

1 JOHN C. ULIN (State Bar No. 165524)
2 John.Ulin@arnoldporter.com
3 ARNOLD & PORTER KAYE SCHOLER LLP
4 777 South Figueroa Street, 44th Floor
5 Los Angeles, California 90017-5844
6 Telephone: (213) 243-4000
7 Facsimile: (213) 243-4199

8
9 *Attorney for Defendant*
10 *Nandasena Gotabaya Rajapaksa*

11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 AHIMSA WICKREMATUNGE, in her individual
16 capacity and in her capacity as the legal
17 representative of the ESTATE OF LASANTHA
18 WICKREMATUNGE,

19 *Plaintiff,*

20 v.

21 NANDASENA GOTABAYA RAJAPAKSA,

22 *Defendant.*

Case No. 2:19-cv-02577-R-RAO

**DEFENDANT’S NOTICE OF
MOTION AND MOTION TO
DISMISS PURSUANT TO
RULES 12(b)(1) AND 12(b)(6),
FORUM NON CONVENIENS,
AND INTERNATIONAL
COMITY; MEMORANDUM
OF POINTS AND
AUTHORITIES**

*[Declaration of Joseph Asoka
Nihal de Silva and Proposed Order
submitted concurrently herewith]*

Date: Monday, August 5, 2019
Time: 10:00 am
Location: Courtroom 880, Roybal
Federal Building and U.S.
Courthouse
Judge: Hon. Manuel L. Real

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 Please take notice that on Monday, August 5, 2019 at 10 am, or as soon thereafter
3 as this matter may be heard, in the courtroom of the Honorable Manuel L. Real,
4 Courtroom 880, 8th Floor, Roybal Federal Building and U.S. Courthouse, 255 East
5 Temple Street, Los Angeles, CA 90012, Defendant Nandasena Gotabaya Rajapaksa will
6 and hereby does move the Court, pursuant to Federal Rules of Civil Procedure 12(b)(1)
7 and 12(b)(6), *forum non conveniens*, and international comity, for an order dismissing
8 with prejudice Plaintiff Ahimsa Wickrematunge's Complaint in its entirety.

9 Mr. Rajapaksa's motion is based on this Notice of Motion; the accompanying
10 Memorandum of Points and Authorities; the Declaration of Joseph Asoka Nihal de Silva
11 and exhibits; the complete files and records in this action; and such other argument or
12 evidence as this Court may consider.

13 Dated: June 27, 2019

ARNOLD & PORTER
KAYE SCHOLER LLP

14
15
16
17 By: /s/ John C. Ulin
John C. Ulin

18 *Attorney for Defendant*
19 *Nandasena Gotabaya Rajapaksa*

TABLE OF CONTENTS

1

2 INTRODUCTION..... 1

3 ALLEGATIONS IN THE COMPLAINT 2

4 ARGUMENT 4

5 I. The Complaint Should Be Dismissed for *Forum Non*

6 *Conveniens* 4

7 A. Sri Lanka Is an Adequate Alternative Forum 5

8 B. Plaintiff’s Choice of Forum Merits Minimal Deference 7

9 C. The Public and Private Interests Strongly Favor

10 Dismissal 8

11 II. The Court Lacks Subject-Matter Jurisdiction Because

12 Defendant Is Immune Under the Doctrine of Foreign-Official

13 Immunity 13

14 III. The Complaint Should Be Dismissed Based on Principles of

15 Comity 19

16 IV. Plaintiff’s Claims Are Barred for Multiple Other Reasons..... 20

17 A. The Statute of Limitations Bars the TVPA and ATS

18 Claims 20

19 B. The ATS Claims Fail Because They Are Entirely

20 Extraterritorial 23

21 C. Plaintiff’s Failure to Exhaust Local Remedies Bars Her

22 TVPA Claims 24

23 CONCLUSION 25

24

25

26

27

28

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Actions Against Foreigners,*

5 1 U.S. Op. Atty. Gen. 81 (1797) 14

6 *Belhas v. Ya’alon,*

7 515 F.3d 1279 (D.C. Cir. 2008) 15

8 *Bi v. Union Carbide Chems. & Plastics Co.,*

9 984 F.2d 582 (2d Cir. 1993) 6, 10

10 *Carijano v. Occidental Petroleum Corp.,*

11 643 F.3d 1216 (9th Cir. 2011) 5

12 *Corrie v. Caterpillar, Inc.,*

13 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff’d*, 503 F.3d 974 (9th

14 Cir. 2007) 24

15 *Doe I v. Buratai,*

16 318 F. Supp. 3d 218 (D.D.C. 2018) *passim*

17 *Doe v. Rafael Saravia,*

18 348 F. Supp. 2d 1112 (E.D. Cal. 2004) 21

19 *Doğan v. Barak,*

20 No. 2:15-cv-8130, 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016) 13, 17, 18

21 *Eliahu v. Jewish Agency for Isr.,*

22 919 F.3d 709 (2d Cir. 2019) 13

23 *Gutierrez v. Advanced Med. Optics, Inc.,*

24 640 F.3d 1025 (9th Cir. 2011) 5

25 *Hassen v. Nahyan,*

26 No. 09-cv-1106, 2010 WL 9538408 (C.D. Cal. Sept. 17, 2010) 21, 24

27 *He Nam You v. Japan,*

28 150 F. Supp. 3d 1140 (N.D. Cal. 2015) 21

Hilao v. Estate of Marcos,

103 F.3d 767 (9th Cir. 1996) 24

1 *Kiobel v. Royal Dutch Petroleum Co.*,
 2 569 U.S. 108 (2013).....23

3 *Leetsch v. Freedman*,
 4 260 F.3d 1100 (9th Cir. 2001)5

5 *Lueck v. Sundstrand Corp.*,
 6 236 F.3d 1137 (9th Cir. 2001)*passim*

7 *Matar v. Dichter*,
 8 563 F.3d 9 (2d Cir. 2009) 15, 17

9 *Mireskandari v. Mayne*,
 10 No. 12-cv-3861, 2016 WL 1165896 (C.D. Cal. Mar. 23, 2016) 14, 15

11 *Moriah v. Bank of China, Ltd.*,
 12 107 F. Supp. 3d 272 (S.D.N.Y. 2015) 15

13 *Mujica v. AirScan Inc.*,
 14 771 F.3d 580 (9th Cir. 2014)*passim*

15 *Mujica v. Occidental Petroleum Corp.*,
 16 381 F. Supp. 2d 1134 (C.D. Cal. 2005)9, 11, 12, 13

17 *Papa v. United States*,
 18 281 F.3d 1004 (9th Cir. 2002)20

19 *Petersen v. Boeing Co.*,
 20 108 F. Supp. 3d 726 (D. Ariz. 2015)6

21 *Piper Aircraft Co. v. Reyno*,
 22 454 U.S. 235 (1981).....*passim*

23 *Republic of Mexico v. Hoffman*,
 24 324 U.S. 30 (1945)..... 18

25 *RJR Nabisco, Inc. v. European Cmty.*,
 26 136 S. Ct. 2090 (2016) 12

27 *Samantar v. Yousef*,
 28 560 U.S. 305 (2010)..... 14, 15, 18

Sandoval v. Carnival Corp.,
 No. 12-cv-5517, 2014 WL 12585803 (C.D. Cal. Sept. 15, 2014)..... 11

1 *The Schooner Exch. v. McFaddon*,
 2 11 U.S. (7 Cranch) 116 (1812) 13

3 *Tuazon v. R.J. Reynolds Tobacco Co.*,
 4 433 F.3d 1163 (9th Cir. 2006) 5

5 *Underhill v. Hernandez*,
 6 168 U.S. 250 (1897)..... 14

7 *Ungaro-Benages v. Dresdner Bank AG*,
 8 379 F.3d 1227 (11th Cir. 2004) 19

9 *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*,
 10 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*,
 809 F.2d 195 (2d Cir. 1987) 10

11 **Statutes**

12 28 U.S.C. § 1350 4, 23

13 28 U.S.C. § 1350 note *passim*

14 **Other Authorities**

15 Brief for the United States at 15, *Doğan v. Barak*, No. 16-56704 (9th Cir.
 16 July 26, 2017), ECF No. 41 18

17 Brief for the United States, *Giraldo v. Drummond Co.*, 493 F. App'x 106
 18 (D.C. Cir. 2012) (No. 11-7118), 2012 WL 3152126..... 15

19 Brief for the United States, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009)
 20 (No. 07-2579), 2007 WL 6931924 15, 17

21 Freedom House, *Freedom of the World 2019, Sri Lanka Country Report*
 22 (2019), <https://freedomhouse.org/report/freedom-world/2019/sri-lanka> 7

23 U.S. Dep't of Justice, *Sri Lanka 2018 Human Rights Report*,
 24 <https://www.justice.gov/eoir/page/file/1145711/download>..... 7

25 World Justice Project, *World Justice Project Rule of Law Index 2017-*
 26 *2018* (2018), [https://worldjusticeproject.org/sites/default/files/](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition.pdf)
 27 [documents/WJP-ROLI-2018-June-Online-Edition.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition.pdf) 7

28

INTRODUCTION

1
2 Plaintiff, an Australian citizen and resident, has brought this suit in California on
3 behalf of her deceased father, a resident of Sri Lanka, concerning conduct allegedly
4 committed in Sri Lanka more than a decade ago by the then-Sri Lankan Secretary to
5 the Ministry of Defense, Gotabaya Rajapaksa, a citizen and resident of Sri Lanka. The
6 Complaint alleges that Mr. Rajapaksa ordered the assassination of Plaintiff’s father, a
7 Sri Lankan journalist. Although these allegations are serious—and Mr. Rajapaksa
8 will, if necessary, disprove them on the merits—this lawsuit has no place in U.S.
9 courts. It should be dismissed, with prejudice, for several reasons.

10 *First*, Sri Lanka has a far greater interest than the United States in this litigation,
11 requiring dismissal based on *forum non conveniens*. All the conduct alleged in the
12 Complaint occurred in Sri Lanka. All the allegations point to parties, witnesses, and
13 evidence located in Sri Lanka. That includes Mr. Rajapaksa, who resides in Sri Lanka
14 and is currently running for president there; members of the Sri Lankan military and
15 any other potential witnesses; and evidence gathered by the Sri Lankan government in
16 an ongoing investigation. Nothing whatsoever ties this litigation to the United States.

17 *Second*, even if the United States were a convenient forum, the Complaint
18 alleges conduct undertaken solely “in [Mr. Rajapaksa’s] capacity as Secretary of
19 Defense” of Sri Lanka. Compl. ¶ 54. Mr. Rajapaksa therefore is immune from suit
20 under common-law foreign-official immunity, and the Complaint must be dismissed
21 for lack of subject-matter jurisdiction.

22 *Third*, for many of the same reasons supporting dismissal for *forum non*
23 *conveniens*, the Court should dismiss the Complaint as a matter of international
24 comity, out of respect for Sri Lanka’s courts and in recognition that they provide a far
25 better forum for this suit.

26 *Finally*, the Complaint fails on multiple other grounds. Plaintiff’s claims, filed
27 more than a decade after the alleged conduct occurred, are time-barred. Further,
28 Plaintiff’s claim under the Alien Tort Statute fails because all alleged conduct occurred

1 abroad and had no connection to the United States. And Plaintiff has failed to exhaust
2 local remedies in Sri Lanka, as required to assert a claim under the Torture Victim
3 Protection Act.

4 **ALLEGATIONS IN THE COMPLAINT**

5 Plaintiff Ahimsa Wickrematunge is a citizen and resident of Australia. Compl.
6 ¶ 13. She brings suit in her individual capacity and on behalf of the estate of her
7 father, Lasantha Wickrematunge (“Decedent”), a Sri Lankan journalist, who was killed
8 on January 8, 2009, in Colombo, Sri Lanka. *Id.* ¶¶ 1, 13.¹

9 The Complaint alleges that Defendant Gotabaya Rajapaksa is a dual U.S.-Sri
10 Lankan citizen and resident of Sri Lanka. *Id.* ¶ 1, 5.² From November 2005 until
11 January 2015, Mr. Rajapaksa served as Secretary to the Sri Lankan Cabinet Ministry of
12 Defence, Public Security, Law and Order (hereinafter “Defense Secretary”). *Id.* ¶ 11.
13 Plaintiff alleges that, as Defense Secretary, Mr. Rajapaksa “instigated and authorized
14 the extrajudicial killing of [Decedent]; had command responsibility over those who
15 executed the assassination; and incited, conspired with, or aided and abetted
16 subordinates” to commit the extrajudicial killing “of Decedent on political grounds.”
17 *Id.* ¶ 1. Plaintiff further alleges that, following Decedent’s death, Mr. Rajapaksa
18 engaged in a “cover-up” to “[obstruct] an effective investigation into the murder,” *id.*
19 ¶¶ 57-58, and that he “failed to take necessary and reasonable measures to punish” the
20 perpetrators, *id.* ¶ 68. Specifically, Plaintiff alleges that because Mr. Rajapaksa was
21

22
23 ¹ For the purposes of this motion only, Mr. Rajapaksa addresses the legal
24 inadequacy of the Complaint even assuming that the well-pleaded allegations of the
25 Complaint are true. While this temporary suspension of disbelief is an accepted
26 feature of U.S. legal procedures, it is alien to Sri Lankan law. As many Sri Lankan
27 citizens are following this case, Mr. Rajapaksa wishes to make absolutely clear that
28 *assuming* the truth of the allegations for purposes of this motion in no way *concedes*
their truth. To the contrary, Mr. Rajapaksa vigorously disputes the allegations.

² In fact, Mr. Rajapaksa relinquished his U.S. citizenship at the U.S. embassy in
Colombo, Sri Lanka on April 17, 2019.

1 “in overall command of Sri Lanka’s armed forces, intelligence forces, and police
2 force” as Defense Secretary, he “had the power to direct investigations involving
3 ‘national security’ and ‘terrorism.’” *Id.* ¶¶ 11, 21.

4 Plaintiff alleges that, on January 8, 2008, Decedent “was swarmed by black-clad
5 plainclothes commandos on motorcycles at a busy intersection in an area secured by
6 military checkpoints” while he was driving to work. *Id.* ¶ 43. The riders “smashed the
7 car’s windows and one of the assassins punched a hole in [Decedent’s] skull with a
8 sharp instrument.” *Id.* He died at the hospital several hours later. *Id.* Plaintiff alleges
9 that “this group of riders were part of, or worked in concert with, the Directorate of
10 Military Intelligence’s Tripoli Platoon.” *Id.* She alleges that Mr. Rajapaksa exercised
11 command responsibility over the Tripoli Platoon because he “closely coordinated”
12 with the Directorate, and that he “knew or should have known” about the attack. *Id.*
13 ¶ 55.

14 Further, Plaintiff alleges that, as “commander of both the armed forces and the
15 police,” Mr. Rajapaksa “had a duty to ensure an effective investigation and to punish
16 those responsible” for Decedent’s death. *Id.* Plaintiff alleges that instead, Mr.
17 Rajapaksa “obstructed Plaintiff’s efforts to seek justice in Sri Lanka by tampering with
18 witnesses and engaging in a pattern of coercion and intimidation.” *Id.* ¶ 3. Plaintiff
19 alleges that Sri Lanka’s Criminal Investigation Department (CID) opened an
20 investigation only after “Plaintiff’s attorneys and other family members successfully
21 petitioned the Mount Lavinia Magistrates Court” to order them to do so. *Id.* ¶ 48. But
22 Plaintiff claims that Mr. Rajapaksa continued to interfere, *id.* ¶ 49, and that, despite
23 multiple arrests, no charges were filed, *id.* ¶ 51. According to the Complaint, in 2015,
24 following a change in government, the Sri Lanka police “re-activated its
25 investigation.” *Id.* ¶ 51. That investigation is ongoing today.

26 Plaintiff claims that Mr. Rajapaksa should be held liable for Decedent’s death in
27 violation of “international and domestic law.” *Id.* ¶ 6. Specifically, she claims that the
28 death “constitutes extrajudicial killing” in violation of the Torture Victim Protection

1 Act (TVPA), 28 U.S.C. § 1350 note, and the Alien Tort Statute (ATS), 28 U.S.C.
 2 § 1350. *Id.* ¶¶ 63, 76. Plaintiff seeks “compensatory and punitive damages and
 3 declaratory and injunctive relief for torts in violation of international and domestic
 4 law.” *Id.* ¶ 6. She claims damages for Decedent’s pain and suffering, as well as her
 5 own. *Id.* ¶ 69. She also requests that this U.S. Court issue “an injunction prohibiting
 6 [Mr. Rajapaksa] from interfering with any criminal investigations” in Sri Lanka
 7 involving Decedent’s death. *Id.* at p. 36.

8 ARGUMENT

9 **I. The Complaint Should Be Dismissed for *Forum Non Conveniens***

10 The Court should dismiss the Complaint on the basis of *forum non conveniens*.
 11 Under the *forum non conveniens* doctrine, courts have discretion to dismiss cases that
 12 would be better adjudicated elsewhere. For reasons of convenience and comity, the
 13 Court should do so here.

14 *Forum non conveniens* is rooted in both “international principles of sovereignty
 15 and territoriality” and “constitutional doctrines such as the political question doctrine.”
 16 *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014). To determine whether to
 17 dismiss a case under the doctrine, courts must first determine whether an adequate
 18 alternative forum exists. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142-43 (9th Cir.
 19 2001) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257 (1981)).

20 Second, they must weigh “whether the balance of private and public interest factors
 21 favors dismissal.” *Id.*

22 This case passes both tests. First, Sri Lanka is an adequate forum to hear this
 23 case. The Sri Lankan courts would have jurisdiction over the types of claims brought
 24 by the Plaintiff against Mr. Rajapaksa, and, if properly pleaded, the allegations in the
 25 Complaint would constitute the basis for a cause of action recognized by Sri Lankan
 26 law. *See de Silva Decl.* ¶ 4.3. Second, both the public and private interest factors
 27 favor dismissal. The public interest analysis turns on whether adjudicating the case in
 28 the plaintiff’s chosen forum is appropriate in the context of the legal system at large.

1 Because this case involves questions relating to politics and security that go to the
2 heart of Sri Lanka’s national sovereignty—and because it involves no questions that
3 directly relate to California—Sri Lanka, not the Central District of California, is the
4 appropriate forum. The traditional private factors are rooted in reasonableness and
5 convenience. *Piper Aircraft*, 454 U.S. at 256. In this case, a citizen and resident of
6 Australia has sued a citizen and resident of Sri Lanka for alleged acts that occurred
7 exclusively in Sri Lanka. Adjudicating it here is neither reasonable nor convenient.

8 **A. Sri Lanka Is an Adequate Alternative Forum**

9 This case should be dismissed because Sri Lanka provides an adequate
10 alternative forum. An alternative forum is adequate if “(1) the defendant is amenable
11 to process there; and (2) the other jurisdiction offers a satisfactory remedy.” *Carijano*
12 *v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011) (citing *Piper*
13 *Aircraft*, 454 U.S. at 254 n.22). The moving party bears the burden of proof. *Leetsch*
14 *v. Freedman*, 260 F.3d 1100, 1103 (9th Cir. 2001).

15 The test’s first prong is satisfied “when defendants are amenable to service of
16 process in the foreign forum and when the entire case and all parties can come within
17 the jurisdiction of that forum.” *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d
18 1025, 1029 (9th Cir. 2011) (quotation marks omitted). That is the case here. *First*,
19 Mr. Rajapaksa is amenable to service of process in Sri Lanka. *See de Silva Decl.* ¶¶
20 3.74-3.77, 3.86. *Second*, Sri Lankan courts would have jurisdiction over similar claims
21 brought in Sri Lanka. *See id.* ¶¶ 4.3-4.6, 4.14-4.15. *Third*, it is not necessary for
22 Plaintiff to be physically present in Sri Lanka to file a civil action; a plaintiff living
23 abroad may bring suit from outside the country by granting a power of attorney to a
24 competent person who is a resident of Sri Lanka or, for claims alleging an
25 infringement of a fundamental right, by sending a postcard addressed to the Supreme
26 Court’s Chief Justice. *See id.* ¶¶ 3.70, 3.75, 4.16-4.18.

27 The second prong, whether the alternative jurisdiction offers a satisfactory
28 remedy, is deliberately “easy to pass.” *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d

1 1163, 1178 (9th Cir. 2006). The Supreme Court has held that a court should find a
2 forum inadequate only if “the remedy provided by the alternative forum is so clearly
3 inadequate or unsatisfactory that it is no remedy at all.” *Piper Aircraft*, 454 U.S. at
4 254 & n.22. “An alternative forum is not inadequate merely because the substantive
5 law to be applied is less favorable than that of the present forum.” *Petersen v. Boeing*
6 *Co.*, 108 F. Supp. 3d 726, 731 (D. Ariz. 2015) (citing *Piper Aircraft*, 454 U.S. at 247).
7 Rather, “[t]he forum need only provide *some potential* avenue for redress.” *Id.*
8 (quotation marks omitted) (emphasis added). In other words, “a foreign forum will be
9 deemed adequate unless it offers no practical remedy for plaintiff’s complained of
10 wrong.” *Lueck*, 236 F.3d at 1144.

11 There are important foreign policy reasons for why finding a forum inadequate
12 is rare. Under the principle of equal sovereignty, courts are reluctant to pass judgment
13 on foreign legal systems. *See Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d
14 582, 586 (2d Cir. 1993) (“[W]ere we to pass judgment on the validity of India’s
15 response to a disaster that occurred within its borders, it would disrupt our relations
16 with that country and frustrate the efforts of the international community to develop
17 methods to deal with problems of this magnitude in the future.”). There are also
18 domestic considerations. “Requiring district courts to interpret the law of foreign
19 jurisdictions . . . is diametrically opposed to another of the [*forum non conveniens*]
20 doctrine’s purposes”: to “help courts avoid conducting complex exercises in
21 comparative law.” *Lueck*, 236 F.3d at 1144 (quoting *Piper Aircraft*, 454 U.S. at 251).

22 Under this standard, Sri Lanka’s remedies provide an adequate alternative
23 forum. Sri Lanka has a well-established legal system steeped in the English common
24 law and Roman Dutch Law, among other traditions, as well as a constitutional
25 structure of government and an independent judiciary. *See de Silva Decl.* ¶¶ 3.1-3.41.
26 A civil cause of action is available for wrongful death, *id.* ¶¶ 3.63, 3.68, 4.4, and civil
27 actions may be brought against both sitting and former public officials, *id.* ¶¶ 3.50-
28 3.52, 3.86. Moreover, Sri Lankan law criminalizes torture. *See id.* ¶ 3.88.

1 Recent developments bolster the idea that the Sri Lankan judiciary is capable of
 2 providing Plaintiff with redress. New reports by international monitoring
 3 organizations commend the country’s fair and independent judiciary.³ And the U.S.
 4 Department of Justice has noted that Sri Lankan “law provides for an independent
 5 judiciary, and the government generally respect[s] judicial independence and
 6 impartiality.”⁴ Sri Lankan courts have recently demonstrated these qualities by
 7 permitting criminal cases against former high-ranking public officials to proceed. *See*
 8 *id.* ¶ 4.10. Indeed, Mr. Rajapaksa is currently facing criminal charges in Sri Lanka’s
 9 High Court based on allegations that he aided and abetted board members of the Land
 10 Reclamation and Development Authority in misappropriating public funds to build a
 11 memorial. *See id.* ¶ 4.11; *id.*, Ex. 2 (copy of indictment with certified translation).
 12 Although Mr. Rajapaksa vigorously disputes these charges, they demonstrate that Sri
 13 Lanka is capable of holding high-level government officials accountable for wrongful
 14 conduct undertaken while in office.

15 **B. Plaintiff’s Choice of Forum Merits Minimal Deference**

16 The Court should dismiss this case because Plaintiff is foreign and her case is
 17 precisely the type that the *forum non conveniens* doctrine was designed to address. As
 18 the Supreme Court has explained, “[b]ecause the central purpose of any *forum non*
 19 *conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice
 20 deserves less deference.” *Piper Aircraft*, 454 U.S. at 256.

21
 22 ³ *See, e.g.,* Freedom House, *Freedom of the World 2019, Sri Lanka Country*
 23 *Report* (2019), <https://freedomhouse.org/report/freedom-world/2019/sri-lanka> (raising
 24 Sri Lanka’s judicial independence score from two to three out of four because the
 25 Supreme Court and Court of Appeal “demonstrated their independence” during a 2018
 26 constitutional crisis); World Justice Project, *World Justice Project Rule of Law Index*
 27 *2017-2018*, at 25 (2018), [https://worldjusticeproject.org/sites/default/files/documents/](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition.pdf)
 28 [WJP-ROLI-2018-June-Online-Edition.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition.pdf) (noting that of an indexed 113 countries, Sri
 Lanka’s rank improved significantly, by nine spots).

⁴ U.S. Dep’t of Justice, *Sri Lanka 2018 Human Rights Report 8*, available at
<https://www.justice.gov/eoir/page/file/1145711/download>.

1 Implementing this rule, the Ninth Circuit has held that defendants bear a
2 “reduced” burden to demonstrate inconvenience in suits brought by foreign plaintiffs.
3 *Lueck*, 236 F.3d at 1145. In these instances, dismissal is proper whenever “the balance
4 of conveniences suggests that trial in the chosen forum would be unnecessarily
5 burdensome for the defendant or the court.” *Id.*

6 Here, the “balance of conveniences” clearly tilts to dismissal. Plaintiff is
7 foreign, and the Complaint provides no valid reason for bringing suit in California
8 when Mr. Rajapaksa is amenable to suit in Sri Lanka. Plaintiff’s Australian residency
9 does not affect this calculus because Sri Lanka has procedural mechanisms that allow a
10 plaintiff to file suit while abroad. *See de Silva Decl.* ¶¶ 3.70, 3.75, 4.16-4.18. In any
11 event, both Plaintiff and Mr. Rajapaksa are domiciled in foreign jurisdictions, the
12 alleged conduct occurred in a foreign jurisdiction, and all relevant evidence is located
13 in a foreign jurisdiction. The only reason Plaintiff was able to sue in this District is
14 that she managed to obtain “gotcha” jurisdiction by serving Mr. Rajapaksa while he
15 was visiting California. That is not sufficient reason to proceed here.

16 **C. The Public and Private Interests Strongly Favor Dismissal**

17 When an alternative forum is adequate, *forum non conveniens* is appropriate
18 where the “‘private interest’ and the ‘public interest’ factors strongly favor trial in a
19 foreign country.” *Lueck*, 236 F.3d at 1145. That is the case here.

20 **1. The Public Interest Factors Favor Dismissal**

21 The public interest factors strongly favor dismissal. To assess these public
22 interest factors, courts look to the “(1) local interest of [the] lawsuit; (2) the court’s
23 familiarity with governing law; (3) burden on local courts and juries; (4) congestion in
24 the court; and (5) the costs of resolving a dispute unrelated to this forum.” *Lueck*, 236
25 F.3d at 1147 (citing *Piper Aircraft*, 454 U.S. at 259-61). All five factors weigh in
26 favor of dismissal here.

27 *First*, there is no local interest in this lawsuit. The alleged acts were taken
28 exclusively in Sri Lanka by a resident of Sri Lanka against another resident of Sri

1 Lanka. By contrast, Sri Lanka has a strong national interest in adjudicating this
2 dispute, which arises from facts that are the subject of an ongoing investigation by the
3 authorities of that country. *See de Silva Decl.* ¶¶ 4.22-4.23.

4 *Second*, while this Court is well equipped to interpret federal law claims, this
5 case is not limited to federal law. The Court will necessarily need to engage with Sri
6 Lankan law, particularly as it relates to command responsibility within the Ministry of
7 Defense—or more aptly, the lack of command responsibility—to fairly adjudicate
8 Plaintiff’s claims.

9 *Third*, absent a local interest in the adjudication of the dispute, it will unduly
10 burden the Court and a jury to hear this case. This Court reached an identical
11 conclusion in a case very similar to this one, *Mujica v. Occidental Petroleum Corp.*,
12 381 F. Supp. 2d 1134, 1153 (C.D. Cal. 2005). There, the court held that, although
13 Congress had permitted American juries to review foreign claims arising under the
14 TVPA, the equities favored dismissal where the alleged acts involved foreign plaintiffs
15 and occurred abroad. *Id.*

16 *Fourth*, caseloads in the Central District of California are high, and there is no
17 reason to further burden this Court with a case that has no connection to this District or
18 the United States more broadly.

19 *Finally*, the costs of this case will significantly outstrip any local interest it may
20 hold. The facts alleged in the Complaint suggest that all relevant evidence is located
21 abroad, and some appears to be in the possession of a foreign government. *See, e.g.*,
22 Compl. ¶ 27 (“court filings made by the CID”); *id.* ¶ 43 (“cell phone tower logs”); *id.*
23 ¶ 46 (“autopsy report” by the Judicial Medical Officer and Decedent’s notebook
24 “collected by police officers at the scene of the crime”). The United States will need to
25 expend substantial resources to request the evidence, and, if it does receive it—which
26 is far from certain, given the national security implications raised by this litigation—
27 there may be additional translation costs.

1 There is yet another reason to dismiss this case on public interest grounds. The
2 Second Circuit famously reaffirmed this rationale in *Bi v. Union Carbide Chemicals &*
3 *Plastics Co.*, 984 F.2d 582, 583 (2d Cir. 1993). *See also AirScan*, 771 F.3d at 607
4 (relying on *Bi*). In *Union Carbide*, the district court, against the State of India’s own
5 request, dismissed a case relating to a gas leak at an American-owned chemical plant
6 in India because allowing it to proceed would unfairly indict India’s courts and stunt
7 the development of its judiciary. *In re Union Carbide Corp. Gas Plant Disaster at*
8 *Bhopal, India in Dec., 1984*, 634 F. Supp. 842, 866-67 (S.D.N.Y. 1986), *aff’d as*
9 *modified*, 809 F.2d 195 (2d Cir. 1987). The plaintiffs in that case had claimed that “the
10 Indian justice system ha[d] not yet cast off the burden of colonialism to meet the
11 emerging needs of a democratic people.” *Id.* at 867. But the court rejected their
12 argument, holding that,

13 to retain the litigation in this forum . . . would be yet another example of
14 imperialism, another situation in which an established sovereign inflicted
15 its rules, its standards and values on a developing nation To deprive
16 the Indian judiciary of this opportunity to stand tall before the world and to
17 pass judgment on behalf of its own people would be to revive a history of
18 subservience and subjugation from which India has emerged.

19 *Id.*

20 So too here, with even greater force. The Sri Lankan courts are well-
21 established, with deep roots in Sri Lanka’s Commonwealth history and the common-
22 law tradition. *See de Silva Decl.* ¶¶ 3.1. Moreover, the Sri Lankan Constitution
23 guarantees judicial independence, and the Sri Lankan courts have recently
24 demonstrated this quality by permitting prosecutions of former public officials to
25 proceed. *See id.* ¶¶ 3.36-3.41, 4.10-4.11. Adjudicating this Sri Lankan dispute in
26 California would deprive the country’s judiciary of the opportunity to “stand tall” and
27 “pass judgment on behalf of its own people.” *See Union Carbide*, 634 F. Supp. at 867.

2. The Private Interest Factors Favor Dismissal

The doctrine's traditional private interest factors similarly warrant dismissal. When considering whether to dismiss a case, courts will review "(1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) 'all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Lueck*, 236 F.3d at 1145-46 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). No one factor is dispositive; rather, the court "should consider them together in arriving at a balanced conclusion." *Id.* Here, not just some but *all* factors dictate dismissal.

First, as noted, all parties reside abroad, and the facts alleged in the Complaint suggest that any potential witnesses are located in Sri Lanka.

Second, because no party or identified witness to the case resides in California, the forum is inconvenient to everyone involved.

Third, the facts alleged in the Complaint suggest that all or the vast majority of the physical and documentary evidence is located abroad, making it difficult and expensive to obtain. Although Sri Lanka is a signatory to the Hague Convention, conducting cross-border discovery remains inconvenient and time-consuming. *See Sandoval v. Carnival Corp.*, No. 12-cv-5517, 2014 WL 12585803, at *7 (C.D. Cal. Sept. 15, 2014). This is especially so because the Sri Lankan law giving effect to the Hague Convention provides an exception when sharing the information will be, in the judgment of the Sri Lanka Central Authority, "prejudicial to the sovereignty or security of Sri Lanka." *See de Silva Decl.* ¶ 3.78. And beyond the challenges associated with *obtaining* evidence from abroad, courts have acknowledged that "conducting a substantial portion of a trial on deposition testimony precludes the trier of fact from its most important role; evaluating the credibility of the witnesses." *Mujica*, 381 F. Supp. 2d at 1151 (citation omitted). Moreover, as noted, many of the alleged evidentiary

1 documents are in the control of the Sri Lankan government. Courts have recognized
2 that these circumstances make adjudication particularly difficult because, even under
3 the Hague Convention and similar international agreements, American courts cannot
4 compel production from foreign governments. *See Lueck*, 236 F.3d at 1146-47. The
5 third factor thus weighs very strongly in favor of dismissal.

6 *Fourth*, the most material and important witnesses are abroad and have no
7 “accessibility and convenience to the forum.” *Lueck*, 236 F.3d at 1146 (citation
8 omitted). Beyond the usual challenges involved in convincing foreign witnesses to
9 travel, many of the key witnesses in this case may be unwilling to testify because
10 doing so could expose them to liability. Plaintiff’s claims rest on theories of command
11 responsibility, conspiracy, and aiding and abetting, *see* Compl. ¶ 1; as a result, the
12 witnesses most material to her case—the people who allegedly conspired with Mr.
13 Rajapaksa and executed his orders—could be named third-party defendants. Where, as
14 here, a case involves potential third-party defendants whom the court cannot compel to
15 testify, that factor “clearly support[s] holding the trial” in the foreign forum. *Mujica*,
16 381 F. Supp. 2d at 1152-53.

17 *Fifth*, this case likely will be extremely costly to try. All alleged acts occurred
18 abroad; all relevant evidence likely is located abroad; and relevant materials and
19 testimony may be in a foreign language.

20 *Sixth*, even if Plaintiff were to succeed on the merits, it would be difficult to
21 enforce the judgment. Mr. Rajapaksa resides in Sri Lanka, where he is running for
22 president, and he has relinquished his U.S. citizenship.

23 *Finally*, this lawsuit is a classic “foreign-cubed” case—a case “where the
24 plaintiffs are foreign, the defendants are foreign, and all the relevant conduct occurred
25 abroad.” *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2116 (2016)
26 (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment).
27 These facts suggest that the “practical problems” of this case will make trial in
28

1 Plaintiff’s chosen forum anything but “easy, expeditious, [or] inexpensive.”⁵ *Lueck*,
 2 236 F.3d at 1145-46 (quoting *Gulf Oil*, 330 U.S. at 508).

3 **II. The Court Lacks Subject-Matter Jurisdiction Because Defendant Is**
 4 **Immune Under the Doctrine of Foreign-Official Immunity**

5 As the Complaint makes clear in its very first paragraph, “[t]his case arises from
 6 the [acts of] the government and security forces of Sri Lanka.” Compl. ¶ 1. Plaintiff’s
 7 suit explicitly and directly challenges actions undertaken by Mr. Rajapaksa in his
 8 official capacity as Sri Lanka’s Defense Secretary. Specifically, Plaintiff alleges that
 9 Mr. Rajapaksa acted pursuant to his mandate to defend Sri Lanka’s “national
 10 security”—and pursuant to his “broad authority” to exercise the instrumentalities of the
 11 State to “maint[ain] . . . public order.” *Id.* ¶¶ 21-22; *see also id.* ¶¶ 23, 31 (alleging that
 12 Mr. Rajapaksa acted on behalf of the “Rajapaksa regime” to further the Sri Lankan
 13 government’s “war effort”). For this reason, Mr. Rajapaksa is immune from suit under
 14 common-law foreign-official immunity, and this suit must be dismissed for lack of
 15 subject-matter jurisdiction. *See Doğan v. Barak*, No. 2:15-cv-8130, 2016 WL
 16 6024416, at *3 (C.D. Cal. Oct. 13, 2016) (concluding that common-law foreign-
 17 official immunity “implicates the Court’s jurisdiction over the controversy”); *accord*,
 18 *e.g.*, *Eliahu v. Jewish Agency for Isr.*, 919 F.3d 709, 712 (2d Cir. 2019) (noting that a
 19 lawsuit against a “foreign government official[.]” for acts undertaken in his “official
 20 capacity” must be dismissed for “lack of subject matter jurisdiction”).

21 Foreign-official immunity has been a part of the federal common law for over
 22 two centuries. *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 138
 23 (1812). As Attorney General Charles Lee observed in 1797, “a person acting under a
 24 commission from the sovereign of a foreign nation is not amenable for what he does in
 25

26 _____
 27 ⁵ The traditional choice-of-law analysis also does not preclude dismissal. Neither
 28 the TVPA nor the ATS requires venue in the United States; in fact, the TVPA has a
 foreign exhaustion requirement. *See Mujica*, 381 F. Supp. 2d at 1142.

1 pursuance of his commission, to any judicial tribunal in the United States.” *Actions*
2 *Against Foreigners*, 1 U.S. Op. Atty. Gen. 81 (1797). A century later, in *Underhill v.*
3 *Hernandez*, 168 U.S. 250 (1897), the Supreme Court held that Venezuelan military
4 officials were immune from suit for torts committed during a revolt in Venezuela,
5 explaining that foreign officials are immune “for acts done within their own states, in
6 the exercise of governmental authority, whether as civil officers or as military
7 commanders.” *Id.* at 252. These federal common-law principles continue to govern
8 today. *See Samantar v. Yousef*, 560 U.S. 305, 322 n.17 (2010).

9 At common law, a foreign official could be entitled to either “status-based” or
10 “conduct-based” immunity. *See Doe I v. Buratai*, 318 F. Supp. 3d 218, 230 (D.D.C.
11 2018). Individuals who serve as foreign officials at the time of suit are entitled to
12 “status-based” immunity, which shields them from “legal proceedings ‘by virtue of
13 [their] current official position, regardless of the substance of the claim.’” *Id.* (quoting
14 *Lewis v. Mutond*, 258 F. Supp. 3d 168, 171 (D.D.C. 2017)). Former government
15 officials like Mr. Rajapaksa, by contrast, are entitled to “conduct-based” immunity,
16 which “shield[s] [them] from legal consequences for acts performed on behalf of the
17 state during their tenure in office.” *Id.* (quoting *Sikhs for Justice v. Singh*, 64 F. Supp.
18 3d 190, 193 (D.D.C. 2014)). The “determining factor” in whether a challenged act was
19 done in a government figure’s official capacity is “whether the act was performed on
20 behalf of the foreign state and thus attributable to the state.” *Id.* at 232 (quoting
21 *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 13 (D.D.C. 2014)); *see also Mireskandari v.*
22 *Mayne*, No. 12-cv-3861, 2016 WL 1165896, at *15 (C.D. Cal. Mar. 23, 2016) (“[A]ny
23 act performed by the individual as an act of the State enjoys the immunity which the
24 State enjoys.” (quoting *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012))).

25 Applying the Supreme Court’s decision in *Samantar*, courts today use a “two-
26 step procedure” for determining whether a foreign official is entitled to immunity. *See*
27 *Samantar*, 560 U.S. at 311. First, the foreign official may request a Suggestion of
28 Immunity from the State Department; “[i]f the request [is] granted, the district court

1 surrender[s] its jurisdiction.” *Id.* Second, in the absence of such a Suggestion of
2 Immunity, a district court may “decide for itself,” based on the common-law immunity
3 principles outlined above, “whether all the requisites for such immunity existed.” *Id.*
4 (quoting *Ex parte Peru*, 318 U.S. 578, 587 (1943)). The Executive Branch has made
5 clear that it “need not appear in each case in order to assert the immunity of a foreign
6 official,” Brief for the United States at 3, 21 n.*, *Matar v. Dichter*, 563 F.3d 9 (2d Cir.
7 2009) (No. 07-2579), 2007 WL 6931924; thus, “in the absence of contrary guidance
8 from the Executive Branch, a district court may properly dismiss a suit against a
9 foreign official if the suit challenges acts taken exercising the powers of the official’s
10 office,” Brief for the United States at 14 n.5, *Giraldo v. Drummond Co.*, 493 F. App’x
11 106 (D.C. Cir. 2012) (No. 11-7118), 2012 WL 3152126. For this reason, both this
12 Court and others have dismissed suits on the grounds of conduct-based immunity even
13 without a formal Suggestion of Immunity from the State Department. *See, e.g.*,
14 *Mireskandari*, 2016 WL 1165896, at *20; *see also Buratai*, 318 F. Supp. 3d at 231;
15 *Moriah v. Bank of China, Ltd.*, 107 F. Supp. 3d 272, 276-80 (S.D.N.Y. 2015).

16 This suit presents a straightforward case of foreign-official “conduct-based”
17 immunity. It challenges actions allegedly undertaken by Mr. Rajapaksa in his official
18 capacity as Sri Lanka’s Defense Secretary—“the most senior civil servant in the
19 Ministry of Defense, which houses all branches of the Sri Lankan security forces.”
20 Compl. ¶ 18. *Compare, e.g., id.* ¶ 11 (noting that Mr. Rajapaksa’s “position placed
21 him in overall command of Sri Lanka’s armed forces, intelligence services, and police
22 force”), *with Matar*, 563 F.3d at 14 (citing *Heaney v. Gov’t of Spain*, 445 F.2d 501,
23 504 (2d Cir. 1971), for the proposition that “plaintiff’s concession that defendant was
24 ‘at all relevant times an employee and agent of the defendant Spanish Government’
25 sufficed to dispose of the claim against the individual defendant”), *and Belhas v.*
26 *Ya’alon*, 515 F.3d 1279, 1284 (D.C. Cir. 2008) (“The complaint identifies nothing that
27 General Ya’alon is alleged to have done in an individual capacity, or other than as an
28 agent or instrumentality of the state of Israel.”). In addition, Plaintiff alleges that the

1 branch of the Sri Lankan military that allegedly carried out the acts in question “was
2 directly under the control of the Ministry of Defense,” and the attack “was part of a
3 larger pattern” of Sri Lanka’s military strategy in a decades-long civil war. Compl.
4 ¶¶ 17, 23, 27, 31. Thus, it was “*in his capacity as Secretary of Defense*” that Mr.
5 Rajapaksa allegedly “exercised command responsibility over, conspired with, aided
6 and abetted, and/or incited individuals in the Tripoli Platoon” to engage in the alleged
7 attack. *Id.* ¶ 54 (emphasis added). In short, according to the Complaint’s own
8 allegations, Mr. Rajapaksa acted “as part of [his] official dut[ies]” as Sri Lanka’s
9 Defense Secretary, and he is therefore entitled to “conduct-based” immunity with
10 regard to those actions. *Buratai*, 318 F. Supp. 3d at 232.

11 The allegations of this suit make it similar to *Buratai*, where the United States
12 District Court for the District of Columbia held that Nigerian military officers were
13 entitled to conduct-based immunity for allegedly ordering and carrying out
14 extrajudicial killings of government protestors in Nigeria. *See id.*, 318 F. Supp. 3d at
15 222-25, 230-33. The court recognized that “the defendants’ alleged actions were part
16 of their official duties within the Nigerian government, military, and police,” and noted
17 that, according to the plaintiffs’ complaint, “[t]he defendants all ‘exercised effective
18 command and operational control’ over the Nigerian military and police forces and the
19 State Security Service, or ‘exercised command authority and control over the
20 perpetrators’ of the attacks.” *Id.* at 232 (internal citations omitted). “These
21 allegations,” the court concluded, “do not describe private actions. Rather, as alleged
22 by the complaint, the defendants *acted within the structure of the Nigerian government*
23 *and military, drawing on official powers and duties and relying on the governmental*
24 *and military chains-of-command*—i.e., within their official capacities.” *Id.* (emphasis
25 added). Mr. Rajapaksa is entitled to conduct-based immunity for precisely the same
26 reasons: he committed the alleged wrongdoing while acting *within the structure* of the
27 Sri Lankan government, drawing on his official power as Defense Secretary.

1 The allegation that Mr. Rajapaksa acted in derogation of a *jus cogens* norm
2 against extrajudicial killing does not change this analysis.⁶ This Court in *Doğan*
3 expressly declined to recognize a *jus cogens* exception to common-law foreign-official
4 immunity. *See* 2016 WL 6024416, at *10; *see also Matar*, 563 F.3d at 15 (“A claim
5 premised on the violation of *jus cogens* does not withstand [common-law] foreign
6 sovereign immunity.”); *Buratai*, 318 F. Supp. 3d at 236 (similar). The *Doğan* Court
7 explained that recognizing a *jus cogens* exception “would effectively eviscerate the
8 immunity for *all* foreign officials,” because an inquiry into whether a *jus cogens*
9 violation occurred “is inextricably intertwined with the merits of the underlying
10 claim.” 2016 WL 6024416, at *10.

11 This evisceration would occur in two respects. First, the *Doğan* Court held, “[i]f
12 a court had to reach the merits to resolve the immunity question, there would
13 effectively be no immunity,” because “foreign official immunity is not just a defense
14 to liability” but also “an immunity from trial and the attendant burdens of litigation.”
15 *Id.* (quotation source and brackets omitted). The court found this inversion of the
16 normal procedure “particularly problematic in lawsuits arising from military
17 operations, as any death resulting from such operations could give rise to a plausible
18 allegation that *jus cogens* norms were violated.” *Id.* Second, the court held that
19 “merging the question of immunity with the merits also undermines the original
20 purpose of foreign official immunity: to avoid affronting the sovereignty of a foreign
21 nation by passing judgment on their official government acts, which would inevitably
22 happen if courts had to reach the merits to resolve immunity.” *Id.* Finally, “the
23

24
25 ⁶ “A *jus cogens* norm, also known as a ‘peremptory norm of general international law,’
26 can be defined as ‘a norm accepted and recognized by the international community of
27 States as a whole as a norm from which no derogation is permitted and which can be
28 modified only by a subsequent norm of general international law having the same
character.” *Doğan*, 2016 WL 6024416, at *10 n.18 (quoting *Yousuf v. Samantar*, 699
F.3d 763, 775 (4th Cir. 2012)).

1 Executive has made clear that it does not recognize a *jus cogens* exception to
2 immunity,” and “[b]ecause the common law immunity inquiry centers on what conduct
3 the Executive has seen fit to immunize, courts are not free to carve out such an
4 exception on their own.” *Id.* (internal citation omitted); *see also Republic of Mexico v.*
5 *Hoffman*, 324 U.S. 30, 35 (1945) (“It is . . . not for the courts to deny an immunity
6 which our government has seen fit to allow”); *Buratai*, 318 F. Supp. 3d at 235
7 (“[T]he executive branch has not recognized a blanket *jus cogens* exception.”).

8 Nor does the analysis change simply because Plaintiff is suing under the TVPA.
9 The *Doğan* Court expressly rejected the notion that “the TVPA . . . abrogate[d]
10 common law foreign official immunity for former officials,” substantiating its claim
11 with a thorough analysis of the TVPA’s text and legislative history. 2016 WL
12 6024416, at *11-12. The *Doğan* Court also concluded that “[i]f immunity did not
13 extend to officials whose governments acknowledge that their acts were officially
14 authorized, it would open a Pandora’s box of liability for foreign military officials”:
15 “any military operation that results in injury or death could be characterized at the
16 pleading stage as torture or an extra-judicial killing,” and “[w]ithout common law
17 foreign official immunity, former military officials from other nations would find
18 themselves subject to TVPA lawsuits every time they visit the United States.” *Id.* at
19 *12. In recent filings in *Doğan*, the U.S. government reiterated its view that the TVPA
20 does not abrogate common-law immunity. *See, e.g.*, Brief for the United States at 15,
21 *Doğan v. Barak*, No. 16-56704 (9th Cir. July 26, 2017), ECF No. 41 (“The TVPA does
22 not address, let alone abrogate, the common-law immunity of foreign officials.”).
23 Indeed, to treat the TVPA as abrogating sovereign immunity would in many cases
24 effectively nullify the Supreme Court’s ruling in *Samantar* deeming the State
25 Department’s determination of common-law immunity dispositive. *See* 560 U.S. at
26 311.

27 As in *Doğan*, this Court should decline to open “Pandora’s Box” and correctly
28 recognize Mr. Rajapaksa’s immunity.

1 **III. The Complaint Should Be Dismissed Based on Principles of Comity**

2 Alternatively, the Court should dismiss this case as a matter of international
3 comity. Comity is a prudential abstention doctrine intended “to promote cooperation
4 and reciprocity with foreign lands.” *AirScan*, 771 F.3d at 597 (quotation marks
5 omitted). It is “the golden rule among nations [that] compels [courts] to give the
6 respect to the laws, policies, and interests of others that [they] would have others give
7 to [their] own in the same or similar circumstances.” *Id.* at 608 (quotation marks
8 omitted). Comity “counsels voluntary forbearance when a sovereign which has a
9 legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate
10 claim to jurisdiction under principles of international law.” *Id.* (citation omitted).

11 International comity traditionally encompasses two distinct doctrines. The first,
12 legislative, or prescriptive, comity, “guides domestic courts as they decide the
13 extraterritorial reach of federal statutes.” *AirScan*, 771 F.3d at 598-99 (quotation
14 marks omitted). The second, adjudicatory comity, or comity among courts, “arises in
15 two contexts: (i) determining the preclusive effect or enforceability of a foreign ruling
16 or judgment; or (ii) evaluating whether to stay or dismiss an action in a domestic court
17 in favor of either a pending or future proceeding in a foreign forum.” *Id.* at 621 (Zilly,
18 J., concurring in part and dissenting in part).

19 The Ninth Circuit recently applied adjudicatory comity in *AirScan*, 771 F.3d
20 580, to dismiss claims against an American corporate defendant for its alleged
21 involvement in a bombing of a Colombian village. Although the court had jurisdiction
22 to hear the case, it deferred because the plaintiffs had already successfully brought
23 related claims against different defendants in Colombia. To reach its decision, the
24 court applied the three-part analysis introduced in *Ungaro-Benages v. Dresdner Bank*
25 *AG*, 379 F.3d 1227, 1238 (11th Cir. 2004), under which a court “evaluate[s] several
26 factors, including [1] the strength of the United States’ interest in using a foreign
27 forum, [2] the strength of the foreign governments’ interests, and [3] the adequacy of
28 the alternative forum.” *AirScan*, 771 F.3d at 603. The court held that, “because of the

1 strength of the U.S. government’s interest in respecting Colombia’s judicial process,
2 the weakness of California’s interest in the case, the strength of Colombia’s interests in
3 serving as an exclusive forum, and the adequacy of the Colombian courts[.]” the
4 plaintiffs’ claims were nonjusticiable under the doctrine of international comity. *Id.*

5 This Court should abstain here for the reasons articulated by the Ninth Circuit in
6 *AirScan*. First, the U.S. interest factors point toward dismissal. As the court in
7 *AirScan* explained, “[t]he (nonexclusive) factors we should consider when assessing
8 U.S. interests include (1) the location of the conduct in question, (2) the nationality of
9 the parties, (3) the character of the conduct in question, (4) the foreign policy interests
10 of the United States, and (5) any public policy interests.” 771 F.3d at 604. For the
11 reasons discussed above in the context of *forum non conveniens*, all of these factors
12 favor dismissal. Second, because Sri Lanka’s interest in the case is as strong as the
13 interests of the United States and California are weak, this case should be dismissed in
14 favor of adjudication in Sri Lanka, out of respect for Sri Lanka’s courts and in
15 recognition that they provide a far better forum for this suit. *See id.* at 607 (the foreign
16 forum analysis “essentially mirrors the consideration of U.S. interests”). Finally, for
17 the reasons stated above, Sri Lanka provides an adequate alternative forum.

18 **IV. Plaintiff’s Claims Are Barred for Multiple Other Reasons**

19 **A. The Statute of Limitations Bars the TVPA and ATS Claims**

20 The Court should dismiss the TVPA and ATS claims as time-barred. The
21 statute of limitations for both the TVPA and the ATS is ten years. *See* 28 U.S.C.
22 § 1350 note; *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002). Because
23 Plaintiff filed the Complaint on April 7, 2019, more than ten years after January 8,
24 2009, the date the alleged acts occurred, they should be dismissed as untimely.

25 Plaintiff’s claims are not subject to equitable tolling. While equitable tolling
26 applies to the TVPA and the ATS, it is limited to situations in which the plaintiff was
27 meaningfully prevented from bringing a claim before the limitations statute expired.
28 Specifically, in the context of the TVPA, the statute of limitations is tolled only when

1 either “(1) defendant’s wrongful conduct prevented plaintiff from asserting the claim;
2 or (2) extraordinary circumstances outside the plaintiff’s control made it impossible to
3 timely assert the claim.” *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1146 (E.D. Cal.
4 2004) (quotation marks omitted).

5 Courts have emphasized that, in the first instance, “wrongful conduct” is limited
6 to “active conduct by a defendant, *above and beyond* the wrongdoing upon which the
7 plaintiff’s claim is filed to prevent the plaintiff from suing in time.” *He Nam You v.*
8 *Japan*, 150 F. Supp. 3d 1140, 1147 (N.D. Cal. 2015) (emphasis added) (citing
9 *Guerrero v. Gates*, 442 F.3d 697, 706-07 (9th Cir. 2003)). Further, plaintiffs must
10 establish proximate cause between a defendant’s wrongful conduct and the plaintiff’s
11 failure to timely file. *Id.* As for the second instance, courts have applied
12 “extraordinary circumstances” sparingly. For example, courts have permitted tolling
13 when “the *regime responsible* for the heinous acts for which these statutes provide
14 redress remains in power,” *Hassen v. Nahyan*, No. 09-cv-1106, 2010 WL 9538408, at
15 *17 (C.D. Cal. Sept. 17, 2010) (quoting *In re S. African Apartheid Litig.*, 617
16 F.Supp.2d 228, 289 (S.D.N.Y.2009)), or when the judges who would oversee the
17 claims themselves face personal danger for doing so, *see Rafael Saravia*, 348 F. Supp.
18 2d at 1134 (“During the civil war, judges were murdered at a high rate. As the Truth
19 Commission concluded, ‘In the 1980s, it was dangerous to be a judge in El
20 Salvador.’”).

21 Neither basis for equitable tolling applies here. *First*, the Complaint fails to
22 sufficiently allege that Mr. Rajapaksa acted wrongfully, above and beyond the
23 underlying claims, to prevent Plaintiff from timely filing suit in Sri Lanka. Although
24 the Complaint condemns Mr. Rajapaksa’s alleged posture toward journalists, Compl.
25 ¶ 23, and accuses him of failing to adequately investigate Decedent’s death, *id.* ¶¶ 3,
26 57-58, nowhere does it articulate whether and how Mr. Rajapaksa took additional steps
27 to prevent Plaintiff from seeking legal redress, nor whether and how those steps
28 proximately caused a filing delay.

1 *Second*, Plaintiff fails to sufficiently allege that extraordinary circumstances
2 prevented her from filing in Sri Lanka before the limitations period had run. While
3 Plaintiff references the general political situation in Sri Lanka under the Rajapaksa
4 regime, *see* Compl. ¶¶ 14-41, she does not allege how that situation prevented her from
5 bringing a lawsuit. Further, Plaintiff is a citizen and resident of Australia. *See* Compl.
6 ¶ 13. Even if she could allege that extraordinary circumstances in Sri Lanka precluded
7 her from suing Mr. Rajapaksa, Sri Lanka has procedural mechanisms that allow a
8 plaintiff to file suit while abroad. *See de Silva Decl.* ¶¶ 3.70, 3.75, 4.16-4.18.
9 Similarly, she does explain what prevented her from bringing this case exactly as she
10 did now, through service directly on Mr. Rajapaksa, when he was previously in
11 California. *See* Compl. ¶ 11 (stating that “Defendant continues to travel frequently to
12 California”).

13 *Third*, Plaintiff herself admits that her attorneys and other family members
14 “successfully petitioned the Mount Lavinia Magistrates Court to order that
15 investigations into the murder be conducted by the CID of the Sri Lanka Police, in
16 December 2009.” *Id.* ¶ 48. If Plaintiff could successfully petition a Sri Lankan court
17 to order an investigation into the claims, it is unclear what concurrent circumstances
18 prevented her from filing this suit.

19 *Fourth*, Sri Lankan law provides for suits against both sitting and former public
20 officials. *See de Silva Decl.* ¶¶ 3.50-3.52, 3.86. But even if Plaintiff could have, and
21 had, made a case that extraordinary circumstances prevented her from suing Mr.
22 Rajapaksa while he remained part of the government, Mr. Rajapaksa has not been a
23 government official since 2015. And despite Plaintiff’s claims that Mr. Rajapaksa
24 continues to assert unspecified “influence over the new administration,” *id.* ¶ 52, he is
25 currently facing criminal charges for misappropriation of public funds, *see id.* ¶ 4.11;
26 *id.*, Ex. 2.

27 Because the Complaint is untimely and Plaintiff fails to allege any basis for
28 equitable tolling, it should be dismissed.

1 **B. The ATS Claims Fail Because They Are Entirely Extraterritorial**

2 The ATS provides district courts with jurisdiction over “any civil action by an
3 alien for a tort only, committed in violation of the law of nations or a treaty of the
4 United States.” 28 U.S.C. § 1350. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S.
5 108 (2013), the Supreme Court explained that “the presumption against
6 extraterritoriality applies to claims under the ATS,” and thus a court must dismiss any
7 ATS suit in which “all the relevant conduct took place outside the United States.” *Id.*
8 at 124; *see also id.* at 124-25 (explaining that even when some relevant conduct took
9 place domestically—and thus the claim “touch[es] and concern[s] the territory of the
10 United States”—the domestic conduct must be sufficient “to displace the presumption
11 against extraterritorial application”). Thus, “[i]f all the relevant conduct” for an ATS
12 claim “occurred abroad, that is simply the end of the matter under *Kiobel*” and the
13 claim must be dismissed. *AirScan*, 771 F.3d at 594 (quoting *Balintulo v. Daimler AG*,
14 727 F.3d 174, 190 (2d Cir. 2013)); *see also id.* at 592 (dismissing an ATS claim
15 because “[t]he allegations that form the basis of Plaintiffs’ claims exclusively concern
16 conduct that occurred in Colombia”).

17 Here, the Complaint contains not a single allegation of domestic conduct. While
18 living *in Sri Lanka*, Mr. Rajapaksa allegedly ordered the killing of the decedent *in Sri*
19 *Lanka*, and then allegedly obstructed a legitimate investigation *in Sri Lanka*. Although
20 Mr. Rajapaksa—now a resident of Sri Lanka—briefly lived in the United States, there
21 is no allegation that he conspired with any individual in this country during that time,
22 nor, indeed, that he committed *any* relevant conduct here.

23 The above analysis would not change even if, as the Complaint alleges, Mr.
24 Rajapaksa were still a United States citizen, or even if he “continues to travel
25 frequently to California.” Compl. ¶ 11. As the Ninth Circuit made clear in *AirScan*,
26 “the Supreme Court has never suggested that a plaintiff can bring an action based
27 solely on extraterritorial conduct *merely because* the defendant is a U.S. national. To
28 the contrary, the Court has repeatedly applied the presumption against

1 extraterritoriality to bar suits meeting that description.” *AirScan*, 771 F.3d at 594
2 (emphasis in original). Indeed, “in all of the post-*Kiobel* cases in which courts have
3 permitted ATS claims against U.S. defendants to go forward, the plaintiffs have
4 alleged that *at least some* of the conduct relevant to their claims occurred in the United
5 States.” *Id.* at 595 (emphasis added). There is no such relevant conduct alleged in the
6 Complaint. The ATS claims are therefore barred.

7 **C. Plaintiff’s Failure to Exhaust Local Remedies Bars Her TVPA Claims**

8 The Court should dismiss Plaintiff’s TVPA claims because Plaintiff failed to
9 exhaust adequate and available Sri Lankan remedies. The TVPA expressly states that
10 “[a] court shall decline to hear a claim under this section if the claimant has not
11 exhausted adequate and available remedies in the place in which the conduct giving
12 rise to the claim occurred.” 28 U.S.C. § 1350 note.

13 As this Court has previously explained, “Congress included the exhaustion
14 requirement to promote comity, avoid unnecessary burdens on American courts, and
15 encourage the development of foreign legal systems.” *Hassen v. Nahyan*, No. 09-cv-
16 1106, 2010 WL 9538408, at *18 (C.D. Cal. Sept. 17, 2010) (citing H.R. Rep. No. 102-
17 367, at 5 (1991)). While the “ultimate burden of proof and persuasion . . . lies with the
18 defendant,” “[o]nce the defendant makes a showing of remedies abroad which have not
19 been exhausted, the burden shifts to the plaintiff to rebut by showing that the local
20 remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously
21 futile.” *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996).

22 The Ninth Circuit has interpreted “adequate and available remedies” for
23 purposes of the TVPA to accord with the *forum non conveniens* standard articulated in
24 *Piper Aircraft*, 454 U.S. 235. *See Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019,
25 1025-26 (W.D. Wash. 2005), *aff’d*, 503 F.3d 974 (9th Cir. 2007) (holding that Israeli
26 law provided adequate remedies and therefore that the exhaustion requirement
27 applied). For the same reasons that Sri Lanka constitutes an adequate forum for
28

1 purposes of *forum non conveniens*, it provides adequate and available remedies under
2 the statute.

3 **CONCLUSION**

4 This case—brought against a former Sri Lankan Defense Secretary and current
5 presidential candidate just before elections there—has no place in a U.S. court.
6 Everything about this case is centered in Sri Lanka; nothing connects it to this District.
7 The Defendant is immune from suit for his official conduct. And the Complaint is
8 barred because it is untimely, because all the alleged conduct occurred abroad, and
9 because Plaintiff failed to exhaust Sri Lankan remedies. The Court should dismiss the
10 Complaint in its entirety and with prejudice.

11
12 Dated: June 27, 2019

ARNOLD & PORTER
KAYE SCHOLER LLP

13
14
15 By: /s/ John C. Ulin
John C. Ulin

16
17 *Attorney for Defendant*
18 *Nandasena Gotabaya Rajapaksa*
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I electronically filed the foregoing **DEFENDANT’S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(6), FORUM NON CONVENIENS, AND INTERNATIONAL COMITY; MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Vicky Apodaca

Vicky Apodaca