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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

AHIMSA WICKREMATUNGE, in her individual capacity and in her capacity as the legal representative of the estate of LASANTHA WICKREMATUNGE,

Plaintiff,

v.

NANDASENA GOTABAYA RAJAPAKSA,

Defendant.

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

DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT 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: September 16, 2019
Time: 10:00 am
Courtroom: 880
Judge: Hon. Manuel L. Real

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*Applications to appear *pro hac vice* pending.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 16, 2019 at 10:00 a.m., or as soon thereafter as this matter may be heard, in the Roybal Federal Building and U.S. Courthouse, 255 East Temple Street, Los Angeles, CA 90012, Defendant Nandasena Gotabaya Rajapaksa will and hereby does move the Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), *forum non conveniens*, and international comity, for an order dismissing with prejudice Plaintiff Ahimsa Wickrematunge's First Amended Complaint in its entirety.

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

Dated: August 16, 2019

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ John C. Ulin
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*Applications to appear *pro hac vice* pending.

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INTRODUCTION

Plaintiff, an Australian citizen and resident, has brought this suit in California on behalf of her deceased father, a resident of Sri Lanka, concerning conduct allegedly committed in Sri Lanka more than a decade ago by the then-Sri Lankan Secretary to the Ministry of Defense, Gotabaya Rajapaksa, a citizen and resident of Sri Lanka. The First Amended Complaint ("FAC") alleges that Mr. Rajapaksa, "in his capacity as Secretary of Defense, exercised command responsibility over, conspired with, aided and abetted, and/or incited" individuals responsible for the assassination of Plaintiff's father, a Sri Lankan journalist. FAC ¶ 65. Although these allegations are serious—and Mr. Rajapaksa will, if necessary, disprove them on the merits—this lawsuit has no place in U.S. courts. It should be dismissed, with prejudice, for several reasons.

First, the FAC alleges conduct undertaken solely "in [Mr. Rajapaksa's] capacity as Secretary of Defense" of Sri Lanka. *Id.* Mr. Rajapaksa therefore is immune from suit under common-law foreign-official immunity, and the FAC must be dismissed for lack of subject-matter jurisdiction.

Second, Sri Lanka has a far greater interest than the United States in this litigation and provides an adequate alternative forum, requiring dismissal based on *forum non conveniens*. All the conduct alleged in the FAC occurred in Sri Lanka. All the allegations point to witnesses and evidence located in Sri Lanka, including members of the Sri Lankan military and any other potential witnesses, and evidence gathered by the Sri Lankan government in an ongoing investigation. The defendant, Mr. Rajapaksa, resides in Sri Lanka and is currently a nominee for president there. Plaintiff also resides abroad. Nothing whatsoever—no party, no witness, no evidence—ties this litigation to the United States.

Third, for many of the same reasons supporting dismissal for *forum non conveniens*, the Court should dismiss the FAC as a matter of international comity, out

of respect for Sri Lanka's courts and in recognition that they provide a far better forum for this suit.

Finally, the FAC fails on multiple other grounds. Plaintiff's claim under the Alien Tort Statute is barred because all alleged conduct occurred abroad and had no connection to the United States. Plaintiff has failed to exhaust local remedies in Sri Lanka, as required to assert a claim under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note. And, under the plain language of the TVPA, Plaintiff is not a proper plaintiff to bring a claim for torture under the TVPA, nor may she seek recovery for her own injuries in addition to her father's.

ALLEGATIONS IN THE FIRST AMENDED COMPLAINT

Plaintiff Ahimsa Wickrematunge is a citizen and resident of Australia. FAC ¶ 13. She brings suit in her individual capacity and on behalf of the estate of her father, Lasantha Wickrematunge ("Decedent"), a Sri Lankan journalist. *Id*. ¶¶ 1, 13.[1]

The FAC alleges that Defendant Gotabaya Rajapaksa is a U.S. citizen and resident of Sri Lanka. *Id*. ¶¶ 1, 10-11.[2] From November 2005 until January 2015, Mr. Rajapaksa served as Secretary to the Sri Lankan Cabinet Ministry of Defence, Public Security, Law and Order (hereinafter "Defense Secretary"). *Id*. ¶ 11.

Plaintiff alleges that on January 8, 2008, while Decedent was driving to work, he was "swarmed by black-clad plainclothes commandos on motorcycles" who "smashed

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[1] For the purposes of this motion only, Mr. Rajapaksa addresses the legal inadequacy of the Complaint even assuming that the well-pleaded allegations of the Complaint are true. This temporary suspension of disbelief is an accepted feature of U.S. legal procedures. As many Sri Lankan citizens are following this case, Mr. Rajapaksa wishes to make clear that *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.

[Decedent's] car's windows" and attacked him, lacerating his body and skull. *Id*. ¶ 43. According to the FAC, Decedent died at the hospital several hours later. *Id.* Plaintiff alleges that, as Defense Secretary, Mr. Rajapaksa "instigated and authorized the torture and extrajudicial killing of [Decedent]; had command responsibility over those who carried out the torture and assassination; and incited, conspired with, or aided and abetted subordinates" to commit "the torture, extrajudicial killing, and persecution of Decedent on political grounds." *Id*. ¶ 1. Plaintiff further alleges that, following Decedent's death, Mr. Rajapaksa engaged in a "cover-up" to "prevent an effective investigation into Decedent's killing," *id*. ¶¶ 65-67, and that he "failed to take necessary and reasonable measures to punish" the perpetrators, *id*. ¶ 78.

Plaintiff claims that the alleged acts constitute extrajudicial killing and torture in violation of the TVPA, 28 U.S.C. § 1350 note, and the Alien Tort Statute (ATS), 28 U.S.C. § 1350, *id*. ¶¶ 73-74, 92-93, as well as crimes against humanity under the ATS, *id.* ¶ 86. Plaintiff seeks "compensatory and punitive damages and declaratory and injunctive relief." *Id*. ¶ 6. She claims damages for her own injuries, as well as Decedent's. *Id*. ¶ 88. She also requests that this U.S. Court issue "an injunction prohibiting [Mr. Rajapaksa] from interfering with any criminal investigations" in Sri Lanka involving Decedent's death. *Id.* at p. 45.

ARGUMENT

I. Defendant Is Immune Under the Doctrine of Foreign-Official Immunity

As the FAC makes clear in its very first paragraph, "[t]his case arises from the [acts of] the government and security forces of Sri Lanka." FAC ¶ 1. Plaintiff's suit explicitly and directly challenges actions that, if undertaken by Mr. Rajapaksa, were in his official capacity as Sri Lanka's Defense Secretary. Specifically, Plaintiff alleges that Mr. Rajapaksa acted pursuant to his "power to direct investigations involving 'national security' and 'terrorism,'" as well as his "sweeping powers" under various "wartime measures." *Id.* ¶ 21. Mr. Rajapaksa is therefore immune from suit under

common-law foreign-official immunity, and this suit must be dismissed for lack of subject-matter jurisdiction. *See Doğan v. Barak (Doğan I)*, No. 2:15-cv-8130, 2016 WL 6024416, at *3 (C.D. Cal. Oct. 13, 2016), *aff'd*, *Doğan v. Barak (Doğan II)*, No. 16-56704, 2019 WL 3520606 (9th Cir. Aug 2, 2019).

If there were any doubt that principles of immunity barred these claims at the time Plaintiff filed the FAC, the Ninth Circuit extinguished it in a decision issued August 2, 2019. *See Doğan II*, 2019 WL 3520606. In *Doğan*, as here, the plaintiffs brought TVPA and other claims against a former high-ranking government official, the Israeli Defense Minister. *Id.* at *2. As here, plaintiffs alleged that the defendant should be held liable for acts carried out by forces under his command. *Id.* And, as here, plaintiffs sought to avoid the bar on suits against a foreign *sovereign* by suing a former foreign official in his individual capacity. *See id.* Judge Wright dismissed the suit on immunity grounds, and the Ninth Circuit affirmed, concluding after an "independent judicial determination" that Barak was "entitled to common-law foreign sovereign immunity." *Id.* at *5.

Doğan II provides the controlling standard for whether the immunity of the sovereign extends to a former foreign official like Mr. Rajapaksa: "Common-law foreign sovereign immunity extends to individual foreign officials for 'acts performed in [their] official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]'" *Id.* (quoting Restatement (Second) of Foreign Relations Law § 66(f) (1965)). If all the requisites for immunity are met, the court must dismiss the suit, even without a formal Suggestion of Immunity from the State Department.[3] *Id.*; *see also Mireskandari v. Mayne*, No. 12-cv-3861, 2016 WL 1165896, at *20 (C.D. Cal. Mar. 23, 2016); *Moriah v. Bank of China, Ltd.*, 107 F.

[3] The position of the Executive Branch is that it "need not appear in each case in order to assert the immunity of a foreign official." Brief for the United States at 3, 21 n.*, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579), 2007 WL 6931924.

Supp. 3d 272, 276-80 (S.D.N.Y. 2015). The determining factor in whether a government official is entitled to immunity for a challenged act is "whether the act was performed on behalf of the foreign state and thus [is] attributable to the state." *Moriah*, 107 F. Supp. 3d at 277 (quoting *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 13 (D.D.C. 2014)).

This suit presents a straightforward case of foreign-official immunity under *Doğan II*. 2019 WL 3520606, at *5. It challenges actions allegedly undertaken by Mr. Rajapaksa "in his capacity as Secretary of Defense" of Sri Lanka, FAC ¶ 65—"the most senior civil servant in the Ministry of Defense, which houses all branches of the Sri Lankan security forces," *id.* ¶ 18. *Compare, e.g.*, *id.* ¶ 11 (noting that Mr. Rajapaksa's "position placed him in overall command of Sri Lanka's armed forces, intelligence services, and police force"), *with Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) ("[P]laintiff's concession [in *Heaney v. Gov't of Spain*, 445 F.2d 501 (2d Cir. 1971)] that defendant was 'at all relevant times an employee and agent of the defendant Spanish Government' sufficed to dispose of the claim against the individual defendant[.]") (internal quotation marks omitted), *and Belhas v. Ya'alon*, 515 F.3d 1279, 1284 (D.C. Cir. 2008) ("The complaint identifies nothing that General Ya'alon is alleged to have done in an individual capacity, or other than as an agent or instrumentality of the state of Israel."). In addition, Plaintiff alleges that the branch of the Sri Lankan security forces that allegedly carried out the acts in question "was directly under the control of the Ministry of Defense" and that the attack "was part of a larger pattern" of Sri Lankan military strategy in a decades-long civil war. FAC ¶¶ 18-22, 27, 33.

Indeed, the allegations in the FAC closely track allegations the Ninth Circuit cited in holding that the Israeli Minister of Defense was entitled to immunity. In *Doğan II*, the court noted that "[t]he Complaint's claims for relief state—several times—that Barak's actions were done under 'actual or apparent authority, or color of

law, of the Israeli Ministry of Defense and the Government of the State of Israel.'" 2019 WL 3520606, at *5. The same is true of the FAC. FAC ¶ 75 ("The assassination was . . . committed under actual or apparent authority, or color of law, of the government of Sri Lanka."), ¶ 100 ("The attack and torture described herein were . . . committed under actual or apparent authority, or color of law, of the government of Sri Lanka."). The *Doğan II* Court also pointed to the allegation "that Barak's 'power . . . to plan, order, and control the IDF operation and troops as Minister of Defense is set out in Israel's Basic Law[.]'" 2019 WL 3520606, at *5. Plaintiff alleges a similar statutory basis for the alleged acts. *See* FAC ¶ 21 (describing "wartime measures" that "gave sweeping powers to the Secretary of Defense to order arrests and detention at his discretion"). Here, as in *Doğan II*, Plaintiff's own allegations establish that Mr. Rajapaksa is immune because he acted in his official capacity and "the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]" 2019 WL 3520606, at *5.

The allegation that Mr. Rajapaksa acted in derogation of a *jus cogens* norm against torture and extrajudicial killing does not change this analysis.[4] The Ninth Circuit in *Doğan II* expressly declined to recognize a *jus cogens* exception to common-law foreign-official immunity. *See* 2019 WL 3520606, at *7; *see also Matar*, 563 F.3d at 15 ("A claim premised on the violation of *jus cogens* does not withstand [common-law] foreign sovereign immunity."). As the district court in *Doğan I* explained, recognizing a *jus cogens* exception "would effectively eviscerate immunity for *all*

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

foreign officials," because an inquiry into whether a *jus cogens* violation occurred "is inextricably intertwined with the merits of the underlying claim[.]" 2016 WL 6024416, at *10 (emphasis in original).

Nor does the analysis change simply because Plaintiff is suing under the TVPA. The *Doğan II* Court expressly held—and it is thus the law in this Circuit—that "the TVPA does not abrogate foreign official immunity." 2019 WL 3520606, at *5-7. The Ninth Circuit reasoned that a contrary approach "would open a Pandora's box of liability for foreign military officials," and "[t]he Judiciary . . . would be faced with resolving any number of sensitive foreign policy questions which might arise in the context of such lawsuits." *Id.* at *6. "It simply cannot be that Congress intended the TVPA to open the door to that sort of litigation." *Id.*

Applying the binding standard set forth in *Doğan II*, this Court should dismiss the FAC on immunity grounds.

II. The FAC Should Be Dismissed for *Forum Non Conveniens*

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

Forum non conveniens is rooted in both "international principles of sovereignty and territoriality" and "constitutional doctrines such as the political question doctrine[.]" *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014). To determine whether to dismiss a case under the doctrine, courts must first determine whether an adequate alternative forum exists. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142-43 (9th Cir. 2001) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257 (1981)). Second, they must weigh "whether the balance of private and public interest factors favors dismissal." *Id.*

This case passes both tests. First, Sri Lanka is an adequate forum to hear this case. The Sri Lankan courts would have jurisdiction over the types of claims brought

by the Plaintiff against Mr. Rajapaksa, and, if properly pleaded, the allegations in the FAC would constitute the basis for a cause of action recognized by Sri Lankan law. *See* de Silva Decl. ¶ 4.3. Second, both the public and private interest factors favor dismissal. The public interest analysis turns on whether adjudicating the case in the plaintiff's chosen forum is appropriate in the context of the legal system at large. Because this case involves questions relating to politics and security that go to the heart of Sri Lanka's national sovereignty—and because it involves no questions that directly relate to California—Sri Lanka, not the Central District of California, is the appropriate forum. The traditional private factors are rooted in reasonableness and convenience. *Piper Aircraft*, 454 U.S. at 256. In this case, a citizen and resident of Australia has sued a citizen and resident of Sri Lanka for alleged acts that occurred exclusively in Sri Lanka. Adjudicating it here is neither reasonable nor convenient.

A. Sri Lanka Is an Adequate Alternative Forum

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

The test's first prong is satisfied "when defendants are amenable to service of process in the foreign forum and when the entire case and all parties can come within the jurisdiction of that forum." *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1029 (9th Cir. 2011) (quotation marks omitted). That is the case here. *First*, Mr. Rajapaksa is amenable to service of process in Sri Lanka. *See* de Silva Decl. ¶¶ 3.74-3.77, 3.86. *Second*, Sri Lankan courts would have jurisdiction over similar claims brought in Sri Lanka. *See id.* ¶¶ 4.3-4.6, 4.14-4.15. *Third*, it is not necessary for Plaintiff to be physically present in Sri Lanka to file a civil action; a plaintiff living

abroad may bring suit from outside the country by granting a power of attorney to a competent resident of Sri Lanka or, for claims alleging an infringement of a fundamental right, by sending a postcard addressed to the Supreme Court's Chief Justice. *See id.* ¶¶ 3.70, 3.75, 4.16-4.18.

The second prong, whether the alternative jurisdiction offers a satisfactory remedy, is deliberately "easy to pass." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006). The Supreme Court has held that a court should find a forum inadequate only if "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft*, 454 U.S. at 254 & n.22. Rather, "[t]he forum need only provide *some potential* avenue for redress." *Petersen v. Boeing Co.*, 108 F. Supp. 3d 726, 731 (D. Ariz. 2015) (quotation marks omitted) (emphasis added). In other words, "a foreign forum will be deemed adequate unless it offers no practical remedy for the plaintiff's complained of wrong." *Lueck*, 236 F.3d at 1144.

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

Under this standard, Sri Lanka's remedies provide an adequate alternative. Sri Lanka has a well-established legal system steeped in the English common law and

Roman Dutch Law, among other traditions, as well as a constitutional structure of government and an independent judiciary. *See* de Silva Decl. ¶¶ 3.1-3.41. A civil cause of action is available for wrongful death, assault, and battery, *id.* ¶¶ 3.63, 3.68, 4.4; a plaintiff can bring an action to recover damages (including emotional damages) caused by harms suffered by a parent who is legally incapacitated, *id.* ¶ 4.4; and civil actions may be brought against both sitting and former public officials, *id.* ¶¶ 3.50-3.52, 3.86. Moreover, Sri Lankan law criminalizes torture. *See id.* ¶ 3.88.

Recent developments demonstrate that the Sri Lankan judiciary is capable of providing Plaintiff with redress. At most, the FAC alleges that Sri Lanka prior to 2015 would not have constituted an adequate alternative forum because of challenges within the judiciary. FAC ¶ 61. But those challenges have since been addressed, winning praise from international monitoring organizations.[5] And the U.S. Department of Justice has noted that Sri Lankan "law provides for an independent judiciary, and the government generally respect[s] judicial independence and impartiality."[6]

Sri Lankan courts have recently demonstrated these qualities by permitting criminal cases against former high-ranking public officials to proceed. *See* de Silva Decl. ¶ 4.10. Indeed, Mr. Rajapaksa is currently facing criminal charges in Sri Lanka's High Court based on allegations that he aided and abetted board members of the Land Reclamation and Development Authority in misappropriating public funds to build a

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[5] *See, e.g.*, Freedom House, *Freedom of the World 2019, Sri Lanka Country Report* (2019), https://freedomhouse.org/report/freedom-world/2019/sri-lanka (raising Sri Lanka's judicial independence score from two to three out of four because the Supreme Court and Court of Appeal "demonstrated their independence" during a 2018 constitutional crisis); World Justice Project, *World Justice Project Rule of Law Index 2017-2018*, at 25 (2018), 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).

[6] U.S. Dep't of Justice, *Sri Lanka 2018 Human Rights Report*, at 8, https://www.justice.gov/eoir/page/file/1145711/download.

memorial. *See id.* ¶ 4.11; *id.*, Ex. 2 (copy of indictment with certified translation). Although Mr. Rajapaksa vigorously disputes these charges, they demonstrate that Sri Lanka is capable of proceeding against high-level government officials for wrongful conduct undertaken while in office.

Finally, Plaintiff suggests that Sri Lanka does not provide an adequate forum because "judicial delays are extreme," FAC ¶ 60, and Sri Lanka's witness protection system is lacking, *id.* ¶ 61. But mere assertions of lengthy judicial delays are insufficient to support a finding that a forum is inadequate. *See Tuazon*, 433 F.3d at 1179 (reversing a lower court's decision that the Philippine courts were inadequate, observing that plaintiff's claims that civil proceedings could face delays of up to thirty years were made in an "evidentiary void"); *see also Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1074 (C.D. Cal. 2012) (holding that "[p]laintiffs[']' focus on the general backlog of cases throughout the Pakistani legal system, largely citing statistics from unidentified civil courts," was insufficient to demonstrate that the case at bar would suffer similar delay). In fact, Sri Lankan courts are committed to timely adjudicating cases and in recent years have implemented reforms to significantly improve judicial efficiency. *See* de Silva Decl. ¶ 3.57. In particular, Sri Lanka has recently amended its civil procedure code to improve civil case management. *Id.*

Similarly, Plaintiff's assertions regarding Sri Lanka's witness protection system are neither correct nor relevant. Sri Lanka affords plaintiffs and witnesses substantial legal protections from intimidation and retaliation. *See* de Silva Decl. ¶ 3.82. Indeed, in appropriate circumstances, they are permitted to proceed anonymously. *Id.* And even if, as Plaintiff contends, witnesses are "reluctant to come forward in politically sensitive cases" in Sri Lanka, FAC ¶ 61, those same Sri Lankan witnesses would have to come forward if the case were adjudicated here.

B. Plaintiff's Choice of Forum Merits Minimal Deference

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

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

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

C. The Public and Private Interests Strongly Favor Dismissal

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

1. The Public Interest Factors Favor Dismissal

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

First, there is no local interest in this lawsuit. The alleged acts were taken exclusively in Sri Lanka by a resident of Sri Lanka against another resident of Sri Lanka. By contrast, Sri Lanka has a strong national interest in adjudicating this dispute, which arises from facts that are the subject of an ongoing investigation by the authorities of that country. *See* de Silva Decl. ¶¶ 4.22-4.23.

Second, while this Court is well equipped to interpret federal law claims, this case is not limited to federal law. The Court will necessarily need to engage with Sri Lankan law, particularly as it relates to the powers of the Defense Secretary and the chain of command within the Sri Lankan Ministry of Defense, to fairly adjudicate Plaintiff's claims.

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

Fourth, caseloads in the Central District of California are high, and there is no reason to further burden this Court with a case lacking any connection to this District or the United States more broadly.

Finally, the costs of this case will significantly outstrip any local interest it may hold. The facts alleged in the FAC suggest that all relevant evidence is located abroad, and some appears to be in the possession of a foreign government. *See*, *e.g.*, FAC ¶ 27 ("court filings made by the CID"); *id*. ¶ 43 ("mobile telephone tower logs"); *id*. ¶ 46 ("false autopsy report" by the Judicial Medical Officer and Decedent's notebook "collected by police officers at the scene of the crime," which allegedly later "disappeared"). The parties and the Court will need to expend substantial resources to request the evidence, and, if they obtain it—which is far from certain, given the national security implications raised by this litigation—there may be translation costs.

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

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

Id.

So too here, with even greater force. The Sri Lankan courts are well-established, with deep roots in Sri Lanka's Commonwealth history and the common-law tradition. *See* de Silva Decl. ¶¶ 3.1. The Sri Lankan Constitution guarantees judicial independence, and the Sri Lankan courts have recently demonstrated this quality by permitting prosecutions of former public officials to proceed. *See id.* ¶¶ 3.36-3.41, 4.10-4.11. Further, as the FAC itself establishes, in 2015 the Sri Lankan government "announced an ambitious transitional justice plan that included calls for criminal accountability for human rights abuses committed during the Rajapaksa regime." FAC ¶ 58. While Plaintiff contests the efficacy of those efforts, *id.*, this Court is not best positioned to adjudicate a foreign nation's approach to internal rapprochement. The cultural, political, historical, psychological, and communal issues implicated by such a truth and reconciliation effort are powerful and intensely local. Adjudicating this Sri Lankan dispute in California would threaten this process in ways a U.S. court could not foresee, and would deprive the Sri Lankan judiciary of the opportunity to "stand tall" and "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 (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.* at 1145-46. Here, not just some but *all* factors dictate dismissal.

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

Fourth, the most material and important witnesses are abroad and have no "accessibility and convenience to the forum," for two reasons. *Lueck*, 236 F.3d at 1146 (citation omitted). First, according to the Plaintiff, "[w]itnesses are . . . reluctant to come forward in politically sensitive cases because they fear reprisals." FAC ¶ 61. But if this is the case, such witnesses would be even less likely to testify here, where

the court cannot compel them and they potentially would need to travel across the world to do so. Second, many of the key witnesses in this case may be unwilling to testify because doing so could expose them to liability. Plaintiff's claims rest on theories of command responsibility, conspiracy, and aiding and abetting, *see* FAC ¶ 1; as a result, the witnesses most material to her case—the people who allegedly conspired with Mr. Rajapaksa and executed his orders—could be named third-party defendants. Where, as here, a case involves potential third-party defendants whom the court cannot compel to testify, that factor "clearly support[s] holding the trial" in the foreign forum. *Mujica*, 381 F. Supp. 2d at 1152-53 (citation omitted).

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

Sixth, even if Plaintiff were to succeed on the merits, it would be difficult to enforce the judgment. Mr. Rajapaksa resides in Sri Lanka, where he is the nominee of a major political party for president, and he has relinquished his U.S. citizenship.

Finally, this lawsuit is a classic "foreign-cubed" case—a case "where the plaintiffs are foreign, the defendants are foreign, and all the relevant conduct occurred abroad." *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2116 (2016) (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment). These facts suggest that the "practical problems" of this case will make trial in Plaintiff's chosen forum anything but "easy, expeditious, [or] inexpensive." *Lueck*, 236 F.3d at 1145 (quoting *Gulf Oil*, 330 U.S. at 508).[7]

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[7] When conducting a *forum-non-conveniens* analysis, courts in the Ninth Circuit also review relevant choice-of-law principles. *See, e.g.*, *Mujica*, 381 F. Supp. 2d at 1141 ("A district court must also make a choice of law determination in considering whether to dismiss on the basis of forum non conveniens"); *Lueck*, 236 F.3d at 1148. Where, as here, suit is brought under federal law, "the choice of law analysis is only determinative when the case involves a United States statute requiring venue in the

III. The FAC Should Be Dismissed Based on Principles of Comity

Alternatively, the Court should dismiss this case as a matter of international comity. Comity is a prudential abstention doctrine intended "to promote cooperation and reciprocity with foreign lands." *AirScan*, 771 F.3d at 598 (citation omitted). It is "the golden rule among nations [that] compels [courts] to give the respect to the laws, policies, and interests of others that [they] would have others give to [their] own in the same or similar circumstances." *Id*. at 608 (quotation marks omitted). Comity "counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *Id.* at 598 (citation omitted).

International comity traditionally encompasses two distinct doctrines. The first, legislative, or prescriptive, comity, "guides domestic courts as they decide the extraterritorial reach of federal statutes." *Id*. at 598-99 (citation omitted). The second, adjudicatory comity, or comity among courts, "arises in two contexts: (i) determining the preclusive effect or enforceability of a foreign ruling or judgment; or (ii) evaluating whether to stay or dismiss an action in a domestic court in favor of either a pending or future proceeding in a foreign forum." *Id*. at 621 (Zilly, J., concurring in part and dissenting in part).

The Ninth Circuit recently applied adjudicatory comity in *AirScan*, 771 F.3d 580, to dismiss claims against an American corporate defendant for its alleged involvement in a bombing of a Colombian village. Although the court had jurisdiction to hear the case, it deferred because the plaintiffs had already successfully brought related claims against different defendants in Colombia. To reach its decision, the

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United States." *Id*. Neither 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 1154. As such, "the applicability of United States law to the various causes of action 'should . . . not be given conclusive or even substantive weight.'" *Lueck*, 236 F.3d at 1148 (quoting *Piper Aircraft*, 454 U.S. at 247).

court applied the three-part analysis introduced in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004), under which a court "evaluate[s] several factors, including [1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." *AirScan*, 771 F.3d at 603. The court held that, "because of the strength of the U.S. government's interest in respecting Colombia's judicial process, the weakness of California's interest in the case, the strength of Colombia's interests in serving as an exclusive forum, and the adequacy of the Colombian courts," the plaintiffs' claims were nonjusticiable. *Id.* at 615.

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

IV. Plaintiff's Claims Are Barred for Multiple Other Reasons

A. The ATS Claims Fail Because They Are Entirely Extraterritorial

The ATS provides district courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S.

108 (2013), the Supreme Court explained that "the presumption against extraterritoriality applies to claims under the ATS," and thus a court must dismiss any ATS suit in which "all the relevant conduct took place outside the United States." *Id.* at 124; *see also id.* at 124-25 (explaining that even when some relevant conduct took place domestically—and thus the claim "touch[es] and concern[s] the territory of the United States"—the domestic conduct must be sufficient "to displace the presumption against extraterritorial application"). Thus, "[i]f all the relevant conduct" for an ATS claim "occurred abroad, that is simply the end of the matter under *Kiobel*" and the claim must be dismissed. *AirScan*, 771 F.3d at 594 (quoting *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013)); *see also id.* at 592 (dismissing an ATS claim because "[t]he allegations that form the basis of Plaintiffs' claims exclusively concern conduct that occurred in Colombia").

Here, the FAC contains not a single allegation of domestic conduct. While living *in Sri Lanka*, Mr. Rajapaksa allegedly ordered or facilitated the killing of the decedent *in Sri Lanka*, and then allegedly obstructed a legitimate investigation *in Sri Lanka*. Although Mr. Rajapaksa—now a resident of Sri Lanka—briefly lived in the United States, there is no allegation that he conspired with anyone in this country, nor, indeed, that he engaged in *any* relevant conduct here.

The above analysis would not change even if, as the FAC alleges, Mr. Rajapaksa were still a United States citizen, or even if he "continues to travel frequently to California." FAC ¶ 11. As the Ninth Circuit made clear in *AirScan*, "the Supreme Court has never suggested that a plaintiff can bring an action based solely on extraterritorial conduct *merely because* the defendant is a U.S. national. To the contrary, the Court has repeatedly applied the presumption against extraterritoriality to bar suits meeting that description." *AirScan*, 771 F.3d at 594 (emphasis in original). Indeed, "in all of the post-*Kiobel* cases in which courts have permitted ATS claims against U.S. defendants to go forward, the plaintiffs have alleged that *at least some* of

the conduct relevant to their claims occurred in the United States." *Id.* at 595 (emphasis added). There is no such relevant conduct alleged in the FAC. Moreover, Plaintiff's allegation that Mr. Rajapaksa "returned to the United States multiple times in 2008 and 2009," FAC ¶ 10, is irrelevant. "*Kiobel* rejected the notion that a defendant's mere presence in the United States is sufficient to displace the presumption against extraterritoriality." *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 (2d Cir. 2014); *see also Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016) ("Mere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context."). The ATS claims are therefore barred.

B. Plaintiff's Failure to Exhaust Local Remedies Bars Her TVPA Claims

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

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

The Ninth Circuit has interpreted "adequate and available remedies" for purposes of the TVPA to accord with the *forum non conveniens* standard articulated in

Piper Aircraft, 454 U.S. 235. *See Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1025-26 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (holding that Israeli law provided adequate remedies and therefore that the exhaustion requirement applied). For the same reasons that Sri Lanka constitutes an adequate forum for purposes of *forum non conveniens*, it provides adequate and available remedies under the statute.

Nevertheless, Plaintiff suggests that exhaustion is futile because "judicial delays are extreme" and "politically sensitive cases, such as those implicating security forces in human rights abuses, are often stalled or simply not investigated." FAC ¶ 60. But "[a] litigant asserting inadequacy or delay must make a powerful showing," and generalized assertions of corruption or delay are insufficient to establish that the alternative forum is inadequate. *Tuazon*, 433 F.3d at 1179. This standard sets a very high bar, which Plaintiff cannot meet. *See id.* (stating that the court was aware of only two federal cases "to hold that an alternative forum was inadequate because of corruption"). Because Sri Lanka provides adequate and available remedies for the causes of action Plaintiff alleges accrued there, and because they failed to exhaust those remedies, Plaintiff's suit is barred.

C. Plaintiff Cannot Bring TVPA Claims for Torture or Her Own Injuries

In addition to bringing a claim for Decedent's extrajudicial killing under the TVPA, Plaintiff seeks recovery for Decedent's alleged torture and for her own injuries as a result of the alleged acts. Neither type of claim is cognizable under the TVPA.

First, under the plain language of the TVPA, Plaintiff may not bring a claim for torture on another's behalf. The statute provides that a person who "subjects an individual to torture shall, in a civil action, be liable for damages *to that individual*." 28 U.S.C. § 1350 note (emphasis added). By contrast, the TVPA provision for extrajudicial killing provides for liability to "the individual's legal representative, or to

any person who may be a claimant in an action for wrongful death." *Id.* "[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Bates v. United States*, 522 U.S. 23, 29 (1997) (where the term "intent to defraud" appeared in one provision and not a parallel provision, applying *Russello* to decline to read the term into the latter clause). As such, the FAC's new claim for torture is not cognizable under the TVPA, and it must be dismissed. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 192 (D. Mass. 1995) (holding that plaintiffs could not recover for claims of arbitrary detention or torture on behalf of their deceased relatives under the TVPA).

Second, although the TVPA permits Plaintiff to bring a claim *on behalf of* Decedent for extrajudicial killing, it does not permit her to shoehorn her own alleged injuries and request for damages into that cause of action. *See* FAC ¶ 103 (alleging that "the attack and torture endured by Decedent . . . prior to his death also caused Plaintiff . . . severe pain and suffering and emotional distress" and seeking damages "in an amount to be proven at trial"). *See Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 30 (D.D.C. 2007) ("The plain language and the legislative history of the TVPA make clear that standing is limited to the victim herself or one bringing a claim on behalf of a direct victim . . . Thus, Plaintiffs are not entitled to recover under the TVPA for any injuries they sustained as a result of [defendant's] acts."). Plaintiff's claims for damages based on her own injuries must be dismissed.

CONCLUSION

This case—brought against a former Sri Lankan Defense Secretary and current presidential candidate just before elections there—has no place in a U.S. court. Everything about this case is centered in Sri Lanka; nothing connects it to this District. The Defendant is immune from suit for the alleged official acts. And the FAC is

barred because all the alleged conduct occurred abroad, because Plaintiff failed to exhaust Sri Lankan remedies, and because Plaintiff is not a proper TVPA plaintiff. The Court should dismiss the FAC in its entirety and with prejudice.

Dated: August 16, 2019

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*Applications to appear *pro hac vice* pending.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I electronically filed the foregoing **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT 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