

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:19-cv-02577-R-RAO	Date	10-17-2019
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Title	Ahimsa Wickrematunge v. Nandasena Gotabaya Rajapaksa
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Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Christine Chung

Not Reported

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiff:

Attorneys Present for Defendant:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Order Re: Defendant's Motion to Dismiss (DE 42) and Defendant's Motion to Stay Case Pending Sri Lanka's Presidential Election (DE 48)

I. INTRODUCTION

On July 15, 2019, Plaintiff Ahimsa Wickrematunge ("Plaintiff") filed the operative First Amended Complaint ("FAC") against Defendant Nandasena Gotabaya Rajapaksa ("Defendant") asserting the following causes of action: (1) extrajudicial killing, (2) crimes against humanity, and (3) torture. Each cause of action is brought pursuant to the Alien Tort Statute ("ATS") (28 U.S.C. § 1350) and the Torture Victim Protection Act of 1991 ("TVPA") (28 U.S.C. § 1350, Note).

Presently before the Court are Defendant's Motion to Dismiss and Motion to Stay Case. For the following reasons, the Court **GRANTS** the Motion Dismiss and **DENIES as moot** the Motion to Stay Case.

II. FACTUAL BACKGROUND

In 2005, Defendant was appointed by his brother, then-President of Sri Lanka Mahinda Rajapaksa as Secretary to the Sri Lankan Cabinet Ministry of Defence, Public Security, Law and Order (hereinafter "Secretary of Defense"). Defendant served as Secretary of Defense from November 2005 to January 2015. Defendant is a resident and citizen of Sri Lanka. Defendant also gained United States citizenship in 2003; however, the parties dispute the current status of Defendant's U.S. citizenship, which Defendant claims to have recently revoked.

Plaintiff's now-deceased father, Lasantha Wickrematunge ("Lasantha") was co-founder and editor-in-chief of *The Sunday Leader*, an English-language weekly newspaper known for being one of the few media outlets in Sri Lanka reporting on human rights violations and war crimes being committed

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by both sides in Sri Lanka's decades-long civil war between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam. Plaintiff brings this action in her individual capacity and in her capacity as personal representative of Lasantha's estate.

In March 2011, a United Nations panel released a report documenting alleged international law violations by the Sri Lankan Government and Liberation Tigers. The panel found that as many as 40,000 civilians died in the final stages of the war, which ended in 2009, and that leaders on both sides could potentially be found criminally liable for these casualties. The FAC alleges that Defendant "was a chief architect of this violent campaign." More specifically, Plaintiff alleges that Defendant abused "sweeping powers" given to him by emergency wartime measures, including the power "to order arrests and detention at his discretion, if he 'is of [the] opinion' that the individual is acting 'in any manner prejudicial to the national security or to the maintenance of public order.' These laws criminalized a broad set of conduct, such as any act causing 'communal disharmony or feelings of ill-will' between different communities." Plaintiff further alleges that these wartime laws were used to target journalists critical of the Rajapaksa administration or the war effort.

The Sunday Leader published multiple articles criticizing the Rajapaksa administration beginning in late 2006. In October 2008, President Mahinda Rajapaksa allegedly called Lasantha a "terrorist journalist" during an interview with Reporters Without Borders, and on or before September 2008, the State Intelligence Service, which was overseen by Defendant, allegedly began surveilling Lasantha's phone. Lasantha allegedly received threats on several occasions and believed he was being followed shortly before his death. Two days before his death, Lasantha made a television appearance "urging viewers . . . to remain resolute and unbowed in the face of government attempts to silence the media" immediately after the television network studio was "stormed by black-clad commandos armed with automatic weapons, grenades, and claymore mines" that allegedly could only be lawfully obtained by the armed forces under Defendant's control.

On January 8, 2009 as Lasantha drove to work, "he was swarmed by black-clad plainclothes commandos on motorcycles at a busy intersection in an area secured by military checkpoints," who smashed the windows to Lasantha's car and attacked him. Plaintiff alleges that mobile telephone tower logs showed that the attackers were "part of, or worked in concert with, the Directorate of Military Intelligence's Tripoli Platoon." One of the attackers punched a hole in Lasantha's skull with a sharp instrument, and Lasantha also suffered a number of lacerations and abrasions on his chest, arms, neck, and face during the attack. The attackers allegedly sped off in the direction of a military checkpoint and entered a "High Security Zone" policed by the Sri Lanka Air Force. Lasantha underwent emergency surgery but died several hours later.

Plaintiff alleges that "Defendant, in his capacity as Secretary of Defense, exercised command responsibility over, conspired with, aided and abetted, and/or incited individuals in the Tripoli Platoon,

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or groups acting in coordination with this unit, to perpetrate the extrajudicial killing of Decedent, whom Defendant viewed as a threat because of his reporting.” Plaintiff further alleges that “Defendant and individuals under his command then worked to prevent an effective investigation” into Lasantha’s death.

III. JUDICIAL STANDARD

Defendant seeks dismissal of the entire FAC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), forum non conveniens doctrine, and principles of international comity.

Pursuant to Rule 12(b)(1), a district court must dismiss an action if it lacks jurisdiction over the subject matter of the suit, including where the court lacks jurisdiction because the defendant is protected by a doctrine of immunity. Fed. R. Civ. P. 12(b)(1).

IV. DISCUSSION

Defendant contends that the FAC should be dismissed because he is immune from suit under the doctrine of common law foreign official immunity, and, therefore, the Court lacks subject matter jurisdiction over this action. Courts use “a two-step procedure developed for resolving a foreign state’s [or official’s] claim of sovereign immunity.” *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). First, the foreign state can ask the State Department to make a “suggestion of immunity” (“SOI”) to the court. *Id.* If the State Department issues an SOI, the court should dismiss the case. *Id.* Absent an SOI, the district court should determine “whether the ground of immunity is one which it is the established policy of the State Department to recognize.” *Id.* at 311-12 (citing *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)).

“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[.]’” *Dogan v. Barak (Dogan I)*, 2016 WL 6024416, at *3 (C.D. Cal. Oct. 13, 2016), *aff’d*, *Dogan v. Barak (Dogan II)*, 932 F.3d 888 (9th Cir. 2019) (quoting Restatement (Second) of Foreign Relations Law § 66(f) (1965)).

The State Department has not filed an SOI in this case; thus, the Court must determine whether Defendant is entitled to foreign official immunity under the second step. Defendant contends that he is entitled to immunity because the FAC plainly accuses him of acts performed in his official capacity of Secretary of Defense. However, Plaintiff argues that this case should be distinguished from *Dogan* because in that case, Israel affirmatively authorized and ratified the defendant’s military conduct for which he was sued, and the State Department issued an SOI at Israel’s request.

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“The State Department has consistently recommended conduct-based sovereign immunity when (1) the foreign state requests it, and (2) the defendant acted in his official capacity on behalf of a recognized foreign government.” *Fed. Ins. Co. v. Al Qaida (In re Terrorist Attacks on Sept. 11, 2001)*, 122 F. Supp. 3d 181, 188 (S.D.N.Y. 2015) (citations omitted). In *In re Terrorist Attacks on Sept. 11, 2001*, the District Court for the Southern District of New York relied upon common law foreign official immunity to dismiss a case against Dr. Abdul Rahman Al-Swailem, the former president of two Saudi Arabian government charitable organizations who allegedly used his authority to deliver material support and resources to al Qaida while knowing that such support would be used to aid al Qaida’s jihad against the United States. There, the court relied heavily upon the fact that the allegations against Al-Swailem concerned actions performed in his official government capacity.

Here, Plaintiff does not dispute that Defendant acted in his official capacity on behalf of the Sri Lankan government. In fact, because Plaintiff does not allege that Defendant took any direct action against Lasantha, her allegations of Defendant’s involvement are reliant upon Defendant’s role as Secretary of Defense. This is the type of action by a foreign government official “which it is the established policy of the State Department to recognize” as a basis for immunity. *See Matar v. Dichter*, 500 F. Supp. 2d 284, 287 (S.D.N.Y. 2007) (quoting “Statement of Interest” from U.S. State Department indicating policy that “foreign officials . . . do enjoy immunity from suit for their official acts. This immunity is not codified in the [FSIA] but instead is rooted in longstanding common law that the FSIA did not displace . . .”). The fact that the State Department has not issued an SOI here does not change this analysis since “[d]istrict courts are empowered to determine common law sovereign immunity without input from the Executive Branch.” *In re Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp 3d at 186 (citing *Hoffman*, 324 U.S. at 34-35 (“In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist.”)).

Plaintiff primarily relies upon *Hilao v. Marcos*, 25 F.3d 1467; *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); and *Samantar v. Yousuf*, 560 U.S. 305 (2010) for the proposition that a foreign official is entitled to immunity only where the State Department issues an SOI or the foreign government ratifies the defendant’s conduct. However, in the *Marcos* cases, the Philippines repeatedly disavowed Marcos’s conduct and even “urged that the lawsuits be allowed to proceed.” *Dogan II*, 932 F.3d at 896 (citing *Hialo*, 35 F.3d at 1472). In *Yousuf*, the U.S. State Department issued a “suggestion of non-immunity,” relying on the facts that (1) the defendant was a former official of a state with no currently recognized government, and (2) he was a U.S. legal permanent resident. Here, Sri Lanka had a recognized government at the time of Defendant’s alleged misconduct and maintains a recognized government today, and Defendant resides in Sri Lanka. Although Defendant was a U.S. citizen and the current status of his citizenship is disputed, Plaintiff has cited to no authority suggesting that Defendant’s citizenship alone should override the fact that all of the

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allegations against him concern actions taken in an official capacity as the Sri Lankan Secretary of Defense.

In sum, Defendant is entitled to common law foreign official immunity. Because it lacks subject matter jurisdiction on that basis, the Court need not consider Defendant's additional arguments for dismissal.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion to Dismiss. (DE 42). Defendant's Motion to Stay Case is **DENIED as moot**. (DE 48).

IT IS SO ORDERED.

Initials of Deputy Clerk

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