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.

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

AMICUS CURIAE BRIEF BY THE PLANETHOOD FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

Rajeev E. Ananda (SBN 302574)
260 Park Avenue South, #2G
New York, New York 10010
Email: rajeev.ananda@gmail.com

Attorney for Amicus Curiae The Planethood Foundation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* The Planethood Foundation states that it does not have any parent corporations, and no public company owns 10% or more of its stock.

Dated: June 2, 2015

By: /s/ Rajeev E. Ananda

Rajeev E. Ananda (SBN 302574)
260 Park Avenue South, #2G
New York, New York 10010
Email: rajeev.ananda@gmail.com

Attorney for Amicus Curiae The Planethood Foundation

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Planethood Foundation (the "Foundation") is a private foundation incorporated under Section 402 of the Not-for-Profit Corporation Law of the State of New York and qualified under Section 501(c)(3) of the Internal Revenue Code of the United States. It was established in 1996 by Benjamin B. Ferencz, the sole surviving Chief Prosecutor of the International Military Tribunal at Nuremberg (the "Nuremberg Tribunal"),[1] with the aim of helping replace the law of force with the force of law. The current directors of the Foundation are Benjamin Ferencz, his wife, Gertrude Ferencz, and his son, Donald Ferencz, currently a Visiting Professor at Middlesex University School of Law, in London, and Research Associate at the Oxford University Faculty of Law's Centre for Criminology. He writes and lectures regularly on the status of the illegal use of force within international law.

The Foundation is committed to helping to advance respect for, and enforcement of, laws pertaining, in particular, to international or transnational uses of armed force. The Foundations believes that the provisions of the U.N. Charter constraining the unauthorized use of force constitute customary international law, binding on all States, and that the precedents and principles established at

[1] Benjamin Ferencz was Chief Prosecutor in the U.S.-led case prosecuted subsequent to the International Military Tribunal under Control Council Law No. 10 against Otto Ohlendorf *et al.*, commonly referred to as the Einsatzgruppen Case, (*United States of America* vs *Otto Ohlendorf et a.l, Case No. 9*). A further description of his life's work may be found on his website, www.benferencz.org.

Nuremberg – if they are to serve the salutary purpose of deterring illegal uses of armed force in international affairs – should be given effect as broadly as possible.

Finally, the Foundation believes in the fundamental American commitment to the ideal that we are "a nation of laws and not of men", and that our respect for binding treaty obligations and well-established norms of conduct within the community of nations ought not be subverted by those in positions of power who, in the words of Justice Robert Jackson, "make deliberate and concerted use of it to set in motions evils which leave no home in the world untouched." It is our hope and our contention that those responsible for the most serious violations of our treaties and of "the law of nations" should know that the Alien Tort Statute, where appropriate, provides a portal by which their victims may justly seek a measure of relief for damages suffered.

This Amicus Curiae brief is intended to help shed light on the validity of this contention, and we respectfully request its consideration by the Court.

Counsel for all parties have consented to the filing of this brief.

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 the Amicus, its members, or its counsel – contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

The Alien Tort Statute ("ATS") states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, *committed in violation of the law of nations* or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

This brief argues:

1) That term "the law of nations", as construed within the meaning of the ATS, refers to customary international law;

2) That "Crimes against Peace," as that term was understood within the context of the Agreement and the judgment of the International Military Tribunal at Nuremberg, represents customary international law.

3) That the proscriptions on the threat or use of armed force set forth within the U.N. Charter represent customary international law. U.N. Charter art. 2, 39-51.

4) That the Kellogg-Briand Pact, General Treaty for the Renunciation of War as an Instrument of National Policy, 46 Stat. 2343 (1928), was a treaty in force between the United States and Iraq as High Contracting Parties, so as to bring its violation by the United States within the purview of the ATS. Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2002, The United States Department of State, p.454 (Aug.

2002); Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003, The United States Department of State, p.458 (June 2003).

I. The "Law of Nations" Forms the Basis for ATS Claims

The proper construction of the term "the law of nations" within the meaning of the ATS was considered by the United States Supreme Court in *Sosa v. Alvarez-Machain.* 542 U.S. 692 (2004). After a comprehensive review of the subject, the *Sosa* majority held as follows:

> Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.

Id. at 725.The Court's conclusion that the present-day "law of nations" could form the basis of ATS claims was reached over the rather colourful objection of Justice Scalia who, in his concurring opinion, wrote:

> In Benthamite terms, creating a federal command (federal common law) out of "international norms," and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.

Id. at 743. He added that:

> For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion

> approves that process in principle, though urging the lower courts to be more restrained.

Id. at 750.

That the term "the law of nations" may be equated with the term "customary international law" is clearly evidenced by the *Sosa* Court's consistent references to customary international law as the present-day benchmark to be considered for the establishment of potential claims asserted under the ATS. *Id.* at 728, 733, 735, 736, 737, 738, 739, 740, 743, 747, and 748.

II. The "Crimes Against Peace" Doctrine Represents Customary International Law

A. As Defined and Prosecuted at the Nuremberg Trials

The Nuremberg Charter was an annex and constituent part of the London Agreement, August 8, 1945, 82 UNTS 279, which formed the basis of the indictments at the International Military Tribunal at Nuremberg (the "IMT"). Charter Int'l Military Tribunal, art. 6(a), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279. It provided, in pertinent part, that:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> **(a)** CRIMES AGAINST PEACE: 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., art. 6.

Shortly thereafter, on December 20, 1945, for purposes of the Subsequent Proceedings which were to be prosecuted solely by the United States at Nuremberg, authorities representing the United States, the United Kingdom, France, and the Soviet Union enacted Control Council Number 10 "[i]n order to give effect to the terms of the... London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), available at https://www1.umn.edu/humanrts/instree/ccno10.htm (last visited June 1, 2015). Consistent with the terms of the London Charter, Control Council Law No. 10 reiterated the IMT definition of Crimes against Peace, defining the crime as:

> Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging 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., art. 2. The IMT rendered its judgment on October 1, 1946, holding twelve individuals within leadership positions in Nazi Germany guilty of Crimes Against Peace.

The IMT judgment cited numerous sources in support of the proposition that, even prior to the outbreak of World War II, acts subsumed within Crimes Against Peace had been established as a violation of customary international law despite criticism of this view.[2] The Kellogg-Briand Pact was prominent among the sources cited by the IMT in its judgment. In this regard, the Tribunal quoted the words of Henry L. Stimson who, as the Secretary of State of the United States, had unequivocally stated in 1932 that:

> 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 this general treaty law . . . We denounce them as law breakers.

22 Trial of the Major War Criminals Before the International Military Tribunal, 462 (Nuremberg: IMT, 1947), available at http://avalon.law.yale.edu/imt/09-30-46.asp (last visited on June 1, 2015). The judgment of the IMT famously articulated the view that "[t]o initiate a war of aggression, therefore, is not only an

[2] *See, e.g.*, George A. Finch, *The Nuremberg Trials and International Law*, 41 THE AM. J. OF INT'L L. 20 (1947); Quincy Wright, *The Law of the Nuremberg Trial*, 41 THE AM. J. OF INT'L L. 38 (1947).

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." *Id.* At 186.

B. The Nuremberg Principles as Customary International Law

Within a week of the IMT's judgment having been rendered, the Chief Counsel for the United States, Robert H. Jackson, on leave from his role as a Justice of the Supreme Court of the United States, issued a report to President Truman, on the import of the trial. His report emphasized that "[n]o one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction." Report to the President by Mr. Justice Jackson, October 7, 1946, at p.438 reproduced within Department of State Publication 3080 (1949).

Shortly thereafter, on October 23, 1946, Truman addressed the General Assembly of the United Nations, echoing Jackson's conclusion on this subject:

> I remind you that 23 members of the United Nations have bound themselves by the Charter of the Nuremberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as states shall be tried before the bar of international justice.[3]

[3] The complete transcript of his speech is available online at http://trumanlibrary.org/calendar/viewpapers.php?pid=914 (last visited on June 1, 2015).

This message was reiterated before the General Assembly, in even more explicit terms, a week later, by the U.S. Chief Delegate to the United Nations, Warren R. Austin:

> Besides being bound by the law of the United Nations Charter, twenty-three nations, members of this Assembly, including the United States, Soviet Russia, the United Kingdom and France, are also bound by the law of the Charter of the Nuremberg Tribunal. That makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished.

Quoted in Quincy Wright, *supra n.2*, at p.38.

On December 11, 1946, based on the initiative of the United States, the General Assembly of the United Nations considered and *unanimously* approved Resolution 95(I), formally affirming the principles of the Nuremberg Charter and judgment. G.A. Res. 95(I), A/RES/1/95 (Dec. 11, 1946).[4]

In 1947, the General Assembly adopted a resolution requesting the

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[4] The resolution stated, in pertinent part, that:

> *The General Assembly* . . . *Therefore*, *Affirms* the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal; Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal.

International Law Commission (the "ILC") to formulate the principles of law set forth in the Nuremberg Charter and judgment. G.A. Res. 177(II), (Nov. 21, 1947). Such formulation was developed and reported by the ILC in 1950, and included, in relevant part, the following principles:

> *Principle I*
>
> Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
>
> *Principle II*
>
> The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
>
> *Principle III*
>
> The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
>
> *Principle IV*
>
> The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
>
> *Principle V*
>
> Any person charged with a crime under international law has the right to a fair trial on the facts and law.
>
> *Principle VI*
>
> The crimes hereinafter set out are punishable as crimes under international law:
>
> *(a)* Crimes against peace:

> (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
>
> (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i). . . .
>
> *Principle VII*
>
> Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

2 Yearbook of the International Law Commission, Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, 374-78 (1950).

During the period that the ILC was engaged in the work of formulating the Nuremberg Principles, others within the Nazi leadership were being convicted of Crimes Against Peace by the Subsequent Proceedings, which were prosecuted by the United States. In *The Ministries Trial*, for example, the court, in convicting four defendants of Crimes Against Peace, stated:

> We hold that aggressive wars and invasions have, since time immemorial, been a violation of international law, even though specific sanctions were not provided.[5]

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[5] Although not cited by the court, in this respect it should be noted that in 1758, Emer de Vattel wrote, in his internationally well-known and well-respected treatise, *The Law of Nations*, that:

> Whoever therefore takes up arms without a lawful cause, can absolutely have no right whatever: every act of hostility that he commits is an act of injustice . . . He is chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and

United States v. von Weizsäcker et al., Military Tribunal XI, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1949).

Although Crimes Against Peace had not been prosecuted *prior* to Nuremberg, Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom, in his statement before the judges of the IMT, asked the rhetorical question, "[s]ince when has the civilized world accepted the principle that the temporary impunity of the criminal not only deprives the law of its binding force but legalizes his crime?" 19 Trial of the Major War Criminals Before the International Military Tribunal, 360 (Nuremberg: IMT, 1946). Having posed the question, Sir Shawcross went on to answer it:

> And you will notice, incidentally, that in the case both of the Japanese and Italian aggressions, the Council and the Assembly of the League of Nations denounced these acts as violations both of the Covenant and of the General Treaty for the Renunciation of War and that in

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(*continued*)

> his crimes. He is guilty of a crime against the enemy, whom he attacks, oppresses, and massacres without cause: he is guilty of a crime against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity, — against those of his subjects who are ruined or distressed by the war, — who lose their lives, their property, or their health, in consequence of it: *finally, he is guilty of a crime against mankind in general, whose peace he disturb*s, and to whom he sets a pernicious example.

EMER DE VATTEL, THE LAW OF NATIONS Book III, Chapter 11 ¶¶ 183-184 (Joseph Chitty trans., Liberty Fund, Inc. 2008) (1758) (emphasis added).

> both cases sanctions were decreed. *It may be that the policemen did not act as effectively as one could have wished them to act. But that was a failure of the policeman, not of the law*.

Id. (emphasis added).

Given the absence of a post-Nuremberg permanent international criminal court with jurisdiction to prosecute Crimes Against Peace, and given the veto-ability of the five permanent member of the U.N. Security Council, there have been no international criminal prosecutions for Crimes Against Peace since the Nuremberg Tribunal and the International Military Tribunal for the Far East (the "Tokyo Tribunal"). Regardless of the dearth of prosecutions for Crimes Against Peace, either before or after the Nuremberg and Tokyo Tribunals, various post-Nuremberg courts have affirmed that the principles of the Nuremberg Charter and judgment certainly represent customary international law: these include the judgment of the Supreme Court of Israel in the trial of Adolf Eichmann;[6] a high

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[6] The court stated:

> [I]f there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law 'since time immemorial,' such doubt has been removed by two international documents. We refer to the United Nations Assembly resolution of 11.12.46 which 'affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal, and the judgment of the Tribunal,' and also to the United Nations Assembly resolution of the same date, No. 96 (1) in which the Assembly 'affirms that genocide is a crime under international law'".

court judgment by the Law Lords of the United Kingdom (where the specific question of whether the crime of aggression exists in customary international law was a primary issue for consideration in the proceeding)[7]; a ruling of the European Court of Human rights;[8] and even the much-criticised trial of Saddam Hussein.[9]

(*continued*) *Attorney General of Israel v. Eichmann*, Supreme Court of Israel, 36 ILR 277 (1962).

[7] *R v. Jones [2006] UKHL 16* ¶ 59 ("If the core elements of the crime are certain enough to have secured convictions at Nuremberg, or to enable everyone to agree that it was committed by the Iraqi invasion of Kuwait, then it is in my opinion sufficiently defined to be a crime, whether in international or domestic law"); *see, e.g.*, the concurring opinion of Lord Mance:

> I agree in particular that there is under public international law a crime of aggression which is, as history confirms, sufficiently certain to be capable of being prosecuted in international tribunals.

Id. ¶ 99; *see also*, the concurring opinions of Lord Bingham of Cornhill, who stated, with respect to wars of aggression that:

> It may, I think, be doubtful whether such wars were recognised in customary international law as a crime when the 20th century began. But whether that be so or not, it seems to me clear that such a crime was recognised by the time the century ended.

Id. ¶ 12.

[8] *Kolk and Kislyiy v. Estonia*, Eur. Ct. H.R. Decision on Admissibility (Jan. 17, 2006) available at

http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72404#{"itemid":["001-72404"]} (last visited on June 1, 2015) (noting that "[a]lthough the Nuremberg Tribunal was established for trying the major war

III. The UN Charter's Proscription Against the Use of Force Is Customary International Law

In 1974, the U.N. General Assembly adopted Resolution 3314 by consensus, defining the crime of aggression. G.A. Res. 3314 (XXIX) (Dec. 14 1974). With regard to at least the component of this definition which echoes the definition of Crimes Against Peace pursuant to Control Council No. 10, that is, invasion, the International Court of Justice ("ICJ"), in what is commonly referred to as "the Nicaragua case," held that:

(*continued*) criminals of the European Axis countries for the offences they had committed before or during the Second World War… the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission.")

[9] *Judgment of the Dujail Trial at the Iraqi High Tribunal*, Case No. 1/C 1/2005, at p.27 (2005) available online at http://www.asser.nl/upload/documents/3272012_3403305-11-2006%20-%C2%A0Iraqi%20High%20Tribunal%20Judgement%C2%A0Saddam%20Hussein.pdf (last visited on June 1, 2015), wherein the Court referenced the Nuremberg precedent:

> According to the law and judicial criminal practice in effect or in conformity with international humanitarian law, this Tribunal is based on judicial precedents, namely the Nuremberg trials, whereby it is stipulated that "crimes against international law are perpetrated by individuals and not legal institutions." Furthermore, the Constitution of the "International Military Tribunal" does not recognize "the immunity enjoyed at any time by public figures who are criminals."

> In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "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" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), *may be taken to reflect customary international law.*

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 195 (June 27) (emphasis added).

There can be little doubt—particularly in light of the ICJ opinion in *Nicaragua*—that following the establishment of the United Nations, the unauthorized use of force in violation of the UN Charter may be seen as a violation of customary international law.

There, the court, after a thorough analysis of state practice and *opinio juris*, held that the prohibition on the use of armed force enshrined in Article 2.4 of the U.N. Charter[10] is clearly recognized at the highest levels within customary

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[10] Article 2 provides, *inter alia*, that:

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> 4. All Members shall 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 Nations.

international law, and that such law had been violated by the United States through its armed interference in the internal affairs of Nicaragua. *Nicar.* at ¶ 190. The Court observed that:

> A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."

Id. (citations omitted). Moreover, it went on to remind the parties that each of them had made submissions concurring with this conclusion:

> Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens",* The 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.

IV. The Kellogg-Briand Pact Was In Force in 2003

The Kellogg-Briand Pact, formally known as the "Treaty providing for the renunciation of war as an instrument of national policy," was signed at Paris on August 27, 1928, and entered into force on July 24, 1929. The United States was among the initial High Contracting Parties, and it ratified the treaty on January 15, 1929.[11]

During hearings before the Committee on Foreign Relations in December 1928, Secretary of State Frank Kellogg, observed, with respect to the British signing of the Pact, that such signing represented "*an absolute obligation not to go to war*; of course, subject to the right of self-defense that every country has." General Pact for the Renunciation of War, Signed at Paris, Hearings before the Committee on Foreign Relations, 70th Cong. (1928) (eemphasis added).

The Treaty provides, in pertinent part:

> **ARTICLE I**
>
> The High Contracting Parties 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.
>
> **ARTICLE II**

[11] It was overwhelmingly approved in the U.S. Senate by a vote of 85 in favor, and one opposed. *See* ROBERT H. FERRELL *PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND* PACT 252 (Yale University Press 1952).

> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.
>
> **ARTICLE III**
>
> The present treaty shall be ratified by the high contracting parties Named in the preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.
>
> This treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the treaty *shall immediately upon such deposit become effective* as between the Power thus adhering and the other Powers parties hereto.

46 Stat. 2343 arts. 1-3 (emphasis added).

Upon deposit of the Treaty's instruments of ratification in Washington, D.C. on July 24, 1929, the President of the United States signed the following statement:

> NOW THEREFORE, be it known that I, Herbert Hoover, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.
>
> IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed."

46 Stat. 2343.

The Kellogg-Briand Pact was a treaty in force in 2002 and 2003, which is when the acts giving rise to the Plaintiff-Appellant's claims in the instant

proceeding occurred. Further, according to published reports of the United States Department of State, the Treaty was in force in 2002 and 2003 between the United States and Iraq. *See* Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2002, 454 (The United States Department of State Aug. 2002); Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003, 458 (The United States Department of State June 2003).

As to the question of whether Kellogg-Briand may be cognizable as a treaty within the meaning of the ATS, in the U.S. Supreme Court recently declined to give extraterritorial effect to the ATS with respect to torts committed outside the U.S. by foreign corporations. *Kiobel v. Royal Dutch Shell Petroleum*, __ U.S. __, 133 S.Ct. 1659, 1663 (2013). *Kiobel* addressed a 1795 opinion by Attorney General William Bradford concerning a case in which several U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone. With respect to civil suits under the ATS, Bradford stated that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." *Id.* at 1667 (citation omitted).

The *Kiobel* majority declined to apply Bradford's reasoning to the case before it, which involved foreign nationals, noting "[w]hatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain." *Id.* However, for purposes of ATS suits against U.S. citizens for torts committed on foreign shores, which was the focus of Bradford's opinion and Plaintiff's-Appellant's claims in the pending appeal, Bradford concluded that there is "no doubt" of ATS jurisdiction. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795). Law Professor Douglass Cassell argues that "[t]he majority did not specifically address suits against U.S. citizens. If it had done so, only with difficulty could the majority have evaded the plain meaning of the Bradford opinion on this issue." Douglass Cassell, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1790 (2014); see also Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1612 (2014) (concluding that the ATS "originally encompassed claims by aliens against U.S. citizens (but only U.S. citizens) for any tort of violence against person or personal property, wherever committed").

CONCLUSION

For the reasons set forth above, we conclude that that term "the law of nations,"

as construed within the meaning of the ATS, refers to customary international law, and that, therefore, both "Crimes against Peace," the Nuremberg Principles, and the proscriptions against the threat or use of armed force set forth within the U.N. Charter, each form a part of the present-day "the law of nations," as that term is intended to be construed within the meaning of the ATS. Likewise, we conclude that the violation of the Kellogg-Briand Pact by U.S. citizens comes within the purview of the ATS.

Respectfully submitted,

Dated: June 2, 2015

By: /s/ Rajeev E. Ananda

Rajeev E. Ananda
Attorney for Amicus Curiae The Planethood Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I, the undersigned counsel, certify that this *Amicus Curiae* Brief by the Planethood Foundation is proportionally spaced, has a typeface of 14 points or more, and contains 5,339 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: June 2, 2015

By: /s/ Rajeev E. Ananda

Rajeev E. Ananda
Attorney for Amicus Curiae The Planethood Foundation