UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KASIPPILLAI MANOHARAN, *et al*.,

Plaintiffs,

v. Civil Action No. 11-235 (CKK)

PERCY MAHENDRA ("MAHINDA") RAJAPAKSA,

Defendant.

_____/

PLAINTIFFS' OPPOSITION TO THE SUGGESTION OF IMMUNITY SUBMITTED BY THE UNITED STATES OF AMERICA AND REQUEST FOR ORAL ARGUMENT

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

Come now Plaintiffs, through their undersigned attorney, and submit the below Memorandum in Opposition to the Suggestion of Immunity submitted by the United States in the above-captioned case. Plaintiffs also request oral argument on the immunity question.

MEMORANDUM IN OPPOSITION

I. INTRODUCTION

Contrary to the insinuation of the United States, the sitting head of state immunity issue pivots solely on an interpretation of the words "an individual" in the Torture Victim Protection Act (the "TVPA"). 28 U.S.C. § 1350 (1991). The statute was enacted pursuant to the express power of Congress under Article I, Section 8, Clause 10 of the U.S. Constitution to punish violations of the law of nations, which inarguably includes both torture or extrajudicial killings. In other words, the TVPA is undoubtedly constitutional. The Executive Branch does not argue otherwise. There is no basis for departing from the plain language of the TVPA to avoid a serious constitutional question. The President signed the statute into law nearly twenty years ago on March 12, 1992.

The TVPA creates liability against "an individual" who tortures or perpetrates an extrajudicial killing under the apparent or actual authority of any foreign nation. *Id*. § 1350(2)(a). The plain language of the statute makes no exceptions irrespective of the office an individual might occupy or the circumstances of the crimes universally abhorred. The Executive Branch insolently maintains that this Court must obey its directive to dismiss this TVPA case that rests upon universally repugnant crimes in

violation of the law of nations. To bow to that command would be to permit usurpation of the judicial power by the Executive. Article III of the Constitution entrusts the "judicial power" of the United States to this Court and sister independent federal tribunals. Plaintiffs' TVPA claims clearly fall within the judicial power of this Court to adjudicate, through statutory interpretation, a time-honored Article III task from the inception of the Constitution. Every relevant canon of statutory interpretation militates against the Executive's Suggestion of Immunity.

Justice Robert Jackson expounded the prevailing view of Executive power in foreign relations in his famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion). He elaborated a tripartite analytical scheme for evaluating the President's claim of constitutional authority in the realm of foreign affairs:

1) "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* 635. It is in these circumstances that he can be said to personify federal sovereignty, and his acts would be entitled to the widest latitude of judicial interpretation. 2) "When the President acts in absence of either a congressional grant or denial authority, he can only rely upon his own independent powers." *Id.* 637. And 3) "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by

disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id*. 637-638.

Plaintiffs' TVPA case falls into Justice Jackson's category three, where presidential authority is at its nadir. Congress declared "an individual" without exception subject to a civil damages remedy for perpetrating despicable crimes in violation of the law of nations. The Executive Branch butts heads with the congressional enactment in this case by demanding an exception for the notorious sitting head of state of Sri Lanka, whose heinous actions epitomize what Congress aimed to deter by enacting the TVPA. Unless the TVPA is unconstitutional—which the Executive Branch does not argue—the will of Congress must prevail and the Suggestion of Immunity must be rejected.

II. THE PLAIN LANGUAGE OF THE TVPA

The Suggestion of Immunity submitted by the United States ignores the language of the TVPA, which is dispositive of the immunity question. The "plain language doctrine" instructs that the text of an unambiguous statute should be interpreted in accord with its ordinary or customary meaning, and no further, unless the result would be absurd or be unreasonable in light of the statutory policy fashioned by Congress. See *Connecticut Nat'l Bank v. Germain* 503 US 249, 253-54 (1992) ("In interpreting a statute, a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statue are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"). The

Court should not wander beyond the unambiguous plain language of the statute unless the interpretation would produce an absurd or totally unreasonable result. See *U.S. v. Amer. Trucking Ass'ns.*, 310 U.S. 534, 543-544 (1950):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words."

The Torture Victim Protection Act is unambiguous as to the persons subject to liability. It states in relevant part:

> (a) Liability.—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 (1991)

A sitting head of state like Defendant is "an individual." And Defendant has been sued in his individual capacity. The TVPA creates no exceptions for any individual within the general universe of individuals.

Legislative history does not suggest adherence to the plain meaning rule in the interpretation of the TVPA would be absurd or lead to unreasonable results at variance with the statutory policy. H.R. REP NO. 102-367, at 5 (1991) declares: "[S]overeign immunity would not generally be an available defense [to a TVPA claim]." S. REP. NO.

102-249, at 7 (1991) similarly elaborates that "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FISA) of 1976."

Indeed, the Department of Justice concedes a sitting head of state is "an individual" for purposes of TVPA liability. In footnote 3 on Page 2 of its Suggestion, the Department maintains that the Executive may either create or deny immunity for a sitting head of state in its sole discretion. But if a head of state were not "an individual" for purposes of the TVPA, the Executive could not override the congressional will with an edict creating a cause of action against a sitting head of state by withholding a suggestion of immunity. Congress, not the Executive, writes the laws.

Had Congress wanted to make an exception for sitting heads of state in the TVPA, Congress knows how to do so. Congress commonly makes exceptions to baseline liability provisions. See e.g., The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1948). Plaintiffs have been unable to find a single general liability statute in the United States that created an exception for sitting heads of state.

The Executive Branch does not and could not argue that interpreting "an individual" to include sitting heads of state produces absurd or unreasonable results at variance with the policy of the TVPA. Since the ratification of the United Nations Convention Against Torture (the "Convention"), and, in particular, since the creation of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in 1993, the Special Court for Sierra Leone ("SCSL") in 2002, and the International Criminal Court

("ICC") in 2002, numerous sitting heads of state who otherwise would be protected by sitting head of state immunity have been indicted for violating the international prohibitions on torture or extrajudicial killings. These include Slobodan Milošević (President of Yugoslavia, indicted by the ICTY in 1999), Charles Taylor (President of Liberia, indicted by the SCSL in 2003), Omar al-Bashir (President of Sudan, indicted by the ICC in 2009), and Muammar Gaddafi ("Brother Leader" of Libya, indicted by the ICC in 2011).[1] The Executive has supported the criminal prosecutions of the sitting heads of state for torture or extrajudicial killings.

At present, no individual may assert head of state immunity as a defense to a prosecution for torture or extrajudicial killing under international law, including the Defendant if he were indicted by the International Criminal Court. Other nations have also noted the Convention's impact on sitting head of state immunity. The House of Lords of the United Kingdom held in *Regina v. Bartle*, that after the United Kingdom passed legislation implementing the Convention in 1988, head of state immunity was no longer available for charges of torture or extrajudicial killing. *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet,* House of Lords, U.K. (24 March 1999), 119 I.L.R. 135 (1999). It cannot be absurd or unreasonable that the Defendant be precluded from asserting immunity in a civil matter

[1] http://www.icty.org/case/slobodan_milosevic/4#ind, http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx, http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB, http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pre_trial%20chamber%20i%20issues%20three%20warrants%20of%20arrest%20for%20muammar%20gaddafi_%20saif%20al-islam%20gaddafi%20and%20a

regarding the identical alleged despicable criminal acts. The affront to the dignity of a foreign sovereign is clearly greater in a criminal prosecution against its head of state that could lead to life imprisonment and *de facto* removal from office.

Assuming any ambiguity in the words "an individual" in the TVPA, the Court should resolve the ambiguity to advance the statutory objectives of deterrence and compensation to victims of torture or extrajudicial killings. President Bush spoke to the TVPA's overarching objective in his signing statement: "The United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur." President's Statement on Signing "The Torture Victim Protection Act of 1991" (March 12, 1992) at http://www.presidency.ucsb.edu/ws/?pid=20715, accessed February 1, 2012.

Interpreting the TVPA to preclude causes of action against sitting heads of state may encourage continued torture and extrajudicial killing, since the head of state would only have immunity while he retained his grip on power. Syria's President Bashir Assad is emblematic. Even if the foreign dictator's tenure did not require torture and killings, the passage of time and the TVPA's 10-year statute of limitations could make a cause of action hollow if plaintiffs were required to wait until the criminal transgressor against the law of nations left office.

TVPA plaintiffs are most likely to receive compensation, and deterrence is best effectuated, by suits against sitting heads of state and their inner circles. Minions and grunts will predictably be judgment proof, and suits against them will not deter their odious superiors who gave them orders to torture or slaughter. In sum, interpreting the

TVPA and its words "an individual" to include liability for sitting heads of state furthers the statutory objectives, while an opposite interpretation would cripple them.

III. PURPOSE OF THE TVPA

The TVPA was enacted by Congress in 1992 to create a civil cause of action in federal court for the universal crimes of torture and extrajudicial killing. The statute is an adjunct to implementing United States obligations under the United Nations Convention Against Torture, a treaty ratified by the Senate on October 21, 1994.[2] It requires parties to make all acts of torture criminal offenses punishable "by appropriate penalties which take into account their grave nature." UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (accessed 2 February 2012). The U.S. Department of State has reported to the Committee Against Torture (a monitoring body created by the Convention) that the TVPA is an implementing United States statute under Article 19 of the Convention. The Executive has specifically and repeatedly cited a victim's ability to bring civil suits under the TVPA for damages based on torture or extrajudicial killing as an example of the U.S. meeting its obligation to provide remedies for violations of the Convention. The Executive even agrees that the scope of the TVPA applies to "any individual" without reservation. See § 82 U.S. Department of State Second Periodic

[2] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#12

Report of the United States of America to the Committee Against Torture May 6, 2005 and § 281 of U.S. Department of State Initial Report of the United States of America to the Committee Against Torture February 9, 2000.

The congressional objective behind the TVPA was to fortify human rights around the world by endowing federal courts with jurisdiction to compensate the victims of the universal crimes and to deter repetition of the despicable acts. S. HRG. 101-1284 (1990), 1. Congress specifically identified the Iranian and Muammar Qaddafi regimes as exemplary of the types of malevolent actors that should be sanctioned under the TVPA. *Id., 18, 30-32, 35, 44, 62, 65.*

The Defendant fits the type of individual Congress wished to subject to liability under the TVPA like a glove. His notoriety for war crimes and atrocities ranks with Iran's Ayatollahs and Libya's Gaddafi. He has been accused of responsibility for, among other things, extrajudicial killings, kidnapping, war crimes, and torture. These crimes have been well documented, including video footage in a documentary prepared by an esteemed British television network. Words would only cheapen the suffering of the victims of Defendant's vileness. See http://www.channel4.com/programmes/sri-lankas-killing-fields/4od. Defendant's accusers range from his own former Commander of the Army, Sarath Fonseka,[3] to well respected international human rights groups Human Rights Watch[4] and Amnesty International,[5] from the UN Secretary-General's Panel of

[3] http://news.bbc.co.uk/2/hi/8410611.stm
[4] http://www.hrw.org/news/2012/01/23/sri-lanka-no-progress-justice
[5] http://www.amnesty.org/en/sri-lanka

Experts[6] to the United States' Department of State itself, including its ambassador to Sri Lanka. United Nations Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, March 31, 2011. Complaint at ¶ 23.

In particular, the most recent U.S. Department of State Human Rights Report on Sri Lanka, elaborates:

There were reports that the government or its agents committed arbitrary or unlawful killings, but reliable statistics on such killings by the government or its paramilitary allies were difficult to obtain because past complainants were killed and families feared reprisals if they filed complaints. U.S. Department of State: 2010 Human Rights Report: Sri Lanka, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2010 Country Reports on Human Rights Practices Report, April 8, 2011 § 1(a).[7]

The government did not conduct any further inquiries into the high profile cases investigated by the Commission of Inquiry ("COI"), including the 2006 killing in Mutur of 17 local staff of the French NGO Action Against Hunger ("ACF").[8] The COI was disbanded in June 2009 without issuing a public report, though unofficial reports indicated that the commission had blamed ACF for allowing its workers to be in an unsafe location while at the same time exonerating all government security forces from any possible involvement in the killing of the aid workers. *Id*. In addition, there was

[6] http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf
[7] http://www.state.gov/j/drl/rls/hrrpt/2010/sca/154486.htm
[8] One of the plaintiffs in this suit is the widow an Action Against Hunger humanitarian worker who was a victim of Defendant's extrajudicial killings.

zero progress on the January 2009 killing of the chief editor of the *Sunday Leader* and *Morning Leader* newspapers, Lasantha Wickrematunga. *Id*.

Moreover, Defendant monopolizes power in Sri Lanka reminiscent of Stalin in the Soviet Union. *Id*. p. 1. ("The government is dominated by the president's family; two of the president's brothers hold key executive branch posts as defense secretary and minister of economic development, while a third brother is the speaker of parliament.") Omnipotent heads of state, like the Defendant, are armed with the greatest power to perpetrate or orchestrate mass torture or extrajudicial killings that Congress sought to deter with the TVPA. Nothing significant happens in Sri Lanka without Defendant's endorsement. To carve out a sitting head of state exception to the TVPA for Defendant would cripple its deterrent and compensatory purposes, akin to an exception for Adolph Hitler for crimes prosecuted at Nuremburg or payment of reparations to Holocaust victims.

The TVPA is not an indiscriminate attempt by Congress to subject any individual (including foreign heads of state) to civil litigation in the United States. It is narrowly confined to the most heinous universal crimes imaginable—on a moral par with genocide or crimes against humanity. The United States Court of Appeals for the Second Circuit underscored in *Filartiga v. Pena-Irala*, "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." *Filartiga v. Pena-Irala*, 630 F. 2d 876, 881 (1980). Like the Alien Tort Statute at issue in that case, the TVPA created liability only for crimes "the nations of the world have demonstrated…is of mutual, and not merely

several, concern, by means of express international accords." *Id*. 888 (citing *ITT v. Vencap, Ltd*., 519 F.2d at 1015 (1975)).

IV. THE EXECUTIVE BRANCH'S SUGGESTION OF IMMUNITY

The Executive impertinently argues that it possesses the sole and dispositive power to immunize the Defendant Rajapaksa from civil liability under the TVPA. The Executive does not argue that Congress has conferred such extraordinary power. Neither does the Executive point to the Constitution as endowing the President with authority to decide the outcome of an Article III case. The Executive seems to argue that its draconian power is derived from some "brooding omnipresence in the sky," to borrow from the inimitable Justice Oliver Wendell Holmes in *Southern Pacific Co. v. Jensen*. 244 U.S. 205, 222 (1917) (dissenting).

The Suggestion states in Paragraph 1 that "the Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations." True enough. But to represent the Nation in its foreign relations is not the power to decide what foreign policy the President shall represent. The Constitution entrusts that power to both Congress and the President. The following is an inexhaustive list of major congressional foreign policy enactments in contemporary times that bind the President: the Jackson-Vanik Amendment, Section 401, Title IV of the Trade Act of 1974, Pub. L. 93-618 (1974); Taiwan Relations Act, 22 U.S.C. §§2201-16 (1979); Helms-Burton Act, 22 U.S.C. §§ 6021-6091 (1996); Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996); Hickenlooper Amendments, 22 U.S.C. § 2370(e)(1) & (2) (1964); Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq*. (1977); the

Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 (1986); the U.S.-Hong Kong Policy Act of 1992, Pub. L. No. 102-383 106 Stat. 1448 (1992); and the TVPA itself.

The Constitution explicitly provides both direct and indirect powers over foreign relations to the legislative branch. Congress may "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Congress may "regulate commerce with foreign Nations", "declare War…and make rules concerning Captures on Land and Water," "provide for the common Defence" "raise and support Armies," and "make rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. III, § 2, cls. 1, 11, 12, 14. All of these powers involve Congress making or impacting the foreign policy of the United States.

The TVPA's extraterritorial application is untroublesome. The Supreme Court has made clear that Congress has "authority to enact laws applicable to conduct beyond the territorial boundaries of the United States." *EEOC v. Arabian American Oil Co*., 499 U.S. 244, 260-61 (1991).

The TVPA was no foreign policy novelty. Congress similarly overrode previous Executive Branch immunity policy with the enactment of the Foreign Sovereign Immunity Act ("FSIA") in 1976. Before Congress spoke, foreign state immunity was governed by customary international law and, as the Suggestion notes, the Executive's determination that it applied in a particular case was ordinarily conclusive. Congress abandoned this framework with the FSIA. Instead, Congress created specific statutory

exceptions to foreign sovereign immunity, and as the Suggestion states, claims of immunity were to be decided by federal courts in accordance with the congressional handiwork.

Justice John Paul Stevens, writing for the Court in *Samantar v. Yousuf*, declared: "Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity," implying that Congress could do so in additional legislation. *Samantar v. Yousuf*, 560 U.S. ____, (2010) (Sl. Op. June 1, 2010 at 19). Justice Stevens recognized in *Samantar* that, "[a]fter the enactment of the FSIA, the Act- and not pre-existing common law- indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* 7.

When Congress codified the principles of foreign state immunity in FSIA, it left undisturbed the practice of judicial deference to Executive Branch head of state immunity determinations *at that time* (i.e. 1976). As set forth in Justice Jackson's second category of executive power in *Youngstown*, the Executive Branch retained its historic authority to determine a foreign official's immunity from suit only in the absence of Congressional legislation to the contrary. That Congress allowed the Executive to make determinations of head of state immunity under international customary law does not prevent Congress from changing its mind and deciding the matter for itself by statute.

The judiciary should not cower before the Executive's foreign policy rhetoric. The Supreme Court did not hesitate to invalidate the President's seizure of steel mills in

Youngstown during the Korean War regardless of the international consequences. Congressional authority, including the National Labor Relations Act, was preeminent. Likewise, the Court in *Leal Garcia v. Texas* refused to intervene when Congress declined to enact the Executive's preferred legislation, despite the Executive's assertions of grave foreign policy ramifications and danger to U.S. citizens abroad. *Leal Garcia v. Texas*, 564 U.S. _____ (2011). In that case, the U.S. was in violation of international law, yet Congressional authority was controlling. The Judicial Branch is not bound by suggestions of the Executive, but rather by the statutes enacted by Congress. See also *Medellin v. Texas*, 552 U.S. 491 (2008). Indeed, the Department of State even acknowledges that "[u]nder the U.S. legal system, however, the scope of a foreign state's immunity is determined by judicial, rather than executive, authorities."[9] In its 2000 report to the Committee Against Torture, the Department observed, in the "federal system, laws are enacted by the Congress, enforced by the Executive Branch through its various departments and agencies, and interpreted and applied by the judiciary." (2000 Report, ¶ 13, *supra*.)

The Executive asserts that it retains historic authority to determine a foreign official's immunity from suit despite the unambiguous language and policy of the TVPA, relying on *Samantar v. Yousuf*. But the Court in *Samantar* only considered the narrow question of whether the FSIA provided petitioner with immunity from suit, not whether the petitioner may be entitled to immunity under the TVPA or common law. The

[9] http://travel.state.gov/law/judicial/judicial_693.html

petitioner argued that a foreign official was an "agency or instrumentality" under the FSIA. *Samantar v. Yousuf*, *supra*. The Court's decision did not pivot on an Executive determination of immunity, but rather the "entire statutory text" to determine "the meaning that Congress enacted." *Id*. Thus, the Executive's interpretation of the TVPA is not dispositive. What is dispositive is this Court's interpretation of the statute enacted by Congress informed by relevant canons of statutory construction.

The Executive states that courts have routinely deferred to the Executive Branch's immunity determinations concerning sitting heads of state and cites to *Ye v. Jiang Zemin* for support. *Ye v. Jiang Zemin,* 383 F.3d 620 (7th Cir. 2004). But the *Ye* Court's analysis did not examine the issue of immunity under the TVPA. Instead, the Court only examined whether under customary international law the Executive could suggest immunity for individuals accused of violating *jus cogens* norms. *Id*. 626. As the Court in *Ye* makes clear, "Pursuant to their respective authorities, Congress or the Executive Branch can create exceptions to blanket immunity. In such cases the courts would be obliged to respect such exceptions." *Id*. 627. The Executive further cites to a string of cases for the proposition that in no case has a court subjected a sitting head of state to suit after the Executive Branch has suggested the head of state's immunity. But again, the majority of these cases do not concern claims brought under the TVPA, but rather claims such as state torts, matrimonial issues, copyright infringement, RICO Act violations or false imprisonment. See *Doe v. Roman Catholic Diocese of Galveston- Houston,* 408 F. Supp. 2d 272, 278 (S.D. Tex. 2005), *Anonymous v. Anonymous,* 181 A.D.2d 629, 629–30 (N.Y. Sup. Ct. App. Div. 1992), *Leutwyler v. Office of Her Majesty Queen Rania Al-*

Abdullah, 184 F.Supp.2d 277 (S.D.N.Y.2001), *First American Corp. v. Al-Nahyan,* 948 F. Supp. 1107, 1119 (D.D.C. 1996), *Kline v. Kaneko,* 535 N.Y.S. 2d 303 (N.Y. Sup. Ct. 1988), *Alicog v. Kingdom of Saudi Arabia,* 860 F. Supp. 379, 382 (S.D. Tex. 1994).

The few cases that address TVPA claims pivot on whether head of state immunity was abolished under the FSIA, and not under the plain language of the TVPA. See *Tachiona v. U.S.*, 386 F. 3d 205 (2nd Cir 2004), *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.C.D.C. 2005), *Habyarimana v. Kagame*, Memorandum and Order, Case No. 5:10-cv-00437-W (W.D. Okla. October 28, 2010). The narrow issue before this Court is only whether, despite the clear language and intent of Congress in enacting the TVPA, it nevertheless, silently left the executive with case-by-case authority, to block suits against heads of state for the ghastly crimes of torture and extrajudicial killings.

The one case that appears to support the Executive's Suggestion of Immunity is *Lafontant v. Aristide* (the Suggestion cites another case, *Tachiona v. Mugabe*, that completely relies on *Lafontant's* TVPA analysis without more). *Lafontant v. Aristide,* 844 F.Supp. 128 (1994). Plaintiffs submit *Lafontant* was wrongly decided. The reasoning contravenes established rules of statutory construction. Moreover, the case was decided in 1994. The status of head of state immunity under international law has changed dramatically since then.

The District Court in *Lafontant* ignored the plain language rule and the meaning of the words "an individual." It did not address whether the plain language "an individual" is ambiguous. It did not address whether the plain meaning of "an individual" would lead

to absurd or unreasonable results, or otherwise justified analysis beyond the plain language of the TVPA.

Lafontant also misconceived the nature of head of state immunity. The decision conflates it with diplomatic immunity. The latter is United States law by virtue of the Vienna Convention on Diplomatic Relations and the companion Vienna Convention on Consular Relations, treaties signed by the Executive and ratified by the Senate (Justice Jackson's first category of executive power in foreign affairs). Head of state immunity has no similar foundation. It existed as a creature of federal common law in applying customary international law. It has never had the explicit imprimatur of Congress. As evidence of its confusion, the District Court in *Lafontant* quoted in support of its TVPA analysis legislative history and The Restatement (Third) of Foreign Relations Law of the United States (1986). *Lafontant,* 138-139. All of its citations refer only to continuing immunity for heads of state on official visits or conducting official business in the United States. The Defendant's repulsive criminal acts at issue in this lawsuit have nothing to do with official business or visits.

Even if *Lafontant* were correctly decided in 1994, the Court's analysis relies on the customary international law of sitting head of state immunity. As noted *supra,* since 1999, numerous sitting heads of state have been criminally indicted for torture or extrajudicial killing. Regardless of whether the customary rule may have given sitting heads of state immunity in 1994, it quite clearly no longer does. The ruling delivered by the Court in *Lafontant* was made four years before the Rome Statute unambiguously exposed sitting heads of state to criminal prosecution for actions condemned by the

TVPA. This Court "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga v. Pena-Irala*, 630 F. 2d 876, 881 (1980).

Finally, any system of justice that bestowed immunity on criminally culpable sitting heads of state for the damages inflicted by their crimes of torture or extrajudicial killing in violation of the law of nations would deserve the odium of all civilized peoples. It strains credulity to believe Congress intended to visit such odium on the United States in enacting the TVPA under the banner of human rights.

IV. CONCLUSION

For the reasons set forth above, the Executive's Suggestion of Immunity should be denied, and Defendant should be ordered to file an answer within 21 days of the denial. Plaintiffs also request this Court to hear oral argument on the Executive's Suggestion of Immunity.

DATED: February 3, 2012
Respectfully submitted,

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UNITED STATES DISTRICT COURT
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Defendant.

_____/

[PROPOSED] ORDER

Having considered the relevant law and facts, on this ____ day of _____, 2012, the Executive's Suggestion of Immunity is DENIED, and Defendant will file an answer within 21 days of the denial.

DATED: _____

_____
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
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Defendant.

_____/

[PROPOSED] ORDER

Having considered the relevant law and facts, on this ____ day of _____, 2012, the Plaintiffs request for oral argument on the Executive's Suggestion of Immunity is GRANTED.

DATED: _____

_____
UNITED STATES DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, BRUCE FEIN, I hereby certify that on February 3, 2012, a copy of the foregoing Memorandum in Opposition, and a proposed orders, were filed via the Court's CM/ECF filing system, by which those papers automatically will be served on Defendant's counsel and the United States.

Dated: February 3, 2012

Respectfully submitted,

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