No. 16-56704

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

EHUD BARAK

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE No. CV 15-08130-ODW (GJSx)

BRIEF OF *AMICUS CURIAE* RACHEL CORRIE FOUNDATION FOR PEACE AND JUSTICE AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici curiae hereby certify that they have no parent corporation and have not issued any shares of stock to any publicly held corporation.

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INTEREST AND IDENTITY OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2.[1] It is filed in support of the Plaintiffs-Appellants and seeks the reversal of the district court's decision. Both parties have consented to the filing of this Brief of *Amici Curiae*.

Amici Curiae are non-governmental organizations working to protect and advance human rights globally, including in the Middle East. They are committed to seeking justice, promoting peace, enforcing and upholding the rule of law, and ensuring accountability. *Amici* are part of a global movement seeking to ensure respect for human rights and international law, including by promoting accountability and redress for violations of fundamental norms wherever they occur.

The Rachel Corrie Foundation for Peace and Justice is a 501(c)(3) nonprofit that continues the work of human rights activist and observer Rachel Corrie who was killed in 2003 by the Israeli military in the Gaza Strip as she tried to prevent the demolition of a Palestinian family's home. In *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007), the U.S. Government, on its own initiative, submitted an amicus brief urging dismissal for "foreign policy" considerations, because of U.S.

[1] No party or party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that funded the preparation or submission of this Brief. No person other than *Amici* and their counsel contributed money that funded the preparation and submission of this Brief.

involvement and financing in foreign military sales to Israel. The Rachel Corrie Foundation conducts and supports programs that foster connections between peoples, that build understanding, respect, and appreciation for differences, and that promote cooperation within and between local and global communities. Through grassroots efforts, the foundation fosters the pursuit of human rights and social, economic, and environmental justice, as pre-requisites for world peace.

The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has been responsible for some of the most significant advancements in the recognition of international law in federal courts over the last three decades. CCR attorneys pioneered the use of the Alien Tort Statute in holding individuals accountable for violations of international law in U.S. courts, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). Since then, CCR has sought liability for perpetrators of torture, extrajudicial killings, and war crimes by litigating the following cases, among others: *Corrie v. Caterpillar,* 503 F.3d 974 (9th Cir. 2007); *Doe v. Karadžić*, 70 F. 3d 232 (2d Cir. 1995), *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000), *Belhas v. Ya'alon*, 515 F.3d 1279 (DC Cir. 2008); *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009); and *Al Shimari v. CACI et al.*, 840 F.3d 147 (4th Cir. 2016), currently proceeding before the district court on remand.

SUMMARY OF ARGUMENT

Amici are deeply concerned by the district court's disregard of the international legal principles that underlie and animate this case and write to demonstrate that the district court failed to consider the proper role of international law in its analysis of Mr. Barak's claim of immunity. While dismissing Plaintiffs' claims on the basis of purported common law immunity for a former foreign official, the district court ignored that the doctrine of sovereign immunity is itself derived from international law and therefore any consideration of common law immunity must be anchored in an analysis of relevant international legal principles, which are part of domestic common law as well as codified in domestic statutes. Had the district court engaged in this analysis, it would have found that Defendant—the former Israeli Minister of Defense allegedly responsible for planning, commanding, and failing to prevent the torture and extrajudicial killing of Furkan Doğan—is not entitled to immunity for conduct that is universally recognized as unlawful, and instead, recognize the Doğan family's right to bring suit in the district where Mr. Barak was properly served, under the laws of the United States enacted to provide a remedy for serious breaches of international human rights law.

The Executive branch's Suggestion of Immunity is devoid of any fact-based analysis of the concrete foreign policy considerations implicated by this case.

Rather, it relies on a single vague and conclusory reference by the State Department to "the overall impact of this matter on the foreign policy of the United States," including, presumably, its relationship with Israel. The nationality of the perpetrator or the identity of the government on whose behalf he purported to act cannot determine liability for torture and extrajudicial killing. It is contrary to the very notion of international human rights, with its core commitments to equality and non-discrimination, for one's ability to exercise the right to a remedy to turn on politics and power. It cannot be—and indeed, it must not be—that a victim's ability to vindicate this right turns on the question of whether the torturer or killer is friend or foe, rather than the legality of the conduct at issue. *All* who are alleged to have committed torture or extra-judicial killing in a well-pled complaint must be judged by the same legal standard.

The decision of the district court effectively grants Ehud Barak impunity for his wrongful actions, upon the recommendation and with the full support of the United States. Impunity is contrary to the entire architecture of international law, including human rights law, to which the United States is bound. As such, the district court's decision incorrectly interprets the governing principles in this case and inappropriately absolves the United States from its firm duty to punish those who commit egregious violations of international law and provide remediation for wrongdoing. This abdication of responsibility to provide a forum for accountability

and redress is all the more concerning given that the victim was a young U.S. citizen.

In addition, *amici* are alarmed by the district court's construction of the Torture Victim Prevention Act (TVPA), which would strip the statute of its meaning and effectively eliminate the legal remedies that Congress intended to extend for victims of torture and extrajudicial killing. If allowed to stand, the district court's decision will slam the courthouse doors shut for a large class of victims, eliminating their right to redress. Congress did not intend this result. The Ninth Circuit has consistently and correctly maintained that there is no immunity for *jus cogens* violations committed by foreign officials, and should affirm that holding in this case.

Victims of egregious human rights abuses also have the right to adjudication of their claims by an independent and impartial tribunal. Pursuant to the fundamental constitutional principle of the separation of powers, it is the role of the judiciary to interpret the law, mete out justice, and provide redress to victims. Undue deference to the Executive branch and expansive readings of historical doctrines of sovereign immunity cannot be used to deny victims their right to justice and a remedy. Speculative concerns regarding possible impacts on foreign relations cannot trump respect for international law and accountability for grave human rights violations. International law and justice require that Plaintiffs have a

forum to bring their claims.

The district court's improper finding of immunity for Ehud Barak based on a Suggestion of Immunity provided by the United States, upon the request of its ally, Israel, not only misapplies international law, but it also allows the United States to evade an essential and fundamental principle of international human rights law, namely the right to a remedy. It is the Court's duty to interpret federal statutes and customary international law, and it "should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights." *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995).

Accordingly, *Amici* write to provide the Court with an understanding of the governing international law principles that constrain the Executive branch and this Court from granting immunity to Ehud Barak in this case.

ARGUMENT

The Suggestion of Immunity proffered by the Executive Branch, and relied on by the district court, conflicts with principles of international law and U.S. obligations thereunder. This Court is entrusted to interpret and apply the principles of international law, which is part of U.S. law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). An

independent assessment of the international legal principles at issue in this case, including the prohibition against torture and extra-judicial killing, the right to a remedy and the independence of the judiciary, all require this Court to reject the Suggestion and deny Mr. Barak's claim to immunity from liability for *jus cogens* violations.

I. The Suggestion of Immunity Conflicts with U.S. Obligations under International Law to Prohibit and Punish Torture and Extra-judicial Killing.

Torture and extra-judicial killing are among the most widely accepted prohibitions in international law. The prohibitions are considered *jus cogens* principles of international law which are non-derogable. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679; *see also Hilao v. Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The prohibition against summary execution . . . is similarly [as torture is] universal, definable, and obligatory.").

The United States has long recognized and affirmed the prohibition against torture and willful killing, as expressed through its ratification of numerous treaties prohibiting this conduct. Willful killing, torture, and inhuman treatment of civilians during wartime or occupation constitute "grave breaches" of the Fourth Geneva Convention. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, art. 147 ("Fourth Geneva

Convention").[2] The Fourth Geneva Convention stipulates that "no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches." *Id*., art. 148. Likewise, the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, prohibits torture and the arbitrary taking of life. International Covenant on Civil and Political Rights, Dec. 19, 1996, art. 6-7, 999 U.N.T.S. 171.

In 1994, the Unites States became a party to the UN Convention Against Torture ("CAT" or "Torture Convention"). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). The Torture Convention requires that State parties enact domestic legislation to require that every State party define, punish and redress torture. *See* CAT, arts. 2, 4 and 14. The United States has consistently affirmed its commitment to prohibiting, punishing and redressing torture in its reports to the Committee Against Torture.[3] Unlike many other international treaties prohibiting torture, CAT provides a general definition of

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[2] One of the "cardinal principles" of international humanitarian law is that all parties limit their attacks to specific military objectives; civilians and civilian objects must never be the object of an attack. *See, e.g., Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, ¶54 (Dec. 17, 2004).

[3] *See, e.g., Initial Report of the United States of America to the Committee Against Torture*, CAT/C/28/Add.5, Oct. 15 1999, available here: https://2001-2009.state.gov/documents/organization/100296.pdf.

the term. Article 1 of the Convention defines torture as "any act by which severe pain or suffering . . . is intentionally inflicted on a person [for certain purposes] when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of *a public official or other person acting in an official capacity*" (emphasis added). The Torture Convention provides detailed obligations designed to "make more effective the struggle against torture." CAT, Preamble.

The United Nations fact-finding mission investigating the Israeli military's attacks on the Gaza-bound flotilla of ships concluded that the attacks "betrayed an unacceptable level of brutality" and "constituted a grave violation of human rights law and international humanitarian law." UN Human Rights Council, *Report of the international fact-finding mission*, Sept. 27, 2010, A/HRC/15/21. The UN mission found "clear evidence to support prosecutions of...[w]ilful killing; [t]orture or inhuman treatment; [and] [w]ilfully causing great suffering or serious injury to body or health" under article 147 of the Fourth Geneva Convention. *Id*. The mission also considered the Israeli attacks to violate the ICCPR (*inter alia* right to life under article 6; prohibition on torture under article 7) and CAT (prohibition against torture). *Id*.

II. The Suggestion of Immunity Conflicts with Domestic statutes that codify the United States' international law obligations to enforce the prohibition against torture and extrajudicial killings.

There are numerous domestic statues which codify the U.S.'s obligations

under international law to prevent torture and extrajudicial killings, hold perpetrators accountable, and provide a remedy for victims of gross human rights violations.[4] Most relevant to this case, the Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides jurisdiction over claims against *inter alia* former foreign officials for violations of the law of nations,[5] and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note), provides liability for torture and extrajudicial killings committed under the authority of a foreign nation. The TVPA was enacted "to carry out obligations of the United States under the United Nations Charter and other international agreements," Pub. L. No. 102-256, 106 Stat. 73, including the CAT. S. Rep. No. 102-249, at 3.[6]

The landmark decision *Filártiga v. Peña-Irala* acknowledged the continuing progress made by the international community toward respecting fundamental human rights, and the critical role the court was playing in ensuring respect for

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[4] Other domestic statutes also impose civil and criminal penalties for torture and extrajudicial killings. *See* War Crimes Act of 1996, 18 U.S.C. § 2441. The Torture Statute, 18 U.S.C. §§ 2340-2340A, criminalizes torture, defining it as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

[5] The ATS is regarded both within the United States and abroad as one of the main pillars of human rights enforcement. *See, e.g.*, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, Dec. 10, 1998, ¶¶ 147 and 155.

[6] Like the definition of torture reflecting that of the Torture Convention, "[t]he definition of 'extrajudical killing' is specifically derived from common article 3 of the Geneva Conventions of 1949." 137 Cong. Rec. S1378 (1991); *see* Fourth Geneva Convention, art. 3.

human rights through its interpretation and application of the ATS. 630 F.2d 876, 890 (2d Cir. 1980).[7] Since *Filártiga*, courts around the country have continued the tradition of permitting suits against defendants like Jorge Peña-Irala – former government officials accused of human rights abuses abroad. *See, e.g., Mamani v. Berzain*, 825 F.3d 1304 (11th Cir. 2016); *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012); Certification of Extraditability & Order of Commitment, *In re Request By Spain for the Extradition of Inocente Orlando Montano Morales* (No. 2:15-MJ-1021-KS, U.S. Dist. Ct., E. D. N.C., N. Div. Feb. 5, 2016). The Supreme Court affirmed *Filártiga* and its progeny in *Sosa v. Alvarez-Machain*, making clear that it is the role of United States federal courts to adjudicate international law violations that are sufficiently accepted and definite. 542 U.S. 692, 732 (2004).

Congress reaffirmed the United States' commitment to provide an avenue for accountability and redress for the egregious human rights violations of torture and extra-judicial killing and expanded the reach of the ATS to U.S. citizen plaintiffs when it enacted the Torture Victim Protection Act. *See Kadić*, 70 F.3d at 241.

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[7] In *Filártiga*, the Court recognized that certain violations are so egregious and so universally condemned that the deterrence and punishment of these acts is the responsibility of all: "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." *Filártiga*, 630 F.2d at 890, quoted with approval in *Sosa*, 542 U.S. at 732 (2004).

The text and purpose of the TVPA indicate that, far from immunizing foreign officials, Congress sought to impose liability on foreign officials for acts of torture. "The first step [in statutory interpretation] 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quotations omitted). The unambiguous language of the TVPA provides for liability where an "individual who, under actual or apparent authority, or color of law, of any foreign nation...subjects an individual to torture...or...extrajudicial killing...." 28 U.S.C. § 1350 note, sec. 2(a)(1-2). Thus, even if Defendant's actions were "authorized," he would not be immune under the TVPA; indeed, the TVPA was enacted *precisely in order to* ensure accountability for such state-sanctioned acts of torture and extrajudicial killing. The court should not—and indeed cannot—exclude from its jurisdiction the very claims that Congress intended the TVPA to reach.

The court in *Kadić v. Karadžić* looked to the TVPA's plain language imposing liability on those who acted "under actual or apparent authority, or color of law, of any foreign nation," as well as the legislative history to confirm that this language was intended to make "clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim," and that the statute "does not attempt to deal with torture or killing by purely private groups."

70 F.3d at 245 (citing, H.R. REP. NO. 367, 102d Cong., 2d Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87). Because those who act with "actual authority" are generally government officials, the plain language of the TVPA contemplates that foreign officials may be liable. To hold otherwise would in effect render the TVPA a dead letter. "Where, as here, the statutory language is unambiguous, the inquiry ceases." *Barnhart*, 534 U.S. at 439.

Even if the court's inquiry were not to end with an analysis of the TVPA's text, however, the statute's explicit purpose provides further support that the TVPA abrogated common law immunity (to the extent that it may have existed at the time of the statute's enactment, which it did not) for acts of torture and extrajudicial killing by former foreign government officials. In *Filártiga v. Peña-Irala*, the Second Circuit established that a former Paraguayan official could be held liable under the ATS for his participation in the torture of a citizen of Paraguay. 630 F.2d at 884. "The *Filártiga* Court concluded that acts of torture committed by *State* officials violate 'established norms of the international law of human rights, and hence the law of nations.'" *Flores v. Southern Peru Copper*, 414 F.3d 233, 244 (2d Cir. 2003), citing *Filártiga*, 630 F.2d at 880 (emphasis added). After subsequent decisions in the D.C. Circuit challenged the basis of *Filártiga*, Congress enacted the TVPA to codify the Second Circuit's holding in *Filártiga*. *Sosa*, 542 U.S. at 731.

Under the district court's analysis, TVPA cases like *Filártiga* – which seek to hold foreign officials accountable for torture and extrajudicial killing – are precluded because the common law provides for immunity for *jus cogens* violations and the TVPA does not abrogate this immunity. Both of these propositions are against the weight of Ninth Circuit and statutory authority, inconsistent with the plain language and purpose of the TVPA, and contrary to federal common law and Congressional intent.

III. The Suggestion of Immunity Conflicts with International Law on the Scope of Immunity.

Since at least Nuremberg, it has been clear that foreign officials can be held accountable for violations of international law. *The Nuremberg Trial 1946*, 6 F.R.D. 69, 110 (1946, 1947) ("The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.")

Immunity for the acts alleged here would fly in the face of both international law and domestic common law because torture and extrajudicial killings are prohibited and entail individual responsibility under international law, which is part of U.S. common law. *See, e.g.*, *Filártiga*, 630 F.2d at 884-85 ("official torture

is now prohibited by the law of nations...which has always been part of the federal common law"); *The Nereide*, 13 U.S. 388, 423 (1815) ("the Court is bound by the law of nations which is a part of the law of the land").

In accepting not only that a non-status based common law immunity exists, but that its existence is to be determined by Executive Branch, the district court disregarded legal developments of the past century and ushered in a return to a time when politics, rather than the equal application and protection of the law decided whether victims of gross human rights abuses are afforded redress. A primary reason for enacting the Foreign Sovereign Immunities Act ("FSIA") was to de-politicize immunity cases – and shift the responsibility to the courts, where it rightly belongs (*see* Section V, *infra*). *See Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487-88 (1983) (noting that "diplomatic pressure" and "political considerations" often played a determinative factor in whether suggestions of immunity were issued, leading to "governing standards [that] were neither clear nor uniformly applied"). *See also* H.R. Rep. No. 94-1487, at 7 (1976) (transferring sovereign immunity determination to the judicial branch "assur[es] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process").

Any evaluation of the existence or scope of immunity must be measured against the principles of international law as a whole. The international community,

with the leadership and full engagement of the United States, has developed a system of laws that bound the actions of States themselves, government officials and non-state actors. *E.g.*, 1949 Geneva Conventions; Convention Against Torture; ICCPR. It would run contrary to the object and purpose of the international legal system and undermine the enforcement mechanisms to substitute the political views of a political branch for the considered legal opinion of the judiciary.

As set out above, violations of international law entail individual responsibility. At the domestic level, individuals can be held liable under criminal statutes, such as the Torture Statute, or under civil statutes, such as the ATS and TVPA. Accountability, rather than immunity, is the rule for serious violations of international law. *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995) ("*Tadić* Decision") ¶128 ("[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"). It is no surprise then that customary international law does not recognize immunity for all government officials – especially in cases that include serious violations of international law, such as this. As the ICTY Appeals Chamber held: "[i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights." *Id.*, ¶58.

Customary international law recognizes personal immunity for limited classes of persons, namely diplomats, consular officials or heads of state, and cease when an official leaves office. *See* Chimene Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag 2d 61 at *63-65 (2010). These immunities reflect a more classical view of international law, which was centered around the rights and responsibilities of the state (rather than its citizens), and in which this narrow class of officials are viewed as an expression of (it not extension of) the state itself.[8] As the Restatement (Second) of Foreign Relations Law of the United States in effect at the time the FSIA was enacted made clear, the purpose of immunity for officials was to protect the *state* from enforcement of a rule of law against *it*, arising from the attribution of the official's act to the state. *See* Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965).

Acts recognized as crimes by – and against – the international community, however, such as the *jus cogens* violations in this case, cannot be attributable to the state as a "state act" due to the consensus among states that such conduct is impermissible and illegal under all circumstances, and therefore no immunity can

[8] Even these status based immunities have been qualified and limited in recent years, most notably in the context of international criminal tribunals. See, e.g., Charter of the International Military Tribunal of Nuremberg ("Nuremberg Charter"), 82 U.N.T.S. 280, art. 7; Rome Statute of the Int'l Criminal Court, art. 75, U.N. Doc. A/CONF. 183/9 (July 17, 1998), art. 27.

be afforded for these acts. *See Attorney General of the Government of Israel v Eichmann*, 36 I.L.R. 277, 310 (Supreme Court of Israel 1962) ("international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of "international crime" that a person who was a party to such crime must bear individual responsibility for it. If it were otherwise, the penal provisions would be a mockery."). The prohibition of a *jus cogens* norm must prevail over any conflicting claim of immunity for the individual perpetrator. *See, e.g.*, 1969 Vienna Convention on Treaties, art. 53 (a treaty is void if it conflicts with a peremptory norm of general international law). Adherence to the hierarchy of international norms is critical to accurately enforce and protect the key underlying values and rules that States embrace. That immunity cannot be successfully invoked for *jus cogens* violations in this case reflects customary international law.

As the Ninth Circuit has found, *jus cogens* violations by individuals are not sovereign acts and there can be no immunity for them. A *jus cogens* norm, such as the prohibition against torture, "is a norm accepted and recognized by the international community of states 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 v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (citations omitted). *Jus cogens* norms

"'enjoy the highest status within international law'...Indeed, the supremacy of *jus cogens* extends over all rules of international law; norms that have attained the status of *jus cogens* 'prevail over and invalidate international agreements and other rules of international law in conflict with them.'" *Id*. at 715-16 (internal citations omitted).

The plaintiffs in *Siderman*, who sought to hold the Republic of Argentina accountable for torture by Argentine military officials, argued that "when a foreign state's act violates *jus cogens*, the state is not entitled to sovereign immunity with respect to that act...since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*...when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit... International law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law." *Id*. at 717-18. The court found the plaintiffs' argument persuasive, noting that "[a]s a matter of international law, the Sidermans' argument carries much force." *Id*. at 718.[9]

[9] Ultimately, the court did not find for the plaintiffs because "[u]nfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the FSIA." Since there is no *jus cogens* exception to sovereign immunity under the FSIA, held the court, a *jus*

The Ninth Circuit has since reaffirmed the validity of its reasoning in *Siderman* regarding immunity for *jus cogens* violations outside the FSIA context. *See, e.g.*, *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1210 (9th Cir. 2007) *on reh'g en banc*, 550 F.3d 822 (9th Cir. 2008) ("because '[i]nternational law does not recognize an act that violates jus cogens as a sovereign act,' the alleged acts of racial discrimination cannot constitute official sovereign acts, and the district court erred in dismissing these claims under the act of state doctrine"); *Hilao v. Marcos*, 25 F.3d 1467, 1471-72 (9th Cir. 1994) (concluding that Defendant's "acts of torture, execution, and disappearance were clearly acts outside of his authority as President" and therefore were "not 'official acts' unreviewable by federal courts"); *Mireskandari v. Mayne*, 2016 U.S. Dist. LEXIS 38944, at *50 (C.D. Cal. Mar. 23, 2016) ("the Fourth Circuit [in *Yousuf v. Samantar*] concluded that [Samantar] was nonetheless not entitled to common law sovereign immunity because the acts of which he was accused — torture, extrajudicial killings, and other human rights violations — violated *jus cogens norms*...The Court finds the reasoning of the Fourth Circuit in *Yousuf* detailed and persuasive, and as such, will apply it to the facts of this case").

Thus, beginning with *Siderman*, the Ninth Circuit has consistently

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cogens violation does not confer jurisdiction under the FSIA. *Siderman*, 965 F.2d at 719.

In 2010, the Supreme Court limited the applicability of the FSIA to states only. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010).

maintained that foreign officials are not immune for *jus cogens* violations because such violations are not sovereign acts. Since the conduct alleged in this case violated *jus cogens* norms, Israel's embrace of this conduct does not immunize Defendant.

Moreover, although the legislative history of the TVPA explicitly preserves certain categories of immunities, none of those immunities are relevant or applicable to this case, which involves a *former* foreign official who has claimed immunity based on his conduct. The text, purpose, and legislative history of the TVPA make clear that Congressional intent was to hold to account former foreign officials for acts of torture and extrajudicial killing.

Both the House and Senate Reports indicate that Congress intended to preserve sovereign immunity for foreign states and status-based immunities for sitting heads of state and diplomats. See, e.g., H.R. Rep. No. 102-367, at 4 ("nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity"). The Senate Report also states in no uncertain terms that "the committee does not intend these immunities to provide former officials with defense to a lawsuit brought under this litigation." S. Rep. No. 102-249, at 7.

According to these clear statements of Congressional intent, the TVPA was enacted to hold former foreign officials as well as current, non-head of state and non-diplomat foreign officials accountable for torture and extrajudicial killings.

Defendant, the former Israeli Minister of Defense, enjoys no immunity for the torture and killing of Furkan Dogan under the TVPA.

In rejecting *jus cogens* as a measure for immunity claims that fall beyond the reach of the narrowly defined class status-based immunities, the Executive Branch is urging the courts to accept that common law immunity is essentially anything it says it is – untethered from any basis in law.

IV. The Suggestion of Immunity Conflicts with the Right to an Effective Remedy and Adequate Reparation Recognized under International Law.

All victims of human rights violations have a right under international law to an effective remedy and reparations. This right is guaranteed in the Universal Declaration of Human Rights, and codified in treaties ratified by the United States. *See, e.g.*, Universal Declaration of Human Rights, art. 8, G.A. Res. 217A (III) U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.") *See also,* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles on Remedy"), G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (Dec. 16, 2005), at sec. I, ¶ 2(b) & (c)

(requiring States to provide "fair, effective and prompt access to justice" and "adequate, effective, prompt and appropriate remedies, including reparation").

The Basic Principles on Remedy indicate that the obligation to respect and implement international human rights law emanates from customary international law as well as treaties and the domestic law of states. *Id.* at ¶ 1. Without such a remedy, victims' rights would be rendered meaningless. Indeed, as early as 1927, the Permanent Court of International Justice, which preceded the International Court of Justice, found that "reparation is the indispensable complement of a failure to apply a convention." *Chorzów Factory Case (Ger v. Pol)*, 1928 P.C.I.J. (Ser. A) No. 17, at 24.

The United States has ratified several international human rights treaties that include the right to a remedy. Concomitant with that right, sovereign States have a duty to investigate, punish, and redress abuses of fundamental human rights, including those committed by State actors. Of particular relevance to this case, the Convention Against Torture requires States to provide "an enforceable right to fair and adequate compensation." CAT, art. 14.[10] *See also, id.* at arts. 4, 12-13; General Comment 3, CAT/C/GC3, Dec. 13, 2012, ¶ 2 (explaining that "'redress'

[10] Article 14 of CAT provides, in part: "(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."

encompasses both an 'effective remedy' and 'reparation,'" with reparations including "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition"). Notably, the United States has reported to the international body monitoring its compliance with its international law obligations under CAT that the TVPA and the ATS are two key ways in which it satisfies its obligation to provide victims of egregious human rights violations with a remedy. *See,* Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America (May 6, 2005), U.N. Doc. CAT/C/48/Add.3 (2005) at paras. 79, 81-82, *available at* http://www.state.gov/g/drl/rls/45738.htm; Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America (Aug. 12, 2013), U.N. Doc. CAT/C/USA/3-5 (2013) at para, 147, *available at*: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en (stating that the TVPA provides an avenue for redress for individuals "including U.S. nationals, who are victims of official torture or extrajudicial killing").

The ICCPR also provides for access to and enforcement of an effective remedy determined by a competent authority. ICCPR, art. 2(3), Dec. 16, 1966, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171 (ratified by the United States

Sept. 8, 1992). States are obligated to provide victims access to "effective remedies to vindicate those rights," and to make reparations. U.N. Human Rights Committee, *Gen. Cmt. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, para. 15, 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).[11]

Recognizing the importance of ensuring redress to victims, the international community included in the Rome Statute for the International Criminal Court responsibilities for the Court to ensure that victims receive reparations, whether in the form of restitution, compensation or rehabilitation. Rome Statute, art. 75. *See also, id*. at art. 79 (calling for the establishment of a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims"). The inclusion of these provisions reflects the growing importance that the international community has put on the right to a remedy.

Victims must have "equal access to an effective judicial remedy as provided for under international law." Basic Principles on Remedy at ¶ 12; CAT General Comment 3, ¶ 12 (same). This requires that States treat similarly situated victims—

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[11] Regional human rights instruments also include the right to an effective remedy. *See, e.g.*, American Convention on Human Rights of the Organization of American States, art. 25, July 18, 1978**,** 1144 U.N.T.S. 123; *See also, Velasquez-Rodriguez v. Honduras*, Judgement of July 29, 1988, Inter-Am.Ct. H.R. (ser. C) No. 4, at para. 62 (1988) ("States Parties have an obligation to provide effective judicial remedies to victims of human rights violations").

and all defendants—equally, with legal principles rather than *inter alia* nationality or political opinion determining one's access to justice. Basic Principles on Remedy, ¶ 25 (application of the Principles "must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception"). Full and effective reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. *Id*. at ¶ 18. The guarantee of non-repetition is advanced when perpetrators are held accountable for their violations—and undercut when they are permitted to enjoy impunity, and thus fear no consequence of violating rights, and the law, again. *See* CAT General Comment 3, ¶ 18 ("To guarantee non-repetition of torture or ill-treatment, States parties should undertake measures to combat impunity for violations of the Convention.")

The Executive Branch Suggestion of immunity indicates that the United States is not upholding its obligation to provide "equal access" to justice, nor fulfilling its obligation to provide a remedy for serious breaches of international law. In bestowing immunity on Ehud Barak—with the resulting impunity—the district court denied the Doğan family their right to a remedy for the torture and killing of their son, in contravention of the international obligations the U.S. has undertaken. This Court is bound to comply with international human rights law and the U.S. obligations thereunder, and permit Plaintiffs-Appellants to pursue their

right to a remedy for the killing of their U.S. teenager son in a U.S. court.

V. The Suggestion of Immunity Conflicts with U.S. Obligations under International Law to Provide Victims with an Independent Judiciary and Offends domestic constitutional law principles.

International law provides the right to an independent and impartial judiciary. *See, e.g.*, UDHR, art. 10; *see also,* ICCPR, art. 14 ("In the determination of…[one's] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). The United Nations Basic Principles on the Independence of the Judiciary arose out of these general provisions to promote independence and impartiality in States' judiciaries, with a focus on judges. G.A. Res. 40/32, U.N. Doc. A/Res/40/32 (Nov. 29, 1985) ("Basic Principles on Judiciary"); G.A. Res. 40/146, U.N. Doc. A/Res/40/146 (Dec. 13, 1985). The first principle provides that national law should ensure the separation of powers of government in order to promote and sustain an independent and impartial judiciary. Basic Principles on Judiciary, para. 1.

As the U.N. Special Rapporteur on the independence of judges and lawyers has affirmed, "[it] is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency." *See*, Leandro Despouy, *Report of the Special Rapporteur on the independence of judges and*

lawyers, at paras.18, A/HRC/11/41 (Mar. 24, 2009). Accordingly, as recognized throughout this country's history, the functions and competencies of the judiciary and the executive must be visibly "distinguishable," *id.*, with the power to interpret and apply the law clearly vested in the courts. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

This Court should not cede its constitutionally-mandated power to the Executive. *Sosa v. Alvarez-Machain* found that federal courts have jurisdiction to hear claims by non-citizens seeking redress for violations of a core class of international law violations. 542 U.S. at 712. The *Sosa* Court further confirmed—contrary to the Executive's Suggestion—that that federal courts are both empowered and obligated to determine the scope and content of customary international law. *Id*. at 724-725.

When an Executive submission offers only legal analysis on a question of statutory construction, the Supreme Court has found that such views "merit no special deference" as "'pure question[s] of statutory construction...well within the province of the Judiciary.'" *Republic of Aus. v. Altmann*, 541 U.S. 677, 701 (2004); *see also, Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) ("we hold true to a fundamental principle behind our separation of powers design, namely that 'it is emphatically the province and duty of the judicial department to say what the law is'"). The Executive's Suggestion of Immunity opines on the statutory

construction of the TVPA, the scope of foreign sovereign immunity, and the level of deference to which its views are entitled. These issues lie squarely within the purview and expertise of the judiciary and the court should grant them no weight.

The Suggestion of Immunity fails to articulate—let alone provide factual support for—any reasonable, specific, concrete foreign policy concerns arising from this litigation. "[S]hould the [Executive branch] choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Aus.*, 541 U.S. at 702 (emphasis in original). *See also*, *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1062 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990) (stating that although "not controlling on the courts," the Executive's "*factual* assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation is entitled to substantial respect" (emphasis added)). The Suggestion submitted in the district court is entirely devoid of *any* discussion about the nexus between U.S. foreign policy and the particular facts of this case – perhaps because there is none.

Moreover, courts assess the logic, factual support, and reasonableness of the Executive's purported foreign policy concerns before granting them deference, declining to defer to arbitrary or ad hoc Executive submissions. *See*, *e.g.*, *Regan v.*

Wald, 468 U.S. 222, 243 (1984) (deferring to the views of the Executive after evaluating the logic and "evidence presented to both the District Court and the Court of Appeals" to support the Executive's contentions); *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 422 (2003) (finding the logic underlying the Executive's views sound because it "serves to resolve...several competing" factors at play). Allegations of harm must be specific and concrete. *See, e.g.*, *Sarei* 456 F.3d at 1082 (deeming the Executive's "nonspecific invocations of risks to the peace process" as insufficient to merit deference); *City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 377 n.17 (2d Cir. 2006), *aff'd*, *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007) (same). The Executive's Suggestion is unfounded and vague, failing to even articulate any foreign policy concerns arising from this case, let alone support them with factual evidence.

Consistency of Executive views over time and across administrations might weigh in favor of judicial deference. *See, e.g.*, *Regan*, 468 U.S. at 229 ("Presidents Carter and Reagan...have determined that the continued exercise of [the challenged restrictions] with respect to Cuba is in the national interest") Notably, the views expressed by the Executive in the seminal case, *Filártiga v. Peña-Irala* run contrary to those being advanced by the Executive in this case. In *Filártiga*, the Executive fully supported *accountability* for a former official, finding that an

opposite result, i.e., immunizing conduct carried out by a former foreign official, would be contrary to its international obligations. There, the U.S. asserted that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States as Amicus Curiae at 22-23 (Jun. 06, 1980) (Appellate Brief), 1980 WL 340146.

The lack of factual support for the Executive's view that Defendant is entitled to immunity underscores the court's responsibility to exercise its jurisdiction here. The role of the judiciary—insulated from the diplomatic and political pressures with which the Executive must contend—is to render judgments on narrow legal questions like the one presented here. When the Executive attempts to encroach on the "province of the Judiciary" and strip the court of its authority to render those judgments, *see Republic of Aus.*, 541 U.S. at 701, the court should not allow such a result. To defer to the Executive's Suggestion in this case would not only offend the foundational principle of separation of powers but also strip Plaintiffs of their right to redress for the torture and extrajudicial killing of their son.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Dated: May 26, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed.R.App.P. 32(a)(7)(C) and Circuit Rule 29-2(c)(3), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 6,999 words.

Dated: May 26, 2017

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CERTIFICATE OF SERVICE

I, Katherine M. Gallagher, the undersigned, hereby certify that I am employed by the Center for Constitutional Rights. I further declare under penalty of perjury that on May 26, 2017, I caused to be served a true copy of the foregoing Brief of *Amici Curiae* via the Court's CM/ECF electronic filing system.

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