[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Court of Appeals Docket #: 12-5087

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KASIPPILLAI MANOHARAN, DR.,
ET AL.,
Plaintiffs-Appellants

v.

PERCY MAHENDRA RAJAPAKSA
AND UNITED STATES OF AMERICA,
Defendants-Appellees.

On Appeal From A Final Order Dismissing the Complaint for Lack of Jurisdiction Based on a Suggestion of Immunity filed by the Department of Justice on behalf of the Department of State.

BRIEF FOR PLAINTIFFS-APPELLANTS

BRUCE FEIN (D.C. Bar No. 446615)
BRUCE FEIN & ASSOCIATES, INC.
722 12th St. NW, 4th Floor
Washington, D.C. 20036
Telephone: (703) 963-4968
Facsimile: (202) 478-1664
bruce@thelichfieldgroup.com
Attorney for Plaintiffs-Appellants

ADAM BUTSCHEK
Of Counsel
BRUCE FEIN & ASSOCIATES, INC.
722 12th St. NW, 4th Floor
Washington, D.C. 20005
Telephone: (202) 785-2166
Facsimile: (202) 478-1664
Email: adam.butschek@gmail.com
Attorney for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel of record for Petitioners-Appellees certify as follows:

A. CORPORATE DISCLOSURE STATEMENT

A Corporate Disclosure Statement is not applicable Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1.

The Appellants and Appellee in the above-captioned matter are individuals.

B. CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Percy Mahendra ("Mahinda") Rajapaksa [Defendant/Appellee]
2. Kasippillai Manoharan [Plaintiff/Appellant]
3. Kalaiselvi Lavan [Plaintiff/Appellant]

4. Jeyakumar Aiyathurai [Plaintiff/Appellant]

5. United States of America

C. PARTIES, INTERVENORS, AND AMICI CURIAE

Except for the preceding, all parties, intervenors, and amici appearing before this court are listed in the Brief for Petitioners/Appellants.

D. RULINGS UNDER REVIEW

The ruling under review is the Feb. 29, 2012 Memorandum & Opinion of the District Court for the District of Columbia (Hon. Colleen Kollar-Kotelly) in Civil Action No. 1:11-cv-00235-CKK, dismissing the case for lack of jurisdiction.

E. RELATED CASES

Undersigned counsel is not aware of any related cases pending in this Court or any other Court specifically regarding the dismissal of a case after an entered Suggestion of Immunity in a suit brought under the Torture Victim Protection Act (28 U.S.C. § 1350).

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I. STATEMENT OF JURISDICTION

The United States District Court for the District of Columbia possessed subject matter jurisdiction of the case under 28 U.S.C. § 1331 because the Appellants' claims arose under the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. §1350, a federal statute duly enacted by Congress and signed into law by the President on March 12, 1992. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350 (1991).

This Court possesses appellate jurisdiction pursuant to 28 U.S.C. § 1291 based on a February 29, 2012 final order of the District Court dismissing the Complaint for lack of jurisdiction following a Suggestion of Immunity submitted by the Executive Branch. Plaintiffs/Appellants filed a timely Notice of Appeal on March 26, 2012, which was transmitted to the U.S. Court of Appeals for the District of Columbia Circuit on March 27.

II. ISSUE PRESENTED

Whether the words "an individual" in the TVPA describing the defendants Congress subjected to civil liability for complicity in the universal crimes of torture or extrajudicial killings under color of foreign law to implement the Convention Against Torture and to advance the Congressional foreign policy of promoting human rights abroad include sitting heads of state sued in their individual capacities.

III. STATUTES AND REGULATIONS

The principal statute, reproduced in full in the appendix, is the Torture Victim Protection Act,, enacted pursuant to Article 1, Section 8, Clause 10 of the Constitution

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988) ("Torture Convention").

A. TORTURE VICTIM PROTECTION ACT, PUB. L. NO. 102-256, 106 STAT. 73, 28 U.S.C. § 1350 (1991)

§ 1350. Alien's action for tort

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.

(June 25, 1948, ch. 646, 62 Stat. 934.) HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(17) (Mar. 3, 1911, ch. 231, § 24, par. 17, 36 Stat. 1093).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes in phraseology were made. TORTURE VICTIM PROTECTION

Pub. L. 102–256, Mar. 12, 1992, 106 Stat. 73, provided that:

"SECTION 1. SHORT TITLE. "This Act may be cited as the 'Torture Victim Protection Act of 1991'. "SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

"(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

"(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

"(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) EXHAUSTION OF REMEDIES.—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.

"(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

"SEC. 3. DEFINITIONS.

"(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as in- dispensable by civilized peoples. Such term, however, does not include any such killing that, under inter- national law, is lawfully carried out under the authority of a foreign nation.

"(b) TORTURE.—For the purposes of this Act—

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third

person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

B. ARTICLE 1, SECTION 8, CLAUSE 10 OF THE UNITED STATES CONSTITUTION

"To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"

C. THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, DEC. 10, 1984, ARTICLES 1-14

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of

torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only

for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to

in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of

extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph I of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review

interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

IV. STATEMENT OF THE CASE

Plaintiffs sued Sri Lankan President Mahinda Rajapaksa in his individual capacity under the TVPA for complicity in extrajudicial killings under color of foreign law perpetrated during a gruesome, genocidal, ethnic civil war. It was blighted by, among other things, frightful slaughters of tens of thousands of non-combatant Hindu/Christian Tamils by the Sinhalese Buddhist Sri Lankan Armed Forces for which redress in Sri Lankan courts is chimerical. Paragraph 23 of the Complaint, for example, alleges:

According to the then U.S. Ambassador to Sri Lanka, "…accountability has not been a high-profile issue in the presidential election -- other than President Rajapaksa's promises personally to stand up to any international power or body that would try to prosecute Sri Lankan war heroes. While regrettable, the lack of attention to accountability is not surprising. There are no examples we know of a regime undertaking wholesale investigations of its own troops or senior officials for war crimes while that regime or government remained in power. In Sri Lanka this is further complicated by the fact that responsibility for many of the alleged crimes rests with the country's

senior civilian and military leadership, including President Rajapaksa and his brothers and opposition candidate General Fonseka." Ambassador Patricia A. Butenis, *Sri Lanka War Crimes Accountability: The Tamil Perspective*, THE GUARDIAN, Jan. 15, 2010, http://www.guardian.co.uk/world/us-embassy-cables-documents/243811 (last visited Oct. 2, 2012).

Defendant Rajapaksa's responsibility for war crimes and greater atrocities is well documented. No person can view the below referenced video program of Britain's Channel 4 without nauseating revulsion at Defendant's savage assaults on innocent human life indistinguishable from a tour through the Holocaust Museum. Sri Lankan soldiers would not have blithely incriminated themselves in grisly extrajudicial killings unless they knew Defendant Rajapaksa would protect them from legal accountability. See SRI LANKA'S KILLING FIELDS (Channel 4 2011) *available at* http://www.channel4.com/programmes/sri-lankas-killing-fields/4od. The U.S. Department of State, Bureau of Democracy, Human Rights, and Labor notes: "Britain's Channel 4 broadcast a report in 2009 [sic] on events at the end of the war, followed by a more extensive documentary made available worldwide on the Internet on

June 14 entitled 'Sri Lanka's Killing Fields,' which purported to show graphic evidence of army forces committing human rights violations, including footage of extrajudicial executions. The government claimed that its investigations showed that the video was a fake, and that those filmed were actually LTTE [popularly known as the "Tamil Tigers"] members wearing uniforms to impersonate army soldiers while carrying out the executions. The UN special investigator into extrajudicial killings in Sri Lanka, Christof Heyns, told the UN Human Rights Council on May 30 that forensic and technical experts concluded that the video was authentic and that the events reflected in the video occurred as depicted." U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, "2010 Human Rights Report: Sri Lanka" (Apr. 8, 2011) http://www.state.gov/j/drl/rls/hrrpt/2010/sca/154486.htm.

Defendant's accusers, in addition to the former US Ambassador, range from former Commander of the Army, Sareth Fonseka, to international human rights groups Human Rights Watch and Amnesty International. Complaint at ¶ 21-23, *Manoharan v. Rajapaksa*, -- F. Supp. 2d --, 2012 WL 642446 (D.D.C. Feb 29, 2012).

On December 16, 2011, Defendant waived any deficiencies in

service of the Complaint, submitted to the Court's personal jurisdiction, and filed a motion asking the Court to solicit the views of the United States. The motion was granted, and the United States, through the Department of Justice ("DOJ"), filed a Suggestion of Immunity to shield the Defendant from civil redress for violations of the universal crime of extrajudicial killing under color of foreign law. Plaintiff filed a Brief in Opposition, and the DOJ filed a Reply.

The DOJ argued that the Constitution endows the Executive Branch with inherent and absolute power to immunize individuals selectively from TVPA suits based on its interpretation of customary international law ("CIL") (or the Law of Nations) to advance the President's foreign policy. Dept. Just.'s Mem. Supp. at 1-2. The Judiciary, according to the DOJ, is an errand boy for the President in litigation affecting international relations. Federal courts are constitutionally precluded from independent interpretations of CIL and from second-guessing the President's interpretation of the TVPA to immunize sitting heads of state from liability for extrajudicial killing.

The DOJ failed to identify any constitutional text to support unchecked presidential power to define and apply CIL in Article III

cases or controversies at the expense of Congress or the Judicial Branch. Neither did the DOJ suggest any federal statute delegated the expounding of CIL exclusively to the Executive Branch in Article III disputes.

The DOJ further argued that sitting head of state immunity is wholly discretionary under CIL. The President may refrain from a Suggestion of Immunity for partisan politics or any other purpose, which would expose the sitting head of state to suit under the TVPA. Sitting Head of State Immunity under CIL, according to the DOJ, is like equity measured by the Chancellor's foot. John Seldon, Table Talk. Equity. Dept. Just.'s Mem. Supp. at 2 n. 3. The President, for instance, might withhold immunity in a TVPA suit brought against the President of Iran to punish its nuclear ambitions and placate Members of Congress, but invoke immunity in a TVPA suit brought against Israeli Prime Minister Benjamin Netanyahu to solidify the President's political standing in the American Jewish community and to thicken Israeli-U.S. bilateral relations. Thus, John Bellinger III, former Department of State Legal Adviser, has written about the immunity of foreign officials from suit under CIL: "In the future, the State Department, rather than

federal judges, will be in the hot seat in deciding issues of impunity or accountability for foreign officials for international human rights abuses." See John B. Bellinger III, *Ruling Burdens State Dept.: Samantar Held Foreign Officials Are Not Immune from Human Rights Suits, So State Will Have to Decide Whether to Assert Immunity and Will Be Subject to Lobbying*, NAT'L L. J., June 28, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463009727&slreturn= 1&hbxlogin=1.

The DOJ's Reply to Plaintiff's Opposition insinuated that Congress would have unconstitutionally encroached on inherent constitutional authority of the President over foreign affairs if it attempted to regulate or abolish the President's limitless discretion over sitting Head of State Immunity in exercising its power under Article I, Section 8, Clause 10 to punish violations of the Law of Nations. Dept. Just.'s Mem. Supp. at 2. The DOJ also argued that notwithstanding the plain language of the TVPA and its deterrent and compensatory purposes, it should be interpreted to leave preexisting CIL rules of immunity undisturbed. *Id*. According to the DOJ, CIL crowns the President with optional authority to invoke sitting Head of State

Immunity in civil actions for the universal crimes of torture or extrajudicial killings.

In a Memorandum Opinion, the District Court concluded "the United States' Suggestion of Immunity is binding on the Court and dispositive of jurisdiction." Op. at 1. According to the District Court, the Constitution reduces federal judges to echo chambers of the Executive Branch's interpretations and applications of CIL. No constitutional text was cited to justify that jarring separation of powers conclusion. Ever since *Marbury v. Madison,* 1 Cranch 137 (1803), it has been generally thought the Judicial Branch, not the President, declares the law in Article III cases and controversies.

The District Court relied substantially on *Schooner Exchange v. McFaddon,* 7 Cranch 116 (1812) for the conclusion that CIL confers absolute immunity on sitting heads of state in United States courts. Mem. 3-4. The Court also noted that Congress enacted the Foreign Sovereign Immunities Act of 1976 ("FSIA") to trump the Executive Branch's politically skewed or unprincipled invocations of immunity in actions against foreign sovereigns. *Id.* at 4. But as regards foreign officials, Congress left pre-FSIA common law immunities and practices

undisturbed, as the Supreme Court held in *Samantar v. Yousuf*, 560 U. S. ____ (2010) (slip op. at 5). And under that pre-FSIA protocol, the District Court decreed, Executive Branch Suggestions of Immunity are conclusive on the Judicial Branch, and require dismissal of Article III cases and controversies for lack of jurisdiction. *Id.* at 5-6.

The District Court did not deny that the TVPA's plain language exposes "an individual," including sitting heads of state, to liability for torture or extrajudicial killings under color of foreign law. *Id*. at 6. Nor did it deny that the TVPA's compensatory and deterrent purposes would be advanced by its application to sitting heads of state. *Id*. at 7. Further, the District Court did not dispute that application of the TVPA to sitting heads of state would not yield an absurd or unreasonable result. (Sitting heads of state seem subject to criminal prosecution in United States Courts for torture, 18 U.S.C. § 2340A, or genocide, 18 U.S.C. § 1091).

The District Court reasoned, however, that the TVPA should be interpreted to retain putative CIL sitting Head of State Immunity from civil suits for the universal crimes of torture or extrajudicial killings unless there is evidence that Congress intended to reject immunity. *Id.*

at 7. In searching for Congressional intent, the District Court relied exclusively on snippets of ambiguous legislative history (never voted on by Congress or signed by the President) in lieu of the statutory text (that Congress approved and the President signed). The legislative history summoned by the District Court indicated sitting heads of state conducting diplomatic missions would be immune from TVPA suits, but was indistinct as to whether the mere status of a sitting head of state would be sufficient. The District Court neglected to consider the deterrent and compensatory purposes of the TVPA. *Id*. at 7-8. It declared that legislative history demonstrated that "the clear statutory purpose behind the TVPA was to *maintain* the common law doctrine of head of state immunity, not override it." *Id*. at 8.

The District Court rejected Appellants' argument that CIL had evolved since the 1992 enactment of the TVPA and the 1994 District Court precedent in *Lafontant v. Aristide,* 844 F.Supp. 128 (E.D.N.Y. 1994) by dint of the 1998 Rome Statute establishing the International Criminal Court (Rome Statute of the International Criminal Court art. 27, U.N. Doc. A/CONF. 183/9 (July 17, 1998) (entered into force on July 1, 2002) (hereinafter "Rome Statute"), the creation of international

tribunals to prosecute sitting heads of state, and the Convention Against Torture ratification by the Senate in October 1994.

That evolution, Appellants maintained, repudiated sitting Head of State Immunity for the universal crimes of torture and extrajudicial killing and their civil suit counterparts. *Id*. at 8-9. The District Court reasoned that even if sitting Head of State Immunity from *criminal* liability has been abolished, there are no precedents holding a sitting head of state *civilly* liable in domestic courts. *Id*. at 9. The District Court also noted that contemporary heads of state indicted for extrajudicial killings involved the International Criminal Court or special criminal tribunals, not ordinary domestic courts. *Id*.

Finally, the District Court maintained that the Constitution's separation of powers required the Judicial Branch to ratify CIL as expounded and applied by the Executive Branch to avoid confounding the President's foreign policy—even if it frustrates a contrary Congressional foreign policy on human rights. *Id*. at 10. It concluded: "This Court is not in a position to second-guess the Executive's [conclusory] determination that in this case, the nation's foreign policy interests will be best served by granting Defendant Rajapaksa head of

state immunity while he is in office." *Id.*

V. SUMMARY OF ARGUMENT

The District Court misinterpreted the TVPA by reliance on inconclusive legislative history in lieu of plain statutory text. It further erred in conceiving CIL as including discretionary as opposed to obligatory rules and by slighting the Convention Against Torture and the Rome Statute in determining whether CIL has evolved since the TVPA to permit civil suits against sitting heads of state for the universal crimes of torture and extrajudicial killing, which do not paralyze a foreign government as would a criminal arrest or imprisonment of a sitting Head of State The District Court further stumbled by neglecting the constitutional foreign policy prerogatives of Congress under Article I, Section 8, Clause 10 to sanction violations of the law of nations at variance with the President's preferred realpolitik. Contrary to the District Court, CIL does not recognize limitless executive discretion to grant or withhold sitting Head of State Immunity. By definition, CIL is obligatory, not optional. Further, to sustain the President's unfettered discretion to extinguish a TVPA claim against a sitting head of state to advance the Presidents' foreign policy would effect an unconstitutional taking of property without just

compensation under the Takings Clause of the Fifth Amendment of the U.S. Constitution. The District Court's conclusion that Executive Branch prescriptions of sitting Head of State Immunity are binding on the Judiciary in Article III cases and controversies conflicts with the Supreme Court's rationale in *United States v. Klein,* 80 U.S. 128 (1871) that rules of decision for federal courts may not be prescribed by the political branches. In sum, all relevant canons of statutory construction militate in favor of the TVPA's application to sitting heads of state complicit in the universal crimes of torture or extrajudicial killings under color of foreign law to further Congressional human rights objectives abroad.

VI. ARGUMENT

A. STANDARD OF REVIEW

The Court of Appeals reviews district court orders dismissing complaints *de novo* as per its ruling in *Herbert v. Nat'l Acad. of Scis.*, 974 F. 2d 192 (D.C. Cir. 1992). "This court, of course, will conduct an independent, de novo review on all questions of law." *Id.* at 197.

B. THE PLAIN LANGUAGE DOCTRINE

The Supreme Court instructed in *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992): "In interpreting a statute, a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* See also *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543-544 (1950).

The TVPA is unambiguous as regards the persons subject to civil liability for torture or extrajudicial killings under actual or apparent authority, or color of law, of any foreign nation, i.e., "[a]n individual." TVPA, *supra.* An "individual" is as unambiguous as the meaning of the

word "is." Congress was not moved to specially define "an individual" for purposes of the TVPA because its meaning seems as obvious as the word "is." The noun received a definitive construction by the Supreme Court in *Mohamad v. Palestinian Authority,* ____ U.S. ___ (2012),

Justice Sonia Sotomayor, writing for the Court, elaborated, "[b]ecause the TVPA does not define the term 'individual,' we look first to the word's ordinary meaning. *See FCC v. AT&T Inc.,* 562 U.S. _____, ____- (2011) (slip op., at 5). ('When a statute does not define a term, we typically give the phrase its ordinary meaning' (internal quotations marks omitted))." *Mohamad v. Palestinian Authority,* 566 U.S. _____ (2012) (slip op. at 3). Justice Sotomayor explained that "[a]s a noun, 'individual' ordinarily means '[a] human being, a person' 7 Oxford English Dictionary 880 (2d ed. 1989); see also *e.g.*, Random House Dictionary of the English Language 974 (2d. Ed. 1987) ('a person'); Webster's Third New International Dictionary 1152 (1986) ('a particular person')." *Id.* at 3-4.

In *Mohamad*, the petitioners argued that "an individual" for the purposes of the TVPA included organizations like the Palestinian Authority. Invoking the ordinary meaning rule, Justice Sotomayor

conspicuously refrained from any insinuation that Congress intended to carve out an exception for sitting heads of state from the TVPA's application to "an individual." The Justice, in quotations and otherwise, references the word "individual" and its iterations on fifty-one occasions. In describing the language that Congress chose to include in the TVPA, Justice Sotomayor amplifies, "[t]he Act's liability provision uses the word "individual" five times in the same sentence: once to refer to the perpetrator (*i.e.*, the defendant) and four times to refer to the victim see §2(a). Only a natural person can be a victim of torture or extrajudicial killing. 'Since there is a presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when at term is repeated within a given sentence," *Brown v. Gardner,* 513 U.S. 115, 118 (1994) (citation omitted), it is difficult indeed to conclude that Congress employed the term "individual" four times in one sentence to refer to a natural person and once to refer to a natural person and any nonsovereign [sic] organization." *Mohamad* at 5-6. Justice Sotomayor opines that, absent an explicit definition contained within the language of the statute, the Court should rely upon the common and customary

meaning of "individual." The Justice notes: "After all, that is how we use the word in everyday parlance. We say 'the individual went to the store,' 'the individual left the room,' and 'the individual took the car,' each time referring unmistakably to a natural person." *Id. at 4.*

The plain language doctrine of statutory construction as applied in *Mohamad* compels the conclusion that a sitting head of state is "an individual" within the meaning of the TVPA.

None of the recognized exceptions to the plain language doctrine apply in this case. The transcendent objective of statutory construction is to honor Congressional intent. *Chevron, USA, Inc. v Nat'l Res. Def. Council*, 476 U.S. 837, 842-43 (1984). Thus, the plain language doctrine should only bow if it would yield an absurd or an obviously unreasonable result in light of the statutory purpose. The Supreme Court explained in *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543-544 (1950):

> "There is, of course, no more persuasive evidence of the purpose of a statute that the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases, we have followed their plain meaning. When that meaning has led to absurd

> or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed the purpose, rather than the literal words."

Id. The self-evident remedial purposes of the TVPA are deterrence of torture and extrajudicial killing under color of foreign law and compensation to victims of the twin universal crimes. Michael Posner, the current Assistant Secretary of State for Democracy, Human Rights, and Labor, elaborated on behalf of the Lawyer's Committee for Human Rights in a Congressional hearing on the TVPA: "This really is an effort to clarify, to make sure that every federal court in the United States understands explicitly that the acts of torture and extrajudicial killing can be remed[ied] in the United States, that there is a private right of action. And that the U.S. Congress … has gone on record … in support of this kind of judicial relief." The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Committee of Foreign Affairs and its Subcommittee on Human Rights and International Organizations of the House of Representatives, 100th

Cong., 2nd Sess. (1988), p. 71.

Holding a sitting head of state liable under the TVPA harmonizes with the human rights policy of the legislation. Sitting heads of state typically command more power than any other foreign official, whether it be ordering or pardoning torture or extrajudicial killing, including the Defendant Mahinda Rajapaksa in this case. Complaint ¶ 6. Neither the District Court nor the Executive Branch asserted that application of the TVPA to sitting heads of state would conflict with Congressional foreign policy respecting human rights abroad or would yield an absurd result. The TVPA is part of a long and lustrous history of Congressional promotion of human rights internationally, oftentimes at variance with the enthusiasm of the President for realpolitik.

In 1976, Congress overrode a presidential veto and enacted the International Security and Arms Export Control Act (Arms Export Control and Disarmament Act, 22 U.S.C. § 2751), which amended the Foreign Assistance Act of 1961 (Foreign Assistance Act of 1961, 22 U.S.C. § 2151). The amendments prohibited security assistance to any country which engaged in a consistent pattern of gross violations of human rights, including torture. 22 U.S.C. § 2151n(a). In furtherance

of this policy, the President was directed to conduct international security assistance programs in a manner which would advance human rights. The Secretary of State was required to transmit to Congress a yearly report on each country proposed as a recipient of security assistance regarding that country's observance of and respect for human rights. *Id.* at § 2151n(b) and § 2151n(d). Any security assistance could be restricted or terminated pursuant to a joint resolution of Congress. The Act also established the Senate-confirmed position of a Coordinator for Human Rights and Humanitarian Affairs within the Department of State, who shall maintain continuous observation and review of all matters pertaining to human rights and humanitarian affairs in the conduct of foreign policy. Finally, the President was authorized to provide assistance for the rehabilitation of victims of torture. 22 U.S.C. § 2152.

The International Security Assistance and Arms Export Control Act of 1976 (Jun 30, 1976; P.L. 94-329; 90 Stat. 748) made the Coordinator a Presidential appointee, subject to the advice and consent of the Senate, and changed the title to Coordinator for Human Rights and Humanitarian Affairs.

"Already in 1977, eighteen different countries were adversely affected by the [legislation requiring certification of a state's human rights record]. In 1978, Argentina lost all its military aid." Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, The Journal of American History, Dec. 1999, 1231 at 1242.

The Flatow Amendment, 28 U.S.C. § 1610, Section 117 of the Treasury and General Government Appropriations Act of 1999, authorizes the dedication of seized assets to satisfy civil judgments in state sponsor of terrorism civil litigation.

In sum, the TVPA is a bright ornament in an array of Congressional human rights legislation that challenges the President's institutional inclination to crucify human rights on a national security or foreign policy cross.

The prudential rule of constitutional avoidance, *Ashwander v. TVA*, 297 U.S. 288, 347 (Brandeis concurring) (1936), militates against the District Court's crabbed construction of the TVPA. The District Court recognized a limitless power in the President to extinguish an otherwise valid private TVPA claim against a sitting heard of state to further the President's foreign policy. In *Dames & Moore v. Regan,* 453

U.S. 654 (1981), the Court opined that the President's suspension and settlement of private claims against Iran or its instrumentalities in federal courts to resolve a major foreign policy crisis might effect a "taking" of property within the meaning of the Fifth Amendment requiring just compensation, even though a U.S.-Iran Claims Tribunal was created as a substitute forum for relief. In a concurring opinion, Justice Lewis Powell wrote (463 U.S. at 691): "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." The "Takings Clause" argument of Plaintiffs would be stronger in this case than in *Dames & Moore* if the Executive's extinguishments of their TVPA claims were sustained for twofold reasons. In the former, the President and Congress acted jointly, whereas here the President acted unilaterally and in contradiction to the policy of the Convention Against Torture and Congressional human rights policy abroad. Presidential power is at its nadir when it acts in contradiction to Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 348 U.S. 586, 637-638 (1952) (Jackson, J. concurring). Moreover, in this case, in contrast to *Dames &*

Moore, the Executive Branch has extinguished Appellants' TVPA claims in a federal court without creating an alternative adjudicatory tribunal like the U.S.-Iran Claims Tribunal.

Article I, Section 8, Clause 10 clearly empowered Congress to make sitting heads of state civilly liable under the TVPA to sanction the universal crimes of torture or extrajudicial killing. The President's foreign policy is subservient to Congressional foreign policy if the two diverge. Prominent examples include the so-called "Boland Amendment" concerning assistance to the Nicaraguan resistance, the Clark Amendment ending CIA activity in Angola (Clark Amendment to the Arms Export Control Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757-58 (1976), *as amended by* Pub. L. No. 96-533, tit. I § 118(a)-(d), 94 Stat. 3141 (codified as amended at 22 U.S.C. § 2293 note (1980))), and the Comprehensive Anti-Apartheid Act of 1986 (Pub. L. No. 99-440, 100 Star. 1086 (1986). In *Leal Garcia v. Texas*, the executive "[asked] [the Court] to stay the execution [of Leal Garcia] until January 2012 in support of [the Court's] 'future jurisdiction to review the judgment in a proceeding' under … yet-to-be- enacted legislation." *Leal Garcia v. Texas*, 564 U.S. _____ (2011) (per curiam) (slip op. at 2) (citations

omitted). The Supreme Court balked despite the Executive Branch's fears of adverse foreign policy consequences. The Court amplified on the supremacy of Congress in the matter: "First, we are doubtful that it is ever appropriate to stay a lower court judgment in light of unenacted [sic] legislation. Our task is to rule on what the law is, not what it might eventually be." *Id.* See also *Medellin v. Texas,* 552 U.S. 491 (2008).

The TVPA's legislative history does not justify departing from the plain language rule of statutory construction in interpreting the words "an individual" to exclude sitting heads of state. Several versions of the legislation were considered by the House and Senate before becoming Public Law 102-256 in 1992. "The Torture Victim Protection Act was first introduced on May 6, 1986, as H.R. 4756." H. R. REP. NO. 693, Part 1, 100th Congress, 2d Sess., 1 (1988) (hereinafter H. R. REP NO. 693). "It was reintroduced by the same original sponsors during the 100th Congress on March 4, 1987, as H.R. 1417, the Torture Victim Protection Act of 1987." *Id.* at 1-2. "H.R. 1417, as amended, represents an effort to clarify and expand existing law pertaining to the practice of torture by establishing a Federal right of action against violators of human rights.

It also authorizes suits by both aliens and U.S. citizens who have been victims of gross human rights abuses." *Id.* at 2. "Governments throughout the world continue to violate fundamental human rights. While in principle virtually every nation now condemns torture and extrajudicial killing, in practice more than one-third of the world's governments engage in, tolerate, or condone such acts. The United States has long recognized that if international human rights are to be given legal effect, adhering nations must make available domestic remedies and sanctions to address abuses regardless of where they occur." *Id.* "H.R. 1417, as amended, allows victims of torture, or their representatives, residing in the United States to bring a civil action in Federal court against the torturer. Any person who, under actual or apparent authority of any foreign nation, subjects another to torture or extrajudicial killing would be liable. It protects not only aliens living in this country, but also U.S. citizens who have been tortured." *Id.* "This bipartisan initiative is extremely important to the furtherance of human rights law. It was the consensus of opinion of expert witnesses in the legal field, as well as prominent members of the human rights community, that passage of this legislation would be very beneficial in

calling attention to the plight of torture victims, and curtailing this practice." *Id.* at 3.

"The purpose of the legislation is to provide a Federal cause of action against *any* individual who, under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing." H. R. REP. NO. 55, Part 1, 101st Congress, 1st Sess., 1 (1989) (hereinafter H. R. REP NO. 55) (emphasis added). "Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law. As the Second Circuit Court of Appeals held in 1980, 'official torture is now prohibited by the law of nations.' *Filartiga v. Pena-Irala,* 630 F. 2d 876, 884 (2d Cir. 1980). The prohibition against summary executions has acquired a similar status." *Id.* at 2. "These universal principles provide scant comfort, however, to the many thousands of victims of torture and summary executions around the world. Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in the past decade alone. (*See* 'Amnesty International,

Political Killings by Governments 5' (1983).) Too often, international standards forbidding torture and summary executions are honored in the breach." *Id.* "For this reason, recent international initiatives seeking to address these human rights violations have placed special emphasis on enforcement measures. A notable example is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which was adopted, with strong support from the U.S. Government, by the U.N. General Assembly on December 10, 1984. Essentially enforcement-oriented, this Convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. One such obligation is to provide means of civil redress to victims of torture." *Id.* at 2-3. "The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.' (28 U.S.C. § 1350). Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy,

not limited to aliens, for torture and extrajudicial killing." *Id.* at 3. "The appellate court unanimously acknowledged that although torture of one's own citizens was not recognized as a violation of the law of nations in 1789, when the Alien Tort Claims Act was enacted, the universal prohibition of torture had ripened into a rule of customary international law, thereby bringing torture squarely within the language of the statute. (See *Filartiqa,* [sic] 630 F. 2d at 884-85)." *Id.* "The TVPA is subject to restrictions embodied in the common law doctrine of sovereign immunity, now codified in the Foreign Sovereign Immunities Act of 1976 [FSIA]. Pursuant to the FSIA, 'a foreign state,' or an 'agency or instrumentality' thereof, 'shall be immune from the jurisdiction of the courts of the United States and of the States,' with certain exceptions as elsewhere provided in the FSIA, and subject to international agreements to which the United States was a party at the time of the FSIA's enactment.

"While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats

visiting the United States on official business." *Id.* at 5 (emphasis added).

This legislative history indicates a Congressional understanding that the TVPA would implement an obligation of the Convention Against Torture (which does not recognize Head of State Immunity, sitting or otherwise, for civil suits under Article 14); but rather that sitting heads of state would be shielded from suit when acting in a diplomatic status while visiting the United States, which is not the case here. See also S. REP. NO. 102-249, at 8 (1991): "Nor should *visiting* heads of state be subject to suit under the TVPA" (emphasis added). The House Report accompanying the TVPA, might be read to suggest a sitting Head of State Immunity independent of diplomatic immunity in stating that, "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity." H. R. REP. NO. 102-367, at 5 (1991). But it seems more likely that Congress understood that the diplomatic immunity conferred in the Vienna Convention on Diplomatic Relations, Article 31, which omits any specific mention of a head of state, is granted to a head of state under CIL. Vienna Convention, *infra*.

Legislative history also suggests a Congressional

misunderstanding of the textual non-applicability of the TVPA to foreign sovereigns by suggesting a TVPA sovereign immunity *defense*. The most convincing extrapolation from this confusion is that Congress intended the TVPA to follow the liability rules endorsed by the CAT, i.e., that the statute should be interpreted consistent with the treaty ratified by the Senate in 1994. See *Reed v. Wiser*, 555 F. 2d 1079 (2nd Cir.), *cert. denied*, 434 U.S. 922 (1977). And the Supreme Court instructed in *Asakura v. City of Seattle*, 265 U.S. 332 (1924): "Treaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is preferred." *Id.* at 342. As amplified infra, the CAT, Article 14, clearly permits civil suits against sitting heads of state for torture or extrajudicial killing under color of foreign law. President George H.W. Bush celebrated the TVPA, writing in his signing statement, "[t]he United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur." President's Statement on Signing "The Torture Victim Protection Act of 1991" (March 12, 1992) at http://www.presidency.ucsb.edu/ws/?pid=20715, accessed February 1,

2012. President Bush voiced concern over politically-motivated suits and the potential statutory burden on federal court dockets. But the President explained that "[t]hese potential dangers… do not concern the fundamental *goals that this legislation seeks to advance*. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." *Id.* at 4-5, emphasis added. The President conspicuously refrained from insinuating he would interpret the TVPA to authorize the Executive Branch to suggest immunity for sitting heads of state to preserve a constitutional prerogative over foreign affairs.

C. CUSTOMARY INTERNATIONAL LAW

The Supreme Court instructed in *Samantar* that "when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law," *Samantar* n. 13, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

Assuming its retention by the TVPA , the District Court erred in concluding CIL crowns the President with limitless discretion to invoke

sitting Head of State Immunity to claims founded on torture or extrajudicial killing.

CIL rules are obligatory. If a rule is optional or discretionary with the Executive, it by definition cannot be CIL. CIL "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987). See also Statute of the International Court of Justice art. 38(I)(b), June 26, 1945, 59 Stat. 1055, 1060 (international custom as a source of law when it is "evidence of a general practice accepted as law."). State practice that is "generally followed but which states feel legally free to disregard" is not CIL. Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. (c). States must take or not take action out of a sense of legal obligation or *opinion juris*. *Id.* See also *S.S. Lotus (Fr. V. Turk.)*, 1927 P.C.I.J. (ser. A.) No. 9, at 28 ("even if the rarity of the judicial decisions to be found…were sufficient to prove…the circumstance alleged…it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were

based on [states'] being conscious of having a duty to abstain would it be possible to speak of an international custom." *Id.* They cannot take or abstain from taking action based "merely for reasons of political expediency." Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. (f), quoting *Asylum Case* (*Colom. v. Peru*), 1950 I.C.J. 266, 277 (June 13). CIL is distinct from comity. Comity by definition is state practice that is not taken as "a matter of absolute obligation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Instead, it is "the voluntary act of the nation by which it is offered, [and is inadmissible when contrary to its policy]." *Bank of Augusta v. Earle*, 13 Pet. 519, 589 (1839), *quoted in Hilton* at 165-6. Thus, if state practice is taken voluntarily in the name of "comity" or other purely political considerations, and not from a sense of legal obligation, it by definition cannot be CIL.

The Executive maintained and the District Court agreed that the President enjoys limitless discretion binding on Article III courts in determining whether sitting heads of state should enjoy immunity in TVPA suits. The Suggestion of Immunity maintained (p.2 n.3): "The fact that the Executive Branch has the constitutional power to suggest

the immunity of a sitting Head of State does not mean that it will do so in every case. The Executive Branch's decision in each case is guided, inter alia, by considerations of international norms and the implications of the litigation for the Nation's foreign relations." *Id.* The District Court agreed that immunity for sitting heads of state under the TVPA was discretionary with the President: "This Court is not in a position to second-guess the Executive's determination that in this case, the nation's foreign policy interests will be best served by granting Defendant Rajapaksa head of state immunity while he is in office." Mem. 10.

The discretionary rule championed by the District Court and the DOJ is no part of CIL because it is not obligatory. The District Court erred in concluding otherwise.

Contemporary CIL also does not create an obligatory TVPA sitting Head of State Immunity. Judge Kaufman taught in *Filartiga* that we must not endeavor to divine the state of CIL at the time a statute was passed, but rather look to the standing of an issue within the current framework of CIL. *Filartiga v. Pena-Irala*, 630 F .2d 876 (2nd Cir. 1980). ("Thus it is clear that courts must interpret international law not as it

was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881.)

The CAT became effective internationally in 1987 to enshrine CIL. It was ratified by the Senate for the United States in 1994. It does not endorse sitting Head of State Immunity in either criminal prosecutions or civil actions based on torture. Convention, *supra*, Articles 1-4, 14. Criminal prosecutions may be brought against any "person." Civil actions must be made available by signatory to victims of torture perpetrated by any "person" within their jurisdictions. S. TREATY DOC. 100-20 (1988). In addition, not a syllable in the submissions of the CAT by Presidents Ronald Reagan and George H.W. Bush or the Senate reservations or debate on the CAT hints at a Head of State Immunity for civil suits required or permitted by the Treaty under Article 14. See S. TREATY DOC. 100-20 (1988).

Civil suits against sitting heads of state are far less intrusive on foreign sovereignty than are criminal prosecutions. An arrest or prison sentence disables a sitting head of state from governing, whereas a civil suit does not. Thus, diplomatic immunity is absolute as regards criminal prosecutions, but qualified as to civil suits. Vienna Convention

on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Similarly, the domestic law of the United States exposes a sitting President to civil suit, *Clinton v. Jones,* 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974), but criminal prosecution of an incumbent President under orthodox thinking is constitutionally foreclosed because it would paralyze an entire branch of government. Moreover, Sri Lanka acceded to the CAT in 1994. Subjecting Defendant Rajapaksa to the TVPA does not sanction conduct that is legal under Sri Lanka's domestic jurisdiction. Katarina Martholm, *The Implementation of the Anti-Torture Convention,* 10 SRI LANKA J. INT'L L. 133 (1998).

Congress and the Executive Branch erred in thinking the TVPA implemented the civil liability obligation of the CAT. Article 14 requires the United States to provide a civil cause of action to victims of torture perpetrated in the United States. S. TREATY DOC. 100-20. But the TVPA provides a civil cause of action to victims of torture or extrajudicial killing under color of *foreign* law, which is required only by the spirit, not the letter of the CAT. But in either case, nothing in the

CAT indicates a sitting Head of State Immunity should be recognized in civil causes of action. Indeed, Article 2, paragraph 2 militates against such an inference by making clear there are "[n]o exceptional circumstances whatsoever" that ever excuse torture.

The District Court pointed to the absence of precedents of civil suits against sitting heads of state as proof that sitting Head of State Immunity was CIL. But other reasons are more persuasive. Sitting heads of state like Defendant Rajapaksa routinely threaten violent retaliation against the family or property of any would-be TVPA plaintiff. Further, service of process and personal jurisdiction are steep hurdles to suing a sitting head of state under the TVPA. Additionally, collecting any judgment would be problematic, which further discourages TVPA suits against sitting heads of state. Finally, the United States' TVPA extraterritorial reach has no civil counterpart abroad.

The 1998 Rome Statute ratified by more than 120 nations, which established the International Criminal Court, also reflects CIL. It more explicitly than the CAT denies sitting Head of State Immunity for any crimes within its jurisdiction, including torture or extrajudicial killing.

Article 27 of the Rome Statue provides:

> Irrelevance of official capacity
>
> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Rome Statute of the International Criminal Court art. 27, U.N. Doc. A/CONF. 183/9 (July 17, 1998).

The ICC and cognate special international tribunals have prosecuted sitting heads of state. Since the ratification of the United Nations Convention Against Torture, and, in particular, since the creation of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in 1993, the Special Court for Sierra Leone ("SCSL") in 2002, and the International Criminal Court ("ICC") in 2002,

numerous sitting heads of state who otherwise would be protected by sitting Head of State Immunity have been indicted for violating the international prohibitions on torture or extrajudicial killings. These include Slobodan Milošević (President of Yugoslavia, indicted by the ICTY in 1999), Charles Taylor (President of Liberia, indicted by the SCSL in 2003), Omar al-Bashir (President of Sudan, indicted by the ICC in 2009), and Muammar Gaddafi ("Brother Leader" of Libya, indicted by the ICC in 2011).[1] The Executive has supported the criminal prosecutions of the sitting heads of state for torture or extrajudicial killings.

At present, no individual may assert sitting Head of State Immunity as a defense to a prosecution for torture or extrajudicial killing under international law, including the Defendant if he were

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[1]http://www.icty.org/case/slobodan_milosevic/4#ind, http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx, http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB, http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pre_trial%20chamber%20i%20issues%20three%20warrants%20of%20arrest%20for%20muammar%20gaddafi_%20saif%20al-islam%20gaddafi%20and%20a

indicted by the International Criminal Court. Other nations have also noted the Convention's impact on sitting Head of State Immunity. The House of Lords of the United Kingdom held in *Regina v. Bartle*, that after the United Kingdom passed legislation implementing the Convention in 1988, Sitting Head of State Immunity was no longer available for charges of torture or extrajudicial killing. *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet,* House of Lords, U.K. (24 March 1999), 119 I.L.R. 135 (1999).

In sum, CIL does not recognize a sitting Head of State immunity for either criminal or civil liability for torture or extrajudicial killings.

VII. CONCLUSION

For the reasons set forth above, the decision of the District Court should be reversed and the case remanded for further proceedings.

DATED: OCTOBER 2, 2012

Respectfully Submitted,

/S/ Bruce E. Fein
BRUCE E. FEIN (D.C. Bar No. 446615)
BRUCE FEIN & ASSOCIATES, INC.
722 12th St. NW, 4th Floor
Washington, D.C. 20005
Telephone: (703) 963-4968
Facsimile: (202) 478-1664
Email: bruce@thelichfieldgroup.com
Attorney for *Plaintiffs-Appellants*

/S/ Adam Butschek
ADAM BUTSCHEK
Of Counsel
BRUCE FEIN & ASSOCIATES, INC.
722 12th St. NW, 4th Floor
Washington, D.C. 20005
Telephone: (202) 785-2166
Facsimile: (202) 478-1664
Email: adam.butschek@gmail.com
Attorney for *Plaintiffs-Appellants*

VIII. CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(A)(7)(C)

I hereby certify that the foregoing OPENING BRIEF FOR APPELLANTS KASIPPILLAI MANOHARAN, DR.,ET AL., contains no more than 14,000 words and fully complies with Circuit Rule 32(a)(7)(C).

DATED: OCTOBER 2, 2012

Respectfully Submitted,

/S/ Bruce E. Fein

BRUCE E. FEIN (D.C. Bar No. 446615)
BRUCE FEIN & ASSOCIATES, INC.
722 12th St. NW, 4th Floor
Washington, D.C. 20005
Telephone: (703) 963-4968
Facsimile: (202) 478-1664
Email: bruce@thelichfieldgroup.com
Attorney for *Plaintiffs-Appellants*

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2012, a true and correct copy of foregoing OPENING BRIEF FOR APPELLANTS KASIPPILLAI MANOHARAN, DR.,ET AL, was served upon Defendant's counsel of record and Interested Parties via Electronic Claims File (ECF):

Mitchell Rand Berger
Direct: 202-457-5601
[COR NTC Retained Atty]
Patton Boggs LLP
Firm: 202-457-6000
2550 M Street, NW
Washington, DC 20037-1350
Attorney for Defendant – Appellee, Percy Mahendra Rajapaksa

Adam C. Jed
Direct: 202-514-8280
Email: adam.c.jed@usdoj.gov
[COR LD NTC Gvt Atty US DOJ]
U.S. Department of Justice
(DOJ) Civil Division
7240
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
United States of America
Interested Party - Amicus Curiae

R. Craig Lawrence
Email: craig.lawrence@usdoj.gov
[NTC Gvt Atty USAO/AUSA]
U.S. Attorney's Office
(USA) Civil Division
Firm: 202-514-7159

555 4th Street, NW
Washington, DC 20530
United States of America
Interested Party - Amicus Curiae

Mark B. Stern, Attorney
Email: mark.stern@usdoj.gov
[COR NTC Gvt Atty US DOJ]
U.S. Department of Justice
(DOJ) Civil Division, Appellate Staff
Firm: 202-514-2000
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
United States of America
Interested Party - Amicus Curiae

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Respectfully Submitted,

/S/ Bruce E. Fein

BRUCE E. FEIN (D.C. Bar No. 446615)
BRUCE FEIN & ASSOCIATES, INC.
722 12th St. NW, 4th Floor
Washington, D.C. 20005
Telephone: (703) 963-4968
Facsimile: (202) 478-1664
Email: bruce@thelichfieldgroup.com
Attorney for *Plaintiffs-Appellants*