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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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,

vs.

EHUD BARAK,

Defendant.

Case No.: CV 15-08130-ODS (GJSx)

[Assigned to the Honorable Otis D. Wright, II – Courtroom 11]

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

DATE: May 23, 2016
TIME: 1:30 p.m.
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I. INTRODUCTION

This action is brought by Ahmet Doğan and Himet Doğan, in their individual capacities and on behalf of their deceased son, Furkan Doğan, against the former Israeli Minister of Defense, Ehud Barak, for planning and commanding the attack on the Gaza Freedom Flotilla resulting in the torture and extrajudicial killing of their son and nine other unarmed activists. Defendant moves to dismiss all of Plaintiffs' claims on the basis of immunity, political question, act of state, and for failure to state a claim. Defendant's attacks misstate the law, ignore relevant authorities, rely on inadmissible evidence, and mischaracterize detailed allegations in the Complaint. All must fail.

First, Defendant is not entitled to immunity. The Ninth Circuit has repeatedly denied immunity for human rights violations, as has the leading post-*Samantar* case. Second, Plaintiffs' claims are not political questions because they involve only the application of statutes providing a "textual commitment" of the adjudication of claims of torture and extrajudicial killing to the judiciary. Third, Defendant's argument that his misconduct is protected as an act of state fails because every factor courts consider weighs in Plaintiffs' favor, and because the killing occurred outside of Israel's territory where the doctrine does not even apply. Fourth, Plaintiffs have adequately pled facts stating each of their claims. This Court should deny Defendant's motion in its entirety.

II. STATEMENT OF FACTS

This case concerns the torture and unlawful killing of a U.S. citizen, Furkan Doğan, while attempting to deliver humanitarian supplies to the people of Gaza. On May 31, 2010, Israeli Defense Forces ("IDF") intercepted and attacked the Gaza Freedom Flotilla, a group of six unarmed civilian vessels carrying more than 700 civilian passengers and humanitarian supplies for delivery to the citizens of Gaza, while the Flotilla was sailing in international waters. Compl. ¶ 2; Declaration of John Chalcraft ("J.C. Decl.") ¶¶ 19, 24-27. IDF soldiers killed ten civilian passengers, many of them execution style. Compl. ¶ 2. The victims included Furkan Doğan, who was shot to death while recording the incident on camera. *Id.*

Furkan was a 19 year-old American citizen born in the State of New York. Compl. ¶ 12. Furkan was motivated by a strong desire to help others. He planned to attend medical school in the United States, and had passed a university entrance exam on May 9, 2010, just three weeks before he was killed. He desired to serve on the Gaza Freedom Flotilla in order to help deliver humanitarian aid to the residents of Gaza. *Id.* ¶ 2; J.C. Decl. ¶¶ 19, 24. The Flotilla was organized by various humanitarian organizations including a Turkish humanitarian organization recognized by Israel for its charitable work and commonly known by its Turkish initials, IHH. Compl. ¶ 24; J.C. Decl. ¶ 16.[1] The Flotilla's passengers did not seek to support Hamas or harm Israel, engage in terrorism, or pursue "martyrdom," but aimed merely to bring attention to the humanitarian crisis in Gaza, protest Israel's blockade, and provide humanitarian assistance to those most in need. Compl. ¶ 24; J.C. Decl. ¶¶ 15, 18-21, 24-25, 30-33. Each vessel underwent a rigorous security check ensuring that no weapons were on board and that all members of the Flotilla were unarmed. Compl. ¶ 26; J.C. Decl. ¶ 23.

Furkan was assigned to a ship called the *Mavi Marmara*, where he and a friend volunteered to assist with media activities, including recording video footage of the Flotilla's journey. The two friends were provided with video equipment on the night of the attack and went up to the top deck to record Israel's impending attack. As the attack on the *Mavi Marmara* began, Furkan was on the top deck with a small video camera attempting to record the events. He was shot while video-recording the Israeli forces boarding the vessel. Compl. ¶ 39.

Furkan's death was prolonged and painful. *Id.* He was shot five times with live ammunition, including four times from behind followed by a fifth shot at point blank range to his face. *Id.* The first four shots struck Furkan in the head, back, left leg, and

[1] Notwithstanding Defendant's scurrilous attacks and transparent attempt to prejudice Plaintiffs, no credible evidence links the IHH or the Flotilla passengers in any way to terrorist groups. J.C. Decl. ¶¶ 16-21. Defendant's assertions that the Flotilla passengers engaged in violence, including shooting IDF soldiers, are similarly unsubstantiated. J.C. Decl. ¶¶ 22-33. All such assertions, moreover, are belied by Defendant's offer to personally "take responsibility for the *Mavi Marmara* incident and issue an apology." Compl. ¶ 54.

left foot. *Id.* Reports and video footage show that following the first four shots, Furkan was lying on his back on the deck, "in a conscious, or semi-conscious state for some time." *Id.* IDFs soldiers walked up to Furkan, kicked him, and then fired a shotgun into his face, killing him. *Id.*; J.C. Decl. ¶ 27.

The severity of Furkan's killing was addressed in several international reports following the attack. For example, the report of the U.N. Human Rights Council fact-finding mission noted that the final shot to Furkan's face was "compatible with the shot being received while he was lying on the ground on his back" and concluded that the "circumstances of the killing of at least six of the passengers [including Furkan] were in a manner consistent with an extra-legal, arbitrary and summary execution." J.C. Decl. ¶¶ 26-27. The evidence demonstrates that the killing of Furkan and the other *Mavi Marmara* passengers constituted war crimes against civilians. Compl. ¶¶ 41, 47.

Furkan's parents were not informed about their son's killing until June 3, three days after the attack. Following Furkan's death, U.S. Embassy staff repeatedly asked Israeli officials for information concerning American citizens injured during the attack. However, the Israeli officials withheld information. Moreover, Furkan's U.S. passport and personal belongings went missing from his corpse after they were searched by IDF soldiers. The U.S. authorities finally learned that an American citizen had been killed from Professor Ahmet Doğan, who was not permitted to identify his son's body at a morgue until four days after the attack. J.C. Decl. ¶ 27 & n.27.

Today, nearly six years later, Israeli officials have not taken responsibility for Furkan's death by the Israeli authorities and have provided no compensation. In an effort to finally obtain justice, Furkan's parents filed the present suit in federal court against Defendant Ehud Barak in his personal and individual capacity.

III. ARGUMENT

A. Legal Standards Governing Motions to Dismiss

Defendant moves to dismiss each of Plaintiffs' claims under Rule 12(b)(6). To survive a 12(b)(6) challenge, a complaint need provide only "[a] short and plain

statement of the claim showing that the pleader is entitled to relief." FED.R.CIV.PROC. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court must accept all well-pled factual allegations as true and draw all reasonable inferences in the Plaintiffs' favor. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In deciding Defendant's 12(b)(6) attacks, the Court may consider only the pleadings, judicially noticeable documents, and extrinsic documents properly incorporated into the pleadings by reference. *City of Roseville Emps.' Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1106 (E.D. Wash. 2013).

Defendant also moves to dismiss Plaintiffs' claims under Rule 12(b)(1) on the basis of immunity and political question. MTD at 7-8. Defendant's assertion that the Court may "look beyond the face of the complaint" to decide both challenges misstates the law. *See* MTD at 8. Rule 12(b)(1) challenges take two forms: a facial 12(b)(1) challenge asserts that the allegations in the complaint are insufficient on their face to invoke federal jurisdiction, while a factual challenge attacks the truth of allegations that, if true, would establish jurisdiction. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Courts treat facial attacks under Rule 12(b)(1) the same as a motion to dismiss under Rule 12(b)(6), "accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Yellen v. United States*, No. 14-00134 JMS-KSC, 2014 U.S. Dist. LEXIS 76502, at *3 (D. Haw. June 4, 2014). Courts deciding facial attacks may not consider evidence extrinsic to the Complaint. *See NLRB v. Vista Del Sol Health Servs.*, 40 F. Supp. 3d 1238, 1249-50 (C.D. Cal. 2014).

Here, Defendant's claim of immunity is a facial attack. It relies only on the Complaint's allegations that Defendant acted in his official capacity and his Exhibit H *confirming* that fact, and does not dispute the truth of even a single allegation. MTD at 8, 10. Accordingly, the Court may consider only judicially noticeable documents and extrinsic documents properly incorporated by reference in deciding this issue.

B. Defendant is Not Immune from Suit

Defendant asserts that in the absence of a suggestion of immunity from the State

Department, this Court may decide the issue itself and should hold that he is immune. MTD at 8-14. Defendant is correct about the first point,[2] wrong about the second.

1. The Ninth Circuit Denies Immunity for Human Rights Violations

Ignoring the numerous authorities that hold to the contrary, Defendant argues that he must be granted conduct immunity because his unlawful acts were committed in his official capacity.[3] MTD at 8, 10-14. In fact, the Ninth Circuit has repeatedly held that human rights violations are acts falling beyond the lawful scope of a foreign official's authority, and has accordingly denied immunity for such acts.

In *Trajano v. Marcos*, 978 F.2d 493, 497-98 (9th Cir. 1992), the Ninth Circuit held that a government official was not immune for human rights abuses including torture and extrajudicial killing because they arose from acts falling "beyond the scope of [the official's] authority" which "the sovereign has not empowered the official to do." In *Hilao v. Marcos (In re Estate of Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1471-72 (9th Cir. 1994), the Ninth Circuit similarly held that the alleged "acts of torture, execution, and disappearance were clearly acts outside of [Marcos's] authority as President" and, consequently, were "not 'official acts' unreviewable by federal courts." *See also Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1282-83, 1287-88 (N.D. Cal. 2004), *report and recommendation adopted* 349 F. Supp. 2d 1264 (Dec. 8, 2004) (denying immunity to Chinese government official accused of torture, and stating that "[t]he mere fact that acts were conducted [in an official capacity or] under color of law . . . is not sufficient to clothe the official with sovereign immunity").

Defendant does his best to avoid these authorities. He ignores *Trajano* and *Doe I* entirely. Defendant acknowledges *Hilao*, but weakly attempts to distinguish that case in a footnote. He argues that Marcos was denied immunity only because the Philippine

[2] Defendant is incorrect that this Court would be bound by a suggestion of immunity should the State Department choose to issue one. MTD at 9. *See Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012). Should the State Department issue a suggestion of immunity during the pendency of this case, Plaintiffs will request leave of court to brief the issue of the level of deference it should receive.

[3] Courts distinguish between absolute "status immunity" for sitting heads of state and diplomats, and "conduct immunity" immunizing only certain acts of current and foreign government officials. *Yousuf*, 699 F.3d at 769, 774. Defendant claims only the latter. MTD at 12-13.

government indicated that his conduct fell outside his authority as President, while in this case the Israeli government has ratified Defendant's misconduct by characterizing it as involving official acts. MTD at 13 n.4. This argument—that a government's decision to ratify its official's acts mandates a finding of immunity—is contrary to law. In *Doe I*, which Defendant fails to cite, the court expressly held that foreign officials are not entitled to immunity for acts exceeding the scope of their lawful authority even when the acts have been authorized by government policy. 349 F. Supp. 2d at 1286 ("[A]cts by an official which violate the official laws of his or her nation but which are authorized by covert unofficial policy of the state . . . are not immunized[.]"). The court explained that "an official obtains sovereign immunity . . . only if he or she acts under a *valid and constitutional* grant of authority." *Id.* at 1287 (emphasis added). Under this holding, states such as Israel *may ratify* their officials' unlawful acts but *lack the authority to immunize* them. *Doe I* thus directly undercuts Defendant's assertion that he is entitled to immunity simply because the Israeli government has said that his conduct was part of an "authorized military action taken by the State of Israel." MTD, Exh. H at 1.[4]

In 2010, the Supreme Court held in *Samantar v. Yousuf* that the FSIA applies only to States, and that the common law governs immunity for individual officials. 560 U.S 305, 320 (2010). Although *Trajano*, *Hilao*, and *Doe I* each predate *Samantar*, and analyzed officer immunity under the FSIA, several reasons strongly indicate that the Ninth Circuit will reach the same conclusion under the common law. First, the *Samantar* Court noted that the *Chuidian* rule, which the *Trajano*, *Hilao*, and *Doe I* courts each applied to deny immunity for acts falling beyond the scope of the official's lawful authority, "may be correct as a matter of common-law principles." 560 U.S. at

[4] It is immaterial that the *Doe I* court defined the scope of a foreign official's lawful authority with regard to the domestic law of the foreign state rather than international law. *Id.* at 1283-84. While the more recent case law defines the lawfulness of an official's authority for the purpose of immunity with regard to international law, *see, e.g.*, *Yousuf*, 699 F.3d at 776-78, both rules lead to the same result here because states universally proscribe torture and extrajudicial killing. *See Doe I*, 349 F. Supp. 2d at 1285 n.18; *Yousuf*, 699 F.3d at 777.

322 n.17. Second, because the FSIA "codif[ied] the existing common law principles of sovereign immunity" as they existed prior to 1976, *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), *overruled on other grounds*, *Samantar v. Yousuf*, 560 U.S. 305 (2010), courts analyzing foreign official immunity essentially looked through the statute to the common law principles they believed it incorporated. The Ninth Circuit's belief that the common law denied immunity to officials for human rights violations is apparent from the fact that this rule was not based on the FSIA's text. Rather, it was an exception the court read into the statute for individual officials but not for states, even though the court believed that the same text governed both. *Compare Trajano*, 978 F.2d at 497-98 (reading an exception into the FSIA denying immunity to officials accused of torture) *with Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718-19 (9th Cir. 1992) (taking a literal reading of the FSIA's enumerated exceptions and declining to recognize a non-enumerated exception for torture by states); *see also Samantar*, 560 U.S. at 322 n.17 ("The Courts of Appeals have had to develop, in the complete absence of any statutory text, rules governing when an official is entitled to immunity under the FSIA."). The law is clear: if presented with the issue, the Ninth Circuit would deny immunity in this case.

2. The Better View Among Other Circuits Holds Officials Are Not Immune for *Jus Cogens* Violations

The Ninth Circuit is highly unlikely to follow *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), the non-binding wrongly decided Second Circuit case on which Defendant relies. MTD at 11, 13. *Matar* provides scant reasoning for its conclusion that foreign officials are immune even for *jus cogens* violations, and relies on inapposite authorities.[5] Specifically, the *Matar* court cites *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996), for the proposition that "we have previously held that there is no general *jus cogens* exception to FSIA immunity." 563

[5] A *jus cogens* norm "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." *Yousuf*, 699 F.3d at 775. *Jus cogens* norms include prohibitions on torture and extrajudicial killing. *Id.*

F.3d at 14-15. In *Smith*, however, the court rejected only the narrow argument that *jus cogens* violations do not constitute an implied waiver within the meaning of 28 U.S.C § 1605(a)(1) of a *state's* immunity. *Smith* is entirely silent on the issue of an *individual's* immunity, and the court's holding does not compel the conclusion in the Ninth Circuit that individual immunity must follow the state's immunity. In fact, the Ninth Circuit has held precisely the opposite, *Trajano*, 978 F.2d at 497-98; *Siderman*, 965 F.2d at 718-19, and the Supreme Court has indicated that state and individual immunities are not identical, *Samantar*, 560 U.S. at 321-22. The *Matar* court also deemed itself bound by the Executive Branch's statement of interest suggesting immunity. 563 F.3d at 14. The Ninth Circuit has never held itself bound by the Executive's suggestion of immunity, however, and in any event no such statement has been issued in this case.[6]

By contrast, numerous post-*Samantar* courts, including the only published post-*Samantar* circuit court decision, squarely hold that foreign officials are not entitled to immunity under the common law for violations of *jus cogens* norms such as torture and extrajudicial killing. *See Yousuf*, 699 F.3d 763; *see also Warfaa v. Ali*, 811 F.3d 653, 2016 U.S. App. LEXIS 1670 (4th Cir. Feb. 1, 2016) (Unpub. Disp.); *Sikhs for Justice v. Singh*, 64 F. Supp. 3d 190, 194 (D.D.C. 2014).[7] In an admission of his argument's

[6] The other cases Defendant cites are similarly distinguishable. MTD at 12. In *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 105 (D.D.C. 2005), unlike in this case, plaintiffs failed to allege *ultra vires* action by the individual defendants. Similarly, in *Giraldo v. Drummond Co.*, 493 Fed. App'x 106 (D.C. Cir. 2012), the plaintiffs failed to adequately allege illegal conduct by the former President of Colombia, and the D.C. Circuit therefore found it unnecessary to reach the question of whether illegal acts or *jus cogens* violations eliminate immunity. *Wultz v. Bank of China Ltd.*, 32 F. Supp. 3d 486, 498 (2014), and *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272, 280 (S.D.N.Y. 2015), are distinguishable because each concerned immunity from subpoena for individuals who were not parties to the action and against whom plaintiffs alleged no unlawful acts whatsoever. In *Rosenberg v. Pasha*, 577 F. App'x 22, 24 (2d Cir. 2014), the Second Circuit was bound by its prior decision in *Matar*, and this case thus provides no authority independently supporting the holding of that case. In *Belhas v. Moshe Ya'Alon*, 515 F.3d 1279, 1288-89 (D.C. Cir. 2008), the court concluded that the TVPA did not create an exception to the FSIA, an analysis abrogated by the Supreme Court's decision in *Samantar*. Finally, *Nikbin v. Islamic Republic of Iran*, 517 F. Supp. 2d 416 (D.D.C. 2007), is simply inapposite as that case does not even address the issue of individual immunity.

[7] Many pre-*Samantar* courts similarly denied immunity for acts including human rights violations falling beyond the scope of the official's valid legal authority. *See Hassen v. Al Nahyan*,

weakness, Defendant does not even cite *Yousuf*.

In *Yousuf*, the Fourth Circuit denied immunity to the former Minister of Defense of Somalia for torture and extrajudicial killing by government officials under his command and control, in violation of the TVPA and ATS. 699 F.3d 763, 766. The court conducted a well-reasoned analysis of the scope of conduct immunity, focusing on the policies underlying the TVPA and the increasing trend in international law and among American courts abrogating immunity for foreign officials who commit *jus cogens* violation. *Id.* at 776-77. The court held that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, *even if the acts were performed in the defendant's official capacity.*" *Id.* at 776 (emphasis added); *accord Warfaa*, 2016 U.S. App. LEXIS 1670, at *19-20. As the foregoing discussion demonstrates and the following discussion confirms, the Ninth Circuit is far more likely to adopt this view.[8]

3. The TVPA Forecloses Immunity for Torture and Extrajudicial Killing

Even if the common law prior to the TVPA's enactment required conduct immunity for foreign officials accused of torture or extrajudicial killing, which it did not, *see supra* § III.B.1, the passage of the TVPA in 1992 was a "controlling legislative act" abrogating any such immunity for officials participating in such acts. *See Bradvica v. INS*, 128 F.3d 1009, 1014 n.5 (7th Cir. 1997). The text, purpose, and history of the TVPA each demonstrate that Congress intended to impose liability without exception.

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(continued…)

No. 09-01106 DMG (MANx), 2010 U.S. Dist. LEXIS 144819, *15 (C.D. Cal. Sept. 17, 2010); *Xuncax v Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *see also Hernandez v. United States*, 785 F.3d 117, 128 (5th Cir. 2015) (Jones, J., concurring); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting).

[8] The suggestions of immunity proffered by Defendant as Exhibits I, J, K, and L do not mandate a different conclusion because none involved cases in the Ninth Circuit, and all but one predate *Yousuf*. *Rosenberg*, the one *post-Yousuf* SOI, does not engage with or distinguish that case.

a. The TVPA's Text Supports Abrogating Immunity

The TVPA imposes civil liability on any "individual who, under actual or apparent authority, or under color of law, of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing[.]" 28 U.S.C. § 1350 note. The statutory text could not be any more clear and unambiguous: foreign officials who engage in torture or extrajudicial killing are to be held liable for their unlawful acts. This language admits of no exception, and certainly not the wholesale nullification urged by Defendant's theory of immunity. Because the text of the TVPA is unambiguous, the inquiry into its scope should end here. *See United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) ("The first step in ascertaining congressional intent is to look to the plain language of the statute . . . . If the statute is ambiguous . . . courts may look to its legislative history for evidence of congressional intent.").

b. Congress's Purpose Supports Abrogating Immunity

If the Court nevertheless considers the TVPA's purpose, it should find further support for the conclusion that Congress's intent in enacting the TVPA was to eradicate torture and extrajudicial killings by broadly imposing liability on foreign officials committing such acts. *See, e.g.*, 102 H. Rpt. 367, at 2 ("Official torture and summary execution violate standards accepted by virtually every nation."); 102 S. Rpt. 249, at 3 ("This legislation . . . [will ensure] that torturers and death squads will no longer have a safe haven in the United States."); *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105-06 (2d Cir. 2000) ("[The TVPA] seems to represent a . . . direct recognition that the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations."). The blanket application of immunity urged by Defendant is directly contrary to Congress's legislative intent.

To be sure, Congress did not intend the TVPA to categorically eliminate all immunities. To this end, Congress identified the specific immunities it intended to preserve, namely, the sovereign immunities of foreign states and the status-based

immunities for sitting heads of state and diplomats. *See* S. Rep. 102-249 at 1, 7-8 (stating that the TVPA is not intended to pierce immunity for foreign governments, diplomats, or visiting heads of state, but "should normally provide no defense to an action taken under the TVPA against a former official"). Congress's intent is clear: the TVPA eliminated any conduct immunity for foreign officials to the extent that such immunity even existed prior to the statute's enactment in 1992.

c. The TVPA's History Supports Abrogating Immunity

Congress's purpose in enacting the TVPA was specifically to codify the cause of action for torture by government officials acting in their official capacity recognized in the Second Circuit's landmark decision in *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and to extend it to plaintiffs who are U.S. citizens. *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995). The *Filártiga* court considered immunity, but did not grant it to the defendant. 630 F.2d at 879. This history further demonstrates Congress's intent to impose liability under the TVPA and that conduct immunity should not apply.

It is also relevant that the TVPA was enacted in the same year, and by the same Congress, as the ATA. PUB. L. 102-572, title X, § 1003(a)(4), Oct. 29, 1992. Unlike the TVPA, which *limits* liability only to individuals acting "under actual or apparent authority, or color of law, of any foreign nation," the ATA expressly *precludes* liability for any "officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337(2). This powerfully demonstrates that Congress knew how to shield incumbent foreign officials from liability for acts undertaken under color of law when sued in their official capacity, and applied no such exception when it enacted the TVPA. Because Congress has shown it knew how to expressly preclude liability for official acts, the Court should decline Defendant's invitation to draw a categorical exemption to liability from the silence of the TVPA's text on this issue. *See Samantar*, 560 U.S. at 317 ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms.").

4. Adopting Defendant's Rule Disregards Congress's Intent and Renders the TVPA a Virtual Nullity

The TVPA contains a state action requirement, imposing liability only on government officials acting "under color of law" or in their "official capacity." Thus, purely private acts are not covered by the statute. 28 U.S.C. § 1350 note; *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998). Because the TVPA requires state action, which the statute defines as participation by an official acting "under color of law," granting immunity on this basis nullifies the statute due to the very conduct it necessitates.[9] This is an absurd result this Court should avoid. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). As one oft-cited scholar recognized, granting immunity for acts committed in an official capacity

> turns the fundamental premise of much international human rights law on its head—namely, that certain actions rise to the level of international law violations precisely because they involve the abuse of state authority. . . . It would be passing strange to find that international law categorically prevents states from holding individuals accountable for universally recognized violations of international law.

Chimene Keitner, *Officially Immune?*, 36 YALE J. INT'L L. ONLINE (2010) 1, 4, 10.

The rule Defendant urges would leave victims of the most severe human rights abuses with no recourse. Although states may waive their officials' immunity, Defendant's rule would create the perverse incentive for states to immunize their

[9] Plaintiffs use the terms "under color of law" and "official capacity" interchangeably in their Complaint and in this Opposition because this is the practice followed by Congress and courts. *See United States v. Belfast*, 611 F.3d 783, 809 (11th Cir. 2010) ("There is no material difference between this notion of official conduct [under the color of law] and that imparted by the phrase 'in an official capacity.'"); S. Exec. Rep. 101-30, at 14 (stating that the Convention Against Torture "is limited to torture 'inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an *official capacity*.' Thus, . . . in terms more familiar in U.S. law, it applies to torture inflicted '*under color of law*.'" (emphasis added)); *see also Yousuf*, 699 F.3d at 777 (holding defendant liable under the TVPA, which requires acts under "color of law," for acts committed in his "official capacity"). To the extent that the Court finds any distinction between these two phrases for the purpose of sovereign immunity, however, Plaintiffs request leave to amend.

officials for their most degraded acts by simply ratifying their misconduct, just as Israel attempts to do here. This Court should not sanction such a result.

5. Domestic Sovereign Immunity Law Supports Finding No Immunity

Defendant wrongly asserts that Plaintiffs' suit against Defendant is "the practical equivalent" of a suit against the State of Israel directly. MTD at 8. This is just wrong. The domestic law of sovereign immunity plainly demonstrates that there is no tension between imposing personal liability on government officials for their official acts and maintaining the immunity of the state. Under § 1983, government officials may be held liable even if the government itself would be immune from suit.[10] *See Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Alden v. Maine*, 527 U.S. 706, 756-57 (1999). So too here, Plaintiffs' claims against Defendant, which may proceed under the common law of foreign sovereign immunity, do not undermine Israel's immunity, which is protected by the FSIA. Barak's motion to dismiss on the basis of immunity should be denied.

C. None of Plaintiffs' Claims Present Nonjusticiable Political Questions

Defendant asserts that this case presents a nonjusticiable "political question" requiring the Court to "inject[] itself directly into the Israeli-Palestinian conflict" and "act adversely to U.S. interests" by souring relations between the U.S. and Turkey. MTD at 14-15. Not so. Defendant is wrong on the law because this action concerns only the legality of a single execution-style killing under specific statutes proscribing such acts. It does not require this Court to even consider the larger political context, let alone review any aspect of U.S. foreign policy. Declaration of Erwin Chemerinsky ("E.C. Decl.") ¶¶ 8-10. He is also wrong on the facts, as adjudication of this case will not meaningfully affect foreign relations. J.C. Decl. ¶¶ 34-43.

[10] Section 1983 jurisprudence is highly relevant to the Court's analysis of the TVPA. Congress used similar language to draft the two statutes, *compare* TVPA § 2, codified at 28 U.S.C. § 1350 note, *with* 42 U.S.C. § 1983. Moreover, the TVPA's legislative history contains express references to § 1983. *See* TVPA Act of 1991, HR Rep No. 102-367(I), 102d Cong., 1s Sess 5 (1991); TVPA of 1991, S. Rep. No. 102-249, 102d Cong. 1st Sess 8 (1991). *See also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (recognizing similarities between international human rights litigation and claims under § 1983).

The "Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1427 (2012). "[C]ourts cannot avoid their responsibility merely 'because the issues have political implications.'" *Id.* at 1428. The "political question" doctrine thus presents only a "narrow exception" to a court's responsibility to decide the cases before it. *Id.* at 1427.

The mere fact that a claim arises in a foreign relations context does not render it nonjusticiable under the first *Baker* test. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (courts may not refuse to adjudicate claims merely because a decision "may have significant political overtones" or affect "the conduct of this Nation's foreign relations"); *Baker v. Carr*, 369 U.S. 224, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). 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*; 132 S.Ct. 1421 (interpretation of statute implicating political status of Jerusalem is justiciable); *Boumediene v. Bush*, 553 U.S. 723, 755 (2008) (question of whether habeas corpus applies to the U.S.' activities at Guantanamo is justiciable); *see also Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 912 (9th Cir. 2011) ("[A]lthough the claims [challenging warrantless wiretapping] 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 statutes such as 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. *See Kadic*, 70 F.3d at 249 (stating, in an ATS case, that "the department to whom this issue has been 'constitutionally committed' is none other than our own – the Judiciary"); *see also Japan Whaling Ass'n*, 478 U.S. at 229-31 (interpretation of statutes involving foreign affairs is a justiciable question); *Zivotofsky*, 132 S.Ct. at 1427-28 (same). It is only when the adjudication of a statutory 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), for example, 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 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." And in *Alperin v. Vatican Bank*, 410 F.3d 532, 559-60 (9th Cir. 2005), the court held ATS claims nonjusticiable because their adjudication would have required the court to question the U.S.'s prosecutorial decisions in the Nuremberg Trials and would furthermore have implicated the U.S.'s own conduct. Here, unlike in *Corrie* and *Alperin*, Plaintiffs' claims implicate no decision by a political branch.[11]

Even cases raising foreign policy implications at the very heart of the Israeli-Palestinian conflict are not "political questions" where, as in this case, the precise question before the court is *legal* rather than *political*. In *Zivotofsky*, the District Court held that the political question doctrine barred judicial review of a statute permitting Americans born in Jerusalem to list "Israel" as their birthplace on their passports. 132 S.Ct. at 1424, 1427. The district court reasoned that deciding the case would require it to "decide the political status of Jerusalem," thereby "interfer[ing] with the President's exercise of constitutional power" over foreign affairs, and the D.C. Circuit affirmed. *Id.* at 1427. The Supreme Court reversed, explaining that the district court had erred by focusing on the political implications of the claim rather than the underlying legal issue the court must decide. As the Supreme Court explained, "Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to

[11] Defendant's citations to Senate Resolution 548 for its expression of support for Israel, and to a Congressional Research Service report for its assertion that President Obama has sought to improve relations between Israel and Turkey, MTD at 6, fall far short of the actions necessary to raise a political question under *Corrie* and *Alperin*. Moreover, this evidence is inadmissible. *See* Pls.' Obj. to Def.'s Evid. & Opp. RJN at 13-16 (stating that Defendant's E and F are inadmissible).

determine whether he may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth." *Id.*

Here, like the claim in *Zivotofsky*, Plaintiffs' claims concern the availability of statutory rights, and require only that the Court determine whether the torture and killing of Furkan Doğan violated the TVPA, ATS, and/or ATA. These are precisely the type of questions courts routinely resolve. E.C. Decl. ¶¶ 8-10; J.C. Decl. ¶¶ 9-14, 44. Defendant's assertions that this case implicates the Israeli-Palestinian conflict, and requires the Court to render an "initial policy determination" as to the legality of Israel's blockade, are not well taken. *Id.* Like the erroneous district court decision in *Zivotofsky*, Defendant's "statement of the issues is far too broad, and fails to focus on the specific rights that Plaintiffs' . . . claims seek to vindicate." *Ctr. for Biological Diversity v. Hagel*, 80 F. Supp. 3d 991, 1004 (N.D. Cal. 2015). Adjudicating Plaintiffs' claims does not require the Court to decide the legality or even the desirability of the blockade, let alone any issue pertaining to the Israeli-Palestinian conflict. E.C. Decl. ¶¶ 8-10. Such issues are not even properly before the Court. Rather, this case concerns one issue and one issue only: the legality of the torture and execution-style killing of Furkan Doğan, a young man armed only with a video camera, under three statutes.

Doe I v. State of Israel, 400 F. Supp. 2d 86 (D.D.C. 2005), on which Defendant relies, is not to the contrary. MTD at 15. Like this case, *Doe* involved claims against the former Israeli Minister of Defense, *id.* at 96 n.1, but any similarities end there. In *Doe*, the plaintiffs alleged injuries arising from Israel's settlement activities in the West Bank. *Id.* at 97. Focusing on the history of the Israeli-Palestinian conflict, the plaintiffs alleged that "Israel is a terrorist state," that the land in the West Bank is Palestinian land, and that Israel had confiscated that land by encouraging settlements in violation of international law. *Id.* at 98. The court dismissed plaintiffs' claims as nonjusticiable because they required the court to "adjudicate the rights and liabilities of the Palestinian and Israeli people, making determinations on such issues as to whom the land in the West Bank actually belongs." *Id.* at 112.

Because this out-of-circuit district court case disregards the Ninth Circuit's rule that courts apply the political question doctrine individually to each claim, and provides no individual analysis of plaintiffs' human rights claims at all, it is contrary to the law of this Circuit and inapposite to this case. *Ctr. for Biological Diversity*, 80 F. Supp. 3d at 1003 (a court applying the political question doctrine must "consider each claim individually"); *Corrie*, 503 F.3d at 982. *Doe* is also distinguishable. Unlike the *Doe* plaintiffs, Plaintiffs make no sweeping challenge to Israel's policies toward the Palestinian territories or the United States' support for Israel. Rather, Plaintiffs simply challenge the legality of a single use of force incident by the IDF under three U.S. statutes. "Resolution of that issue is not one 'textually committed' to another branch; to the contrary, it is committed to this one." *Zivotofsky*, 132 S.Ct. at 1435 (Sotomayor, J., concurring). For all of these reasons, the first *Baker* factor does not apply.

Defendant's arguments that this case implicates the second and third *Baker* tests are even less persuasive. 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*, 410 F.3d at 553. Here, the TVPA, ATS, and ATA provide concrete definitions for the conduct they proscribe, and the application of these statutes to the facts of this case falls squarely within the competence of this Court. *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."). In cases implicating foreign policy, moreover, "[i]t is only where this Court is called on 'to supplant a foreign policy determination of the political branches with the court's own *unmoored determination* of what United States policy . . . should be,' that *Baker*'s second factor is implicated." *Ctr. for Biological Diversity*, 80 F. Supp. 3d at 1005 (quoting *Zivotofsky*, 132 S. Ct. at 1427). As noted, however, Plaintiffs' claims do not require this Court to render *any* foreign policy determination. E.C. Decl. ¶¶ 8-10.

Nor is the third *Baker* test implicated, because this Court need not make "an initial policy determination" of any kind. *Baker*, 369 U.S. at 217. Because the

desirability and lawfulness of the blockade have no bearing on the question of the lawfulness of the IDF's use of lethal force against unarmed civilians on board the *Mavi Marmara*, the Court need not decide the former issues or render any other initial policy determination reserved to the political branches. E.C. Delc. ¶¶ 8-10. *See Kadic*, 70 F.3d at 249 (alleging claims under international human rights statutes "obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion"); *compare Doe*, 400 F. Supp. 2d at 112 (third *Baker* test implicated only because "[t]he legality or propriety of the Israeli defendants' actions in the West Bank directly weighs on whether plaintiffs' injuries are redressable under the law"). The political question doctrine simply does not apply to this case. Defendant's motion should be denied.

D. The Act of State Doctrine Does Not Apply to This Case

1. Every Factor Courts Consider Weighs Against Dismissal

The act of state doctrine is a prudential 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). The Supreme Court had identified three factors guiding the doctrine's application, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), and the Ninth Circuit has added a fourth, *Liu*, 892 F.2d at 1432. Here, Defendant satisfies no factor.

The first factor weighs against dismissal where there exists a high degree of consensus in the area of international law at issue. *Sabbatino*, 376 U.S. at 428. Because the violation of universal *jus cogens* norms such as torture and extrajudicial killing is, by its very definition, supported by an international consensus, such violations weigh strongly against the act of state defense. *Doe I*, 349 F. Supp. 2d at 1296; *Filártiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984); *Siderman*, 965 F.2d at 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); *Kadic*, 70 F.3d at 250 ("[I]t would be a rare case in which the act of state doctrine precluded suit under section 1350."); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 894 (C.D. Cal. 1997) (holding act of state doctrine does not apply to violations of

international law including torture). Moreover, in enacting the ATS Congress specifically authorized U.S. courts to adjudicate claims alleging violation of customary international law such as Plaintiffs' claims in this case.[12]

In fact, courts have held that violation of *jus cogens* norms *alone* defeats any application of the act of state doctrine. *See Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1242 (S.D. Fla. 2012) ("[*J*]*us cogens* norms, which are afforded the highest status under international law, are exempt from the act of state doctrine because they 'constitute norms from which no derogation is permitted.'"); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *see also* REST. (3D) OF FOREIGN RELATIONS LAW 443 cmt. C. (1987) ("A claim arising out of an alleged violation of human rights . . . would (if otherwise sustainable) probably not be defeated by the act of state doctrine[.]").

Defendant's reliance on *Underhill v. Hernandez*, 168 U.S. 250 (1897) is unavailing. MTD at 17. *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. *Hourani v. Mirtchev* is similarly inapposite because it deals only with a defamation claim and not allegations of violations of *jus cogens* norms. 796 F.3d 1, 15 (D.C. Cir. 2015). MTD at 17.

The second *Sabbatino* factor, the need for the U.S. to "speak with one voice" in foreign relations, *Doe I*, 349 F. Supp. 2d at 1296 (quoting *IAM v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981)), also weighs against dismissal. Courts find this factor favors dismissal only when the U.S. government states that adjudication would be detrimental to its foreign relations. *See id.* at 1296-1300 (collecting cases). However, the U.S. government has issued no such statement in this case, which raises only the narrow legal issue of the torture and killing of Furkan Doğan and does not require the Court to decide the legality of the blockade or any issue of Israeli, Turkish, or U.S.

[12] The basis for command responsibility, as alleged here, is similarly well recognized by international law. *Doe I*, 349 F. Supp. 2d at 1296.

foreign policy. Moreover, Plaintiffs' TVPA claims weigh against dismissal because the statute demonstrates Congress's desire that torture and extrajudicial killings be adjudicated by federal courts. *Id.* at 1296.

Courts interpret the third factor as weighing against dismissal where, as here, a case targets only a *former* government official. *See id.* at 1304 ("Virtually every case permitting a suit to proceed over the act of state objection advanced by an individual defendant involve[s] former dictators, rulers or officials no longer in power."); *see also Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360-61 (9th Cir. 1988) (en banc) (act of state doctrine does not apply to suit against *former* dictator); *Kadic*, 70 F.3d at 250 (same); *Filártiga*, 630 F.2d at 889 (same); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (same); *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984) (doctrine doe not apply to suit against current Israeli official for acts taken while formerly serving as Defense Minister).

The fourth factor is "whether the foreign state was acting in the public interest." *Liu*, 892 F.2d at 1432. It is beyond debate that human rights violations are not in the "public interest." *See Doe I*, 349 F. Supp. 2d at 1306 ("It would be difficult to conclude that the more specific actions allegedly taken in violation of international human rights . . . were 'in the public interest.'"). Because every factor weighs against dismissal, the act of state doctrine does not apply.

2. The Misconduct Did Not Occur Within Israel's Territory

Moreover, the act of state doctrine is inapplicable on the separate and independent ground that the alleged acts occurred *outside* Israel's territory. It is well-established that the doctrine simply does not apply to acts not "committed within a foreign state's own borders." *Liu*, 892 F.2d at 1432; *see Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) (holding act of state doctrine did not apply to acts occurring outside state's sovereign territory). Because the IDF attacked the Flotilla while sailing in *international waters*, the alleged misconduct did

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not occur within the territorial confines of the Israel and the doctrine does not apply.[13]

E. Plaintiffs State a Claim Under the TVPA

Defendant next raises a scattershot of arguments that Plaintiffs fail to state a claim under the TVPA. MTD at 18-20. None have merit.

Plaintiffs satisfy each element of "torture" within the meaning of the TVPA, alleging detailed facts demonstrating that Furkan suffered (1) severe pain and suffering, (2) intentionally committed for a proscribed purpose, (3) while under the IDF's custody or physical control. 28 U.S.C. § 1350 note (b) (setting forth the elements of torture); *Doe I*, 349 F. Supp. 2d at 1314-19.

First, Plaintiffs adequately allege severe pain and suffering. When assessing this element, "[t]he critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002). "[M]ere police brutality" will not suffice. *Id.* Here, Furkan was shot four times and left to "l[ie] on deck in a conscious, or semi-conscious state for some time" prior to the fifth and fatal shot. Compl. ¶ 39. The only reasonable inference, which must be drawn in Plaintiffs' favor, is that his pain was *excruciating*. Defendant cannot seriously contend that these facts constitute "mere police brutality."

Moreover, Plaintiffs' allegations are sufficiently specific. In *Price*, the court held that the plaintiffs failed to state a claim for torture because their conclusory allegations provided "no way to determine . . . the severity of plaintiffs' alleged beatings – including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out." Here, by contrast, Plaintiffs plead detailed factual allegations depicting the frequency of the harm Furkan suffered before he died

[13] To the extent that the attack was planned in Israel, this does not alter the conclusion. Courts have rejected this precise argument and held that the doctrine does not apply to acts planned inside a state but taking place beyond its borders. *See Letelier v. Republic of Chile*, 488 F.Supp.664, 673-74 (D.D.C. 1980); *Liu*, 892 F.2d at 1432-33.

(four gunshots, *id.*), its duration (Furkan lay on the ground dying "in a conscious, or semi-conscious state for some time," *id.*), the parts of the body targeted (Furkan's "head, back, left leg, and left foot," *id.*), and the weapons used (firearms, *id.*).

Second, Plaintiffs adequately plead intent and impermissible purpose. "[T]he production of pain [must be] purposive[.]" *Price*, 294 F.3d at 93. Clearly, Furkan was not shot four times by accident or inadvertence; the only reasonable inference is that the shooting was intentional and done with the knowledge and purpose of causing him harm. *See* Compl. ¶ 75 (alleging intent). Plaintiffs also allege a prohibited purpose. Such purposes include, *inter alia*, "punishing that individual for an act that individual or a third person has committed or is suspected of having committed" and "intimidating or coercing that individual or a third person." 28 U.S.C. § 1350 note § (b)(1). Plaintiffs satisfy this definition by alleging that the torture was undertaken for purposes including "intimidating and discriminating against Furkan Doğan and others, punishing him and the passengers of the Flotilla for their involvement in challenging the naval blockade of Gaza, and as a form of collective punishment against those living in Gaza" or highlighting their plight. Compl. ¶ 75.

Third, Plaintiffs adequately plead that the shooting occurred while Furkan was in the IDF's custody and physical control. Defendant cites no authority imposing a durational requirement on custody, and the Complaint adequately alleges facts demonstrating that Furkan was under the IDF's control prior to his death. By surrounding, stopping, and attacking the *Mavi Marmara* with gunfire, and capturing and boarding the ship, the IDF clearly restrained the movement of the boat, controlling it and, consequently, its passengers. *Cf. United States v. Streifel*, 665 F.2d 414, 423 (2d. Cir. 1981) (stating, in the Fourth Amendment context, that the Coast Guard's stop of a boat, enforced by firing shots, and subsequent boarding constituted a seizure of the boat and its passengers). Furkan himself was shot at as the IDF attacked and seized the ship, and he lay injured on the top deck for some time before he was finally shot in the face and killed. Compl. ¶ 39. No reasonable person in such circumstance would have

been able to escape, let alone feel free to leave. *Cf. Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

Plaintiffs have also adequately alleged extrajudicial killing. Defendant's contention that the killing was not "deliberate" but merely "accidental or negligent" is blinking reality. The final and fatal shot to Furkan was fired into his face at point blank range while he lay supine on the deck. *Id.* ¶ 39. Such an act is "deliberate" in every possible sense of the word. Defendant's citation to *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011) for the proposition that Furkan was "mistakenly" targeted "during an ongoing civil uprising" asks this Court to overlook his deliberate execution.

Finally, Plaintiffs have adequately alleged Defendant's command responsibility. Plaintiffs plead detailed allegations describing Defendant's role in planning and commanding the IDF operation and its troops. *Id.* ¶¶ 28-34. Contrary to Defendant's assertion, there is no requirement that Defendant have personally pulled the trigger or ordered the shooting to establish liability. *See* S. Rep. No. 249, 102d Cong., 1st Sess. 9 (1991), at 7 ("Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts–anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them."); *see also Forti*, 672 F. Supp. at 1541 (recognizing command liability); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 & n.15 (D. Mass. 1995) (same). Defendant's motion should be denied.

F. Plaintiffs State a Claim under the ATS

Defendant asserts that Plaintiffs' ATS claims fail to overcome the presumption against extraterritoriality set forth in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). MTD at 20-21. Unlike in *Kiobel*, however, which concerned only "conduct occurring in the territory of a foreign sovereign," *id.* at 1664, the acts forming the basis of Plaintiffs' claim took place in international waters. Plaintiffs thus avoid "the foreign policy concerns that tend to arise when domestic statutes are applied to foreign nationals engaging in conduct in foreign countries." *Sexual Minorities Uganda*

v. Lively, 960 F. Supp. 2d 304, 322 (D. Mass. 2013) (citing *Kiobel*, 133 S.Ct. 1664-65). Moreover, as numerous post-*Kiobel* courts have recognized, conduct occurring within the U.S. is just one of the factors capable of displacing the presumption against extraterritoriality. *See id.*; *Mwani v. bin Laden*, 947 F. Supp. 2d 1, 4 (D.D.C. 2013) ("[A]n act occurring outside the United States could so obviously touch and concern the territory of the United States that the presumption against extraterritorial application of the ATS *is* displaced") (emphasis in original); *see also Mujica v. Airscan*, 771 F.3d 580, 591 (9th Cir. 2014) (*Kiobel* does not mean "that plaintiffs may *never* bring ATS claims based on extraterritorial conduct") (emphasis in original).

A case involving only conduct occurring outside the U.S. satisfies *Kiobel*'s "touch and concern" test and overcomes the presumption against extraterritoriality if it involves "an important American national interest." *Mwami*, 947 F. Supp. 2d at 5 (attack on U.S. embassy in Nairobi "touches and concerns" the U.S.); *aff'd* 417 F.3d 1, 13 (D.C. Cir. 2005) (noting that attack was intended "not only to kill both American and Kenyan employees inside the building, but to cause pain and sow terror in the embassy's home country, the United States"). So too here, the IDF's attack touches "an important American national interest" because it similarly involved the murder of an American citizen and was undertaken for the purpose of "intimidating and discriminating" against American and non-American passengers onboard the *Mavi Marmara*, Compl. ¶ 75, and by implication the citizens of these countries who might undertake similar efforts to assist the people of Gaza in the future.[14]

Defendant's next argument, that torture and extrajudicial killing are not cognizable ATS claims under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), misstates the law. MTD at 21. *See, e.g.*, *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1324 (S.D. Fla. 2011) ("Torture and extrajudicial killings are recognized violations of the law of nations under the ATS"); *Velez v. Sanchez*, 693 F.3d 308, 316 (2d Cir.

[14] A finding that the facts of this case sufficiently "touch and concern" the U.S. would not open floodgates to claims by the surviving family members of every murdered American citizen because ATS claims may be brought only by aliens. 28 U.S.C. § 1350.

2012); *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008).[15]

G. Plaintiffs State a Claim under the ATA

Defendant finally argues that § 2337 of the ATA bars Plaintiffs' claims. MTD at 21-22. Not so. "Individual defendants sued in their personal capacity are not insulated from suit under the ATA simply because a foreign state endorsed their terrorist acts. To conclude otherwise would render the ATA a nullity." *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 28, 29 (D.D.C. 2007) (ATA claim against former foreign government official in his personal capacity for acts undertaken in his official capacity not barred by § 2337). *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Hafer v. Melo*, 502 U.S. 21, 26 (1991) (each describing difference between personal capacity and official capacity suits). Here, even Defendant concedes that he is sued in his personal capacity for acts taken in his official capacity. MTD at 7 ("The complaint seeks to hold Mr. Barak personally liable"); MTD at 10-11 (Defendant sued for acts undertaken in his official capacity). Defendant's argument must fail.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Defendant's motion in its entirety. Should this Court decide to grant any part of Defendant's motion, however, Plaintiffs request that they be given leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

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[15] Defendant's argument is belied by the very sources he cites. *See Mamani*, 654 F.3d at 1152 ("'[E]xtrajudicial killings' may give rise to a cause of action under the ATS.").