

Historic: California District Court Lawsuit against George W. Bush, et Al for “Crime of Aggression”

Where Do We Go From Here? On Saleh v. Bush, The Crime of Aggression, and Efforts to Criminalize War

By [Inder Comar](#)

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[Witness Iraq](#)

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In-depth Report: [IRAQ REPORT](#)

On April 18, 2015, Inder Comar, Esq. was invited to speak at the Kuala Lumpur Foundation to Criminalise War’s International Forum on Peace and Justice. He presented on the Saleh v. Bush case and its implications for international justice alongside diplomats, politicians, and war experts including Hans von Sponeck, the former UN Humanitarian Coordinator for Iraq, and Tun Dr. Mahathir Mohamed, the fourth Prime Minister of Malaysia.

[To listen to the speech, click here.](#) The text below has been edited for clarity.



Inder Comar, Esq. with (from left) Professor Gurdial Singh Nijar; Admiral Vishu Bhagawat; and John Philpot, Esq.

Thank you very much. Honored guests; Tun Dr. Mahathir Mohamed; Tun Dr. Siti Hamseh; thank you for the opportunity to speak about the lawsuit that I currently lead in the United States.

My topic is, “Where do we go from here?” So what I’d like to do is present a very small overview of the case, talk about where we are procedurally, then give some thoughts as to how the case that I’m leading could a model for actually using the theory of aggression, which came from Nuremberg, and implementing it not only in courts in the United States, but in courts all over the world.

The theme of my speech is basically that so much has already been done for us as partisans in the cause of peace, and a lot of that work was done more than sixty years ago at the [Tribunal in Nuremberg against the defeated Axis powers](#). With that as precedent, it’s quite amazing, actually, what might be possible, and a lot of where I’m coming from is as a student of Nuremberg, having learned about the Nuremberg case in law school, having studied it and read it now countless times, learning about [the crime of aggression](#) that was the chief crime prosecuted at Nuremberg.

So much has already been done, and I think that the challenge for us here, today, now, is to take that hard work and to move forward into new frontiers and to apply it in courts of law as we would with any other type of law.

SALEH V BUSH AND PRECEDENT FOR THE CRIME OF AGGRESSION

First, some brief background about the case. In 2013, my client [Sundus Shaker Saleh], who is an Iraqi refugee, [filed a lawsuit](#) in San Francisco, California, in the Northern District of California, which is a federal court, alleging the crime of aggression. The defendants in that case are the six highest ranking Bush administration officials: George W. Bush, Richard Cheney, Donald Rumsfeld, Condoleezza Rice, Colin Powell, and Paul Wolfowitz. So she is suing them in a civil case for her damages as a victim of the war, in much the same way that she would sue anybody for any cause of action.

To make it very simple, if George Bush had hit her in a car, for example, there would be no controversy that she could sue him if she were injured. It’s a similar type of claim that we’re making: his conduct and his actions caused her monetary damage and under the American system, she has a right to seek her [tort damages](#), her tort relief.

The basis of the lawsuit in the United States is a very old law dating from 1789, the first year of our republic, known as the [Alien Tort Claims Act](#). The first Congress in the United States passed this law to permit non-U.S. citizens—non-Americans—the ability to go to the United States courthouse and file claims against anybody for violations of international law. So you have to allege violations of international law in order to use this law.

For about 200 years, people have used this law for piracy cases, for example. More recently, in the 1970s and 1980s, people started to use the Alien Tort Claims Act for claims of torture or for claims of crimes against humanity.

In this case, we’ve alleged the “supreme crime,” the crime of aggression, as Ms. Saleh’s international law claim. What this suggests is that just as you could pursue a pirate under this law, or just as you could pursue a torturer under this law, you must be able to pursue those who commit the “supreme crime”—the crime of aggression. In this case, she’s

pursuing the six people who caused the Iraq War. As we know from Nuremberg, you don't get to sue the soldiers who committed the aggression: they're not responsible. The people who are responsible are the leaders who caused the aggression. And those are the people who are giving the orders, who are planning and executing these crimes.

We filed the lawsuit. The United States Department of Justice headed by President Obama moved to immunize these defendants soon thereafter. They requested that the federal court immunize them under domestic law, on the basis that these defendants were acting under the scope of their valid employment when they planned and waged the Iraq War.

We fought that certification for more than a year and a half. But unfortunately, [in December of last year, the District Court agreed that they were immune and immunized these defendants from further proceedings](#). We've since appealed that order, and right now that case is [on appeal in the Federal Court of Appeal for the Ninth Circuit in San Francisco](#).

At the end of next month, we're due to submit a brief arguing a very specific point of law on appeal: whether or not a domestic immunity applies to allegations of aggression.

Now for those of you who are familiar with Nuremberg, you may recall that this was the exact defense—or one of the defenses—raised by the German defendants. They argued that everything they had done was valid under German law and, as a result, they couldn't be held guilty for something like aggression.

One of the things that we'll be raising in our brief next month is that that issue was decided already at Nuremberg: domestic defendants do not get to raise that as a defense.

Similarly, we're going to be citing [the Pinochet case](#), which came down in the late 1990s from the British House of Lords, one of the most conservative legal bodies in the world. But even that legal body decided in 1997 that Pinochet was potentially liable. They said that Pinochet could not rely on his domestic immunity—which he claimed he had as a life-long senator of Chile—to avoid the charge of torture that was brought against him by the Spanish judge, Baltasar Garzón. We're going to be citing that as persuasive authority on this point.

Pinochet is a very critical case because this issue is, I think, the final wall when we talk about accountability of leaders: the ability for a leader to claim some type of immunity. Right? This is what has to be, I think, destroyed in our minds and destroyed in the minds of judges once and for all. Why should immunity apply merely because someone was acting as a leader, if the act in question was illegal? That's a key question.

In the last decade, many amazing lawyers [brought similar lawsuits against Donald Rumsfeld for torture](#). He was immunized under very similar theories, which I think was a very upsetting moment in modern U.S. legal discourse. What we have to do is challenge that, battle by battle, step by step, proceeding by proceeding.

WHAT'S NEXT? CONCRETE RECOMMENDATIONS FOR ACTION

So that's the background of the case, and what I'd like to do is move now onto concrete recommendations that, as someone who is fighting in a courtroom to make this happen, I would like to see.

When I brought this lawsuit, there was nothing institutional. If I was bringing a lawsuit about

electronic privacy, for example, or an environmental issue, or freedom of speech, there are institutions and organizations both in the United States and worldwide with databanks of research, with authority, with reputations, who would be willing to support that endeavor, and to help bring a concerted movement and unity and solidarity to those issues.

There doesn't exist anything like that for aggression, other than this foundation [the KLFCW]. This foundation is the first entity that's out there that has done a lot of the hard work in describing aggression, in gathering together the experts, in moving the legal research forward because the last case about aggression was more than sixty years ago, right? Other than [the Tokyo Trials and Nuremberg](#), there hasn't been any precedent set on aggression other than this 2012 judgment.

What I'd like to offer are some thoughts as to how we can take this battle now on the offensive and go into courthouses, go find venues where we can try and do our best. Ultimately, I think, we can convince judges that this is the law—and to not follow it would not only upset Nuremberg, it would validate the defenses made by the Nazi defendants, who argued that this type of law could never exist, that everything they did was completely legitimate, that they were simply following orders.

If those things don't give you a chill, they ought to, because these are the exact defenses that the government is making in my case: that everything these defendants did was valid, that the court shouldn't scrutinize war making, because war making is outside the scope of what the sovereign can be liable for.

This is a rehash of [Carl Schmitt's theory about the exceptional sovereign](#). Carl Schmitt, who was the philosopher for the National Socialists (or one of them), presented a view in one of his books called *The Concept of the Political* in which he argued the sovereign can act outside the law and doesn't have to be accountable to law, and that a valid sovereign has every right to act in an exceptional manner, even if it's counter to the constitution or the grounding law of that country.

That's the idea that we have to fight: that sovereigns or that individuals who become sovereigns can act outside the valid scope of what the laws permit. That was the philosophical basis of National Socialism, and that's something that needs to be really exorcised from judicial houses and from politics altogether.

In terms of where we go from here, I want to propose a concept that comes from Ancient Rome. In Ancient Rome, the senators, who were very ambitious, would battle for power amongst each other in order to gain influence in the Senate so that they could have more fame and glory. The term they came up for that was something called [auctoritas](#) in Latin. The modern English word "authority" comes from that, but *auctoritas* in Latin meant something more: it meant the ability to charm people and governments and judges and anybody to listen to what you had to say.

For example, [in the famous battle between Pompey and Caesar](#) [at Pharsalus], both of whom were extremely accomplished generals who had conquered vast territories and subdued many enemies of Rome, there was a valid question between many of those Romans: who would they follow? Who had the greater *auctoritas*? That would enable them to command the Senate, to raise legions, and to ultimately fight for dominance in Rome.

We can take the principle and apply it to the idea space. What we need to think about is,

how can we raise the *auctoritas* of this idea of aggression and the liability of people who commit aggression?

One of the battles that I have in an American courthouse is to convince judges that *this is what the law is*. Let me give you an example: If I were to file an intellectual property case, a trademark case, which I do a lot for clients, I don't have to tell the judge what the law is, because the judge has seen this a thousand times. The judge knows the law—I just have to display what the facts are and why I'm right.

When I'm bringing this case about aggression there's an additional battle, because I have to unearth 60 years of history to educate a judge who probably has never heard about the Nuremberg court. I have to tell them why Nuremberg is relevant, why Nuremberg is important, and that takes up half my brief. It's already an uphill battle when half of my pleading has to be done on this educational effort.

That's what we need to create, as people who are committed to the idea of peace and committed to the idea that aggression is criminal: We have to create that backdrop already, so that when a judge receives a legal complaint that alleges aggression, there's no homework that we have to do. The judge already understands the language that we're talking about. The judge already understands Nuremberg—remembers Nuremberg, remembers the principles about Nuremberg: Wars of aggression are not merely illegal, they are *criminal*. These are the holdings of Nuremberg, and under U.S. law, those are binding norms (that's binding law that comes in as a common law element).

HOW CAN INTERNATIONAL ORGANIZATIONS HELP?

I would argue for three different things that international organizations can do to help me and lawyers like me in this fight to criminalize aggression.

The first is what I would the proactive litigation approach. I think it's time that organizations committed to peace join the litigators and step foot into court. And it's time to actually take the battle into the legal courthouses. Just like with any type of litigation there are going to be battles that we're going to lose. There's going to be motions that we're going to lose; there are going to be courts who aren't going to like us. But fundamentally, there are going to be things that we can do and that we can win.

It's time, for example, that we reach out to those professors out there who are writing about these subjects and ask them to give us legal research, to put together amicus briefs. One of the things that I've noted is that many international courts permit the filing of amicus briefs: The International Criminal Court, for example, permits the filing of amicus briefs. The European Court of Human Rights permits the filing of amicus briefs. The domestic courts in the United States permit the filing of amicus briefs. This is the way we educate the judges, by providing them with briefs and memoranda of law from distinguished panelists and legal researchers from all over the world, to identify what it is about aggression that exists and what aggression is, basically.

One of the things I think we can be doing is finding out what those venues are, where those courts are, what the rules are, and just begin submitting briefs wherever we can. Even if the clerk reads it and not the court, someone needs to be taught what these rules are. We have a giant education gap that we have to fill. That's something we can immediately do: start putting all this amazing research into a legal pleading and submitting that to courts

wherever we can find them.

The second thing I would propose would be direct outreach efforts. What I mean by that is that we have to make aggression a topic of conversation around the world, not just in courthouses, but also with NGOs, and rights groups. What I think groups can start to do is follow and comment on other legislative efforts to criminalize aggression. Something that groups can do is to look at [the protocol to the ICC which will criminalize aggression as early as 2017](#), and follow and comment on implementation of that, and on other international efforts that could help, again, to educate people about aggression.

The third thing that I think groups can do is to finally support independent research. That's the great victory of [the 2012 case](#), which was based in part on aggression—to start moving the ball forward. Again, the last court case about aggression was more than 60 years ago. The international tribunals that have been founded since then—in Yugoslavia and Rwanda—specifically removed aggression; it was not part of their jurisdiction. So we haven't had judges or justices actually examine law in this area for more than 60 years.

We need to support independent research so that we can talk about what aggression is moving forward. We need to be able to talk about the legal bases of aggression that exist today and put it in the words of law, so that people like me can pull up those articles and cite that to the court to show that this is something that isn't dead—this concept of aggression is alive and well. It's never gone anywhere, and it's still part of our conversation.

I also think it would be interesting to think about successful groups like UNICEF, which has been amazing in bringing the conversation about the rights of children internationally. They have a very interesting approach where they have a master organization that is able then to create chapters all over the world, to raise awareness. Some of the efforts with children's clubs, for example, are amazing and might serve as a model for how we could directly increase the dialogue and conversation about aggression and criminalizing war.

This type of multi-faceted approach—litigation efforts, direct outreach, and independent research—this type of multi-prong, multi-level approach is the way we have to proceed. And we have to be willing to lose a few battles, because that's the only way these things happen. I've lost motions in this court; that doesn't mean I'm going to lose the issue altogether. It is a bit daunting, to be honest, but it's something I feel is important, and it's something that I think a lot of lawyers would feel is important.

CONCLUSION: "ENEMIES OF CIVILIZATION" AND THE FUTURE OF EFFORTS TO CRIMINALIZE WAR

Sometimes when I'm doing this case, I wonder if I'm crazy because there's no other research and no other resources out there about aggression. What grounds me is thinking about the Nuremberg case. I'm just pulling a lot of this stuff from Nuremberg. And my thought is that if this is what's holding Nuremberg together, then this has to apply in the U.S. court as well.

We have a concept, again from Rome, called the *hostis humani generis*: "enemies of civilization." What U.S. law recognizes is that pirates, for example, are *hostis humani generis*—they are enemies of civilization. Wherever pirates go, they destroy civilization. Our effort has to be to equate the people who commit aggression to pirates, to enemies of human civilization, because that's in fact what they do: they destroy civilizations elsewhere,

and then they destroy the civilization at home.

What we have to do is to equate that together, so that we can make those who commit aggression enemies of civilization in the same way that pirates are. We need to start using the same language. These concepts are there, they are all sitting there—we just need to do a better job at packaging this stuff and then presenting it to courts.

I'll conclude my talk on those points, but I'm actually very optimistic about the future. I think there is so much work that we can start to do immediately, starting today, that could have really amazing ramifications.

I know that the world is sick and tired of war. I know I certainly am, as an American, and I know that I'm not alone in that endeavor. I think the problem is that it's such a huge problem that it's easy to feel isolated, and it's easy to feel you can't make a difference. But that isn't true. Good, committed people together can make a really amazing and meaningful impact. The comments this morning about slavery are so true: it was just a small group of people—an incredibly small group of people—who decided that they didn't want to have slaves anymore as part of that civilized moment. That movement grew and took time, but today we acknowledge fundamentally that slavery is a horrible thing and shouldn't be permitted.

We live in a very dangerous time where the high watermarks of civilization are coming apart. We live in a time where torturers are allowed to walk free, without any sense of accountability. We live in a time where today, as we speak, there are civilizations—ancient civilizations—being destroyed by bombs and missiles without any sense of recourse, with blindness from the international community that's supposed to protect them.

We have to have faith in the fundamental precept that the pen is mightier than the sword. That together, we can make our efforts known through law, through research, through the courthouses. We can do it: Motion by motion, complaint by complaint, summons after summons, we can make this happen. But it's going to take a joint, concerted effort. It's going to take the ability to work together, which is the fundamental basis of any great movement. But I think if we can do those points and agree on a high level strategy, I am very optimistic that the world will join this movement, because it's time for it. It's time to put war aside and live under an international community and an international regime where we can all live together in peace.

Thank you very much.

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