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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AMHET DOGAN, individually and on behalf of his deceased son FURKAN DOGAN; and HIMET DOGAN individually and on behalf of her deceased son, FURKAN DOGAN *Plaintiffs*, v. EHUD BARAK, *Defendant*.	Case No. 2:15-CV-08130-ODW-(GJSx) Assigned To: Hon. Otis D. Wright II **REPLY IN SUPPORT OF MOTION TO DISMISS** Date: May 23, 2016 Time: 1:30 p.m. Ctrm: 11

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INTRODUCTION

Plaintiffs' opposition confirms that this suit should be dismissed. Plaintiffs do not dispute that the Executive Branch's established policy affords immunity to a former Israeli official for his official involvement in Israel's authorized military operations. Nor do they dispute that the Court's role is to defer to such a policy. These undisputed points require dismissal. Nor would Plaintiffs' claims be supportable even in the absence of clearly stated Executive policy, because there is no applicable *jus cogens* exception to immunity, and the common law of foreign official immunity applies to Plaintiffs' TVPA claims just as to any statutory claim.

Plaintiffs' suit also is barred under the political question and act of state doctrines. Although Plaintiffs downplay the reach of their case, they offer no response to the unavoidable fact that resolving this suit in Plaintiffs' favor would require this Court to contradict the express views of Congress; to thrust itself into the sensitive and ongoing diplomacy in the Middle East; and to cast judgment on the authorized military actions of a sovereign ally of the United States.

Finally, Plaintiffs' claims fail under Rules 8 and 12(b)(6). Defendant's alleged oversight of an authorized military mission to enforce Israel's legal naval blockade amounts neither to "terrorism" nor to "torture" or "extrajudicial killing," so Plaintiffs do not state a claim under the TVPA, the ATS, or the ATA.

This Court should dismiss Plaintiffs' complaint with prejudice.

ARGUMENT

I. Defendant Is Immune From Suit In U.S. Courts.

A. Plaintiffs Concede The Motion By Failing To Dispute That The State Department's Established Policy Requires Dismissal.

The parties agree that Defendant's acts at issue in this case were official acts taken in his capacity as Israel's Minister of Defense. The Plaintiffs allege as much, and the State of Israel confirms it. *See* Compl. ¶¶ 8, 9, 3, 83; Opp. at 6; State of Israel Diplomatic Note, No. 1 (Dec. 31, 2015), Egleson Decl., Ex. H.[1]

[1] Plaintiffs concede that the State of Israel's Diplomatic Note is judicially

(Footnote continued)

Plaintiffs also do not dispute that the State Department's established policy, expressed in case after case, is that a suit like this must be dismissed. Mot. at 11–13; *see* Opp. 4–5. In *Matar v. Dichter*, for instance, the plaintiffs asserted ATA and TVPA claims against a former Israeli security chief related to a strike against a Hamas leader. The State Department asked the court to recognize the defendant's immunity because his "alleged participation in the [] attack was clearly undertaken in his official capacity." Egleson Decl., Ex. I ("Matar SOI"); *id.*, Ex. G.[2] The situation here is identical, insofar as in *Matar*, Defendant's alleged participation in the flotilla interception was undertaken in his official capacity for Israel.

The State Department's suggestions of immunity in *Matar* and in other cases with analogous facts in this regard make no exception for alleged *jus cogens* violations. To the contrary, the Executive has repeatedly stated that *jus cogens* and TVPA allegations like those here do not abrogate foreign official immunity. *See* Matar SOI at 27–36 (regarding Israeli official); Egleson Decl., Exs. J, K & L (similar for officials of Mexico, India, and Pakistan). Courts should not "deny an immunity which our government has seen fit to allow." *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). "[I]n the chess game that is diplomacy only the executive has a view of the entire board," so the courts may not "second-guess the executive." *Spacil v. Crowe*, 489 F.2d 614, 618–19 (5th Cir. 1974). In short, it is undisputed that

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noticeable for the "fact that Israel has requested a suggestion of immunity on behalf of Defendant." Opp. RJN at 10. Also, the Court may consider the stated reason for Israel's request—*i.e.*, because the acts were officially authorized—as a "record or statement of a public office" under FRE 803(8). *Belhas v. Ya'alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008) (relying on "statement[] of the foreign state," collecting cases); *Matar v. Dichter*, 563 F.3d 9, 11 (2d Cir. 2009) (taking notice of position of foreign state); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[I]t is the state that gives the power to lead and the ensuing trappings of power—including immunity.").

[2] Plaintiffs ask the Court to ignore the State Department's official filings in *Matar* and other cases as irrelevant hearsay. Opp. RJN at 10–13 (opposing admission of Egleson Decl., Exs. G, I, J, K & L). But they are admissible evidence of the State Department's official position (*see* FRE 803(8)), and are so centrally relevant that it is virtually mandatory that the Court notice them. *See Hoffman*, 324 U.S. at 36. The State Department's immunity determinations do not vary by circuit, so its views stated in other cases have full weight here. *Contra* Opp. at 9 n.8; Opp. RJN at 11.

the State Department's established policy is to recognize foreign official immunity on facts such as these. The Court should therefore dismiss the Complaint.

Because the State Department's established policy so clearly affords immunity, the Court need not wait for a State Department submission here before dismissing. The Executive Branch has stressed that principles of official immunity are "susceptible to general application by the judiciary without the need for recurring intervention by the Executive." Egleson Decl., Ex. H at 21 n.*. In other words, the Court may decide for itself that "the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Hoffman*, 324 U.S. at 35, 36; *see Samantar v. Yousuf*, 560 U.S. 305, 311–12 (2010); *see also Wultz v. Bank of China Ltd.*, 32 F. Supp. 3d 486 (S.D.N.Y. 2014) (dismissing under "established policy of the State Department" in the absence of a suggestion of immunity); *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272 (S.D.N.Y. 2015) (similar).[3] Alternatively, the Court may wait for the views of the Executive Branch, as Israel's formal request to the State Department to confirm Defendant's immunity is under consideration.

Even setting aside the State Department's prior, dispositive, positions under similar circumstances, Defendant's immunity from suit also is supported by a host of dismissals of similar claims. *See* Mot. at 12. Plaintiffs cannot distinguish those authorities. They say, for instance, that *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005), is different because that case did not "allege *ultra vires* action by the individual defendants." Opp. at 8 n.6. But Plaintiffs' complaint in *this* case does not allege *ultra vires* acts and, regardless, Israel has confirmed that Defendant's actions were lawful and within his authority. Egleson Decl., Ex. H. To the extent Plaintiffs assert that any international law violation is necessarily *ultra vires*, *Doe I* offers no

[3] That these cases involve immunity from a subpoena rather than from suit makes no difference (*contra* Opp. at 8 n.5)—the question of immunity is the same. *See Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 250–51 (D.D.C. 2011), *aff'd*, 493 F. App'x 106 (D.C. Cir. 2012).

aid, as its allegations of "genocide . . . crimes against humanity . . . war crimes [and] torture" did not prevent dismissal. 400 F. Supp. 2d at 96–97, 105 & n.2.[4]

In sum, common-law official act immunity requires dismissal.

B. Plaintiffs' Purported Human Rights Violations And TVPA Claims Do Not Abrogate Sovereign Immunity.

Notwithstanding the State Department's controlling views, Plaintiffs argue that they have pleaded around immunity by alleging *jus cogens* and TVPA violations. *See* Opp. at 5–13. Neither claim abrogates immunity.

As to the purported *jus cogens* exception, where, as here, the State Department's policy favors immunity, "[a] claim premised on the violation of *jus cogens* does not withstand [common-law] sovereign immunity." *Matar*, 563 F.3d at 14–15; *see also Ye v. Zemin*, 383 F.3d 620, 626–27 (7th Cir. 2004) (same); *see also* Matar SOI at 27–36 (explaining State Department's view that no *jus cogens* exception exists).[5] That rule is needed to preserve the protection from suit that immunity provides. "[S]overeign immunity is an immunity from [all of the] burdens of litigation, and not just a defense to liability on the merits." *Giraldo*, 808 F. Supp. 2d at 250–51. It would mean little if it could be nullified through artful pleading. Otherwise, "[a]s soon as a party alleged a violation of a *jus cogens* norm, a court would have to determine whether such a norm was indeed violated in order to determine immunity—*i.e.*, the merits would be reached." *Id.* If Plaintiffs could abrogate immunity here merely by describing an alleged excessive force claim in the language of *jus cogens* norms, no official from any civilized nation (including the U.S.) would ever be immune—official act immunity would be meaningless.

[4] Plaintiffs argue that *Matar* is no longer good law after *Samantar*. But there is no basis in *Samantar* for such an assertion, and post-*Samantar* courts continue to rely on *Matar*. *E.g.*, *Rosenberg v. Pasha*, 577 F. App'x 22, 23 (2d Cir. 2014) (*Samantar* did not overrule *Matar*'s rejection of a *jus cogens* exception); *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (following *Matar* in holding that common-law immunity applies to TVPA claims).

[5] Plaintiffs ignore the distinction between "human rights violations" generally and *jus cogens* violations in particular. Opp. at 5–7. That distinction ultimately does not affect the outcome here, as neither is excepted from sovereign immunity.

Separately, Plaintiffs argue that the TVPA abrogates common-law sovereign immunity because its text "admits of no exception." Opp. at 10. But where a "statute on its face admits of no immunities, [courts must] 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). And when it passed the TVPA, Congress knew that immunity would allow "former official[s]" to "avoid liability" when a sovereign "admit[ted] some knowledge or authorization of relevant acts." S. Rep. No. 102-249, at 8 (1991), *see* H.R. Rep. No. 102-367, at 5 (1991) (FSIA limits the TVPA). The State of Israel has done that in this case, and the TVPA thus does not abrogate common-law immunity. *See, e.g.*, *Matar*, 563 F.3d at 15 (so holding).

Plaintiffs' authorities do not counsel a different result. Plaintiffs rely on the Fourth Circuit's decision in *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012). There, however, no "currently recognized government" requested immunity for the defendant, obviating "the usual risk of offending a foreign nation by exercising jurisdiction." *Id.* at 777. Also, the defendant was a U.S. resident, giving him a "binding tie to the United States and its court system." *Id.* at 777–78. Given those considerations, the State Department "submitted a suggestion of non-immunity." *Id.* *Yousuf* placed "substantial weight" on these factors, none of which is present here. *Id.*

Plaintiffs' other cases are similarly unavailing. Plaintiffs fault Defendant's motion for "ignor[ing]" *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (Opp. at 5–6), but the *Trajano* court did not even reach the issue of foreign official immunity. *See* 978 F.2d at 498 n.11. The defendant defaulted and "admitted acting on her own authority, not on the authority of the Republic of the Philippines." *Id.* at 498. That her actions were admittedly *ultra vires* and not in her official capacity made rejecting immunity "easy," for there is no immunity for personal acts. *Id.* Plaintiffs suggest that in *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), it was immaterial that the Philippine government disavowed the defendant's actions and waived his immunity. *See* Opp. at 5–6. As *Hilao* explained, however, the Philippine waiver meant the case

no longer "implicate[d] any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts." *Id.* at 1472. The same goes for *Doe v. Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (Opp. at 5–6), in which the defendants defaulted as in *Trajano*, and the parent government "publicly disclaimed the alleged human rights violations" as in *Hilao*. *Id.*[6] Those cases do not bear on a situation where, as here, the Defendant's acts were official acts, and so they do not bear on the proper resolution here: that Defendant is immune from this suit, and this case should be dismissed.[7]

II. This Case Presents A Nonjusticiable Political Question.

Plaintiffs concede that under the political question doctrine, the Court cannot "adjudicate[e] . . . a statutory claim" if it "would require a court to question a separate affirmative act by a political branch." Opp. at 14–15. That is correct: when another branch exercises discretion within its sphere, the courts should not intervene. But that concession ends Plaintiffs' case, for here the U.S. Senate has found that Israel's naval blockade is "legitimate and justified"; that the "Mavi Marmara's passengers brutally and violently attacked the members of the Israeli Navy"; and that the Israeli forces, "under attack and in grave danger, reacted in self-defense." S. Res. 548 at 3 & 6, 111th Cong. (2010), Egleson Ex. E.[8] The Senate has further resolved that the "United States stands with Israel," and to "condemn the violent attack and provocation by extremists aboard the Mavi Marmara." *Id.* at 7.

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[6] *Sikhs for Justice v. Singh*, 64 F. Supp. 3d 190 (D.D.C. 2014), has no bearing here. *See* Opp. at 8. It addressed only the narrow question whether head-of-state immunity—not official-acts immunity—persisted when the official left office after the State Department suggested status-based immunity. It left for later whether "other immunities" might apply. *Id.* at 195.

[7] Plaintiffs try to minimize the comity and deference concerns here by analogizing to § 1983 suits. Opp. at 13. But Section 1983 jurisprudence has nothing to say about how, in the foreign sovereign immunity context, courts must defer to the views of the Executive and the foreign sovereign.

[8] The Court may notice the Senate's resolution as a matter of public record. *See* RJN at ¶ 2. It is offered to establish the Senate's views regarding the incident, and for that purpose, it is both admissible and dispositive. *See supra* n.1.

Plaintiffs ask the Court to condemn Israel's official actions, but it cannot do so without undermining the Senate's decision to "stand with" Israel. Nor could the Court resolve the case without entangling itself in the Executive's Middle East policy.[9] So this case is nonjusticiable, because the Court cannot "find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy toward Israel." *Corrie v. Caterpillar*, 503 F.3d 974, 984 (9th Cir. 2007).[10]

Plaintiffs' cited cases are inapposite. In each of those the question was whether the Executive Branch could ignore a constitutional or statutory mandate. In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), the question was whether the Secretary of Commerce could disregard a Congressional command that he take action with respect to international whaling; in *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), it was whether the Secretary of State could similarly disregard a Congressional statute regarding the printing of passports; in *Jewel v. National Security Agency*, 673 F.3d 902 (9th Cir. 2011), it was whether the NSA could disregard the strictures of the Foreign Intelligence Surveillance Act and other statutes; and in *Boumediene v. Bush*, 553 U.S. 723 (2008), it was whether the government's refusal to allow Guantanamo prisoners to file for habeas relief violated the Constitution's Suspension Clause. Those cases centered around an inherently constitutional question: which branch of Government—Legislative or Executive—prevails in a particular situation. This case involves no such separation-of-powers question. Here the Judiciary is instead being asked to weigh in on a political issue.

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[9] Plaintiffs submit "expert declarations" of a foreign political science professor and an American political science and law professor, both of whom assert (paradoxically) that this case raises no real issues of a political nature. The Court should strike these declarations as improper testimony on questions of law. *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) ("Expert testimony is not proper for issues of law."). To the extent the foreign professor opines on what happened aboard the *Mavi Marmara*, it is improper hearsay testimony without any evidentiary foundation, and the Court should strike the material on that basis.

[10] Plaintiffs' expert submissions, although inadmissible, confirm that to decide this case the Court will have to pass judgment on whether the Senate's conclusions were correct. *See* Chalcraft Decl. ¶ 16 (asserting (without personal knowledge) that the Senate's factual conclusions were "false and without any foundation").

Plaintiffs' only other case is *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). Critically missing in *Kadic*, though, was any possibility that the court's involvement would complicate U.S. foreign affairs. The *Kadic* defendant had presided over a military campaign of genocide and rape in the former Yugoslavia. The U.S. Government filed a statement of interest noting that "there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victims Protection Act that might raise a political question," but "this is not one of them." *Id.* at 250. The court agreed, finding that the case before it was justiciable but recognizing that the matter should be assessed "case-by-case" to avoid "compromising the primacy of the political branches in foreign affairs." *Id.* at 249.

This Court should follow decisions like *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005), which held that a suit regarding an Israeli military action in the West Bank presented a political question. *See also Matar v. Dichter*, 500 F. Supp. 2d 284, 293–96 (S.D.N.Y. 2007) (dismissing TVPA claim on political question and immunity grounds because of "potential impact of this litigation on the Middle East's delicate diplomacy"; distinguishing *Kadic*). Plaintiffs argue that *Doe I* is different because it involved a "sweeping challenge" to Israeli policy, while this case purports to be a simple tort case. But addressing Plaintiffs' own allegations (Compl. ¶¶ 22–23) and resolving Defendant's defenses will require determining the legality of the naval blockade, the flotilla, the interception, and Defendant's alleged responsibility for the alleged conduct at issue. This Court should refrain from addressing such complex issues of Middle Eastern and international affairs, and should dismiss this action.

III. The Act Of State Doctrine Requires Dismissal.

The act of state doctrine "reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by sovereign states, may be interfering with the conduct of American foreign policy by the Executive and Congress." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 707 (9th Cir. 1992). Just as a suit in a foreign court challenging a U.S. official's decision to authorize U.S.

military action would offend the sovereignty of the United States, so too would an adjudication of this matter offend the sovereignty of Israel and embarrass the Executive in its conduct of foreign relations. For that reason, the act of state doctrine requires dismissal. *Kirkpatrick Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 408 (1990); *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).

Plaintiffs resist the doctrine's application here, however, because they say the "factors" set forth in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), are absent. In so doing, they misapply the considerations set forth in *Sabbatino*. Plaintiffs claim that this suit involves *jus cogens* violations and that the international consensus with respect to *jus cogens* norms makes the case adjudicable. But as set forth in Defendant's opening brief and herein, merely labeling claims in the language of *jus cogens* does not make the case adjudicable. *Sabbatino* also held that the expropriation question there was not amenable to suit in the U.S. because it "touch[ed] much more sharply on national nerves than" other more routine questions might. 376 U.S. at 428. Here, too, the allegations raise sensitive national, foreign-relations-related issues. Plaintiffs also say the need for the U.S. to "speak with one voice" is a factor. Opp. at 19. If so, that too favors dismissal, as the Senate and the Executive have already spoken, and their uniform voice would be undermined by any conflicting judicial pronouncement.

Sabbatino noted that the act of state doctrine might not apply when the U.S. government no longer recognizes the state in question. 376 U.S. at 428. Plaintiffs suggest that this means a former official's invocation of the doctrine is disfavored (Opp. at 19), but *Sabbatino* did not hold that, and neither do the cases Plaintiffs cite. Those hold only that acts of former officials may not be protected by the doctrine *if* they were unauthorized at the time. *See* Opp. at 19 (citing cases). Here, where Defendant's alleged acts were authorized official acts, the doctrine applies. Plaintiffs also suggest that in considering whether a suit challenges an act of state, the Court should make a threshold determination whether the foreign acts were in the "public

interest." That again misunderstands the law. The issue articulated in *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), was whether the actions were by the state "*qua state*" such that adjudication in the U.S. would be an affront to state sovereignty. *Id.* at 1432. A decision that the Israeli Defense Minister is civilly liable in a U.S. court for his role with regard to a lawful Israeli military engagement would undoubtedly challenge a sovereign act of Israel.

Plaintiffs' other response, that the act of state doctrine is limited to acts within a nation's borders, is wrong on the law and inapplicable to these facts. The Ninth Circuit rejected such a narrow territorial limit in *In re Philippine National Bank*, 397 F.3d 768, 773–74 (9th Cir. 2005), holding that the court would not question the validity of a Philippine judgment even though it touched assets located in Singapore. As the court held, the Philippine "Republic's 'interest in the [enforcement of its laws does not] end at its borders.'" *Id.* Similarly here, Israel has an interest in protecting its national security by enforcing its naval blockade, notwithstanding that the enforcement of the naval blockade necessarily took place outside of Israel's borders. Finally, Plaintiffs do not allege that any of Defendant's own alleged actions took place outside of Israel. Dismissal of the complaint is therefore required.

IV. Plaintiffs Fail To Allege A TVPA Claim.

Plaintiffs have not alleged the essential elements of a TVPA claim. *See* Mot. at 18–20. Plaintiffs' arguments that Mr. Dogan was "tortured" or was the target of an "extrajudicial killing" grossly overreach.

Regarding "torture," Plaintiffs acknowledge that the TVPA requires custody of the injured party. There is no allegation that the decedent himself was ever in custody—the vessel he was on may have been intercepted, but on board the Israeli forces faced resistance, and are not alleged to have obtained control of the decedent himself. The same facts do not allow a plausible inference that he was shot with the required specific intent to cause pain, for the use of force here was to suppress violent resistance. And Plaintiffs have no response to the requirement that the "conduct" be

"sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes" (*Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002)), and nowhere suggest that they clear that substantial hurdle.

Plaintiffs also have no response to the requirement that an extrajudicial killing is one "undertaken with studied consideration and purpose," a level of premeditation not plausibly alleged here. *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011). Faced also with the rule that "precipitate shooting" in the course of an armed struggle does not count under the statute (*id.*), Plaintiffs offer no rebuttal. Their attempts to fit the facts of this case into the TVPA's narrow proscriptions should be rejected.

Nor, finally, do Plaintiffs' factual allegations suggest that Defendant can be held liable here. According to Plaintiffs, to be held liable, a non-participant must have "authorized, tolerated or knowingly ignored" the alleged torture or extrajudicial killing. *See* Opp. at 23 (quoting S. Rep. No. 249 (1991) at 7). Here, however, there is no allegation that Defendant authorized, tolerated or knowingly ignored any such acts. Plaintiffs' TVPA claims should be dismissed.

V. Plaintiffs' ATS And ATA Claims Also Fail.

Plaintiffs' ATS claims must also be dismissed. *See* Mot. at 20–22. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), holds that the ATS does not apply to acts abroad, unless they "touch and concern" the United States. Plaintiffs' reliance on *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013), highlights the deficiencies of Plaintiffs' case, because the defendant there was a U.S. citizen whose wrongful conduct, unlike here, was "alleged to have occurred, in substantial part, within this country." *Id.* at 310. *Mwani v. bin Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013), also shows what is lacking here, for it applied the ATS to an attack on the U.S. Embassy in Nairobi. An attack on a U.S. embassy touches and concerns the United States. The facts as alleged here do not meet *Kiobel*'s "touch and concern" test.

Separately, the ATS distinguishes between labels and facts. Mot. at 21. Even if actual "torture" and "extrajudicial killing" would be recognized under the ATS, that does not save Plaintiffs' claims. Plaintiffs must show that a "clearly established and specifically defined" rule of international law specifically prohibits Defendant's acts authorizing the interception as Israel's Minister of Defense. *Mamani*, 654 F.3d at 1152. Plaintiff cannot point to any rule or precedent that specifically and clearly prohibits those acts.

Finally, Plaintiffs' defense of their Anti-Terrorism Act claim also fails. Contrary to Plaintiffs' argument, the ATA's plain text bars a suit against an official "*acting* within his or her official capacity" (18 U.S.C. § 2337(2))—not merely one *sued* in his or her official capacity (*contra* Opp. at 25). Plaintiffs' argument, if applied here, would render the protections of 18 U.S.C. § 2337(2) meaningless. In any event, Plaintiffs do not even try to defend their characterization of the acts here as "terrorism." The military acts of a sovereign nation engaged in armed conflict and undertaken in enforcing a legal naval blockade are not terrorism, and are not prohibited by the ATA.

CONCLUSION

For the foregoing reasons and those stated in Defendant's motion, the Court should dismiss the complaint in its entirety and with prejudice.

Respectfully submitted,

Dated: April 18, 2016

SIDLEY AUSTIN LLP

By: /s/ Douglas A. Axel
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