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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

"THE AMERICAN JUSTICE CENTER, INC., "JOHN DOES 1-10" and "JANE DOES 1-10", on Behalf of themselves and their deceased relatives, left presently unnamed,	**Civ. No. 14 Civ. 7780 (AT)**
Plaintiffs,	
v.	
NARENDRA MODI, Prime Minister of India, in His official capacity,	
Defendant.	

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' OBJECTION
TO THE SUGGESTION OF IMMUNITY FILED BY NON-PARTY
UNITED STATES OF AMERICA ON BEHALF OF DEFENDANT

The defendant Modi is being sued for the acts he committed as "Chief Minister" of the state of Gujarat in 2002 and not for any acts that he committed as "Prime Minister" India. It is undisputed that in 2002 defendant Modi was only "Chief

Minister" and it is also well established and undisputed that Modi became Prime Minister of India and "head of a foreign government" only in May 2014 long after the events of 2002. It is undisputed that foreign sovereign immunity extends only to the "head of the foreign government" for the actions committed during tenure as "head of a foreign government". In this case, the defendant's action in question were committed long before he became head of the foreign government.

Defendant is, among other torts, charged with acts that are covered under Torture Victims Protection Act (TVPA). The legislative history of TVPA states that ***torture and similar violations of human rights can never be considered the public acts required to invoke the act of state doctrine.*** "Since this doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation." S. REP. NO. 102-249, at 8 (1991) (citing *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989)). Additionally, United States Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ____(2013) held that it is an "international duty" and "important American national interest "to not provide safe harbor to *hostis humani generis*, or the common enemy of mankind". (Breyer, J., concurring), Slip Op. at 7-8, citing, inter alia, Leval, Pierre N. "The Long Arm of International Law." Foreign Affairs. 5 Feb. 2013. Web. 22 Apr. 2013.

<http://www.foreignaffairs.com/articles/138810/pierre-n-leval/the-long-arm-of-international-law>.

With the above factual and legal background in mind, the plaintiffs, by and through the undersigned attorney, submit the following as their objections to the suggestion of immunity filed by the United States of America, a non-party, on behalf of Defendant in this action.

I. DEFENDANT IS NOT ENTITLED TO IMMUNITY

Many federal courts have applied the rejection of immunity of foreign officials holding that sovereign immunity doesn't apply to protect foreign government officials from facing charges of blatant human rights abuses, as in this case. The United States Supreme Court has held that the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1605A ("FSIA"), does not protect foreign government officials sued in United States Courts. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). It has been specifically held that foreign officials are not protected by the FSIA. *Id.* at 2292–93. The courts have reasoned that the foreign government official's actions or inactions that resulted in his being sued for the blatant human rights abuses are not protected by sovereign immunity because they were committed outside of his official lawful authority. In this case, Defendant is charged with the most heinous and egregious violations of domestic and international law as well as the law of

nations for actions and inactions connected during the 2002 Gujarat massacre and were outside his official lawful authority in his previous role as Chief Minister of the state of Gujarat. The defendant is being sued for the acts he committed as "Chief Minister" and not for any acts that he committed as "Prime Minister" India. It is undisputed that foreign sovereign immunity extends only to the "head of the foreign government" for the actions committed during tenure as "head of a foreign government". In this case, the defendant's action in question were committed long before he became head of the foreign government.

The high court further elucidated the common law norms involved in lawsuits for human rights violations in *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). The law has evolved a great deal over the years to ensure that perpetrators of the most egregious human rights violations, as in this case, cannot escape justice under the guise of sovereign immunity. Also, in, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), it was held that an alien can sue for torture in U.S. courts.

A. DEFENDANT IS NOT IMMUNE UNDER FSIA

The statute itself, FSIA, states in pertinent part that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ---- (1) in which the foreign state has waived its immunity either explicitly or ***by implication***...." 28 U.S.C. 1605(a) (1) (Emphasis added).

In *Samantar,* the U.S. Supreme Court determined that FSIA as a whole indicates that the term "foreign state" does not include individual government officials. The court reasoned that FSIA does not apply to an official's claim to immunity because "[t)he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA" *Samantar, at 33*; however, "[e]ven if the suit is not governed by [FSIA], it may still be barred by foreign sovereign immunity under the common law" *Samantar.*

In this case, Plaintiffs did not sue the entire state of India but merely Defendant Narendra Modi, a public official. It is respectfully submitted that statutory immunity does not apply. It is also respectfully submitted as argued below that common law immunity does not apply as well.

B. DEFENDANT IS NOT IMMUNE UNDER COMMON LAW

Common law immunity to foreign officials does not apply in this case. Because of *Samantar*, lower federal courts can hold common law foreign sovereign immunity inapplicable for government officials sued for human rights abuses to make sure accountability for such abuses is brought to light and cannot simply adopt common law principles applied before the FSIA enacted in 1976 because of dramatic changes in both international and U.S. norms governing accountability for human rights violations. The lower federal courts should look to

international and domestic immunity principles and doctrines developed in U.S. human rights litigation.

It is well-settled that when foreign officials violate *jus cogens* or clearly defined, widely accepted international law norms, they act outside of their lawful authority and are not entitled to immunity. While the United States courts have generally held that foreign officials not entitled to "conduct-based" immunity based on their statuses as foreign heads of state or other foreign government representatives are immune from suit only for their "official acts", it has also been held that consistently by federal and international tribunals that gross violations of human rights are not official acts to which "conduct-based" immunity attaches. See, e.g., *Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); Doe v. Qi, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995); *Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte*, (No.3), [2000] 1 A.C. 147, 205 (H.L. 1999) (Lord Browne-Wilkinson); *Attorney General of Israel v. Eichmann*, 36 I.L.R. 277, 309-10 (Israel S. Ct. 1962); *1 Trial of the Major War Criminals Before the International Military Tribunal* 223 (1947).

Restatement (Second) of Foreign Relations Law, Section 66(f) (1965) provides that foreign states' sovereign immunity extends to public officials for "acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state...."

In this case, Defendant's actions and inactions as alleged in the complaint are for massive human rights violations and are clearly outside of Defendant's official capacity. Further, whether the effect of exercising jurisdiction over Defendant would enforce the rule of law against India for the massive human rights violations committed against the Muslim people in the 2002 Gujarat massacre is of no consequence because these actions and inactions occurred outside the official capacity of Defendant as prime minister. Defendant was chief minister of the state of Gujarat during the massacre and exceeded the scope of his lawful authority in committing flagrant *jus cogens* human rights abuses resulting in the deaths of thousands.

Accordingly, such a *jus cogens* exception to "conduct-based" immunity under common law should apply here because no immunity attaches to the *jus cogens* violation in the first instance.

Therefore, due to the nature of the *jus cogens* exception in this case, gross violations of human rights committed by Defendant are not "official acts" within the lawful authority of Defendant to which "conduct-based" immunity attaches.

Moreover, it has been argued that violations of *jus cogens* or peremptory norms of international law, including human rights violations, amount to an implicit waiver of Foreign Sovereign Immunity under FSIA. *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (1994) (Wald, J., dissenting), *cert. denied,* 115 S. Ct. 923 (1995). Also see Adam C. Belsky, et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law,* 77 CALIF. L. REV. 365 (1989).

The concept of *jus cogens* recognizes certain fundamental core crimes and torts enshrined into international norms from which sovereigns may not derogate. Genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination are all violations of *jus cogens.* Restatement (Third) of Foreign Relations Law § 702 & cmt. n (1987).

II. PLAINTIFF'S HAVE MERITORIOUS CAUSES OF ACTION NOT AFFECTED BY SOVEREIGN IMMUNITY

As alleged in the complaint, the Alien Tort Statute ("ATS") and the Torture Victims Protection Act ("TVPA") 28 U.S.C. § 1350 provide federal jurisdiction over a claim by an alien for a "tort . . . in violation of the law of nations" and "state-sponsored terrorism." Also, these have been found to all be exceptions to FSIA.

The courts have further held that "Sovereign Immunity" does not extend to "suits arising out of the unlawful acts of [the state's] representatives," and does not

bar "suits brought against them for the doing of such unlawful acts." *Pilger v. U.S. Steel Corp.*, 130 A.D. 523, 524 (N.J. 1925).

The courts have also held that "[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under [the] FSIA." *Id. Hilao v. Marcos* (citing Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

The courts have held that the right that deserves the highest status under international law is the right to be free from official torture and that this right is fundamental and universal. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 720–22 (9th Cir. 1992).

In this case, Defendant Narendra Modi committed unspeakable actions and inactions of cruelty, torture, genocide, and various tortuous acts surrounding the 2002 Gujarat Massacre of thousands of Muslim men, women, and children that directly and indirectly affected the Plaintiffs in this action and their decedents.

The complaint in this action mentions in explicit detail the horrific torts and crimes against humanity and instigation of killings that were the result of, and directly traceable to, the actions and inactions of Defendant Narendra Modi in his capacity as Chief Minister of Gujarat in India and while under color of authority in this role he did commit blatant human rights abuses as alleged in the complaint, directly harming the lives and well being of Plaintiffs and their decedents. These

horrific acts fall within a square exception to the sovereign immunity doctrine. The high court made it clear in *Samantar*, supra, that not all government employment acts trigger immunity and foreign states seeking to invoke immunity for their officials should focus on whether the acts alleged in the complaint were taken with lawful authority as circumscribed by clearly defined and widely accepted international law norms? Clearly, that is the case here as the allegations are crimes against humanity and serious breaches of ethics and the law of nations surrounding the 2002 Gujarat Massacre. These allegations are supported by the facts as alleged in the complaint and the law of the ATS and TVPA.

In *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1266 (N.D. Cal. 2004), the court rejected the arguments in favor of immunity because the allegations brought by Plaintiffs were clear violations of international law, basically isolating a singular minority targeted for persecution based on their differences.

Certainly such failure of the doctrine of immunity applies to something as callous and coldblooded as Genocide, long since recognized as a core international law norm and how immunity should not be sanctioned for a state that authorizes genocide, defined by international law in Article 2 of the Genocide Convention as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."

III. THE ACT OF STATE DOCTRINE DOES NOT APPLY

The act of state doctrine indicates that every state is bound to respect and recognize the independence of every other state. It has been held that "common crimes committed by the Chief of State done in violation of his position and not in pursuance of it . . . are as far from being an act of state as rape." *Jimenez v. Aristeguieta*, 311 F.2d 547, 558 (5th Cir. 1962).

The courts have also held that in a similar case involving allegations of genocide, including widespread rape and other torture, the rejection of the use of the act of state doctrine by the defendant applied with force to human rights violations. In that case the court observed that "the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state." *Kadic v. Karadzic*, 70 F.3d at 250 (2d Cir. 1995).

In fact, the legislative history behind the TVPA states explicitly that ***torture and similar violations of human rights can never be considered the public acts required to invoke the act of state doctrine.*** "Since this doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation." S. REP. NO. 102-249, at 8 (1991) (citing *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989)).

There can be no doubt the acts of Defendant, Narendra Modi, amounted to torture under the eyes of the laws of nations. The complaint goes into detail from the preliminary statement to the conclusion of the horrors caused during the 2002 Gujarat Massacre that he instigated and propagated as a result of actions and inactions resulted in the deaths, beatings, rapes, detentions, and torture of thousands.

Therefore, Defendant is not entitled to either statutory immunity or common law immunity. Defendant should not be granted immunity in this action because the egregious nature of the charges laid against him in this civil action implicates his direct and indirect participation and involvement in *jus cogens* or violations of certain norms of international law that are inherently base or vile, specifically the tortuous acts amounting to torture, crimes against humanity, and genocide, amongst others of Plaintiffs and their decedents. Defendant's actions and inactions in the 2002 Gujarat massacre provide exception from, and weigh heavily against, any grant of immunity.[1]

Submitted on November 14, 2014.

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[1] Beth Stephens, *The Modern Common Law of Foreign Official Immunity,* 79 Fordham L. Rev. 2669 (2011). http://ir.lawnet.fordham.edu/flr/vol79/iss6/8