UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ESTATE OF TAMAR KEDEM SIMAN TOV, BY HEIR-AT-LAW GAD KEDEM, ET AL., Plaintiffs, v. UNITED NATIONS RELIEF AND WORKS AGENCY ("UNRWA"), ET AL., Defendants.	§ § § § § § § § § §	Civil Action No. 24 Civ. 4765 (AT)

PLAINTIFFS' SUR-REPLY MEMORANDUM OF LAW IN RESPONSE TO THE GOVERNMENT'S REPLY CONCERNING IMMUNITY ISSUES

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Plaintiffs respectfully submit this Sur-Reply, as authorized by the Court's order of October 24th (Doc. No. 41), in further opposition to the Government's assertion that the Court should dismiss their claims against certain of the Defendants on immunity grounds. This Sur-Reply is limited to addressing certain arguments raised for the first time in the Government's reply (Doc. No. 38, the "DOJ Reply Letter") which Plaintiffs were thus unable to address in their prior opposition brief (Doc. No. 25, the "Pl. Opp.").[1]

ARGUMENT

I. UNRWA IS NOT PROTECTED FROM PLAINTIFFS' CLAIMS BY THE INTERNATIONAL ORGANIZATIONS IMMUNITY ACT ("IOIA")

The Government initially claimed that the CPIUN provided immunity to UNRWA, and we showed in our initial opposition why it did not. On reply, the Government claims for the first that it is actually the IOIA (22 U.S.C. §288 et seq.), enacted in 1946 before the creation of UNRWA, which immunizes UNRWA from this suit. It does not because the IOIA covers only specified organizations (and UNRWA is not so specified, Pl. Opp. at 9, as further expanded on below) and because the IOIA has been authoritatively construed to contain several exceptions which are applicable here. *Jam v. Int'l Finance Corp*., 586 U.S. 199, 207-8 (2019), (IOIA's provision that a protected international organization enjoys (§288a(b)) the "same immunity ... as is enjoyed by foreign governments" meant that such immunity is now subject to all of the current exceptions to immunity specified in the relevant portion (28 USC §1605) of the Foreign Sovereign Immunities Act, enacted several decades after the IOIA).

The Government is apparently now motivated to invoke the IOIA as a backstop to the CPIUN because it has not rebutted the showing (Pl. Opp. at 16-20) that the CPIUN provides no

[1] All defined terms used herein have the same meanings as in the Pl. Opp.

immunity in the case of a jus cogens violation, whereas in this Circuit's case law there is no "jus cogens" exception to FSIA immunity and thus to IOIA immunity. DOJ Reply Letter at 6 (citing cases). But even if the IOIA did cover UNRWA, which it does not, the IOIA cannot be used to provide broader protection than the CPIUN in this fashion as long as Plaintiffs' claims fall within any of the other, explicit FSIA exceptions to IOIA immunity.

a. Plaintiffs' Claims Against UNRWA Fall Within Statutory Exceptions to IOIA Immunity

The frequently-applied "commercial activity" exception of 28 U.S.C. §1605(a)(2) provides that there is no immunity in a case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."[2] As the Second Circuit has recently summarized the law:

> The FSIA provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). A foreign state engages in commercial activity when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it. … [A] state engages in commercial activity under the FSIA where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity for purposes of the FSIA only where it acts in the manner of a private player within the market. It is thus the nature of the act, not its purpose, that matters in evaluating commercial character. To determine the nature of a sovereign's act, we ask not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives but rather whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.

Attestor Master Value Fund LP v. Argentina, 113 F.4th 220, 230-31 (2d Cir. 2024) (quotations from and citations to case law omitted). Significantly, *Republic of Argentina v. Weltover, Inc.*,

[2] The final clause of that subsection, applying to purely extraterritorial acts that nonetheless cause a "direct effect" in the U.S., is not relevant here.

504 U.S. 607, 615-16 (1992), held that a sovereign government raising funds by issuing debt instruments was engaged in a commercial activity because it was not fundamentally different from private corporations doing the same "except perhaps [in] its purpose."

The Second Circuit has also focused on the right level of generality for this analysis, which is the specific activity rather than some higher-level project or goal which would allow defendants to try to smuggle in a distinctively sovereign purpose. *See, e.g*, *Harvey v. Permanent Mission of Republic of Sierra Leone*, 97 F.4th 70 (2d Cir. 2024) (immunity denied; relevant activity was not operating a diplomatic mission but hiring a contractor to do construction work on a Manhattan building, which private actors commonly do); *Pablo Star Ltd. v. Welsh Government*, 961 F.3d 555 (2d Cir. 2020) (immunity denied; relevant activity was not promoting tourism to Wales but using allegedly copyrighted photographs in promotional materials without permission, which private actors could equally well do).

Here, as the Complaint makes clear in great detail, all of the actions of UNRWA that give rise to its liability to the Plaintiffs have their causal origin in its continuous and systematic fund-raising activities in the United States, indeed in the Southern District of New York, together with its New-York-based actions in following up and collecting the pledged funds and then disbursing them out of a New York bank account for operational expenditures in Gaza. Complaint ¶¶ 6(b), 617-631. Crucially, as alleged, UNRWA is not supported by the UN's general funds (analogous to a government's tax revenues) but overwhelmingly by voluntary donations it must solicit year-to-year, exactly like a private charity or NGO carrying out similar services (healthcare, education, and the like) to a needy population, whether in Gaza or anywhere else in the world. Its cash-raising and cash-handling activities are thus identical to those of a similarly-situated private charity or NGO and thus "commercial activity" for IOIA purposes, in precisely the same

way *Weltover* found government bond issuance functionally similar to corporate bond issuance and thus commercial for FSIA purposes.

Just as importantly, the subsequent New-York-funded UNRWA activities within Gaza that aided and abetted Hamas' atrocities are almost all analogous to those a private charity or NGO could and would carry out in similar circumstances rather than distinctively "sovereign," much less regulatory, i.e. for IOIA/FSIA purposes they are commercial activities conducted outside the United States but in connection with acts (the fundraising and subsequent disbursement of the funds raised) within the United States. In particular, the way UNRWA manipulated its payroll process in Gaza to enrich Hamas by predictably funneling hundreds of millions of US dollars to it in cash so that it could pay its arms smugglers (Complaint ¶¶ 581-86) could equally well have been done by any private-sector local employer with the same desire to fund Hamas.

In *Rodriguez v. Pan American Health Organization*, 29 F.4th 706, 716-17 (D.C. Cir. 2022), the court held that the plaintiffs had sufficiently alleged that the UN-affiliated defendant had served as a financial intermediary "moving money for a fee" in connection with the plaintiffs' injuries and that this was "commercial activity carried on the United States" sufficient at the pleadings stage to deny IOIA immunity based on the commercial-activity exception. Significantly, the plaintiffs' actual injuries had been suffered in either Cuba or Brazil at the hands of the totalitarian government of Cuba, which PAHO had assisted in receiving funding, but because the money had been moved through the United States that was the location that counted. Equally significantly, the plaintiffs themselves had not been direct participants in the "commercial activity," but were entitled to pursue their claims because they were injured by the

activities the money transfers facilitated. Plaintiffs here were similarly injured, as alleged in the pleadings, as a foreseeable consequence of UNRWA's commercial activity.[3]

Separately, another of the enumerated exceptions to FSIA, and thus IOIA, immunity is that of 28 U.S.C. §1605(a)(1), where the defendant "has waived its immunity either expressly or by implication." As already explained, Pl. Opp. at 19 n.14, the UN Security Council's binding Resolution 1373, authoritatively declaring that financing terrorist activity is contrary to the purposes and principles of the UN, is a prospective waiver of any attempt by UN-affiliated defendants to claim immunity for financing terrorist activity, as the plaintiffs here allege in great detail UNRWA has done. The multiple other statements of the UN's General Assembly and International Law Commission already referenced (Pl. Opp. at 18-20) likewise either waive any claim by UNRWA to IOIA immunity for jus cogens violations or estop it from claiming it.

In the FSIA/IOIA context "the ultimate burden of persuasion [including proving the inapplicability of a plausibly-raised exception] remains on the party seeking … immunity," and the Government has not met that burden. *Pablo Star*, 961 F.3d at 560.

b. The Government Has Not Made the Threshold Showing that UNRWA Is Protected by the IOIA in the First Place

As we previously explained, Pl. Opp. at 9 n.4, the IOIA only protects "international organizations" which have been specifically designated for protection by the President via Executive Order, and UNRWA, as opposed to the UN itself, has never been so designated. The Government does not deny that UNRWA has never been so designated, but insinuates (DOJ

[3] This is fully consistent with the Second Circuit's holding in *Harvey*, 97 F.4th at 79-80, that the neighboring property owners could sue for injury to their property caused by the sovereign defendant's contractor even though they were not direct participants in the "commercial activity" (the diplomatic mission's hiring of the contractor) that gave rise to their claims.

Reply Letter at 5) that President Truman's 1946 designation of the UN itself for protection somehow provided a blank check giving the same protection to any number of potential UN-affiliated entities that did not even exist in 1946. No historical evidence is offered to show that this was President Truman's intention, and no rationale is offered for this argument, which is in obvious tension with the IOIA's requirement of specific entity-by-entity designation. Even more importantly, the Government does not even attempt to explain why, for example, President Reagan in 1988 separately designated by Executive Order (Pl. Opp. at 9 n.4) the United Nations Industrial Development Organization ("UNIDO") for IOIA protection. If the 1946 designation of the UN itself was really broad enough to cover UNRWA when it was subsequently established, why would it not also have been broad enough to cover UNIDO when it was subsequently established, thus making separate designation unnecessary and redundant?[4] The Government cannot answer this question, so it ignores it.

Moreover (assuming the Government's argument is that "United Nations" means the same thing in President Truman's IOIA Executive Order as it does in the relevant section of the CPIUN), the Government cannot even keep its story straight on the legal test it proposes. First, it claimed (DOJ Letter at 4), that UNRWA was protected because it was supposedly an "integral part" of the UN. Now it claims instead (DOJ Reply Letter at 1) that UNRWA is protected

[4] The same unanswered question would apply to the various other UN affiliates that have been separately designated for IOIA protection in various Executive Orders over the years, such as, to give only one example, UNESCO. Ex. Ord. 9863, 12 F.R. 3559. Indeed, as we previously noted (Pl. Opp. at 9), the very 1946 Executive Order designating the UN itself simultaneously designated by name several other UN affiliates for protection.

because it is supposedly a "subsidiary organ" of the UN, albeit without acknowledging that it has changed its argument.[5]

Perhaps the Government's position has changed because it cannot respond to the showing (Pl. Opp. at 13-16) that there are at a minimum fact questions as to whether UNRWA is an "integral part" of the UN. But the Government likewise cannot dispute that the public record shows that the UN itself is hopelessly inconsistent as to whether UNRWA is a "subsidiary organ."[6] Indeed, the UN's letter submitted with the initial DOJ Letter (Doc. No. 17-1) never applies that description to UNRWA. In sum, the Government has proffered neither a coherent

[5] The cases the Government cites hardly establish any persuasive support for the claim that the 1946 designation of the UN itself for IOIA purposes protects UNRWA. *Shamsee v. Shamsee*, 74 A.D.2d 357 (2d Dep't 1980), has already been distinguished (Pl. Opp. at 13 n.9) and the Government has not responded to that distinction. *Hunter v. United Nations*, 6 Misc. 3d 1008(A) (Sup. Ct. N.Y. Cty. 2004), inexplicably relies for its contention that UNICEF is protected by the IOIA on *International Refugee Organization v. Republic S.S. Corp*., 189 F.2d 858 (4th Cir. 1951), which involved a UN affiliate which at the time *had* been separately designated for IOIA purposes. *See* Ex. Ord. 9887 (Aug. 22, 1947), 12 F.R. 5723.

In *Bisson v. United Nations*, 2007 WL 2154181 (S.D.N.Y. July 27, 2007), the court held that the World Food Programme was a *joint* "program" of the UN and the UN-affiliated Food and Agriculture Organization (separately designated under the IOIA in the same 1946 executive order that designated the UN) that had no independent legal personality of its own distinct from those of its two controlling entities. In *D'Cruz v. Annan*, No. 05 CIV. 8918 (DC), 2005 WL 3527153 (S.D.N.Y. Dec. 22, 2005), the pro se plaintiff had purported to sue, in addition to the UN itself, entities named in the caption such as "United Nations Insurance Services," which do not appear to actually exist.

[6] The Government asks (DOJ Reply Letter at 2 and 3 n.3) this Court to ignore the UN's own current official organizational chart, which shows UNRWA as outside the group of entities labeled "subsidiary organs" in favor of the supposedly greater authority of a few General Assembly resolutions from the 1950's that do refer to UNRWA as a subsidiary organ. But the Government is simply cherry-picking from a record it should know full well is inconsistent, since it failed to advise the Court of the existence of dozens of more recent General Assembly resolutions expressly related to extending UNRWA's mandate that do *not* characterize UNRWA as a subsidiary organ. *See, e.g.*, G.A. Res. 2002 (XIX) (1965); G.A. Res. 35-13 A-F (1980); G.A. Res. 50/28 (1995); G.A. Res. 78/78 (2023).

legal standard for why UNRWA should have IOIA immunity nor evidence proving that as a factual matter UNRWA satisfies any such standard.

II. THE GOVERNMENT'S ASSERTION OF DIPLOMATIC STATUS FOR DEFENDANTS LAZZARINI AND GRANDI IN COURT FILINGS WITHOUT EVIDENTIARY SUPPORT IS ENTITLED TO NO DEFERENCE

We previously noted that the Government's assertion that Messrs. Grandi and Lazzarini qualified for "diplomatic" immunity under Section 19 of the CPIUN was not "backed by evidence" (Pl. Opp. at 26), although the claims against them were outside the scope of that immunity anyway. Rather than point to actual evidence of those defendants' status, the Government now claims that its "determination" that they are so entitled is entitled to "substantial deference," citing for the first time (DOJ Reply Letter at 8) *United States v. Al-Hamdi*, 356 F.3d 564 (4th Cir. 2004). But in *Al-Hamdi*, the court was not asked to defer to an unsupported factual allegation in a court filing by the *Justice* Department, rather, the Department of *State* had provided for the record a separate formal certification explaining its institutional position that the defendant's protected status as "member[] of the family" of a diplomat had terminated on his 21st birthday. Similarly, in *Devi v. Silva*, 861 F. Supp. 2d 135 (S.D.N.Y. 2012), which the Government cites, the defendant put into the record a formal document from the *State* Department (a "Diplomatic Note" from the U.S. Ambassador to the UN) recognizing his status as a protected diplomat. Nothing like that has been proffered here.

In any event this case has nothing to do with the President's constitutional power "to send and receive ambassadors" (DOJ Reply Letter at 8), because there is no claim that either Grandi or Lazzarini is actually a diplomat within the meaning of the Vienna Convention on Diplomatic Relations ("VCDR"), only that Section 19 of the CPIUN separately entitles certain UN officials (supposedly including them) to the same protection that the VCDR provides to actual diplomats.

But as explained at length in the amicus brief of Michael Mukasey et al., Doc. No. 37-1, at 7-11, the unsubstantiated claim that Grandi and Lazzarini have "the *rank* of" Under Secretary-General simply confirms that they do not actually serve in that role, but have at most received some sort of courtesy title due to internal UN office politics. This is crucial because the State Department explicitly assured the Senate before ratification of the CPIUN, Doc. No. 24-1 at 8, 12, 15, 17-18, that the heightened protection of Section 19 would apply only to a very limited number of senior UN officials actually assisting the Secretary-General in running the UN. For the Government to now claim such immunity for additional dozens or hundreds of UN-affiliated individuals who have been given a courtesy title without fulfilling the actual job responsibilities of the title cannot be reconciled with the representation it made to the Senate in 1970 to allay concerns about the scope of the increased immunity that Section 19 would provide to its beneficiaries.

III. IF THE COURT EVEN REACHES "OFFICIAL-ACTS" IMMUNITY FOR ANY OF THE INDIVIDUAL DEFENDANTS, THE GOVERNMENT'S COMMON-LAW IMMUNITY CASES ARE IRRELEVANT

The Government has now clarified that it "takes no position on whether the Individual Defendants are entitled to" official-acts immunity under Section 18 of the CPIUN. DOJ Reply Letter at 8. Because it is not asking this Court to dismiss the case against any of the Individual Defendants (all but two of whom are not asserted to have Section 19 immunity) on this ground, there is no occasion for the Court at this point to offer any advisory ruling on the Government's abstract claims that any immunity the Individual Defendants may (or may not) have has not been waived and that there is no "jus cogens" exception to any immunity those defendants may (or may not) have.

That said, we note that the Government's belated attempt to inject caselaw involving common-law immunity such as *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), is a red herring.

That case held that either the foreign-government-official defendants there were covered by the FSIA (which does not require an act to have been committed in the defendant's "official" capacity for immunity to be available) or that the defendants were covered by residual common-law immunity, as to which the Second Circuit would follow the pre-FSIA practice of deferring to whatever the Government's views on a particular defendant's immunity might happen to be in the particular case. But the Individual Defendants here have no claim to either FSIA immunity or common-law immunity. The immunity they are asserted to have would come (DOJ Letter at 7) either from the CPIUN or from the IOIA, and in both cases is expressly limited to official acts. Pl. Opp. at 3. The rationale of *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), that jus cogens violations *by definition* cannot be "official" acts (Pl. Opp. at 20-24) is thus directly on point.[7] The Government's dismissive attitude toward *Yousuf* is especially bizarre because the court in that case *agreed* with the Government's view as expressed in that case that the defendants did not have immunity. 699 F.3d at 777-78. The pre-FSIA regime in which the courts deferred to the Government's politically-driven views, varying case to case, as to which defendants should or should not receive immunity cannot be the law when, as here, there is a statute or treaty to provide this Court with the rule of decision.

[7] The non-precedential case of *Rosenberg v. Pasha*, 577 F. App'x 22 (2d Cir. 2014), disagreed with the Fourth Circuit in *Yousuf* as to how much deference is due the Government in common-law immunity cases, but this is not a common-law immunity case so that disagreement is irrelevant. What is relevant (Pl. Opp. at 23) is the Second Circuit's broad endorsement of *Yousuf*'s reasoning and rationale in *Kashef v. BNP Paribas, S.A.*, 925 F.3d 53 (2d Cir. 2019), which the Government has nothing to say about and cannot distinguish.

CONCLUSION

For the foregoing reasons as well as those set forth in the Plaintiffs' prior Memorandum of Law in response to the DOJ Letter, the Government's suggestions that this Court dismiss this action as against any of the defendants on immunity grounds should be denied in their entirety.

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