No. 16-56704

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

vs.

EHUD BARAK,

Defendant-Appellee.

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

PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Rules

California Statutes

FRAP 35(b) STATEMENT

The panel's decision addresses the critical issue of whether international human rights law prevents U.S. courts from holding former foreign government officials accountable for universally recognized violations of human rights—here, the torture and extrajudicial killing of an unarmed 18-year old American citizen. The panel determined that the answer to this question is yes. The panel's decision conflicts with multiple decisions of this Court and creates three circuit splits. Panel rehearing or rehearing en banc is warranted.

The panel affirmed the district court's order granting Defendant Ehud Barak's motion to dismiss, and held that (1) Defendant enjoys conduct immunity under the common law as set forth in the Restatement (Second) of Foreign Relations (1965) § 66(f) for his official acts; (2) the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350 note, does not abrogate this common law immunity for official acts; and (3) immunity applies even to a former foreign official's acts violating *jus cogens* norms when ratified by the official's government. While a contrary determination on any one of these holdings would require reversal of the district court's order, panel rehearing or rehearing en banc is warranted on all three.

First, rehearing en banc is warranted under FRAP 35(b)(1)(A) because the panel's holding that a foreign official is immune even for *jus cogens* violations

conflicts with multiple prior decisions of this Court. Specifically, the panel's holding conflicts with this Court's holdings in *Hilao v. Marcos*, 25 F.3d 1467, 1471-72 (9th Cir. 1994), and *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 987 F.2d 493, 497-98 (9th Cir. 1992), that the foreign government official was not immune for their *jus cogens* violations. The panel sought to distinguish *Hilao* and *Marcos* on the ground that the foreign government in those cases did not ratify the official's *jus cogens* violations, whereas the state of Israel ratified Barak's *jus cogens* violations as official acts of state. (Op. at 17 n.7.) This distinction directly conflicts with other decisions of this Court. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992), this Court held that *jus cogens* violations can never be official acts of state. And in *Nuru v. Gonzalez*, 404 F.3d 1207, 1221-22 (9th Cir. 2005), this Court held that states lack any authority to authorize torture. The panel's attempt to distinguish *Hilao* and *Marcos* thus directly contradicts rules established by *Siderman* and *Nuru*. The panel makes no attempt to distinguish either *Siderman* or *Nuru*.

Second, rehearing en banc is warranted under FRAP 35(b)(1)(B) because the panel's two other holdings present issues of "exceptional importance." Specifically, the panel's holding that the Restatement provides immunity for all official acts creates a circuit split with the D.C. Circuit's authoritative decision in *Lewis v. Mutond*, 918 F.3d 142, 146-47 (D.C. Cir. 2019). In *Lewis*, the D.C.

Circuit rejected the same reasoning adopted by the panel here, and held that the official nature of the acts in question is *not* sufficient to trigger immunity.

The panel's final holding—that the TVPA does not abrogate common law immunity for official acts ratified by the foreign government—creates a second circuit split with *Lewis*'s alternative holding that the TVPA abrogates common law conduct immunity for acts of torture. The panel's interpretation of the TVPA's impact on common law immunities relies on a distorted reading of the Supreme Court's opinions in *Filarsky v. Delia*, 566 U.S. 377, 389 (2012), and *Malley v. Briggs*, 475 U.S. 335, 339 (1986), and ignores the rule of statutory interpretation set forth in *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009). These cases mandate that courts analyze a statute's impact on the common law by examining Congressional intent as revealed by the statute's history, purpose, and a comparison with similar statutes enacted at the same time.

The TVPA's history and purpose, and a comparison with a contemporaneously enacted statute—the Anti-Terrorism Act—each demonstrate Congress's intent to abrogate immunity for acts of torture and extrajudicial killing by former foreign government officials. However, the panel did not consider Congress's intent, nor did it analyze any of these sources. By granting immunity, the panel subjects U.S. courts to the whims of those foreign governments willing to embrace their officials' acts of torture and extrajudicial killing— acts that "violate

standards accepted by virtually every nation," H.R. Rep. No. 102-367, at 2—as their own. This does not simply disregard Congress's intent in passing the TVPA—it literally turns Congress's intent on its head.

Under the panel's decision, former foreign government officials may claim immunity for acts of torture and extrajudicial of American citizens committed in their official capacity even though these precise acts are prohibited by non-derogable international norms and a U.S. statute. This case should accordingly be reheard by the panel or by an en banc panel of this Court, and the district court's judgment should be reversed.

FACTUAL AND PROCEDURAL HISTORY[1]

Plaintiffs are the parents of Furkan Doğan, an 18-year old American citizen executed by members of the Israeli Defense Force ("IDF") while on a civilian ship attempting to deliver humanitarian supplies to the citizens of Gaza. Mr. Doğan was a passenger aboard a ship called the Mavi Marmara, one of six unarmed civilian vessels comprising the Gaza Freedom Flotilla. (ER 121.) Like the more than 700 other passengers participating in the Freedom Flotilla, Mr. Doğan was unarmed. (ER 127.) On May 31, 2010, IDF soldiers boarded the Mavi Marmara, killing nine civilian passengers; a tenth later died from injuries sustained in the

[1] Even though this appeal concerns a motion to dismiss, the panel's factual summary heavily relies on facts not alleged in the operative complaint.

attack. (ER 121, 130, 005-006.) One passenger was shot between the eyes while attempting to photograph the IDF soldiers; another was shot in the back of the head while bent over to assist another injured passenger. (ER 130-131.) Mr. Doğan was shot 4 times, after which he lay on his back, injured but alive. (ER 130-131.) IDF soldiers walked up to Mr. Dogan and fired a shotgun into his face, killing him. (ER 130-131.)

Following the attack, several international bodies, including the United Nations and the Office of the Prosecutor of the International Criminal Court, examined the attack and addressed the severity of Mr. Doğan's killing. (ER128, ER131-132, ER132-133, ER135.) They concluded that the killing of Mr. Doğan and other Mavi Marmara passengers likely constituted war crimes against civilians. (ER131, ER132-133, ER 133.) Defendant publicly accepted responsibility for the attack. (ER134.)

Plaintiffs brought suit against Defendant Ehud Barak in his personal and individual capacity under the Torture Victims Protection Act, 28 U.S.C. § 1350 note (TVPA) and other human rights statutes, seeking to hold him personally and individually liable for acts undertaken while serving as the Israeli Minister of Defense including planning, commanding, and failing to prevent the attack. (ER 121-123.) The Israeli embassy quickly requested that the United States submit a suggestion of immunity expressing the view the Defendant is immune from suit in

the course of "an authorized military action taken by the State of Israel." (ER 117-119.) The U.S. Department of Justice thereafter filed a suggestion of immunity on behalf of the U.S. State Department asserting its view that Defendant is "immune from suit." (ER 078.) The district court dismissed the case on the grounds that it owed absolute deference to the State Department's suggestion of immunity, and alternatively that immunity was warranted as a matter of the court's independent judgment. (ER 015.)

The panel affirmed. The panel made no determination as to the level of deference owed to the State Department's suggestion of immunity. (Op. at 12.) The panel held that Defendant was immune from suit because (1) "exercising jurisdiction over Barak in this case would be to enforce a rule of law against the sovereign state of Israel" within the meaning of the Restatement § 66(f); (2) the TVPA does not abrogate Barak's immunity; and (3) no exception to immunity exists for violations of the universal *jus cogens* norms against torture and extrajudicial killing alleged here. (Op. at 12, 16, 19.)

DISCUSSION

I. The Panel's Holding that Defendant Is Immune Even for His *Jus Cogens* Violations Directly Contradicts Four Prior Decisions of this Court and Creates a Circuit Split

The panel held that even conduct violating *jus cogens* norms warrants

immunity when a government official is acting in their official capacity and their acts are ratified by the foreign government. (Op. at 17-19 & n.7.) A *jus cogens* norm "appl[ies] universally to states and individuals," *Nuru v. Gonzales*, 404 F.3d 1207, 1222 (9th Cir. 2005), and is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992). *Jus cogens* norms include the prohibitions against torture and extrajudicial killing. *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012). The torture and extrajudicial killing of Furkan Doğan violated these *jus cogens* norms.

The panel's holding directly conflicts with this Court's *jus cogens* precedents. In *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 987 F.2d 493, 497-98 (9th Cir. 1992), this Court held that a government official was not immune for human rights abuses, such as torture and extrajudicial killing, because they arose from acts falling "beyond the scope of [the official's] authority" which "the sovereign has not empowered the official to do." In *Hilao v. Marcos*, 25 F.3d 1467, 1471-72 (9th Cir. 1994), this Court similarly held that the defendant's alleged "acts of torture, execution, and disappearance were clearly acts outside of [Marcos's] authority as President" and, consequently, were "not 'official acts' unreviewable by federal courts."

The panel sought to distinguish *Marcos* and *Hilao* on the ground that the

Philippine government "repeatedly disavowed" the defendant's acts in those cases and "did not ratify [the official's] conduct," whereas in this case Barak's acts were "performed in [his] official capacity," under "actual or apparent authority, or color of law, of the Israeli Ministry of Defense and the Government of the State of Israel," and ratified by the state of Israel as official acts of state. (Op. at 12, 17-19 n.7; *see also id.* at 4.) However, the basis for this distinction directly conflicts with multiple other decisions of this Court.

First, the panel's reasoning that Barak's acts are immune because they were authorized as the official acts of a sovereign state directly conflicts with this Court's decision in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). In *Siderman*, this Court declared that "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."[2] *Id.* at 718. The panel does not explain how a state may, under international law, confer its sovereign immunity on an act that international law holds can never be a sovereign act.

Second, the panel's reasoning that this case is distinguishable from *Hilao*

[2] Nearly twenty years later, this Court, sitting en banc, reiterated this bedrock principle by stating that violations of *jus cogens* norms "are not sovereign acts." *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011) (en banc), *vacated on other grounds*, 133 S. Ct. 1995 (2013).

and *Marcos* because Israel ratified Barak's actions directly conflicts with this Court's holding in *Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005). In *Nuru*, this Court held that states are prohibited from authorizing acts of torture, both as a matter of treaty under the Convention Against Torture, *id.* at 1221 ("A government cannot exempt torturous acts from CAT's prohibition merely by authorizing them as permissible forms of punishment in its domestic law."), and independent of their consent to any agreement as a *jus cogens* norm ("[T]he proscription against torture 'transcend[s] such consent' of states and individuals."), *id.* at 1222. Simply put, *Nuru* holds that states lack the authority to authorize *jus cogens* violations such as torture and extrajudicial killing as permissible state acts. The panel does not cite *Nuru*.

The panel's one other attempt to distinguish the *Marcos* cases misreads those decisions. The panel reasoned that because the foreign government did not ratify the defendant's conduct in the *Hilao* or *Marcos*, this Court "had no occasion to consider whether *jus cogens* violations should be an exception to foreign official immunity because . . . the defendant was never given immunity in the first place." (Op. at 19.) The panel's reasoning is circular. The defendants in *Hilao* and *Marcos* were not given immunity *because they had committed jus cogens violations.* And ratification of *jus cogens* violations cannot trigger immunity because such ratification is ineffective. *See Siderman*, 965 F.2d at 718; *Nuru*, 404

F.3d at 1221-22. The panel is unable to distinguish this Court's prior *jus cogens* precedents because those precedents are not distinguishable.

The panel sought to distinguish the Fourth Circuit's decision in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), on the same grounds. In *Yousuf*, the Fourth Circuit held that because "*jus cogens* violations are not legitimate official acts," the defendant "is not entitled to conduct-based official immunity under the common law" for his *jus cogens* violations. (Op. at 19.) Because the panel is unable to distinguish *Yousuf* without directly contradicting this Court's prior decisions, the panel's decision in fact creates a split with the Fourth Circuit.[3]

II. The Panel's Interpretation of the Restatement Creates A Second Circuit Split

The panel concluded that Barak is immune under Restatement § 66(f). This

[3] Following the panel's decision, the Ninth Circuit is alone in recognizing immunity for a former government official's *jus cogens* violations committed in their official capacity. The panel's decision is not consistent with the Second Circuit's decision in *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), because *Matar*'s holding rests inapposite and abrogated reasoning. Specifically, the *Matar* court rejected a *jus cogens* exception for the individual defendant because it deemed itself bound by Second Circuit precedent holding that *jus cogens* violations do not create an exception to a foreign *state's* immunity under the Foreign Sovereign Immunities Act (FSIA). 563 F.3d at 12. The *Matar* court mistakenly believed that the FSIA applied to both states and individuals, but the Supreme Court held otherwise in *Samantar v. Yousuf*, 450 U.S. 305, 311 (2010), concluding that the common law, and not the FSIA, governs immunity for individuals. The *Matar* court also deemed itself bound by the Executive Branch's suggestion of immunity. 563 F.3d at 14. The panel did not adopt this holding, and reached no determination as to the level of deference due. (Op. at 12.)

aspect of the panel's holding is an issue of "exceptional importance" because it creates a circuit split. *See Lewis v. Mutond*, 918 F.3d 142, 146 (D.C. Cir. 2019).[4] Under Restatement § 66, "Public ministers, officials, or agents of a state . . . do not have immunity from personal liability even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state." Restatement § 66 cmt. B. Thus, as the D.C. Circuit correctly observed, courts analyzing conduct-immunity for a foreign official must consider three factors: (1) whether the actor is a public minister, (2) whether the acts were performed in the minister's official capacity, and (3) whether exercising jurisdiction would enforce a rule of law against Israel. *Lewis*, 918 F.3d at 146.

The panel reasoned that exercising jurisdiction over Barak's actions would have the effect of enforcing a rule of law against Israel because "Barak's actions were done under 'actual or apparent authority, or color of law[.]'" (Op. at 12.) As the *Lewis* court stated in rejecting an identical argument, however, the official capacity nature of the acts proves only the second Restatement element, but not the third. *Id.* The Restatement commentary makes clear that the third element is satisfied only where the plaintiff seeks to draw on the state's treasury or force the state to take specific action. 918 F.3d at 146. As the Restatement explains:

X, an official of the defense ministry of state A, enters into a contract

[4] Plaintiffs alerted the panel to the *Lewis* decision by filing a 28(j) letter on May 31, 2019. Dkt No. 68. Although *Lewis* is directly on point, the panel does not cite *Lewis*.

> in state B with Y for the purchase of supplies for the armed forces of A. A disagreement arises under the contract and Y brings suit in B against X as an individual, seeking to compel him to apply certain funds of A in his possession to satisfy obligations of A under the contract. X is entitled to the immunity of A.

Restatement § 66, cmt b(2). In *Lewis*, the D.C. Circuit held that the official capacity nature of the defendant's acts does not establish immunity under Restatement § 66. The panel's holding directly contradicts *Lewis.*[5]

III. The Panel's Interpretation of the TVPA Ignores Supreme Court Decisions and Creates A Third Circuit Split

After determining that the Restatement provides for common law immunity in this case, the panel held that the TVPA does not abrogate that common law immunity. (Op. at 12-16.) The panel's holding that the TVPA does not abrogate common law immunity for official conduct involves another question of "exceptional importance" because it creates another split with the D.C. Circuit. In *Lewis v. Mutond*, the D.C. Circuit held that the TVPA abrogates conduct-based immunity where the foreign government informs the State Department that the defendants' alleged actions were "undertaken in their official capacities." 918 F.3d at 144 (stating this holding); *id.* at 148 (Srinivasan, C.J., concurring); *id.* at 149-50 (Randolph, S.C.J., concurring). This is precisely what the Israeli government told

[5] It does not appear that any other circuit had adopted the panel's interpretation of § 66(f), and the panel's opinion identifies no authority in accord with its holding.

the U.S. State Department here.

In finding that the TVPA does not abrogate common law immunity, the panel distorts the Supreme Court cases on which it relies, and ignores other Supreme Court precedent conflicting with its holding. Citing *Filarsky v. Delia*, 566 U.S. 377, 389 (2012), and *Malley v. Briggs*, 475 U.S. 335, 339 (1986)—two cases analyzing whether common law immunities apply to § 1983—the panel reasons that statutes are generally read as retaining common-law immunities even where "the statute on its face admits no immunities," and that common-law immunities "should not be abrogated absent clear legislative intent to do so." (Op. at 13-14.)

The panel misreads these cases. In *Malley*, the Supreme Court explained that even where an immunity existed at common law, "the Court next considers whether § 1983 history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." 475 U.S. at 340. And in *Filarsky*, the Supreme Court, after concluding that the defendant would have enjoyed immunity at common law, went on to consider whether any of "the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule." 132 S. Ct. at 1665. The panel ignores the mandate in *Malley* and *Filarsky* to consider a statute's history and purposes, and provides no discussion of the history and purpose of the TVPA at all. This omission is highly significant

because the TVPA's history and purpose clearly reveal Congress's intent to impose liability for acts of torture and extrajudicial killing.

Congress's intent to abrogate conduct immunity for official acts is clear from the TVPA's legislative history. That history reveals Congress's purpose was to outlaw torture and deny perpetrators of such heinous acts safe haven in the United States. *See, e.g.*, H.R. Rep. No. 102- 367, at 2 ("Official torture and summary execution violate standards accepted by virtually every nation."); S. Rep. No. 102-249, at 3 ("This legislation . . . [will ensure] that torturers and death squads will no longer have a safe haven in the United States."); *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000) ("[The TVPA] seems to represent a . . . direct recognition that the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations."). To realize its purpose, Congress made clear that it did not intend that any common law immunities would apply to former foreign government officials such as Barak. *See* S. Rep. No. 102-249 at 7 ("[T]he committee does not intend these [traditional] immunities to provide former officials with defense to a lawsuit brought under this litigation."); *id.* at 8 (act of state doctrine should not protect former officials from liability because torture cannot be a "public" act of state).

The panel does not discuss any of this legislative history. Instead, the panel explains that its holding is necessary to avoid "open[ing] a Pandora's box of

liability for foreign military officials" that "would effectively extinguish the common law doctrine of foreign official immunity" by "allow[ing] foreign officials to be haled into U.S. courts by 'any person' with a family member who had been killed abroad in the course of a military operation conducted by a foreign power." (Op. at 15.) The panel concludes that "[i]t simply cannot be that Congress intended the TVPA to open the door to that sort of litigation." (Op. at 15.)

The panel misinterprets the TVPA. The TVPA expressly excludes any "killing that, under international law, is lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350 note § 3(a). Lawful killings include those committed by armed forces during war. S. Rep. No. 102-249, at 6. The TVPA similarly excludes from its definition of "torture" actions committed pursuant to "lawful sanctions."[6] Congress thus anticipated and addressed the very concern the panel raises here: injuries and even killings resulting from lawful military actions by foreign powers are not "torture" or "extrajudicial killings" within the meaning of the TVPA. Accordingly, this statute provides no basis for "haling" foreign

[6] The TVPA was enacted in part to fulfill the Unites States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). S. Rep. No. 102-249, at 3. The TVPA incorporates the CAT's definition of torture. *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1312 (N.D. Cal. 2004); S. Rep. No. 102-249, at 3, 6. This definition exempts actions pursuant to "lawful sanctions." 28 U.S.C. § 1350 note § (3)(b)(1); *see also Nuru*, 404 F.3d at 1221.

officials involved in such actions into any U.S. court because such actions are not made unlawful by the TVPA.

The panel's analysis of the TVPA also disregards the Supreme Court's decision in *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). In *Gross*, the Court held that "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" The panel does not cite *Gross*, and performs no analysis of the "disparate provisions" between the TVPA and another similar statute that Congress "considered simultaneously" (and enacted in the same year), the Anti-Terrorism Act (ATA), 18 U.S.C. §§ 2331 *et seq.*

The disparate provisions in the TVPA and ATA addressing official capacity conduct are further indicia of Congress's intent in passing the TVPA to abrogate conduct-immunity for torture and extrajudicial killings committed by former foreign government officials. Unlike the TVPA, which expressly *creates* liability for individuals acting "under actual or apparent authority, or color of law, of any foreign nation," 28 U.S.C. § 1350 note § 2(a), the ATA expressly *precludes* liability for any "officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority," 18 U.S.C. § 2337(2). The absence of any similar language in the TVPA precluding liability for official acts is a negative implication clearly demonstrating Congress's intent to

impose liability on those acts. *See Gross*, 557 U.S. at 175.

The panel's reasoning is also in tension with this Court's decision in *Keeton v. Univ. of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998). In *Keeton*, this Court recognized that statutes may abrogate common law immunities even where no reference to the immunity appears in the statutory text, and recognized Congress's intent to abrogate states' sovereign immunity in the ADEA. *Id.* at 1057. The panel does not cite, let alone distinguish, *Keeton*.

CONCLUSION

The panel's decision violates numerous precedents of this Court, creates considerable tension with the Supreme Court's decisions, and creates three splits with other circuits. Accordingly, this case should be reheard by the panel or reheard en banc to correct that decision. The panel's opinion should be withdraw and the district court's decision dismissing Plaintiffs' suit with prejudice vacated to permit Plaintiffs to litigate their claims on the merits.

DATED: August 16, 2019

Respectfully submitted,

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Attachment

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AHMET DOĞAN, individually and on behalf of his deceased son Furkan Doğan; HIKMET DOĞAN, individually and on behalf of her deceased son Furkan Doğan, *Plaintiffs-Appellants,* v. EHUD BARAK, *Defendant-Appellee.*	No. 16-56704 D.C. No. 2:15-cv-08130-ODW-GJS OPINION

Appeal from the United States District Court
For the Central District of California
Otis D. Wright, II, District Judge, Presiding

Argued and Submitted April 12, 2018
Pasadena, California

Filed August 2, 2019

Before: Carlos T. Bea and Mary H. Murguia, Circuit Judges, and Stanley Allen Bastian,* District Judge.

Opinion by Judge Bea

* The Honorable Stanley A. Bastian, United States District Judge for the Eastern District of Washington, sitting by designation.

SUMMARY[**]

Torture Victim Protection Act / Foreign Official Immunity

The panel affirmed the district court's dismissal, on the basis of foreign official immunity, of a wrongful death action brought under the Torture Victim Protection Act.

Plaintiffs' son was killed by the Israeli Defense Forces while aboard a vessel in the "Gaza Freedom Flotilla," which sailed from Turkey toward the Israeli naval blockade of the Gaza Strip. Plaintiffs sued Ehud Barak, the Israeli Defense Minister at the time of the incident.

The panel held that Barak was entitled to foreign official immunity. The panel declined to decide whether a State Department suggestion of immunity was entitled to absolute deference or substantial weight. The panel concluded that, even if the suggestion of immunity were not accorded absolute deference, Barak would still be entitled to common law immunity because exercising jurisdiction over him in this case would be to enforce a rule of law against the sovereign state of Israel. The panel further held that the TVPA did not abrogate common law foreign official immunity. The panel declined a recognize an exception to foreign official immunity for violations of *jus cogens* norms.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

BEA, Circuit Judge:

We must decide whether the parents of a U.S. citizen killed during a military operation conducted by a foreign nation abroad may sue the foreign official responsible for the operation in federal court on different theories of wrongful death claims, under the Torture Victim Protection Act ("TVPA").[1] Specifically, we must determine whether such a suit may be brought against a foreign official where the official's acts were performed in his official capacity, where the sovereign government has ratified his conduct, and where the U.S. Department of State has asked the judiciary to grant him foreign official immunity. We hold that such a suit may not be brought against him, and we affirm the district court's grant of immunity and its order dismissing the complaint.

I

A

The facts underlying this case occurred in the broader context of the decades-long Israeli–Palestinian conflict. Part and parcel of the conflict has been the ongoing struggle for the eastern Mediterranean tract of land known as the Gaza Strip ("Gaza"). In 1967, following an armed conflict known as the Six-Day War, Israeli Defense Forces ("IDF") took control of Gaza. Eventually, Israel entered into several peace accords with the Palestinian Authority, relinquishing

[1] In the proceedings below, Appellants made arguments based on the Alien Tort Claims Act and the Anti-Terrorism Act. On appeal, they pursue only claims based on the TVPA.

control of Gaza but retaining full control over the territorial waters adjoining it.

Shortly after Israel's withdrawal, Hamas—a group designated by the United States Government as a terrorist organization—came to power in Gaza. With the Palestinian Authority no longer in control, Israeli–Palestinian relations worsened. Israel began experiencing increased attacks by militant groups in Gaza. As a result, Israel imposed a full naval blockade of the Gaza Strip in 2009 to contain the flow of weapons into the area.

On May 31, 2010, a group of six vessels, calling themselves the "Gaza Freedom Flotilla," sailed from Turkey toward the Israeli naval blockade. The group's purported objective was to "draw international public attention to the situation in the Gaza Strip and the effect of the blockade, and to deliver humanitarian assistance and supplies to Gaza." The son of the plaintiffs in this lawsuit, Furkan Doğan ("Furkan"), was aboard one of the vessels in the flotilla: the *Mavi Marmara*.

When the flotilla was still about sixty miles from the blockade, the Israeli navy transmitted several radio messages to the vessels. The messages informed the flotilla that it was entering a restricted area, that humanitarian assistance could be supplied to Gaza by land, and that all legal measures would be taken to prevent the vessels from breaching the naval blockade. In response, the *Mavi Marmara* transmitted a message indicating its intent to sail through the blockade and its belief that Israel could not legally prevent it from doing so. Consequently, IDF decided to board the vessels to prevent them from breaching the blockade.

From a helicopter, IDF soldiers fast-roped down onto the *Mavi Marmara*. According to several reports of the incident,

the first IDF soldiers to board were met with armed resistance. Occupants of the vessel reportedly attacked the soldiers with makeshift weapons, including clubs, knives, axes, and metal poles. Some reports suggest that certain occupants possessed, and may have used, firearms. When a second group of soldiers boarded the ship, they were authorized to use deadly force against the passengers. Nine passengers of the *Mavi Marmara* were killed during the scuffle, one of whom was Furkan. According to the Doğans' complaint, Furkan was filming the operation from the vessel's top-deck when he was shot and killed by the IDF.

Defendant-Appellee, Ehud Barak ("Barak"), was the Israeli Defense Minister at the time of the *Mavi Marmara* incident. He allegedly planned the operation to intercept the flotilla, directed the operation himself, and personally authorized the IDF to board and take over the vessel. Whether Barak also authorized the use of lethal force is unclear from the record. At any rate, because Barak commanded the forces that took Furkan's life, the Doğans allege that he is responsible.

Relations between Turkey and Israel became tense in the wake of the incident, but international responses varied. Some nations issued statements condemning Israel's actions. The United States' response was more equivocal. Whereas both branches of Congress passed resolutions supporting Israel's actions, the President's public statement simply expressed "regret" for the loss of life. President Obama eventually helped persuade Israeli Prime Minister Benjamin Netanyahu to apologize to Turkish President Recep Tayyip Erdoğan, and in June 2016, Secretary of State John Kerry and Vice President Joe Biden reportedly helped broker the deal which formally resolved the Turkey–Israel disagreement. Israel agreed to pay $20 million to a

compensation fund for Turkish families, and Turkey agreed to end all criminal and civil claims against Israel and its military personnel.

B

On October 15, 2015, the Doğans filed this lawsuit in federal court. They asserted eight causes of action, each of which falls under one of three federal statutes: (1) the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"); (2) the Torture Victim Protection Act, 106 Stat. 73, note following 28 U.S.C. § 1350 ("TVPA"); and (3) the Anti-Terrorism Act, 18 U.S.C. § 2333 ("ATA"). The complaint alleges that Furkan's killing constitutes "torture," "terrorism," and/or an "extrajudicial killing" under the relevant federal statutes and international law, and that Barak is personally responsible because of his commanding authority.

In December 2015, Israel asked the U.S. Department of State to file a Suggestion of Immunity ("SOI") on behalf of Barak. On January 20, 2016, Barak moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) based on common law foreign official immunity, the political question doctrine, and the act of state doctrine. The parties fully briefed the motion. After briefing was complete, the United States filed with the district court a Suggestion of Immunity, which concluded that Barak's actions were official government acts that "were authorized by Israel."[2] The parties filed supplemental briefing on the

[2] The SOI is a document filed with the district court by the Department of Justice, based on a determination made by the Department of State. In it, the Government explains that "the State of Israel has asked the Department of State to recognize the immunity of Barak," citing to a "Diplomatic Note" sent by the Israeli embassy to the State Department. In the note, the Embassy of Israel "respectfully requests that the United

effect of the SOI. Thereafter, the district court granted Barak's motion to dismiss on the ground that Barak is entitled to foreign official immunity, declining to reach Barak's arguments as to the political question and act of state doctrines.

The district court held that the foreign official immunity doctrine bars this lawsuit for two reasons. First, the district court stated that federal courts generally have deferred to executive branch determinations of foreign official immunity. *See Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). Here, the district court found that the State Department's SOI warranted such deference. Second, even without the executive branch determination, the district court held that its own analysis would have led it to the same conclusion.

Moreover, the court held that no exception to foreign official immunity applies here. First, the Doğans argued that foreign officials are not immune from liability for violations

States Government submit to the court a suggestion of immunity on behalf of Mr. Barak because 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 Embassy characterizes the operation conducted by Barak as "authorized military action taken by the State of Israel." Thus, "[a]fter careful consideration of this matter, including a full review of the pleadings and other materials relied upon by Plaintiffs, the Department of State . . . determined that Barak is immune from suit." Based on this determination, and presumably out of respect for Israel's sovereignty and a concern for international comity, the Justice Department filed its SOI with the district court, representing that "[t]he Executive Branch has determined that former Israeli Defense Minister Ehud Barak is immune from this suit."

of *jus cogens* norms.[3] Noting that the question whether such an exception exists has not yet been decided by the Ninth Circuit, the district court adopted the Second Circuit's position that there is no *jus cogens* exception to foreign official immunity and rejected the argument on that basis. *See Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009). Second, the Doğans argued that the TVPA abrogates common law foreign official immunity by providing liability for "torture" and for "extrajudicial killing[s]" perpetrated by "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation." The court rejected this argument as well, holding that Congress did not intend for the TVPA to abrogate foreign official immunity "where the sovereign state officially acknowledges and embraces the official's acts," as Israel has here. Finding that foreign official immunity (and no exception) applies, the district court granted Barak's motion to dismiss.

C

We review *de novo* the grant of a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Mills v. United States*, 742 F.3d 400, 404 (9th Cir. 2014). Evidentiary rulings, such as the district court's decision to consider extrinsic evidence, are reviewed for an abuse of discretion. *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2013). This court

[3] A *jus cogens* (Latin: law which compels) norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (adopting definition from the Vienna Convention on the Law of Treaties).

reverses only if the exercise of discretion was "both erroneous and prejudicial." *Id.*

II

As both parties recognize, the doctrine of foreign sovereign immunity—including foreign official immunity—developed as a matter of common law. *See Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812); *see also Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (reaffirming that foreign official immunity is governed by common law).[4] The Supreme Court has noted that a two-step procedure is used to resolve a foreign state's claim of common law immunity. *Id.* at 311–12. At the first step, "the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department." *Id.* at 311. Generally, "[i]f the request [i]s granted, the district court surrender[s] its jurisdiction." *Id.* at 311. However, "in the absence of recognition of the immunity by the

[4] In *Samantar*, a group of Somalis ("Plaintiffs") brought an action against the former Prime Minister of Somalia, Mohamed Samantar. 560 U.S. at 308. Plaintiffs alleged that Samantar had authorized their torture and, in some cases, the extrajudicial killings of their family members when he was in charge of the military regime that previously governed Somalia. *Id.* Samantar argued that the Foreign Sovereign Immunities Act of 1976 ("FSIA") supplied him with immunity from suit. The district court dismissed for lack of jurisdiction under Rule 12(b)(1), holding that the FSIA applied to foreign officials the same as it does foreign states and thus Samantar enjoyed FSIA immunity. The Fourth Circuit reversed, holding that the term "state" in the FSIA does not extend to state *officials*. *Id.* at 309–10. The Supreme Court granted certiorari and affirmed, holding that "the FSIA does not govern whether an individual foreign official enjoys immunity from suit." *Id.* at 310 n.3. However, the Court noted that whether Samantar enjoyed common law foreign official immunity was a different question "to be addressed in the first instance by the District Court on remand." *Id.* at 326.

Department of State," a court moves to the second step, where it has "authority to decide for itself whether all the requisites for such immunity exist[ ]." *Id.* The court grants immunity at step two if it determines that "the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 312 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)).

In *Samantar*, the Supreme Court noted that "the same two-step procedure was typically followed when a foreign official asserted immunity." *Id*. But *Samantar* stands principally for the proposition that the Foreign Sovereign Immunities Act of 1976 does not govern sovereign immunity over individual foreign officials. *Samantar*, 560 U.S. at 308. Emphasizing the narrowness of its holding, the Supreme Court remanded for the district court to consider "in the first instance," "[w]hether petitioner may be entitled to immunity under the common law . . . ." *Id.* at 325–26. On remand, the Fourth Circuit held that the State Department's immunity determination "carrie[d] substantial weight" but was not dispositive. *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) (hereinafter "*Yousuf*"). In so holding, the court distinguished between conduct-based immunity that arises from a foreign official's duties, and status-based immunity that arises from a foreign official's status as a head-of-state. *Id*. at 772–73. Regarding the latter, the Fourth Circuit held that a determination from the State Department is likely controlling. But in *Yousuf*, the defendant was not a head-of-state, and therefore the Fourth Circuit engaged in an independent analysis (although giving "substantial weight" to the State Department's suggestion of non-immunity) to determine that the defendant was not entitled to immunity. *Id.* at 777–78.

The Doğans urge us to adopt the Fourth Circuit's approach. But we need not decide the level of deference owed to the State Department's suggestion of immunity in this case, because even if the suggestion of immunity is afforded "substantial weight" (as opposed to absolute deference), based on the record before us we conclude that Barak would still be entitled to immunity. Common-law foreign sovereign immunity extends to individual foreign officials for "acts performed in [their] official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]" Restatement (Second) of Foreign Relations Law § 66(f) (1965). According to the Complaint, Barak was "instructed by the Prime Minister to conduct" the operations. The Complaint further alleged that Barak's "power . . . to plan, order, and control the IDF operation and troops as Minister of Defense is set out in Israel's Basic Law[.]" The Complaint's claims for relief state—several times—that Barak's actions were done under "actual or apparent authority, or color of law, of the Israeli Ministry of Defense and the Government of the State of Israel." And if the State Department's SOI is not entitled to absolute deference, we would nonetheless give it considerable weight. We conclude that exercising jurisdiction over Barak in this case would be to enforce a rule of law against the sovereign state of Israel, and that Barak would therefore be entitled to common-law foreign sovereign immunity even under the Doğans' preferred standard (i.e., conducting an independent judicial determination of entitlement to immunity).

III

Next, the Doğans argue that even if Barak is entitled to common law immunity, Congress has abrogated common

law foreign official immunity via the TVPA. The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350, note § 2(a). The Doğans contend that the TVPA's plain language unambiguously imposes liability on any foreign official who engages in extrajudicial killings.[5] Thus, the question is whether Barak's common law immunity is abrogated by the text of the TVPA.

The Supreme Court has held that courts should "proceed on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (alteration incorporated) (*quoting Pulliam v. Allen*, 466 U.S. 522, 529 (1984)). Thus, even where "the statute on its face

[5] Because we hold that the TVPA does not abrogate common law foreign official immunity, we do not reach the question whether the killing in this case was "extrajudicial" within the meaning of the TVPA.

admits of no immunities," the Court will read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (*quoting Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Here, although the TVPA purports to impose liability on any "individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in torture or an extrajudicial killing, the statute itself does not expressly abrogate any common law immunities.

Our statutory analysis is also guided by the examination of "the language of related or similar statutes." *City & Cty. of S.F. v. United States Dep't of Transp.*, 796 F.3d 993, 998 (9th Cir. 2015). Here, the most helpful analogue in determining whether the TVPA abrogates common law immunities is 42 U.S.C. § 1983. The Doğans agree that "Section 1983 jurisprudence is highly relevant to the Court's analysis of the TVPA." Section 1983, much like the TVPA, imposes liability on "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives another of a constitutional right. Even with this all-encompassing language ("[e]very person"), the Supreme Court has held that, in passing § 1983, Congress did not "abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Indeed, the Court in *Pierson* held that, even though the word "person" includes legislators and judges, for example, § 1983 did not abrogate common law legislative or judicial immunity. *Id.* at 554–55. It follows that, to the extent this court relies on § 1983 jurisprudence in analyzing the TVPA, the statute's use of the overinclusive term "individual" does not abrogate the immunity given to foreign officials at common law simply because foreign officials fit within the category "individual."

Given that (1) the TVPA is silent as to whether any common law immunities are abrogated and (2) the term "individual" does not imply abrogation of common law immunities for *all* individuals, we "assum[e] that common-law principles of . . . immunity were incorporated" into the TVPA. *Filarsky*, 566 U.S. at 389.

Other considerations counsel against construing the TVPA to abrogate common law foreign official immunity. As the district court observed, "[i]f immunity did not extend to officials whose governments acknowledge that their acts were officially authorized, it would open a Pandora's box of liability for foreign military officials." Indeed, "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extra-judicial killing." And the TVPA allows suits not only by U.S. citizens but by "any person." Because the whole point of immunity is to enjoy "an immunity from *suit* rather than a mere defense to *liability*," the Doğans' reading of the TVPA would effectively extinguish the common law doctrine of foreign official immunity. *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam) (emphasis added). Under the Doğans' reading, the TVPA would allow foreign officials to be haled into U.S. courts by "any person" with a family member who had been killed abroad in the course of a military operation conducted by a foreign power. The Judiciary, as a result, would be faced with resolving any number of sensitive foreign policy questions which might arise in the context of such lawsuits. It simply cannot be that Congress intended the TVPA to open the door to that sort of litigation.

Nor does Barak's reading of the TVPA render the statute a nullity, as the Doğans contend. The parties agree that

Congress expected foreign states would generally disavow conduct that violates the TVPA because no state officially condones such actions. Thus, in the great majority of cases, an official sued under the TVPA would never receive common-law immunity in the first place, thereby making abrogation unnecessary. Barak points to two examples of this, which adequately prove the point. First, in *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), plaintiffs brought claims against the estate of former Filipino dictator Ferdinand Marcos, based on allegations of torture and extrajudicial killings. The Filipino government expressly denied that Marcos's conduct had been performed in an official capacity and urged that the lawsuits be allowed to proceed. *Id.* at 1472. Likewise, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), plaintiffs brought an action against a former Paraguayan police official based on allegations that he was responsible for the death of their son. In discussing the act of state doctrine, the Second Circuit noted that the defendant's conduct had been "wholly unratified by [the Paraguayan] government." In cases like *Hilao* and *Filartiga*, the TVPA would operate to impose liability on foreign officials who engaged in torture or extrajudicial killings. Thus, our holding today does not render the TVPA a nullity.[6]

For the foregoing reasons, we hold that the TVPA does not abrogate foreign official immunity.

[6] These cases illustrate circumstances in which a sovereign disavows the conduct of its official. However, both cases mentioned here were filed prior to the TVPA's enactment and thus were not brought under the TVPA. They nevertheless demonstrate an important point: The TVPA need not abrogate foreign official immunity to have effect.

IV

The Doğans next urge this court to hold that foreign officials are not immune from suit for violations of *jus cogens* norms. Under the circumstances of this case, we decline to recognize this exception to foreign official immunity.

At least three circuits have considered whether to create an exception to foreign official immunity for *jus cogens* violations.[7] The Doğans urge this court to follow the approach taken by the Fourth Circuit in *Yousuf* (post-remand from the Supreme Court). 699 F.3d at 777. After the Supreme Court denied Samantar immunity under the FSIA and remanded for consideration of foreign official immunity at common law, the Fourth Circuit held that "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Id.* at 777. The court explained that *jus cogens* violations should be excepted from the doctrine of foreign official immunity because they are, "by definition, acts that are not officially authorized by the Sovereign." *Id.* at 776.

[7] The Doğans argue that this court's precedent requires us to recognize an exception for *jus cogens* violations. But this is a misreading of the court's case law. The cases relied upon by the Doğans for this proposition involve Ferdinand Marcos, a Filipino dictator whose actions were repeatedly disavowed by his own government. *See Marcos*, 25 F.3d at 1472; *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992). In those cases, Marcos was not entitled to immunity because the Philippines did not ratify his conduct, and thus the court did not have occasion to consider whether to create an *exception* to foreign official immunity for *jus cogens* violations. No exception was necessary because Marcos never received immunity in the first place.

In examining this same question below, the district court found the Second Circuit's opinion in *Matar v. Dichter* more persuasive. 563 F.3d 9 (2d Cir. 2009). In *Matar*, plaintiffs sued the former head of the Israeli Security Agency for his role in an Israel-sanctioned bombing which killed the leader of a terrorist group, but which also incidentally killed the plaintiffs' family members. *Id.* at 10–11. The Israeli official, Avraham Dichter, argued that he enjoyed foreign official immunity. Because *Matar* was decided pre-*Samantar*, the Second Circuit analyzed immunity alternatively under both the FSIA and the common law. The court reiterated that "there is no general *jus cogens* exception to FSIA immunity." *Id*. at 14. And, relying on the State Department's statement of interest in favor of immunity, the court held that Dichter was entitled to common law foreign official immunity. *Id.* at 15 ("The Executive Branch's determination that a foreign [head-of-state] should be immune from suit even where the [head-of-state] is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity.") (*quoting Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004)).

The Doğans frame their argument as a request that this court adopt the Fourth Circuit's view. But they actually ask this court to go one step further than the Fourth Circuit went in *Yousuf*. In *Yousuf*, the State Department had filed a "suggestion of non-immunity," highlighting the facts that (1) the defendant was "a former official of a state with no currently recognized government to request immunity on his behalf" and (2) he was a U.S. legal permanent resident, enjoying "the protections of U.S. law," and thus "should be subject to the jurisdiction of the courts." *Yousuf*, 699 F.3d at 777. Although the court ultimately held that foreign officials are not immune for *jus cogens* violations, it did not have occasion to consider whether that should be the case

where the foreign sovereign has ratified the defendant's conduct and the State Department files a Suggestion of Immunity on his behalf. *Id.* at 776 ("However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.") (*citing Siderman*, 965 F.2d at 718). Thus, the court in *Yousuf* had no occasion to consider whether *jus cogens* violations should be an *exception* to foreign official immunity because, as in the *Marcos* cases, the defendant was never given immunity in the first place. As far as we can tell, no court has ever carved out an exception to foreign official immunity under the circumstances presented here. We also decline to do so.

V

Finally, the Doğans argue that the district court abused its discretion when it used extrinsic evidence in describing the *Mavi Marmara* incident and some of the related foreign policy considerations. The court mentioned extrinsic evidence in describing the background facts of the case. However, its decision was based on the facts alleged in the complaint and declarations filed. That is: (1) the conduct challenged was taken by Barak in his official capacity as Israeli defense minister, (2) the state of Israel subsequently ratified Barak's conduct, and (3) the State Department filed a Suggestion of Immunity asking that he be immune from suit. These three facts are undisputed, and they form the basis of the court's legal analysis and decision. Any use of extrinsic evidence was not prejudicial.

VI

For the foregoing reasons, we **AFFIRM** the district court judgment dismissing the Doğans' suit on the ground that Barak is entitled to common law foreign official immunity.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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