 9/11 to implement their plan for war. It is this ***planning*** that distinguishes Defendants alleged conduct from that in *Rasul*, where the Defendants allegedly committed their torts while in office and as part of their job functions in responding to crises.

2. *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." *See Section 6.b*. This factor weighs heavily in favor of Plaintiff. Assuming a December 1, 1997 start date for the inception of the planning of the war, (Am. Compl. ¶ 29), the Defendants (and in particular Defendants WOLFOWITZ and RUMSFELD) ***spent more time planning the war prior to the inauguration of Defendant BUSH*** (January 20, 2001) than they did from his inauguration to the beginning of the war.[35] The planning for the war explicitly sought to use United States military personnel to "remove Saddam from power." Am. Compl. ¶ 31. Once in office, Plaintiff alleges that Defendants implemented the plan the on and shortly after the 9/11 attack. Am. Compl. ¶¶ 36-54.

Plaintiff has not uncovered any cases under District of Columbia law with respect to this prong and the importance of the timing element in finding conduct outside the scope of employment. But there is another judgment that heavily relies on this factor: the Nuremberg Judgment. Specifically, the Nuremberg Judgment focused on the planning that took place prior to the wars:

> "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."

---

[35] 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.

Goering, 41 AM. J. INT'L L. at 186 (emphasis added).

The judgment further noted that *Mein Kampf* (published in 1928) made the plan for aggressive war "quite plain." *Goering*, 41 AM. J. INT'L L. at 187. "The precise objectives of this policy of force are also set forth in detail. *Id*. "*Mein Kampf* is not to be regarded as a mere literary exercise, nor as an inflexible policy or plan incapable of modification. Its importance lies in the ***unmistakable attitude of aggression*** revealed throughout its pages." *Id*. at 188 (emphasis added). The Tribunal examined a series of meetings held by Hitler with his top confederates from November 5, 1937 to November 23, 1939, in which he outlined his plans for aggressive war. "If any doubts had existed in the minds of any hearers in November 1937, after March 1939 there could no longer be any question that Hitler was in deadly earnest in his decision to resort to war. *Id*. at 188-192. Based on the evidence, the Tribunal held:

> "That plans were made to wage war, as early as 5 November 1937, and probably before that, is apparent. And thereafter, such preparations continued in many directions, and against the peace of many countries . . . In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants . . . Continued planning, with aggressive war as the objective, has been established beyond doubt."
> *Goering*, 41 AM. J. INT'L L. at 225.

Plaintiff submits that the Nuremberg Tribunal's analysis is dispositive. The materials published by PNAC laid out plans for aggressive war against Iraq and plainly contain an "unmistakable attitude of aggression. *Goering*, 41 AM. J. INT'L L. at 188; *see* Comar Decl., Exs. C-J. Once the "moment was thought opportune," *Goering*, 41 AM. J. INT'L L. at 186, Defendants implemented their plan.[36]

---

[36] While held in custody, defendant Goering candidly explained why the planning element was so critical to engaging in aggression. "Of course, the people don't want war. Why would some poor slob on a farm want to risk his life in a war when the best he can get out of it is to come back in one piece? The common people don't want war; not in Russia, not in England, not in America, not for that matter in Germany. It's the leaders who determine policy . . . and the people can always be made to do the leaders' bidding. All you have to do is tell them they are being attacked and denounce the pacifists for lack

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

"***The key inquiry is the employee's intent at the moment the tort occurred***." *Majano*, 469 F.3d at 142 (emphasis added). "The outrageous quality of an employee's [sic] act may well be persuasive in considering whether his motivation was purely personal." *Penn. Cent. Transp. Co.*, 398 A.2d at 31. 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) (holding that even though hockey player who mistakenly hit a spectator did so during a match, the hockey player "may have been, at the moment he struck the blow, completely indifferent to the work he was employed to do and actuated only by anger or hostility toward the man he tried to injure."); *see also Boykin*, 484 A.2d at 562 (employer not liable for sexual assault committed by educator because the assault "appears to have been done solely for the accomplishment of Boyd's independent, malicious, mischievous and selfish purposes.")

Plaintiff has alleged that Defendants were motivated by personal, selfish purposes when they planned and executed the war in Iraq. 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

---

of patriotism. It works the same way in any country." Hermann Goering to psychologist G.M. Gilbert, *in* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 324-325 (1994).

further ideological purposes. Am. Compl.¶¶ 26-33. She alleges that 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. Am. Compl.¶ 92. She alleges how every Defendant took advantage of an unrelated terrorist incident to implement their plan to invade Iraq. Am. Compl.¶¶ 34-54. She alleges how all of the Defendants repeatedly convened to discuss their plan, (Am. Compl. ¶¶ 41, 42, 59, 60, 54, 77, 83), came up with marketing buzz words to scare the public (Am. Compl. ¶ 60) "fixed" facts to set policy, (Am. Compl. ¶ 55), knowingly and falsely made connections between the Hussein regime and al Qaeda, (Am. Compl. ¶¶ 41, 43, 73-87) and made misrepresentations to the United Nations in order to obtain support for the Iraq War (Am. Compl. ¶ 85). Plaintiff has plainly alleged an "independent malicious or mischievous purposes" by these Defendants in their execution of a pre-existing plan to use the United States military to invade Iraq. *See Majano*, 469 F.3d at 142.

For the foregoing reasons, the certification by the United States must be denied as a matter of law. In the alternative, the Court, under District of Columbia law, is required to leave this question to the jury if it cannot resolve this issue as a matter of law. *Majano*, 469 F.3d at 141. Should there be any further doubt, Plaintiff requests limited pre-certification discovery, as permitted by law.[37] *Stokes*, 327 F.3d at 1215, 1216 ("Because the district court deviated from the *Kimbro* approach by essentially affording conclusive weight to the AUSA's scope-of-employment certifications and failing to consider whether Stokes' allegations entitled him to discovery, we reverse.")

[37] Plaintiff would request, for example, discovery related to Defendants' involvement with the Project for the New American Century and other materials or documents that might have existed prior to January 20, 2001 (when they entered office) related to the planning of the Iraq War. These materials are unquestionably relevant and not subject to any governmental immunity. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 694 (1997) ("[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity") (holding that sitting President could be subject to suit while in office for conduct that occurred prior to his taking office). Plaintiff would also seek discovery with respect to Defendants' intent in going to war – also unquestionably relevant under the "scope of employment" question.

8. Venue Is Proper Before This Court.

Venue is governed by 28 U.S.C. § 1391. A civil action may be brought in "(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the actions is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such section." *Id*.

The "fallback" provision of venue, 28 U.S.C § 1391(3), permits this Court to adjudicate this case. As explained in *Fs Photo, Inc. v. PictureVision, Inc.*, 48 F.Supp.2d 442, 448 (D. Del. 1999), this third venue prong may be "utilized if there is no other district which would have both personal jurisdiction and venue as to all defendants." 28 U.S.C. § 1391(1) cannot apply as Defendants are not all located in any one State. Similarly, 28 U.S.C § 1391(2) cannot apply because at the time of filing, any one of the Defendants may have argued lack of personal jurisdiction. Indeed, the United States has insisted that Defendants reserve the right to argue lack of personal jurisdiction in the event that the Court rejects its certification. (Motion at 7, fn. 7). Accordingly, there is and remains no district that "would have both personal jurisdiction and venue as to all defendants," *Fs Photo, Inc.*, 48 F.Supp.2d at 448, and based on Defendant's RICE residency within this judicial district, Plaintiff may bring an action here. It is conceivable that any of the Defendants will object on jurisdictional grounds to any other district court. Finally, 28 U.S.C § 1402(b) does not apply as the United States is not a defendant in this lawsuit. For the reasons discussed in *Section 7*, *supra*, the certification by the United States is not consistent with law and must be rejected.[38]

[38] Courts in this Circuit have had no issue adjudicating cases involving allegations of high-ranking official misconduct (*see, e.g., Padilla v. Yoo*) or cases involving application of D.C. scope of employment issues under the Westfall Act (e.g., *Wilson*). Venue in this court was and remains proper. However, should this Court determine that

9. **Conclusion**.

For the reasons set forth above, Plaintiff requests that this Court deny the Motion to Dismiss, reject the United States Westfall Act certification of Defendants, and permit Plaintiff's cause of action for the Crime of Aggression as defined by the Nuremberg Judgment and international law to proceed towards trial against these six Defendants.

Respectfully submitted,

Dated: January 28, 2014

COMAR LAW

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

venue is not proper, then Plaintiff requests that the Court transfer this case to a proper district in the interests of justice. 28 U.S.C. § 1406(a).

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.640.5856
Facsimile: +1.415.513.0445

Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SUNDUS SHAKER SALEH, et al.,

Plaintiffs,

vs.

GEORGE W. BUSH, et al.,

Defendants.

No. 3:13-cv-01124 JST

DECLARATION OF D. INDER COMAR

Date: April 3, 2014
Time: 2:00 P.M.
Dept: Courtroom 5, 17th Floor
Judge: The Honorable Jon S. Tigar

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

[*Response to United States' Motion to Dismiss and Proposed Order filed concurrently*]

DECLARATION OF D. INDER COMAR

I, D. Inder Comar, declare as follows:

1. I am counsel of record in this action. I am licensed to practice law in the State of California. My bar number is #243732. I make this declaration of my own personal knowledge and, if called upon to testify, could and would competently testify thereto.

2. In the Amended Complaint, Plaintiff cites to various documents from a website called "The Project for the New American Century," available at http://www.newamericancentury.org (the "PNAC Website"). At the time of filing the Amended Complaint, the PNAC Website was active and the links in the Complaint directly opened content from the website. I had personally accessed the PNAC Website on and around the time of filing of the Amended Complaint to ensure that the citations were accurate.

3. On or around October 29, 2013, I attempted to connect to the PNAC Website and discovered that it had been suspended. Attached hereto as Exhibit A is a true and correct screenshot of the PNAC Website as it appeared on or around that day, and as it appears at the time of this filing.

4. When I discovered that the PNAC Website was no longer active, I emailed counsel for Defendants and for the United States to lay a record that evidence related to this lawsuit needed to be preserved. Attached hereto as Exhibit B is a true and correct copy of the email I sent to counsel for Defendants and for the United States.

5. I have found backup copies of the PNAC Website courtesy of the Internet Archive (http://archive.org), a non-profit in San Francisco whose mission is to create a "digital library of internet sites." Using the Internet Archive, I was able to find copies of the PNAC Website as they would have appeared in early October 2013. For purposes of a complete record and as an offer of proof with respect to Plaintiff's claims, I have attached relevant pages from the PNAC Website as a component of Plaintiff's allegations regarding the planning of the Iraq War from 1997 to approximately 2000. The archived PNAC web pages on the Internet Archive website are listed on the bottom of each page and are freely accessible to the public.

6. Attached hereto as Exhibit C is a true and correct copy of the PNAC Website

homepage as it would have looked in early October 2013. The PNAC Website homepage lists its address at the bottom and contains an introductory message from its chairman, William Kristol.

7. Plaintiff alleges that the planning for the Iraq War began as early as December 1, 1997, with the publication of an article from Paul Wolfowitz and Zalmay M. Kahlilzad entitled "*Overthrow Him*," in the Weekly Standard magazine. Am. Compl. ¶ 29. William Kristol (listed as Chairman of the PNAC Website) is the current Editor of the Weekly Standard, and is listed as a founder of the magazine on its website (http://www.weeklystandard.com/author/william-kristol#biography).

8. Attached hereto as Exhibit D is a true and correct copy of a letter dated January 26, 1998 from, among others, Defendant WOLFOWITZ, Defendant RUMSFELD, and William Kristol as it would have looked on the PNAC website in early October 2013. The letter calls for "removing Saddam's regime from power" which included a "willingness to undertake military action as diplomacy is clearly failing."

9. Attached hereto as Exhibit E is a true and correct copy of the PNAC Website's section entitled "Iraq / Middle East" as it would have looked in early October 2013. From 1997 to 2000, the PNAC Website hosted such articles as "Bombing Iraq Isn't Enough;" "A Way To Oust Saddam;" and "How To Attack Iraq".

10. Attached hereto as Exhibit F is a true and correct copy of the article "How To Attack Iraq," that is linked to on the PNAC Website. This article stated, in part, that "Any sustained bombing and missile campaign against Iraq should be part of an overall political-military strategy aimed at removing Saddam from power." The article calls for implementation of Defendant WOLFOWITZ's plan to "establish a 'liberated zone' in southern Iraq."

11. Attached hereto as Exhibit G is a true and correct copy of an article dated February 26, 1998, entitled "A 'Great Victory' for Iraq," as it would have looked on the PNAC Website in early October 2013. This article states calls for a "serious political-military strategy to remove Saddam and his regime," in which the "military element is central . . . we need to be willing to use U.S. air power and ground troops to get rid of him."

12. Attached hereto as Exhibit H is a true and correct copy of a letter dated May 29,

1998, signed, in part, by Defendant WOLFOWITZ and Defendant RUMSFELD. The letter stated that United States policy "should have as its explicit goal removing Saddam Hussein's regime from power" including the use of "U.S. and allied military power to provide protection for liberated areas in northern and southern Iraq" and to "use that force to protect our vital interests in the Gulf – and, if necessary, to help remove Saddam from power."

13. Attached hereto as Exhibit I is a true and correct copy of an article dated September 18, 1998 as it would have looked on the PNAC Website in early October 2013. This article relates Defendant WOLFOWITZ's testimony before the House National Security Committee in which he called for the use of the United State military to form a "protected zone" in the South of Iraq.

14. Attached hereto as Exhibit J is a true and correct copy of a Letter to the Editor from the journal Foreign Affairs, published on the PNAC Website, written by Defendant WOLFOWITZ. Defendant WOLFOWITZ called for the United States committing "ground forces to protect a sanctuary in southern Iraq where the opposition could safely mobilize."

15. Since the filing of the Amended Complaint, I have spoken to several more Iraqi civilian victims who have described various harms they suffered as a result of the war. At least two of them have offered and are willing to serve as named plaintiffs in this lawsuit. While this may be more relevant to class certification issues, should the Court deem it useful or relevant, I would be happy to submit declarations from them with respect to the types of harms suffered by Iraqi civilian victims at any time.

Respectfully submitted,

Dated: January 28, 2014

COMAR LAW

By _____
D. Inder Comar
Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

1998, signed, in part, by Defendant WOLFOWITZ and Defendant RUMSFELD. The letter stated that United States policy "should have as its explicit goal removing Saddam Hussein's regime from power" including the use of "U.S. and allied military power to provide protection for liberated areas in northern and southern Iraq" and to "use that force to protect our vital interests in the Gulf – and, if necessary, to help remove Saddam from power."

13. Attached hereto as Exhibit I is a true and correct copy of an article dated September 18, 1998 as it would have looked on the PNAC Website in early October 2013. This article relates Defendant WOLFOWITZ's testimony before the House National Security Committee in which he called for the use of the United State military to form a "protected zone" in the South of Iraq.

14. Attached hereto as Exhibit J is a true and correct copy of a Letter to the Editor from the journal Foreign Affairs, published on the PNAC Website, written by Defendant WOLFOWITZ. Defendant WOLFOWITZ called for the United States committing "ground forces to protect a sanctuary in southern Iraq where the opposition could safely mobilize."

15. Since the filing of the Amended Complaint, I have spoken to several more Iraqi civilian victims who have described various harms they suffered as a result of the war. At least two of them have offered and are willing to serve as named plaintiffs in this lawsuit. While this may be more relevant to class certification issues, should the Court deem it useful or relevant, I would be happy to submit declarations from them with respect to the types of harms suffered by Iraqi civilian victims at any time.

Respectfully submitted,

Dated: January 28, 2014

COMAR LAW

By: ______________________
D. Inder Comar
Attorney for Lead Plaintiff
SUNDUS SHAKER SALEH

EXHIBIT A

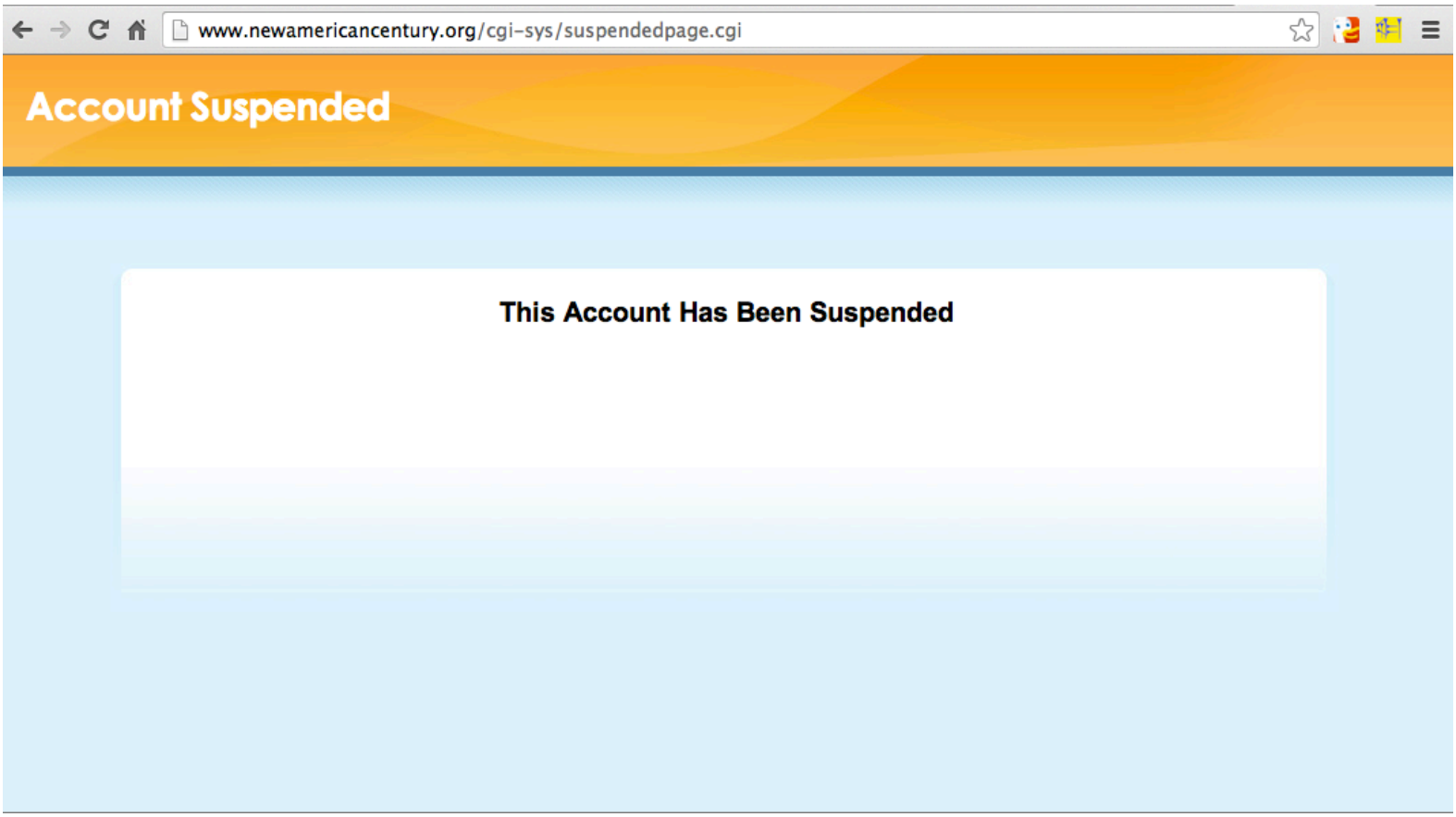

www.newamericancentury.org/cgi-sys/suspendedpage.cgi
Account Suspended
This Account Has Been Suspended

EXHIBIT B

Inder Comar <inder@comarlaw.com>

Project for the New American Century website

Inder Comar <inder@comarlaw.com> Tue, Oct 29, 2013 at 10:24 AM
To: "Greene, Glenn (CIV)" <Glenn.Greene@usdoj.gov>

Dear Glenn,

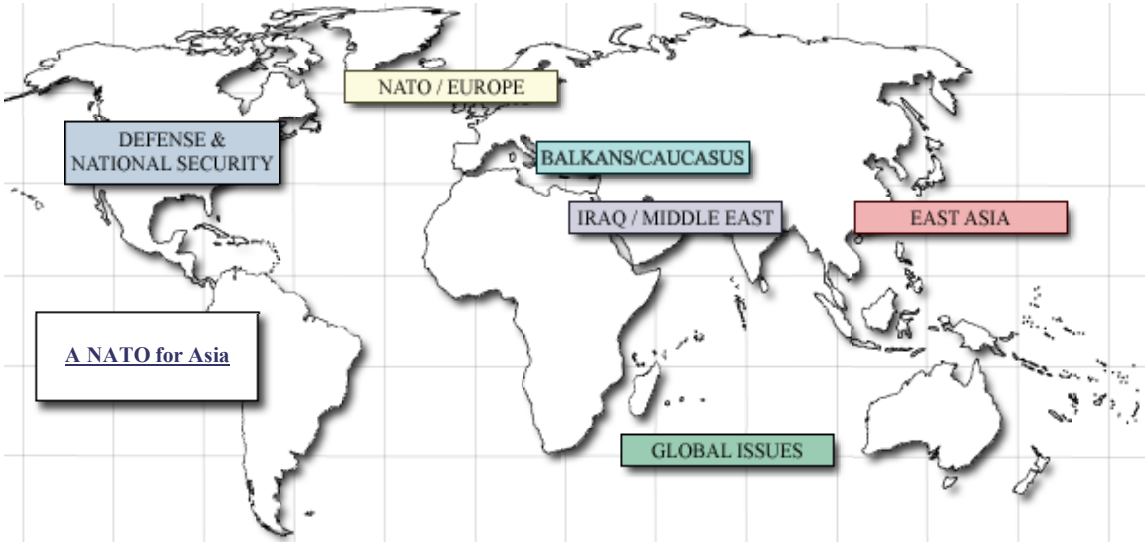
It has recently come to my attention that the Project for the New American Century website, which we cite to in the complaint in various parts, has been disabled. This website was active at least as of a few weeks ago. I do not know whether any of the served Defendants are still responsible for maintaining the website, but this action does raise a concern with respect to preservation of data and evidence, a standard protocol in any civil litigation. While we have access to non-live copies of the website, I would be remiss in my duties to my client if I did not bring this issue to your attention and provide a reminder of duties in civil litigation to preserve all data and evidence within the possession, custody or control of any defendant, once on notice of a pending lawsuit.

Best,

D. Inder Comar
COMAR LAW
901 Mission Street, Suite 105
San Francisco, California 94103
t: +1.415.562.6790
f: +1.415.513.0445
e: inder@comarlaw.com

EXHIBIT C

PROJECT FOR THE NEW AMERICAN CENTURY



The Project for the New American Century is a non-profit educational organization dedicated to a few fundamental propositions: that American leadership is good both for America and for the world; and that such leadership requires military strength, diplomatic energy and commitment to moral principle.

The Project for the New American Century intends, through issue briefs, research papers, advocacy journalism, conferences, and seminars, to explain what American world leadership entails. It will also strive to rally support for a vigorous and principled policy of American international involvement and to stimulate useful public debate on foreign and defense policy and America's role in the world.

William Kristol, Chairman

SEARCH PNAC

Search the Project for the New American Century's publications:
Search this site or the Internet

Find! Site Map

Site search Web search

Powered by FreeFind

CONTACT

1150 17th St. NW
Suite 510
Washington, DC 20036

Phone: (202) 293-4983
Fax: (202) 293-4572

EXHIBIT D

January 26, 1998

The Honorable William J. Clinton
President of the United States
Washington, DC

Dear Mr. President:

We are writing you because we are convinced that current American policy toward Iraq is not succeeding, and that we may soon face a threat in the Middle East more serious than any we have known since the end of the Cold War. In your upcoming State of the Union Address, you have an opportunity to chart a clear and determined course for meeting this threat. We urge you to seize that opportunity, and to enunciate a new strategy that would secure the interests of the U.S. and our friends and allies around the world. That strategy should aim, above all, at the removal of Saddam Hussein's regime from power. We stand ready to offer our full support in this difficult but necessary endeavor.

The policy of "containment" of Saddam Hussein has been steadily eroding over the past several months. As recent events have demonstrated, we can no longer depend on our partners in the Gulf War coalition to continue to uphold the sanctions or to punish Saddam when he blocks or evades UN inspections. Our ability to ensure that Saddam Hussein is not producing weapons of mass destruction, therefore, has substantially diminished. Even if full inspections were eventually to resume, which now seems highly unlikely, experience has shown that it is difficult if not impossible to monitor Iraq's chemical and biological weapons production. The lengthy period during which the inspectors will have been unable to enter many Iraqi facilities has made it even less likely that they will be able to uncover all of Saddam's secrets. As a result, in the not-too-distant future we will be unable to determine with any reasonable level of confidence whether Iraq does or does not possess such weapons.

Such uncertainty will, by itself, have a seriously destabilizing effect on the entire Middle East. It hardly needs to be added that if Saddam does acquire the capability to deliver weapons of mass destruction, as he is almost certain to do if we continue along the present course, the safety of American troops in the region, of our friends and allies like Israel and the moderate Arab states, and a significant portion of the world's supply of oil will all be put at hazard. As you have rightly declared, Mr. President, the security of the world in the first part of the 21st century will be determined largely by how we handle this threat.

Given the magnitude of the threat, the current policy, which depends for its success upon the steadfastness of our coalition partners and upon the cooperation of Saddam Hussein, is dangerously inadequate. The only acceptable strategy is one that eliminates the possibility that Iraq will be able to use or threaten to use weapons of mass destruction. In the near term, this means a willingness to undertake military action as diplomacy is clearly failing. In the long term, it means removing Saddam Hussein and his regime from power. That now needs to become the aim of American foreign policy.

We urge you to articulate this aim, and to turn your Administration's attention to implementing a strategy for removing Saddam's regime from power. This will require a full complement of diplomatic, political and military efforts. Although we are fully aware of the dangers and difficulties in implementing this policy, we believe the dangers of failing to do so are far greater. We believe the U.S. has the authority under existing UN resolutions to take the necessary steps, including military steps, to protect our vital interests in the Gulf. In any case, American policy cannot continue to be crippled by a misguided insistence on unanimity in the UN Security Council.

We urge you to act decisively. If you act now to end the threat of weapons of mass destruction against the U.S. or its allies, you will be acting in the most fundamental national security interests of the country. If we accept a course of weakness and drift, we put our interests and our future at risk.

Sincerely,

Elliott Abrams Richard L. Armitage William J. Bennett

Jeffrey Bergner John Bolton Paula Dobriansky

Francis Fukuyama Robert Kagan Zalmay Khalilzad

William Kristol Richard Perle Peter W. Rodman

Donald Rumsfeld William Schneider, Jr. Vin Weber

Paul Wolfowitz R. James Woolsey Robert B. Zoellick

BACK TO TOP | HOME | CONTACT US

EXHIBIT E

PROJECT FOR THE
NEW AMERICAN CENTURY

STATEMENT OF PRINCIPLES | ABOUT PNAC | WHAT'S NEW

DEFENSE AND NATIONAL SECURITY
NATO / EUROPE
IRAQ / MIDDLE EAST
EAST ASIA
BALKANS / CAUCASUS
GLOBAL ISSUES
PUBLICATIONS / REPORTS
LETTERS/STATEMENTS

SEARCH
HOME

Iraq / Middle East

2005 2004 2003 2002 2001 2000-1997

Iraq (For Middle East click here.)

State of Terror Gary Schmitt, Weekly Standard, November 20, 2000

Project Memorandum, Gary Schmitt, March 3, 1999

Letter to the Editor Stephen Solarz and Paul Wolfowitz, Foreign Affairs, March/April 1999

Project Memorandum, Mark Lagon, January 7, 1999

Saddam Wins-Again Robert Kagan, Weekly Standard, January 4-11, 1999

Project Memorandum, Mark Lagon, November 13, 1998

Project Memorandum, Gary Schmitt, November 10, 1998

How to Attack Iraq Weekly Standard Editorial, November 16, 1998

A Way to Oust Saddam, Robert Kagan, Weekly Standard, September 28, 1998

Wolfowitz Statement on U.S. Policy Toward Iraq, Project Memorandum, Gary Schmitt, September 18, 1998

Statement before the House National Security Committee, Paul Wolfowitz

Project Memorandum, Gary Schmitt, August 14, 1998

Project Memorandum, Gary Schmitt, June 17, 1998

Project Letter to Newt Gingrich and Trent Lott, May 29, 1998

Adrift in the Gulf, John Bolton, Weekly Standard, March 23, 1998

Kofi Hour, John Bolton, Weekly Standard, March 9, 1998

A 'Great Victory' For Iraq, William Kristol and Robert Kagan, Washington Post, February 26, 1998

Saddam's Impending Victory Robert Kagan, Weekly Standard, February 2, 1998

186

Bombing Iraq Isn't Enough, William Kristol and Robert Kagan, New York Times,

January 30, 1998

Speaking of Iraq Project Article, Washington Times, January 27, 1998

Project Memorandum, Gary Schmitt, January 26, 1998

Letter to President Clinton, January 26, 1998

Congress Versus Iraq John Bolton, Weekly Standard, January 19, 1998

The UN Rewards Saddam, John Bolton, Weekly Standard, December 15, 1997

Middle East (For **Iraq** click here.)

Project Memorandum, Willliam Kristol, October 17, 2000

Department of State Memorandum October 16, 2000

Project Memorandum, William Kristol, June 22, 2000

What Happened to Secure Borders for Israel? The US, Israel, and the Strategic Jordan Valley, Dore Gold, June 22, 2000

Project Memorandum, Gary Schmitt, March 23, 1999

Project Memorandum, Gary Schmitt, January 2, 1998

Why the West Needs Turkey Zalmay Khalilzad, Wall Street Journal, December 22, 1997

Dialogue with Iran? Peter Rodman, Washington Post, December 24, 1997

Project Memorandum, Gary Schmitt and Henry Sokolski, October 15, 1997

Statement before the Senate Foreign Relations Committee, Paul Wolfowitz, October 1997

PDF Format

Files with the icon shown above are Adobe Acrobat files. You can download the free Adobe Acrobat Reader here (**www.adobe.com**).

BACK TO TOP | HOME | CONTACT US

EXHIBIT F

How to Attack Iraq

It now seems fairly certain that some time in the next few weeks the Clinton administration will have to strike Iraq. There really are no acceptable alternatives. Saddam's recent demand for the expulsion of the U.N. weapons inspectors and for the removal of Richard Butler as head of the inspections regime is mostly a ploy to buy time. Saddam would, of course, like to force the United States and the U.N. to agree to further dilution of the already badly compromised inspection effort.

The deal he wangled with U.N. secretary general Kofi Annan last February has so far worked out wonderfully for him. The next deal he wants would look something like this: In return for backing down from his latest challenge, Saddam is rewarded with a U.N. Security Council commitment to wrap up its review of Iraq's compliance with the inspections regime and to move quickly to lift economic sanctions. France and Russia would agree to such a deal in a heartbeat. But even if the Clinton administration blocked it at the Security Council, Saddam wouldn't mind. The longer the present crisis lasts, the more weeks the United States spends arguing with its allies and with Russia, the closer Saddam comes to his real objective: finally acquiring chemical and biological weapons of mass destruction and the missiles to deliver them.

CIA director George Tenet said last January that Iraq already had the "technological expertise" to produce biological weapons "in a matter of weeks." And according to former U.N. weapons inspector Scott Ritter, Saddam needs only six months without inspectors looking over his shoulder to build those weapons and deploy them on missiles capable of reaching Israel and other targets in the Middle East. Saddam has already bought himself three of those months, since the inspections effectively came to a halt at the beginning of August. He's halfway home. By the time the newly elected Congress returns to Washington, we could well be facing a Saddam armed with some of the most dangerous weapons known to man.

> EVEN THE CLINTON ADMINISTRATION MUST REALIZE THAT ITS PREFERRED STRATEGY—DIPLOMACY BACKED BY BLUFF—HAS FAILED.

Even the Clinton administration must now realize that its preferred strategy—diplomacy backed by bluff—has failed and that Saddam is an inch away from (to use the administration's lingo) "breaking out of his box." Even the president and his team must know that more diplomatic compromises will only play into Saddam's hands. More hollow threats of force, more empty declarations that "all options are on the table," will only further erode America's already badly damaged credibility. As the Iraqi vice president said a few days ago, "Iraq does not fear the threats of the United States because it has been threatening Iraq for the past eight years." Even the Clinton administration, confronted by the inescapable and horrible logic of the situation, will soon come to the conclusion that military action is necessary.

But what kind of military action? Last February the administration geared itself up for a strike, only to realize belatedly that the action it had planned—a cruise-missile attack to destroy suspected Iraqi weapons-production sites—was not going to solve the problem. For one thing, military planners could not be confident that they knew where all the production facilities were—after all, that was precisely what the U.N. inspectors had been prevented from finding out. And for another thing, when all the U.S. missiles had been fired, Saddam would still be in power in Baghdad. What would military action have accomplished? The answer, the administration concluded, was not

much. That's one of the reasons Clinton officials decided to embrace the lousy deal that Kofi Annan negotiated with the Iraqi government.

So now we're back to where we were in February: the same crisis, the same high stakes, the same unpleasant options. The Clinton administration, of course, would still prefer to launch a cruise-missile attack because it carries almost no political or military risk. But officials should remember what they learned last February: It won't work.

It won't work, that is, if that's all the United States does. There is a way to deal with Saddam that can work, and we've outlined it in these pages over the past year: It is to complete the unfinished business of the 1991 Gulf War and get rid of Saddam.

Any sustained bombing and missile campaign against Iraq should be part of an overall political-military strategy aimed at removing Saddam from power. And as it happens, the elements of such a strategy are already falling into place. On Saturday, President Clinton signed into law the Iraq Liberation Act, which authorizes the provision of almost $100 million in military assistance to anti-Saddam forces in Iraq. The idea, as outlined by former undersecretary of defense Paul Wolfowitz and others, is to establish a "liberated zone" in southern Iraq that would provide a safe haven where opponents of Saddam could rally and organize a credible alternative to the present regime.

This is not a plan for victory on the cheap: The liberated zone would have to be protected by U.S. military might, both from the air and, if necessary, on the ground. And that would require beefing up our ground and air forces in the Middle East immediately. But unlike a one-shot cruise-missile strike, the Wolfowitz plan offers a chance for a lasting solution to the Iraqi crisis.

Saddam Hussein's behavior over the past year, not to mention over the past twenty years, ought to have proved that the world will never be safe, and U.S. interests and allies will never be secure, so long as Saddam is in charge in Baghdad. Unless we are prepared to live in a world where aggressive dictators like Saddam Hussein wield weapons of mass destruction—presumably not the legacy for which President Clinton would like to be remembered—then the time has come to take the necessary risks to prevent it. There is no more middle ground; there are no more safe options. Maybe even Bill Clinton now understands. ♦

Michael Ramirez

EXHIBIT G

PROJECT FOR THE NEW AMERICAN CENTURY

A 'Great Victory' for Iraq

William Kristol & Robert Kagan
The Washington Post
February 26, 1998

The devil is in the details. With this mantra, critics indicate their prudent reservations about the deal struck by Kofi Annan in Baghdad this week. And the Clinton administration, too, is concerned about the details, fretting over the composition of the inspection teams, the chain of command, the relationship between UNSCOM's chief and the secretary general, and other questions raised by Annan's intentionally vague agreement.

But the details are not the problem. The real problem is the Clinton administration strategy that made this deal inevitable. The administration's strategy was limited to "containment" -- getting the inspectors back in, not getting Saddam out. It was limited in the military means it was willing to employ -- air attacks only. That's why the concessions Kofi Annan made to get Saddam to approve the latest agreement should not be surprising. It is doubtful Madeleine Albright could have done better. This deal merely ratifies the fact that as long as Saddam remains securely in power, unthreatened by internal uprisings or American ground troops, he has the upper hand. This is the truth of "containment."

Make no mistake: The deal is, as Tariq Aziz claims, a "great victory" for Iraq. Even a return to the status quo ante would have been bad enough. But Saddam obtained concessions this week that administration officials would have considered unthinkable five months ago. Saddam Hussein is now able to sell more oil; he will enjoy a weakened inspections regime; he has a new advocate in the person of the secretary general of the United Nations; and he has every prospect of greater international support for a loosening of sanctions and the eventual collapse of the coalition that was arrayed against him seven years ago.

The fact that UNSCOM will be allowed to continue its mission in some form, moreover, does not mean the inspectors will be any closer to finding Saddam's biological and chemical weapons than they were before. After all, as administration officials acknowledged just last week, after 6 1/2 years of inspections, the United States still has no idea where the weapons are hidden. Saddam has now had four months to conceal his weapons. How many months, or years, will it take the inspectors to get back on the scent?

In short, the situation today is precisely the opposite of the administration's depiction of it. Saddam has not "reversed" himself, as Albright insists. It is the Clinton administration that has reversed itself and retreated in the face of Saddam's determination. A year ago, Albright declared that she could not imagine lifting sanctions against Iraq so long as Saddam was in power. Now, buffeted by international pressures, the administration has declared a willingness to see sanctions lifted with Saddam still in power -- and this expectation is codified in the deal signed by Kofi Annan. A couple of months ago, Albright's spokesman was chastised for suggesting that Saddam would be offered a "little carrot" in exchange

for compliance. Now the United Nations has offered Saddam lots of big carrots in exchange for a signature. Last fall, it would have been unthinkable for the U.N. secretary general to interpose himself as a neutral arbiter between UNSCOM and the outlaw regime in Baghdad -- between the prison guards and the prisoner. Now Kofi Annan chastises U.N. inspectors for trying to do their job and praises Saddam Hussein as someone you can do business with.

Bad as this deal is, however, it is the logical conclusion of a policy of containment. Seven years of such policies have proven that, in the end, "containment" of Saddam cannot be sustained, diplomatically, financially or militarily. Over time, containment of Saddam becomes "detente," and eventually detente becomes appeasement. Why? Because Saddam is so determined to obtain weapons of mass destruction, his route back to strategic dominance in the Middle East, that he is willing to weather sanctions, threats and even airstrikes to pursue this goal. The only thing Saddam fears is the one thing that containment does not threaten -- his removal from power.

Events of recent weeks proved this once again. The administration likes to claim that the Annan deal is evidence of the efficacy of diplomacy backed by force. On the contrary, it was the failure to adopt a convincing military option that produced the present disastrous outcome. Saddam did not sign this deal because he was afraid of airstrikes. He signed it because it locked in the extraordinary diplomatic and strategic gains he has made since last fall.

Containment of Saddam Hussein is an illusion. The notion that we can sustain a policy of deterring Saddam for another 10 or 20 years is ludicrous. The administration couldn't hold the international coalition together; it couldn't control the U.N. secretary general; it couldn't get Arab states to allow U.S. aircraft to launch attacks; it couldn't survive an Ohio "town meeting"; and it couldn't bring itself to launch an airstrike. Whenever Saddam decides to violate the present deal -- whether next week or next month -- the administration's promise of a retaliatory airstrike will be just as hard to fulfill as it was this time, and just as futile. Who honestly believes this administration will be capable of sustaining a containment policy for another six months, much less into the next century?

It is clearer now than ever that there are only two real choices: ever more Kofi Annan-style concessions leading eventually to the full emancipation of Saddam, or a serious political-military strategy to remove Saddam and his regime. And let's not kid ourselves: In any such political-military strategy, the military element is central. Unless we are willing to live in a world where everyone has to "do business" with Saddam and his weapons of mass destruction, we need to be willing to use U.S. air power and ground troops to get rid of him.

William Kristol is editor and publisher of the Weekly Standard. Robert Kagan, a senior associate at the Carnegie Endowment for International Peace, was a State Department official in the Reagan administration.

BACK TO TOP | HOME | CONTACT US

EXHIBIT H

May 29, 1998

The Honorable Newt Gingrich
Speaker of the House
U.S. House of Representatives
H-232 Capitol Building
Washington, DC 20515-6501

The Honorable Trent Lott
Senate Majority Leader
United States Senate
S-208 Capitol Building
Washington, DC 20510-7010

Dear Mr. Speaker and Senator Lott:

On January 26, we sent a letter to President Clinton expressing our concern that the U.S. policy of "containment" of Saddam Hussein was failing. The result, we argued, would be that the vital interests of the United States and its allies in the Middle East would soon be facing a threat as severe as any we had known since the end of the Cold War. We recommended a substantial change in the direction of U.S. policy: Instead of further, futile efforts to "contain" Saddam, we argued that the only way to protect the United States and its allies from the threat of weapons of mass destruction was to put in place policies that would lead to the removal of Saddam and his regime from power. The administration has not only rejected this advice but, as we warned, has begun to abandon its own policy of containment.

In February, the Clinton Administration embraced the agreement reached between the UN Secretary Koffi Annan and the Iraqi government on February 23. At the time of the agreement, the administration declared that Saddam had "reversed" himself and agreed to permit the UN inspectors full, unfettered, and unlimited access to all sites in Iraq. The administration also declared that the new organizational arrangements worked out by Mr. Annan and the Iraqis would not hamper in any way the free operation of UNSCOM. Finally, the administration stated that, should Iraq return to a posture of defiance, the international community would be united in support of a swift and punishing military action.

According to the UN weapons inspectors, Iraq has yet to provide a complete account of its programs for developing weapons of mass destruction and has continued to obstruct investigations. Sites opened to the inspectors after the agreement had "undergone extensive evacuation," according to the most recent UNSCOM report. UN weapons inspector Charles Duelfer has also pointed to significant problems in the new reporting arrangements worked out by Annan and the Iraqis, warning that these may have "important implications for the authority of UNSCOM and its chief inspectors." And, in the wake of these "Potemkin Village" inspections, the Iraqi government is now insisting that the inspections process be brought to an end and sanctions lifted - going so far as to threaten the U.S. and its allies should its demands not be met.

In the face of this new challenge from Saddam, however, the President's public

response has been only to say that he is "encouraged" by Iraq's compliance with the UN inspections and to begin reducing U.S. military forces in the Gulf region. Unwilling either to adopt policies that would remove Saddam or sustain the credibility of its own policy of containment, the administration has placed us on a path that will inevitably free Saddam Hussein from all effective constraints. Even if the administration is able to block Security Council efforts to lift sanctions on Iraq this year, the massive expansion of the so-called "oil for food" program will have the effect of overturning the sanctions regime. It is now safe to predict that, in a year's time, absent a sharp change in U.S. policy, Saddam will be effectively liberated from constraints that have bound him since the end of the Gulf War seven years ago.

The American people need to be made aware of the consequences of this capitulation to Saddam:

> -- We will have suffered an incalculable blow to American leadership and credibility; -- We will have sustained a significant defeat in our worldwide efforts to limit the spread of weapons of mass destruction. Other nations seeking to arm themselves with such weapons will have learned that the U.S. lacks the resolve to resist their efforts;
>
> -- The administration will have unnecessarily put at risk U.S. troops in the Persian Gulf, who will be vulnerable to attack by biological, chemical, and nuclear weapons under Saddam Hussein's control; -- Our friends and allies in the Middle East and Europe will soon be subject to forms of intimidation by an Iraqi government bent on dominating the Middle East and its oil reserves; and
>
> -- As a consequence of the administration's failure, those nations living under the threat of Saddam's weapons of mass destruction can be expected to adopt policies of accommodation toward Saddam. This could well make Saddam the driving force of Middle East politics, including on such important matters as the Middle East peace process.

Mr. Speaker and Mr. Lott, during the most recent phase of this crisis, you both took strong stands, stating that the goal of U.S. policy should be to bring down Saddam and his regime. And, at the time of the Annan deal, Senator Lott, you pointed out its debilitating weakness and correctly reminded both your colleagues and the nation that "We cannot afford peace at any price."

Now that the administration has failed to provide sound leadership, we believe it is imperative that Congress take what steps it can to correct U.S. policy toward Iraq. That responsibility is especially pressing when presidential leadership is lacking or when the administration is pursuing a policy fundamentally at odds with vital American security interests. This is now the case. To Congress's credit, it has passed legislation providing money to help Iraq's democratic opposition and to establish a "Radio Free Iraq." But more needs to be done, and Congress should do whatever is constitutionally appropriate to establish a sound policy toward Iraq.

U.S. policy should have as its explicit goal removing Saddam Hussein's regime from power and establishing a peaceful and democratic Iraq in its place. We recognize that this goal will not be achieved easily. But the alternative is to leave the initiative to Saddam, who will continue to strengthen his position at home and in the region. Only the U.S. can lead the way in demonstrating that his rule is not legitimate and that time is not on the side of his regime. To accomplish Saddam's removal, the following political and military measures should be undertaken:

> -- We should take whatever steps are necessary to challenge Saddam Hussein's claim to be Iraq's legitimate ruler, including

indicting him as a war criminal;

-- We should help establish and support (with economic, political, and military means) a provisional, representative, and free government of Iraq in areas of Iraq not under Saddam's control;

-- We should use U.S. and allied military power to provide protection for liberated areas in northern and southern Iraq; and -- We should establish and maintain a strong U.S. military presence in the region, and be prepared to use that force to protect our vital interests in the Gulf - and, if necessary, to help remove Saddam from power

Although the Clinton Administration's handling of the crisis with Iraq has left Saddam Hussein in a stronger position that when the crisis began, the reality is that his regime remains vulnerable to the exercise of American political and military power. There is reason to believe, moreover, that the citizens of Iraq are eager for an alternative to Saddam, and that his grip on power is not firm. This will be much more the case once it is made clear that the U.S. is determined to help remove Saddam from power, and that an acceptable alternative to his rule exists. In short, Saddam's continued rule in Iraq is neither inevitable nor likely if we pursue the policy outlined above in a serious and sustained fashion. If we continue along the present course, however, Saddam will be stronger at home, he will become even more powerful in the region, and we will face the prospect of having to confront him at some later point when the costs to us, our armed forces, and our allies will be even higher. Mr. Speaker and Senator Lott, Congress should adopt the measures necessary to avoid this impending defeat of vital U.S. interests.

Sincerely,

Elliot Abrams   William J. Bennett   Jeffrey Bergner

John R. Bolton   Paula Dobriansky   Francis Fukuyama   Robert Kagan

Zalmay Khalilzad   William Kristol   Richard Perle   Peter Rodman

Donald Rumsfeld   William Schneider, Jr.   Vin Weber   Paul Wolfowitz

R. James Woolsey   Robert B. Zoellick

BACK TO TOP | HOME | CONTACT US

EXHIBIT I

PROJECT FOR THE
NEW AMERICAN CENTURY

September 18, 1998

MEMORANDUM TO: OPINION LEADERS

FROM: GARY SCHMITT

SUBJECT: Wolfowitz Statement on U.S. Policy Toward Iraq

Wednesday, Paul Wolfowitz, dean of the Nitze School of Advanced International Studies of The Johns Hopkins University, and former under secretary of defense for policy, testified before the House National Security Committee on Iraq. In his testimony Wolfowitz takes the administration to task for the “muddle of confusion and pretense” that defines its current policy and offers an alternative policy which goes to “the heart of the problem,” the continuing rule of Saddam Hussein and his regime in Iraq. An abbreviated version of his statement before the committee follows.

Statement before the House National Security Committee
Paul Wolfowitz

Mr. Chairman, I appreciate the invitation to testify before this distinguished committee on the important subject of U.S. policy toward Iraq.

It is an honor to appear as part of a hearing in which Scott Ritter testifies. Scott Ritter is a public servant of exceptional integrity and moral courage, one of those individuals who is not afraid to speak the truth. Now he is speaking the truth about the failures of the UN inspection regime in Iraq, even though those truths are embarrassing to senior officials in the Clinton Administration. And the pressures he is being subjected to are far worse. After first trying to smear his character with anonymous leaks, the administration then took to charging that Mr. Ritter doesn’t “have a clue” about U.S. policy toward Iraq and saying that his criticisms were playing into Saddam Hussein’s hands by impugning UNSCOM’s independence.

In fact, it is hard to know what U.S. policy is toward Iraq because it is such a muddle of confusion and pretense. Apparently, the administration makes a distinction between telling Amb. Butler not to conduct an inspection and telling him that the time is inopportune for a confrontation with Iraq and that the U.S. is not in a position to back up UNSCOM. That kind of hair-splitting only further convinces both our friends and adversaries in the Middle East that we are not serious and that our policy is collapsing. It is only reinforced when they see us going through semantic contortions to explain that North Korea is not in violation of the Framework Agreement or when they see us failing to act on the warnings that we have given to North Korea or to Milosevic or to Saddam Hussein.

The problem with U.S. policy toward Iraq is that the administration is engaged in a game of pretending that everything is fine, that Saddam Hussein remains within a “strategic box” and if he tries to break out “our response will be swift and strong.” The fact is that it has now been 42 days since there have been any weapons

inspections in Iraq and the swift and strong response that the Administration threatened at the time of the Kofi Annan agreement earlier this year is nowhere to be seen.

Recently a senior official in a friendly Arab government complained to me that the U.S. attaches great store to symbolic votes by the Non-Aligned Movement on the “no fly zone” in Southern Iraq, while doing nothing to deal with the heart of the problem which is Saddam himself.

The United States is unable or unwilling to pursue a serious policy in Iraq, one that would aim at liberating the Iraqi people from Saddam's tyrannical grasp and free Iraq’s neighbors from Saddam’s murderous threats. Such a policy, but only such a policy, would gain real support from our friends in the region. And it might eventually even gain the respect of many of our critics who are able to see that Saddam inflicts horrendous suffering on the Iraqi people, but who see U.S. policy making that suffering worse through sanctions while doing nothing about Saddam.

Administration officials continue to claim that the only alternative to maintaining the unity of the UN Security Council is to send U.S. forces to Baghdad. That is wrong. As has been said repeatedly in letters and testimony to the President and the Congress by myself and other former defense officials, including two former secretaries of defense, and a former director of central intelligence, the key lies not in marching U.S. soldiers to Baghdad, but in helping the Iraqi people to liberate themselves from Saddam.

Saddam’s main strength -- his ability to control his people though extreme terror -- is also his greatest vulnerability. The overwhelming majority of people, including some of his closest associates, would like to be free of his grasp if only they could safely do so.

A strategy for supporting this enormous latent opposition to Saddam requires political and economic as well as military components. It is eminently possible for a country that possesses the overwhelming power that the United States has in the Gulf. The heart of such action would be to create a liberated zone in Southern Iraq comparable to what the United States and its partners did so successfully in the North in 1991. Establishing a safe protected zone in the South, where opposition to Saddam could rally and organize, would make it possible:

- For a provisional government of free Iraq to organize, begin to gain international recognition and begin to publicize a political program for the future of Iraq;

- For that provisional government to control the largest oil field in Iraq and make available to it, under some kind of appropriate international supervision, enormous financial resources for political, humanitarian and eventually military purposes;

- Provide a safe area to which Iraqi army units could rally in opposition to Saddam, leading to the liberation of more and more of the country and the unraveling of the regime.

This would be a formidable undertaking, and certainly not one which will work if we insist on maintaining the unity of the UN Security Council. But once it began it would begin to change the calculations of Saddam’s opponents and supporters -- both inside and outside the country -- in decisive ways. One Arab official in the Gulf told me that the effect inside Iraq of such a strategy would be “devastating” to Saddam. But the effect outside would be powerful as well. Our friends in the Gulf, who fear Saddam but who also fear ineffective American action against him, would see that this is a very different U.S. policy. And Saddam’s supporters in the Security Council -- in particular France and Russia -- would suddenly see a different

prospect before them. Instead of lucrative oil production contracts with the Saddam Hussein regime, they would now have to calculate the economic and commercial opportunities that would come from ingratiating themselves with the future government of Iraq.

The Clinton Administration repeatedly makes excuses for its own weakness by arguing that the coalition against Saddam is not what it was seven years ago. But in fact, that coalition didn't exist at all when Saddam Hussein invaded Kuwait. The United States, under George Bush's leadership, put that coalition together by demonstrating that we had the strength and the seriousness of purpose to carry through to an effective conclusion. President Bush made good on those commitments despite powerful opposition in the U.S. Congress. The situation today is easier in many respects: Iraq is far weaker; American strength is much more evident to everyone, including ourselves; and the Congress would be far more supportive of decisive action. If this Administration could muster the necessary strength of purpose, it would be possible to liberate ourselves, our friends and allies in the region, and the Iraqi people themselves, from the menace of Saddam Hussein.

BACK TO TOP | HOME | CONTACT US

EXHIBIT J

FOREIGN AFFAIRS

MARCH/APRIL 1999
VOLUME 78, NUMBER 2

Letters to the Editor

To the Editor:

It is wrong to dismiss criticism of America's current Iraq policy as partisan, just as it would have been wrong to dismiss opposition to the Gulf War as mere politics ("The Rollback Fantasy," January/February 1999). Many Democrats in Congress supported President Bush's decision to go to war. Daniel Byman, Kenneth Pollack, and Gideon Rose do not advance serious discussion of Iraq policy by portraying those of us who advocate more forceful U.S. action as "cynically playing politics." While they take pains to point out the Republican affiliations of many former officials who have signed letters to the president on Iraq, the authors neglect to mention that the coauthor of one of those letters (and of this one) is a Democratic former congressman. They also do not mention that Democratic Senators Robert Kerrey (Neb.), John Kerry (Mass.), and Joseph Lieberman (Conn.) have prominently taken the same position. Finally, they ignore the fact that the Iraq Liberation Act passed by overwhelming bipartisan majorities in both houses of Congress.

It should be made clear that our views do not correspond with those of the unnamed "many advocates" who, according to the authors, contend that Saddam Hussein could be replaced "at relatively low cost—even . . . without committing American ground troops." Overthrowing Saddam would be a formidable undertaking, not one without problems and perils. But the risks of the gradual collapse of current U.S. policy are worse. The United States should be prepared to commit ground forces to protect a sanctuary in southern Iraq where the opposition could safely mobilize.

The authors critique three "strategies" for overthrowing Saddam, none of which resembles what we would consider a serious approach—although such an approach would incorporate elements of each. A serious strategy would be based on the notion that if the United States demonstrated a readiness to more strongly support the forces of rebellion—with military action if necessary—those forces would prove much stronger and the Iraqi regime much weaker than they are today. Saddam has lost substantial control of northern Iraq because of very modest American efforts; a much stronger push in the south could produce significant results.

An effort to overthrow Saddam would not begin, as the authors suggest, by attempting to seize and hold a vast area of southern Iraq with 10,000–20,000 lightly armed opposition troops, in the face of Saddam's forces and without U.S.

military intervention. Rather, it would start with limited objectives and the much more direct commitment of U.S. force and would develop depending on how resistance spread and whether Saddam's troops stayed loyal. These factors cannot be known in advance. The possibility of serious internal opposition cannot be dismissed with the categorical assurance of Byman, Pollack, and Rose.

One should not underestimate one's opponents or overestimate one's friends. The authors do the opposite. They overstate the analogy with Cuba, where U.S. planners were surprised by the absence of popular opposition to Fidel Castro. The more relevant experience is that of Iraq itself, where U.S. policymakers were surprised by the extent of the popular post–Gulf War uprisings against Saddam and where dissatisfaction with his regime is still widespread.

The authors exaggerate Saddam's strength. They base their calculations of the airpower needed to free Iraq on the assumption that Iraqi divisions would march blindly, one after another, into the bombs of the U.S. Air Force. Theoretically this might happen, but during Operation Provide Comfort the Iraqi army surrendered the northern third of the country to a small U.S. ground force and lightly armed Kurdish guerrillas because they had lost the stomach to fight.

Assuming the worst case—about opposition strength or regime weakness—can produce better plans for dealing with those outcomes. But it can also paralyze, as it did in Bosnia. Mistakenly believing that the Serbs were too strong and the opposition too weak for U.S. intervention to make a difference led to three long years of inaction and thousands of unnecessary deaths. Besides, to be consistent, the authors should apply a worst-case analysis to their preferred policy of containment. If that collapses—or when it collapses—the United States will face a Saddam who has new nuclear, biological, and chemical weapons and a renewed capacity to conduct conventional warfare and terrorism, and who is bent on avenging his 1991 defeat. That would risk many more lives than trying to overthrow Saddam by force.

Neither side of this debate has a monopoly on responsible judgment; neither course of action is free from significant dangers. On balance, however, containment entails much greater long-term risks than using force to help the Iraqi people rid themselves and us of this tyrannical menace.

STEPHEN J. SOLARZ
President, Solarz Associates, and Former Democratic Member of the House Foreign Affairs Committee

PAUL WOLFOWITZ
Dean, Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, and Under Secretary of Defense in the Bush Administration

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 **NOTICE OF SUBSTITUTION OF THE UNITED STATES AS SOLE DEFENDANT ON COUNTS I AND II**

Please take notice that under 28 U.S.C. § 2679(b) (the "Westfall Act"), the United States of America is substituted for 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, with respect to Counts I and II of Plaintiff's Amended Complaint ("Am. Compl."). The grounds for this substitution are as follows:

1. Plaintiff alleges that former President Bush, former Vice-President Cheney, former Secretary of Defense Rumsfeld, former National Security Advisor Rice, former Secretary of State Powell, and former Deputy Secretary of Defense Wolfowitz, violated international law while they were employed by the United States and that Plaintiff was damaged by their actions. *See* Am. Compl. ¶¶ 8-124.

2. Count I of the Complaint alleges that all of the named individuals conspired to wage a war of aggression against Iraq in violation of international law, the United Nations Charter, and the Kellogg-Briand Pact, a treaty signed in 1928, to which the United States is a signatory. *See id.* ¶¶ 129-38. Count II of the Complaint alleges that all of the named individuals did in fact wage a war of aggression against Iraq in violation of international law, the United Nations Charter, and the Kellogg-Briand Pact. *See id.* ¶¶ 139-48.

3. The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b); 2671-2680 (the "FTCA"), as amended by the Westfall Act, provides that where an individual claims that federal employees damaged him or her through their negligent or wrongful acts or omissions taken within the scope of their office or employment, a suit against the United States shall be the exclusive remedy for that individual's claim. 28U.S.C. § 2679(b)(1). There are two exceptions to this exclusivity provision. 28 U.S.C. § 2679(b)(2). Neither exception applies to claims for violations of

customary international law, the United Nations Charter, or a treaty. Therefore, Plaintiff's claims for such violations fall within this provision.

4. Under the Westfall Act, where the Attorney General of the United States certifies that a federal employee was acting within the scope of his or her office or employment at the time of the incident giving rise to the claim against the employee, that claim shall be deemed an action against the United States, and the United States shall be substituted as sole defendant for that claim. 28 U.S.C. § 2679(d)(1)-(2). Certification authority has been delegated to Directors of the Torts Branch. 28 C.F.R. § 15.4.

5. Rupa Bhattacharyya, Director, Torts Branch, Civil Division, United States Department of Justice, has certified that at the time of the conduct alleged in Plaintiff's complaint, 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, were each acting within the scope of his or her employment. *See* Ex. 1, Certification.

6. For these reasons, the United States has, by operation of law, been substituted as the sole defendant with respect to all of Plaintiff's claims.

7. The Court is respectfully referred to the Certification filed along with this Notice. Also, a Proposed Order is attached to this notice.

Dated: November 29, 2013

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

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 **CERTIFICATION OF SCOPE OF EMPLOYMENT**

I, Rupa Bhattacharyya, Director, Torts Branch, Civil Division, United States Department of Justice, acting by virtue of the authority vested in me by 28 C.F.R. §15.4, hereby certify that I have read the Amended Complaint in this action. On the basis of the information now available with respect to the claims set forth therein and pursuant to the provisions of 28 U.S.C. § 2679(d)(1), I find that 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 were each acting within the scope of their federal office or employment at the time of the incidents out of which Counts I and II of the Amended Complaint in this matter arose.

Dated: November 29, 2013

RUPA BHATTACHARYYA
Director, Torts Branch,
Civil Division
U.S. Department of Justice

COMAR LAW
D. Inder Comar (SBN 243732)
inder@comarlaw.com
901 Mission Street, Suite 105
San Francisco, CA 94103
Telephone: +1.415.640.5856
Facsimile: +1.415.513.0445
Attorney for Lead Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

GEORGE W. BUSH, RICHARD B. CHENEY, DONALD H. RUMSFELD, CONDOLEEZZA RICE, COLIN L. POWELL, PAUL M. WOLFOWITZ, and DOES 1-10, inclusive,

Defendants.

CASE NO. 3:13-cv-01124 JST

AMENDED COMPLAINT FOR CONSPIRACY TO COMMIT AGGRESSION; AND THE CRIME OF AGGRESSION

DEMAND FOR TRIAL BY JURY

CLASS ACTION

SUNDUS SHAKER SALEH (hereinafter "Plaintiff") on behalf of herself and those similarly situated, alleges against Defendants (1) GEORGE W. BUSH, (2) RICHARD B. CHENEY, (3) DONALD H. RUMSFELD, (4) CONDOLEEZZA RICE, (5) COLIN L. POWELL, (6) PAUL WOLFOWITZ, and (7) DOES 1-10 (collectively, "Defendants"), as follows:

NATURE OF THIS ACTION

1. Defendants GEORGE W. BUSH, RICHARD B. CHENEY, DONALD H. RUMSFELD, CONDOLEEZZA RICE, COLIN L. POWELL, PAUL WOLFOWITZ, and DOES 1-10 broke the law in conspiring and committing the crime of aggression against the people of Iraq.

2. Defendants planned the war against Iraq as early as 1998; manipulated the United States public to support the war by scaring them with images of "mushroom clouds" and conflating the Hussein regime with al-Qaeda; and broke international law by commencing the invasion without proper legal authorization.

3. More than sixty years ago, American prosecutors in Nuremberg, Germany convicted Nazi leaders of the crimes of conspiring and waging wars of aggression. They found the Nazis guilty of planning and waging wars that had no basis in law and which killed millions of innocents.

4. Plaintiff – now a single mother living as a refugee in Jordan – was an innocent civilian victim of the Iraq War. She seeks justice under the Nuremberg principles and United States law for the damages she and others like her suffered because of Defendants' premeditated plan to invade Iraq.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over the claims and causes of action described herein pursuant to 28 U.S.C. § 1350.

6. Venue is proper in the Northern District of California because Defendant RICE is subject to personal jurisdiction in this district, and the

allegations described in this Complaint did not take place in any one judicial district. 28 U.S.C. § 1391(b)(3).

7. Personal jurisdiction over Defendants is proper in this Court because Defendants are within the jurisdiction of this Court.

THE PARTIES

8. Plaintiff Sundus Shaker Saleh is a citizen of Iraq and resides in Amman, Jordan. She lived in Iraq at the inception of the Iraq War in 2003, lost her home and her property, and was forced to flee to Jordan in 2005 because of the lack of security caused by the war and the occupation that followed. She is currently supporting four dependents by herself in Jordan.

9. Defendant George W. Bush ("BUSH") was the 43rd President of the United States from 2001 and 2009. Defendant BUSH, under his authority as Commander-in-Chief of the United States armed forces, gave the order to invade Iraq on March 19, 2003. In so ordering the invasion, and as further described in this Complaint, Defendant BUSH joined the conspiracy and pre-existing plan initiated by Defendants CHENEY, RUMSFELD and WOLFOWITZ to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant BUSH is a resident of Dallas, Texas.

10. Defendant Richard B. Cheney ("CHENEY") was the 46th Vice President of the United States from 2001 to 2009, under Defendant Bush. As further described in this Complaint, Defendant Cheney participated in a conspiracy and pre-existing plan in the late 1990s with Defendants RUMSFELD and WOLFOWITZ to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant CHENEY is a resident of Wilson, Wyoming.

11. Defendant Donald H. Rumsfeld ("RUMSFELD") was the 21st Secretary of Defense of the United States from 2001 to 2006, under Defendant BUSH. As further described in this Complaint, Defendant Rumsfeld participated in

a conspiracy and pre-existing plan in the late 1990s with Defendants CHENEY and WOLFOWITZ to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant RUMSFELD is a resident of Washington DC.

12. Defendant Condoleezza Rice ("RICE") was the 20th United States National Security Advisor from 2001 to 2005, under Defendant BUSH. As further described in this Complaint, Defendant RICE joined the conspiracy and pre-existing plan to invade Iraq at least in August 2002, when she joined and participated in the "White House Iraq Group," a group established by the White House in August 2002 for the sole purpose of convincing the American public that the United States had to invade Iraq. Upon information and belief, Defendant RICE is a resident of Stanford, California.

13. Defendant Paul Wolfowitz ("WOLFOWITZ") was the 25th Deputy Secretary of Defense from 2001 to 2005, under Defendant BUSH. As further described in this Complaint, Defendant WOLFOWITZ was the prime architect of the Iraq War and initiated a conspiracy and plan in the late 1990s with Defendants CHENEY and RUMSFELD to use the United States armed forces to commit the crime of aggression against the people of Iraq. Upon information and belief, Defendant WOLFOWITZ is a resident of Washington DC.

14. Defendants DOES One through Ten, inclusive, are previous high-ranking officials of the Bush Administration who joined in the conspiracy, or otherwise planned and executed, the pre-existing plan to invade Iraq. Plaintiff will fully name these Doe defendants following discovery into their complete identities. Does One through Ten, inclusive, are sued for damages in their individual capacity.

NUREMBERG OUTLAWED THE CRIME OF AGGRESSION: THE "SUPREME INTERNATIONAL CRIME"

15. At the end of World War II, the United States and its allies put

Nazi leaders on trial for their crimes, including crimes against humanity and war crimes. But the chief crime prosecuted against the Nazis was the **crime of aggression**: engaging in a premeditated war without lawful reason.

16. Count One of the Nuremberg indictment charged Nazi leaders with a "Common Plan or Conspiracy" to engage in "Crimes against Peace, in that the defendants planned, prepared, initiated wars of aggression, which were also wars in violation of international treaties, agreements, or assurances."[1]

17. In his opening statement to the Tribunal, Chief Counsel for the United States Robert H. Jackson stated "This Tribunal . . . represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war."[2]

18. Chief Prosecutor Jackson argued, "The Charter of this Tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke put it to King James, '**under God and the law**.'" (*Id.*) (Emphasis added).

19. Chief Prosecutor Jackson argued, "Any resort to war – to any kind of a war – **is a resort to means that are inherently criminal**. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property." (Emphasis added).

20. He continued, "The 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, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes**." (*Id.*) (Dmphasis added).

---

[1] *See* Judgment, *United States v. Goering et al.*, Int'l Military Tribunal (Oct. 1 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

[2] Robert Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/

21. Chief Prosecutor Jackson recognized that the crime of aggression applied to the United States. He argued, "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." (*Id*.)

22. The International Military Tribunal at Nuremberg found Nazi leaders guilty of the crimes of conspiracy to engage in a war of aggression and the crime of aggression.[3] The Tribunal stated, "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. **War is essentially an evil thing**. Its consequences are not confined to the belligerent states alone, but affect the whole world." (Emphasis added).

23. The Tribunal held, "To initiate a war of aggression, therefore, is not only an international crime; it is the **supreme international crime** differing only from other war crimes in that it contains within itself the accumulated evil of the whole." (Emphasis added).

24. The Tribunal rejected the defendants' argument that Adolph Hitler was solely to blame for the acts of aggression. "**[T]hose who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it**. Hitler could not make aggressive war by himself." (Emphasis added).

25. High-ranking Nazis, including Hermann Göring, Alfred Jodl and Wilhelm Keitel were sentenced to death for their crimes.

THE PROJECT FOR THE NEW AMERICAN CENTURY

26. In 1997, William Kristol and Robert Kagan formed a think tank in Washington DC called "The Project for the New American Century," or "PNAC." PNAC members included Defendants CHENEY, RUMSFELD and

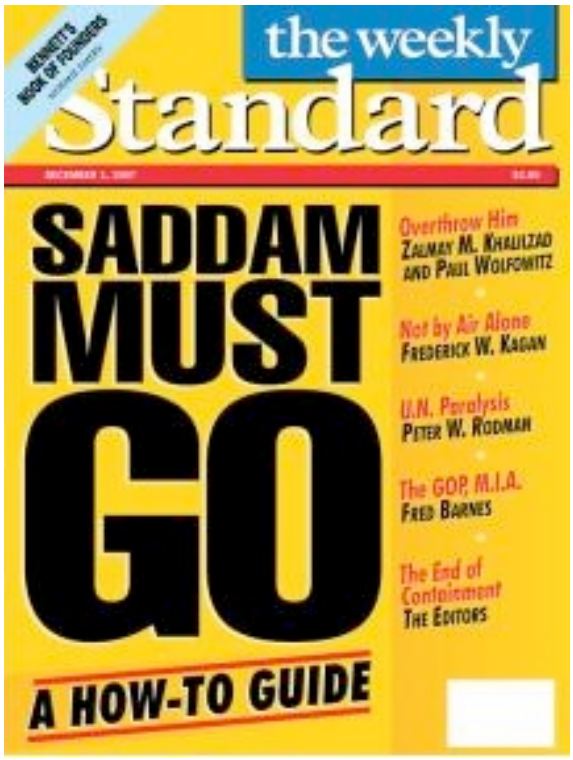
[3] Judgment, *United States v. Goering et al*., Int'l Military Tribunal (Oct. 1 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

WOLFOWITZ.

27. PNAC adheres to a neoconservative philosophy regarding the United States' use of its military and its role in international politics. With respect to Iraq, PNAC had a larger strategic vision of expanding the United States' influence and "showing its muscle in the Middle East."[4]

28. From 1997 to 2000, PNAC produced several documents advocating the military overthrow of Saddam Hussein.[5]

29. In the December 1, 1997 issue of the neoconservative magazine the *Weekly Standard*, Defendant WOLFOWITZ published an article, which discussed how the United States should overthrow Saddam Hussein. The issue was entitled "Saddam Must Go: A How-To Guide."[6]



[4] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 78-79 (2006).

[5] Project for the New American Century, http://www.newamericancentury.org/iraqmiddleeast2000-1997.htm.

[6] Paul Wolfowitz & Zalmay M. Khalilzad, *Overthrow Him*, Weekly Standard, (Dec. 1, 1997), *available at* http://www.weeklystandard.com/Content/Protected/Articles/000/000/008/876iiuqh.asp

30. On January 26, 1998, Defendants RUMSFELD and WOLFOWITZ signed a letter[7] to then President William J. Clinton, requesting that the United States implement a "**strategy for removing Saddam's regime from power**," which included a "willingness to **undertake military action** as diplomacy is clearly failing." Removing Saddam from power had to "become the aim of American foreign policy." (Emphasis added). The letter further stated that the United States could not be "crippled by a misguided insistence on unanimity in the UN Security Council."

31. On May 29, 1998,[8] Defendants RUMSFELD and WOLFOWITZ signed a letter to then Speaker of the House Newt Gingrich and Senate Majority Leader Trent Lott in which they advocated that "U.S. policy should have as its explicit goal removing Saddam Hussein's regime from power and establishing a peaceful and democratic Iraq in its place," which included the use of "U.S. and allied military power . . . to help remove Saddam from power."

32. On September 18, 1998,[9] Defendant WOLFOWITZ gave testimony before the House National Security Committee on Iraq in which he stated that the United States had to "liberat[e] the Iraqi people from Saddam's tyrannical grasp and free Iraq's neighbors from Saddam's murderous threats." Defendant WOLFOWITZ advocated that the United States establish a "safe protected zone in the South" and form a provisional government that would "**control the largest oil field in Iraq**." (Emphasis added).

33. Defendant WOLFOWITZ was an avid supporter and believer of other neoconservative theorists such as Laurie Mylroie, and Defendant

---

[7] Letter to President Clinton (Jan. 26, 1998), *available at* http://www.newamericancentury.org/iraqclintonletter.htm.

[8] Letter to Newt Gingrich and Trent Lott (May 29, 1998), *available at* http://www.newamericancentury.org/iraqletter1998.htm.

[9] Letter by Gary Schmitt regarding Paul Wolfowitz's Statement on U.S. Policy Toward Iraq (Sept. 18. 1998), *available at* http://www.newamericancentury.org/iraqsep1898.htm.

WOLFOWITZ had been fixated on the overthrow of Saddam's regime in Iraq since the mid-1990s.[10] In fact, in June 2001, Defendant WOLFOWITZ tried to get the CIA to reinvestigate Mylroie's theory that Iraq was involved in the 1993 World Trade Center bombings, which had been disproved by the CIA in 1996.[11]

ONCE IN POWER, DEFENDANTS USE 9/11 AS COVER TO EXECUTE THEIR PRE-EXISTING PLAN TO INVADE IRAQ

34. In January 2001, Defendant BUSH was sworn in as 43rd President of the United States. Defendant CHENEY was Defendant BUSH's Vice President. Defendant BUSH appointed Defendants RUMSFELD, WOLFOWITZ, RICE and POWELL to high-ranking positions within his administration.

35. On September 11, 2001, Saudi Arabian terrorists with links to an Afghan-based group called "al-Qaeda," and headed by Osama bin Laden, hijacked four planes and committed terrorist acts against the American people.

36. According to British journalist John Kampfner,[12] the day of the 9/11 attacks, Defendants WOLFOWITZ and RUMSFELD openly pushed for war against Iraq – despite the fact that the 9/11 hijackers were Saudi Arabian and had been based out of Afghanistan. Defendant RUMSFELD asked, "Why shouldn't we go against Iraq, not just al-Qaeda?" with Defendant WOLFOWITZ adding that Iraq was a "brittle, oppressive regime that might break easily—it was doable."

37. Kampfner writes, "from that moment on, he and Wolfowitz used every available opportunity to press the case."

---

[10] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 68-82 (2006).

[11] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 76 (2006); Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 71-73 (2004)

[12] Jonathan Kampfner, *Blair's Wars* (2003).

38. According to Richard A. Clarke,[13] the former National Coordinator for Security, Infrastructure Protection and Counter-terrorism (and who worked for Presidents George H.W. Bush and William Clinton) Defendants WOLFOWITZ, RUMSFELD and BUSH sought to use 9/11 as an excuse to attack Iraq.

39. On Wednesday, September 12, 2001, the day after 9/11, Richard A. Clarke heard Defendant RUMSFELD state that the United States had to broaden its objectives by "getting Iraq."[14] Defendant POWELL pushed back, urging a focus on al-Qaeda. Richard A. Clarke stated, "Having been attacked by al-Qaeda, for us now to go bombing Iraq in response would be like our invading Mexico after the Japanese attacked us at Pearl Harbor."

40. Later in the day, Richard A. Clarke heard Defendant RUMSFELD complain that there were no decent targets for bombing in Afghanistan and that the United States military should consider bombing Iraq, which, he said, had better targets. At first Richard A. Clarke thought Rumsfeld was joking. But he was serious, and Defendant BUSH did not reject out of hand the idea of attacking Iraq. Instead, Defendant BUSH noted that what the United States needed to do with Iraq was to change the government, not just hit it with more cruise missiles, as Defendant RUMSFELD had implied.

41. During the afternoon of September 11, 2001, Defendant RUMSFELD discussed with his staff the possibility of using the terrorist attacks on the World Trade Center as an "opportunity" to launch an attack on Iraq.[15] On

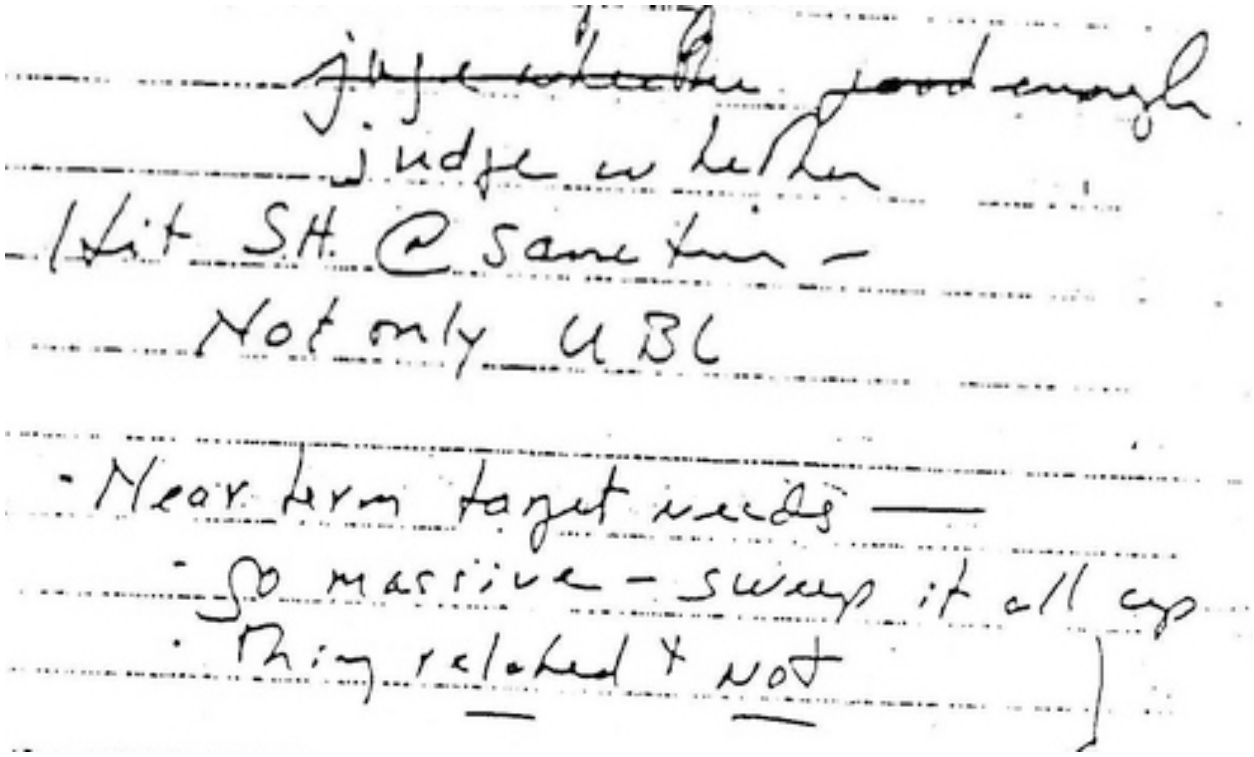
---

[13] This information is lifted from press articles and Richard A. Clarke, *Against All Enemies – Inside America's War On Terror* (Free Press 2004).

[14] Richard A. Clarke, *Against All Enemies*, N.Y. Times (March 28, 2004), *available at* http://www.nytimes.com/2004/03/28/books/chapters/0328-1st-clarke.html?pagewanted=all; *See also* Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 334-35 (2004).

[15] Bob Woodward, *Plan of Attack* 24 (2004); *See also* Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 334-35 (2004).

September 11, 2001, an aide to Defendant RUMSFELD quickly scribbled notes regarding the attack and quoted Defendant RUMSFELD as saying, "Hit S.H. @ same time – Not only UBL." The note referred to Saddam Hussein (S.H.) and Osama bin Laden (UBL). This note also read, "Go massive - Sweep it all up. Thing [sic] related + not."[16] (*See* Exhibit A, incorporated into this Amended Complaint hereto).



42. Defendant WOLFOWITZ has stated that during the weekend after 9/11, there was a "long discussion" about the part that Iraq would play in a counterterrorist strategy and the question was "about not whether but when."[17]

43. On September 12, 2001, the day after the 9/11 attacks, Defendant BUSH approached Richard A. Clarke and a few other people and stated,

---

[16] *See* Joel Roberts, *Plans for Iraq Attack Began On 9/11*, CBS News (Sept. 10, 2009), *available at* http://www.cbsnews.com/2100-500249_162-520830.html; Thad Anderson, Flickr, *available at* http://www.flickr.com/photos/66726692@N00/sets/72057594065491946/.

[17] Sam Tannenhais, *Interview with Paul Wolfowitz*, Vanity Fair (May 9, 2003), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2594.

"I know you have a lot to do and all, but I want you, as soon as you can, to go back over everything, everything. See if Saddam did this. See if he's linked in any way." Richard A. Clarke was again incredulous. He responded, "But, Mr. President, Al Qaeda did this." Defendant BUSH responded, "I know, I know, but - see if Saddam was involved. Just look. I want to know any shred-" "Absolutely, we will look-again," Richard A. Clarke answered. "But you know, we have looked several times for state sponsorship of Al Qaeda and not found any real linkages to Iraq. Iran plays a little, as does Pakistan, and Saudi Arabia, Yemen." "Look into Iraq, Saddam," Defendant BUSH responded.

44. On September 18, 2001, Clarke's office sent a memo to Defendant RICE entitled "Survey of Intelligence Information on Any Iraq Involvement in the September 11 Attacks," which found "no compelling case" that linked Iraq to the 9/11 attack.[18]

45. During a December 9, 2001 appearance on *Meet the Press*, Defendant CHENEY attempted to falsely persuade the American public that Iraq and some connection to 9/11. Defendant CHENEY claimed it was "well confirmed that [Atta, the lead 9/11 hijacker] did go to Prague and he did meet with a senior official of the Iraqi Intelligence service." However, this alleged meeting between Mohamed Atta and the Iraqi Intelligence service was not only unconfirmed, but the CIA and the FBI had already concluded that no such meeting had probably taken place.[19]

46. On November 27, 2001, Defendant RUMSFELD met with U.S. Central Command (CENTCOM) Commander General Tommy Franks in order to

---

[18] Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 334 (2004).

[19] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 102-105 (2006); *Meet the Press*, Interview by Tim Russert with Dick Cheney (Dec. 9, 2001), transcript *available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/cheneytext120901.html.

discuss the "decapitation of the [Iraqi] government." In the meeting, Defendant RUMSFELD discussed strategies on how to justify a military invasion of Iraq, which included a debate on weapons of mass destruction (WMD) and a "Saddam connection to Sept. 11 attack…"[20] (*See* Exhibit B, incorporated into this Amended Complaint hereto).

47. According to Richard A. Clarke, the Bush Administration had been focused on Iraq **prior** to the attacks of 9/11: so focused that **they failed to listen to warnings** that al-Qaeda-linked terrorists were planning a spectacular attack.

48. For example, on January 25, 2001, four days after Defendant BUSH was inaugurated, Richard A. Clarke wrote to Defendant RICE and asked for a cabinet-level meeting to discuss the threat posed by al-Qaeda and suggesting how the United States should respond.[21]

49. Defendant RICE downgraded Richard A. Clarke's position so that he no longer had direct access to the president, a privilege he had enjoyed under President Clinton.

50. In April 2001, Richard A. Clarke met with Defendant WOLFOWITZ to discuss the threat posed by al-Qaeda. Defendant WOLFOWITZ responded, "I just don't understand why we are beginning by talking about this one man bin Laden." He told Richard A. Clarke, "You give bin Laden too much credit. He could not do all these things like the 1993 attack on New York, not without a state sponsor. Just because FBI and CIA have failed to find the linkages does not mean they don't exist."[22]

---

[20] The U.S. Prepares for Conflict, 2001, *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB326/.

[21] Bush Administration's First Memo on al-Qaeda- declassified, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB147/index.htm.

[22] Rebecca Leung, *Excerpt: Against All Enemies* (Sept. 10, 2009), http://www.cbsnews.com/8301-18560_162-607774.html.

51. Defendant WOLFOWITZ was repeating a discredited theory that Iraq had been behind the 1993 attack, which was not true.

52. On August 6, 2001, Defendant BUSH received a briefing from the CIA entitled, "Bin Ladin [sic] Determined To Strike US."[23] (*See* Exhibit C, incorporated into this Amended Complaint hereto).

53. Defendants were on notice of an attack against the United States by al-Qaeda but failed to listen to warnings of an attack because they were too focused on looking for ways to attack Iraq.

54. According to Defendant POWELL, Defendant WOLFOWITZ could not justify his belief regarding a link between Iraq and the 9/11 attacks and stated, "[Defendant WOLFOWITZ] was always of the view that Iraq was a problem that had to be dealt with…And he saw this as one way of using this event as a way to deal with the Iraq problem."[24]

IN JULY 2002, THE BRITISH GOVERNMENT LEARNS THAT DEFENDANTS PLAN TO INVADE IRAQ AND "FIX" INTELLIGENCE AROUND THE INVASION

55. In July 2002, high-ranking British politicians, including Prime Minister Tony Blair, Foreign Secretary Jack Straw and Attorney General Lord Goldsmith met to discuss intelligence on Iraq. This meeting was memorialized in a secret memorandum that has since been leaked.[25] (*See* Exhibit D, incorporated into this Amended Complaint hereto). During that meeting, head of Secret Intelligence Service Sir Richard Dearlove reported on his recent meetings in the United States. He stated, "There was a perceptible shift in attitude. Military action was now seen

---

[23] The President's Daily Brief (Aug. 6, 2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB116/index.htm.

[24] Nat'l Comm. on Terrorist Attacks upon the United States, The 9/11 Commission Report 335 (2004).

[25] This memo has been labeled the "Downing Street Memo" in the United Kingdom, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB328/II-Doc14.pdf.

as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. **But the intelligence and facts were being fixed around the policy**." (Emphasis added).

56. The meeting went on to discuss likely American military options, including a "slow build-up of 250,000 US troops, a short (72 hour) air campaign, then a move up to Baghdad from the south."

57. Foreign Secretary Jack Straw stated that it seemed clear that Defendant BUSH had "made up his mind" to take military action, even if the timing was not yet decided. Foreign Secretary Straw noted, "But the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran."

58. The Attorney General of the United Kingdom affirmed that there was no legal justification for the war. "[T]he desire for regime change was not a legal base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or UN [Security Counsel] authorisation. The first and second could not be the base in this case. Relying on UNSCR 1205 of three years ago would be difficult. The situation might of course change."

DEFENDANTS EXECUTE A PLAN TO SCARE THE AMERICAN PUBLIC SO THAT THEY CAN INVADE IRAQ

59. In August 2002, the White House established a group called the White House Iraq Group ("WHIG"), the purpose of which was to convince the American public into supporting a war against Iraq. Defendant RICE was a member of WHIG, along with Karl Rove, I. Lewis ("Scooter") Libby, and other high-ranking Bush Administration officials. Defendant RICE, along with other members of WHIG continually used fabricated intelligence from unreliable sources in order to prep the public for an invasion of Iraq.[26]

---

[26] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 59 (2006).

60. At a September 5, 2002 WHIG meeting, the term "smoking gun/mushroom cloud" was unveiled related to the supposed nuclear dangers posed by Saddam Hussein. According to Newsweek columnist Michael Isikoff, "The original plan had been to place it in an upcoming presidential speech, but WHIG members fancied it so much that when the *Times* reporters contacted the White House to talk about their upcoming piece [about aluminum tubes], one of them leaked Gerson's phrase – and the administration would soon make maximum use of it."[27]

61. On September 7, 2002 unnamed White House officials told the New York Times[28] that the Bush Administration was unveiling this strategy to "persuade the public, the Congress and the allies of the need to confront the threat from Saddam Hussein."

62. The New York Times also reported that White House Chief of Staff Andrew Card, Jr., explained that the Bush Administration waited until after Labor Day to begin this push because "From a marketing point of view you don't introduce new products in August."

63. The New York Times reported that the centerpiece of the strategy would be to use Mr. Bush's "speech on September 11 to help move Americans towards support of action against Iraq, which could come early next year."

64. An August 10, 2003 article in the Washington Post confirmed that during this period from September 2002 to the initiation of the war, Defendants engaged in a "pattern" of "depicting Iraq's nuclear weapons program as more active, more certain and more imminent in its threat than the data they had

---

[27] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 35 (2006).

[28] Elisabeth Bumiller, *Traces of Terror: The Strategy; Bush Aides Set Strategy to Sell Policy on Iraq*, N.Y. Times (Sept. 7, 2002), *available at* http://www.nytimes.com/2002/09/07/us/traces-of-terror-the-strategy-bush-aides-set-strategy-to-sell-policy-on-iraq.html.

would support."[29]

65. On September 8, 2002,[30] Defendant RICE told CNN's Late Edition that Saddam Hussein was "actively pursuing a nuclear weapon." "There will always be some uncertainty about how quickly he can acquire nuclear weapons but we don't want the smoking gun to be a mushroom cloud."

66. Additionally, Defendants BUSH, CHENEY, and RICE used faulty intelligence and "cherry picked" intelligence facts in order to better market a war with Iraq to the American people.[31] For example, during an interview with *Meet the Press* on September 8, 2002, Defendant CHENEY stated that the White House knew "with absolute certainty" that "…[Saddam] has been seeking to acquire" aluminum tubes for his nuclear weapons program, even though there was clear dissent over this fact and overwhelming evidence that the aluminum tubes were not suitable for a nuclear centrifuge.[32] Also, on CNN's Late Edition, Defendant RICE said the aluminum tubes "are only really suited for nuclear weapons programs, centrifuge programs." On FOX News Sunday, Defendant POWELL said that "[Saddam] is still trying to acquire…some of the specialized aluminum tubing one needs to develop centrifuges."[33]

---

[29] Barton Gellman & Walter Pincus, *Depiction of Threat Outgrew Supporting Evidence*, The Washington Post (Aug. 10, 2003), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/12/AR2006061200932.html.

[30] CNN *Late Edition*, Interview by Wolf Blitzer with Condoleezza Rice (Sept. 8, 2002), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html

[31] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 16 (2006); *See also* The World According to Dick Cheney (Cutler Productions, 2013).

[32] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 36-42, 86-87, 222-24, 259-60 (2006); *Meet the Press*, Interview by Tim Russert with Dick Cheney (Sept. 8, 2002), *available at* https://www.mtholyoke.edu/acad/intrel/bush/meet.htm.

[33] CNN *Late Edition*, Interview by Wolf Blitzer with Condoleezza Rice (Sept. 8, 2002), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html; FOX *News Sunday*, Interview by Tony Snow with Colin Powell (Sept. 8 2002), *available at*

67. During an address at the United Nations on September 12, 2002, Defendant BUSH claimed "Iraq has made several attempts to buy high-strength aluminum tubes used to enrich uranium for a nuclear weapon."[34]

68. Although the CIA had rejected the claim, Defendant BUSH declared during his weekly radio address on September 28, 2002 that Saddam "could launch a biological or chemical attack in as little as forty-five minutes."[35]

69. Furthermore, after the White House had been warned that the assertion that Iraq was trying to obtain large quantities of uranium from Africa was unconfirmed and highly unlikely, Defendant BUSH used the allegation in his 2003 State of the Union address in order to justify the invasion of Iraq.[36]

70. In 2008,[37] former Bush aide and press secretary Scott McClellan would write that Defendants engaged in a "political propaganda campaign" aimed at "manipulating sources of public opinion."

71. Defendants BUSH and RUMSFELD manipulated intelligence regarding Iraq's drones and unmanned aerial vehicles (UAV) and their ability to attack the U.S. mainland with biological or chemical weapons in order to justify an invasion in Iraq. The CIA had reported by early 2003 that it had "no definite indications that Baghdad [was] planning to use WMD-armed UAV's against the

---

http://www.foxnews.com/story/2002/10/21/transcript-colin-powell-on-fox-news-sunday/.

[34] President Bush, Address to the United Nations General Assembly (Sept. 12, 2002), *available at* http://www.un.org/webcast/ga/57/statements/020912usaE.htm.

[35] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 100 (2006); Radio Address by the President to the Nation, Sept. 28, 2002, transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020928.html.

[36] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 86-87, 222-24, 259-260 (2006).

[37] Michael D. Shear, *Ex-Press Aide Writes That Bush Misled U.S. on Iraq*, The Washington Post (May 28, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052703679.html.

U.S. mainland." However, on February 6, 2003, Defendant BUSH still claimed an Iraqi UAV containing biological weapons "launched from a vessel off the American coast could reach hundreds of miles inland." And during a news conference on March 12, 2003, Defendant RUMSFELD declared, "We know that [Saddam] continues to hide biological or chemical weapons, moving them to different locations as often as every twelve to twenty-four hours."[38]

72. In an interview given on May 9, 2003, Defendant WOLFOWITZ stated, "For reasons that have a lot to do with the U.S. bureaucracy we settled on the one issue [to justify the war] that everyone could agree on which was weapons of mass destruction as the core reason."[39]

DEFENDANTS FALSELY LINK AL-QAEDA TO IRAQ

73. Despite the fact that there has never been any proof of any operational cooperation between al-Qaeda and Iraq, Defendants engaged in a pattern and practice of deceiving the American public into believing that such a link existed in order to win approval for the crime of aggression against Iraq.

74. On December 9, 2001,[40] Defendant CHENEY alleged that an Iraqi intelligence officer met with one of the 9/11 hijackers (Mohammed Atta) in the Czech Republic. He repeated this allegation again in September 2003.[41]

75. No such meeting took place, and in 2006, Defendant CHENEY

---

[38] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 205-206 (2006); Statement by President Bush from the White House (Feb. 6, 2003), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030206-17.html.

[39] Sam Tannenhais, *Interview with Paul Wolfowitz*, Vanity Fair (May 9, 2003), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2594.

[40] *Meet the Press*, Interview by Tim Russert with Dick Cheney (December 9, 2001), transcript *available at* http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/print/vp20011209.html.

[41] *Meet the Press*, Interview by Tim Russert with Dick Cheney (Sept. 14, 2003), transcript *available at* http://www.nbcnews.com/id/3080244/default.htm#.UTPUdRms1JM.

retracted this statement.[42]

76. In March 22, 2002, UK Director of the Foreign and Commonwealth Office Peter Ricketts wrote a memo to Foreign Secretary Jack Straw (now publicly available) and stated that the "US is scrambling to establish a link between Iraq and Al Aaida [sic]" and that it was "so far frankly unconvincing."[43] (*See* Exhibit E, incorporated into this Amended Complaint).

77. In September 2002, Defendant RUMSFELD set up the Office of Special Plans (OSP) in the Pentagon, where raw intelligence regarding Iraq would be assessed and sent directly to Defendant BUSH, prior to being filtered through the proper intelligence channels. Through the OSP, Defendants CHENEY, RUMSFELD, and WOLFOWITZ were able to use intelligence that was uncertain, unverified, and unreliable and turn it into fact.[44] The OSP was active until June 2003.

78. On October 7, 2002, Defendant BUSH told the American Public that "Iraq and al Qaeda have had high-level contacts that go back a decade. Some al Qaeda leaders who fled Afghanistan went to Iraq. These include one very senior al Qaeda leader who received medical treatment in Baghdad this year, and who have been associated with planning for chemical and biological attacks. We've learned that Iraq has trained as Qaeda members in bomb-making and poisons and deadly gases. And we know that after September the 11th, Saddam Hussein's regime gleefully celebrated the terrorist attacks on America."[45]

---

[42] *The Tony Snow Show*, Interview of Dick Cheney (March 29, 2006), transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060329-2.html.

[43] Letter from Peter Ricketts to Jack Straw, The Downing Street Memos (March 22, 2002), *available at* http://downingstreetmemo.com/rickettstext.html.

[44] Bob Woodward, *Plan of Attack* 228-229 (2004); Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 109 (2006).

[45] President Bush, Cincinnati Museum Center Speech: Outlines Iraqi Threat (Oct. 7, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html.

79. In this same speech, Defendant BUSH claimed that Saddam Hussein had a group of "nuclear mujahaideen – his nuclear holy warriors."

80. On October 14, 2002, Defendant BUSH stated that Saddam Hussein "has had connections with al Qaeda. This is a man who, in my judgment, would like to use al Qaeda as a forward army."[46]

81. Defendant BUSH made these statements despite the fact that ten days after the 9/11 attacks, he was told in his daily brief ("PDB") from the CIA that there was no evidence linking Iraq to 9/11 and scant evidence that Iraq had any collaborative ties with al Qaeda.[47]

82. A Defense Intelligence Agency document from February 2002 confirmed that the source of the intelligence linking Iraq to al Qaeda was a likely fabricator and "intentionally misleading" his interrogators.[48] The report concluded, "Saddam's regime is intensely secular and is wary of Islamic revolutionary movements. Moreover, Baghdad is unlikely to provide assistance to a group it cannot control."

83. According to Defendant POWELL, Defendants CHENEY and WOLFOWITZ feverishly looked for a connection between Saddam Hussein and 9/11. In January 2003, Defendant POWELL privately referred to Doug Feith's office as the "Gestapo office," a place where Defendant WOLFOWITZ, Scooter Libby, and Feith would meet and discuss a strategy to invade Iraq.[49]

---

[46] President Bush, Thaddeus McCotter for Congress Dinner Speech (Oct.14, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html.

[47] Murray Waas, *Key Bush Intelligence Briefing Kept From Hill Panel, National Journal*, (Nov. 2005, updated May 29, 2013), http://www.nationaljournal.com/whitehouse/key-bush-intelligence-briefing-kept-from-hill-panel-20051122.

[48] Douglas Jehl, *Report Warned Bush Team Against Intelligence Doubts*, N.Y. Times, (Nov. 6, 2005), http://www.nytimes.com/2005/11/06/politics/06intel.ready.html?pagewanted=all&_r=0.

[49] Bob Woodward, *Plan of Attack* 292-293 (2004).

84. Defendant CHENEY claimed that Iraq had "direct ties" to al-Qaeda in order to convince individual members of Congress, including Representative Dick Armey, that an invasion of Iraq was necessary.[50]

85. During a visit to Cairo in February 2001, Defendant POWELL stated that Iraq "has not developed any significant capability with respect to weapons of mass destruction."[51] However, in February 2003, Defendant POWELL gave a speech to the United Nations Security Council on the issue of Iraq, considered critical to winning approval for military action. In that speech, Defendant POWELL stated[52] that Iraq "harbors a deadly terrorist network headed by Abu Musab Al-Zarqawi, an associated collaborator of Osama bin Laden and his al-Qaeda lieutenants." He stated that Saddam Hussein was "more willing to assist al-Qaida after the 1998 bombings of [US] embassies in Kenya and Tanzania." He alleged that, "From the late 1990s until 2001, the Iraqi Embassy in Pakistan played the role of liaison to the Al Qaeda organization." In a 2005 interview with ABC News, Defendant POWELL admitted he felt "terrible" about this speech and considered it a "blot" on his record.[53]

86. When asked about a specific Iraq and al-Qaeda connection, Defendant POWELL admitted, "I have never seen a connection . . . I can't think otherwise because I'd never seen evidence to suggest there was one." Defendant POWELL thus admitted that the allegations given in his speech were untrue.

87. In 2003, when asked about a specific Iraq and 9/11 connection, Defendant WOLFOWITZ admitted, "I'm not sure even now that I would say Iraq

---

[50] The World According to Dick Cheney (Cutler Productions, 2013).

[51] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 26 (2006).

[52] Colin Powell, U.S. Secretary of State's Address to the United Nations Security Council (Feb. 5, 2003), *available at* http://www.guardian.co.uk/world/2003/feb/05/iraq.usa3.

[53] ABC News, "Colin Powell on Iraq, Race, and Hurricane Relief," Sept. 8, 2005, *available at* http://abcnews.go.com/2020/Politics/story?id=1105979&page=1

had something to do with it."[54]

DEFENDANTS REJECT ALL AVENUES FOR DIPLOMACY AND DISSENTING INTELLIGENCE REPORTS

88. On November 26, 2002, shortly after U.N. Resolution 1441 was passed and even before the new team of UN weapons inspectors entered Iraq, Defendants RUMSFELD and BUSH approved the deployment of 300,000 American troops to the Gulf. Defendant RUMSFELD even decided to "stagger" the order in two-week intervals in order to avoid generating too much attention related to the Defendants' pre-planned invasion of Iraq.[55]

89. Although the CIA sent a memo to the White House and specifically to Defendant RICE on October 6, 2002 which warned that the claims that Saddam Hussein attempted to purchase uranium from Africa were not confirmed and lacked sufficient evidence, Defendant BUSH still claimed that "Saddam Hussein recently sought significant quantities of uranium from Africa."[56] Moreover, Defendant RICE admitted that she failed to heed the warnings of the CIA and took "personal responsibility" for the misrepresentation.[57]

90. On January 31, Defendant BUSH met with Prime Minister Blair and told Prime Minister Blair that the United States still planned to wage a war in Iraq on March 10, 2003 regardless of what happened at the United Nations or with the U.N. inspections in Iraq.[58] Defendant BUSH doubted that WMD would

---

[54] *The Laura Ingraham* Show, Interview by Nancy Collins with Paul Wolfowitz (August 1, 2003), transcript *available at* http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3208.

[55] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 158 (2006).

[56] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 299-300 (2006); Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 21.

[57] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 299-300 (2006).

[58] Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 179-180 (2006);

be found during the inspections and Defendant BUSH even admitted to the possibility of provoking confrontation with Iraq in order to justify an attack by the United States.[59]

91. Even though the National Intelligence Estimate (NIE) concluded it was unlikely that Saddam Hussein would cooperate with terrorists and give WMD to al Qaeda, Defendants BUSH and RICE stated that Iraq had operational ties to al Qaeda and would give terrorists WMD to use against the United States.[60] Defendant RICE stated "[T]here clearly are contacts between Al Qaeda and Iraq…and…there's a relationship there."[61] Defendant BUSH stated, "Evidence…reveal[s] that Saddam Hussein aids and protects terrorists, including members of Al Qaeda…Imagine those 19 hijackers with other weapons and other plans—this time armed by Saddam Hussein."[62]

92. A few weeks after the UN Security Council passed Resolution 1441 on November 8, 2002, Defendant BUSH called French president Jacques Chirac and attempted to persuade him to support the United States' invasion of Iraq. After Chirac informed Defendant BUSH that he needed more concrete evidence that Iraq possessed WMD and that the UN inspectors "need more time," Defendant BUSH stated that a U.S. invasion of Iraq is "willed by God" and that "Gog and Magog are at work in the Middle East." Chirac was bewildered over Defendant BUSH's statement.[63]

---

[59] *Ibid*.

[60] Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 43.

[61] PBS *NewsHour with Jim Lehrer*, Interview with Condoleezza Rice (September 25, 2002), transcript *available at* http://www.pbs.org/newshour/bb/international/july-dec02/rice_9-25.html.

[62] President Bush, State of the Union (Jan. 28, 2003), *available at* http://whitehouse.georgewbush.org/news/2003/012803-SOTU.asp.

[63] Kurt Eichenwald, *500 Days: Secrets and Lies in the Terror Wars* 458-59 (2012); *see also* New York Times Sunday Book Review, "Fear Factor," *available at* http://www.nytimes.com/2012/10/07/books/review/500-days-by-kurt-eichenwald.html.

93. On November 27, 2002, the International Atomic Energy Agency (IAEA) resumed inspections in Iraq. Every site which was identified in overhead satellite imagery as having suspicious activity was also inspected. On March 7, 2003, the IAEA Director General Mohamed ElBaradei reported to the UN Security Council that there was no indication "of resumed nuclear activities," "that Iraq has attempted to import uranium," "that Iraq has attempted to import aluminum tubes for use in centrifuge enrichment."[64]

94. Although the Bush administration claimed that Iraq had large stockpiles of chemical weapons and had covert chemical weapon production facilities, UN Monitoring Verification and Inspection Commission (UNMOVIC) did not find significant stockpiles nor did it find any active production facilities or evidence of hidden chemical weapon production capability. Defendant POWELL stated, "There is no doubt that he has chemical weapons stocks"[65] and Defendant BUSH stated, "We know that the regime has produced thousands of tons of chemical agents, including mustard gas, sarin nerve gas, and VX nerve gas."[66]

DEFENDANTS WERE NOT ACTING WITHIN THEIR SCOPE OF EMPLOYMENT IN PLANNING AND COMMITTING AGGRESSION

95. The systematic manipulation and exaggeration of intelligence in order to convince the American public that an invasion of Iraq was necessary was not the kind of conduct that Defendants' were employed to perform. Defendants were not hired, *inter alia*, to falsely link al Qaeda to Iraq, which is

---

64 Mohamed ElBaradei, The Status of Nuclear Inspections in Iraq: An Update, (March 7, 2003), *available at* www.iaea.org/NewsCenter/Statements/2003/ebsp2003n006.shtml (accessed December 4, 2003); Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 23-25.

65 Secretary of State Powell, Fox "News Sunday" (Sept. 8, 2002), *available at* https://www.mtholyoke.edu/acad/intrel/bush/fox.htm.

66 President Bush, Address on Iraq (October 7, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html.

what they did.[67] For example, On October 14, 2002, Defendant BUSH stated that Saddam Hussein "has had connections with al Qaeda. This is a man who, in my judgment, would like to use al Qaeda as a forward army."[68] On December 9, 2001,[69] Defendant CHENEY alleged that an Iraqi intelligence officer met with one of the 9/11 hijackers (Mohammed Atta) in the Czech Republic. He repeated this allegation again in September 2003.[70] Through the OSP, Defendants CHENEY, RUMSFELD, and WOLFOWITZ were able to use intelligence that was uncertain, unverified, and unreliable and turn it into fact.[71] Defendant POWELL stated that Iraq "harbors a deadly terrorist network headed by Abu Musab Al-Zarqawi, an associated collaborator of Osama bin Laden and his al-Qaeda lieutenants."[72]

96. Defendants were not hired, *inter alia*, to scare and mislead the public by exaggerating and inflating the threat of the Iraq. For example although most of the intelligence regarding Iraq's nuclear weapons program was unconfirmed and tainted, on September 8, 2002, Defendant RICE told CNN's Late Edition that Saddam Hussein was "actively pursuing a nuclear weapon." She stated, "There will always be some uncertainty about how quickly he can acquire nuclear weapons but we don't want the smoking gun to be a mushroom cloud."

---

[67] Carnegie Endowment for International Peace, WMD in Iraq: Evidence and Implications (Jan. 2004) 48.

[68] President Bush, Remarks by the President at Thaddeus McCotter for Congress Dinner (Oct. 14, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021014-3.html.

[69] *Meet the Press*, Interview by Tim Russert with Dick Cheney (Dec. 9, 2001), transcript *available at* http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/print/vp20011209.html.

[70] *Meet the Press*, Interview by Tim Russert with Dick Cheney (Sept. 14, 2003), transcript *available at* http://www.nbcnews.com/id/3080244/default.htm#.UTPUdRms1JM.

[71] Bob Woodward, *Plan of Attack* 228-229 (2004); Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War* 109 (2006).

[72] Colin Powell, U.S. Secretary of State's Address to the United Nations Security Council (Feb. 5, 2003), *available at* http://www.guardian.co.uk/world/2003/feb/05/iraq.usa3.

97. Defendants were not hired to execute a pre-existing plan to invade another country, whatever the cost, and by using an unrelated terrorist attack as an excuse to execute their plan. "The aggressive intentions present from the beginning" and the "nature of [the] plan"[73] to invade Iraq constitutes premeditated planning and waging of a war that constitutes the crime of aggression against Iraq by the Defendants. The crime of aggression is the "supreme international crime" and thus not within the duty of high-government officials. For example, Defendant BUSH told Prime Minister Tony Blair that the United States would wage war against Iraq in March 2003 regardless of a lack of evidence of WMD and the UN's alternative diplomatic avenues. Defendants' premeditated aggressive actions against Iraq and the manipulative media campaign to rally American public support for the invasion of Iraq do not constitute conduct that is within the scope of the Defendants' employment.

98. The plan to invade Iraq commenced prior to Defendants taking office and thus did not occur substantially within the authorized time and space limits of Defendants' employment. From 1997 to 2000, PNAC produced several documents advocating the military overthrow of Saddam Hussein.[74] On January 26, 1998, Defendants RUMSFELD and WOLFOWITZ signed a letter[75] to then President William J. Clinton, requesting that the United States implement a "**strategy for removing Saddam's regime from power**," which included a "willingness to **undertake military action** as diplomacy is clearly failing." Removing Saddam from power had to "become the aim of American foreign policy." (Emphasis added). The letter further stated that the United States could not

---

[73] *The United States of America, et al. v. Hermann Wilhelm Goering, et al.*, Opinion and Judgment (October 1, 1946), reprinted in 41 Am. J. Int'l L. 172, 189.

[74] Project for the New American Century, http://www.newamericancentury.org/iraqmiddleeast2000-1997.htm.

[75] Letter to President Clinton (Jan. 26, 1998), *available at* http://www.newamericancentury.org/iraqclintonletter.htm.

be "crippled by a misguided insistence on unanimity in the UN Security Council." On May 29, 1998,[76] Defendants RUMSFELD and WOLFOWITZ signed a letter to then Speaker of the House Newt Gingrich and Senate Majority Leader Trent Lott in which they advocated that "U.S. policy should have as its explicit goal removing Saddam Hussein's regime from power and establishing a peaceful and democratic Iraq in its place," which included the use of "U.S. and allied military power . . . to help remove Saddam from power."

99. On September 18, 1998,[77] Defendant WOLFOWITZ gave testimony before the House National Security Committee on Iraq in which he stated that the United States had to "liberat[e] the Iraqi people from Saddam's tyrannical grasp and free Iraq's neighbors from Saddam's murderous threats." Defendant WOLFOWITZ advocated that the United States establish a "safe protected zone in the South" and form a provisional government that would "**control the largest oil field in Iraq**." (Emphasis added).

100. Defendants' conduct in executing this pre-existing plan to invade Iraq was not actuated by a purpose to serve the master. In fact, Defendants RUMSFELD and WOLFOWITZ advocated for the overthrow of Saddam Hussein during the Defendants' involvement with PNAC from 1997-2000. Defendant CHENEY took unusually frequent trips to the Pentagon in order to meet with intelligence officials about Iraq, intimidate intelligence officials, as well as dig through unverified raw intelligence at the OSP.

101. Defendants were not motivated by genuine national security interests but by their pre-existing plan and agenda to invade Iraq, which began as early as 1998. Defendants were motivated, *inter alia*, by personally-held neo-

---

[76] Letter to Newt Gingrich and Trent Lott, (May 29, 1998), *available at* http://www.newamericancentury.org/iraqletter1998.htm.

[77] Letter by Gary Schmitt regarding Paul Wolfowitz's Statement on U.S. Policy Toward Iraq (Sept. 18. 1998), *available at* http://www.newamericancentury.org/iraqsep1898.htm.

conservative convictions which called for American military dominance of the Middle East, and by a religious worldview that conceived that, "Gog and Magog are at work in the Middle East." Defendants were thus motivated by personal and independent malicious and/or mischievous purposes, and not for purposes related to serving the United States.

102. The use of force by Defendants was unexpected. Defendants were hired to protect the United States and serve its national interests, not to wage war in the interest of a pre-existing plan and personal agenda.

DEFENDANTS INVADE IRAQ IN VIOLATION OF LAW, COMPLETING THEIR CRIME OF AGGRESSION AGAINST IRAQ

103. The crime of aggression is regarded as a violation of law by United Nations General Assembly Resolution 3314, the Kellogg-Briand Pact, Article 6 of the Nuremberg Charter, and Article 5 of the International Military Tribunal for the Far East. Whether aggression has been committed must be determined "in light of all the circumstances of each particular case."[78]

104. On March 19, 2003, the United States, upon the order of Defendant BUSH and in coordination with other Defendants, invaded Iraq.

105. Defendants failed to secure United Nations authorization for the war. Article 39 of the United Nations Charter requires the United Nations Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

106. No such determination was ever or has ever been made by the United Nations Security Council.

107. On March 19, 2003, there was no imminent humanitarian

[78] *See* G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974).

disaster or event in Iraq requiring the intervention of a foreign power.

108. On March 19, 2003, Iraq did not pose an imminent military threat requiring the use of the American military in self-defense.

109. Even had Iraq posed an imminent military threat on March 19, 2003 (which it did not), the invasion of Iraq was not reasonably related or proportionate to the threat posed.

110. On September 14, 2004, United Nations Secretary General Kofi Annan stated,[79] "I have indicated it was not in conformity with the UN charter. From our point of view and from the charter point of view it was illegal."

111. Defendants violated international law, treaties and assurances by failing to secure proper United Nations authorization for the war, and in implementing a plan they had devised as early as 1998.

112. Defendants violated international law, treaties and assurances by ignoring all avenues for diplomacy and seeking to invade Iraq, regardless of the cost, and in implementing a plan they had devised as early as 1998.

113. Defendants violated international law, treaties and assurances by attempting to secure domestic and international authorization for the Iraq War through the deception described in this Amended Complaint, and in implementing a plan they had devised as early as 1998.

PLAINTIFF IS INJURED AS A RESULT OF THE WAR

114. In 2003, lived in Jalawla, Iraq. She used to teach and work in private galleries. She and her family also had a jewelry store. Plaintiff lived with her husband (from whom she is now divorced) and four children.

115. In 2003, the Kurdish Army allied with the United States forced Plaintiff to leave her home in Jalawla. Masked troops came and threatened Plaintiff

---

[79] Ewan MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, says Annan*, The Guardian (Sept. 15, 2004), http://www.guardian.co.uk/world/2004/sep/16/iraq.iraq.

and her family, telling Plaintiff she would be killed if they did not leave the house.

116. Plaintiff was not able to take anything from her house except for some clothes.

117. Plaintiff moved to Baghdad, where she found employment working for the independent committee for elections.

118. In 2005, while in Baghdad, Plaintiff was repeatedly threatened by Shia Muslims over a period of four to five months. Plaintiff is Sabean Mandean, and is considered an "infidel" by some Muslim groups in Iraq.

119. In 2005, Plaintiff went to the police for protection. The police refused to help her because they told her they could not even protect themselves.

120. One day in 2005, as Plaintiff was going home, a group of Shia Muslims tried to kill her by ramming their car into hers on the road.

121. After this attempt, Plaintiff and her family moved in with relatives, where they stayed for 10 days. On the tenth day, Shia Muslims found them again and fired ammunition at them in their home. No one was injured.

122. Following this attack, Plaintiff fled Iraq to Jordan, where she lives today.

123. Since arriving in Jordan, Plaintiff has been unable to secure steady employment.

124. Defendants are the "but-for" and proximate cause of Plaintiff's damages. By launching an illegal war of aggression, Defendants produced the chaos that enveloped Iraq and which led to Plaintiff losing her home, being threatened for her religion, and being forced to flee and live as a refugee in Jordan.

CLASS ACTION ALLEGATIONS

Definition of the Plaintiff Class

125. Pursuant to Federal Rule of Civil Procedure 23(a), Plaintiff brings this action for herself and on behalf of a class of persons consisting of all innocent Iraqi civilians who, through no fault of their own, suffered damage as a

but-for and proximate cause of Defendants' international legal torts, specifically (1) their conspiracy to commit the crime of aggression and (2) the crime of aggression itself. Plaintiff requests certification pursuant to Federal Rule of Civil Procedure 23(b)(3) (hereinafter referred to as the "**Iraq Civilian Victims' Class**")

126. The Iraq Civilian Victims' Class, as defined herein, includes all Iraqi civilians (i.e. non-combatants) who were damaged by the Iraq War.

127. Plaintiff and members of the Iraq Civilian Victims' Class may also seek to amend this complaint further in order to establish subclasses including, but not limited to, one or more of the following:

a. A subclass of Iraqi civilian victims who were subject to torture or other war crimes;

b. A subclass of Iraqi civilian victims who were forced to flee Iraq and are now refuges in other countries;

c. A subclass of Iraqi civilian victims who sustained property damage and/or property loss;

d. A subclass of Iraq civilian victims who sustained only emotional harm, such as pain and suffering as defined by law;

e. Any additional subclass or subclasses of Iraqi civilian victims who have suffered injuries necessitating compensatory damages, to be determined at a later stage in these proceedings.

Rule 23(a) Prerequisites

128. The prerequisites to a class action under Rule 23(a) of the Federal Rules of Civil Procedure exist:

a. **Numerosity:** The members of the Iraq Civilian Victims' Class are so numerous that joinder of all class members is impracticable. While the exact number of Iraqi victims is unknown to the Representative Plaintiff at this time, it is likely that hundreds of thousands or even millions of Iraqis may have been subject to damages as a result of Defendants' actions, and would have

standing to pursue such claims under 28 U.S.C. § 1350.

b. **Commonality:** Common questions of law and fact exist as to all members of the Iraq Civilian Victims' Class and predominate over questions affecting individual members of the Iraq Civilian Victims' Class Questions of law and fact common to the Iraq Civilian Victims' Class include, but are not limited to, the following:

(1) Whether the actions of Defendants constituted a conspiracy to engage in a war of aggression, and whether that conspiracy was the cause of damages to Iraqi civilians;

(2) Whether the actions of Defendants constituted a war of aggression, and whether that war of aggression was the cause of damages to Iraq civilians.

c. **Typicality:** The claims of the Representative Plaintiff is typical of the claims of all members of the Iraq Civilian Victims' Class because all members of the proposed class share the common characteristic of being civilian non-combatants who did not take up arms and who were damaged as a result of Defendant's conspiracy and waging of aggressive war, as complained herein.

d. **Adequacy of Representation:** The Representative Plaintiff will fairly and adequately protect the interests of the Iraq Civilian Victims' Class and is represented by counsel competent and experienced in litigation. The Representative Plaintiff is a member of the Iraq Civilian Victims' Class with claims typical of the claims of all class members. The Representative Plaintiff does not have interests that are antagonistic to or in conflict with those persons whom the Representative Plaintiff seeks to represent.

COUNT I

(Conspiracy To Commit the Crime of Aggression Against All Defendants)

129. Plaintiff incorporates herein Paragraphs 1 through 128 of this Complaint.

130. Defendants violated the rule of Nuremberg by engaging in a common plan to attack another country. Defendants initiated this plan as early as 1998.

131. Once in positions of power, Defendants attracted co-conspirators in government to plan and commit the crime of aggression against Iraq.

132. Defendants violated the Kellogg-Briand Pact, a treaty signed in 1928, to which the United States is still a signatory. The Kellogg-Briand Pact requires signatory nations such as the United States to "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." The Kellogg-Briand Pact requires signatory nations such as the United States to resolve all disputes or conflicts through "pacific means." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

133. Defendants violated the United Nations Charter by planning to commit the crime of aggression. Article II, Section 4 of the United Nations Charter requires countries to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nation." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

134. The crime of conspiracy to wage an aggressive war is also a violation of customary international law, which creates binding obligations on the United States, its citizens, and its courts. The United States has not only recognized "[i]nternational law is part of our law, and must be ascertained and administered by

the courts of justice"[80] but it has established that a court may look to customary international law when its own nation lacks any instruction that is on point for a particular matter.[81] The crime of conspiracy to wage an aggressive war has been recognized by the United States, *inter alia*, in the Nuremberg Charter.[82]

135. The crime of a conspiracy to wage an aggressive war is a violation of international law that rests "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." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Conspiracy to engage in aggressive war was a chief crime prosecuted at Nuremberg, and that Tribunal rejected Nazi attempts to claim vagueness with respect to the specific, definitive, and obligatory nature of this crime.

136. Plaintiff is aware of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) in which the United States Supreme Court held in a 5-4 decision that the President of the United States possesses immunity in civil court for actions taken pursuant to his official duties as President. Plaintiff submits that *Nixon* is distinguishable in this case in that the plan to invade Iraq commenced prior to the President taking office. Plaintiff further submits that *Nixon* is distinguishable in that she alleges violations of accepted customary norms of international law. Plaintiff submits that *Nixon* does not prohibit a cause of action against the President or any other Executive official who engages in behavior considered reprehensible in a civilized society, such as torture, crimes against humanity, or the crime of aggression. To the extent that *Nixon* stands for the proposition that the person holding the office of President cannot be held civilly liable for violations of accepted customary norms

---

[80] *Paquete Habana*, 175 U.S. 677, 700 (1900).

[81] *See Paquete Habana*, 175 U.S. at 690-701.

[82] Charter of the Int'l Military Tribunal, article 6(a) (1945) (hereinafter Nuremberg Charter).

of international law – such as torture, crimes against humanity or the crime of aggression – then Plaintiff submits that *Nixon* is wrongly decided and in direct contravention of accepted principles of the common law, particularly the principle that rulers are "under God and the law."

137. Defendants, by engaging in a conspiracy to commit the crime of aggression, were the but-for and proximate cause of Plaintiff's damages (and others like her) in the form of property loss, physical pain, shame, humiliation, degradation and emotional stress, entitling her to damages in an amount to be determined at trial.

138. In light of Defendants' willful, knowing and intentional violations of law against Plaintiff and others like her, and in light of their reckless and callous indifference to the impact their actions would have on innocent Iraqi civilians, their breach of international peace, their deception and fraud to the democratic polity which elected them, and their reprehensible and cowardice use of a terrorist attack to commit the crime of aggression against another a country that posed no threat to the United States, endangering the United States armed forces and millions of Iraqi civilians for their own malicious purposes, Plaintiff and others like her seek an award of punitive and exemplary damages in an amount to be determined at trial.

COUNT II

(The Crime of Aggression Against All Defendants)

139. Plaintiff incorporates herein Paragraphs 1 through 138 of this Complaint.

140. Defendants violated the rule of Nuremberg by attacking another country without legal justification, and specifically, by committing the crime of aggression against Iraq on March 19, 2003.

141. Defendants violated the rule of Nuremberg by using fraudulent and untrue statements in an attempt to convince diplomats, world leaders and the

American public that Iraq posed a threat to the United States and/or that Iraq was in league with al-Qaeda, when neither of these things was true.

142. Defendants violated the Kellogg-Briand Pact, a treaty signed in 1928, to which the United States is still a signatory. The Kellogg-Briand Pact requires signatory nations such as the United States to "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." The Kellogg-Briand Pact requires signatory nations such as the United States to resolve all disputes or conflicts through "pacific means." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

143. Defendants violated the United Nations Charter by engaging in aggressive war. Article II, Section 4 of the United Nations Charter requires countries to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nation." As a Treaty of the United States, the United States Constitution incorporates this principle into its law under Article VI, clause 2, which declares "treaties made . . . to be the supreme law of the land."

144. The crime of aggression is also a violation of customary international law, which creates binding obligations on the United States, its citizens, and its courts. The United States has not only recognized "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice"[83] but it has established that a court may look to customary international law when its own nation lacks any instruction that is on point for a particular matter.[84] The crime of aggression has been recognized by the United States in the

[83] *Paquete Habana*, 175 U.S. 677, 700 (1900).

[84] *See Paquete Habana*, 175 U.S. at 690-701.

Nuremberg Charter,[85] the International Military Tribunal for the Far East,[86] the Kellogg-Briand Pact,[87] the United Nations Charter,[88] and United Nations General Assembly Resolution 3314.[89]

145. The crime of aggression is a violation of international law that rests "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." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). The crime of aggression was the chief crime prosecuted at Nuremberg and is the "supreme international crime." The Nuremberg Tribunal rejected Nazi attempts to claim vagueness with respect to the specific, definitive, and obligatory nature of this crime.

146. Plaintiff is aware of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) in which the United States Supreme Court held in a 5-4 decision that the President of the United States possesses immunity in civil court for actions taken pursuant to his official duties as President. Plaintiff submits that *Nixon* is distinguishable in this case in that the plan to invade Iraq commenced prior to the President taking office. Plaintiff further submits that *Nixon* is distinguishable in that she alleges violations of accepted customary norms of international law. Plaintiff submits that *Nixon* does not prohibit a cause of action against the President or any other Executive official who engages in behavior considered reprehensible in a civilized society, such as torture, crimes against humanity, or the crime of aggression. To the extent that *Nixon* stands for the proposition that the person holding the office of

---

[85] Charter of the Int'l Military Tribunal, art. 6(b) (1945) (hereinafter Nuremberg Charter).

[86] Charter of the Int'l Military Tribunal for the Far East, art. 5(a) (1946) (hereinafter Tokyo Charter).

[87] General Treaty for the Renunciation of War as an Instrument of National Policy, arts. 1-2 (August 27, 1928) (hereinafter Kellogg-Briand Pact).

[88] The Charter of the United Nations, art. 2(4) (1945).

[89] *See* G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (XXIX) (Dec. 14, 1974).

President cannot be held civilly liable for violations of accepted customary norms of international law – such as torture, crimes against humanity or the crime of aggression – then Plaintiff submits that *Nixon* is wrongly decided and in direct contravention of accepted principles of the common law, particularly the principle that rulers are "under God and the law."

147. Defendants, by engaging in the crime of aggression, were the but-for and proximate cause of Plaintiff's damages (and others like her) in the form of property loss, physical pain, shame, humiliation, degradation and emotional stress, entitling her to damages in an amount to be determined at trial.

148. In light of Defendants' willful, knowing and intentional violations of law against Plaintiff and others like her, and in light of their reckless and callous indifference to the impact their actions would have on innocent Iraqi civilians, their breach of international peace, their deception and fraud to the democratic polity which elected them, and their reprehensible and cowardice use of a terrorist attack to commit the crime of aggression against another a country that posed no threat to the United States, endangering the United States armed forces and millions of Iraqi civilians for their own malicious purposes, Plaintiff and others like her seek an award of punitive and exemplary damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants on all alleged claims, as follows:

1. For an order finding that Defendants conspired to, planned and committed the crime of aggression against Iraq.

2. For an award of compensatory damages against Defendants in an amount sufficient to compensate Plaintiff and all members of the Iraq Civilian Victims' Class for damages they sustained as a result of Defendants' illegal actions in planning and mounting a war of aggression against Iraq.

3. To the extent that Defendants' assets do not cover damages of the Iraq Civilian Victims' Class, that Defendants set up, manage and obtain other funding at their expense a restitution fund to provide for proper compensation to any and all Iraqi civilians who were damaged because of Defendants' commission of the crime of aggression against Iraq.

4. For an award of exemplary and punitive damages against Defendants in an amount sufficient to punish and set an example of them in their unconscionable conduct in planning and committing the crime of aggression against another country, in violation of international treaties and assurances.

5. For an order awarding Plaintiff's costs of suit, including litigation expenses (such as costs for depositions and experts), photocopying expenses, and filing fees in an amount which this Court deems just, equitable and proper. Counsel for Plaintiff has no financial interest tied to the outcome of this litigation and is not charging fees for representing the Plaintiff and the proposed class.

6. Such other and further relief as the Court deems just, equitable and proper.

TRIAL BY JURY DEMANDED

Pursuant to Federal Rule of Civil Procedure 38 and Civil Local Rule 3-6, Plaintiff hereby demands a jury trial on all issues so triable.

Dated: September 10, 2013 COMAR LAW

By___/s/ Inder Comar_________________
D. Inder Comar
Attorney for Lead Plaintiff

EXHIBIT A

TOP SECRET 2:40

Resume Statement:

N.R.

Best info fact
~~judge whether good enough~~
judge whether
Hit SH @ same time -
Not only UBL

Tasks Jim Haynes to talk w/ PW
for additional support v/v US's &
connection w/ UBL

N.R., (b)(1)

- Hard to get a good case

- Need to move swiftly -

- Near term target needs —
- So massive - sweep it all up
- Things related & not

need to do so
to get anything
useful

TOP SE...

(6)

EXHIBIT B

page 1 of 3

UNCLASSIFIED

~~TOP SECRET CLOSE HOLD~~

November 27, 2001

- Focus on WMD.
- Slices (building momentum for regime change): might not have to go all the way

b(1) 1.4(a), 1.4(c)

  - WMD sites.
  - Seize or destroy offensive missile sites (factories, deployed systems).
  - Seize or destroy Republican Guards.
  - b(1) 1.4(a), 1.4(c) Do in advance?
  - Oil fields in south.
  - Oil fields in north.
  - Seize western desert:
    - Secure Jordanian border,
    - Prevent SCUD missile launches (against Israel).
  - Deploy ground forces in western desert or south of Baghdad:
    - Threaten Baghdad.
    - Force Republican Guards to move and present targets.
  - Cut off Baghdad:
    - Prevent movement of WMD materials.
    - Pressure on regime.
  - Protect Provisional Government, north or south.
  - Regime change.

★ what order to create likelihood of collapse?

★ → what do forces do coming out of Afghanistan?

- How start?
  - Saddam moves against Kurds in north?
  - US discovers Saddam connection to Sept. 11 attack or to anthrax attacks?
  - Dispute over WMD inspections?
    - Start now thinking about inspection demands.
- Surprise, speed, shock and risk. — Power communications, etc.
  - Do *not* reduce footprint now.
  - Be ready to strike from a standing start.

People hate him -- may want to take him out.

Enhance current footprint.

Start military action before moving into place all the force Republican Guards that would be required in the worst case. Larger forces flow in behind.

- Decapitation of government.
  - Do early.
  - Cut off communications too – including television and radio.

~~TOP SECRET CLOSE HOLD~~

UNCLASSIFIED

EXHIBIT C

Bin Ladin Determined To Strike in US

Clandestine, foreign government, and media reports indicate Bin Ladin since 1997 has wanted to conduct terrorist attacks in the US. Bin Ladin implied in US television interviews in 1997 and 1998 that his followers would follow the example of World Trade Center bomber Ramzi Yousef and "bring the fighting to America."

After US missile strikes on his base in Afghanistan in 1998, Bin Ladin told followers he wanted to retaliate in Washington, according to a [redacted] service.

An Egyptian Islamic Jihad (EIJ) operative told an [redacted] service at the same time that Bin Ladin was planning to exploit the operative's access to the US to mount a terrorist strike.

The millennium plotting in Canada in 1999 may have been part of Bin Ladin's first serious attempt to implement a terrorist strike in the US. Convicted plotter Ahmed Ressam has told the FBI that he conceived the idea to attack Los Angeles International Airport himself, but that Bin Ladin lieutenant Abu Zubaydah encouraged him and helped facilitate the operation. Ressam also said that in 1998 Abu Zubaydah was planning his own US attack.

Ressam says Bin Ladin was aware of the Los Angeles operation.

Although Bin Ladin has not succeeded, his attacks against the US Embassies in Kenya and Tanzania in 1998 demonstrate that he prepares operations years in advance and is not deterred by setbacks. Bin Ladin associates surveilled our Embassies in Nairobi and Dar es Salaam as early as 1993, and some members of the Nairobi cell planning the bombings were arrested and deported in 1997.

Al-Qa'ida members—including some who are US citizens—have resided in or traveled to the US for years, and the group apparently maintains a support structure that could aid attacks. Two al-Qa'ida members found guilty in the conspiracy to bomb our Embassies in East Africa were US citizens, and a senior EIJ member lived in California in the mid-1990s.

A clandestine source said in 1998 that a Bin Ladin cell in New York was recruiting Muslim-American youth for attacks.

We have not been able to corroborate some of the more sensational threat reporting, such as that from a [redacted] service in 1998 saying that Bin Ladin wanted to hijack a US aircraft to gain the release of "Blind Shaykh" 'Umar 'Abd al-Rahman and other US-held extremists.

continued

Declassified and Approved
for Release, 10 April 2004

— Nevertheless, FBI information since that time indicates patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York.

The FBI is conducting approximately 70 full field investigations throughout the US that it considers Bin Ladin-related. CIA and the FBI are investigating a call to our Embassy in the UAE in May saying that a group of Bin Ladin supporters was in the US planning attacks with explosives.

EXHIBIT D

SECRET AND STRICTLY PERSONAL - UK EYES ONLY

DAVID MANNING
From: Matthew Rycroft
Date: 23 July 2002
S 195 /02

cc: Defence Secretary, Foreign Secretary, Attorney-General, Sir Richard Wilson, John Scarlett, Francis Richards, CDS, C, Jonathan Powell, Sally Morgan, Alastair Campbell

IRAQ: PRIME MINISTER'S MEETING, 23 JULY

Copy addressees and you met the Prime Minister on 23 July to discuss Iraq.

This record is extremely sensitive. No further copies should be made. It should be shown only to those with a genuine need to know its contents.

John Scarlett summarised the intelligence and latest JIC assessment. Saddam's regime was tough and based on extreme fear. The only way to overthrow it was likely to be by massive military action. Saddam was worried and expected an attack, probably by air and land, but he was not convinced that it would be immediate or overwhelming. His regime expected their neighbours to line up with the US. Saddam knew that regular army morale was poor. Real support for Saddam among the public was probably narrowly based.

C reported on his recent talks in Washington. There was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy. The NSC had no patience with the UN route, and no enthusiasm for publishing material on the Iraqi regime's record. There was little discussion in Washington of the aftermath after military action.

CDS said that military planners would brief CENTCOM on 1-2 August, Rumsfeld on 3 August and Bush on 4 August.

The two broad US options were:

(a) Generated Start. A slow build-up of 250,000 US troops, a short (72 hour) air campaign, then a move up to Baghdad from the south. Lead time of 90 days (30 days preparation plus 60 days deployment to Kuwait).

(b) Running Start. Use forces already in theatre (3 x 6,000), continuous air campaign, initiated by an Iraqi casus belli. Total lead time of 60 days with the air campaign beginning even earlier. A hazardous option.

The US saw the UK (and Kuwait) as essential, with basing in Diego Garcia and Cyprus critical for either option. Turkey and other Gulf states were also important, but less vital. The three main options for UK involvement were:

(i) Basing in Diego Garcia and Cyprus, plus three SF squadrons.

(ii) As above, with maritime and air assets in addition.

(iii) As above, plus a land contribution of up to 40,000, perhaps with a discrete role in Northern Iraq entering from Turkey, tying down two Iraqi divisions.

The Defence Secretary said that the US had already begun “spikes of activity” to put pressure on the regime. No decisions had been taken, but he thought the most likely timing in US minds for military action to begin was January, with the timeline beginning 30 days before the US Congressional elections.

The Foreign Secretary said he would discuss this with Colin Powell this week. It seemed clear that Bush had made up his mind to take military action, even if the timing was not yet decided. But the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran. We should work up a plan for an ultimatum to Saddam to allow back in the UN weapons inspectors. This would also help with the legal justification for the use of force.

The Attorney-General said that the desire for regime change was not a legal base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or UNSC authorisation. The first and second could not be the base in this case. Relying on UNSCR 1205 of three years ago would be difficult. The situation might of course change.

The Prime Minister said that it would make a big difference politically and legally if Saddam refused to allow in the UN inspectors. Regime change and WMD were linked in the sense that it was the regime that was producing the WMD. There were different strategies for dealing with Libya and Iran. If the political context were right, people would support regime change. The two key issues were whether the military plan worked and whether we had the political strategy to give the military plan the space to work.

On the first, CDS said that we did not know yet if the US battleplan was workable. The military were continuing to ask lots of questions.

For instance, what were the consequences, if Saddam used WMD on day one, or if Baghdad did not collapse and urban warfighting began? You said that Saddam could also use his WMD on Kuwait. Or on Israel, added the Defence Secretary.

The Foreign Secretary thought the US would not go ahead with a military plan unless convinced that it was a winning strategy. On this, US and UK interests converged. But on the political strategy, there could be US/UK differences. Despite US resistance, we should explore discreetly the ultimatum. Saddam would continue to play hard-ball with the UN.

John Scarlett assessed that Saddam would allow the inspectors back in only when he thought the threat of military action was real.

The Defence Secretary said that if the Prime Minister wanted UK military involvement, he would need to decide this early. He cautioned that many in the US did not think it worth going down the ultimatum route. It would be important for the Prime Minister to set out the political context to Bush.

Conclusions:

(a) We should work on the assumption that the UK would take part in any military action. But we needed a fuller picture of US planning before we could take any firm decisions. CDS should tell the US military that we were considering a range of options.

(b) The Prime Minister would revert on the question of whether funds could be spent in preparation for this operation.

(c) CDS would send the Prime Minister full details of the proposed military campaign and possible UK contributions by the end of the week.

(d) The Foreign Secretary would send the Prime Minister the background on the UN inspectors, and discreetly work up the ultimatum to Saddam.

He would also send the Prime Minister advice on the positions of countries in the region especially Turkey, and of the key EU member states.

(e) John Scarlett would send the Prime Minister a full intelligence update.

(f) We must not ignore the legal issues: the Attorney-General would consider legal advice with FCO/MOD legal advisers.

(I have written separately to commission this follow-up work.)

MATTHEW RYCROFT

EXHIBIT E

CONFIDENTIAL AND PERSONAL

PR.121

FROM: P F RICKETTS
POLITICAL DIRECTOR

DATE: 22 MARCH 2002

CC: PUS

SECRETARY OF STATE

IRAQ: ADVICE FOR THE PRIME MINISTER

1 You invited thoughts for your personal note to the Prime Minister covering the official advice (we have put up a draft minute separately). Here are mine.

2 By sharing Bush's broad objective[1] the Prime Minister can help shape how it is defined, and the approach to achieving it. In the process, he can bring home to Bush some of the realities which will be less evident from Washington. He can help Bush make good decisions by telling him things his own machine probably isn't.

3 By broad support for the objective brings two real problems which need discussing.

4 First, the THREAT. The truth is that what has changed is not the pace of Saddam Hussein's WMD programmes, but our tolerance of them post-11 September. This is not something we need to be defensive about, but attempts to claim otherwise publicly will increase scepticism about our case. I am relieved that you decided to postpone publication of the unclassified document. My meeting yesterday showed that there is more work to do to ensuer that the figures are accurate and consistent with those of the US. But even the best survey of Iraq's WMD programmes will not show much advance in recent years ont he nuclear, missile or CW/BW fronts: the programmes are extremely worrying but have not, as far as we know,[1] been stepped up.

5 US scrambling to establish a link between Iraq and Al Aaida is so far frankly unconvincing. To get public and Parliamentary support for military operations, we have to be convincing that:

- the threat is so serious/imminent that it is worth sending our troops to die for;

- it is qualitatively different from the threat posed by other proliferators who are closer to achieving nuclear capability (including Iran).

CONFIDENTIAL AND PERSONAL

We can make the case on qualitative difference (only Iraq has attacked a neighbour" used CW and fired missiles against Israel). The overall strategy needs to include re-doubled efforts to tackle other proliferators, including Iran, in other ways (the UK/French ideas on greater IAEA activity are helpful here). But we are still left with a problem of bringing public opinion to accept the imminence of a threat from Iraq. This is something the Prime Minister and President need to have a frank discussion about.

6 The second problem is the END STATE. Military operations need clear and compelling military objectives. For Kosovo" it was: Serbs out, Kosovars back" peace-keepers in. For Afghanistan, destroying the Taleban and Al Qaida military capability. For Iraq, "regime change" does not stack up. It sounds like a grudge between Bush and Saddam. Much better, as you have suggested, to make the objective ending the threat to the international community from Iraqi WMD before Saddam uses it or gives it to terrorists. This is at once easier to justify in terms of international law" but also more demanding. Regime change which produced another Sunni General still in charge of an active Iraqi WMD programme would be a bad outcome (not least because it would be almost impossible to maintain UN sanctions on a new leader who came in promising a fresh start). As with the fight against UBL, Bush would do well to de"personalise the objective" focus on elimination of WMD, and show that he is serious about UN Inspectors as the first choice means of achieving that (it is win/win for him: either Saddam against all the odds allows Inspectors to operate freely" in which case we can further hobble his WMD programmes, or he blocks/hinders, and we are on stronger ground for switching to other methods).

7 Defining the end state in this way, and working through the UN, will of course also help maintain a degree of support among the Europeans, and therefore fits with another major message which the Prime Minister will watn to get across: the importance of positioning Iraq as a problem for the inernational community as a whole" not just for the US.

PETER RICKETS

CONFIDENTIAL AND PERSONAL

ADRMOP,APPEAL,CLOSED,E-Filing

U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:13-cv-01124-JST

Saleh v. Bush et al
Assigned to: Hon. Jon S. Tigar
Demand: $0
Case in other court: USCA #15-15098
Cause: 28:1331 Fed. Question

Date Filed: 03/13/2013
Date Terminated: 12/19/2014
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Sundus Shaker Saleh
on behalf of herself & those similarly situated

represented by **Dave Inder Comar**
Comar Law
901 Mission Street, Suite 105
San Francisco, CA 94103
415-640-5856
Fax: 415-513-0445
Email: inder@comarlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

George W. Bush

represented by **Glenn Stewart Greene**
United States Department of Justice, Civil Division
Constitutional & Specialized Tort Litigation
P.O. Box 7146, Ben Franklin Station
Washington, DC 20044
202-616-4143
Fax: 202-616-4314
Email: glenn.greene@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Richard B. Cheney

represented by **Glenn Stewart Greene**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Donald H. Rumsfeld represented by **Glenn Stewart Greene**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Condoleezza Rice represented by **Glenn Stewart Greene**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Colin L. Powell represented by **Glenn Stewart Greene**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Paul M. Wolfowitz represented by **Glenn Stewart Greene**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

The United States represented by **Glenn Stewart Greene**
U.S. Department of Justice, Torts Branch,
Civl Division
P.O. Box 7146
Ben Franklin Station
Washington, DC 20044
2026164143
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/13/2013	1	CLASS ACTION COMPLAINT for Conspiracy to Commit Aggression, and The Crime of Aggression & Demand for Jury Trial - [No Summons Issued] against George W. Bush, Richard B. Cheney, Colin L. Powell, Condoleezza Rice, Donald H. Rumsfeld & Paul M. Wolfowitz, [Filing Fee: $350.00, receipt number 34611084105] Filed byPlaintiff Sundus Shaker Saleh. (Attachments: #(1) Civil Cover Sheet)(tn, COURT STAFF) (Filed on 3/13/2013) (Entered: 03/14/2013)
03/13/2013	2	ADR SCHEDULING ORDER: Joint Case Management Statement due 6/12/2013 & InitialCase Management Conference set for 6/19/2013 at 2:00 PM.. (tn, COURT STAFF) (Filed on 3/13/2013) (Entered: 03/14/2013)

03/13/2013	3	CONSENT/DECLINATION to Proceed Before a United States Magistrate Judge filedby Plaintiff Sundus Shaker Saleh. (tn, COURT STAFF) (Filed on 3/13/2013) (Entered: 03/14/2013)
03/13/2013		CASE DESIGNATED for Electronic Filing. (tn, COURT STAFF) (Entered: 03/14/2013)
05/09/2013	4	Summons Issued as to Defendants George W. Bush, Richard B. Cheney, Colin L. Powell, Condoleezza Rice, Donald H. Rumsfeld & Paul M. Wolfowitz. (tn, COURT STAFF) (Filed on 5/9/2013) (Entered: 05/10/2013)
05/29/2013	5	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Attachments: # 1 Certificate/Proof of Service)(Comar, Dave) (Filed on 5/29/2013) (Entered: 05/29/2013)
05/29/2013	6	NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Attachments: # 1 Certificate/Proof of Service)(Comar, Dave) (Filed on 5/29/2013) (Entered: 05/29/2013)
06/11/2013	7	NOTICE of Appearance by Glenn Stewart Greene (Greene, Glenn) (Filed on 6/11/2013) (Entered: 06/11/2013)
06/11/2013	8	STIPULATION WITH [PROPOSED] ORDER re 2 ADR Scheduling Order; *Stipulated Request to Continue Initial Case Management Conference and Associated Deadlines* filed by George W. Bush, Richard B. Cheney, Colin L. Powell, Condoleezza Rice, Sundus Shaker Saleh. (Attachments: #(1) [Proposed] Order)(Greene, Glenn) (Filed on 6/11/2013) (Entered: 06/11/2013)
06/12/2013	9	Consent MOTION to Appear by Telephone filed by George W. Bush, Richard B. Cheney, Colin L. Powell, Condoleezza Rice. (Attachments: #(1) [Proposed] Order) (Greene, Glenn) (Filed on 6/12/2013) (Entered: 06/12/2013)
06/13/2013	10	**ORDER CONTINUING CASE MANAGEMENT CONFERENCE AND ASSOCIATED DEADLINES by Judge Jon S. Tigar granting 8 Stipulation; denying as moot 9 Motion to Appear by Telephone. (wsn, COURT STAFF) (Filed on 6/13/2013) (Entered: 06/13/2013)**
06/13/2013		Set Deadlines/Hearings: Dispositve Motion due by 8/20/2013. Response due by 10/21/2013. Reply due by 11/20/2013. (wsn, COURT STAFF) (Filed on 6/13/2013) (Entered: 06/13/2013)
06/18/2013	11	CERTIFICATE OF SERVICE by Sundus Shaker Saleh *of summons on Condoleezza Rice, PhD* (Comar, Dave) (Filed on 6/18/2013) (Entered: 06/18/2013)
06/18/2013	12	CERTIFICATE OF SERVICE by Sundus Shaker Saleh *of summons on Colin Powell* (Comar, Dave) (Filed on 6/18/2013) (Entered: 06/18/2013)
06/18/2013	13	CERTIFICATE OF SERVICE by Sundus Shaker Saleh *of summons on George W. Bush* (Comar, Dave) (Filed on 6/18/2013) (Entered: 06/18/2013)
06/18/2013	14	Certificate of Interested Parties filed by Sundus Shaker Saleh (Attachments: #(1) Certificate/Proof of Service)(Comar, Dave) (Filed on 6/18/2013) (Entered: 06/18/2013)
06/26/2013	15	CERTIFICATE OF SERVICE by Sundus Shaker Saleh *of summons on Paul Wolfowitz PhD* (Comar, Dave) (Filed on 6/26/2013) (Entered: 06/26/2013)

06/26/2013	16	CERTIFICATE OF SERVICE by Sundus Shaker Saleh *of summons on Donald Rumsfeld* (Comar, Dave) (Filed on 6/26/2013) (Entered: 06/26/2013)
06/26/2013	17	CERTIFICATE OF SERVICE by Sundus Shaker Saleh *of summons on Richard Cheney* (Comar, Dave) (Filed on 6/26/2013) (Entered: 06/26/2013)
06/26/2013	18	CERTIFICATE OF SERVICE by Sundus Shaker Saleh *on US Attorney and Department of Justice* (Comar, Dave) (Filed on 6/26/2013) (Entered: 06/26/2013)
08/20/2013	19	NOTICE filed by The United States of *Notice of Substitution of the United States as Sole Defendant* (Attachments: #(1) Exhibit Certification of Scope of Employment, #(2) [Proposed] Order)(Greene, Glenn) (Filed on 8/20/2013) (Entered: 08/20/2013)
08/20/2013	20	MOTION to Dismiss filed by The United States. Motion Hearing set for 12/12/2013 02:00 PM in Courtroom 9, 19th Floor, San Francisco before Hon. Jon S. Tigar. Responses due by 10/21/2013. Replies due by 11/20/2013. (Attachments: # 1 Proposed Order)(Greene, Glenn) (Filed on 8/20/2013) (Entered: 08/20/2013)
08/20/2013	21	NOTICE of Appearance by Glenn Stewart Greene (Greene, Glenn) (Filed on 8/20/2013) (Entered: 08/20/2013)
09/04/2013	22	CLERK'S NOTICE Advancing Time of Motion Hearing as to 20 MOTION to Dismiss. The Motion Hearing previously noticed for for 12/12/2013 at 2:00 PM is ADVANCED to begin at **9:30 AM** in Courtroom 9, 19th Floor, San Francisco before Hon. Jon S. Tigar. The date of the hearing remains the same. *This is a text only entry. There is no document associated with this notice*. (wsn, COURT STAFF) (Filed on 9/4/2013) (Entered: 09/04/2013)
09/06/2013	23	STIPULATION WITH [PROPOSED] ORDER; *Stipulated Request for an Order Regarding Briefing Deadlines* filed by Sundus Shaker Saleh. (Attachments: #(1) Certificate/Proof of Service)(Comar, Dave) (Filed on 9/6/2013) (Entered: 09/06/2013)
09/06/2013	24	**STIPULATION AND ORDER re 23 STIPULATION WITH PROPOSED ORDER Regarding Briefing Deadlines filed by Sundus Shaker Saleh. Motions terminated as moot: 20 MOTION to Dismiss filed by The United States. Signed by Judge Jon S. Tigar on September 6, 2013. (wsn, COURT STAFF) (Filed on 9/6/2013) (Entered: 09/06/2013)**
09/06/2013		Set Deadlines/Hearings: Amended Complaint due by 9/10/2013. Dispositve Motion due by 11/13/2013. (wsn, COURT STAFF) (Filed on 9/6/2013) (Entered: 09/06/2013)
09/10/2013	25	AMENDED COMPLAINT *For Conspiracy To Commit Aggression; And The Crime Of Aggression* against All Defendants. Filed bySundus Shaker Saleh. (Attachments: # 1 Certificate/Proof of Service)(Comar, Dave) (Filed on 9/10/2013) (Entered: 09/10/2013)
10/18/2013	26	STIPULATION WITH [PROPOSED] ORDER *Re: Enlargement of Briefing Deadlines* filed by George W. Bush, Richard B. Cheney, Colin L. Powell, Condoleezza Rice, Donald H. Rumsfeld, Paul M. Wolfowitz. (Attachments: #(1) [Proposed] Order) (Greene, Glenn) (Filed on 10/18/2013) (Entered: 10/18/2013)
10/18/2013	27	**STIPULATION AND ORDER re 26 STIPULATION WITH PROPOSED ORDER**

		Re: Enlargement of Briefing Deadlines filed by Richard B. Cheney, Paul M. Wolfowitz, Condoleezza Rice, Donald H. Rumsfeld, Colin L. Powell, George W. Bush. Signed by Judge Jon S. Tigar on October 18, 2013. (wsn, COURT STAFF) (Filed on 10/18/2013) (Entered: 10/18/2013)
10/18/2013		Set Deadlines/Hearings: Dispositve Motion due by 11/29/2013. (wsn, COURT STAFF) (Filed on 10/18/2013) (Entered: 10/18/2013)
10/18/2013		Set/Reset Deadlines: Responses due by 1/29/2014. Replies due by 2/28/2014. (wsn, COURT STAFF) (Filed on 10/18/2013) (Entered: 10/18/2013)
11/29/2013	28	NOTICE by The United States *Notice of Substitution of the United States as Sole Defendant* (Attachments: # 1 Exhibit Scope Certification, # 2 Proposed Order)(Greene, Glenn) (Filed on 11/29/2013) (Entered: 11/29/2013)
11/29/2013	29	MOTION to Dismiss filed by The United States. Motion Hearing set for 4/3/2014 02:00 PM in Courtroom 9, 19th Floor, San Francisco before Hon. Jon S. Tigar. Responses due by 1/29/2014. Replies due by 2/28/2014. (Attachments: # 1 Proposed Order)(Greene, Glenn) (Filed on 11/29/2013) (Entered: 11/29/2013)
11/29/2013	30	NOTICE by The United States *Notice of Substitution of the United States as Sole Defendant* (Attachments: # 1 Exhibit Scope Certification, # 2 Proposed Order)(Greene, Glenn) (Filed on 11/29/2013) (Entered: 11/29/2013)
11/29/2013	31	MOTION to Dismiss filed by The United States. Motion Hearing set for 4/3/2014 02:00 PM in Courtroom 9, 19th Floor, San Francisco before Hon. Jon S. Tigar. Responses due by 1/29/2014. Replies due by 2/28/2014. (Attachments: # 1 Proposed Order)(Greene, Glenn) (Filed on 11/29/2013) (Entered: 11/29/2013)
01/29/2014	32	RESPONSE (re 31 MOTION to Dismiss) *to United States' Motion to Dismiss* filed bySundus Shaker Saleh. (Attachments: # 1 Proposed Order, # 2 Certificate/Proof of Service, # 3 Declaration)(Comar, Dave) (Filed on 1/29/2014) (Entered: 01/29/2014)
02/28/2014	33	REPLY (re 29 MOTION to Dismiss , 31 MOTION to Dismiss) filed byThe United States. (Greene, Glenn) (Filed on 2/28/2014) (Entered: 02/28/2014)
03/25/2014	34	**ORDER VACATING HEARING re 29 MOTION to Dismiss filed by The United States, 31 MOTION to Dismiss filed by The United States. Signed by Judge Jon S. Tigar on March 25, 2014. (wsn, COURT STAFF) (Filed on 3/25/2014) (Entered: 03/25/2014)**
05/19/2014	35	**ORDER GRANTING MOTION TO DISMISS by Judge Jon S. Tigar granting 29 Motion to Dismiss. (wsn, COURT STAFF) (Filed on 5/19/2014) (Entered: 05/20/2014)**
05/19/2014		Set Deadlines: Amended Pleadings due by 6/9/2014. (wsn, COURT STAFF) (Filed on 5/19/2014) (Entered: 05/20/2014)
05/20/2014	36	CLERK'S NOTICE SETTING CASE MANAGEMENT CONFERENCE. The Initial Case Management Conference is set for 8/27/2014 at 2:00 PM in Courtroom 9, 19th Floor, San Francisco. A Joint Case Management Statement is due by 8/13/2014. *This is a text only entry. There is no document associated with this notice*. (wsn, COURT

		STAFF) (Filed on 5/20/2014) (Entered: 05/20/2014)
06/08/2014	37	AMENDED COMPLAINT *(second) by Plaintiff* against All Defendants. Filed bySundus Shaker Saleh. (Attachments: # 1 Certificate/Proof of Service)(Comar, Dave) (Filed on 6/8/2014) (Entered: 06/08/2014)
06/09/2014	38	MOTION for Hearing *pursuant to Osborn v. Haley in support of Second Amended Complaint* filed by Sundus Shaker Saleh. (Attachments: # 1 Proposed Order, # 2 Certificate/Proof of Service)(Comar, Dave) (Filed on 6/9/2014) (Entered: 06/09/2014)
06/17/2014	39	STIPULATION WITH [PROPOSED] ORDER re 38 MOTION for Hearing *pursuant to Osborn v. Haley in support of Second Amended Complaint*; -*STIPULATED Request for an Order Enlarging Briefing Deadlines* filed by George W. Bush, Richard B. Cheney, Colin L. Powell, Condoleezza Rice, Donald H. Rumsfeld, Paul M. Wolfowitz. (Attachments: #(1) Proposed Order)(Greene, Glenn) (Filed on 6/17/2014) (Entered: 06/17/2014)
06/20/2014	40	**STIPULATION AND ORDER re 39 STIPULATION WITH PROPOSED ORDER re 38 MOTION for Hearing *pursuant to Osborn v. Haley in support of Second Amended Complaint* filed by Richard B. Cheney, Paul M. Wolfowitz, Condoleezza Rice, Donald H. Rumsfeld, Colin L. Powell, George W. Bush. Signed by Judge Jon S. Tigar on June 20, 2014. (wsn, COURT STAFF) (Filed on 6/20/2014) (Entered: 06/20/2014)**
06/20/2014	41	CLERK'S NOTICE CONTINUING CASE MANAGEMENT CONFERENCE. The Initial Case Management Conference previously set for 8/27/2014 is CONTINUED to **10/29/2014 at 2:00 PM** in Courtroom 9, 19th Floor, San Francisco. The Joint Case Management Statement is due by 10/15/2014. *This is a text only entry. There is no document associated with this notice*. (wsn, COURT STAFF) (Filed on 6/20/2014) (Entered: 06/20/2014)
06/23/2014	42	NOTICE filed by The United States of *Notice of Substitution of The United States as Sole Defendant on Counts I and II* (Attachments: #(1) Exhibit Scope Certification, #(2) [Proposed] Order)(Greene, Glenn) (Filed on 6/23/2014) (Entered: 06/23/2014)
06/23/2014	43	MOTION to Dismiss filed by The United States. Motion Hearing set for 9/11/2014 02:00 PM in Courtroom 9, 19th Floor, San Francisco before Hon. Jon S. Tigar. Responses due by 7/7/2014. Replies due by 7/14/2014. (Attachments: # 1 Proposed Order)(Greene, Glenn) (Filed on 6/23/2014) (Entered: 06/23/2014)
06/30/2014	44	STIPULATION WITH [PROPOSED] ORDER; -*Stipulated Request for an Order Regarding Briefing Deadlines* filed by Sundus Shaker Saleh. (Attachments: #(1) Proposed Order, #(2) Certificate/Proof of Service)(Comar, Dave) (Filed on 6/30/2014) (Entered: 06/30/2014)
07/02/2014	45	**Order Granting Stipulated Request for Enlargement of Briefing Schedule** The parties' stipulated request for enlargement of the briefing schedule, ECF No. 44, is GRANTED. The parties' briefs shall be due as set forth in their stipulation. (Entered by Judge Jon S. Tigar) (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 07/02/2014)

07/07/2014	46	RESPONSE to (re 38 MOTION for Hearing *pursuant to Osborn v. Haley in support of Second Amended Complaint*) filed by The United States. (Greene, Glenn) (Filed on 7/7/2014) (Entered: 07/07/2014)
07/21/2014	47	RESPONSE to (re 43 MOTION to Dismiss) filed by Sundus Shaker Saleh. (Attachments: #(1) Proposed Order, #(2) Certificate/Proof of Service) (Comar, Dave) (Filed on 7/21/2014) (Entered: 07/21/2014)
07/21/2014	48	REPLY (re 38 MOTION for Hearing *pursuant to Osborn v. Haley in support of Second Amended Complaint*) filed bySundus Shaker Saleh. (Attachments: # 1 Certificate/Proof of Service)(Comar, Dave) (Filed on 7/21/2014) (Entered: 07/21/2014)
08/15/2014	49	REPLY (re 43 MOTION to Dismiss) filed byThe United States. (Greene, Glenn) (Filed on 8/15/2014) (Entered: 08/15/2014)
08/15/2014	50	STIPULATION WITH PROPOSED ORDER re 43 MOTION to Dismiss , 41 Clerks Notice, filed by George W. Bush, Richard B. Cheney, Colin L. Powell, Condoleezza Rice, Donald H. Rumsfeld, The United States, Paul M. Wolfowitz. (Attachments: # 1 Proposed Order)(Greene, Glenn) (Filed on 8/15/2014) (Entered: 08/15/2014)
08/18/2014	51	**STIPULATION AND ORDER re 50 STIPULATION WITH PROPOSED ORDER re 43 MOTION to Dismiss , filed by Richard B. Cheney, Paul M. Wolfowitz, Condoleezza Rice, Donald H. Rumsfeld, The United States, Colin L. Powell, George W. Bush. Motion Hearing set for 11/13/2014 at 2:00 PM in Courtroom 9, 19th Floor, San Francisco before Hon. Jon S. Tigar. Signed by Judge Jon S. Tigar on August 28, 2014. (wsn, COURT STAFF) (Filed on 8/18/2014) (Entered: 08/18/2014)**
11/03/2014	52	**ORDER VACATING MOTION HEARING re 43 MOTION to Dismiss filed by The United States; 38 MOTION for Hearing *pursuant to Osborn v. Haley in support of Second Amended Complaint* filed by Sundus Shaker Saleh. Signed by Judge Jon S. Tigar on November 3, 2014. (wsn, COURT STAFF) (Filed on 11/3/2014) (Entered: 11/03/2014)**
12/19/2014	53	**ORDER DENYING PLAINTIFF'S MOTION FOR AN EVIDENTIARY HEARING AND GRANTING DEFENDANTS' MOTION TO DISMISS by Judge Jon S. Tigar denying 38 Motion for Hearing; granting 43 Motion to Dismiss. (wsn, COURT STAFF) (Filed on 12/19/2014) (Entered: 12/19/2014)**
01/16/2015	54	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Sundus Shaker Saleh. (Appeal Fee of $505.00, receipt number 0971-9217773 paid) (Attachments: #(1) Certificate/Proof of Service)(Comar, Dave) (Filed on 1/16/2015) (Entered: 01/16/2015)
01/28/2015	55	USCA Case Number 15-15098 for re 54 Notice of Appeal filed by Sundus Shaker Saleh. (tnS) (Filed on 1/28/2015) (Entered: 01/28/2015)
02/10/2015	56	Transcript Designation Form (Comar, Dave) (Filed on 2/10/2015) (Entered: 02/10/2015)

PACER Service Center			
Transaction Receipt			
05/20/2015 11:43:53			
PACER Login:	inderc505:3709100:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:13-cv-01124-JST
Billable Pages:	6	**Cost:**	0.60