CASE 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,
Judge Jon S. Tigar, Case No. 3:13-cv-01124 JST

AMICUS CURIAE BRIEF BY LAWYERS FOR INTERNATIONAL LAW IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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IDENTITY, INTEREST AND AUTHORITY OF *AMICI CURIAE*

Counsel for the defendants has graciously consented to permit this brief to be filed. The amicus curiae (Lawyers for International Law) are United States and foreign lawyers or law teachers with expertise in United State and international law. They have all represented or worked with victims of the use of force against Iraq. They include Mr. Ramsey Clark, the 66th Attorney-General of the United States and a New York attorney; Mr. Abdeen Jabara, a former Michigan attorney and former president of the American-Arab Anti-Discrimination Committee and former president of the Association of American Arab University Graduates; Ms. Jeanne Mirer, president of the International Association of Democratic Lawyers, co-chair of the International Committee of the National Lawyers Guild, and founding Board Member of the International Commission for Labour Rights, and a New York Attorney; Professor Marjorie Cohn, former president of the National Lawyers Guild, Professor of Law at Thomas Jefferson Law School; Mr. Arno Develay, French *avocat* and a Washington State attorney; Mr. Paul Wolf, a Colorado and District of Columbia attorney; Dr. Margaretha Wewerinke, Lecturer in Law, University of the South Pacific and President, International-Lawyers.Org; and Dr. Curtis F.J. Doebbler, visiting Professor of International Law at Webster University Geneva and the Geneva School of Diplomacy and International Relations, and a District of Columbia attorney.

STATEMENT OF COMPLIANCE PURSUANT TO FRAP 29(c)(5)

Counsel for the parties did not author this brief. Neither the parties nor their counsel have contributed money intended to fund preparing or submitting the brief. No person – other than Amici, their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief. Attorney Wallingford is representing the amici pro bono publico.

ARGUMENT

Summary

(I) International law is part of the law of the United States both according to the Constitution of the United States and the law decided by the United States Supreme Court and therefore should be applied by all Federal Courts.

(II) International law prohibits the crime of aggression under both treaty and customary international law as a non-derogable norm.

(III) Acts of aggression that violate international law are actionable under the Alien Torts Statute and incur individual responsibility.

(IV) The Westfall Act should not be construed as providing immunity for the crime of aggression. The Defendant-Appellees committed or contributed to the crime of aggression knowing, or, when they should have known, that their actions would constitute the crime of aggression, cannot be construed as falling within the terms of their employment. Moreover, as a matter of policy the United States cannot allow persons who have committed the international crime of aggression to go unpunished, or for these plaintiffs to be denied a remedy. To allow the defendants to be immunized for these acts is to grant them impunity for their crimes and add to a culture of impunity. Fostering a culture of impunity is a slippery slope to a lawless world.

The Amici therefore urge the Court to allow the Plaintiff-Appellants to be able to proceed to prove that the Defendant-Appellees committed unlawful acts that injured them.

I. INTERNATIONAL LAW IS PART OF THE LAW OF THE UNITED STATES AND SHOULD BE APPLIED BY ALL FEDERAL COURTS

Article VI, Clause 2, of the Constitution of the United States makes treaties entered into by the United States "the supreme Law of the Land." Customary international law is equally part of United States law and should be ascertained and applied by the Court. The United States Supreme Court has long held that although "[t]he most certain guide . . . [to the applicable international law] is a treaty or a statute . . . when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is . . . ." *Hilton v. Guyot*, 159 *U.S.* 113, 163 (1895). Mr. Justice Horace Gray, delivering the Opinion of the United States Supreme Court stated that "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination." *Id*.

A US Court may and should apply customary international law as mandated by the Constitution of the United States and by the United States Supreme Court.

II. INTERNATIONAL LAW PROHIBITS THE CRIME OF AGGRESSION

Treaties ratified by the United States as well as customary international law, which has achieved the status of *jus cogens*, prohibit the crime of aggression.

The United States contributed significantly to the initiation of the International Criminal Tribunal at Nuremberg by ratifying the London Agreement, August 8, 1945, 58 Stat. 1544; 82 *U.N.T.S.* 280, establishing the Tribunal to which the Charter of the International Criminal Tribunal is annexed. I *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 14 November 1945-1 October 1946, at p. 8. Article 6, paragraph (a), of the Charter expressly defines as crimes falling under the jurisdiction of the Tribunal "[c]rimes against [p]eace: namely, 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 any of the foregoing . . . ." *Id*. p. 11.

The United States also ratified, after initiating, the Treaty between the United States and other Powers providing for the Renunciation of War as an Instrument of National Policy, August 27, 1928, 94 *L.N.T.S.* 57, by which States "solemnly declare in the names of their respective peoples that they 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." *Id*. at art. 1.

The United States also ratified the Anti-War Treaty of Non-Aggression and Conciliation, 4 *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers* 4793, S. 134, 75th Cong., 3rd Sess. (1938), which entered into force for the United States on November 13, 1935, and which states in article 1 that its State Parties "solemnly declare that they condemn wars of aggression in their mutual relations or in those with other states, and that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law." The United States ratified the Inter-American Treaty of Reciprocal Assistance, September 2, 1947, 21 *U.N.T.S.* 324, by which States, in article 1, "formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations . . . ." The United States also ratified the Montevideo Convention on Rights and Duties of States, 999 *U.N.T.S.* 171 (1933), article 8 of which declares that "[n]o state has the right to intervene in the internal or external affairs of another . . ." and its article 11 establishes

> as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective

> coercive measure … [and] … that [t]he territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

Finally, the prohibition of the crime of aggression is supported by the Charter of the United Nations that prohibits, in its article 2, paragraph 4, the threat or use of force by one State against another State except where it has been authorized by the United Nations or where a State has been the subject of an actual armed attack, but neither exception applies to the aggression against the people of Iraq. United States ratified the Charter of the United Nations on July 28, 1945 and was one of the founding nations of this intergovernmental organization.

These legally binding treaties have been supplemented by numerous resolutions and declarations on which the United States has expressly joined the consensus. For example, the United States voted in favor of United Nations G.A. Res. 380(V), U.N. GAOR, 5th Sess., 308 plenary meeting (Nov. 17, 1950), that states in its first operative paragraph that "any aggression … is the gravest of all crimes against peace and security throughout the world." Subsequently, the United States joined the consensus on the United Nations G.A. Res. 3314(XXIX), 29th Sess. 2302 plenary meeting, (Dec. 14, 1974), which was adopted without a vote to which the "Definition of Aggression" was annexed. This definition had been

repeatedly vetted by legal experts including the General Assembly's own Sixth Committee on Legal Affairs. The Definition of Aggression in United Nations G.A. Res. 3314 states definitively in its article 5, paragraph 2, that a "[a] war of aggression is a crime against international peace."

The United States also joined the unanimous consensus in adopting the United Nations G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, (Oct. 24, 1970) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations," which states unambiguously that "[a] war of aggression constitutes a crime against the peace, for which there is responsibility under international law." This resolution is expressly intended to reiterate existing rules of international law.

In its hemisphere's regional context, the United States supported the resolution of the Sixth International Conference of American States held from January 16 to February 20, 1928, in Havana, Cuba, condemning aggression and stating that a "war of aggression constitutes an international crime against the human species."

The United Nations principal judicial body, the International Court of Justice, refers to the statements of government representatives as expressing the belief that the prohibition of aggression is "not only a principle of customary

international law but also a fundamental or cardinal principle of such law." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, *I.C.J. Reports* 1986, p. 14 at p. 100, para. 188. The United States government had conceded that "it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is … an embodiment of existing general principles of international law," *id*. quoted by the Court at p. 99, para. 187, and that "the provisions of Article 2(4) with respect to the lawfulness of the use of force are 'modern customary law'." *Id*. The Court then duly notes that as concerns the prohibition of aggression that "[t]he United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a 'universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of *jus cogens*'." *Id*. at p. 101, para. 190.

Before the International Military Tribunal established at Nuremberg after World War II, the American Prosecutor and later Justice of the United States Supreme Court, Mr. Robert H. Jackson, argued "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." II *Trial of the Major War Criminals before the International Military Tribunal* 98-155

(1947) at p. 149. Justice Jackson in his "Report to the President on the Atrocities and War Crimes," (June 6, 1945) *reprinted at* p. 40, 53 of the *Report of Robert Jackson United State Representative to the International Conference on Military Trials*, London, 1945, states that "a war of aggression is a crime, and … modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business."

The International Military Tribunal itself confirmed that "[t]o initiate a war of aggression … 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." *Nuremberg Trial Proceedings*, vol. 22, 30 September 1946 at p. 426. Subsequently, the United States joined in the unanimous adoption of United Nations General Assembly Resolution 95(I) of December 11, 1946, entitled "Affirmation of the Principles of International Law recognized by the Charter of the Nüremberg Tribunal," that reaffirms the principles of international law recognized by the Charter and judgment of the Nuremberg Tribunal.

It is relevant to note that the United States' concerns about the inclusion of the crime of aggression in the Rome Statute of the International Criminal Court, July 17, 1998, 2187 *U.N.T.S.* 3, in article 8bis were related to its application of this crime by the International Criminal Court and not directed at the substantive

existence of the crime of aggression, which the aforementioned sources undeniably show has been supported by the *opinio juris* and practice of United States.

This is supported by the United States Supreme Court's recognition of the jurisdiction of the United States courts over the crime of aggression by implication in numerous cases, including in the often-cited *Ex Parte Qurin*, 317 U.S. 1 (1942), in which Justice Learned Hand writing the opinion for Court stated that "[f]rom the very beginning of history, this Court has recognized and applied the law of war as including that part of the law of nations . . . of war, the status, rights and duties of enemy nations as well as enemy individuals." *Id*. at 27-28. Indeed, 18 U.S. Code §2381, PL. 114-9 punishes as treason the levying of war or support for violence against the United States as a federal crime.

The crime of aggression is widely recognized under international law and the United States government has repeatedly supported the position that the crime of aggression is prohibited by international law. The courts of the United States should therefore recognize the crime of aggression as part of international law.

III. ACTS OF AGGRESSION THAT VIOLATE INTERNATIONAL LAW ARE ACTIONABLE UNDER THE ALIEN TORT ACT

Although the Alien Tort Statute is domestic law, whenever possible it should be interpreted consistent with international law in accordance with the Supreme Court's holding in *Murray v. The Schooner Charming Betsey*, 6 *U.S.* 64 (*2 Cranch*)

(1804).

The Alien Tort Statute was intended to create a cause of action for foreign nationals who were injured by acts falling under the jurisdiction of the American courts. Recently in *Abdullahi, et al, v. Pfizer*, Inc., (2nd Cir. 2009), 562 *F.3d* 163, 174, the United States Court of Appeals for the Second Circuit held that a norm for which the Alien Tort Statute can apply "(1) is a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) is defined with a specificity …; and (3) is of mutual concern to States." In *Abdullalhi* the court found involuntary experimentation on individuals to be prohibited finding the three questions above to be answered affirmatively on the basis of treaties to which the United States has consented by ratification and under customary international that was proven by the practices and *opinio juris* as identified by such bodies as the Nuremberg Tribunals. (*Id*. at 175-187). The *Abdullahi* Court of Appeals also took into consideration acts by the United States finding that the United States "government actively attempts to prevent this practice in foreign countries." (*Id*. at 187) In the present case the evidence of the principle of law preventing aggression as an international crime that can be committed by individuals is even more overwhelming than the evidence of the prohibition of involuntary experimentation on human beings.

The international law prohibiting the crime of aggression provides for the

individual responsibility of any person who commits, aids, or abettor before the fact, during the fact, or after the fact, the crime of aggression. The subjective knowledge of the defendant is not needed, but is assumed where objective circumstances indicate that any person committing an act of aggression knew or should have known that they were acting contrary to international law. *United States v. Altstoetter*, 4 *Law Reports of Trials of War Criminals*, Case No. 35, 1, 88 (U.N. War Crimes Commission) (1948). The subjective culpability of the Defendants-Appellees can therefore not function as a bar to their individual responsibility.

As indicated in Section II above, international law unambiguously prohibits aggression as an international crime thus the violation of the prohibition of aggression creates a cause of action under the Alien Torts Statute.

IV. THE WESTFALL ACT SHOULD NOT BE INTERPRETED TO PROVIDE IMPUNITY FOR THE CRIME OF AGGRESSION

The Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679 (1988), should not be interpreted to provide Defendants-Appellees impunity when there is *prima facie* evidence that the crime of aggression has been committed.

The authority of the United States President rests on Article II of the Constitution of the United States, which in the relevant part of its §3 states that "he

shall take Care that the Laws be faithfully executed." These laws include the treaties and customary international laws that are part and parcel of United States law, as indicated in Section I above. In the *United States v. Schooner Peggy*, 5 *U.S. (1 Cranch)* 103, 110 (1801), Chief Justice John Marshall writing the opinion of the United States Supreme Court held that when the President acts contrary to international law his actions violate United States law.

As indicated in Section II above, the rules of international law unambiguously prohibit the use of force by the United States against any nation that has not carried out an armed attack against the United States. An individual who directs or participates as a senior official in such a use of force, commits a crime against peace or the crime of aggression, as has been indicated in Section II above.

As concerns the use of force against the people of Iraq the Defendants-Appellees were, or should have been, aware of the relevant law. In the District Court the Plaintiff-Appellants proffered *prima facie* evidence that the Defendants-Appellees knew or should have known that their actions were unlawful under well-established international law that is part of United States law.

Consequently, the interpretation of any authorization for the Defendants-Appellees' actions must be consistent with the well-established international law that is part of United States law and prohibits the crime of aggression. For

example, Joint Congressional Resolution, 115 STAT. 224, P.L. 107-40 (September 18, 2001), adopted by the 107th Congress, must be interpreted as only authorizing the President and his senior officials to act in a manner that is consistent with international law. In fact there is no wording in P.L. 107-40 that suggests that Congress was expressly authorizing the President and his senior officials to act in violation of international law. It follows from *Murray v. The Schooner Charming Betsey*, 6 *U.S.* 64 (1804), that any authorization of action by the President and his senior officials in P.L. 107-40 must be interpreted in a manner that is consistent with international law.

Indeed, in this instance there were countless alternatives for action to which the President and his senior officials could have resorted that were consistent with international law. For example, the use of force could have been lawfully authorized by the United Nations, but it was not. Defendants-Appellees instead resorted to action that was in clear violation of international law.

In this circumstance, the Attorney-General erred in certifying that the Defendants-Appellees "were each acting within the scope of their federal office of employment," Certification of Scope of Employment issued by the US Justice Department on August 14, 2013. The commission of such a serious crime as the crime of aggression cannot be construed to fall within the terms of Defendants-Appellees employment.

Finally, as an issue of policy, the courts' review of the legality of the action of the President and his senior officials ensures that the United States remains a country based on the rule of law where no one is above the law.

The International Military Tribunal warned of the dangerous policy consequences of asserting "that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning … for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." *Nuremberg Trial Proceedings*, vol. 22, 30 September 1946 at p. 444.

CONCLUSION

The crime of aggression is prohibited by international law and furnishes a cause of action for Plaintiffs-Appellants to bring their action. Therefore the Court should allow Plaintiffs-Appellants to proceed to prove that the crime of aggression has been committed in violation of international and United States law and that they are entitled to a remedy under the Alien Tort Statute.

RESPECTFULLY SUBMITTED this 1st day of June 2015.

By: /s/ JEROME PAUL WALLINGFORD

Attorney for Amici Curiae

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June 2, 2015 — Date

/s/ Jerome P. Wallingford — Attorney for Amici

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Case Number 15-15098

Saleh v. Bush

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