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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 DOĞAN; and HIMET DOĞAN individually and on behalf of her deceased son, FURKAN DOĞAN

Plaintiffs,

v.

EHUD BARAK,

Defendant.

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

Assigned To: Hon. Otis D. Wright II

NOTICE OF DEFENDANT'S MOTION AND MOTION TO DISMISS UNDER RULES 12(b)(1) AND 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES[1]

[Request for Judicial Notice; Declaration of Christopher M. Egleson; and [Proposed] Order filed separately herewith]

Date: May 23, 2016
Time: 1:30 p.m.
Ctrm: 11

[1] This docket entry combines previous docket entries 24 (Notice of Motion and Motion to Dismiss) and 25 (Memorandum of Points and Authorities), both filed January 19, 2016, into a single entry associated with the correct CM/ECF event. There have been no substantive edits or amendments to those documents.

Please take notice that on May 23, 2016, at 1:30 p.m. in Courtroom 11 of the above Court, located at 312 N. Spring Street, Los Angeles, California 90012-4793, Defendant Ehud Barak will, and hereby does, move this Court for an order dismissing Plaintiff's complaint under Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the following grounds: Defendant is immune from suit in this Court, because all acts alleged were taken in his official capacity as Minister of Defense of the State of Israel; the complaint presents a nonjusticiable political question; the adjudication of Plaintiffs' claims is barred by the act of state doctrine; and each of the causes of action asserted in the complaint fails to state a claim.

This motion is based upon this notice of motion; the memorandum of points and authorities filed in support hereof; the declaration of Christopher M. Egleson and accompanying exhibits; Defendant's request for judicial notice; the complete files and records in this action; the oral argument of counsel, if any; and such other and further evidence as the Court may deem proper.

This motion is brought following the meet and confer among counsel in accordance with L.R. 7-3.

Respectfully submitted,

Dated: January 20, 2016

SIDLEY AUSTIN LLP

By: /s/ Douglas A. Axel
Douglas A. Axel

Attorneys for Defendant
Ehud Barak

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OTHER AUTHORITIES

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MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs bring this action against Ehud Barak, formerly the Prime Minister and Minister of Defense of the State of Israel, arising from an Israeli military operation that he is alleged to have planned and approved while serving as Defense Minister. It is more than clear that this lawsuit does not belong in a United States court. The suit seeks to impose command responsibility for allegedly excessive force by the Israel Defense Forces when enforcing Israel's naval blockade of Gaza by intercepting, in the Mediterranean Sea, a Comoros-flagged ship that had departed from Turkey. In so doing, Plaintiffs would have this Court pass judgment on official actions undertaken on behalf of a sovereign nation; interject itself into the foreign affairs of the United States, in possible conflict with the political branches of Government; and possibly interfere with the relations between Israel and Turkey, two United States allies. As set forth below, none of this has any place being litigated here.

In 2010, a flotilla of six ships attempted to breach Israel's lawful naval blockade of the Hamas-controlled territory of Gaza. The flotilla, the U.S. Senate has found, was organized by a Turkish organization that had "aided al Qaeda in the past," and there "were at least 5 active terrorist operatives among" the flotilla participants, "with affiliations with terrorist groups such as al Qaeda and Hamas." S. Res. 548 at 3-4, 111th Cong. (2010). When the flotilla ships refused to comply with Israel's warnings to change course, Israel Defense Forces were forced to board them in order to enforce the naval blockade. On one ship, the *Mavi Marmara*, the Israeli soldiers faced violent resistance from activists on the ship who had armed themselves with "knives, clubs, pipes, and other weapons." *Id.* at 6. The "intention" of these armed activists, the Senate concluded, was "to achieve 'martyrdom' at the hands of Israel Defense Forces." *Id.* at 4-5. As the soldiers struggled to defend themselves against

these attackers and to enforce the naval blockade by taking control of the ship, a number of the soldiers were injured, and several of the flotilla participants were killed.

The Plaintiffs here bring suit on behalf of one of those flotilla participants. They claim, in essence, that the Israeli military used excessive force in enforcing its naval blockade during an armed encounter aboard a ship on the Mediterranean. Their suit is barred in this Court, however, for several reasons. First, Defendant is immune from suit in U.S. courts under the law of foreign sovereign immunity, which prohibits a suit against a foreign official for acts taken in his official capacity. Second, the suit presents a nonjusticiable political question because, among other reasons, the questions at issue here are deeply enmeshed in the foreign policy of the United States, and this Court cannot adjudicate the action without interfering with the foreign policy prerogatives of the President and Congress. Third, this suit challenges the legality of the official acts of a foreign state, and is therefore barred under the act of state doctrine.

Beyond these complete barriers to suit, the complaint also fails to state a claim. Plaintiffs' claims under the Torture Victim Protection Act fail because the acts at issue here do not fall within that statute's scope. Their claims under this Court's Alien Tort Statute jurisdiction fail because the Alien Tort Statute does not apply to acts such as these that took place far outside American borders, and because the alleged conduct does not fall within the limited categories for which the Alien Tort Statute allows a cause of action. Their claims under the Anti-Terrorism Act also fail because the military actions of a foreign sovereign such as Israel are not "international terrorism," and the Anti-Terrorism Act expressly does not apply to the acts of a foreign official acting in his official capacity.

In sum, U.S. law imposes barrier upon barrier to block Plaintiffs' suit. It is simply not the role of a U.S. court to adjudicate a claim of excessive force asserted against a foreign official, alleging command responsibility for military actions taken abroad in the course of a foreign armed conflict to which the United States is not a

party. Nor is it proper for a U.S. court to charge into a foreign-policy thicket by passing judgment on a matter like this. This action cannot be heard in this Court, and Plaintiffs' complaint should promptly be dismissed.

BACKGROUND

I. Israel's Interception of the Gaza Flotilla

The events at issue in this case took place against the backdrop of an armed conflict between the State of Israel and Hamas, a United States-designated foreign terrorist organization that has controlled Gaza since 2007. *See* Compl. ¶ 16; Dep't of State, Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997) (designating Hamas), Decl. of Christopher M. Egleson ("Egleson Decl."), Ex. A.[1] On January 3, 2009, Israel imposed a naval blockade of Gaza after concluding that Hamas' repeated bombing of civilian targets in Israel was conducted with weapons smuggled into Gaza by sea. The blockade remains in effect to this day. Israel Ministry of Foreign Affairs, *The Gaza flotilla and the maritime blockade of Gaza – Legal background*, Egleson Decl., Ex. B; *see* Compl. ¶¶ 18, 20, 21.

In May 2010, a flotilla of six vessels gathered in the Mediterranean Sea south of Cyprus. *See* U.N. Palmer Commission, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident ¶ 86 (Sept. 2011) ("Palmer Report"), Egleson Decl., Ex. C. Three of the vessels in the flotilla had departed from Turkish ports. *Id.* The flotilla was bound for Gaza, as part of a well-publicized attempt to breach Israel's naval blockade. Compl. ¶¶ 24, 25. According to the complaint, the flotilla was organized by the "Free Gaza Movement, a human rights organization registered as a charity in Cyprus," with the aims of "draw[ing] international public attention to the situation in the Gaza Strip and the effect of the blockade" and "deliver[ing] humanitarian assistance and supplies to Gaza." Compl. ¶ 24.

[1] All of the material attached to the Egleson Declaration is appropriately before the Court either under the incorporation-by-reference doctrine (as to Exhibits B, C and D, which are cited at Compl. ¶ 16), *see Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)); or (as to all other Exhibits) because they are judicially noticeable, *see* Defendant's Request for Judicial Notice ("RJN"), filed herewith.

According to the U.N. Palmer Report cited in the complaint, Israel issued several warnings to the flotilla not to proceed to Gaza due to the existing naval blockade, and invited the vessels to head for the Israeli port at Ashdod where any humanitarian supplies could be off-loaded and delivered to Gaza. Palmer Report ¶ 106. After that warning and invitation were ignored, Israel again warned the flotilla not to enter the blockade area and requested that the ships change course; in two subsequent warnings, Israel again emphasized that "all necessary measures" would be taken to enforce the blockade, including through the boarding of the vessels. *Id.* After the flotilla refused to change course and stated its clear intent to proceed directly to Gaza in violation of the blockade, Israel Defense Forces intercepted the flotilla on May 31, 2010, in the Mediterranean Sea approximately 72 nautical miles from Gaza. *Id.* ¶¶ 1, 111.

On one of the vessels, the *Mavi Marmara*, Israel Defense Forces faced violent resistance by a group of flotilla participants when boarding the ship. An Israeli commission convened to investigate the incident concluded that the flotilla participants included "activists" who "violently opposed the Israeli boarding" using "a wide array of weapons, including iron bars, axes, clubs, slingshots, knives, and metal objects." Turkel Commission, Report at 278 (Jan. 2010), Egleson Decl., Ex. D; *see also* Palmer Report ¶ 124 ("soldiers landing from the first helicopter faced significant, organized and violent resistance from a group of passengers when they descended onto the Mavi Marmara"). The commission also concluded that the activists used firearms against the IDF soldiers. Turkel Report at 278. Israeli soldiers used force to protect themselves from harm and to gain control of the ship. Turkel Report at 142-43; *see also* Palmer Report ¶ 124. As part of the operation, several Israeli soldiers were seriously injured with stabbing, gunshot, and blunt force trauma, and nine flotilla participants on board the *Mavi Marmara* were killed. Turkel Report at 142-43, 156, 190; Palmer Report ¶ 125-27; cf. Compl. ¶ 2 (alleging ten were killed).

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One of the flotilla participants killed on the *Mavi Marmara* was Furkan Doğan, whom the complaint alleges was a U.S. citizen of Turkish descent. According to the complaint, Mr. Doğan was struck with bullets five times, including shots to his head, face, back, leg, and foot. Compl. ¶ 39. The complaint alleges that one reviewing panel concluded that he was not killed instantly, and remained conscious or semi-conscious after being shot. *Id.* The plaintiffs are Mr. Doğan's parents, who are citizens of Turkey; the complaint does not allege that they had any direct involvement with the Gaza flotilla.

II. Ehud Barak's Role as Minister of Defense

Defendant Ehud Barak is a former, long-time Israeli public servant who, among other roles, has served as Prime Minister of Israel, Chief of Staff of the Israel Defense Forces, and Minister of Defense. During a 35-year career in the Israeli military, he earned a reputation as a war hero for his role in several high-profile operations, including multiple anti-terrorist and hostage-rescue missions. He is among Israel's most decorated soldiers, and among other distinguished awards was decorated in 1992 by the United States as Commander in the U.S. Legion of Merit.

At the time of the interception of the Gaza flotilla, Mr. Barak was Israel's Minister of Defense. Compl. ¶¶ 8, 28, 29. According to the complaint, Mr. Barak "was instructed by the Prime Minister to conduct 'the inter-ministerial preparations and the preparations of all of the parties in the operation'" and more generally to "coordinate this matter." Compl. ¶ 30. The complaint alleges that Mr. Barak was one of a number of high-level Israeli government officials who decided unanimously to "stop the flotilla." Compl. ¶ 32. It alleges that, at a meeting on May 6, 2010, Mr. Barak "approved the overall format of the operation." Compl. ¶ 31. It also alleges that "further correspondence and planning took place between" Mr. Barak, Prime Minister Netanyahu, and the Israel Defense Forces (IDF) Chief of General Staff on May 13 and May 26, 2010 (Compl. ¶ 31), and that on May 26, Mr. Barak "authorized the operation" (Compl. ¶ 32). None of Mr. Barak's conduct is alleged to have

occurred outside of Israel. Beyond alleging that Mr. Barak has command responsibility as the Minister of Defense, and with regard to his role in planning and authorizing the operation, the complaint does not allege that Mr. Barak had any personal role in the operation or the alleged acts of violence that occurred during the interdiction of the *Mavi Marmara*.

III. The Operation's Impact on U.S. Policy Interests

In a 2010 resolution, the U.S. Senate expressed its support for Israel and defended Israel's Gaza flotilla operation. S. Res. 548, 111th Cong. (2010), Egleson Decl., Ex. E. The Senate recognized that Hamas is a designated terrorist organization that has "fired more than 10,000 rockets and mortars from Gaza into Israel, killing 18 Israelis and wounding dozens more." *Id.* at 3. The Senate found that the flotilla was organized by a Turkish organization that "has aided al Qaeda in the past," and that there "were at least 5 active terrorist operatives among the passengers on the *Mavi Marmara*, with affiliations with terrorist groups such as al Qaeda and Hamas." *Id.* at 3-4. It further found that "the actual intention of passengers on the *Mavi Marmara* had been to achieve 'martyrdom' at the hands of Israel Defense Forces." *Id.* at 5. Based on these findings, the Senate resolved to condemn the provocation and violence perpetrated by extremists aboard the *Mavi Marmara*; condemn Hamas for its attacks on Israel; and to "encourage the Government of Turkey to recognize the importance of continued strong relations with Israel." *Id.* at 7.

As a result of the Gaza flotilla interdiction, the relations between Israel and Turkey – two important United States allies – have been and continue to be strained. Congressional Research Service, Turkey: Background and U.S. Relations at 24 (2013) ("CRS Turkey Report"), Egleson Decl., Ex. F. The United States, including President Barack Obama personally, has been actively involved in efforts to restore these relations. *Id.* at 25. The "deteriorated relationship" between Turkey and Israel "has presented problems for the United States because of the U.S. desire to coordinate its regional policies with two of its regional allies." *Id.* In particular,

"U.S. officials seem to have concerns about the repercussions Turkey-Israel tensions could have for regional order and the alignment of U.S. and Turkish interests." *Id.*

IV. Causes of Action

Plaintiffs assert that Mr. Doğan's death amounts to an "extrajudicial killing" in violation of U.S. and international law. Plaintiffs further assert that Mr. Doğan suffered after being shot and before he died, and that such suffering amounts to "torture" under U.S. and international law. The complaint seeks to hold Mr. Barak personally liable for harm to Mr. Doğan based on the role Mr. Barak is alleged to have played in planning and authorizing the interception of the *Mavi Marmara* as Israel's Minister of Defense. The complaint asserts causes of action under the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (recorded at 28 U.S.C. § 1350 note); the Alien Tort Statute, 28 U.S.C. § 1350; and the Anti-Terrorism Act, 18 U.S.C. § 2333.

For the reasons set forth below, the complaint should promptly be dismissed.

MOTION TO DISMISS STANDARD

Mr. Barak brings this motion to dismiss under Rule 12(b)(1) and 12(b)(6). On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Rojas v. Brinderson Constructors Inc.*, 567 F. Supp. 2d 1205, 1207 (C.D. Cal. 2008) (Wright, J.) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted)). A "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.' " *Id.* (quoting *Twombly*, 550 U.S. at 555). In granting a motion to dismiss, the Court may consider the complaint, "as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint

by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

The questions of sovereign immunity and the application of the political question doctrine are to be evaluated under Rule 12(b)(1). Under that rule, the Court may "look beyond the face of the complaint" to factual submissions to determine whether it may exercise jurisdiction over the subject matter. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007); *see id.* (dismissal under political question doctrine evaluated under 12(b)(1)); *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 11 (D.D.C. 2014) (same as to common law foreign official immunity); *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336, 340 (E.D.N.Y. 2013) *aff'd sub nom. Rosenberg v. Pasha*, 577 F. App'x 22 (2d Cir. 2014) (same).

ARGUMENT

I. Mr. Barak is Immune from Suit in U.S. Courts

A. Common-Law Foreign Official Immunity

Mr. Barak cannot be sued in this Court under the law of foreign sovereign immunity. "[T]he common law of foreign sovereign immunity recognize[s] an individual official's entitlement to immunity for 'acts performed in his official capacity.'" *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (quoting Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965)); *see also Samantar v. Yousuf*, 560 U.S. 305, 324 (2010) (recognizing continuing vitality of common-law foreign official immunity). Immunity is extended to the individual in such circumstances because a suit against an individual acting in his official capacity is "the practical equivalent of a suit against the sovereign directly." *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1472 (9th Cir. 1994) (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), *abrogated on other gds.*, *Samantar*, 560 U.S. 305).

Because of the Executive Branch's constitutional authority over foreign affairs, courts defer to the views of the State Department when considering whether foreign

1 sovereign immunity precludes a suit, including as to the sovereign immunity claims
2 of foreign officials. *Samantar*, 560 U.S. at 311-12; *see also Verlinden B.V. v. Central*
3 *Bank of Nigeria*, 461 U.S. 480, 486 (1983) (courts have generally "deferred to the
4 decisions of the political branches—in particular, those of the Executive Branch—on
5 whether to take jurisdiction over actions against foreign sovereigns and their
6 instrumentalities"). This deference takes two forms:

7 First, under a common "procedure . . . for resolving a . . . claim of sovereign
8 immunity," the "diplomatic representative of the sovereign" may "request a
9 'suggestion of immunity' from the State Department." *Samantar v. Yousuf*, 560 U.S.
10 305, 312 (2010). If the State Department then submits to the court a written
11 suggestion of immunity, the court will "surrender[] its jurisdiction." *Id.* at 311
12 (citing *Ex parte Republic of Peru*, 318 U.S. 578, 581, 588 (1943)). "When the
13 executive branch has determined that the interests of the nation are best served by
14 granting a foreign sovereign immunity from suit in our courts, there are compelling
15 reasons to defer to that judgment without question." *Spacil v. Crowe*, 489 F.2d 614,
16 619 (5th Cir. 1974) (deferring to State Department Suggestion of Immunity); *see also*
17 *Republic of Mexico v. Hoffman,* 324 U.S. 30, at 35 (1945) ("[I]t is a guiding principle
18 in determining whether a court should exercise or surrender its jurisdiction in [cases
19 involving foreign sovereign immunity], that the courts should not so act as to
20 embarrass the executive arm in its conduct of foreign affairs. In such cases the
21 judicial department of this government follows the action of the political branch, and
22 will not embarrass the latter by assuming an antagonistic jurisdiction.").

23 Second, in the absence of a written suggestion of immunity submitted by the
24 State Department, the Executive Branch has stated that it "need not appear in each
25 case in order to assert the immunity of a foreign official." Brief for the United States
26 as Amicus Curiae Supporting Affirmance at 3, 21, *Matar v. Dichter*, 563 F.3d 9 (2d
27 Cir. 2009) (No. 07-2579 Dec. 19, 2007) ("Matar Amicus Brief"), Egleson Decl., Ex.
28 G. Rather, a district court may "decide for itself whether all the requisites for such

immunity exist[].” *Id.* (citing *Ex parte Republic of Peru*, 318 U.S. at 587)).[2] In so doing, the district court is to inquire “whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.” *Hoffman*, 324 U.S. at 36.

B. Mr. Barak is Immune Because All of The Acts at Issue Were Official Acts Undertaken as Minister of Defense on Behalf of Israel

Here, Mr. Barak is indisputably immune from Plaintiffs’ suit. There can be no dispute that the acts at issue were official acts, undertaken by Mr. Barak in his capacity of Minister of Defense, on behalf of Israel. The complaint itself alleges that Mr. Barak was Israel’s Minister of Defense at all relevant times. *See* Compl. ¶ 8. The Plaintiffs also allege that he undertook all of the acts at issue on behalf of Israel as part of his official duties. *See* Compl. ¶ 9 (alleging that Mr. Barak authorized the flotilla interdiction as “the Minister in charge of the Army on behalf of the Government”); *id.* ¶ 31 (alleging that, “[w]hile serving” as Defense Minister, Mr. Barak “planned and commanded the attack and interception of the Flotilla” at the “instruction” of the Israeli Prime Minister); *id.* ¶ 83 (alleging that Plaintiffs’ alleged injuries were “inflicted by and/or at the instigation, under the control or authority, or with the consent or acquiescence of Defendant Barak in his official capacity as Minister of Defense”).

[2] *See Compania Espanola de Navegaction Maritima, S.A. v. The Navemar*, 303 U.S. 68, 75 (1938); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 915 (N.D. Ill. 2003) (“In the absence of guidance from the Executive Branch, ‘courts may decide for themselves whether all the requisites of immunity exist.’” (quoting *Republic of Mexico v. Hoffman,* 324 U.S. 30, 34–35 (1945))); *Fotso v. Republic of Cameroon*, No. 12-cv-1415, 2013 WL 3006338, at *6–7 (D. Or. June 11, 2013) (foreign officials were immune “based on the common law of foreign official immunity,” although “the State Department ha[d] thus far declined to determine [their] immunity” and had suggested immunity for another defendant); *Smith v. Ghana Commercial Bank, Ltd.*, No. Civ. 10-4655, 2012 WL 2930462, at *7, 10 (D. Minn. June 18, 2012) (“the State Department has filed no suggestion of immunity,” but “the Attorney General [of Ghana] is immune from suit under the common law of foreign sovereign immunity”), report and recommendation adopted, 2012 WL 2923543 (D. Minn. July 18, 2012); *see generally* Brief for the United States as *Amicus Curiae* Supporting Appellee at 12 n.5, *Giraldo v. Drummond Co.*, 493 F. App’x 106 (D.C. Cir. 2012) (No. 11-7118), 2012 WL 3152126.

Israel has confirmed that all of Mr. Barak's actions were performed in his official capacity on behalf of Israel. On December 31, 2015, the Embassy of Israel in Washington, D.C. made a formal diplomatic request that the United States Government submit to the Court a Suggestion of Immunity on behalf of Mr. Barak, as all of the actions of Mr. Barak at issue in this lawsuit were performed exclusively in Mr. Barak's official capacity as Israel's Minister of Defense. *See* State of Israel Diplomatic Note, No. 1 (Dec. 31, 2015), Egleson Decl., Ex. H;[3] *see also Matar v. Dichter*, 500 F. Supp. 2d 284, 291 (2007), *aff'd* 563 F.3d 9 (2d Cir. 2009) (citations omitted) (courts assign "'great weight' to the opinion of a sovereign state regarding whether one of its officials was acting within his official scope").

Under circumstances identical in all material respects to those presented by the complaint, the State Department recently affirmed that immunity should be recognized and a lawsuit like this one should be dismissed. In *Matar*, the plaintiff brought suit against the former head of the Israeli General Security Service in the Southern District of New York, asserting claims under, *inter alia*, the Alien Tort Statute and the TVPA. The putative claims arose from an Israeli strike against a Hamas leader that damaged a residential apartment building in Gaza. At the Court's invitation, the United States filed a Statement of Interest supporting dismissal of the case. The United States asserted that because the defendant's "alleged participation in the [] attack was clearly undertaken in his official capacity, [he] is entitled to invoke immunity here." Statement of Interest of the United States of America at 11, *Matar v. Dichter*, No. 05-cv-10270 (S.D.N.Y. Nov 17, 2006) ("Matar SOI"), Egleson Decl., Ex. I. The same principles recently reaffirmed by the State Department in *Matar* establish that Mr. Barak is immune from suit here.

[3] A court may properly consider the legal position of the foreign sovereign regarding the character of the acts at issue because it is the sovereign's legal entitlement to maintain, or waive, the immunity of a former official. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power – including immunity – the state may therefore take back that which it bestowed upon its erstwhile leaders. . . . [B]y issuing the waiver, the Philippine government has declared its decision to revoke an attribute of [the Marcoses'] former political positions; namely, head-of-state immunity.").

In addition to the express views of the State Department, Mr. Barak's immunity from suit is also supported by a long line of decisions dismissing similar claims asserted against foreign officials on ground of immunity. *See, e.g.*, *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) (dismissing claims against Israeli officials brought by individuals allegedly injured by Israeli military action in the West Bank); *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008) (dismissing claims against Israeli officials brought by individuals allegedly injured by Israeli military strikes in southern Lebanon); *Matar v. Dichter*, 563 F.3d 9 (2009) (dismissing claims against Israeli official relating to Israeli military action in Gaza); *Wultz v. Bank of China Ltd.*, 32 F. Supp. 3d 486 (2014) (holding in the absence of a suggestion of immunity that foreign official immunity protected an Israeli official from being compelled to testify regarding his official acts); *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272 (S.D.N.Y. 2015) (same); *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 249 (D.D.C. 2011), *aff'd* 493 F. App'x 106 (D.C. Cir. 2012) (former president of Colombia immune from subpoena); *Nikbin v. Islamic Republic of Iran*, 517 F. Supp. 2d 416 (D.D.C. 2007) (former president of Iran immune from suit); *Rosenberg v. Pasha*, 577 F. App'x 22, 23 (2d Cir. 2014) (former directors of Pakistani intelligence agency immune from suit). Consistent with this line of authority dismissing similar attempts to haul foreign officials into U.S. courts for litigation involving their official acts on behalf of a sovereign state, this Court should dismiss this action.

The fact that Mr. Barak is no longer an Israeli government official is of no relevance. Foreign official immunity applies whenever the acts complained of were official acts undertaken on behalf of the foreign sovereign, regardless of whether the official remains in government by the time the suit is brought. *Matar*, 563 F.3d at 14 (foreign official immunity is based on acts, rather than status, and therefore "does not depend on tenure in office") (citing *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971)); *see also Wultz*, 32 F. Supp. 3d at 489 (immunity applied to former Israeli

official); *Giraldo v. Drummond Co.*, Inc., 808 F. Supp. 2d 247, 249 (D.D.C. 2011) (immunity applied to former President of Colombia).

Nor does it matter, for purposes of immunity, that Plaintiffs allege that the acts at issue amount to "torture" and "extrajudicial killing." Although Plaintiffs may argue that putative *jus cogens* violations should fall outside the scope of foreign official immunity, the law is the opposite: a "claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Matar*, 563 F.3d at 15. The United States Government has repeatedly affirmed that no such exception exists. *See* Matar SOI at 27-33 ("there is no exception to the immunity of individual officials for alleged *jus cogens* violations."); *see also, e.g.*, Suggestion of Immunity at 6, *Doe v. Zedillo*, No. 3:11-cv-01433-MPS (D. Conn.) (suggestion of immunity in case alleging *jus cogens* violations against former president of Mexico); Suggestion of Immunity at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP (E.D.N.Y. Dec. 17, 2012) (same with respect to former Pakistani intelligence officials); Suggestion of Immunity at 5-6, *Giraldo v. Drummond Co.*, No. 1:10-mc-00764-JDB (D.D.C.) (same with respect to subpoena for third-party testimony from former President of Colombia), Egleson Decl., Exs. J, K & L. It is thus the "established policy of the department to recognize" immunity (*Hoffman*, 324 U.S. at 36) without regard to whether a *jus cogens* violation is alleged, and Plaintiffs' allegations do not undermine Mr. Barak's immunity.[4]

In sum, all of the acts at issue were official acts taken by Mr. Barak as Minister of Defense on behalf of the State of Israel, and the Court should hold him to be immune from suit, should "surrender[] its jurisdiction" (*Samantar*, 560 U.S. at 311),

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[4] The Ninth Circuit decision *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994), is not to the contrary. There, the court allowed suit against the estate of deposed Philippine dictator Ferdinand Marcos to proceed, despite an immunity request by the estate. But in that case, the Philippine government had filed an amicus brief stating that Marcos' acts were outside of his authority as President, and not entitled to immunity. *Id.* at 1472; *see* Matar SOI at 31 & n. 25 (distinguishing *In re Estate of Ferdinand Marcos*). This case is the opposite, for the Israeli government has expressly affirmed that the alleged acts at issue were official acts on behalf of Israel.

and should promptly dismiss this action pursuant to Rule 12(b)(1). As noted, Israel has requested that the State Department issue a Suggestion of Immunity in this matter, which would require the dismissal of this case, as it did in *Matar*. *Matar*, 563 F.3d at 15 (affirming dismissal of a lawsuit against a former Israeli official after the State Department filed a suggestion of immunity). There is no need, however, for the Court to wait for the State Department to make that submission before dismissing the case. The Court may instead dismiss because recognizing immunity here is required by the State Department's well established policy in prior cases. *See Hoffman*, 324 U.S. at 36; Matar Amicus Brief at 21 ("the Executive generally recognizes foreign officials to enjoy immunity from civil suit with respect to their official acts," and "[t]hese are principles to which future courts may refer in making immunity determinations in suits against foreign officials in which the Executive does not appear").

II. This Case Presents a Non-Justiciable Political Question

This case should also be dismissed because it presents a non-justiciable political question. If the Court were to accept Plaintiffs' invitation to determine the legality of an Israeli military operation in the Mediterranean Ocean, it would be injecting itself directly into the Israeli-Palestinian conflict. The Court would suddenly occupy a central role in U.S. foreign policy, and could find itself in conflict with the political branches and unwittingly forced to act adversely to U.S. interests in the region. The political question doctrine protects the political branches, this Court, and the nation itself from that kind of chaos by removing cases like this from the Court's remit.

Under *Baker v. Carr*, 369 U.S. 186 (1962), a case presents a non-justiciable political question when any of the following are present: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding the issue without an initial policy determination of a

kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker*, 369 U.S. at 217.

This case is nonjusticiable under the first *Baker* category because deciding this case would entangle this Court in the foreign policy of the United States, which is constitutionally committed to the Executive Branch. The reasoning of *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111-12 (D.D.C. 2005), applies with full force here. The plaintiffs in that case brought putative human rights claims against the State of Israel and certain Israeli officials arising from Israel's policy with respect to settlements in the West Bank. The district court explained that it was "hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli–Palestinian conflict," and held that it could not adjudicate the case because "[a] ruling on any of these issues would draw the Court into the foreign affairs of the United States, thereby interfering with the sole province of the Executive Branch." *Id.*

Those words apply just as fully here, where the United States' sensitivity to these issues is high. As a 2010 Congressional Research Service report observed, "[t]he flotilla crisis may have added to a developing rift in the foreign policies of Turkey and the United States." Congressional Research Service, Israel's Blockade of Gaza, the Mavi Marmara Incident, and Its Aftermath at 15 (2010), Egleson Decl., Ex. M. And the multilateral complications in the region have only grown since the time of the incident. As noted, the United States, including President Obama himself, has been actively involved in efforts to restore these relations. *See* Statement of Facts § III, *supra*; CRS Turkey Report at 25. The delicacy and difficulty of the foreign-relations situation is such that even now, five years after the event, the relations between Israel and Turkey still have not finally been restored.

As those facts illustrate, U.S. foreign policy is directly implicated by the issues presented in this lawsuit, and adjudication of this case would potentially frustrate the Executive Branch's foreign policy aims in the Middle East. It is "difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964).

Similarly, under the second and third *Baker* categories, no "judicially discoverable and manageable standards" exist for resolving the issue presented in this case. Instead, this Court would be required to make an "initial policy determination" regarding whether and how this country's government will view and support Israel's efforts to enforce its naval blockade in connection with its ongoing armed conflict with Hamas. The questions of how to characterize the Gaza blockade, the flotilla, and Israel's response cannot be resolved by reference to any statute or treaty, and instead require policy choices that the political branches must make. In *Doe*, the Court held that determining the propriety of the Israeli defendants' actions was a "predicate policy determination" that was "plainly reserved to the political branches of government," and which the court was "simply not equipped" to make. *Id.* The same analysis applies here, because it is for the political branches to decide the position of the U.S. to take regarding the *Mavi Marmara* incident. The Court should accordingly dismiss for lack of a justiciable question pursuant to Rule 12(b)(1).

III. The Act of State Doctrine Forbids a U.S. Court From Passing on the Legality of the Official Acts of the State of Israel

Even if Mr. Barak were not entirely immune from suit (he is), and even if this case were otherwise justiciable (it is not), the act of state doctrine requires dismissal. Under that doctrine, a court will dismiss when "the outcome of the case turns upon [] the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990). Plaintiffs complain that a foreign

military used excessive force during a naval operation with no connection to U.S. waters, conducted in the course of an armed conflict to which the United States is not a party. The act of state doctrine forbids a U.S. court from deciding whether such purely foreign official acts by an independent sovereign nation were legal or not.

Dismissal is required under this doctrine as a matter of "international comity," out of "respect for the sovereignty of foreign nations on their own territory," and to "avoid[] . . . embarrassment to the Executive Branch in its conduct of foreign relations." *Id.* at 408. The "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); *see also Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989) (the doctrine "is a flexible one designed to prevent judicial pronouncements on the legality of the acts of foreign states which could embarrass the Executive Branch in the conduct of foreign affairs").

The act of state doctrine forbids this Court from adjudicating this case, because addressing the complaint would call into question the lawfulness of Israeli governmental action. The situation here is similar to *Underhill v. Hernandez*, 168 U.S. 250 (1897), where the Court rejected a tort claim of false imprisonment asserted against a foreign military commander because, as here, "the acts of the defendant were the acts of [a foreign] government" and so were "not properly the subject of adjudication in the courts of another government." *Id.* at 252, 254. *See also Hourani v. Mirtchev*, 796 F.3d 1, 15 (D.C. Cir. 2015) (citing *Underhill*, dismissing defamation claim because deciding that claim would have required "that the defamatory content—the 'legality'—of [] published and official foreign government speech be adjudicated"). Just so here. Plaintiffs ask this Court to decide whether Israel's acts in connection with the *Mavi Marmara* were legal or tortious, but the act of state doctrine does not allow that.

A "'touchstone' or 'crucial element'" of the doctrine is the "potential for interference with our foreign relations." *Id.* (quoting *Int'l Ass'n of Machinists v. OPEC*, 649, F.2d 1354, 1360 (9th Cir. 1981)). "[S]ome aspects of international law touch much more sharply on national nerves than do others." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). For the reasons discussed above, the issues in this case could not touch "more sharply on national nerves" (*see id.*). As was the case in *Sabbatino*, it is "difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id*. at 430. The act of state doctrine thus requires dismissal of this action.

IV. The Allegations of the Complaint Fail to State a Claim Under Each of the Asserted Causes of Action

For all the reasons stated above, Plaintiffs' lawsuit should not be allowed to proceed. In addition, each of Plaintiffs' causes of action fails to state a claim.

A. The Complaint Fails to State a Claim Under the Torture Victim Protection Act

Plaintiffs' causes of action for purported "extrajudicial killing" and "torture" under the Torture Victim Protection Act (TVPA) fail because the acts alleged do not meet the statute's definitions of extrajudicial killing or torture.[5] *See generally* Matar SOI at 47-51 (brief for U.S. Government explaining that TVPA does not create a cause of action for "disproportionate use of military force").

"Torture" under the statute means an "act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . , whether physical or mental, is intentionally inflicted," for "such purposes as

[5] The TVPA (which is not codified, and is instead set out in a note to 28 U.S.C. § 1350), provides that "[a]n 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."

obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." 28 U.S.C. § 1350 note.[6] The "sever[ity]" requirement of the statute "ensur[es] that the conduct proscribed by the Convention and the TVPA is 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). Another critical element proscribes an act as "torture" only when the person is "in the offender's custody." And a third requires that the act must have been undertaken for a prohibited purpose. 28 U.S.C. § 1350 note.

Mr. Doğan was shot in the course of a military confrontation. Compl. ¶¶ 2, 3. The complaint is in the nature of a claim of excessive force during a military operation, not torture within the meaning of the statute. Moreover, Mr. Doğan was alleged to have been killed during a conflict, and is not properly alleged to have been "in custody" at the time of the shooting. And his shooting is not adequately alleged to have been intentionally committed for any of the purposes specified in the statute. So the TVPA's torture provision does not apply.

Nor was Mr. Doğan subject to an "extrajudicial killing." Under the TVPA, extrajudicial killing requires a "deliberated killing." 28 U.S.C. § 1350 note. When a complaint "allege[s] no facts showing that the deaths in this case me[e]t the minimal requirement for extrajudicial killing—that is, that plaintiffs' decedents' deaths were 'deliberate' in the sense of being undertaken with studied consideration and purpose," it has failed to state a claim under the TVPA. *Mamani v. Berzain*, 654 F.3d 1148,

[6] The TVPA's definitions of "torture" and "extrajudicial killing" codify the United States' understanding of the meaning of those terms under customary international law. *See* H.R. Rep. 102-367, 2-3 & 4, 1992 U.S.C.C.A.N. 84, 85 & 87 ("The universal consensus condemning these practices"—*i.e.*, official torture and summary execution—"has assumed the status of customary international law," and the TVPA "defines 'torture' and 'extrajudicial killing' in accordance with international standards").

1155 (11th Cir. 2011). In *Mamani*, the plaintiffs brought claims against the President and Defense Minister of Bolivia after a number of civilians died during incidents of civil unrest, in confrontation with Bolivian peace forces. The Court held that this was not "extrajudicial killing" under the TVPA, because the deaths "could plausibly have been the result of precipitate shootings during an ongoing civil uprising," or involved "accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others)." *Id.* The same is true here. Mr. Doğan's death is not alleged to have been "'deliberate' in the sense of being undertaken with studied consideration and purpose," so the TVPA's extrajudicial killing provision also does not apply.

More generally, as in *Mamani*, Plaintiffs "have not pleaded facts sufficient to show that anyone—especially *th[is] defendant[]*, in [his] capacity as [a] high-level official[]—committed" the TVPA wrongs of which he is accused. *Id.* at 1155; *see also Belhas v. Ya'alon,* 515 F.3d 1279, 1293 (D.C. Cir. 2008) (Williams, J., concurring) ("[Plaintiffs] point to no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute . . . extrajudicial killing under international law."). For these reasons, the TVPA claim should be dismissed.

B. The Complaint Fails to State a Claim Under the Alien Tort Statute

Plaintiffs' claims under the Alien Tort Statute (ATS) also fail, because the acts at issue took place outside of the United States, and because the ATS only permits a cause of action based on violation of a sufficiently clear international law norm, which is lacking here.

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1660, 1669 (2013), the Supreme Court held that "the presumption against extraterritoriality applies to claims under the ATS" and "nothing

in the statute rebuts that presumption." *Id.* The plaintiffs' claims in that case, based on alleged acts outside the United States, were dismissed because the ATS has no application beyond U.S. borders. *Id.* The Supreme Court's ruling in *Kiobel* requires dismissal here, because "all the relevant conduct took place outside the United States." *Id.*

Moreover, the complaint fails to state a cause of action cognizable under the ATS. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court held that Congress's understanding in passing the ATS was that "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," and that these specifically included only "those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724.

None of those torts is claimed here, nor do the facts alleged make out a violation of any other sufficiently established norm of international law. As the Eleventh Circuit has explained in evaluating and rejecting claims of purported "extrajudicial killing" under the ATS, "[a]llegations amounting to labels are different from well-pleaded facts, and we must examine whether what this Complaint says these defendants did—in non-conclusory factual allegations—amounts to a violation of already clearly established and specifically defined international law." *Mamani*, 654 F.3d at 1152. Here, Plaintiffs allege no action that violates a principle of international law "already clearly established and specifically defined," *Sosa*, 542 U.S. at 724, so, "[f]or ATS purposes, no tort has been stated," *Mamani*, 653 F.3d at 1156.

C. The Complaint Fails to State a Claim Under the Anti-Terrorism Act

Third, and finally, Plaintiffs claims under the Anti-Terrorism Act (ATA) fail to state a claim. Military actions undertaken by a sovereign state such as Israel here are not "international terrorism." The ATA expressly disallows any action "against . . . an 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); *see Klayman v. Obama*, No. 14-cv-1484 (TSC), 2015 WL 5005009, at *8 (D.D.C. Aug. 21, 2015) (§ 2337 "confers immunity both for acts in an 'official capacity' and acts taken 'under color of legal authority'"). Because Plaintiffs affirmatively allege that Mr. Barak was an official of the State of Israel at all relevant times, they do not state an ATA claim.

CONCLUSION

For the foregoing reasons, the Court should dismiss the complaint in its entirety and with prejudice.

Respectfully submitted,

Dated: January 20, 2016

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