No. 16-56704

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AHMET DOĞAN, individually and on behalf of his deceased son FURKAN DOĞAN; and HIKMET DOĞAN, individually and on behalf of her deceased son, FURKAN DOĞAN,

Plaintiffs-Appellants,

vs.

EHUD BARAK,

Defendant-Appellee.

On Appeal From the Judgment of the United States District Court
For the Central District of California
Case No. CV 15-08130-ODW (GJSx)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The basic facts of this case are undisputed. A foreign government official has overseen the brutal slaying of an unarmed United States citizen. The deceased, Furkan Doğan, did not receive even the rudiments of due process before he lost his life. His parents and survivors—Plaintiffs Ahmet and Hikmet Doğan—commenced this lawsuit against the responsible government official—Defendant Ehud Barak—once Defendant no longer served in the Israeli government and while he was visiting the United States on personal business.

On appeal Mr. Barak once again argues that he is immune from any claim under the Torture Victim Protection Act ("TVPA") and other federal laws even though the extrajudicial shooting and killing of Plaintiffs' son violates federal law and defies international norms. None of the arguments presented by Defendant or Amicus Curiae United States justify the dismissal of this lawsuit.

Defendant makes the overdramatic statement that Plaintiffs' appeal "asks the Court to do something no court has done in the nation's history." Appellees' Brief ("AB") 1. To the contrary, Defendant asks this Court to take the step unprecedented in this Circuit of immunizing a former foreign official for acts of torture and extrajudicial killing of an American citizen. No decision by this Court or the Supreme Court has ever granted immunity to a former foreign official for *jus cogens* violations. Indeed, this Court as well as every district court within this Circuit besides the court below has held that immunity is not appropriate in such circumstances. Outside this Circuit, the Fourth Circuit has held that immunity is unavailable for *jus cogens* violations while the Second Circuit concluded that the Executive can compel immunity even for these heinous acts.

While the level of deference courts owe an Executive branch suggestion of immunity for a former government official has never come before the Supreme Court or this Court, this Court has consistently treated Executive branch

suggestions as non-binding in related contexts. Out-of-circuit authorities similarly are split on the level of deference owed, and, as set forth in Plaintiffs' Opening Brief and the supporting briefs of amici curiae, the better view among them holds that Executive branch suggestions are not binding with regard to former foreign government officials who commit severe human rights abuses.

Immunity for former officials is also foreclosed by the TVPA. In 1991, Congress enacted the TVPA to hold to account individuals who perpetrate the scourges of torture and extrajudicial killing under color of law. Defendant now urges the Court to gut this statute. Under Defendant's construction of the TVPA, any current or former foreign government official could be made immune for acts of torture or extrajudicial killing visited upon an American citizen. If Defendant gets his way, the existing U.S. administration could dispose of the rights of victims and their survivors according only to its politically-driven whims, without any semblance of due process, and unchecked by any court. Under Defendant's view of the law, even in cases where the State Department does not speak, immunity would still be the rule unless the foreign government consented to the lawsuit proceeding against its former official. Taken together, these obstacles would provide foreign governments impunity to torture and murder American citizens. Such an intolerable outcome is the exact opposite of what Congress intended in passing the TVPA and is contrary to the law of this Circuit.

In tacit recognition of all the weaknesses of his immunity argument, Defendant urges affirmance of the judgment on the alternative grounds of the political question and act of state doctrines. The district court did not rule upon either doctrine. Both arguments fail. This case presents no political question because the statutes at issue provide manageable standards and commit resolution of such claims to the judiciary, and resolving these claims would not implicate any action by the political branches. Defendant's act of state argument is frivolous

because the law of this Circuit is that *jus cogens* violations can never be official acts of state.

Furkan Doğan was just 18-years-old when he was killed. By all accounts, this United States citizen did not fight with the Israeli soldiers; he merely filmed their seizure of the ship on which he had been traveling. Plaintiffs have legitimate claims against Mr. Barak for their son's death. This Court should reverse the judgment and reinstate all of Plaintiffs' claims against Mr. Barak.

II. ARGUMENT

A. The District Court's Absolute Deference to the Executive's Suggestion of Immunity for a Former Government Official Is Error

According to Defendant, the courts have recognized "for well over a century" the State Department's determinations of immunity are "binding" irrespective of the type of immunity involved, and thus compel the judiciary to surrender their jurisdiction. AB 16. This is not the law for claims against former government officials.

While Defendant cites to ten cases, AB 16 & n.5, neither of the Ninth Circuit cases involve suggestions of immunity at all. Moreover, *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), is a FSIA case, and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) involves only a state defendant. Of the remaining cases, one involves immunity for a state and its instrumentality,[1] two involve immunity for government-owned ships,[2] three involve grants of head-of-state immunity,[3] and in one no suggestion of immunity

[1] *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).
[2] *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (per curiam); *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).
[3] *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004); *Habyarimana v. Kagame*, 696 F.3d 1029 (10th Cir. 2012); *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (per curiam).

was filed and the defendant's claim of head-of-state immunity was denied.[4] This leaves just one case, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), where a court actually deferred to a State Department suggestion of immunity for a former government official. As set forth in Plaintiffs' Opening Brief, *Matar* is an outlier which relied on inapposite authorities and threadbare reasoning to conclude that the court must defer to the State Department's suggestion. Appellants' Opening Brief ("AOB") at 52-53. Significantly, Defendant makes no attempt to defend *Matar*'s legal analysis and instead attempts to characterize other authorities as support for a proposition that none of them even address. This Court has no reason to follow *Matar*.

In *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), the Fourth Circuit conducted a thorough analysis of the law and concluded that Executive suggestions regarding status-based immunities for sitting heads-of-state and diplomatic officials are entitled to deference as an "act of recognition" in the exercise of the Executive's Art. II, § 3 authority, but suggestions regarding conduct immunity for former officials do not control because they have no equivalent constitutional basis. This appeal concerns the conduct immunity of Mr. Barak, a former government official.

Defendant aims to discredit *Yousuf* with a litany of inaccurate and misleading statements. His assertion that *Yousuf*'s analysis of Art. II, § 3 has "never been so much as hinted at" in the past 200 years is not true: courts have repeatedly recognized this provision as the source of the Executive's power to grant status-based immunity. *See, e.g.*, *Weixum v. Xilia*, 568 F. Supp. 2d 35, 37 (D.D.C. 2008); *United States v. Benner*, 24 F. Cas. 1084, 1086 (C.C.E.D. Pa. 1830).

[4] *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

Defendant nonetheless insists that even conduct immunity involves "questions of recognition," inasmuch as the *Yousuf* court observed that the defendant was "a former official of a state with no currently recognized government." AB 25-26. Defendant misapprehends the act of "recognition." For status immunity to apply, the Executive must recognize not simply "that a particular regime is the effective government of a state," *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015), but also that a specific official is its head-of-state or diplomatic or consular agent. *Id.* at 2084-85 (recognition power includes "receiving diplomatic agents" which is "tantamount to recognizing the sovereignty of the sending state"); U.S. Const. art. II, § 3; *Yousuf*, 699 F.3d at 772; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, arts. 2, 4(1), 9(1), 43(b) (diplomatic status requires agreement of receiving state); Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, arts. 2(1), 4, 19(2), 23(1), 23(3), 25(c), 69(1), 71(2) (same as to consular status); Restatement (Third) of Foreign Relations Law (1986) §§ 464, 465 (diplomatic and consular agents must be "accepted by" the receiving state); *see also Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328, 1331 (11th Cir. 1984) ("[T]he State Department has the broad discretion to classify diplomats" and its views are deemed conclusive); *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984) (diplomatic immunity requires recognition of foreign state *and* the individual's diplomatic status); *City Sch. of Detroit v. Gov't of France*, No. 86-73666, 1988 U.S. Dist. LEXIS 18192, at *4 (E.D. Mich. Apr. 26, 1988) (consular immunity requires recognition of consular official). *Yousuf* did not implicate any such act of recognition because, like Mr. Barak, the defendant did not claim to be a sitting head-of-state or diplomatic official and the court did not recognize him as such.

Defendant asks this Court to disregard *Yousuf* on several other grounds. Each is incorrect. *First*, Defendant mistakenly asserts that *Samantar*'s citation to

Waltier v. Thomason, 189 F. Supp. 319, 320 (S.D.N.Y. 1960), and *Heaney v. Gov't of Spain*, 445 F.2d 501, 505 (2d Cir. 1971), demonstrates that the "two-step" process applied equally to conduct-immunity cases. AB 32-37. *Waltier*, 189 F. Supp. at 320, and *Heaney*, 445 F.2d at 502, 504, each concerned claims against a consular official. The *Samantar* Court pointed out that consular immunity, like diplomatic immunity, is a "position-based individual immunit[y]" based upon the individual's status. *Samantar v. Yousuf*, 560 U.S. 305, 319 n.12 (2010). The Court explained that this fact distinguishes the consular and diplomatic immunities applicable only to individuals occupying those specific positions from the general "official immunity" applicable to all other current and former officials. *Id.*; *see also* Restatement (Second) of Foreign Relations Law (1965) § 66 cmt. b (distinguishing between the "specialized immunities such as those of diplomatic and consular officials" and the more general immunity afforded "[p]ublic ministers, officials, or agents of a state"). That consular immunity does not cover all possible acts does nothing to change the fundamental point recognized by the Supreme Court that whether this immunity applies at all depends upon the threshold question of the individual's status. *Samantar*'s citation to *Waltier* and *Heaney* therefore does not blur the distinction between status and conduct immunity, nor does it support the application of absolute deference to Executive suggestions of immunity for former government officials like Barak in respect of their conduct.

Second, Defendant's argument that the *Samantar* Court's citation to *Peru* and *Hoffman* require deference here is equally lacking in merit. AB 21-22. Those two cases involved immunity only for foreign-owned ships, and not for foreign government officials (current or former). *Ex Parte Peru*, 318 U.S. 578, 580, 589 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 31, 38 (1945). Ships owned by foreign governments and "devoted to public use" are "a part of the

sovereignty." *Hoffman*, 324 U.S. at 37; *see also* AOB 34. In other words, these cases concern the state's immunity, not that of its officials. Different immunities apply to foreign states and foreign officials, and they yield different results. *Compare Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 497-98 (9th Cir. 1992) ("*Marcos Estate I*") (recognizing exception to the FSIA for official accused of torture) *with Siderman*, 965 F.2d at 718-19 (declining to recognize an exception to the FSIA for state accused of torture).

Third, the evolution of foreign sovereign immunity is entirely consistent with *Yousuf*. *Contra* AB 23-24. The theory of "restrictive" sovereign immunity set forth in the Tate Letter dealt only with whether the State Department should suggest immunity (yes for public acts, no for private ones), and not whether courts were required to acquiesce to its views. In fact, even the Tate Letter equivocated on this point, stating that "a shift in policy by the executive cannot control the courts," *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 (1976) (quoting the Tate Letter).

Fourth, Defendant's observation that the Supreme Court does not expressly identify the constitutional power at issue in its foreign vessel cases does not support his conclusion that the power is boundless and extends to every form of immunity. Defendant argues that "the vessel cases ground this deference requirement not in the Reception Clause but in the fact that the Executive Branch is 'charged with the conduct of foreign affairs.'" AB at 22. But the Supreme Court has held that the Executive's foreign affair powers is exclusive only with regard to the recognition power and does not include "the whole content of the Nation's foreign policy." *Zivotofsky*, 135 S. Ct.at 2087-90. Because the foreign affairs power is not boundless, it provides no basis for boundless application of the vessel cases to cases involving only conduct immunity for former officials.

Defendant plucks another quote out of context from *Zivotofsky* to suggest that "functional considerations" related to the Executive's recognition power require that it be left in control of determinations over *all* immunity questions because foreign countries require advance knowledge "whether their officials will be immune from suit in federal court." AB 26-27. Defendant has this backwards. Rendering all immunity determinations a purely political exercise subject to the momentary whims of the then-existing administration will eliminate any predictability as to whether a foreign government's officials will be subject to suit for actions committed years prior (and possibly, as here, under a different administration). By contrast, the neutral application of legal principles, as applied by *Yousuf* and as Plaintiffs urge in this case, provides predictability because officials know at the time of their actions the rules courts will later apply.

Defendant ultimately concedes, as he must, that the Supreme Court's decision in *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926), has never been overruled and is contrary to his argument that courts have followed an unbroken practice of absolute deference stretching back 100 years.[5] AB 30, 34. He therefore urges the Court to read this case narrowly as only permitting a court to allow an immunity the Executive would deny because the opposite proposition, "that a court could impose liability despite an Executive suggestion of immunity, has far graver implications for comity." AB 30. Courts have recognized that a grant of immunity can also have profound foreign policy repercussions. In *The Pesaro*,[6] the court denied immunity to a foreign ship, reasoning that to deprive parties their

[5] The fact that the State Department urged that the ship be denied immunity is set forth in a prior district court opinion. *See Yousuf*, 699 F.3d at 770-71 (citing *The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921)).

[6] This case involved the same ship as *Berizzi Bros.* but a different dispute, and was not overruled by the Supreme Court.

> well-established legal remedies . . . would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns[.]

277 F. 473, 481 (S.D.N.Y. 1921). Declining jurisdiction here would have negative foreign policy repercussions by placing the U.S. in violation of international law norms and treaties requiring accountability for human rights violators and remedies for victims, *see generally* Br. Rachel Corrie Foundation; Br. Int'l Law Scholars 16-17, 20-23 & nn.12-14.

Defendant's attempt to limit *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987), is even less availing. AB 30-31. In *Marcos*, the State Department urged immunity from subpoena for Philippine Solicitor General Ordonez on the basis of foreign sovereign immunity and head-of-state immunity. *Id.* at 796. The court treated the State Department's views as not binding and proceeded to conduct its own independent analysis, denying each immunity urged by the State Department but granting diplomatic immunity even though this was not raised in the State Department's suggestion. *Id.* at 796, 798-99. *Marcos* demonstrates that courts should apply their independent judgment as Plaintiffs urge here.

Notwithstanding these authorities, Defendant is unable to identify a single case in *any* context where this Court has granted absolute deference to the State Department. AB at 31-32. Defendant concedes that his position is contrary to this Court's precedents consistently declining to give the Executive's foreign policy views binding effect in human rights litigation, but seeks to distinguish them on the ground that none involve "subjecting a state to liability." AB 31-32. But neither does this case: Israel is not a defendant in this case and faces no liability because

Plaintiffs sue Defendant Barak in his personal capacity only, and seek damages from his own pocket.[7]

This principle is clearly set forth in the Restatement (Second). Section 66(f) provides that immunity for an official who is not a head-of-state or diplomatic official applies only "with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." (Emphasis added.) Defendant quotes selectively from the Restatement to suggest that the act of bringing a breach of contract suit against an official of state A "as an individual" triggers immunity. AB 33. But Defendant omits the remainder of that sentence, which states that the suit is "*seeking to compel him to apply certain funds of A* in his possession to satisfy obligations of A under the contract." Restatement (Second) §66(f) cmt. b, ill. 2. It is the payment of *government funds* (which Plaintiffs do not seek) that triggers immunity in this example.

Defendant asserts that *Samantar* rejected the rule set forth in §66(f) by not denying immunity even though Samantar had been sued in his personal capacity. AB 33-34. Nonsense. The *Samantar* Court expressly reserved the question of "[w]hether petitioner may be entitled to immunity under the common law . . . for the lower courts to address in the first instance." 560 U.S. at 325. On remand, the Fourth Circuit held that personal capacity suits against former foreign government officials for *jus cogens* violations do not trigger immunity, and that State Department suggestions are not binding. *Yousuf*, 699 F.3d at 773, 777. Notably, the Supreme Court declined to grant certiorari, 134 S.Ct. 897. Hence, *Yousuf* establishes the correct rule on these types of lawsuits against former government officials and Defendant is unable to muster any reasonable argument why it should not be adopted here.

[7] Any decision by Israel to pay for Barak's liability would not immunize him. *Pistor v. Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015).

Leaving no stone unturned, Defendant asserts that this Court should simply disregard the entire established framework of foreign sovereign immunity and treat all claims of immunity the same because each "would 'challenge [the] dignity" of the foreign state and embarrass the U.S. government. AB 22-23. The Supreme Court rejected this very argument in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). While "juridical review of [official] acts . . . of a foreign power could embarrass the conduct of foreign relations by the political branches," "the representations of the State Department . . . cannot be determinative." *Id.* at 765, 790.[8] In sum, Defendant has failed to demonstrate that any courts outside the Second Circuit give absolute deference to the Executive in conduct immunity cases, and provides no reason to do so here.

B. The Suggestion of Immunity Is Not Reasonable and Should Be Rejected

Because the Executive's Suggestion is not binding, the Court must determine what level of deference is appropriate. The Suggestion in this case is not reasonable and therefore is not entitled to the "serious weight" ordinarily owed to the Executive's foreign policy views. Defendant concedes that the Suggestion fails to offer any explanation whatsoever supporting its cursory conclusion that this case will impair the United States' foreign policy interests, and consists solely of legal argument. AB 29. As a general matter, Courts defer only to the political views of the Executive, and not its legal analysis. *See*, *e.g.*, *Altmann*, 541 U.S. at 701; *see also Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1298 n.27 (N.D. Cal. 2004), report and recommendation adopted, 349 F. Supp. 2d 1264. Defendant makes his

[8] *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803-04 (9th Cir. 2001), provides Defendant no help because it is not an immunity case. *Patrickson*'s holding that a foreign government's views provide no basis for federal question jurisdiction *refutes* Defendant's position that the court should relinquish jurisdiction based on Israel's decision to ratify Barak's actions. *Ye v. Zemin* is inapplicable because it concerns head-of-state immunity. AB 23.

own effort to justify the State Department's conclusion, and nothing prevented the State Department from doing the same, just as it did in other cases. *See, e.g.*, *Copelco Capital, Inc. v. Brazilian Consulate Gen.*, No. C 98-1357 VRW, 2005 U.S. Dist. LEXIS 48127, at *11-12 (N.D. Cal. June 8, 2005); *Weixum*, 568 F.Supp.2d at 38-39 (each justifying immunity determination).

Defendant insists that no explanation is necessary, asserting that "every court to consider the question" of whether the Executive must explain its views has concluded it does not. AB 27. In fact, the only case Defendant cites in which this question was actually considered is *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974). But even *Spacil* held only that the Administrative Procedures Act does not compel the State Department to provide "persuasive reasons" justifying its views, *id.* at 618, 620-21, and did not address whether the Constitution permits the Executive to bind courts with conclusory pronouncements unsupported by any reasons. Moreover, the defendant in *Spacil* was a vessel owned by the Cuban government, 489 F.2d at 615, which is "part of the sovereignty, *Hoffman*, 324 U.S. at 37. In other words, in practical terms the plaintiffs sought to bring suit against the state of Cuba itself. Because the State Department's immunity determination regarding the Cuban state's immunity was absolutely binding on the court, there was no reason to set forth the reasons underlying this conclusion.[9]

The Constitutional analysis is different with suggestions of conduct-immunity. Because these types of suggestions are not binding, they must be supported by reasons demonstrating their reasonableness so that the court may determine whether deference is appropriate. Defendant's own cases prove this point. In *Giraldo v. Drummond Co.*, *see* AB 28, the State Department explained in

[9] *Isbrandsten* and *Rich* similarly involved immunity determinations for foreign-owned vessels. Neither court addressed whether or in what circumstances the Executive must justify its views.

its suggestion that enforcing plaintiff's deposition subpoena of the former President of Colombia could irritate the United States' relations with Colombia and trigger reciprocal treatment of U.S. Presidents. ER101, ER 109-110. The Executive's failure to provide any reasons here renders its Suggestion unreasonable.

Deference is furthermore inappropriate here because this case involves *jus cogens* violations and because immunity would be contrary to a duly enacted statute and multiple principles of international law. *See* Br. Int'l Law Scholars 19-25; *see generally* Br. Rachel Corrie Foundation. Defendant provides no response to these points. The Suggestion is not entitled to any level of deference.

C. The TVPA Precludes Immunity

In their Opening Brief, Plaintiffs set forth an exhaustive analysis of the TVPA's text, purpose, and legislative history, all of which demonstrates Congress's intent to impose liability for acts of torture and extrajudicial killing by former government officials like Defendant. AOB 12-21. Defendant makes barely any effort to refute these arguments. The few points he does offer fail.

Defendant contends that legislative history of the TVPA is irrelevant because a statute does not overcome the presumption favoring retention of common law principles absent a "clear statement . . . that must come from the 'statute' itself." AB 38. Yet Defendant's own authorities contradict his argument and hold that even statutes that do not expressly reject the common law must be read in light of Congress's purpose. As the Court in *Isbrandtsen Co. v. Johnson* explained,

> Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident. No rule of construction precludes giving a natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character.

343 U.S. 779, 783 (1952); *United States v. Texas*, 507 U.S. 529, 534 (1993) ("Congress need not 'affirmatively proscribe' the common-law doctrine at issue."); *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) ("'[O]ur task is to interpret the words of the statute in light of the purposes Congress sought to serve.'" (alterations omitted)). Moreover, in reaching their conclusions as to the meaning of each statute, the Court in *Isbrandsten*, *Texas*, and *Norfolk* carefully analyzed the legislative history of each statute even though none contained an express statement of abrogation. Indeed, the Court in *Isbrandsten* after reviewing the legislative history held that the statute abrogated the common law despite containing no express "clear statement" on its face. 343 U.S. at 788-89.

Because statutes must be read in light of Congress's purpose, Defendant's assertion that the Supreme Court's § 1983 cases did "rejected the identical argument" Plaintiffs make regarding the TVPA is obviously wrong. AB 37. Despite their similar language, the TVPA are distinct statutes enacted in different centuries to effect different purposes. The TVPA must be analyzed on its own terms.

Defendant next argues that Congress's intent to codify the cause of action under the Alien Tort Statute ("ATS") for torture recognized in the Second Circuit's landmark decision in *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), confirms his immunity because the ATS did not abrogate common law immunity and Congress did not expand the ATS when it enacted the TVPA. AB 39. Defendant's entire argument on appeal is premised on the mistaken belief that blanket immunity existed at common law for all government officials performing any official act. But prior to the passage of FSIA, cases against individual government officials were rare, and what cases existed produced inconsistent results. AOB 26-27 & n.6. The only conduct-immunity authority cited by

Defendant is the Second Circuit's outlier decision in *Matar* (and its progeny). *Matar* pre-dates *Samantar* and grossly miscites the authorities on which it relies to reach its conclusion. *See* AOB 52-53. Defendant has no answer for the fact that *Filártiga* involved a claim of torture against a former foreign government official in which the court considered but did not grant immunity. If Defendant was correct, the Second Circuit would have held Pena-Irala immune and dismissed the Filártigas' case for want of subject matter jurisdiction. But Defendant is wrong, and the Second Circuit held that it had jurisdiction over Pena-Irala for his heinous acts. *Id.* at 890. Congress's intent to adopt this holding on jurisdiction could not be clearer: both the House and Senate reports cite to *Filártiga* and identify it as a basis for the TVPA. AOB 15.

Defendant's only argument regarding the TVPA's legislative history consists of a single sentence from the Senate Report stating that "To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to the state, which would require that the state 'admit some knowledge or authorization of relevant acts.'" S. Rep. No. 102-249, at 8. This argument fails for several reasons.

First, the entire premise underlying this statement has been abrogated because the FSIA does not apply to individual officials. *Samantar*, 560 U.S. at 325. While Defendant seeks to gloss over this major issue, and substitute "common law" for the FSIA, this is incorrect. The scope of immunity provided to states (and their agencies and instrumentalities) under the FSIA, and individuals under the common law, is not and has never been conterminous. *Compare Marcos Estate I*, 978 F.2d at 497-98 (reading an exception into the FSIA and denying immunity to officials accused of torture) *with Siderman*, 965 F.2d at 718-19 (declining to read an exception into the FSIA and granting immunity to state

accused of torture); *see also Samantar*, 560 U.S. at 321-22 (indicating that state and individual immunities are not identical).

Second, Defendant confuses what is necessary with what is sufficient. Although an agency relationship would *require* knowledge or authorization of relevant acts, this does not mean that such knowledge or authorization would be *sufficient* by itself to trigger immunity, whether under the FSIA or the common law. Defendant's construction would negate the TVPA because the statute requires state action and thus only recognizes claims with "some governmental involvement," which requires knowledge and implies authorization. AOB 28-29.

The court in *Doe I* reconciled these apparently inconsistent rules by clarifying the limits of a state's ability to authorize or ratify its officials' acts. In *Doe I*, the court denied immunity to a Chinese government official accused of torture even though the torture was allegedly undertaken pursuant to China's national policy. The court explained that acts of torture authorized by a "policy of the state . . . are not immunized" because "an official obtains sovereign immunity [under the FSIA] as an agency or instrumentality of the state only if he or she acts under a *valid and constitutional grant of authority*." 349 F. Supp. 2d at 1286-87 (emphasis added)). *Doe I* is fatal to Defendant's argument and he offers no response to this case.

Third, the meaning that Defendant attributes to this single sentence is impossible to reconcile with the legislative history as a whole. AOB 15-21. The House and Senate reports express a clear intent to deny torturers "safe haven," S. Rep. No. 102-249, at 3, and to "ensure that torturers are held legally accountable for their acts," H.R. Rep. No. 367, at 3, while recognizing that "more than one-third of the world[']s governments engage in, tolerate, or condone such acts," S. Rep. No. 102-249, at 2. Defendant's construction would render all these officials immune because their governments at a minimum have knowledge of their acts.

The TVPA, however, must be read in light of Congress's clear intent to impose liability on officials not entitled to status immunity for acts of torture and extrajudicial killing. Defendant is not immune.

D. *Jus Cogens* Violations Preclude Immunity

In addition to the TVPA, Defendant is unable to claim immunity for the independent reason that "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations." *Yousuf*, F.3d at 777; *see also Marcos Estate I*, 978 F.2d at 497-98, and *Hilao v. Marcos*, 25 F.3d 1467, 1471-72 (9th Cir. 1994) ("*Marcos Estate II*"). Defendant resists this conclusion on the ground that the State Department does not have an "established policy" recognizing a *jus cogens* exception to immunity. AB 42-43. Defendant's underlying premise is that the State Department's established policy regarding immunity for former officials is binding on courts. But Defendant has failed to demonstrate that the State Department's views are binding on the judiciary and *Youngstown*, *Zivotofsky*, and *Medellin* make clear they are not.

Defendant tries without success to distinguish this Court's opinions in *Marcos Estate I* and *Marcos Estate II*. Defendant mistakenly argues that those decisions turn on the official's powers under the foreign state's domestic law, while Plaintiffs have not alleged that Barak exceeded his authority or violated Israeli law. AB 46. Plaintiffs allege violations of universal *jus cogens* norms, from which no derogation is permitted. In other words, Plaintiffs have alleged Defendant's violations of principles of international law binding every nation, including Israel.

Defendant attacks *Yousuf*'s reasoning by calling into question the "increasing trend in international law" to abrogate immunity for foreign officials who violate *jus cogens* norms. AB 43-44. Defendant's own authorities

acknowledge this trend. For example, Defendant cites a law review article as support for this proposition, even though it states that

> Over the last decade . . . a growing number of international and national courts have abrogated the conduct immunity of former heads of state as well as current and former lower-level officials from criminal investigations and prosecutions for *jus cogens* violations[.]

Bradley & Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. at 236-37.[10] Defendant also states that a *jus cogens* exception is not recognized by the ICJ, AB 44, or included in the UN Convention on Jurisdictional Immunities, AB 45, but fails to mention that these authorities address only the immunity of *states* and not *individual officials*. And most glaringly, Defendant fails to acknowledge decisions denying immunity such as *Pinochet*, *see* Br. Int'l Law Scholars 13 n.8, or any of the U.S. courts that recognized that immunity is unavailable for officials who commit *jus cogens* violations, *see* AOB 46-52 & n.18.

Contrary to Defendant's arguments, a *jus cogens* exception would not eviscerate conduct immunity. The Ninth Circuit has previously rejected this argument. *Marcos Estate I*, 978 F.2d at 500-01 (identifying factors limiting ATS claims); *see also* Heather L. Williams, *Does an Individual Government Official Qualify for Immunity Under the Foreign Sovereign Immunities Act?*, 69 Md. L. Rev. 587, 623-24 (2010) (identify factors limiting TVPA claims).

Nor would rejecting immunity in this case be likely to subject American officials to reciprocal treatment abroad. *See* Adam C. Belsky, *Implied Waiver*

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[10] Defendants' citation to the European Court of Human Rights' decision in *Jones v. United Kingdom* is not to the contrary. AB 44-45. *Jones* "does not prohibit States from rejecting immunity in civil torture cases brought against foreign State officials. *Jones* only stands for the principle that States which uphold immunity in such cases do not violate the ECHR." C. Ryngaert, *Jones v United Kingdom* (2014) 30(79), Utrecht J. Int'l & European L. 47, 49.

Under the FSIA, 77 Calif. L. Rev. 365, 404-05 (1989) (rejecting this argument). Significantly, declining to grant immunity in this case would not impact the immunities afforded to foreign states or their heads-of-state or diplomats, parties for whom comity concerns are most pronounced. States may also broadly immunize their officials operating abroad through "Status of Force Agreements" or other similar vehicles, *see McGee v. Arkel Int'l, LLC*, 716 F. Supp. 2d 572, 579 n.6 (S.D. Tex. 2010), and may immunize specific officials via special mission immunity, *see Weixum*, 568 F.Supp.2d at 37-38 & n.4. And in any event, as the Supreme Court recognized long ago, policy concerns regarding reciprocal treatment or retaliation resulting from the exercise of jurisdiction "is a political not a legal" concern "for the consideration of the government not of its Courts." *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815); *see also The Pesaro*, 277 F. at 481.[11]

E. None of Plaintiffs' Claims Present Nonjusticiable Political Questions

Although not reached by the district court, Defendant urges affirmance on the ground that this case presents a nonjusticiable "political question" under several factors identified in *Baker v. Carr*, 369 U.S. 186, 217 (1962), because it requires the Court to "second-guess tactical military decisions" and "interfere" in U.S. foreign policy. AB 50-51. Not so. This case concerns only the legality of a single execution-style killing of an unarmed American civilian under specific statutes proscribing these acts, and does not implicate any foreign policy decision by the United States.

The mere fact that a claim arises in a foreign relations context does not render it nonjusticiable under the first *Baker* factor. *Id.* at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond

[11] The exclusion of deaths resulting from lawful military actions from the TVPA's definition of "extrajudicial killing" further limits the frequency of litigation because no exception to immunity would apply to such acts. *Contra* AB 48-49.

judicial cognizance."); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Thus, the Supreme Court has repeatedly held that *legal* questions are justiciable even if they have highly sensitive *political or foreign policy implications*. *See Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (interpretation of statute implicating political status of Jerusalem); *Boumediene v. Bush*, 553 U.S. 723, 755 (2008) (application of habeas corpus to the U.S.' activities at Guantanamo); *see also Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011) ("[A]lthough the claims arise from political conduct in a context that has been highly politicized, they present straightforward claims of statutory and constitutional rights, not political questions.").

By passing the TVPA, ATS, and ATA, Congress entrusted the adjudication of violations of universally recognized norms of international law covered by the statutes to the judiciary, not the political branches. Claims under these statutes present legal questions courts have repeatedly held are justiciable. *See Alvarez-Machain v. United States*, 331 F.3d 604, 614 n.7 (9th Cir. 2003), rev'd on other grounds, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 756 (9th Cir. 2011) (en banc), vacated on other grounds 133 S.Ct. 1995 (2013); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).[12]

It is only when the adjudication of such a claim would require a court to question the separate affirmative act by a political branch that a political question arises. In *Corrie v. Caterpillar*, 503 F.3d 974, 982 (9th Cir. 2007), the court held a TVPA claim alleging Caterpillar's provision of bulldozers to Israel aided and abetted human rights violations nonjusticiable because the bulldozers were "financed by the executive branch pursuant to a congressionally enacted program

[12] Cases holding that claims under the ATS are justiciable apply with equal force to claims under the TVPA, which codified one action available under the ATS. *Kadic*, 70 F.3d at 241.

calling for executive discretion as to what lies in the foreign policy and national security interests of the United States," and deciding the claims would thus "require the judicial branch . . . to question the political branches' decision to grant extensive military aid to Israel." Unlike in *Corrie*, no act of Congress commits resolution of Plaintiffs' claims to the political branches and the first *Baker* factor does not apply.

The second *Baker* factor requires that a court be "capable of granting relief in a reasoned fashion" with "a substantive legal basis for a ruling." *Alperin v. Vatican Bank*, 410 F.3d 532, 553 (9th Cir. 2005). Defendant does not even cite this standard, which is satisfied here because the statutes at issue provide concrete definitions for the conduct they proscribe. *See Kadic*, 70 F.3d at 249 ("[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act].]").

"Nor is the lawsuit rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation." *Koohi v. United States*, 976 F.2d 1328, 1331, 1332 (9th Cir. 1992) (claims challenging military's downing of civilian airplane justiciable); *see also Sarei v. Rio Tinto, PLC*, 671 F.3d at 757 (claims for war crimes justiciable). Under Ninth Circuit law, the second *Baker* factor does not apply. Defendant cites no Ninth Circuit case addressing this issue.

Defendant's argument that this case implicates the fourth, fifth, and sixth *Baker* factors is waived because he failed to raise it below, it is not a purely legal issue, and the district court did not consider it. *United States v. Childs*, 944 F.2d 491, 495 (9th Cir. 1991). Regardless, the argument fails. Unlike in *Corrie*, this case does not challenge any action "by the executive branch pursuant to a congressionally enacted program." 503 F.3d at 982. Defendant cites no authority

holding that nonbinding congressional resolutions satisfy this exacting standard and the Court should decline his invitation to do so here. Nor does this action undermine Israel's agreement with Turkey, which expressly waives only claims against Israel and its citizens *filed in Turkey* and not those filed against Israeli citizens elsewhere.[13]

F. The Act of State Doctrine Does Not Apply

Defendant also urges affirmance on the basis of the act of state doctrine, under which courts refrain from adjudicating certain official acts of foreign states undertaken within their own territory. *Liu v. Republic of China*, 892 F.2d 1419, 1431-32 (9th Cir. 1989). This argument by Defendant borders on being frivolous inasmuch as the Ninth Circuit does not recognize *jus cogens* violations as official state acts. *See, e.g., Siderman*, 965 F.2d at 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); *Sarei*, 671 F.3d at 757 ("[*J*]*us cogens* norms are exempt from the [act of state] doctrine[.]"); Restatement (3d) § 443 cmt. C (doctrine likely not applicable to claim of "violation of fundamental human rights").

Defendant's reliance on *Underhill v. Hernandez*, 168 U.S. 250 (1897) is misplaced. *Underhill*, which long predates the modern law of international human rights, exempts only "acts of legitimate warfare" from liability. *Id*. at 253. Here, by contrast, the allegations involve violations of *jus cogens* norms which are not and could never be legitimate acts of warfare. In fact, the TVPA does not apply to killings resulting from legitimate acts of warfare, AOB 21, and the killing in this

[13] Since filing their Opening Brief, Ahmet and Hikmet Doğan have been paid $2 million pursuant to this agreement by the Government of Turkey on the basis that Plaintiffs have released only Turkey (with no release of Israel) of liability. Plaintiffs' exhaustion of remedies in Turkey and against Turkey does not bar their present claims. *See Mamani v. Berzain*, 825 F.3d 1304, 1312 (11th Cir. 2016).

case were deemed likely war crimes, AOB 5. The act of state doctrine provides no basis for affirming the judgment below.

III. CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be vacated and this case remanded to permit Plaintiffs the ability to litigate their claims on the merits.

DATED: September 8, 2017

Respectfully submitted,

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