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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Declarations of Steven R. Ratner, Juan E. Méndez, and Suri Ratnapala submitted concurrently herewith

Date: September 16, 2019
Time: 10:00 am
Courtroom: 880
Judge: Hon. Manuel L. Real

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INTRODUCTION

Plaintiff Ahimsa Wickrematunge ("Plaintiff") respectfully submits this memorandum of law in opposition to Defendant Nandasena Gotabaya Rajapaksa's ("Defendant") motion to dismiss the First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) on several grounds. For the reasons stated herein, Defendant's arguments are without merit, and his motion to dismiss ("MTD") should be denied.

First, with no suggestion of immunity from the U.S. Department of State and no suggestion that Sri Lanka has authorized or ratified Defendant's conduct, Defendant has no support for his claim to common-law immunity.

Second, Defendant cannot meet the heavy burden of demonstrating Sri Lanka as an adequate and available forum to warrant dismissal under the doctrine of *forum non conveniens*. This suit cannot be litigated in a Sri Lankan court: as the reports submitted by Plaintiff's experts, Professors Juan Méndez, Steven Ratner, and Suri Ratnapala demonstrate, Sri Lankan law offers no adequate civil remedy to Plaintiff, and litigation in Sri Lanka would be so fraught with corruption, delay, and danger to litigants and witnesses, as to render any effort at redress futile and meaningless. Plaintiff's FAC likewise alleges facts establishing the futility of exhausting any domestic remedies in Sri Lanka.

Third, Defendant's "alternative" argument on international comity, which relies on the same faulty assertions regarding the independence and adequacy of the Sri Lankan judicial system, fails for the same reasons. Nor could any concern about comity outweigh the significant U.S. interest in this matter: namely, regulating the conduct of its citizens, including Defendant, for egregious violations of international law prohibiting extrajudicial killing and torture.

Fourth, Defendant's U.S. citizenship is sufficient to rebut the *Kiobel* presumption against extraterritoriality for claims filed under the Alien Tort Statute

("ATS"). At a minimum, Defendant's travel to the United States during the period of the alleged conspiracy warrants jurisdictional discovery regarding conduct that may further touch and concern the United States.

Finally, the Torture Victim Protection Act ("TVPA") creates a civil action for recovery that plainly encompasses damages for both torture and extrajudicial killing and permits Plaintiff to bring claims on her and her father's behalf.

BACKGROUND[1]

On April 4, 2019, Plaintiff brought this action for torture, extrajudicial killing, and crimes against humanity in violation of international law under the TVPA (28 U.S.C. § 1350 note) and the ATS (28 U.S.C. § 1350), for the torture and assassination of her father, Lasantha Wickrematunge ("Lasantha" or "Decedent"), a prominent journalist and defender of human rights in Sri Lanka. FAC ¶¶ 2, 42-43. The FAC alleges that the attack against Decedent was carried out by members of the Sri Lankan Directorate of Military Intelligence under the command and control of Defendant, then Secretary of Defense, and that the attack was part of a larger pattern of persecution and extrajudicial killing targeting independent journalists during Defendant's time in office from 2005 to 2015. *Id.* ¶¶ 23-31, 34-39.

The initial Sri Lankan investigation into Decedent's assassination faced numerous obstructions, including a flawed autopsy report, evidence tampering, witness unavailability, and multiple transfers between departments under Defendant's command. *Id.* ¶¶ 45-52. Defendant's and his family's political influence further impeded any real possibility of domestic accountability. *Id.* ¶ 57.

Although a new government reopened the investigation into Decedent's death in 2015, the case—like nearly all cases against military officials for human

[1] Plaintiff submits this memorandum in compliance with the standing order of Judge Manuel Real, who remains the assigned judge on the docket.

rights abuses—has stalled due to political pressures and witness intimidation. *Id.* ¶ 58. Defendant maintains powerful political influence: Defendant's brother is the leader of the opposition party and indeed, Defendant is a presidential candidate in the upcoming Sri Lankan election. *Id.* ¶ 59, MTD 17. The current President has also promised to shield members of the former military command from prosecution. FAC ¶ 59. In addition, fear of reprisals in politically sensitive cases like this one has dissuaded witnesses from participating in investigations into Decedent's death, and Sri Lanka's ineffective witness protection program has done little to assuage these fears. *Id.* ¶ 61.

Due to the futility of seeking any remedy in Sri Lanka, Plaintiff initiated the present action in the Central District of California, while Defendant, a dual U.S. and Sri Lankan citizen, was physically present in the forum. Plaintiff filed the First Amended Complaint on July 15, 2019.

STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), the Court must "accept [Plaintiff's] allegations as true and construe them in the light most favorable to plaintiff[]." *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224–25 (9th Cir. 2017). The same standard applies to Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction where, as here, the defendant asserts that the "allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

ARGUMENT

I. Defendant Is Not Entitled to Foreign-Official Immunity.

Defendant is not entitled to foreign-official immunity for the attack, torture, and murder of Lasantha, a civilian journalist. Under common law, U.S. courts determine conduct-based foreign-official immunity with a "two-step procedure" that considers: (1) whether "the diplomatic representative of the sovereign []

request[s] a 'suggestion of immunity' from the State Department"; and (2) absent a suggestion of immunity ("SOI"), "whether the ground of immunity is one which it is the established policy of the State Department to recognize." *Samantar v. Yousuf*, 560 U.S. 305, 311-312 (2010).

Defendant plainly fails the first step. Unlike the facts of the Ninth Circuit's recent *Doğan v. Barak* ("Doğan II") decision,[2] on which Defendant heavily relies, the State Department has not filed an SOI in this case. Nor has Defendant offered any proof that Sri Lanka even made any such request.

As for the second step, the asserted "ground of immunity" extends to "acts performed in [a foreign official's] official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]" MTD 4; *Doğan II* at *5 (quoting Restatement (Second) of Foreign Relations Law § 66(f) (1965)). Defendant relies on *Doğan II* to argue that the attack on Lasantha constitutes this requisite "official" act because Defendant was Secretary of Defense and used government and security forces to commit his crimes. MTD 5-6. In doing so, Defendant disregards the key facts that "form the basis" of the *Doğan II* Court's finding of "official" conduct that necessitated "enforc[ing] a rule of law against the state": there, unlike here, Israel *authorized and ratified* the defendant's military conduct. *Doğan II* at *5, 8.[3]

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[2] Israel confirmed that the defendant's actions "were performed exclusively in his official capacity as Israel's Minister of Defense," and that the lawsuit concerned only "authorized military action taken by the State of Israel." *Doğan v. Barak* (*Doğan I*), No. 2:15-cv-8130, 2016 WL 6024416 at *12 (C.D. Cal. Oct. 13, 2016) *aff'd Dogan II*, No. 16-56704, 2019 WL 3520606 (9th Cir. Aug. 2, 2019). Israel then asked the State Department to file an SOI, and the State Department did so, concluding that Barak's actions were "official" government acts "authorized by Israel." *Id*. at *3; *Doğan II* at *3.

[3] Specifically, the defendant purportedly was "instructed by the Prime Minister to conduct" the military operation, *Doğan II* at *5, and "the sovereign state officially acknowledge[d] and embrace[d]" his actions after the fact. *Doğan I* at *12.

The Ninth Circuit distinguished its ruling from previous cases where, as here, the foreign state had not authorized or ratified the defendant's conduct. Addressing the *Marcos* cases, the *Doğan II* Court explained that: "Marcos was not entitled to immunity because the Philippines did not ratify his conduct." *Doğan II* at *7 n. 7 (citing *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992)).[4] The *Doğan II* Court similarly distinguished the Fourth Circuit's decision in the *Yousuf* case because, in that case, the State Department had issued a suggestion of non-immunity, there was no recognized foreign government to request immunity on defendant's behalf, and "he was a U.S. legal permanent resident, enjoying 'the protections of U.S. law,' and thus 'should be subject to the jurisdiction of the courts.'" *Doğan II* at *8 (referring to *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012)). Therefore, the *Doğan II* Court concluded that "as in the *Marcos* cases, the [*Yousuf*] defendant was never given immunity in the first place." *Id.*

Here, Sri Lanka has neither authorized nor ratified Defendant's conduct. To the contrary, Sri Lankan law enforcement agencies have, albeit ineffectively, purported to investigate the attack, torture, and murder of Lasantha as a criminal act. FAC ¶¶ 45-52. In a public interview shortly after Lasantha's murder, Defendant himself did not pretend that Lasantha's killing was related to any purported military operation, instead calling the attack "just another murder." FAC ¶ 47. Moreover, Defendant is (and was at all relevant times) a U.S. citizen, "enjoying the protections of U.S. law, and thus should be subject to the jurisdiction of the courts." *Doğan II* at *8 (internal quotation marks omitted). Defendant has thus failed to show that Lasantha's murder was an authorized or ratified state act;

[4] *Cf. Doe 1 v. Buratai*, 318 F.Supp.3d 218, 233 (D.D.C. 2018) ("Nigeria's authorization and ratification establishes that the defendants acted in their official capacities.").

he is thereby not entitled to immunity.[5]

II. Defendant's *Forum Non Conveniens* Argument Should Be Rejected.

Forum non conveniens (FNC) is "an exceptional tool to be employed sparingly." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011). Defendant bears the burden of demonstrating "an adequate alternative forum, and that the balance of private and public interest factors favors dismissal." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002). For the reasons set out below, Defendant fails to meet this heavy burden.

A. Sri Lanka Is Not an Adequate Alternative Forum.

An alternative forum is not adequate if it "does not permit litigation of the subject matter of the dispute" and "the remedy provided [would be] so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft v. Reyno,* 454 U.S. 235, 254 & n.22 (1981). Here, Sri Lanka cannot be considered an adequate forum for at least five reasons, each of which is independently sufficient to deny Defendant's FNC motion.

First, the remedies that Defendant identifies in Sri Lanka (MTD 9-10; de Silva Decl. ¶¶ 4.3-4.6), are time-barred and as such, unavailable. *Carijano*, 643 F.3d at 1235 (alternative forum is inadequate if statute of limitations bars the claims). Civil claims for wrongful death, assault and battery have a two-year

[5] Nor would the effect of exercising jurisdiction in the present case be to enforce a rule of law against Sri Lanka. *See e.g.*, *Lewis v. Mutond*, 918 F.3d 142, 147 (4th Cir. 2019) (finding that exercising jurisdiction does not enforce a rule of law against the foreign state when defendants are sued in their individual capacities). Further, because Defendant is not entitled to foreign-official immunity in the first place, there is no reason for the Court to consider whether an exception to such immunity applies, either because Defendant acted in violation of a *jus cogens* norm or because the TVPA abrogates foreign official immunity under these circumstances. MTD 6-7, n. 4. *See Doğan II*, at *8 (declining to "carve[] out an exception to foreign official immunity *under the circumstances presented here*") (emphasis added). Even if the Court were to consider this question, the very different circumstances noted here would warrant such an exception.

statute of limitations, and a Fundamental Rights Petition must be filed within one month. Ratnapala Decl. ¶¶ 33, 35, 37. Defendant's expert asserts that equitable tolling may be available (de Silva Decl. ¶ 4.21), but identifies no circumstances upon which tolling is granted. In fact, Sri Lankan courts have no discretion to toll the limitation period related to the civil claims purportedly available to Plaintiff, and the Sri Lankan Supreme Court has only extended the limitation period for Fundamental Rights Petitions in extremely narrow situations, such as when the petitioner was held incommunicado or hospitalized due to torture while in custody—none of which apply here. Ratnapala Decl. ¶¶ 34-40, 43, n. 11.

Second, and in any event, Sri Lankan law does not recognize civil claims for extrajudicial killing, crimes against humanity, or torture—"the subject matter of the dispute." *See Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991); Ratnapala Decl. ¶¶ 5, 19, 21-22. Defendant argues that a civil action for wrongful death, assault, or battery is available. MTD 10. But because these causes of action fail to reflect the "gravity" and "universally-condemned nature" of the alleged offenses—which are "more than the sum of their parts"—they are inadequate. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 337-38 (S.D.N.Y. 2003); *see also Adhikari v. Daoud & Partners*, Civ. Act. No. 09-cv-1237, 2011 WL 13261998, at *17 (S.D. Tex. Dec. 12, 2011) (finding Jordan to be an inadequate forum where defendant identified tort claims generally but failed to identify causes of action akin to those under ATS and Trafficking Victims Protection Act). Defendant's citation of Sri Lanka's criminalization of torture cannot overcome this inadequacy of Sri Lankan law.[6] *See*

[6] Defendant's expert also cites to Fundamental Rights Petitions in Sri Lanka, which provide remedy for constitutional violations. De Silva Decl. ¶ 4.5. The Fundamental Rights Petition does not include redress for crimes against humanity, a violation of international law alleged here (Ratnapala Decl. ¶ 27), and is therefore inadequate to establish the sufficiency of Sri Lanka as a forum for the subject matter of the dispute.

City of Almaty v. Khrapunov, 685 F. App'x 634, 635 (9th Cir. 2017) (finding the existence of possible criminal charges insufficient to establish adequacy of Swiss forum for civil claims); Méndez Decl. ¶ 19 (UN report finding Sri Lanka's tort claims inadequate to reflect the gravity, international character, and harm to victims of human rights violations such as torture and extrajudicial killing).

Third, the risk of reprisal in Sri Lanka for Plaintiff, witnesses, and lawyers, further heightened by the political influence of the Rajapaksa family (FAC, ¶¶ 2, 28-30, 49, 53-59, 61-63; Méndez Decl. ¶ 28-31), preclude finding that Sri Lanka is an adequate alternative forum. *Hassen v. Nahyan*, No. CV 09-01106 DMG MANX, 2010 WL 9538408 at *21 (C.D. Cal. Sept. 17, 2010) (denying dismissal based on FNC because of risk of reprisal in United Arab Emirates); *see also Doe v. Exxon Mobil Corp.,* 393 F. Supp. 2d 20, 29 (D.D.C. 2005) (same in Indonesia); *Rasoulzadeh v. Associated Press,* 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (same in Iran), *aff'd mem.,* 767 F.2d 908 (2d Cir.1985). The nominal existence of legal protections—including the purported ability to file a case *in absentia* and present anonymous testimony "in appropriate circumstances" (MTD 5, 11)—does not mitigate these dangers. Witness, victim, and investigator intimidation, retaliation, and surveillance remain rampant. Méndez Decl. ¶¶ 12.c, 31; Ratner Decl. ¶¶ 25-28. Due to the risks of reprisal and targeted obstruction, Plaintiff could not receive "a fair or even a safe trial" if she filed this complaint in Sri Lanka. *Hassen*, 2010 WL 9538408 at *21.

Fourth despite Defendant's claims concerning the independence of Sri Lanka's courts (MTD 10; de Silva Decl. ¶¶ 3.36-3.41), international experts have documented the Sri Lankan judiciary's lack of judicial independence and susceptibility to political interference, including by Defendant and his family, especially in in human rights claims against officials in the security sector. FAC

¶¶ 57–59; Ratnapala Decl. ¶¶ 44-47; Méndez Decl. ¶¶ 14-17; Ratner Decl. ¶¶ 14, 17-24; *Hassen*, 2010 WL 9538408 at *13, 21 (denying FNC motion "[i]n light of the less-than-clear-cut separation between the political and judicial branches of the UAE government, questions raised regarding the independence of the UAE judiciary, and … the high political positions held by Defendants").

Fifth, Plaintiff has presented expert testimony showing that cases such as hers, seeking to hold government officials accountable for human rights violations, face significant delays of up to 30 years (Méndez Decl. ¶¶ 20-26, *cf*. Ratner Decl. ¶¶ 21-22, 29)—amounting to a denial of justice and rendering "meaningless a putative remedy."[7] *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1227 (3d Cir. 1995).

Each of the foregoing factors alone is sufficient to establish that Sri Lanka is an inadequate forum. Taken together, it is evident that any purported remedy in Sri Lanka is "so clearly inadequate or unsatisfactory, that it is no remedy at all." *Carijano*, 643 F.3d at 1225-1226.

B. Plaintiff's Choice of Forum Is Entitled to Deference.

Contrary to Defendant's assertions that Plaintiff's choice of forum "merits minimal deference" because the "central purpose" of the FNC inquiry is convenience (MTD 12), Plaintiff's forum choice is entitled to more deference. "[T]he more it appears that a *domestic or foreign plaintiff's* choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference will be given to the plaintiff's forum choice." *Mujica v. Occidental Petroleum Corp*., 381 F. Supp. 2d 1134, 1141 (C.D. Cal. 2005) (internal citation omitted) (emphasis added). The situation presented here—where Plaintiff's choice of forum

[7] Defendant's reliance on *Harp* and *Tuazon* is misplaced. MTD 11. Unlike in those cases, which turned on the generalized and anecdotal nature of the evidence of judicial delay, Plaintiff presents specific evidence demonstrating significant delays of up to 30 years. Méndez Decl. ¶¶ 20-26, Ratner Decl. ¶¶ 21-22, 29.

was necessary to obtain jurisdiction over Defendant, as recognized by law—is precisely one where greater deference is warranted.

C. Private and Public Interest Factors Do Not Strongly Favor Dismissal.

Defendant further fails to show that the private and public interest factors "*strongly favor* trial in the foreign country." *Dole Food*, 303 F.3d at 1118 (emphasis added); *see also City of Almaty*, 685 F. App'x at 636. In fact, these factors actually favor Plaintiff's choice of forum.

First, the private interest factors (MTD 15) favor this forum. When balancing the seven traditional factors, the "court should keep in mind that the increased speed and ease of travel and communication makes, especially when a key issue is the location of witnesses, no forum as inconvenient today as it was in 1947." *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1336 (9th Cir. 1984) (internal quotations omitted).

Here, while neither party resides in this forum (factor 1), the well-documented risk of reprisal against Plaintiff, witnesses, and attorneys more than countervails any purported inconvenience to Defendant (factor 2). *See* FAC ¶¶ 2, 28-30, 49, 53–54, 61, 63; Ratner Decl. ¶¶ 25-28. Defendant resides in Sri Lanka, but faces no similar fears in either forum and indeed frequently travels to this forum. FAC ¶ 11. Due to the evidence tampering and other efforts to impede the investigation of Lasantha's murder in Sri Lanka, access to evidence (factor 3) will prove equally challenging in either forum, and once obtained, evidence will be easier to present in this forum. Defendant's claim that unwilling witnesses can be compelled to testify in Sri Lanka (factor 4) (de Silva Decl. ¶ 3.82), fails to account for the reprisal risks that will prevent witnesses from testifying regardless of the forum. FAC ¶ 61; Ratner Decl. ¶¶ 25-28. Further, witnesses who may be willing to testify are less likely to face such risks if they present testimony in this forum. The

remaining factors of cost (factor 5), enforceability (factor 6), and other practical problems (factor 7), are in equipoise, and, if anything, favor this forum: Defendant's arguments regarding these factors, particularly his possible contestation of enforceability in this forum (MTD 17), simply confirm that Plaintiff seeks redress from a powerful and well-resourced politician from Sri Lanka—a fact that will not change regardless of the forum.

Second, the public factors related to the interests of the forums, MTD 13, strongly weigh in favor of Plaintiff. The United States has a "strong public interest" (factor 1) "in favoring the receptivity of United States courts to [torture and extrajudicial killing] claims" (*Hassen*, 2010 WL 9538408 at *21). California, as "the nation's largest resettlement destination for torture survivors" (S. Rules Comm., S. Floor Analyses, S. J. Res. 6, Ch. 45 (Ca. 2011)) has a specifically "strong, localized interest" in subjecting U.S. citizens who may be responsible for acts of torture to the jurisdiction of its courts. *See Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM CWX, 2006 WL 4749756, at *17 (C.D. Cal. Sept. 25, 2006).

The remaining public interest factors also support this forum. This Court is well-versed in the governing U.S. law, the ATS and TVPA (factor 2). *See*, *e.g.*, *In re Marcos,* 25 F.3d at 1475; *Mujica*, 381 F. Supp. 2d at 1139. In contrast, Sri Lankan law does not even recognize equivalent causes of action. *Supra*, at 7. The potential burden on local courts (factor 3) is countervailed by the local interest in the litigation (*Mujica,* 381 F. Supp. 2d at 1153) which for the aforementioned reasons, strongly weighs in favor of Plaintiff. The issue of court congestion (factor 4) also favors this forum, since "the real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket" (*Gates Learjet*, 743 F.2d at 1337), and trial in Sri Lankan courts would face significant delays of up to 30 years. *See supra* at 9.

Lastly, the costs of this litigation (factor 5), including translation costs, will be the responsibility of the parties, not the Court as Defendant suggests. MTD 14. This factor does not weigh in favor of either party.

D. The Balance of Factors Weighs Against Dismissal.

Accordingly, the balance of factors weighs against dismissal for FNC. This suit simply cannot be litigated in a Sri Lankan court: as indicated above, the risks posed to participants in any proceeding involving human rights abuses are well documented; no equivalent causes of action are available to Plaintiff in Sri Lanka; and the Sri Lankan judiciary is burdened with unreasonable delays and a grave lack of independence. Plaintiff has brought her case in this forum—where Defendant holds citizenship, was a long-time resident, and was present in the jurisdiction—out of necessity. Defendant, on the other hand, has offered little to support his contention that this case is more conveniently litigated in Sri Lanka. Nor has Defendant made "a clear showing of facts which ... establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent." *Dole Food Co.*, 303 F.3d at 1118. The Court should deny Defendant's FNC argument.

III. The Court Should Deny Defendant's Motion to Dismiss Based on Principles of Comity.

Defendant asks the Court, "[a]lternatively", to dismiss this case "as a matter of international comity." MTD 18. Having failed to offer *alternative* grounds for dismissal—instead relying solely on the arguments set forth in his FNC motion (MTD 19)—Defendant has not met his burden. *See Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1200 (C.D. Cal. 2002).

The "international comity" test invoked by the Defendant is the most nebulous comity doctrine, having "never been well-defined." *Mujica v. AirScan*

Inc., 771 F.3d 580, 608 (9th Cir. 2014).[8] Notwithstanding this uncertainty, the test invoked by Defendant considers an undefined number of factors, including (1) U.S. interest in adjudicating the case; (2) the foreign jurisdiction's interest in the same; and (3) the adequacy of the foreign jurisdiction. *Id.* at 603, 604. Instead of engaging with this test, Defendant relies entirely on the arguments he made in the FNC context. MTD 19. These same arguments fail in the FNC context, and fail here for the same reasons.

In addition, among other shortcomings, Defendant fails to address the key elements identified in *AirScan* as pertinent to the first factor of U.S. interest: the relevance of his U.S. citizenship; the "interest in upholding international human rights norms"; and the failure of the U.S. executive to express any interest in adjudicating this case in Sri Lanka. *Airscan*, 771 F.3d at 605, 609. Defendant's motion to dismiss on the alternative basis of comity must therefore be denied.

IV. The Court Has Jurisdiction over Plaintiff's ATS Claims.

Defendant's U.S. citizenship is sufficient to establish jurisdiction under the ATS and to displace the presumption against extraterritoriality.[9] *Contra* MTD 23. To trigger ATS jurisdiction, generally a claim must "touch and concern the territory of the United States." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-125 (2013). The *Kiobel* Court was deliberately "careful to leave open a number of significant questions," including, as relevant here, how the ATS applies to natural-person U.S. citizens accused of international law violations committed

[8] Commentators classify foreign official immunity as a form of executive comity, FNC as a form of adjudicative comity, and the presumption against extraterritoriality as a form of prescriptive comity. *Id.* at 598-599; William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2079 (2015).

[9] The ATS provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

abroad. *See id.* at 123-125 (Kennedy, J., concurring) (recounting the Court's "proper disposition," including the majority's decision not to "adopt" a "definitive reading" on this issue).

A close review of the origin and purpose of the ATS demonstrates that its reach extends to cases against natural-person U.S. citizens, regardless of whether the relevant conduct is extraterritorial. *See id. at* 1674 (Breyer, J., concurring) (applying ATS jurisdiction when defendant is a U.S. national, as "[n]ations have long been obliged not to provide safe harbors for their own nationals who commit such serious crimes abroad."). In 1794, the second Attorney General of the United States, William Bradford, concluded there was "no doubt" that ATS jurisdiction existed over civil claims involving extraterritorial destruction of property by two U.S. citizens in the city of Freetown, Sierra Leone. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795)[10]; Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AMER. J. INT'L L. 10 (2012).[11] The earliest federal courts to consider the ATS further support this proposition. *See, e.g.*,

[10] The Bradford Opinion is the "authority most on point" for questions about the extension of the ATS to extraterritorial conduct. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 23 (D.C. Cir. 2011), *judgment vacated on other grounds in light of Kiobel*, 527 F. App'x 7 (D.C. Cir. 2013); *see also* Brief of United States at 11, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499) (finding the Bradford Opinion persuasive).

[11] *AirScan*, on which Defendant's entire analysis hinges, relies on the *Kiobel* misinterpretation of the Bradford Opinion, which resulted from an incomplete historical record. *AirScan*, 771 F.3d at 596. In *Kiobel*, the Supreme Court determined that the Bradford Opinion meant only that ATS jurisdiction exists where a U.S. citizen engages in conduct taking place "*both* on the high seas *and* on a foreign shore." *Kiobel*, 569 U.S. at 123 (emphases added). Subsequent to *Kiobel*, however, diplomatic documents underlying the Bradford Opinion were uncovered showing the at-issue conduct likely took place entirely on land, not on the high seas. Bradley, *supra*, at 13. The subsequent research thus indicates that Bradford used his opinion to "endors[e] extraterritorial application" of the ATS to U.S. citizen conduct abroad. *Id.*

M'Grath v. Candalero, 16 F. Cas. 128, 128 (D.S.C. 1794) (No. 8,810) ("If an alien sue [sic] here for a tort under the law of nations or a treaty of the United States, against a citizen of the United States, the suit will be sustained"); *see also Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1807) ("[T]he legislation of every country is territorial; that beyond its own territory, *it can only affect its own subjects or citizens*.") (emphasis added).

Courts post-*Kiobel* have recognized this key purpose of the ATS—to ensure accountability when a U.S. citizen engages in international torts in other nations' territory. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1416 (2018) (Gorsuch, J., concurring) (stating that, at the founding, a nation's "fail[ure] to redress injuries by its citizens upon the citizens of another nation" resulted in a violation of the latter's "perfect rights") (internal citation omitted); *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1099 (D.C. Cir. 2011) (Williams, J., concurring) ("The concern was that U.S. citizens might engage in incidents that could embroil the young nation in war and jeopardize its status or welfare"). Such liability of U.S. citizens in this manner remains consistent with the foreign policy concerns animating *Kiobel* because it does not involve "bringing foreign nationals into United States courts" to defend themselves. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 530 (4th Cir. 2014).

At best, Defendant's argument merely serves to confirm that jurisdictional discovery, not dismissal, is warranted. Such discovery is appropriate when "more facts are needed" to determine whether there is a basis for subject-matter jurisdiction. *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003). Here, the Court should permit jurisdictional discovery to determine whether Defendant's conduct in the United States during the relevant time period included acts in furtherance of the conspiracy. Defendant traveled to the United States in 2008 and 2009, which was during the time of his participation in the conspiracy to

suppress journalists, out of which the killing of Lasantha arose. FAC ¶ 11. It is likely that Defendant performed acts in furtherance of the conspiracy while in the United States, such as sending emails or text messages and making phone calls to co-conspirators, which—distinct from "mere presence" (MTD 28)—would be sufficient to trigger ATS jurisdiction either independently or as a factor in conjunction with Defendant's U.S. citizenship. *See Doe v. Nestle, S.A.*, 929 F.3d 623, 641 (9th Cir. 2018) (en banc); *AirScan*, 771 F.3d at 594.

In any event, Defendant misconstrues the case law. While Defendant relies on *AirScan* to contend that U.S. citizenship is insufficient for ATS jurisdiction (MTD 20), the relevance of natural-person citizenship was not at issue in that case, which concerned U.S.-headquartered corporations. *AirScan*, 771 F.3d at 584. Notably, the Ninth Circuit has yet to squarely address whether U.S. citizenship is sufficient to create ATS jurisdiction. Defendant's attempt to rely on *dicta* in *AirScan* fails to account for the key "distinction in international law between corporations and natural persons." *Jesner*, 138 S. Ct. at 1402 (Kennedy, J., plurality opinion). Here, Defendant is a natural person and a U.S. citizen, was a U.S. citizen at the time of the alleged acts and also on the date of service,[12] and

[12] Defendant's assertion that he recently revoked his U.S. citizenship (MTD 2) is immaterial for at least four reasons: (1) "[T]he jurisdiction of the court depends upon the state of things at the time of the action brought" (*Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 571 (2004) (internal citation omitted)), and there is no dispute that Defendant was a citizen at the commencement of this action; (2) Defendant put forward no evidence of revocation or U.S. Government recognition of revocation; (3) the Secretary of the Treasury received no information indicating Defendant revoked as of June 30, 3019 (Dep't of Treas., *Quarterly Publication of Individuals, Who Have Chosen To Expatriate, As Required By Section 6039G*, 84 Fed. Reg. 158 (Aug. 15, 2019)); and (4) even if Defendant validly revoked, he did so with the specific intent to destroy the Court's subject-matter jurisdiction and therefore jurisdiction remains (*see Attorneys Tr. v. Videotape Computer Prod., Inc.*, 93 F.3d 593, 598 (9th Cir. 1996) (holding that subject-matter jurisdiction remains even after a transaction destroying diversity where an "improper[] or collusive[]" motive stood behind the transaction)).

therefore, consistent with the origin and purpose of the ATS, the Court has jurisdiction over this case under the ATS.

V. The Court Should Deny Defendant's Motion to Dismiss Plaintiff's TVPA Claims for Failure to Exhaust Local Remedies.

Defendant's motion to dismiss the TVPA claims on the theory that Plaintiff failed to exhaust local remedies fails for two reasons: Defendant has not met the substantial burden of demonstrating adequate and available local remedies, and Plaintiff has alleged sufficient evidence that any remedy in Sri Lanka would be unobtainable.

First, Defendant has failed to meet the substantial burden to show that local remedies are available to Plaintiff. As Defendant conceded, the TVPA exhaustion requirement is an affirmative defense for which the "ultimate burden of proof and persuasion … lies with the defendant." MTD 21 (citing *Hilao v. Marcos*, 103 F.3d 767, 778, n.5 (9th Cir. 1996)). The presumption in favor of plaintiffs is so high that "in most instances the initiation of litigation under [the TVPA] will be virtually prima facie evidence that the claimant has exhausted [local] remedies." *Hilao*, 103 F.3d at 778 n.5 (quoting S. Rep. No. 249, 102d Cong., 1st Sess. at 9-10 (1991)).

Defendant's conclusory analysis cannot overcome this presumption. Defendant's focus on the Sri Lankan judiciary's *general capabilities* as a matter of law sidesteps the vital question whether remedies are *specifically and practically available* to Plaintiff. As established in Section II.A., *supra*, there are no civil remedies in Sri Lanka that address the alleged offenses in the FAC, and even if such remedies did exist, they are barred by the statute of limitations. The mere existence of cases against high-ranking public officials, including an ongoing lawsuit against Defendant, is insufficient to establish adequate remedies for Plaintiff, especially where the proceedings have stalled repeatedly and involve entirely different causes of action. *See Dacer v. Estrada*, 2011 WL 6099381 at *3

(N.D. Cal. Dec. 7, 2011) (finding ongoing proceedings with the same defendant and plaintiff inadequate due to extensive delays); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1097 (N.D. Cal. 2008) (deeming judgments against comparable defendants insufficient as they did not involve the same "specific cause of action").

Second, Plaintiff has pleaded sufficient evidence to conclude that any purported Sri Lankan remedy is "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." MTD 21. Where, as here, Defendant and his co-conspirators enjoy "positions of great power" and maintain deep political influence over ongoing accountability efforts (FAC ¶ 59; Ratner Decl. ¶¶ 23-24), a local remedy becomes effectively "unobtainable." *Hassen*, 2010 WL 9538408 at *20. Even if Defendant did not wield outsized political influence, local redress remains "unobtainable" due to the Sri Lankan government's lack of political will to investigate cases like Plaintiff's. Ratner Decl. ¶¶ 12-22. Further, Plaintiff's well-founded "fear of reprisal" constitutes an independent basis for denying the non-exhaustion defense. *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1151 (E.D. Cal. 2004).

To the extent that the inadequacy of Plaintiff's local remedies is disputed as a matter of fact, such disputes "are not properly considered here, at the motion to dismiss stage." *In re Chiquita Brands Int'l, Inc.*, 190 F. Supp. 3d 1100, 1115 (S.D. Fla. 2017). The Court should therefore deny Defendant's motion to dismiss Plaintiff's TVPA claims for failure to exhaust local remedies.

VI. Plaintiff Has Standing to Bring TVPA Claims for Torture.

Defendant asserts that Plaintiff may not bring a claim for torture on her father's behalf. MTD 22-23. But the TVPA does not allow defendants to escape liability for torture by killing the torture victim. This perverse outcome is foreclosed by the TVPA's text, purpose, and legislative history.

The TVPA stipulates two causes of action for torture: for torture victims

who are alive and for legal representatives of torture victims who have been unlawfully killed. *Doe v. Qi*, 349 F. Supp. 2d 1258, 1313 (N.D. Cal. 2004). The TVPA creates a civil action for recovery that plainly encompasses damages for both causes, without limitation. 28 U.S.C. § 1350 note, § 2(a)(2). *See also Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *16 (S.D.N.Y. Feb. 28, 2002).[13] Recovery for *each* cause of action is consistent with the TVPA's legislative history, which confirms that Congress intended to hold perpetrators of torture accountable, including when they kill their victims. The House Report indicates that the TVPA created "a clear and specific remedy, not limited to aliens, for torture *and* extrajudicial killing." H.R. REP. NO. 102-367, at 4 (1991) (emphasis added). Further, the TVPA was enacted to enshrine the principles of the Convention Against Torture, which calls for a remedy for torture when a torture victim is killed. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 14, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

In order to fully remediate the harms caused by Defendant's conduct, Plaintiff may therefore bring claims both on her and her father's behalf under the TVPA. *See Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347 (11th Cir. 2011) (permitting concurrent wrongful death and survival claims in one action); *Rufo v. Simpson*, 86 Cal. App. 4th 573, 581 (Cal. Ct. App. 2001) (same, under the California Code of Civil Procedure).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), *forum non conveniens*, and international comity.

[13] *Xuncax v. Gramajo*, 886 F. Supp. 162, 192 (D. Mass. 1995), on which Defendant relies, is inapposite because the plaintiffs did not assert legal representative status.

Dated: August 26, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 26, 2019, I electronically filed the foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** 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/Catherine Amirfar
Catherine Amirfar