

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

AMERICAN JUSTICE CENTER, *et al.*

Plaintiffs,

v.

NARENDRA MODI,

Defendant.

14 Civ. 7780 (AT)

ECF Case

**SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF SUGGESTION OF IMMUNITY
SUBMITTED BY THE UNITED STATES OF AMERICA**

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The United States of America, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, pursuant to 28 U.S.C. § 517,¹ respectfully submits this supplemental brief in further support of its Suggestion of Immunity, dated October 19, 2014.

DISCUSSION

In their opposition to the Suggestion of Immunity, plaintiffs raise a series of arguments—none of which has any merit. First, contrary to plaintiffs’ argument, the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602-1611, has no relevance to the United States’ immunity determination in this case. Although plaintiffs are correct that the FSIA does not cover the immunity of foreign officials, *see* Plaintiffs’ Memorandum of Law in Opposition to Suggestion of Immunity (“Opp’n”), ECF No. [8], at 4, it does not follow that foreign officials enjoy no immunity in U.S. courts. The immunity of foreign heads of state and heads of government is governed not by the FSIA but by a nonstatutory regime under which the Executive Branch identifies the controlling principles of foreign official immunity, taking into account the applicable international law.² In enacting the FSIA, “Congress clearly intended to supersede the common-law regime for claims against foreign states,” but there is “nothing in the statute’s origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity.” *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010). Congress instead left in place the practice of judicial deference to Executive Branch immunity determinations with

¹ 28 U.S.C. § 517 provides that “any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States.”

² Although the doctrine is referred to as “head of state immunity,” it applies to heads of government and foreign ministers as well. *See, e.g., The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 138-39 (1812) (discussing generally the immunity of foreign ministers in U.S. courts); *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20-21 (Feb. 14) (Merits) (heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states); Restatement (Second) of Foreign Relations Law §§ 65, 66 (1965) (noting that head of state immunity covers heads of government).

respect to foreign officials. *See id.* at 323 (“We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department’s role in determinations regarding individual official immunity.”); *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (“Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch.”); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). Accordingly, this Court and others have uniformly dismissed cases brought against sitting foreign heads of state and government as to whom the United States has filed a Suggestion of Immunity. *See* Suggestion of Immunity at 4-5 & n.4.

Second, plaintiffs incorrectly argue that Defendant Modi’s immunity does not extend to acts performed before he assumed office as Prime Minister. *See* Opp’n at 1 (“Modi is being sued for acts he committed as ‘Chief Minister’ of the State of Gujarat in 2002 and not for acts he committed as ‘Prime Minister’ [of] India.”). There is no merit to this contention. The fact that the complaint alleges unlawful conduct before Defendant Modi became Prime Minister does not render ineffective the Executive Branch’s assertion of immunity. Under customary international law principles accepted by the Executive Branch, a sitting head of state’s immunity is based on his status as the incumbent office holder, not his conduct, and it renders the head of state immune from the jurisdiction of the court while he or she is in office, without regard to the content of the complaint. *See Habayarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) (holding that courts “must accept the United States’ suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office”); *see also Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005) (accepting Executive Branch’s determination that incumbent Pope enjoyed head of state immunity for acts allegedly

committed before he became head of state). Thus, it is irrelevant that Defendant Modi was not the head of government at the time of the events alleged in the complaint. *Cf. also* Arrest Warrant of 11 Apr. 2000, 2002 I.C.J. at 22 (“No distinction can be drawn between acts performed . . . in an ‘official’ capacity, and those claimed to have been performed in a ‘private capacity’, or, for that matter, between acts performed before the person concerned assumed office . . . and acts committed during the period of office” (discussing head of state immunity under international law)).

Third, contrary to plaintiffs’ argument, neither the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, nor the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350 note, override the immunity of foreign officials. *See* Opp’n at 8. The Second Circuit has already rejected the argument that the ATS or TVPA overrides Executive Branch determinations of foreign official immunity, relying on the Executive’s suggestion of immunity to require the dismissal of a suit asserting ATS and TVPA claims against a foreign official. *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (recognizing Executive Branch’s determination of immunity in case brought under TVPA and ATS); *see also Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (holding that “common law of head of state immunity survived enactment of the TVPA”); *Devi v. Rajapaksa*, 2012 WL 3866495 (S.D.N.Y.) (assuming that plaintiff was relying on the TVPA), *appeal dismissed*, 2013 WL 3855583 (2d Cir.) (dismissing appeal because appellant’s claims lack an arguable basis in law or fact); *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (recognizing head of state immunity in case brought pursuant to ATS and TVPA); *see also* H.R. Rep. No. 102–367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88 (“[N]othing in the TVPA overrides the doctrines of diplomatic and head of state immunity.”).

Fourth, plaintiffs contend that international law does not allow for immunity for alleged *jus cogens* violations, *see* Opp'n at 6; but the Executive has concluded that Prime Minister Modi is entitled to immunity, and the Executive's immunity determination has taken into account applicable international law principles relating to foreign official immunity. *See Matar*, 563 F.3d at 15 (“[I]n the common-law context, we defer to the Executive’s determination of the scope of immunity.”); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (“[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. . . . [F]lexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision.”). The courts have deferred to the Executive’s conclusion that a head of state or head of government defendant is immune, regardless of whether the defendant was alleged to have committed *jus cogens* violations. *See Ye*, 383 F.3d at 627 (“The Executive Branch’s determination that a foreign leader should be immune from suit even when the leader is accused of acts that violate *jus cogens* norms is established by a Suggestion of Immunity. We are no more free to ignore the Executive Branch’s determination than we are free to ignore a legislative determination concerning a foreign state.”); *Devi v. Rajapaksa*, 2012 WL 3866495, *2 (S.D.N.Y. September 4, 2012); *see also Matar*, 563 F.3d at 15 (accepting Executive’s determination of immunity in case alleging *jus cogens* violations); *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp.2d 336, 344 (E.D.N.Y. 2013), *aff’d*, *Rosenberg v. Pasha*, 577 Fed. Appx. 22 (2014).³

³ The cases cited by plaintiffs, *see* Opp'n at 6, are inapposite. First, in none of the cases cited by plaintiffs did the court reject the Executive Branch’s determination that a foreign official is immune from suit. Second, the Fourth Circuit's decision in *Yousuf v. Samantar*, 699 F.3d 763 (2012), is not on point because that case did not involve a sitting head of state. Although the Fourth Circuit held that “the State Department’s determination regarding conduct-based

Finally, the plaintiffs irrelevantly discuss the act of state doctrine, *see* Opp'n at 11, which the United States has not invoked. For the act of state doctrine to be triggered, the relief sought or the defense interposed must require a federal court to declare invalid a foreign government's official act. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990). Here, the United States has suggested the immunity of Prime Minister Modi based solely on his status as head of government, and there is no need for the Court to decide whether Prime Minister Modi's alleged actions fall within the act of state doctrine. This case presents no question regarding the proper scope of the act of state doctrine, and the act of state doctrine is not relevant to the Executive's Suggestion of Immunity.

CONCLUSION

For the reasons stated above and in its initial Suggestion of Immunity filed in this case, the United States respectfully submits that Defendant Modi is immune in this action.

Dated: December 10, 2014

Respectfully submitted,

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immunity . . . is not controlling, *id.* at 773, the court expressly recognized that courts “give absolute deference to the State Department’s position on status-based immunity doctrines such as head-of-state immunity,” *id.* Moreover, to the extent that there is any conflict between *Samantar* and *Matar*, the latter is binding circuit precedent.