No. 19-56312

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ahimsa Wickrematunge, in her individual capacity and in her capacity as the legal representative of the estate of Lasantha Wickrematunge

Plaintiff-Appellant,

v.

Nandasena Gotabaya Rajapaksa

Defendant-Appellee

On Appeal from the United States District Court
for the Central District of California
No. 2:19 CV-02577-R-RAO

APPELLANT'S MOTION TO DISMISS, VACATE THE DISTRICT COURT'S ORDER, AND REMAND WITH INSTRUCTIONS TO DISMISS WITHOUT PREJUDICE; REQUEST TO MODIFY BRIEFING SCHEDULE

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INTRODUCTION

This international human rights dispute has recently become moot, foreclosing appellate review, and requiring dismissal of the appeal, vacatur of the decision below, and remand for dismissal of the case without prejudice, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

The Complaint alleges that in 2009, when Appellee Gotabaya Rajapaksa was Sri Lanka's secretary of defense, he orchestrated the killing of Appellant Ahimsa Wickrematunge's father Lasantha Wickrematunge—a renowned journalist who published articles that were critical of Rajapaksa—as part of a violent campaign targeting independent media in Sri Lanka. Rajapaksa was at all relevant times, and remains to date, a citizen of the United States.

After the District Court's decision was issued and the notice of appeal filed, Rajapaksa was elected, sworn in, and recognized by the United States as Sri Lanka's president, entitling him to head-of-state immunity. This new status-based immunity now eliminates any possibility of Wickrematunge receiving relief for her claims so long as Rajapaksa is president, making the case moot. *Munsingwear* relief is therefore warranted to eliminate the unfairness that would otherwise result in allowing the unreviewable District Court decision to create a preclusive effect.

Moreover, *Munsingwear* relief is particularly appropriate in this instance because the District Court's decision constitutes a significant departure from well-

settled law and practice by the U.S. Department of State and federal courts. The District Court granted Rajapaksa's motion to dismiss because, in its view, he was entitled to conduct-based foreign-official immunity, which attaches to certain official acts of foreign-state government actors and is distinct from head-of-state immunity. That decision was wrong, largely because it ignored the fact that Sri Lanka had not asserted its immunity on the foreign official's behalf, as U.S. law and practice require. The State Department, whose policies are binding, has *never* in modern times done what the District Court did here, and found that foreign-official immunity was present when the foreign state had not requested it.

Munsingwear's principles therefore weigh especially heavy here, since circumstances beyond Wickrematunge's control have foreclosed appellate review of the incorrect decision below.

POSITION OF APPELLEE; REQUEST FOR MODIFICAITON OF BRIEFING SCHEDULE

Per 9th Cir. R. 27-1(2), counsel for Wickrematunge contacted counsel for Rajapaksa, who advised that Rajapaksa opposes this motion.

Wickrematunge respectfully requests that the briefing schedule be amended to accommodate upcoming holidays, with Rajapaksa's response due January 16, 2020, and Wickrematunge's reply due January 23, 2020. *See* 9th Cir. R. 27-1 advisory comm. note (6).

BACKGROUND

I. Factual Background

In 2005, Rajapaksa was appointed as Sri Lanka's secretary of defense by his brother, then-President Mahinda Rajapaksa. Over the final stages of a decades-long civil war, Rajapaksa consolidated control over Sri Lanka's military and intelligence agencies, which he utilized to perpetrate a brutal crackdown on dissent, including a campaign to violently repress journalists deemed critical of the regime. (*See* Decl. of Natalie L. Reid, Ex. A (Appellant's App. ("App.") 10–56 ("Am. Compl.") ¶¶ 18–22).) As part of this widespread systematic campaign, security and intelligence forces under Rajapaksa's command and control routinely abducted, assaulted, tortured, and killed civilian journalists. (*Id.* ¶¶ 23–31.)

From 2006 to 2009, Appellant Wickrematunge's father, Lasantha Wickrematunge, drew Rajapaksa's ire after reporting on corruption allegations involving the Rajapaksa "dynasty." (*Id.* ¶¶ 32–41.) Lasantha was an acclaimed journalist and editor-in-chief of *The Sunday Leader*, one of the few Sri Lankan media outlets that reported on human rights violations and war crimes committed during the civil war. (*Id.* ¶ 12.) After surviving years of threats, surveillance, and attacks, Lasantha was assassinated. On January 8, 2009, individuals under the command and control of Rajapaksa trapped, assaulted, and murdered Lasantha when he was driving home. (*Id.* ¶¶ 42–44.)

Thereafter, Rajapaksa and his forces obstructed an investigation into Lasantha's death, for example, by tampering with crime scene evidence, issuing a flawed autopsy report, and abducting potential witnesses. (*Id.* ¶¶ 45–52.)

II. Procedural Background

Wickrematunge filed the present action against Rajapaksa, a dual U.S.-Sri Lankan citizen, in April 2019. In the Amended Complaint, Wickrematunge alleged claims of extrajudicial killing, crimes against humanity, and torture under the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350, note, and the Alien Tort Statute, *id.* § 1350. (Am. Compl. ¶¶ 73–74, 86, 92–93.)

In August 2019, Rajapaksa moved to dismiss Wickrematunge's complaint on several grounds, including that he supposedly enjoyed conduct-based foreign-official immunity for the alleged acts. (App. 57–88.) Shortly thereafter, Rajapaksa also moved to stay the case. (App. 89–104.) Wickrematunge opposed both motions, arguing that, absent request and ratification by Sri Lanka's government or a suggestion of immunity from the U.S. Department of State, Rajapaksa could not receive foreign-official immunity. (App. 105–32.)

On October 17, 2019, after cancelling the scheduled hearing (App. 144–45), the District Court ruled on the papers and dismissed Wickrematunge's Complaint on the basis of conduct-based foreign-official immunity. (App. 146–50). The District Court concluded that Rajapaksa acted in his "official capacity [as Sri

Lanka's secretary of defense] on behalf of the Sri Lankan government" and therefore enjoyed foreign-official immunity. (App. 149.) The Order did not address the fact that Sri Lanka had not requested immunity for Rajapaksa or ratified his conduct as official, and had in fact opened a criminal investigation of that conduct. The court then denied the motion to stay as moot. (App. 150.)

On November 13, Wickrematunge filed her notice of appeal. (App. 151.)

III. Rajapaksa's Accession to the Sri Lankan Presidency

On November 17, 2019, Rajapaksa won Sri Lanka's presidential election. He was sworn in the next day.[1] The United States immediately recognized Rajapaksa as Sri Lanka's president and head of state.[2]

ARGUMENT

Pursuant to the Supreme Court's decision in *Munsingwear*, when a federal case becomes moot pending appeal, it is the "duty of the appellate court" and the "established practice . . . to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 38–40.

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1 *Gotabaya Rajapaksa Sworn in as Sri Lanka's New President*, Al Jazeera (Nov. 18, 2019), https://www.aljazeera.com/ news/2019/11/gotabaya-rajapaksa-sworn-sri-lanka-president-191118072535784.html.

2 Press Release, Sec'y of State Michael R. Pompeo, On Sri Lanka's Elections (Nov. 18, 2019), https://www.state. gov/on-sri-lankas-elections/ (recognizing "Gotabaya Rajapaksa as the new President of Sri Lanka"); Sri Lanka, *The World Factbook*, Central Intelligence Agency, https://www.cia.gov/library/ publications/the-world-factbook/geos/ce.html (last visited Dec. 10, 2019) (stating Rajapaksa has been "chief of state and head of government" since "November 18, 2019").

Munsingwear relief is appropriate at this juncture because (I) this case has become moot by virtue of Rajapaksa's acquisition of status-based immunity as Sri Lanka's head of state. (II) The appeal should therefore be dismissed, the decision below vacated, and the case remanded with the instruction to dismiss without prejudice. Moreover, (III) the *Munsingwear* equitable principles are particularly implicated in this case, given that Wickrematunge is now foreclosed from seeking reversal of a decision that departs from well-settled law and practice.

I. This Appeal Is Moot Due to Rajapaksa's Accession to the Sri Lankan Presidency.

A case becomes moot when there is no longer an actual "controversy as to which effective relief can be granted." *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007). Mootness prevents federal courts from issuing "advisory opinions on abstract propositions of law." *Oregon v. FERC*, 636 F.3d 1203, 1206 (9th Cir. 2011) (*per curiam*).

In this case, after Wickrematunge filed her appeal to challenge the decision below on foreign-official immunity, Rajapaksa was elected and recognized by the United States as president of Sri Lanka. *Supra*, at 5. Rajapaksa's new position entitles him to head-of-state immunity, rendering him "absolutely immune from suit in the United States" during his time as president, "including for acts committed before [his] time in office." *Sikhs for Justice v. Singh*, 64 F. Supp. 3d

190, 193 (D.D.C. 2014).[3] The effect of head-of-state immunity is jurisdictional: it provides "immunity from the jurisdiction of U.S. courts." Suggestion of Immunity Submitted by the United States at 6, *Manoharan v. Mahendra Rajapaksa*, 845 F. Supp. 2d 260 (D.D.C. 2012) (No. 11-235(CKK)), ECF No. 12.

This acquisition of head-of-state immunity while this appeal was pending has rendered the case moot for at least four reasons: *First*, the case is moot because there is no relief left for the courts to grant to Wickrematunge.[4] Here, if Wickrematunge were to continue her appeal and win her argument that the District Court erred with its holding on foreign-official immunity, she could still not win damages or any other form of relief on remand, because Rajapaksa's head-of-state immunity would require the District Court to surrender jurisdiction. Her claims are no longer redressable. *See M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)) (noting Article III requires that a plaintiff's injury be capable of being "redressed by a favorable decision").

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[3] *See also* Restatement (Second) of the Foreign Relations of the Law of the United States § 66(b) (1965) [hereinafter Restatement] (providing "immunity" for a "head of state"); *Hassen v. Nahyan*, No. CV 09-01106, 2010 WL 9538408, at *5 (C.D. Cal. Sept. 17, 2010) (stating foreign-state immunity "extends absolutely to *inter alia*, . . . its head of state").

[4] *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (stating a case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party"); *Pub. Util. Comm'n v. FERC*, 100 F.3d 1451, 1458–59, 1461 (9th Cir. 1996) (granting *Munsingwear* relief after finding case moot because "[t]he court must be able to grant effective relief, or it lacks jurisdiction and must dismiss the appeal"); *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989) (same).

Second, a case is mooted when a defendant gains immunity while an appeal is pending. *See, e.g.*, Thomson Reuters, Federal Tax Coordinator 2d ¶ V-6202 (2019) (reviewing this Court's decision in *Brand v. United States*, 942 F.2d 790 (Table) (9th Cir. 1991), where *Munsingwear* relief was granted after the United States gained immunity midway through the case); *cf. Dei Gratia v. Stafford*, No. 14-cf-4019-LHK, 2015 WL 332633, at *7 n.2 (N.D. Cal. Jan. 23, 2015) (Koh, J.) (relying on *Brand* as persuasive authority); *Sibley v. Breyer*, No. CV 06-107, 2006 WL 8450216, at *2 (D.D.C. Nov. 14, 2006) ("Upon the Court's determination that the Defendants were immune from suit, the motion for costs became moot.").

Third, as the United States recently argued in a *Munsingwear* motion before this Circuit—which the Court granted this past summer—mootness is created when the "central issue decided by the district court and presented on appeal . . . is no longer live." United States' Mot. to Dismiss Pending Appeals and Remand with Instructions to Dismiss as Moot at 6, *Indigenous Envtl. Network ("IEN") v. U.S. Dep't of State*, No. 18-36068, 2019 WL 2542756 (9th Cir. June 6, 2019), ECF No. 36; *see also IEN*, 2019 WL 2542756, at *1 (granting *Munsingwear* motion to dismiss). Here, the central and only issue decided by the District Court and to be presented on appeal was foreign-official immunity. That central issue is no longer live, because Rajapaksa is entitled to absolute head-of-state immunity.

Fourth, Rajapaksa has repeatedly asserted that this case would become moot under the present circumstances. He averred five times to the District Court that the case should have been stayed until after the election because all of the other issues being litigated would be "mooted" if he received head-of-state immunity:

> The most practical and efficient way forward is therefore to stay this case immediately because any further briefing or other proceedings in the interim will be ***mooted*** and wasteful if Mr. Rajapaksa is elected President of Sri Lanka.

(App. 95 (emphasis added).)

> But if this Court resolves the pending motion to dismiss and moves forward to a decision, it will have to decide complicated questions of constitutional and international law that may be ***mooted*** in a few months.

(App. 99 (emphasis added).)

> Instead, the Court should stay the case until after the election so that it resolves only one motion to dismiss and avoids deciding complex issues that will be entirely ***mooted*** if Mr. Rajapaksa is elected president.

(App. 135 (emphasis added).)

> Granting an immediate, but brief, stay pending the outcome of Sri Lanka's presidential election is the prudent course because Mr. Rajapaksa's Motion to Dismiss raises complicated questions of federal common law, international law, jurisdiction, and statutory interpretation. ECF Nos. 42, 55. Yet Sri Lanka's presidential election could ***moot*** them all, instead posing to the Court the single and straightforward question of whether Sri Lanka's sitting president is entitled to head-of-state immunity.

(App. 136 (emphasis added).)

> Proceeding with this litigation will require this Court to review complex questions of federal law that the November 16, 2019 election could ***moot***.

(App. 141 (emphasis added).)

In sum, because it is no longer possible for Wickrematunge to receive relief due to Rajapaksa's new head-of-state immunity, this case is moot.[5]

II. The Court Should Dismiss the Appeal, Vacate the District Court Order, and Remand the Case for Dismissal Without Prejudice.

Pursuant to *Munsingwear*, when a case becomes moot pending appeal, the appropriate result is for the appellate court to dismiss the appeal, "reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 38–40.[6]

The dismissal by the District Court upon remand must be without prejudice. *Munsingwear* relief is intended to ensure "the rights of all parties are preserved" and "none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40. This Court and other courts of appeal therefore regularly

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[5] No exceptions to mootness apply. Wickrematunge's injury—the torture and extrajudicial killing of her father—cannot possibly occur twice. *See Funbus Sys., Inc. v. State of Cal. Public Utils. Comm'n*, 801 F. 2d 1120, 1131 (9th Cir. 1986) (noting the exception for an injury "capable of repetition, yet evading review" must involve a repeat of "the same injury"). Similarly, Wickrematunge, who is "the party seeking relief from the judgment below," did not "cause[]" Rajapaksa to become head of state. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994).

[6] *See also Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) ("Under the '*Munsingwear* rule,' vacatur is generally 'automatic' in the Ninth Circuit when a case becomes moot on appeal.").

and expressly order that *Munsingwear* dismissal be without prejudice,[7] and district courts accordingly will regularly dismiss without prejudice under *Munsingwear*.[8]

Dismissal without prejudice is independently justified because that is frequently the result when a defendant receives head-of-state immunity. Head-of-state immunity is only temporary (at least in democracies) and claims might be revived when the defendant's term ends. *See Hassen v. Nahyan*, 2010 WL 9538408, at *22 (dismissing without prejudice based on head-of-state immunity).[9]

III. The Decision Below Should Be Vacated Because of the Substantial Risk of Adverse Collateral Legal Consequences.

The equitable principles behind *Munsingwear* offer further support for vacating the decision below, because the decision is subject to great legal dispute.

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[7] *See, e.g.*, *Kitlutsisti v. Arco Alaska, Inc.*, 782 F.2d 800, 801–02 (9th Cir. 1986) (concluding, in dismissing and vacating per *Munsingwear*, that no portions of the opinion below should "retain precedential value"); *see also Bank of Nova Scotia, LLC v. Suitt Const. Co.*, 209 F. App'x 860, 862 (10th Cir. 2006) (ordering that *Munsingwear* dismissal from the district court be "without prejudice"); *Ali v. Cangemi*, 419 F.3d 722, 724 (8th Cir. 2005) (same); *Catanzano v. Wing*, 277 F.3d 99, 108 (2d Cir. 2001) (same); *Nationwide Mut. Ins. Co. v. Burke*, 897 F.2d 734, 740 (4th Cir. 1990) (same).

[8] *See, e.g.*, *San Diego Cty. Office of Educ. v. Pollock*, No. 13-CV-1647-BEN, 2014 WL 2860279, at *13–16 (S.D. Cal. June 20, 2014) (quoting *Alvarez v. Smith*, 558 U.S. 87, 97 (2009)) (dismissing moot claims "without prejudice" because the "ordinary practice" in *Munsingwear* vacatur is to "clear the path for future relitigation of the issues"); *Holder v. Curry*, No. C 08-2572, 2012 WL 1213814, at *3–4 (N.D. Cal. Apr. 11, 2012) ("[T]he Ninth Circuit's order dismissing the appeal as moot [under *Munsingwear*], vacating the judgment and remanding the case to this Court for further proceedings *requires* the Court to enter a judgment dismissing the petition without prejudice, nothing more.") (emphasis added); *Lane v. Simon*, No. 04-4079-JAR, 2007 WL 4365433, at *1–2 (D. Kan. Dec. 7, 2007) (dismissing action as moot without prejudice, pursuant to Tenth Circuit directive).

[9] *See also Smith v. Ghana Commercial Bank, Ltd.*, No. CIV. 10-4655 DWF/JJK, 2012 WL 2930462, at *17 (D. Minn. June 18, 2012) (same); *Howland v. Resteiner*, No. 07-CV-2332, 2007 WL 4299176, at *2 n.2 (E.D.N.Y. Dec. 5, 2007) (same).

"[T]he touchstone of [*Munsingwear*] vacatur is equity," *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995), and equity counsels strongly in favor of vacatur where mootness has foreclosed appellate review of a decision resting on an infirm legal footing, *see Munsingwear*, 340 U.S. at 39 (stating equity's concern that decisions made "unreviewable" due to mootness not have preclusive effect). Permitting errant decisions to have preclusive effect would create "unfairness," which equity should remedy. *In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005).[10]

Here, equity weighs heavily in favor of vacatur because the District Court's now-unreviewable decision departs from settled law in at least three key respects:

A. Sri Lanka Did Not Request Foreign-Official Immunity for Rajapaksa.

The District Court departed from settled law and practice by granting Rajapaksa foreign-official immunity even though Sri Lanka did not request it.

Under conduct-based foreign-official immunity, a current or former foreign official may be entitled to immunity if the foreign state asserts that the alleged actions were official acts, committed in the individual's official capacity. Restatement § 66(f) n.3 (permitting such immunity "if the effect of exercising jurisdiction would be to enforce a rule of law against the state").

[10] *See also id.* ("[C]ollateral estoppel engenders legal consequences from which a party may continue to suffer harm after a claim has been rendered moot.").

As a matter of both federal and international law, however, a foreign state's request is a necessary prerequisite for any individual to receive a grant of foreign-official immunity because the immunity belongs to the foreign state and not to the individual. It is the foreign state's right and no one else's to assert or waive that immunity. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders."). The State Department has long recognized this principle. *See* Statement of Interest of the United States ¶ 13, *Yousuf v. Samantar*, No. 4-CV-1360, 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), ECF No. 147 ("[A] former official's residual immunity is not a personal right. It is for the benefit of the official's state."). The foreign state's request is essential because, without it, a court cannot know whether the state considers the disputed actions as official. As former State Department Legal Adviser John B. Bellinger III has stated, "the foreign government *must* submit a diplomatic note confirming that the officials have been sued with respect to their authorized official actions, not unauthorized personal actions."[11]

[11] John B. Bellinger III, *Lawsuits Force Foreign Governments to Navigate U.S. Court System*, The Washington Diplomat (May 3, 2016), https://washdiplomat.com/index.php?option=com_content&view=article&id=13515:lawsuits-force-foreign-governments-to-navigate-us-court-system&catid=1544&Itemid=428 (emphasis added).

The consistent statements and pronouncements of the State Department confirm that its practice is to require a formal diplomatic request from the foreign state concerned before issuing any suggestion or statement of conduct-based official immunity.[12] While a foreign government's request will not always trigger a suggestion of immunity, the State Department has never, at least in modern times, issued a suggestion of immunity absent that request.[13] The State

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[12] *See, e.g.*, Statement of Interest of the United States ¶ 11, *Samantar*, 2012 WL 3730617 ("The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials."); Statement of Interest and Suggestion of Immunity at 9–10 n.5, *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336 (E.D.N.Y. Sept. 30, 2013) (No. 10-CV-5381), ECF No. 35 ("Under the 'two-step procedure,' the foreign states ask the Department of State to submit a suggestion of immunity."); (*see also* Reid Decl., Ex. B (Michael Sandler, Detlev F. Vagts & Bruno A. Ristau, *Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977*, 177 Dig. U.S. Prac. Int'l L. 1017, 1019 (1977) (stating that from 1952 to 1977, "the Department generally required a formal diplomatic request, usually in the form of a diplomatic note, from the embassy of the foreign state concerned (or from a third country embassy representing the interests of the foreign state concerned)")).)

[13] The six suggestions of foreign-official immunity issued since *Samantar* were all preceded by a request from the foreign state. *See* Statement of Interest and Suggestion of Immunity of and by the United States ¶ 5, *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247 (D.D.C. Sept. 8, 2011) (No. 10-MC-00764), ECF No. 13; Statement of Interest of the United States at 9, *The Abi Jaoudi & Azar Trading Corp. v. CIGNA Worldwide Ins. Co.*, No. 91-CV-6785, 2016 WL 3959078 (E.D. Pa. July 22, 2016), ECF No. 290; Suggestion of Immunity Submitted by the United States ¶ 2, *Doe v. de Leon*, No. 3:11-CV-01433-AWT (D. Conn. July 18, 2013), ECF No. 38; Statement of Interest and Suggestion of Immunity at 10, *Rosenberg*, 980 F. Supp. 2d 336; Suggestion of Immunity by the United States at 1, *Ben-Haim v. Edri*, 453 N.J. Super. 526 (N.J. Super. Feb. 5, 2018) (No. A-2247-15T4), *available beginning at *47 of* https://www.state.gov/wp-content/uploads/2019/05/30-U.S.-brief-on-appeal-in-Ben-Haim-v.-Edri.pdf; Suggestion of Immunity by the United States at 2, *Doğan v. Barak*, No. 15-CV-8130, 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016), ECF No. 48.

Similarly, a State Department review of modern immunity statements issued prior to 1977, when the Foreign Sovereign Immunities Act took effect, identifies only one instance where the Department made a statement absent a request from a foreign state, and that statement found no immunity in part because no request had been made by Hungary. (Reid Decl., Ex. B (Sandler et al., *supra*, at 14 n.12, at 1019).)

Department's precedent in this regard must be followed by district courts, because whenever the State Department has not weighed in on a question of foreign-official immunity, the court is to apply the Department's "established policy," *Doğan v. Barak*, 932 F.3d 888, 893 (9th Cir. 2019) (quoting *Samantar v. Yousuf*, 560 U.S. 305, 312 (2010)),[14] as that policy is laid out in the "broader pronouncements" of State Department court filings in other cases involving questions of immunity, Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 Vand. J. Transnat'l L. 1141, 1161 (2011).[15]

Although a foreign state may make a request for conduct-based official immunity to a court instead of directly to the State Department, it must still make a request, *cf. In re Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d 181, 186–87 (S.D.N.Y. 2015), and the court should give the State Department an opportunity to respond, Statement of Interest and Suggestion of Immunity at 9–10 n.5, *Rosenberg*, 980 F. Supp. 2d 336. Indeed, the requirement that a foreign state must make a request for immunity is taken so seriously that the request must be *formal*; informal requests are insufficient. *See Ex parte Muir*, 254 U.S. 522, 532–33 (1921)

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[14] *See also Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–35 (1945) (stating courts acting without a statement from the State Department must apply "the principles accepted by the department of the government charged with the conduct of our foreign relations").

[15] *Cf. id.* at 1152 ("[I]t may be some time before the Executive Branch develops a full-fledged U.S. Government statement of official immunity principles").

(declining to recognize U.K. immunity request made through "private counsel," filed only as "amicus curiae," and not directed to State Department).[16]

Here, Sri Lanka *never* made a request that Rajapaksa receive foreign-official immunity, to either the State Department or the District Court. In rendering its decision, the District Court did not cite a single case that could support the (incorrect) proposition that Sri Lanka's lack of a request is immaterial. To the contrary, the District Court's decision favorably cites *In re Terrorist Attacks*, which acknowledges the State Department consistently recommends immunity "when (1) *the foreign state requests it*, **and** (2) the defendant acted in his official capacity on behalf of a recognized foreign government," 122 F. Supp. 3d at 188 (emphasis added), but the District Court then skipped over this crucial first step, resting its decision solely on the fact that Rajapaksa allegedly acted in his official capacity (App. 135–40). In failing to consider the consequences of the complete lack of any request for immunity by Sri Lanka, the District Court failed to apply the State Department's established policy as required by *Doğan*.

[16] *See also* Br. for the United States, at 11–12, *Ali v. Warfaa*, 137 S. Ct. 2289 (2017) (No. 15-1345) (stating the Executive refused to consider a request from Somalia's prime minister "because the Somali Government did not communicate [that] letter diplomatically").

B. Sri Lanka Did Not Otherwise Ratify Rajapaksa's Conduct.

The District Court also departed from well-settled law and practice in assuming Rajapaksa had foreign-official immunity even though Sri Lanka did not ratify Rajapaksa's disputed conduct as being made within his official capacity.

For an individual to receive foreign-official immunity, the immunity must be formally requested, *supra*, at 12–16, or the conduct ratified by the foreign state as being taken within the individual's official capacity: "[F]oreign sovereign immunity extends to an individual official 'for acts committed in his official capacity' but not to 'an official who acts beyond the scope of his authority.'" *Samantar*, 560 U.S. at 322 n.17 (citation omitted). Thus, the State Department, when determining immunity, will "take[] into account the views of a foreign state as to the immunity of its own officials, including whether a foreign state understands its officials to have acted in an official capacity." Statement of Interest of the United States at 13, *Abi Jaoudi*, 2016 WL 3959078.[17]

In the absence of a formal immunity request or ratification, conduct in violation of the foreign nation's own laws and international law cannot be

[17] *See also* Suggestion of Immunity Submitted by the United States ¶ 7, *de Leon*, No. 3:11-CV-01433-AWT (stating "[t]he Department of State also considers a foreign government's request for a suggestion of immunity, averring that the acts of its former official that are the subject of a lawsuit were taken (if at all) in an official capacity").

characterized as within the individual's official capacity.[18] This Court has recognized that "acts of torture, execution, and disappearance were clearly acts outside of [defendant's] authority as President" and that acts "not taken within any official mandate" are "not the acts of . . . a foreign state." *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994).[19]

Here, not only did Sri Lanka not endorse Rajapaksa's acts of torture and extrajudicial killing at issue in this case, prior to his election the Sri Lankan government had actually been investigating Rajapaksa's alleged conduct as a crime (albeit with interference and obstruction by Rajapaksa and his allies)—confirming just how far Sri Lanka was from ratifying Rajapaksa's acts as undertaken within his official capacity. (Am. Compl. ¶¶ 45–52.) As this Court has held, "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do." *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990).

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[18] *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (finding no immunity where China "disclaimed the alleged human rights violations" as "prohibited by Chinese law").

[19] *See also Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[N]o state claims a sovereign right to torture its own citizens."); *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) ("doubt[ing] that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (stating that foreign states "usually respond[] to accusations of torture by denial or, less frequently, by asserting that the conduct was unauthorized").

In his briefings to the District Court, Rajapaksa even acknowledged that the allegations against him constitute violations of Sri Lankan law for which civil remedies are available. (App. 73.) Without affirmative ratification from Sri Lanka that these apparently *ultra vires* actions were in fact within Rajapaksa's official capacity—and every indication suggests Sri Lanka would have *refused* to do so—it was a departure from well-settled law for the District Court to assume as much.

C. Rajapaksa's Actions of Torture and Extrajudicial Killing Were Not "Official" Merely Because He Had a Position with the Sri Lankan Government.

The District Court also incorrectly assumed Rajapaksa's actions of torture and extrajudicial killing could be "official," when they cannot, under the TVPA.

The TVPA expressly permits plaintiffs to sue individuals who commit torture and extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350, note § 2(a). The TVPA's legislative history confirms Congress's intent to distinguish torture and extrajudicial killing from truly "official actions" of the foreign state, because "no state officially condones torture or extrajudicial killings," and "few such acts, if any, would fall under the rubric of 'official actions.'" S. Rep. 102-249, at 8 (1991).[20] The District Court's decision ignores this distinction, rendering the TVPA a dead letter.

[20] The D.C. Circuit recently held as much, stating the TVPA displaces common-law foreign-official immunity by "[i]mpos[ing] liability for actions that would render [a] foreign official eligible" under the common law. *Lewis v. Mutond*, 918 F. 3d 142, 150 (D.C. Cir. 2019)

This Court's decision in *Doğan* does not alter the conclusion that the TVPA permits claims like Wickrematunge's. The *Doğan* Court's holding that the TVPA did not abrogate common-law foreign-official immunity writ large was expressly limited to instances "where the sovereign state officially acknowledges and embraces the official's acts." 932 F.3d at 892. The Court did not address what should occur here, where the foreign state did not embrace the official's acts.[21] Moreover, numerous courts have recognized that acts such as torture and extrajudicial killing simply cannot be "official acts" for purposes of conduct-based immunity. *Supra*, at 18, n.19.[22] The District Court was incorrect to simply assume that Rajapaksa's acts were official.

CONCLUSION

For the foregoing reasons, Appellant Wickrematunge respectfully requests this Court to dismiss the appeal, vacate the decision below, and remand the case with the instruction that it be dismissed without prejudice.

(Randolph, J., concurring), *pet. for cert. filed*, No. 19-185 (U.S. Aug. 9, 2019); *see also id.* at 148 (Srinivasan, J., concurring) (agreeing with Judge Randolph").

[21] *See also id.* at 895 (stating that because Congress understood that "no state officially condones" torture and extrajudicial killing, "in the great majority of cases, an official sued under the TVPA would never receive common-law immunity").

[22] *See also Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (denying immunity because defendant's acts of torture were beyond his authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (D. Mass. 1995) (same, because such acts "exceed . . . the scope of [defendant's] official authority"); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (stating that acts of torture "hardly qualify as official public acts").

Respectfully submitted,

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December 20, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(5), I certify that the foregoing Motion To Dismiss, Vacate The District Court's Order, and Remand With Instructions To Dismiss Without Prejudice is in 14-point proportionally spaced Times New Roman font.

I further certify that this motion contains 5,324 words, excluding the items listed in Federal Rule of Appellate Procedure 32(f), and thus meets the requirement of Circuit Rules 27-1 and 32-3(b).

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2019, I served one copy of the foregoing Motion To Dismiss, Vacate The District Court's Order, and Remand With Instructions To Dismiss Without Prejudice on all registered counsel in these consolidated cases through the Court's CM/ECF system.

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