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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
13 **WESTERN DIVISION**

14 AMHET DOĞAN, individually and on
15 behalf of his deceased son, FURKAN
16 DOĞAN; and HIMET DOĞAN,
individually and on behalf of her
deceased son, FURKAN DOĞAN,

17 Plaintiffs,

18 v.

19 EHUD BARAK,

20 Defendant.

No. 2:15-CV-08130-ODW (GJSx)

Assigned to the Honorable Otis D. Wright II

**SUGGESTION OF IMMUNITY BY THE
UNITED STATES**

INTRODUCTION

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2 The United States respectfully submits this Suggestion of Immunity to inform the Court
3 of the Executive Branch’s determination regarding the immunity of former Israeli Minister of
4 Defense Ehud Barak in this action.¹ This case implicates principles of foreign official immunity,
5 and the United States has strong interests in ensuring the correct application of those principles
6 as accepted by the Executive Branch. The Department of State has made the determination, to
7 which the Court must defer, that Barak is immune from suit under the common law. *See*
8 Attached Exhibit. In arriving at this determination, the United States emphasizes that it
9 expresses no view on the merits of Plaintiffs’ claims.
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BACKGROUND

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12 Plaintiffs Ahmet and Hikmet Doğan bring suit individually and on behalf of their
13 deceased son, Furkan Doğan (“Doğan”), who was killed by Israeli Defense Forces (“IDF”)
14 during their interception of six vessels bound for Gaza in 2010. Compl. ¶¶ 1–3. They proffer
15 claims under the Torture Victim Protection Act (“TVPA”), Pub. L. No. 102–256, 106 Stat. 73
16 (codified at 28 U.S.C. § 1350 note), the Alien Tort Statute, 28 U.S.C. § 1350, and the Anti-
17 Terrorism Act, 18 U.S.C. § 2331 et seq. Compl. ¶¶ 59–125. In support of their claims, Plaintiffs
18 allege that in planning, directing, and ordering the IDF operation and exercising command
19 responsibility, “Barak knew or should have known that his subordinates . . . had committed, were
20 committing, or were about to commit human rights abuses . . . [and] failed to prevent the
21 abuses.” *Id.* ¶¶ 63, 70, 78, 84, 90, 99, 110, 121. Plaintiffs seek compensatory and punitive
22 damages. *Id.* ¶ 1.
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26 ¹ The United States submits this filing pursuant to 28 U.S.C. § 517, which provides that “any
27 officer of the Department of Justice[] may be sent by the Attorney General to any State or district
28 in the United States to attend to the interests of the United States in a suit pending in a court of
the United States, or in a court of a State, or to attend to any other interest of the United States.”

1 On December 31, 2015, the State of Israel formally requested that the Department of
2 State file a Suggestion of Immunity on behalf of Barak. *See* Decl. of Christopher M. Egleson in
3 Supp. of Def.’s Mot. to Dismiss Ex. H, ECF No. 26 [hereinafter Diplomatic Note from Israel].
4 The United States respectfully submits this Suggestion of Immunity to inform the Court of the
5 Executive Branch’s determination regarding Barak’s immunity from suit.

6 **ARGUMENT**

7 **I. THE EXECUTIVE BRANCH HAS DETERMINED THAT BARAK IS**
8 **IMMUNE FROM SUIT**

9 **A. The Executive Branch’s Foreign Official Immunity Determinations Are**
10 **Controlling**

11 The conduct of the Nation’s foreign affairs is committed to the political branches. Unlike
12 sovereign immunity determinations with respect to foreign states, which are governed by the
13 Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602 et seq., the FSIA does not
14 displace “the State Department’s role in determinations regarding individual official immunity.”
15 *Samantar v. Yousuf*, 560 U.S. 305, 323 (2010). The Supreme Court in *Samantar* explained that,
16 prior to the enactment of the FSIA, a two-step procedure, which developed under the common
17 law, existed for resolving a foreign state’s claim of sovereign immunity. *Id.* at 311. A foreign
18 state sued in a court in the United States could request a “Suggestion of Immunity” from the
19 Department of State. *Id.* If the Executive Branch then filed a Suggestion of Immunity, the court
20 “surrendered its jurisdiction.” *Id.* If the Executive Branch declined to file a Suggestion of
21 Immunity, the court “had authority to decide for itself whether all the requisites for such
22 immunity existed.” *Id.* (quoting *Ex parte Peru*, 318 U.S. 578, 587 (1943)). In making that
23 decision, “a district court inquired ‘whether the ground of immunity is one which it is the
24 established policy of the [Department of State] to recognize.’” *Id.* at 312 (quoting *Republic of*
25 *Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)) (alteration in original). The Court further explained
26 that “the same two-step procedure was typically followed when a foreign official asserted
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1 immunity.” *Id.* Because it concluded that Congress did not codify standards governing the
2 immunity of foreign officials, the Supreme Court held that the common law, two-step procedure
3 remains in place for determinations of foreign official immunity. *Id.* at 323–25.

4 As courts have long recognized, the separation of powers requires courts to defer to the
5 Executive Branch’s determination regarding foreign official immunity. *See Habyarimana v.*
6 *Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) (“We must accept the United States’ suggestion
7 that a foreign head of state is immune from suit . . . ‘as a conclusive determination by the
8 political arm of the Government that the continued [exercise of jurisdiction] interferes with the
9 proper conduct of our foreign relations.’” (quoting *Ex Parte Republic of Peru*, 318 U.S. at 589)
10 (first alteration added, second alteration in original)); *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir.
11 2009) (“Here, the Executive Branch has urged the courts to decline jurisdiction over appellants’
12 suit, and under our traditional rule of deference to such Executive determinations, we do so.”).
13 Indeed, as the Court of Appeals for the Seventh Circuit observed in *Ye v. Zemin*, 383 F.3d 620
14 (2004), “[i]t is a guiding principle in determining whether a court should [recognize a
15 suggestion of immunity] in such cases, that the courts should not so act as to embarrass the
16 executive arm in its conduct of foreign affairs . . . by assuming an antagonistic jurisdiction.” *Id.*
17 at 626 (quoting *Hoffman*, 324 U.S. at 35) (alteration in original)).

18 In the absence of a controlling statute, the common law governing foreign official
19 immunity constitutes a “rule of substantive law” requiring courts to “accept and follow the
20 executive determination” concerning a foreign official’s immunity from suit. *Hoffman*, 324 U.S.
21 at 36; *see also Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (“When the executive branch
22 has determined that the interests of the nation are best served by granting a foreign sovereign
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1 immunity from suit in our courts, there are compelling reasons to defer to that judgment without
2 question.”²

3 The Court of Appeals for the Ninth Circuit consistently has acknowledged and followed
4 this practice. *See, e.g., Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126 (9th Cir. 2010)
5 (noting that if the Executive Branch filed a Suggestion of Immunity, “the district court dismissed
6 the case for lack of jurisdiction”); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705
7 (9th Cir. 1992) (“When the State Department issued a suggestion of immunity in a particular
8 case, the court followed it”); *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1100 (9th
9 Cir. 1990) (discussing pre-FSIA practice and noting that “the courts treated such ‘suggestions’ as
10 binding determinations, and would invoke or deny immunity based upon the decision of the State
11 Department”), *abrogated by Samantar v. Yousuf*, 560 U.S. 305 (2010); *Hassen v. Nahyan*, No.
12 CV 09-01106 DMG MANX, 2010 WL 9538408, at *5 (C.D. Cal. Sept. 17, 2010) (“Because the
13 State Department has [filed a Suggestion of Immunity], [the defendant] is entitled to
14 immunity.”)³

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18 ² *See also Se. Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974)
19 (rejecting argument that district court “erred . . . in accepting the executive suggestion of
20 immunity without conducting an independent judicial inquiry”); *Isbrandtsen Tankers, Inc. v.*
21 *President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) (“[O]nce the State Department has ruled
22 in a matter of this nature, the judiciary will not interfere.” (deferring to Department of State
foreign sovereign immunity determination)); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th
Cir. 1961) (“We think that the doctrine of the separation of powers under our Constitution
requires us to assume that all pertinent considerations have been taken into account by the
Secretary of State in reaching his conclusion.” (deferring to Department of State foreign
sovereign immunity determination)).

23 ³ The cases of *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir.
24 1992) (“Estate I”), and *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th
25 Cir. 1994) (“Estate II”), are not to the contrary. The United States did not file a Suggestion of
26 Immunity in either case. Moreover, the Ninth Circuit rejected claims of immunity in those cases
27 because the claims clearly pertained to activities outside the scope of the defendants’ official
28 capacities. In *Estate I*, the Ninth Circuit determined that the defendant “admitted acting on her
own authority, not on the authority of the Republic of the Philippines.” 978 F.2d at 498; *see id.*
at 498 n.10 (defendant’s affidavit “declare[d] that she was not a member of the government”). In
Estate II, the Ninth Circuit confirmed that the defendant had not acted in his official capacity, in
part because “the Philippine government[] agree[d] that the suit against [him could] proceed.”
25 F.3d at 1472.

1 This Court should not follow the analysis of the Court of Appeals for the Fourth Circuit
2 in *Yousuf v. Samantar*, which held that that while the Executive Branch’s determination regarding
3 status-based immunity under the common law receives “absolute deference,” the Executive’s
4 determination regarding conduct-based immunity is not controlling, but “carries substantial
5 weight.” 699 F.3d 763, 773 (4th Cir. 2012). The Fourth Circuit’s approach constitutes legal
6 error and cannot be reconciled with the Supreme Court’s decision in *Samantar*, which itself
7 involved conduct-based immunity. The defendant in that case was a former Somali official. *See*
8 *Samantar*, 560 U.S. at 308–09, 310 n.5. Under international law, former officials enjoy conduct-
9 based immunities for official acts taken while in office. *See, e.g., 1 Oppenheim’s International*
10 *Law* 1043–44 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). Yet, in concluding that
11 Congress did not intend to alter “the State Department’s role in determinations regarding
12 individual official immunity,” *Samantar*, 560 U.S. at 323, the Court made no distinction between
13 status- and conduct-based immunity determinations.
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16 And in discussing the Department of State’s historic role, the Supreme Court explained
17 categorically that when the Department of State submitted a Suggestion of Immunity, a “district
18 court surrendered its jurisdiction.” *Id.* at 311. Indeed, two of the cases cited by the Supreme
19 Court in *Samantar* regarding foreign officials—*Heaney v. Government of Spain*, 445 F.2d 501,
20 504–05 (2d Cir. 1971), and *Waltier v. Thomson*, 189 F. Supp. 319, 320–21 (S.D.N.Y. 1960)—
21 involved consular officials who had only conduct-based immunity for acts carried out in their
22 official capacity. And in reasoning that Congress did not intend to modify the historical practice
23 regarding individual foreign officials, *see Samantar*, 560 U.S. at 322, the Supreme Court cited a
24 third case, *Greenspan v. Crosbie*, No. 74 Civ. 4734(GLG), 1976 WL 841 (S.D.N.Y., Nov. 23,
25 1976), in which the district court deferred to the Department of State’s recognition of conduct-
26 based immunity of individual foreign officials, *see id.* at *2.
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1 Similarly, the Fourth Circuit’s distinction between the deference due to Executive Branch
2 determinations of conduct-based and status-based immunities finds no support in Ninth Circuit
3 case law. Rather, under the common law, when the Executive Branch filed a Suggestion of
4 Immunity, “the courts treated such ‘suggestions’ as binding determinations, and would invoke or
5 deny immunity based upon the decision of the State Department.” *Chuidian*, 912 F.2d at 1100
6 (describing common law practice); *see also Peterson*, 627 F.3d at 1126 (not distinguishing
7 between conduct-based and status-based immunities); *Siderman de Blake*, 965 F.2d at 705
8 (same).⁴

9
10 These decisions reflect the fact that the Executive Branch’s authority to make foreign
11 official immunity determinations, and the requirement of judicial deference to such
12 determinations, flow from the Executive’s constitutional responsibility for conducting the
13 Nation’s foreign relations, and not just from the more specific constitutional power to recognize
14 diplomats and foreign heads of state on which the Fourth Circuit relied. *See, e.g., Ex parte Peru*,
15 318 U.S. at 589 (noting that a Suggestion of Immunity “must be accepted by the courts as a
16 conclusive determination by the political arm of the Government” that “continued retention of
17 the vessel interferes with the proper conduct of our foreign relations”). While the scope of
18 foreign state and foreign official immunity is not invariably coextensive, *see Samantar*, 560 U.S.
19 at 321, the basis for recognizing the immunity of current and former foreign officials is that “the
20 acts of the official representatives of the state are those of the state itself, when exercised within
21 the scope of their delegated powers.” *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895),
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25 ⁴ Although a district court in the Central District of California recently “[found] the reasoning of
26 the Fourth Circuit in [*Samantar*] detailed and persuasive,” *Mireskandari v. Mayne*, No. 12- cv-
27 3861-JGB-MRWx, 2016 WL 1165896, at *17 (C.D. Cal. Mar. 23, 2016), the Fourth Circuit’s
28 decision constitutes legal error and should not be followed for the reasons discussed above. Moreover, in *Mireskandari*, the United Kingdom did not ask the Department of State to file Suggestions of Immunity on behalf of any of the defendants. Consequently, no Suggestions of Immunity were filed, and the district court considered the Fourth Circuit’s opinion without any briefing by the United States regarding the legal errors inherent in that decision.

1 *aff'd*, 168 U.S. 250 (1897). As a result, suits against foreign officials—whether they are heads of
 2 state or lower-level officials—implicate many of the same considerations of comity and respect
 3 for other Nations’ sovereignty as suits against foreign states. The Executive Branch’s
 4 constitutional authority over the conduct of foreign affairs thus serves as a foundation for its
 5 authority to determine the immunity of foreign officials. In the absence of a governing statute
 6 (such as the FSIA with respect to foreign state immunity), it continues to be the Executive
 7 Branch’s role to determine foreign official immunity from suit. *See, e.g., Ye*, 383 F.3d at 626
 8 (“Our deference to the Executive Branch is motivated by the caution we believe appropriate of
 9 the Judicial Branch when the conduct of foreign affairs is involved.”).⁵

11 **B. The Executive Branch Has Determined that Barak Is Immune From Suit**

12 In accordance with the process described above, the Court should dismiss this action
 13 because the Executive Branch has determined that Barak is immune from suit. As a general
 14 matter, under principles of customary international law accepted by the Executive Branch, a
 15 foreign official enjoys immunity from suit based upon acts taken in an official capacity. In
 16 making the immunity determination, the Department of State considers, *inter alia*, a foreign
 17 government’s request (if there is such a request) that the Department of State suggest the
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19 ⁵ The Solicitor General twice argued in briefing before the Supreme Court that the Fourth
 20 Circuit’s decision on remand in *Samantar* constitutes legal error. On both occasions, however,
 21 the Solicitor General urged the Supreme Court not to grant plenary review. On the first occasion,
 22 after the Fourth Circuit issued its decision on remand in *Samantar*, the Solicitor General
 23 recommended that the Court grant *Samantar*’s petition for certiorari, vacate the court of appeals’
 24 judgment, and remand the case to permit the district court to “consider any further determination
 25 by the United States on the immunity issue in light of . . . developments and diplomatic
 26 discussions between the United States and the recently recognized Government of Somalia.”
 27 Brief for the United States as Amicus Curiae 22, *Samantar v. Yousuf*, No. 12-1078 (2014)
 28 [hereinafter First SG Brief]. The Supreme Court instead denied the petition. On the second
 occasion, *Samantar* had sought certiorari after he was found liable following a bench trial, and
 the court of appeals dismissed *Samantar*’s appeal as moot. Because the Fourth Circuit’s ultimate
 judgment was “consistent with the Executive Branch’s determination that [*Samantar*] [was] not
 immune,” the Solicitor General argued that the Supreme Court “should not grant review simply
 to correct the erroneous reasoning in the Fourth Circuit’s opinion.” Brief for the United States as
 Amicus Curiae at *23, *Samantar v. Yousuf*, No. 13-1361, 2015 WL 412283 (2015) [hereinafter
 Second SG Brief]. The Supreme Court denied review. *See Samantar v. Yousuf*, 135 S. Ct. 1528
 (2015).

1 official's immunity. Notwithstanding such a request, the Department of State could determine
2 that a foreign official is not immune. That would occur, for example, should the Department of
3 State conclude that the conduct alleged was not taken in an official capacity, as might be the case
4 in a suit challenging an official's purely private acts, such as personal financial dealings. In
5 making that determination, it is for the Executive Branch, not the courts, to determine whether
6 the conduct alleged was taken in a foreign official's official capacity. *See Hoffman*, 324 U.S. at
7 35 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow,
8 or to allow an immunity on new grounds which the government has not seen fit to recognize.").

9
10 Here, the State of Israel has asked the Department of State to recognize the immunity of
11 Barak. Diplomatic Note from Israel at 1. After careful consideration of this matter, including a
12 full review of the pleadings and other materials relied upon by Plaintiffs, the Department of State
13 has determined that Barak is immune from suit. *See* Ex. 1 (Letter from Brian J. Egan, Legal
14 Adviser, Department of State, to Benjamin C. Mizer, Principal Deputy Assistant Attorney
15 General, Civil Division, Department of Justice, requesting that the United States suggest the
16 immunity of Barak). All of Plaintiffs' claims challenge actions undertaken by Barak in his
17 former role as Israeli Minister of Defense. Indeed, Plaintiffs allege that Barak "is sued in his
18 personal capacity for acts taken in his official capacity." Opp'n to Def.'s Mot. to Dismiss at 25
19 (ECF No. 37) [hereinafter Opposition]. Plaintiffs note in their Complaint that Barak "held the
20 position of Minister of Defense during the planning of the IDF operation," and contend that
21 "[w]hile serving in that position[,] he planned and commanded the attack and interception of the
22 Flotilla"—an operation that allegedly "resulted in the torture and extrajudicial killing of Furkan
23 Doğan." Compl. ¶¶ 3, 8–9. Plaintiffs reiterate in their Opposition that their challenge stems
24 from Barak's "planning and commanding the attack on the Gaza Freedom Flotilla resulting in the
25 torture and extrajudicial killing of their son." Opp'n at 1.
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1 Accordingly, it is clear that Plaintiffs expressly challenge Barak’s exercise of his official
2 powers as the former Minister of Defense of Israel.⁶ On their face, acts of defendant foreign
3 officials who are sued for exercising the powers of their office are treated as acts taken in an
4 official capacity, and plaintiffs have provided no reason to question that determination.

5 Plaintiffs argue in their Opposition that “foreign officials are not entitled to immunity
6 under the common law for violations of *jus cogens* norms,”⁷ relying primarily on the Fourth
7 Circuit’s decision in *Samantar*. Opp’n at 8–9. There, the Fourth Circuit held that “under
8 international and domestic law, officials from other countries are not entitled to foreign official
9 immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official
10 capacity.” *Samantar*, 699 F.3d at 777. Plaintiffs’ reliance is misplaced. The per se rule of non-
11 immunity adopted by the Fourth Circuit is not drawn from any determination made or principles
12 articulated by the Executive Branch. In *Samantar*, the Solicitor General informed the Supreme
13 Court that “[t]he Executive has not adopted any such categorical exception to immunity,” and
14 that the Fourth Circuit’s judicially created rule “would substantially impair the Executive’s
15 authority and responsibility to make immunity determinations.” Second SG Brief at 12; *see also*
16 First SG Brief at 11. The Fourth Circuit’s decision is thus inconsistent with the basic principle
17 that Executive Branch immunity determinations establish “substantive law governing the
18 exercise of the jurisdiction of the courts.” *Hoffman*, 324 U.S. at 36.

19 Moreover, the Supreme Court in *Samantar* unanimously held that courts should continue
20 to adhere to official immunity determinations formally submitted by the Executive Branch, just
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24 ⁶ Indeed, Israel has confirmed that “all of the actions of Mr. Barak at issue in the lawsuit were
25 performed exclusively in his official capacity as Israel’s Minister of Defense.” Diplomatic Note
26 from Israel 1.

27 ⁷ A *jus cogens* norm “is a norm accepted and recognized by the international community of states
28 as a whole as a norm from which no derogation is permitted and which can be modified only by
a subsequent norm of general international law having the same character.” *Siderman de Blake*,
965 F.2d at 714 (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155
U.N.T.S. 332, 8 I.L.M. 679).

1 as they did before the enactment of the FSIA. *See Samantar*, 560 U.S. at 321–25. Both before
2 and after that decision, the United States has suggested immunity for former foreign officials
3 who were alleged to have committed *jus cogens* violations. *See* U.S. Amicus Br. at 19–25,
4 *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23–34, *Ye v.*
5 *Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004); *see also* Statement of Interest & Suggestion of
6 Immunity at 7–11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP (E.D.N.Y. Dec.
7 17, 2012); Suggestion of Immunity at 6, *Doe v. De Leon*, No. 3:11-cv-01433-AWT (D. Conn.
8 Sept. 7, 2012); Statement of Interest & Suggestion of Immunity at 5–8, *Giraldo v. Drummond*
9 *Co.*, No. 1:10-mc-00764-JDB (D.D.C. Mar. 31, 2011). The courts deferred to the United States’
10 Suggestions of Immunity in those cases. *See Matar*, 563 F.3d at 14-15; *Ye*, 383 F.3d at 626–27;
11 *Rosenberg v. Pasha*, 577 F. App’x 22, 23–24 (2d Cir. 2014); *Doe v. De Leon*, 555 F. App’x 84, 85
12 (2d Cir. 2014); *Giraldo v. Drummond Co.*, 493 F. App’x 106 (D.C. Cir. 2012) (per curiam). The
13 Department of State has determined that Barak is immune from suit. The Court must defer to
14 that determination, notwithstanding Plaintiffs’ allegations of *jus cogens* violations.
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17 **C. The TVPA Does Not Override the Immunity of Foreign Officials**

18 Plaintiffs also err in suggesting that Congress abrogated immunity under the common law
19 for foreign officials accused of torture or extrajudicial killing. Opp’n at 9. Indeed, they argue
20 that the TVPA does so “unambiguous[ly].” Opp’n at 10. This is plainly incorrect, as the TVPA
21 is entirely silent as to whether it limits the immunities of foreign officials. Indeed, Plaintiffs can
22 cite no portion of the TVPA that references or mentions common law immunity. As the Supreme
23 Court has noted, “[i]n order to abrogate a common-law principle, the statute must ‘speak
24 directly’ to the question addressed by the common law.” *United States v. Texas*, 507 U.S. 529,
25 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)); *see also The*
26 *Schooner Exch. v. McFaddon*, 11 U.S. 116, 146 (1812) (noting that courts may not infer a
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1 rescission of foreign sovereign immunity unless expressed by the political branches “in a manner
2 not to be misunderstood”). The TVPA lacks any such clear statement abrogating immunity.

3 Indeed, the Court of Appeals for the D.C. Circuit rejected on this basis the proposition
4 that the TVPA supersedes common law head-of-state immunity. *See Manoharan v. Rajapaksa*,
5 711 F.3d 178, 180 (D.C. Cir. 2013) (per curiam). The D.C. Circuit relied on “[t]he canon of
6 construction that statutes should be interpreted consistently with the common law[, which] helps
7 us interpret a statute that, as here, clearly covers a field formerly governed by the common
8 law.” *Id.* at 179 (quoting *Samantar*, 560 U.S. at 320). Finding no “language [in] the TVPA . . .
9 [that] supersedes the common law,” the D.C. Circuit “conclude[d] that the common law of head
10 of state immunity survived enactment of the TVPA.” *Id.* at 180. The same is true of the
11 common law of foreign official immunity more generally.

13 The legislative history of the TVPA further confirms that the TVPA does not abrogate
14 common law foreign official immunity. The Senate Judiciary Committee Report (“Senate
15 Report”) specifically states that the “TVPA is not meant to override the Foreign Sovereign
16 Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S.
17 courts, except in certain instances.” S. Rep. No. 102-249, at *7 (1991) (footnote omitted).
18 Additionally, the Senate Report emphasizes that the TVPA was not intended to override
19 diplomatic and head-of-state immunities. *Id.* at *7–*8; *see also* H.R. Rep. No. 102-367, at *5
20 (1991) (“[N]othing in the TVPA overrides the doctrines of diplomatic and head of state
21 immunity.”). With respect to conduct-based immunity, the legislative history indicates that
22 Congress believed that foreign states rarely would request immunity on behalf of an official in
23 cases where torture or extrajudicial killing occurred—since states would rarely “admit some
24 knowledge or authorization of relevant acts.” Senate Report at *8 (internal quotation marks
25 omitted). But the converse implication is that where, as here, the foreign state has asserted that
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1 the acts alleged were taken in an official capacity, the Senate Judiciary Committee understood
2 that the TVPA would not override foreign official immunity.⁸

3 Contrary to Plaintiffs’ assertion, reading the TVPA in harmony with the immunities of
4 foreign officials does not render the TVPA a “[v]irtual [n]ullity.” Opp’n at 12. For example,
5 foreign officials may be liable under the TVPA, even for official acts, where the parent state
6 waives their immunity. See *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472 (noting the
7 “Philippine government’s agreement that the suit against Marcos proceed”). And a foreign
8 official will be subject to liability under the TVPA in any case where the Executive Branch
9 informs the court that it has decided not to recognize the foreign official’s claim of immunity
10 from suit, as was the case in *Samantar*. Here, however, the Executive Branch has determined
11 that Barak is immune from suit under the TVPA.
12

13 **CONCLUSION**

14 The Executive Branch has determined that former Israeli Defense Minister Ehud Barak is
15 immune from this suit.

16 DATED: June 10, 2016

17 Respectfully submitted,

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8 The Senate Report operated under the assumption that the FSIA governs the immunity of foreign officials. See Senate Report at *8. That assumption was proved incorrect by the Supreme Court’s decision in *Samantar*. See 560 U.S. at 308.

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Attorneys for the United States of America

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EXHIBIT

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

June 10, 2016

Benjamin C. Mizer
Principal Deputy Assistant Attorney General
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Washington D.C. 20530

Re: *Ahmet Doğan et al. v. Ehud Barak*, No. 2:15-cv-8130 (C.D. Cal.)

Dear Mr. Mizer:

I am writing to request that the Department of Justice convey to the United States District Court for the Central District of California in the above-referenced case the determination of the Department of State that Ehud Barak enjoys immunity from suit with respect to this action. This determination of immunity does not express any views on the merits of Plaintiffs' claims.

This case was brought by the Turkish citizen parents of Furkan Doğan, a United States citizen who was killed by Israel Defense Forces (IDF) during their interception of the Gaza flotilla on May 31, 2010. Plaintiffs claim that Doğan's suffering and death constitute torture and extrajudicial killing and that the killing of Doğan was an act of terrorism. Plaintiffs allege that Doğan was shot five times by the IDF, including once at point-blank range. Complaint ¶ 39. Plaintiffs allege that the harms allegedly suffered by Doğan were "inflicted by and/or at the instigation, under the control or authority, or with the consent or acquiescence of Defendant Barak in his official capacity as Minister of Defense." *Id.* ¶¶ 83, 89. *Accord id.* ¶ 76. The Complaint refers repeatedly to Barak's official position as Defense Minister immediately before and during the relevant time period (¶¶ 8, 9, 11, 19, 28-32, 37, 53, 83, 89). The Complaint, which cites a number of reports concerning the interception of the Gaza flotilla, does not allege any conduct by former Defense Minister Barak in the events leading to Doğan's death beyond his general participation in the planning of the interception of the flotilla and his issuance of unspecified orders to the IDF forces who intercepted it. *See id.* ¶¶ 28-29. In addition, Plaintiffs allege generically that Barak knew or should have known that the interception of the flotilla would result in violations of international law, *id.* ¶¶ 11, 82, 90, that he was briefed in advance of the interception about unspecified "extreme situations and extreme scenarios" that might develop in the course of the interception, and that he made the IDF forces responsible for carrying out the interception aware of those extreme situations and scenarios. *Id.* ¶ 34.

By diplomatic note dated December 31, 2015, which already has been submitted to the District Court, Israel requested that the United States file a Suggestion of Immunity on behalf of Barak. The diplomatic note states that “all of the actions of Mr. Barak at issue in the lawsuit were performed exclusively in his official capacity as Israel’s Minister of Defense.” The diplomatic note describes the interception of the Mavi Marmara and the other five vessels attempting to break Israel’s naval blockade of the Gaza Strip as “an authorized military action taken by the State of Israel.”

Plaintiffs expressly challenge Barak’s exercise of his official powers as an official of the Government of Israel. The Complaint does not refer to any private conduct by Barak, but only to his official actions. Moreover, in their most recent filing, they contend that Barak is responsible “for planning and commanding the attack on the Gaza Freedom Flotilla resulting in the torture and extrajudicial killing of their son.” Opposition to Defendant’s Motion to Dismiss at 1. Plaintiffs allege that Barak “is sued in his personal capacity for acts taken in his official capacity.” *Id.* at 25. As a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate. This assessment is reinforced when, as is the case here, the foreign government also asserts that the actions of its official were authorized acts taken in an official capacity.

In the circumstances of this case, the military orders issued by Barak, which were authorized by Israel, are official acts for which he is immune from suit. Plaintiffs have provided no reason that would call into question our assessment that Barak is immune in this case, and we are aware of no other information that would lead us to do so.

In light of these circumstances, taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the Department of State has determined that Ehud Barak enjoys immunity from suit with respect to this action. Accordingly, I request that the Department of Justice file a Suggestion of Immunity on behalf of Barak in this case.

Sincerely,



Brian J. Egan
Legal Adviser