UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RA'ED MOHAMAD IBRAHIM MATAR, On behalf of himself and his deceased wife Eman Ibrahim Hassan Matar, and their deceased children Ayman, Mohamad and Dalia; MAHMOUD SUBHAI AL HUWETI, on behalf of himself and his deceased wife Muna Fahmi Al Huweti, their deceased sons Subhai and Mohammed, and their injured children, Jihad, Tariq, Khamis, and Eman; and MARWAN ZEINO on his own behalf,	:	05 Civ. 10270 (WHP)
Plaintiffs,	:	**ECF CASE**
v.	:	
AVRAHAM DICHTER, former Director of Israel's General Security Service,	:	
Defendants.	:	

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

Plaintiffs in this case sue Avraham Dichter, former Director of the Israeli General Security Service, for his role in an Israeli military attack carried out in the Gaza Strip in July 2002. The attack struck a residential apartment building where Saleh Mustafa Shehadeh, a leader of the armed wing of the Hamas terrorist organization, had been determined by Israeli intelligence to be at the time. Shehadeh was killed in the attack, but a substantial number of civilians were killed or wounded as well. Plaintiffs, surviving victims of the attack, claim that the attack was unlawful under international law by virtue of targeting a building where civilians were known to be located. Their principal claims are brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for alleged "war crimes," "crimes against humanity," "cruel, inhuman, or degrading treatment or punishment," and "extrajudicial killing" within the meaning of the Torture Victim Protection Act ("TVPA"), Pub. L. 102-256 (1992), *codified at* 28 U.S.C. § 1350 note. After Dichter moved to dismiss plaintiffs' complaint on grounds of the Foreign Sovereign Immunities Act ("FSIA"), the political question doctrine, and the act of state doctrine, the Court issued an order on July 20, 2006, inviting the United States to "state its views, if any, on these issues or on any other issues it considers relevant to the case." Pursuant to 28 U.S.C. § 517,[1] the United States respectfully submits this Statement of Interest in response to the Court's order.

At the outset, it should be made clear that the United States has voiced serious objections to the Shehadeh attack, which are a matter a public record. As the State Department said at the

[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

time: "We have repeatedly criticized the use of heavy weaponry in densely populated areas because of these kind[s] of dangers of large numbers of innocent civilians being killed."[2] In filing this Statement of Interest, the United States does not seek to revisit these issues and takes no position herein as to the lawfulness of the Shehadeh attack. Rather, the United States makes this submission in order to clarify its views on two issues with broad-reaching ramifications for U.S. interests: (1) whether foreign officials are immune from civil suit for their official acts; and (2) whether federal law recognizes a private cause of action for the disproportionate use of military force in armed combat.

As explained below, foreign officials such as Dichter do enjoy immunity from suit for their official acts. This immunity is not codified in the FSIA but instead is rooted in longstanding common law that the FSIA did not displace. Plaintiffs' apparent position that the FSIA eliminated this immunity runs contrary to the statute's text and legislative history, post-FSIA case law, and customary international law. Moreover, any refusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests, by straining diplomatic relations and possibly leading foreign nations to refuse to recognize the same immunity for American officials.

Given that Dichter's alleged participation in the Shehadeh attack was clearly undertaken in his official capacity, Dichter is entitled to invoke immunity here. The fact that plaintiffs allege that Dichter's conduct was unlawful or violated *jus cogens* norms does not change the analysis; what matters is that the conduct was performed on Israel's behalf and is properly attributed to the State of Israel rather than to Dichter personally. Nor is Dichter's immunity trumped by the

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[2] *See* U.S. Department of State, Daily Press Briefing, Jul. 23, 2002, *available at* http://www.state.gov/r/pa/prs/dpb/2002/12098.htm.

TVPA, which was intended to be construed in harmony with existing immunity rules, not in derogation of them. Accordingly, this suit should be dismissed on immunity grounds.

The issue of Dichter's immunity, though, is not the only issue in this case of concern to the United States. In essence, plaintiffs seek for this Court to recognize a private cause of action for the disproportionate use of military force in armed conflict – either by creating such a cause of action as a matter of federal common law under the ATS, or by reading such a cause of action into the TVPA. Following either course would lead to bad law and bad policy.

As the Supreme Court stressed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the federal courts' power to create common-law causes of action for violations of international law is extremely narrow. It would be an improper exercise of this power to create a cause of action based on a norm – proportionality in the use of military force – that, however well accepted, is subjective, open-ended, and susceptible to considerable controversy in its application. Moreover, the practical consequences of creating such a cause of action would be wholly untenable. Opening the federal courthouse doors to such claims would threaten to enmesh the courts in policing armed conflicts across the globe – a charge that would exceed judicial competence and intrude on the Executive's control over foreign affairs.

For related reasons, nor should the TVPA be read to supply a vehicle for plaintiffs' claims. The TVPA was intended to supply a narrow cause of action for summary executions by foreign governments – a severely grave violation of international law that Congress viewed as on par with torture. Construing the statute to encompass military operations causing harm to untargeted civilians would dilute the meaning of the statute and extend its reach far beyond the bounds Congress intended, thereby engendering the very same problems that would attend the judicial creation of such a cause of action under the ATS.

ARGUMENT

POINT I

DICHTER IS ENTITLED TO IMMUNITY

A. Foreign Officials Enjoy Immunity at Common Law for Their Official Acts, Which Was Not Displaced by the FSIA

The parties' immunity arguments in this case center on the FSIA: Dichter claims that he is entitled to the statute's protection, Def.'s Br. at 6-8, while plaintiffs argue that "[t]he FSIA does not extend sovereign immunity to individuals," Pls.' Br. at 3. This emphasis on the FSIA is understandable given that, following the Ninth Circuit's decision in *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), a number of courts have analyzed the immunity of individual foreign officials under the statute's rubric. *See infra* at 13-19.

In the Government's view, however, this emphasis is misplaced. The Government agrees with Dichter that he is entitled to immunity, but that immunity resides in common law rather than the FSIA. As explained below, individual foreign officials have long been recognized to hold immunity from suit with respect to their official acts. Contrary to plaintiffs' argument, this immunity was not displaced by the enactment of the FSIA. Rather, common-law immunity for foreign officials endures as a vital complement to the FSIA's grant of immunity to foreign states – for, absent the former, litigants could easily circumvent the latter, frustrating the important purposes served by the statute.

1. Immunity for Foreign Officials Acting in an Official Capacity Was Well-Established at Common Law prior to the Enactment of the FSIA

a. Official Immunity before the Issuance of the Tate Letter in 1952

The doctrine of foreign sovereign immunity, broadly construed, extends deep into American jurisprudence, having been established as a matter of common law well before Congress enacted the FSIA in 1976. As the Supreme Court stated two decades prior to the

FSIA's enactment: "Very early in our history this immunity was recognized, and it has since become part of the fabric of our law. It has become such solely through adjudications of this Court." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358-59 (1955) (citations omitted).

The seminal expression of the sovereign immunity doctrine was set forth nearly 200 years ago by Chief Justice Marshall in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden v. B.V. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). *The Schooner Exchange* also introduced the practice of deferring to "suggestions of immunity" by the Department of State wherever made in individual cases, or, in the absence of such determinations, deferring to State Department policies concerning foreign immunity generally. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943). This deference reflected a basic function of foreign sovereign immunity – the avoidance of cases that might fray relations with foreign sovereigns – and the corresponding need to follow the lead of the Executive as the branch of government responsible for foreign affairs. *See Hoffman*, 324 U.S. at 35 ("'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.") (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)).

The "absolute" immunity of the sovereign was, early on, generally understood to encompass not only the state and the head of state,[3] but also other individual officials insofar as they acted on the sovereign's behalf. Thus, even prior to the *Schooner Exchange* case, statements recognizing immunity for the official acts of foreign officials appear in the opinions of the Attorney General. *See* 1 Op. Att'y Gen. 45, 46 (1797) (concerning civil suit brought against governor of French island for seizure of a ship: "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation."); 1 Op. Att'y Gen. 81 (1797) (concerning suit brought against British official: "[I]t is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.").

Expressions of official-act immunity likewise appear in subsequent federal case law. Thus, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit brought against a Venezuelan general for acts undertaken in his official capacity in Venezuela, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether

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[3] *See* S.V. George, *Head of State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1058-59 (Dec. 1995) ("Historically, sovereign immunity for states and head-of-state immunity were considered one and the same because the head-of-state was considered to be the equivalent of the state.").

as civil officers or as military commanders." *Id.* at 252.[4] The more common fact pattern, though, involved suits against consular officials, who by virtue of their position had a regular presence within the United States. Unlike diplomatic officials, whose immunity extended even to acts of a personal nature, consular officials were viewed as possessing the same immunity as a state's non-diplomatic officers generally – *i.e.*, immunity from suit only for acts within the scope of their official duties. *See Arcaya v. Paez*, 145 F. Supp. 464, 466-467 (S.D.N.Y. 1956) (collecting pre-1952 cases for the proposition that "a consul is not immune from suit except when the action is based upon acts which he has committed within the scope of his duties"); *see also Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) ("[I]n actions against the officials of a foreign state not clothed with diplomatic immunity, it can be said that suits based upon official, authorized acts, performed within the scope of their duties on behalf of the foreign state, and for which the foreign state will have to respond directly or indirectly in the event of a judgment, are actions against the foreign state."). Thus, prior to 1952, which marks the beginning of modern sovereign immunity jurisprudence in the United States, foreign officials were already understood to enjoy immunity for their official acts.

b. Official Immunity after the Tate Letter

In 1952, the State Department issued the Tate Letter, which announced that the Department would no longer follow the absolute theory of sovereign immunity set forth in *The Schooner Exchange*. Instead, the letter explained that the Department would follow the so-called "restrictive theory" of sovereign immunity, according to which a foreign state enjoys immunity

[4] Although the holding in *Underhill* is more widely cited as an expression of the "act of state" doctrine, the Supreme Court has recognized that "sovereign immunity provided an independent ground" for the holding. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964).

as to its "public," *i.e.*, sovereign, activities, but not for its "private," *i.e.*, commercial, activities. *See generally Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 697-706 (1976); *see also id.* 712-15 (appended text of Tate Letter). This evolution in policy reflected similar developments in foreign jurisdictions, driven by "the widespread and increasing practice on the part of governments of engaging in commercial activities." *Id.* at 714.

The adoption of the restrictive theory did not change the rule applicable to individual officials, however. As before the Tate Letter, the State Department continued to recognize the immunity of foreign officials for their official acts in suggestions of immunity made to the federal courts. *See* Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.) ("Immunity Decisions Report"), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, at 1020, 1037 (No. 19), 1075-77 (Nos. 96 & 97) (reporting suggestions of immunity for individual officials). Likewise, the federal courts continued to defer to such suggestions when they were presented. *See Greenspan v. Crosbie*, No. 74 Civ. 4734 (JCM), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960). And where no suggestion was made, courts applied the same general rule of decision. *See Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (noting in *dicta* that the immunity of a foreign state extends to any official or agent of the state with respect to their official acts). Thus, the Restatement (Second) of Foreign Relations Law of the United States (1965), published during this time period, includes official-act immunity among the various dimensions of immunity belonging to foreign sovereigns.[5]

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[5] The Second Restatement states that the immunity of a foreign state extends to:

(a) the state itself;
(continued…)

Notably, in at least one of the post-Tate Letter cases, *Greenspan v. Crosbie*, *supra*, the immunity of individual foreign officials was recognized to be unlimited by the restrictive theory's exceptions to immunity for commercial activity – and thus broader than the immunity of the state itself. In the case, plaintiffs sued the Province of Newfoundland and three of its individual officials for alleged violations of U.S. securities laws. 1976 WL 841, at *1. Pursuant to the restrictive theory, the Department of State determined that the Province was *not* immune from claims for compensatory damages with respect to the securities sales at issue, given that the sales constituted commercial activity. *Id.*; *see also* Immunity Decisions Report at 1076. The Department nevertheless filed a suggestion of immunity recognizing the individual officials to be fully immune for their participation in this same activity, reasoning: "although it is alleged that the defendant officials of the Province of Newfoundland acted in excess of their authority, it is not alleged that these officials acted other than in their official capacities and on behalf of the Province." Immunity Decisions Report at 1076. Accordingly, this Court declined to exercise jurisdiction as to these individual defendants, finding that "[t]he Suggestion of Immunity removes the individual defendants from this case" – even while the court went on to exercise

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> (b) its head of state and any person designated by him as a member of his official party;
> (c) its government or any governmental agency;
> (d) its head of government and any person designated by him as a member of his official party;
> (e) its foreign minister and any person designated by him as a member of his official party;
> (f) *any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state*;
> (g) a corporation created under its laws and exercising functions comparable to those of an agency of the state.

Id. § 66(f) (emphasis added).

jurisdiction as to the Province itself. *Greenspan*, 1976 WL 841, at *2. Hence, the State Department recognized, and this Court accepted, that insofar as the individual defendants had acted on behalf of the state, their actions were not attributable to them in their personal capacity; they were instead attributable only to the state, and accordingly the state was the only proper defendant in the case.[6] Decided in late 1976, *Greenspan* reflects the scope of common-law immunity for individual foreign officials as it existed when the FSIA was enacted that same year.[7]

2. The FSIA Did Not Displace Common-Law Immunity for the Official Acts of Foreign Officials

a. Statutory Text and Legislative History

Contrary to plaintiffs' apparent position that the enactment of the FSIA in effect "eliminated" sovereign immunity for "individuals acting in their official capacity," *see* Pls.' Br. at 4, there is no suggestion anywhere in the FSIA's text or legislative history that the statute was intended to effect any change whatsoever in the immunity previously recognized for individual foreign officials. The text of the statute makes no mention of the immunity belonging to

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[6] This application of immunity resembles the way in which immunity for federal employees works under the Federal Tort Claims Act ("FTCA"). Under the so-called "Westfall Amendment" to the Act, in any tort action filed against a federal employee, the United States is substituted as party defendant upon certification by the Attorney General that the acts at issue were performed in the employee's official capacity. *See* 28 U.S.C. § 2679(d).

[7] The Immunity Decisions Report also describes an unpublished 1968 case in which the State Department declined to suggest immunity for a "non-profit organization funded by the Caribbean governments" *or* its liaison officer, after concluding that the organization's function was commercial in nature, being analogous to that of a labor union or private employment agency. *Id.* at 1062-63 (No. 62). The Report does not explain why the Department did not suggest immunity for the official involved, but an official of a non-profit organization providing employment services to a number of governments is clearly distinguishable from the provincial government officials involved in *Greenspan*.

individual foreign officials, but rather speaks only to the immunity of "foreign states" and any "agency or instrumentality of a foreign state." 28 U.S.C. §§ 1605, 1610. Likewise, the legislative history's only reference to any type of individual official – diplomatic or consular representatives – clarifies that the FSIA does not govern their immunity since the statute "deals only with the immunity of foreign states." H.R. Rep. No. 94-1487, at 21 (1976), 1976 U.S.C.C.A.N. 6604, 6620 ("FSIA House Report").

The statute's exclusive focus on states and their agencies and instrumentalities is explained by the history leading up to its enactment. The fundamental problem Congress sought to address at the time was an ongoing explosion in commercial litigation against foreign states and state enterprises engaged in commerce with the United States, and the concomitant need to regularize such litigation under a system of clear and predictable rules. *See* FSIA House Report at 7, 1976 U.S.C.C.A.N. at 6605 ("In a modern world where foreign state enterprises are every day participants in commercial activities, [the FSIA] is urgently needed legislation."); *see also Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) ("[The FSIA] was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities."). The regime ushered in by the Tate Letter had proven unworkable: the State Department lacked significant fact-finding machinery by which to guide application of the restrictive theory in cases allegedly concerning commercial activity, and moreover, foreign governments seeking determinations of immunity were prone to exert diplomatic influence. FSIA House Report at 8-9, 1976 U.S.C.C.A.N. at 6607. As a result, these determinations were characterized by a lack of uniformity and transparency and became a burden on the State Department. *Id.* Thus, at the urging of the Executive Branch, Congress enacted the FSIA in

order to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law," so as to render it susceptible to application directly by the courts, without the need for State Department involvement. *Id.* at 7, 44-46, 1976 U.S.C.C.A.N. at 6605, 6634-35. By contrast, cases particularly concerning individual foreign officials had posed no significant problems in the past and were not the impetus for the new legislation. *Cf. Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 290 (S.D.N.Y. 2001) (concluding that issues regarding head-of-state immunity "were not yet 'in the air' as part of the underlying concerns that prompted the FSIA nor in the debate and deliberations that accompanied the enactment"), *rev'd in part on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

Accordingly, there is no reason to believe that in enacting the FSIA, Congress intended, *sub silentio*, to alter or eliminate the pre-existing common-law immunity for individual foreign officials. Indeed, the FSIA was not intended to effect *any* major change from the *status quo ante* with respect to substantive rules of immunity. It was instead intended to "codify" the restrictive theory, "as presently recognized." FSIA House Report at 7, 1976 U.S.C.C.A.N. at 6605. Given that Congress expressly sought to preserve the pre-existing immunity rule for foreign states, it would be incongruous to believe that Congress simultaneously abrogated the long-standing immunity of individual foreign officials. *See Chuidian*, 912 F.2d at 1101-02 ("It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment."); *see also Tachiona*, 169 F. Supp. 2d at 276 (rejecting argument that the FSIA was "intended to enunciate a substantive redirection of United States international relations policy").

Indeed, in the compilation of the State Department's pre-FSIA immunity decisions published immediately after the FSIA's enactment, the editors – officials of the State Department

and Department of Justice who had been involved in the statute's drafting – specifically noted that the FSIA was not intended to eliminate the precedential effect of past "decisions concerning the immunity of heads of state and of other nondiplomatic and nonconsular officials." Immunity Decisions Report at 1020. As the editors noted: "These decisions may be of some future significance, because the [FSIA] does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities." *Id.*[8]

b. Post-FSIA Case Law

Reading the FSIA to eliminate immunity for individual foreign officials would conflict not only with the statute's text and legislative history, but also with post-FSIA case law. Since the statute's enactment, numerous circuit courts have continued to recognize the existence of immunity for individual foreign officials with respect to their official acts,[9] as have numerous

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[8] The continuation of common law immunities post-FSIA finds an analogy in the federal tort context. In 1946, the enactment of the FTCA comprehensively codified the sovereign immunity of the United States as to common law tort claims. *See* Pub. L. No. 601 (1946). Yet, the immunity of individual federal officials from such claims was unaffected by the statute's enactment and continued to evolve separately at common law, *see, e.g.*, *Barr v. Matteo*, 360 U.S. 564 (1959), until Congress, in response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), amended the FTCA so as to afford individual federal officials immunity by statute. *See* H.R. Rep. 100-700, at 2-3 (1988), 1988 U.S.C.C.A.N. 5945, 5945-46 (discussing background of amendment).

[9] *See Velasco v. Gov't of Indonesia*, 370 F.3d 392, 402 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990). In the one exception cited by the plaintiffs – *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) – the court found only that such immunity was not provided *by the FSIA*. *Id.* at 882 ("[W]e conclude, based on the language of the FSIA, that the FSIA does not apply to General Abubakar . . . ."). The court was not presented with, and thus had no occasion to consider, the Government's argument here, *viz.*, that such immunity is rooted in common law that was unaffected by the FSIA's enactment.

judges in this district.[10] In so holding, courts have broadly agreed on the functional rationale for this immunity – *viz.*, that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Chuidian*, 912 F.2d at 1101; *accord, e.g.*, *Velasco*, 370 F.3d at 399; *In re Terrorist Attacks*, 349 F. Supp. 2d at 788; *Doe I v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005); *see also Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990) (finding sovereign immunity to protect individual officers on the ground that "a government does not act but through its agents"). Hence, courts have recognized, rightly, that unless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA. *See Chuidian*, 912 F.2d at 1102 ("Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly.").

However, while the rationale for the immunity recognized in these cases has thus been cogently identified, the source of the immunity has not been. In *Chuidian*, the leading circuit case, the Ninth Circuit identified the FSIA as the source; specifically, the court held that individual officials fall within the statute's definition of an "agency or instrumentality of a foreign state" and so possess the same immunity afforded to such entities under the statute. 912 F.2d at 1103. In reaching this holding, the court unnecessarily and erroneously rejected the Government's position – which was the same as the position asserted here – that immunity for foreign officials is instead rooted in the common law. *Id.* at 1102-03. A number of other courts

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[10] *See, e.g.*, *In re Terrorist Attacks*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286-87 (S.D.N.Y. 2001); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996); *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995); *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981).

have followed *Chuidian* in this respect, though without significant analysis, and without the benefit of briefing by the Government. *See, e.g.*, *El-Fadl*, 75 F.3d at 671; *Keller*, 277 F.3d at 815.[11] Other courts, however, have declined to read the FSIA's "agency or instrumentality" definition as encompassing natural persons, but nonetheless have recognized a "judicially created" extension of the statute's protection to individual officials. *Velasco*, 370 F.3d at 398-99 ("Although the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state."); *Herbage*, 747 F. Supp. at 66 ("Nowhere does the FSIA discuss the liability or role of natural persons . . . . Nonetheless, decisions in other federal courts, as well as reason, indicate – even if only indirectly – that the sovereign immunity granted in the FSIA does extend to natural persons acting as agents of the sovereign."); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1120 (D.D.C. 1996) (same).

The latter line of cases is closer to (though still wide of) the mark; for, while *Chuidian*'s result was correct, its statutory interpretation is unpersuasive. The *Chuidian* court based its holding on the flawed premise that "a bifurcated approach to sovereign immunity was not intended by the Act" – *i.e.*, that Congress intended the FSIA to be a "comprehensive" statute governing all sovereign immunity determinations, regardless of the nature of the defendant. *See Chuidian*, 912 F.2d at 1102. As indicated above, such a reading of the statute is inconsistent with its text and legislative history. *See supra* at 10-13. Moreover, courts have in fact followed such "a bifurcated approach to sovereign immunity" in cases involving heads of state. As

[11] Although the Government agreed with the result in *Chuidian*, it has never endorsed the *Chuidian* approach to foreign official immunity and has not filed any brief revisiting the source of foreign official immunity since *Chuidian* was decided.

numerous courts have held, because the FSIA does not address the immunity of heads of state, their immunity continues to be governed by common law as it was pre-FSIA.[12] The Second Circuit recently expressed this view in *dicta* in *Tachiona v. United States*, 386 F. 3d 205 (2d Cir. 2004):

> We have some doubt as to whether the FSIA was meant to supplant the "common law" of head-of-state immunity, which generally entailed deference to the executive branch's suggestions of immunity. For one thing, the FSIA applies only to foreign states, which are defined as including "political subdivision[s]," and "agenc[ies] or instrumentalit[ies]" thereof. "[A]genc[ies] [and] instrumentalit[ies]" in turn are defined in terms not usually used to describe natural persons. Moreover, the only references to heads of state or other foreign officials in the FSIA's legislative history suggest that their immunity is not governed by the Act.

Id. at 220-21 (citations omitted). The same reasoning applies to the immunity of individual officials *other* than heads of state: the FSIA did not address their immunity, and so did not supplant it as it previously existed at common law.[13]

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[12] *See, e.g.*, *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir.1997) ("Because the FSIA [does not address] head-of-state immunity, . . . head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny."); *Tachiona*, 169 F. Supp. 2d at 276 (rejecting the proposition that the FSIA was intended to set forth "a uniform rule of law to govern all assertions of foreign immunity, including head-of state immunity"); *First Am. Corp.*, 948 F. Supp. at 1119 ("[T]he enactment of the FSIA was not intended to affect the power of the State Department . . . to assert immunity for heads of state or for diplomatic and consular personnel."); *Aristide*, 844 F. Supp. at 137 ("The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state."). Cases involving diplomats and consular officials have likewise been decided outside the confines of the FSIA, as courts have instead looked to specific treaties governing diplomatic and consular relations, *see, e.g.*, *Tachiona*, 169 F. Supp. 2d at 215-220, as envisioned in the FSIA's legislative history, FSIA House Report at 21, 1976 U.S.C.C.A.N. at 6620.

[13] Thus, while plaintiffs prominently rely on the above passage from *Tachiona* for the proposition that "the FSIA does not apply to individuals," Pls.' Br. at 5, the passage cuts against their argument in the end. The view expressed in the passage is not merely that the FSIA does not extend immunity to individuals, but that the statute does not *rescind* such immunity either.

Further, *Chuidian*'s attempt to stretch the FSIA's "agency or instrumentality" definition to cover individual officials leads to problematic results. For example, this reading implies that individual officials are subject to the same *exceptions* to immunity laid out in the FSIA for states and their agencies and instrumentalities – such that if an individual foreign official were sued, for example, over commercial transactions undertaken in an official capacity, the official would not be immune from suit and could be held personally liable for the conduct at issue. *See Chuidian*, 912 F.2d at 1103-06 (considering, after finding individual official's immunity to be governed by the FSIA, whether any of the FSIA's exceptions were met). This result diverges from the common law as it existed at the time of the FSIA's enactment. As reflected in *Greenspan v. Crosbie*, *supra*, the immunity then recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be. *See supra at* 9-10. Thus, by subjecting the immunity of individual officials to the same limits applicable to the immunity of states and their agencies or instrumentalities, the *Chuidian* court's construction leaves foreign officials with less immunity than they enjoyed before the FSIA's enactment. This change in substantive law was unanticipated not only by Congress, but apparently by the *Chuidian* court itself – which thought its reading of the FSIA's "agency or instrumentality" definition would *preserve* the immunity previously afforded to individual officials under common law. *See Chuidian*, 912 F.2d at 1101 ("If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law.").[14]

[14] Notably, a rule allowing suit against an individual official if the state itself is not immune (continued…)

Along similarly problematic lines, *Chuidian* would also seem to imply that an individual official's *personal* property qualifies as property of a state agency or instrumentality, making it subject to attachment according to the rules set forth in § 1610 – even though § 1610 was clearly intended to apply only to state-owned assets. *See* FSIA House Report at 27-30, 1976 U.S.C.C.A.N. at 6626-29. Notably, § 1610 affords litigants broader attachment rights with respect to property of state agencies or instrumentalities compared to property of the state itself: so long as an agency or instrumentality is "engaged in commercial activity in the United States," any of its property can be attached to satisfy any claim as to which it lacks immunity from suit. *See* 28 U.S.C. § 1610(b); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984).[15] Thus, were "agency or instrumentality" read to encompass individual officials, litigants in any action brought under the FSIA would have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize the potential for recovery and to circumvent the FSIA's limitations on attachment of property of the state itself. It defies common sense to believe that Congress intended these consequences.[16]

Accordingly, this Court should find Dichter to be immune from suit for his official acts and should rest this holding on common law rather than any provision of the FSIA. While

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would diverge from the approach endorsed by Congress in the federal tort context – where federal employees are completely immunized from suit for their official-capacity acts, even if the federal government has waived its own sovereign immunity as to those acts. *See supra* n.6.

[15] By contrast, property of the state itself can be attached only if the property sought for attachment is used for commercial activity and various other conditions are met. *See* 28 U.S.C. § 1610(a).

[16] Yet another problem concerns service of process. The FSIA imposes stricter requirements for service of process on a foreign state as opposed to its agencies or instrumentalities. *See* 28 U.S.C. § 1608; *see also, e.g.*, *Magness v. Russian Federation*, 247 F.3d 609, 614-617 (5th Cir. 2001). Under the *Chuidian* approach, litigants in any FSIA case might circumvent those stricter requirements by suing, and, accordingly, serving, an individual official rather than the state itself.

official immunity serves, importantly, to prevent circumvention of the FSIA, it is not itself codified in the FSIA, but instead is afforded by common law that the FSIA did not displace. This holding would be consistent with the results reached in the accumulated post-FSIA case law on point, yet at the same time would avoid the conceptual difficulties and troublesome implications entailed by the *Chuidian* approach.[17]

c. International Law

A final reason to reject the idea that the FSIA eliminated immunity for individual foreign officials is that any such holding would bring U.S. sovereign immunity law into conflict with customary international law. The FSIA was enacted partly in order to bring U.S. foreign immunity law into line with prevailing international practice, *see* FSIA House Report at 7-8, 1976 U.S.C.C.A.N at 6605-06, and should be construed compatibly with customary international law absent a specific reason to the contrary. As stated by the district court in *Tachiona*:

> Authorities recognize that the growth of international law is evolutionary. It expands by accretion as consensus develops among nations around widely recognized customs, practices and principles, and not by patchwork elevation of any one country's *ad hoc* pronouncements. Thus, any dramatic deviation from accepted international norms legislated by any single state without reference to widely accepted customary rules would be inconsistent with this principle.

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[17] Even if the FSIA did govern the immunity of a foreign official, however, Dichter would be entitled to immunity, and plaintiffs' claims brought under the ATS and the TVPA would be subject to dismissal. As the Supreme Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the ATS does not supply a jurisdictional basis for claims against a foreign state since the FSIA is "the sole basis for obtaining jurisdiction of a foreign state in our courts." *Id.* at 434. Moreover, the FSIA does not recognize an exception to immunity for torts committed outside the territory of the United States. *Id.* at 439-43. The FSIA thus bars plaintiffs from bringing their ATS and TVPA claims against Israel and, accordingly, would bar such claims against Dichter were his immunity governed by the statute as well.

169 F. Supp. 2d at 276-77; c*f. Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 135 (2d Cir. 2005) ("[W]here legislation is ambiguous, it should be interpreted to conform to international law.") (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

Like U.S. law, customary international law has long recognized that foreign officials enjoy civil immunity for their official acts. As explained by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia:

> Such officials are mere instruments of a State and their official function can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity.' This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

Prosecutor v. Blaskic (Issue of subpoena duces tecum), 110 I.L.R. 607, 707 (1997) (citing cases).[18]

These principles have been applied in several significant foreign jurisdictions, some with immunity statutes that, like the FSIA, make no mention of individual officials. Thus, most recently, the House of Lords recognized immunity from civil suit for official-capacity acts even though the United Kingdom's immunity statute did not "expressly provide[] for the case where suit is brought against the servants or agents, officials or functionaries of a foreign state"; the court reasoned that "[t]he foreign state's right to immunity cannot be circumvented by suing its servants or agents." *Jones v. Ministry of Interior*, UKHL 26, ¶ 10 (House of Lords, United Kingdom 2006). Likewise, a Canadian appellate court has held that "[t]he fact that [Canada's

[18] Although this holding was rendered by a criminal tribunal, it specifically concerned an issue of civil process – specifically, the tribunal's power to enforce a subpoena to state officials acting in their official capacity.

immunity statute] is silent on its application to employees of the foreign state can only mean that Parliament is content to have the determination of which employees are entitled to immunity determined at common law. . . . There is nothing in the State Immunity Act which derogates from the common law principle that, when acting in pursuit of their duties, officials or employees of foreign states enjoy the benefits of sovereign immunity." *Jaffe v. Miller*, 95 ILR 446, 459-60 (Ontario Court of Appeal, Canada 1993). Germany's national court has reached the same result. *Church of Scientology v. Commissioner of the Metropolitan Police*, 65 ILR 193 (Federal Republic of Germany, Federal Supreme Court 1978) (recognizing immunity for head of Scotland Yard: "The acts of such agents constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them in a given case.").

The United Nations Convention on Jurisdictional Immunities of States and their Property ("UN Immunity Convention") embodies the most current effort to codify international law concerning foreign sovereign immunity. U.N. Doc. A/RES/59/38 (Dec. 16, 2004), *available at* http://untreaty.un.org/English/notpubl/English_3_13.pdf. While the United States has not signed the Convention and does not necessarily agree that the Convention accurately reflects customary international law in every particular, it does view the Convention's treatment of individual officials as consistent with customary international law to the extent that it clothes individual officials with the immunity of the state. The Convention generally grants immunity to states, and defines the term "State" to include "representatives of the State acting in that capacity." *See id.* Art. 2, ¶ 1(b)(4). As explained in the drafting committee's commentary, this provision reflects the understanding that official capacity acts are properly attributed to the state itself rather than the individual whom the state acts through:

> It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their

> directors or permanent representatives in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity.

Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session, ¶ 18, p. 25, U.N. Doc. A/46/10 (Jul. 19, 1991).

In light of all of the foregoing authorities, any reading of the FSIA that would eliminate the immunity historically recognized for individual foreign officials would constitute a "dramatic deviation from accepted international norms," and should be rejected. *Tachiona*, 169 F. Supp. 2d at 276-77. Indeed, parting with this international consensus would threaten serious harm to U.S. interests, by inviting reciprocation in foreign jurisdictions.[19] Given the global leadership responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad – including damages suits arising from alleged war crimes.[20] The immunity defense is a vital means of deflecting these suits and averting the nuisance and diplomatic tensions that would ensue were they to proceed. It is therefore of critical importance that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn. As the Supreme Court has stated in a related context:

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[19] *See Hilton v. Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciprocity."); *see also Garb v. Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006) (describing the concept of reciprocity as a "touchstone[] of international law").

[20] Even more worrisome, foreign *criminal* courts might look to U.S. civil immunity rules in an effort to justify assertions of jurisdiction over U.S. officials.

> In light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens. Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials. These underlying purposes combine to make our national interest in protecting diplomatic personnel powerful indeed.

Boos v. Barry, 485 U.S. 312, 323-24 (1988). Thus, this Court should adhere to prevailing international norms, which are reflected in our own common law, and afford Dichter immunity for his official acts.

B. Dichter's Participation in Planning a Military Strike Constitutes an Official Act

1. Whether an Act Is Performed in an Official Capacity Turns on Whether the Act Is Attributable to the State, Not on Whether It Was Lawful

As a fallback position, plaintiffs argue that the defendant's acts, as alleged in the complaint, were not "lawfully within the scope of his authority," so they cannot be deemed official acts protected by official immunity, Pls.' Br. at 6. There is no merit in this argument.

Plaintiffs do not claim that the defendant's acts were actually unauthorized by the State of Israel. Rather, plaintiffs argue that the acts were not *validly* authorized because, according to plaintiffs, the acts were unlawful under international and Israeli law. *See* Pls.' Br. at 6-12. The flaws in this logic are obvious. By definition, a civil lawsuit against a foreign official will challenge the lawfulness of the official's acts. Hence, the official's immunity would be rendered meaningless if it could be overcome by such allegations alone. *See Waltier*, 189 F. Supp. at 321 n.6 (rejecting argument that foreign official's allegedly false statements could not be considered within the scope of his duties based simply on the premise that "wrongdoing is never authorized") (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.) ("[I]t can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly

is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine.")); *see also Herbage*, 747 F. Supp. at 67 (rejecting argument that officials lost immunity by virtue of "acting illegally," finding that conduct was within the scope of their official capacities); *Kline*, 685 F. Supp. at 390 (holding that plaintiff's claim that Mexican immigration official expelled her without due process "is in no way inconsistent with [the official] having acted in his official capacity"); *Jones*, UKHL 26, ¶ 12 ("The fact that conduct is unlawful or objectionable is not, of itself, a ground for refusing immunity.").

Rather, the official-capacity test properly turns on whether the acts in question were performed on the state's behalf, such that they are attributable to the state itself – as opposed to constituting private conduct. This test flows directly from the principle underlying immunity for foreign officials, which is that an official acting in an official capacity is a manifestation of the state, and as such the official's acts are attributable to the state rather than to the official personally. *See supra* at 9-10, 19-22. Because an individual official cannot be sued for conduct of the state, the relevant inquiry is simply whether the official's actions constitute state conduct. *See Doe I*, 400 F. Supp. at 104 ("[S]uits against officers in their personal capacities must pertain to private action – that is, to actions that exceed the scope of authority vested in that official so that the official cannot be said to have acted on behalf of the state."); *see also El-Fadl*, 75 F.3d at 671 (dismissing on immunity grounds where defendant's activities "were neither personal nor private, but were undertaken only on behalf of the Central Bank [of Jordan]").[21]

[21] This view conforms to international law regarding when individual conduct is attributable to states. *See* Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, Art. 4 (2001) *available at*
(continued…)

Moreover, any contrary rule would create an easy end-run around the immunity of the state. The immunity of a foreign state is not subject to any roving "unlawfulness" exception but rather is subject only to those immunity exceptions specifically set forth in the FSIA. *See Amerada Hess*, 488 U.S. at 433-35. Given that a foreign state's immunity under the FSIA does not dissipate upon mere allegations that its acts were unlawful, the immunity of the officials through whom the state acts must be similarly resilient. Any gap in the officials' immunity would simply "allow[] litigants to accomplish indirectly what the Act barred them from doing directly." *Chuidian*, 912 F.2d at 1102; *see also Park v. Shin*, 313 F.3d 1138, 1144 (9th Cir. 2002) (in determining whether acts at issue were performed in an official capacity, courts should consider "whether [the] action against the foreign official is merely a disguised action against the nation that he or she represents" and "whether [the] action against the official would have the effect of interfering with the sovereignty of the foreign state that employs the official"). Indeed, in *Amerada Hess*, which involved the bombing of a neutral ship by the Argentine military, the Supreme Court specifically held that a foreign state's immunity was not subject to any general exception for alleged violations of international law brought under the Alien Tort Statute. *Id.* at 435-43. By plaintiffs' logic, the litigants in *Amerada Hess* could have avoided this result simply

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http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Draft Article 7 specifies that the conduct of any person empowered to exercise governmental authority is considered conduct of the state under international law if the person acts in that capacity, even if the person exceeds his authority or contravenes his instructions. As the commentary of the International Law Commission further makes clear: "Cases where officials acted in their capacity as such, *albeit unlawfully or contrary to instructions*, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State." *Id.* commentary ¶ 7 (emphasis added); *see also, e.g.*, *Velasquez-Rodriguez Case*, Inter-Am. Ct. H.R. (Ser. C) No. 4 (Inter-American Court of Human Rights 1989), ¶ 170 ("Under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of authority or violate internal law.").

through the contrivance of naming the bomber pilot or defense minister as defendant rather than the Argentine government itself. Such a glaring loophole in the immunity afforded to state conduct would render the Supreme Court's holding in the case a practical nullity.

Here, plaintiffs' complaint clearly concerns state conduct. The complaint alleges that "since at least November 2000, *the State of Israel* has systematically engaged in so-called 'targeted killings' . . . of 'suspected terrorists' in [occupied Palestinian territory] and elsewhere outside of Israel," and that "[t]hese 'targeted' executions have been carried out with knowledge that non-targeted civilians would also be killed or injured, or with utter disregard for that probability." Compl. ¶ 17 (emphasis added). Dichter is named as defendant only by virtue of his alleged involvement in planning and authorizing such an operation as the Director of Israel's General Security Service. *See* Compl. ¶¶ 36-45 (alleging that "Defendant participated in the specific decision to authorize the 'targeted assassination' of Shehadeh" and approved the use of military aircraft in the attack). Thus, the complaint itself makes plain that the challenged conduct was performed on Israel's behalf – as Israel itself has confirmed in a letter to the State Department from its ambassador, *see* Kalicki Decl. Ex. A (stating that Dichter's actions were performed in the course of his "official duties, and in furtherance of official policies of the State of Israel").[22]

Accordingly, the actions alleged were clearly undertaken in Dichter's official capacity and cannot form the basis for a suit against Dichter personally. *See Doe I*, 400 F. Supp. 2d at 105 ("Plaintiffs do not present legitimate claims against the individual Israeli defendants in their

[22] Courts in this district have accorded "'great weight' to any extrinsic submissions made by . . . foreign defendants regarding the scope of their official responsibilities." *See In re Terrorist Attacks*, 392 F. Supp. 2d at 551 (quoting *Leutwyler*, 184 F. Supp. 2d at 287).

personal capacities. . . . All allegations stem from actions taken on behalf of the state and, in essence, the personal capacity suits amount to suits against the officers for being Israeli government officials.").

2. There Is No Exception to the Immunity of Individual Officials for Alleged Jus Cogens *Violations*

Contrary to plaintiffs' contentions, *see* Pls.' Br. at 9-12, nothing in the foregoing analysis is changed by the fact that plaintiffs allege that defendant's conduct violated *jus cogens* norms.[23] Plaintiffs argue that because a *jus cogens* norm "by definition permits of no derogation . . . . Israel could not authorize the acts alleged." Pls.' Br. at 10 (internal quotation marks and citation omitted). But this is simply another variation of the argument that "wrongdoing is never authorized." *Waltier*, 189 F. Supp. at 321 n.6. The principle that a *jus cogens* norm permits of no derogation merely implies that any derogation from the norm will be unlawful; it does not imply anything about the identity of the actor responsible for the derogation. Here, assuming *arguendo* that the specific conduct plaintiffs allege constituted violation of a norm that the United States would recognize as a *jus cogens* violation, the violation would remain attributable to the state itself rather than to Dichter personally – because the conduct at issue was not private

[23] The concept of *jus cogens* is of relatively recent origin and remains unsettled. *See* International Law Commission Draft Articles on the Law of Treaties with Commentaries, Art. 50, cmt. 3 (1966) ("The emergence of rules having the character of jus cogens is comparatively recent . . . ."). The Vienna Convention on the Law of Treaties introduced the concept that treaties are invalid if they conflict with a *jus cogens* norm, which it defines as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." 1155 U.N.T.S. 331, Art. 53 (May 23, 1969) . Not only are the consequences of a norm qualifying as *jus cogens* unclear outside of the treaty context, *see, e.g.*, I OPPENHEIM'S INTERNATIONAL LAW 8 (Robert Jennings & Arthur Watts, eds.) (9th ed. 1992); Fox, *infra*, at 523-25, but controversy surrounds the question of which norms – if any – qualify as *jus cogens*. *See* Sean D. Murphy, PRINCIPLES OF INTERNATIONAL LAW 82 (2006); OPPENHEIM'S INTERNATIONAL LAW, *supra*, at 8.

in nature but rather was officially authorized by the state. *See Herbage*, 747 F. Supp. at 67 (holding that individuals acting in their official capacities as agents of a foreign government are entitled to immunity "no matter how heinous the alleged illegalities"). As the Supreme Court held in finding that alleged police torture was "sovereign" rather than commercial activity, and thus protected by sovereign immunity:

> [H]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. Such acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such.

Saudi Arabia v. Nelson, 507 U.S. 349, 361-62 (1993) (citations and internal quotation marks omitted). Certainly the same holds true for a foreign state's exercise of its military powers.

Further, any rule denying civil immunity to individual officials for alleged *jus cogens* violations would allow circumvention of the state's immunity for the same conduct. A foreign state's immunity is not subject to any general exception for *jus cogens* violations under the FSIA. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997); *accord Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173-75 (D.C. Cir. 1994); *cf. Saudi Arabia*, *supra*. Indeed, while plaintiffs consider "extrajudicial killing" to be a *jus cogens* violation, the one exception of the FSIA encompassing such conduct is narrow in scope, aimed specifically at eliminating sovereign immunity as a defense to acts of state-sponsored terrorism. *See* 28 U.S.C. § 1605(a)(7).[24] Were plaintiffs' position accepted, however, litigants could easily

[24] As the D.C. Circuit has noted: "[T]he passage of § 1605(a)(7) involved a delicate legislative compromise. While Congress sought to create a judicial forum for the compensation of victims and the punishment of terrorist states, it proceeded with caution, in part due to executive branch (continued…)

bypass these tight restraints by suing individual officials for alleged *jus cogens* violations without limitation. *See Doe I*, 400 F. Supp. 2d at 105 (rejecting *jus cogens* exception given that no such exception is found in the FSIA: "[E]ven assuming that the Israeli defendants have engaged in *jus cogens* violations, . . . *[j]us cogens* violations, without more, do not constitute an implied waiver of FSIA immunity.").

Not only would a *jus cogens* exception to official-act immunity be at odds with the FSIA, it would also be out of step with customary international law. No such exception is included in the UN Immunity Convention, having been specifically rejected for lack of support within the current international consensus. *See* Report of the International Law Commission to the General Assembly on the Work of Its Fifty-First Session, U.N. Doc. A/54/10 (1999), at 171-72. Recently, the House of Lords likewise rejected such an exception in the *Jones* case, in which individual foreign officials were held to be immune from civil suit, notwithstanding that they were alleged to have engaged in torture. *See Jones*, UKHL 26, ¶¶ 12-35. As the court stated:

> [T]here is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory [*i.e.*, *jus cogens*] norms of international law, nor is there any consensus of judicial and learned opinion that they should. . . . But this lack of evidence is not neutral: since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.

Id. ¶ 27.

Plaintiffs' citation to the International Military Tribunal's rejection of an immunity defense in the Nuremburg trials, *see* Pls.' Br. at 11-12, is off point for a number of reasons. This

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officials' concern that other nations would respond by subjecting the American government to suits in foreign countries." *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1035 (D.C. Cir. 2004).

is a civil suit, in what, for the defendant, is a foreign court. The Nuremburg trials, by contrast, were criminal proceedings, which were, as a legal matter, under the authority of the defendants' own sovereign. In such different circumstances, immunity considerations can play out differently. As an initial matter, international law clearly distinguishes between the civil and criminal immunity of officials. On the civil side, officials are accorded immunity in part because states themselves are responsible for their officials' acts. On the criminal side, in contrast, international law holds individuals personally responsible for their international crimes, and does not recognize the concept of state criminal responsibility. *See Jones*, UKHL 26, ¶ 31; *see also id.* ¶ 19 (distinguishing criminal proceedings as "categorically different" for immunity purposes). Moreover, critically, there is the check of prosecutorial discretion in the criminal context: the Nuremburg proceedings were instituted by sovereign governments, and criminal prosecutions in this country are likewise controlled by the Executive branch. *See In re Grand Jury Proceedings*, 613 F.2d 501, 505 (5th Cir. 1980). Thus, while Congress has provided limited authority for the criminal prosecution of war crimes in the federal courts, *see infra* at 45-46, any decision to bring such grave charges against a foreign official would be made by the Executive – and only after exceedingly careful consideration of the potential diplomatic consequences. By contrast, civil lawsuits like the one at bar are brought by private plaintiffs and consequently present an uncontrolled risk of interference with the Executive's conduct of foreign affairs. *Cf. Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues beyond the mere consideration whether underlying conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.").

Significantly, the lack of an immunity exception for civil suits alleging *jus cogens* violations does not mean that such violations, when they actually occur, will necessarily be

beyond the reach of the courts. The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign and can be waived by the sovereign – as has happened, for example, where former officials have been removed from power and the ascendant government has distanced itself from past abuses. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power – including immunity – the state may therefore take back that which it bestowed upon its erstwhile leaders. . . . [B]y issuing the waiver, the Philippine government has declared its decision to revoke an attribute of [the Marcoses'] former political positions; namely, head-of-state immunity."). Similarly, the circumstances of a case may create a question whether the conduct was performed on behalf of the state or was instead performed in the official's private capacity, in which case immunity would not attach in the first place. *See Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) ("[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law *and wholly unratified by that nation's government*, could properly be characterized as an act of state.") (emphasis added); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) ("Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.") (quoting United States *amicus* brief). Indeed, in none of the cases cited by plaintiffs finding that individual defendants had overstepped the bounds of their lawful authority, *see* Pls.' Br. at 6, did the foreign state publicly ratify the conduct of the official being sued.[25]

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[25] *See Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994) (finding that "the Philippine government's agreement that the suit against Marcos proceed" negated any sovereign immunity concern); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (finding that "Defendants cannot claim to have acted under a valid grant of authority" where the government of China had "publicly disclaimed" any policy of torture and denied the misconduct alleged, (continued…)

Moreover, even where sovereign immunity is validly invoked by a foreign official for an alleged *jus cogens* violation, and not waived in any manner by the parent government, remedies may still exist outside the civil setting. Beyond the possibility of criminal proceedings, the Executive may pursue sanctions or apply other forms of pressure in the diplomatic sphere – which is, of course, the usual forum for addressing objectionable conduct by foreign states. *See* Hazel Fox QC, THE LAW OF STATE IMMUNITY 525 (2002) ("State immunity . . . does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement."). The Fourth Hague Convention of 1907, for example, provides that a "belligerent party" – *i.e.*, the *state* – is "responsible for all acts committed by persons forming part of its armed forces" and "shall, if the case demands, be liable to pay compensation." Fourth Hague Convention of 1907, 36 Stat. 2306, Art. 3. This obligation is generally understood to be enforceable by states through diplomatic means rather than by individuals through private litigation. *See* Jean Pictet, COMMENTARY ON THE ADDITIONAL PROTOCOLS 1053-54 (1987) (explaining that Article 3 of the Fourth Hague Convention envisions claims brought by the government of those wronged against the government responsible for the violations); *see also Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (4th Cir. 1992) (refusing to

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even if it allegedly had "covertly authorized" that conduct); *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 n.10 (D. Mass. 1995) ("There is no suggestion that either the past or present government of Guatemala characterizes the actions alleged here as 'officially' authorized."). In the other two cases cited, the defendant officials themselves waived the argument. *See Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) ("Marcos-Manotoc's default makes the application of both cases easy in this case, for she has admitted acting on her own authority, not on the authority of the Republic of the Philippines."); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) ("Assasie-Gyimah does not claim that the acts of torture he is alleged to have committed fall within the scope of his authority."). To the extent that these cases contain language to the effect that actions contravening an official's statutory mandate *categorically* cannot be deemed to fall within his official capacity, *see, e.g.*, *Liu Qi*, 349 F. Supp. 2d at 1282, this argument should be rejected for the reasons explained above.

recognize private cause of action under Article 3 of the Fourth Hague Convention). To permit plaintiffs here to seek such compensation by suing an individual official would thus run contrary to the accepted international-law model, which contemplates addressing such issues through state-to-state negotiations.

C. The TVPA Does Not Trump the Immunity of Foreign Officials for Their Official Acts

Finally, plaintiffs argue that, even if foreign officials are protected by immunity for their official acts, and even if the defendant's conduct was within his scope of authority, the TVPA trumps the defendant's claim to immunity. This argument, too, should be rejected.

Contrary to plaintiffs' contentions, *see* Pls.' Br. at 12, the TVPA is not unambiguous, but is instead silent as to whether its provisions take precedence over the immunity of a foreign official where that immunity is validly asserted. Given that the statute does not directly address the question, it should be read in harmony, rather than in conflict, with relevant immunity rules – as the Supreme Court has instructed in the parallel context of § 1983. *See Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("Although the statute on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)).[26]

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[26] The TVPA and § 1983 both apply, on their face, to official acts. *Compare* TVPA § 2, *codified at* 28 U.S.C. § 1350 note ("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing shall, in a civil action, be liable . . . .") *with* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . .").

The TVPA's legislative history confirms that this was the intent of Congress. In addition to making clear that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity," H.R. Rep. 102-367(I), at 5 (1991), 1992 U.S.C.C.A.N. 84, 88 ("TVPA House Report") , the legislative history also indicates that the statute was intended to be compatible with the immunity an individual official might claim "by invoking the FSIA," S. Rep. 102-249, at 8 (1991) ("TVPA Senate Report"); *see also* TVPA House Report at 5, 1992 U.S.C.C.A.N. at 88 ("The TVPA is subject to restrictions in the [FSIA]."). Although it was believed that such immunity would typically be unavailable in a TVPA case (at least for former officials), this belief was based not on the idea that the TVPA would trump the individual defendant's immunity, but rather on the idea that the defendant would have difficulty establishing immunity in the first place because the state would disown the conduct at issue. The Senate report offered the following explanation:

> To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state "admit some knowledge or authorization of relevant acts." 28 U.S.C. 1603(b) [FSIA's "agency or instrumentality" definition]. Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should *normally* provide no defense to an action taken under the TVPA against a former official.

TVPA Senate Report at 8 (emphasis added).

In essence, Congress expected that where an individual official is accused of conduct truly covered by the TVPA , foreign states would not normally assert that the conduct was within the scope of the official's authority. *See Kadic*, *supra*; *Filartiga*, *supra*. But the converse implication is that where, as here, there is no doubt that the official's conduct was performed on the state's behalf, Congress understood that the official could validly assert an immunity defense. Although the legislative history apparently followed *Chuidian* in tracing that immunity to the FSIA's "agency and instrumentality" definition, nothing suggests that Congress would have

intended a different result if this immunity had correctly been traced back to common law instead. Rather, the thrust of the legislative history is that the statute was not intended to conflict with any form of immunity for foreign officials. *See Aristide*, 844 F. Supp. at 138-39 (holding that the TVPA "was not intended to trump diplomatic and head-of-state immunities," nor does it conflict with the FSIA since "the TVPA will only apply to state actors when they act in their individual capacity").

POINT II

THE COURTS SHOULD NOT RECOGNIZE A CIVIL CAUSE OF ACTION FOR THE DISPROPORTIONATE USE OF MILITARY FORCE

Given Dichter's immunity from suit, the Court has no occasion to reach the merits of the case. However, even if Dichter were found to lack immunity, plaintiffs' complaint should still be dismissed for failure to state a valid cause of action under federal law.

Plaintiffs' complaint, at its core, asks this Court to adjudicate the proportionality of a military targeting decision by a foreign nation, in order to determine whether the degree of force used was unjustified by any legitimate military objective. While plaintiffs acknowledge that the target of the attack in question was a Hamas military leader, Saleh Mustafa Shehadeh, Compl. ¶ 23, they do not purport to bring any claims on Shehadeh's behalf. Instead, plaintiffs are survivors of the attack who bring claims on behalf of non-targeted civilians injured or killed in the operation. *See* Compl. ¶¶ 5-7; *see also id.* ¶ 17 ("These 'targeted' executions have been carried out with knowledge that non-targeted civilians would also be killed or injured, or with utter disregard for that probability."). The crux of these claims is the allegation that Dichter violated international law in planning and authorizing the strike by, as plaintiffs put it, failing to "take all feasible precautions in the choice of means and methods of attack, with a view to avoiding or minimizing loss of civilian life and injury to civilians." Compl. ¶ 50.

No such civil cause of action exists within federal law, nor should this Court recognize one. While plaintiffs rely heavily on customary international law and the Geneva Conventions as the basis for their claims, these sources do not by themselves supply a federal private cause of action.[27] Thus, plaintiffs' claims are cognizable only if they may be brought under federal common law pursuant to the Supreme Court's decision in *Sosa v. Alvarez-Machain* or if they may be brought under the TVPA. As explained below, however, neither federal common law nor the TVPA provides a basis for plaintiffs' claims. Indeed, the creation of such a cause of

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[27] It is well settled that international treaties do not generally provide private litigants with enforceable rights. *See Head Money Cases*, 112 U.S. 580, 598 (1884); *see also* Restatement (Third) of Foreign Relations Law of the United States (1986), § 907 cmt. a ("International agreements, even those directly benefit[t]ing private persons, generally do not create private rights or provide for a private cause of action in domestic courts"); *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001) ("[T]here is a strong presumption against inferring individual rights from international treaties."); *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988) ("An action arises under a treaty only when the treaty expressly or by implication provides for a private right of action."); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975). In particular, the Geneva Conventions do not themselves create a private right of action. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749 (2006); *cf. Johnson v. Eisentrager*, 339 U.S. 763, 789 n. 14 (1950) (explaining that, with the 1929 Geneva Conventions, "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities."). Indeed, the recent Military Commissions Act of 2006, Pub. L. No. 109-366, § 5, 120 Stat. 2600, 2631 (2006)("MCA"), provides that no person may invoke the Geneva Conventions and its protocols in any civil action against members of the U.S. armed forces for whom the United States bears international responsibility. This reflects Congressional intent not to use the federal courts as a venue for adjudicating private claims for violations of the Geneva Conventions, even in instances where there is a strong connection with the United States. Implying such an action under the ATS, where there is no such connection, would be anomalous. See Section 5 of MCA ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus proceeding or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States, is a party as a source of rights in any court of the United States or its states or territories.") Nor does customary international law supply a federal cause of action, except to the extent permitted by the Supreme Court's decision in *Sosa v. Alvarez-Machain*. *See infra* at 37-47.

action would raise serious concerns about the respective roles of the judiciary and the political branches in addressing sensitive disputes regarding armed conflicts abroad.

A. The Courts Have No Authority to Create a Federal Common Law Cause of Action under the ATS for the Disproportionate Use of Military Force

In *Sosa v. Alvarez-Machain, supra,* the Supreme Court clarified the conditions under which claims for alleged violations of international law can be brought under the ATS. As the Court explained, while the ATS is itself a jurisdictional statute that does not establish a private cause of action, Congress understood, in enacting the statute in 1789, that courts exercising jurisdiction under the statute would recognize private causes of action for certain international law violations as a matter of federal common law. 542 U.S. at 712. The *Sosa* Court affirmed that courts continue to retain such authority, but took pains to emphasize that this authority must be exercised with "great caution." *Id.* at 728, 730. Given that "[t]he creation of a private right of action raises issues beyond the mere consideration whether the underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion," the creation of such a right is generally "better left to legislative judgment." *Id.* at 727. Moreover, "the potential implications for the foreign relations of the United States of recognizing such cases should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*

Accordingly, the *Sosa* Court left the door of federal common law open only to a "very limited category" of international law claims, *id.* at 728, "subject to vigilant doorkeeping," *id.* at 729. Specifically, the Court instructed that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the statute] was enacted" in 1789 – namely, violation of safe conducts, infringement of the rights of

ambassadors, and piracy. *Id.* at 715, 732. "And," the Court stressed, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33 (footnotes omitted).

All of these considerations counsel strongly against recognizing a private cause of action under federal common law for the international law violations alleged here. As a preliminary matter, the courts should be very hesitant to recognize a federal common law cause of action for *any* claim centering on a foreign government's treatment of foreign nationals in foreign territory. There is a strong presumption generally against projecting U.S. law onto disputes arising in foreign territories – a presumption which "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Notably, the same strong presumption existed in the early years of the nation; even the federal statute that punished, as a matter of U.S. law, one of the principal offenses under the law of nations – piracy – was held not to apply where a foreign state had jurisdiction. *See United States v. Palmer*, 16 U.S. 610, 630-31 (1818) (the federal piracy statute should not be read to apply to foreign nationals on a foreign ship); *see also The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1807).

In light of this presumption, which is strongly reinforced by the judicial restraint mandated by the Supreme Court in *Sosa*, courts should be very hesitant ever to apply their federal common law power under the ATS to entertain such extraterritorial claims. Indeed, the *Sosa* Court expressly questioned whether this federal common law power could properly be employed "at all" in regard to a foreign nation's actions taken abroad. *Sosa*, 542 U.S. at 727-28.

Moreover, nothing in the ATS, or in its contemporary history, suggests that Congress intended the statute to apply to conduct in foreign lands. To the contrary, the assaults on ambassadors that preceded and motivated the enactment of the ATS involved conduct purely within the United States. The point of the ATS was to ensure that the United States would be able to provide a forum for redressing such violations, thereby *preventing* diplomatic conflicts with the nations offended by such conduct. *See id.* at 715, 720, 723-24 & n.15; *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) ("[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."). Suits against a foreign government for conduct occurring in foreign territory are entirely removed from these types of concerns.

In any event, whatever limited discretion the courts might have to extend the ATS to certain claims involving extraterritorial conduct, they certainly should not exercise that discretion to recognize a federal cause of action for the disproportionate use of military force in the context of a foreign armed conflict. Such a cause of action would not, as *Sosa* requires, "rest on a norm of international character . . . defined with a specificity comparable to the features of the 18th-century paradigms" recognized at the time the ATS was enacted. *Sosa*, 542 U.S. at 725.

Indeed, a comparable norm was rejected in *Sosa* itself, where the Court found that the international law norm against "arbitrary" detention was not sufficiently well defined to merit recognition as the basis for a federal common law cause of action. As the Supreme Court explained, although many nations recognize this norm, this consensus exists only "at a high level of generality." *Id.* at 737 n.27. Accordingly, the norm could not be taken as the predicate for a federal lawsuit, for by itself it fails to specify what qualifies as "arbitrary" in any particular case.

Id. at 737-38. As the Court concluded, "[w]hatever may be said for the broad principle [plaintiffs] advance[], in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.* at 738.

Likewise, while all agree in the abstract that military force should not be "disproportionate" to military objectives, this moral clarity tends to dissipate in the application of principle to practice. The provisions of the Geneva Conventions cited in plaintiffs' complaint serve to illustrate. For example, plaintiffs cite Article 52 of Additional Protocol I, which forbids attacks on "civilian objects" – meaning "objects which are not military objectives." *See* Protocol Additional to the Geneva Conventions of 12 August 1949 (adopted Jun. 8, 1977), *reprinted in* 16 I.L.M. 1391 (1977) ("Additional Protocol I"), Art. 52, cl. 1. The term "military objectives" is defined in turn as "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." *Id.*, Art. 52, cl. 2. Yet, putting aside for the moment that the United States has never ratified Additional Protocol I of the Geneva Conventions, the problem is that the cited Article fails to specify what constitutes "an effective contribution to military action" or "a definite military advantage" – nor can such specificity be expected, since these determinations are highly value-laden and context-specific. Along similar lines, plaintiffs cite Article 57 of Additional Protocol I, which provides, *inter alia*, that "[t]hose who plan or decide upon an attack shall . . . [r]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Additional Protocol I, Art. 57, cl. 2(a)(iii). Again, the rub lies in determining what counts as "excessive." Any number of intangibles must be

considered: How important is the military objective sought to be achieved? What are the pros and cons of each option available to achieve that objective? For each option, what is the probability of success? What are the costs of failure? What are the risks of civilian casualties involved in each option? What are the risks of military casualties involved in each option? How are casualties of either kind to be weighed against the benefits of the operation?[28]

In short, questions of proportionality are highly open-ended, and the answers to them tend to be subjective and imprecise. *See Corrie v. Caterpillar, Inc*., 403 F. Supp. 2d 1019, 1025 (W.D. Wash. 2005) (rejecting ATS claim based on Geneva Conventions provision prohibiting destruction of personal property "except where such destruction is rendered absolutely necessary by military operations" as a "subjective" norm that "is not sufficient under *Sosa*"). As stated in a recent report by a committee established to review the NATO bombing campaign in Yugoslavia:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

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[28] As the commentary to Article 57 itself acknowledges, its terms "are relatively imprecise and are open to a fairly broad margin of judgment." Additional Protocol I, Art. 57, cmt. 2187, *available at* http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument. Indeed, the ambiguity of the provision, coupled with the possibility of prosecutions for grave breaches of the Article, led several delegations to object to it as "dangerously imprecise" and imposing a "very heavy burden of responsibility . . . on military commanders." *Id.*

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 48, *available at* http://www.un.org/icty/pressreal/nato061300.htm. Thus, while there are certainly clear-cut cases on the extremes, the proportionality principle fails to provide a serviceable rule of decision in the large run of cases; accordingly, it does not possess the specificity required under *Sosa* to afford a federal common law cause of action. *See Sosa*, 542 U.S. at 737 ("[A]lthough it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses.").

This conclusion is bolstered by the "practical consequences" of recognizing such a civil cause of action. *Id.* at 738. As in *Sosa*, the implications of transforming the international norms on which plaintiffs rely into a springboard for federal litigation would be "breathtaking." *Id.* at 736 (finding that allowing ATS suits for "arbitrary" detention "would support a cause of action in federal court for any arrest, anywhere in the world"). Civilian casualties frequently occur in armed conflict. Were lawsuits such as this one cognizable under the ATS, the federal courts could quickly become embroiled as referees of such conflicts around the world, called upon whenever civilian casualties occur to adjudge the legitimacy of the military action that caused them.

The assumption of such a far-reaching role would plainly strain the competence of the judiciary. Initially, discovery into the knowledge, planning, and motives behind a foreign military attack would tend to be impracticable: most, if not all, of the relevant evidence would be in the exclusive control of governments and officials beyond the jurisdiction of the federal courts; and the information at issue would presumably be mostly classified or otherwise

privileged. *See Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (questions regarding propriety of military action are beyond judicial management given that, *inter alia*, the relevant evidence is often "in the hands of foreign governments"). But more fundamentally, given the lack of a specific, objective standard of decision, even if the relevant information were discoverable, its "digestion" would in any event often be "beyond judicial management." *Id.* at 1312. Indeed, in non-ATS cases raising issues of military proportionality, courts have generally abstained on political question grounds, in large part due to a lack of judicially manageable standards.[29] As the Eleventh Circuit stated in one such case:

> [W]e read the allegations of the complaint . . . as [requiring the court] to discern between military, quasi-military, industrial, economic and other strategic targets,

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[29] *See Linder v. Portocarrero*, 963 F.2d 332, 335 (11th Cir. 1992) (finding no judicially manageable standards for evaluating decision by Nicaraguan rebels to attack allegedly civilian targets); *Tiffany v. United States*, 931 F.2d 271, 279 (4th Cir. 1991) ("Judges have no 'judicially discoverable and manageable standards' for resolving whether necessities of national defense outweigh risks to civilian aircraft."); *El-Shifa Pharm. Indus. v. United States*, 402 F. Supp. 2d 267, 274 (D.D.C. 2005) (finding no judicially manageable standards for evaluating President's decision to target pharmaceutical plant based on intelligence that it was a chemical weapons facility); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 738 (S.D.N.Y. 1986) (finding no judicially manageable standards in case involving damage to civilian ship from mine accident); *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (dismissing claim against United States for downing Iranian civilian plane during combat with hostile forces); *Rappenecker v. United States*, 509 F. Supp. 1024, 1025 (N.D. Cal. 1981) (holding claims arising out of military operations to recover ship from hostile Cambodian forces were nonjusticiable); *see also Aktepe v. United States*, 105 F. 3d 1400, 1404 (11th Cir. 1997) ("[C]ourts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life."); *but see Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992) (finding suit concerning accidental military shooting of civilian aircraft justiciable). In *In re Agent Orange*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *appeal filed*, No. 05-1953 (2d Cir. 2005), a case challenging the use of Agent Orange in the Vietnam War which *did* include an ATS claim, the district court found that the political question doctrine did not bar adjudication of the case, *see id.* at 69; but, given "the inherently subjective judgments necessary to determine whether the concept [of proportionality] applies," the court refused to recognize a private cause of action for plaintiffs' proportionality claims under the ATS. *See id.* at 138.

> and rule upon the legitimacy of targeting such sites as hydroelectric plants on Nicaraguan soil in the course of a civil war. We would be called upon to inquire into whether, and under what circumstances, defendants [Nicaraguan anti-government leaders and organizations] were justified in targeting such sites, with knowledge that civilians or paramilitary or military personnel would be present at these sites. Indeed, we would be called upon to discern between military or paramilitary personnel guarding a strategic dam and engineers building or maintaining such a site during time of war. In short, we would necessarily be required to measure and carefully assess the use of the tools of violence and warfare in the midst of a foreign civil war . . . .

Linder, 963 F.2d at 335. Judges – being "'deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action,'" *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (quoting *Da Costa v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973)) – are generally in a poor position to resolve such questions, yet they could be frequently put in this position were claims such as plaintiffs' deemed cognizable under the ATS.

Moreover, not only do the courts lack a sufficiently reliable compass to become regular travelers in this subject matter area, but were they to do so, they would inevitably cross paths with the Executive in its management of foreign affairs. It is an unfortunate fact that violent conflict remains a virtual constant in human affairs and exists today in numerous parts of the world – not only in Israel and the occupied territories, but also in Iraq, Afghanistan, Chechnya, Sudan, Kashmir, and elsewhere. Civilian casualties arising from these hostilities can generate considerable political and diplomatic controversy, as this case offers but one illustration. When such controversy arises, it is important for the Executive to be able to speak for the government with one voice – or, for that matter, to keep silent; given the global leadership role of the United States, its pronouncements can draw intense international scrutiny and carry significant political and diplomatic consequences. To allow overseas hostilities to become fodder for federal lawsuits would invite a stream of unpredictable commentary from the courts, creating "the

potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962).[30] Moreover, such suits would subject the foreign states and officials involved to the burdens and embarrassments of litigation, leading to strains in U.S. relations. In both respects, such litigation would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all. *See Sosa*, 542 U.S. at 727-28 (warning that "many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences"); *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("We have . . . consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.'") (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)).[31]

Of significant interest, Congress specifically paid heed to such foreign policy concerns in drafting the War Crimes Act of 1996, Pub. L. 104-492 (1996), *codified as amended at* 18 U.S.C. § 2441. The statute, as enacted, criminalizes grave breaches of the Geneva Conventions

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[30] Such pronouncements as to what constitutes a disproportionate use of military force could cause embarrassment to the Executive not only to the extent that those pronouncements might conflict with positions taken by the Executive in its conduct of foreign affairs, but also to the extent that they might conflict with actions taken by the Executive in its conduct of military operations.

[31] As with justiciability concerns, concerns over the potential for judicial intrusion into sensitive areas of foreign policy have led courts to dismiss specific cases on political question grounds. *See, e.g., Schneider v. Kissinger*, 412 F.3d 190, 198 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. (Apr. 17, 2006) (dismissing FTCA claims against U.S. government official for involvement in coup in Chile); *Whiteman v. Austria*, 431 F.3d 57, 73 (2d Cir. 2005) (dismissing FSIA claims against Austria arising from Nazi confiscation of property in light of U.S. efforts to resolve claims through diplomatic channels); *Corrie*, 403 F. Supp. 2d at 1032 (E.D. Wash. 2005) (dismissing ATS claims against U.S. manufacturers for sale of bulldozers to Israel); *Doe I*, 400 F. Supp. 2d at 111-13 (D.D.C. 2005) (dismissing ATS claims against Israeli government officials regarding lawfulness of Israeli settlement policy).

committed by or against members of the U.S. military or U.S. nationals. *Id.* However, when the bill was under consideration by Congress, the Executive Branch proposed expanding the scope of coverage to include grave breaches committed by any individual who was subsequently found in the United States – regardless of whether that perpetrator, or the victim of the breach, was a member of the U.S. military or a U.S. national. As explained in the report of the House Judiciary Committee, this proposal was rejected:

> The Committee decided that the expansion . . . to include universal jurisdiction would be . . . unwise at present. *Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight.* In addition, problems involving witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunal. If a war criminal is discovered in the United States, the federal government can extradite the individual upon request in order to facilitate prosecution overseas. The Committee is not presently aware that these alternative venues are inadequate to meet the task.

H.R. Rep. 104-698, at 8 (1996), 1996 U.S.C.C.A.N. 2166, 2173 (emphasis added). Thus, even in the *criminal* context, with the check of prosecutorial discretion, Congress was unwilling to bestow the federal courts with universal jurisdiction to adjudicate even "grave" breaches of the Geneva Conventions, for fear of the possible foreign policy ramifications. Plainly, then, the courts have no license to devise, on their own initiative, a *civil* cause of action under federal common law for breaches of the Geneva Conventions – "grave" or not – as alleged by plaintiffs here. The fact that Congress has not even ratified the particular provisions of Additional Protocol I on which plaintiffs rely further underlines the impropriety of courts jumping ahead of Congress on these issues. *See Sosa*, 542 U.S. at 726 ("[A]lthough we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, . . . the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in

exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.") (citations omitted).

In sum, because any consensus regarding the principle of proportionality exists only "at a high level of generality," *Sosa* at 736 n.27, and because the transformation of that principle into the basis for a private cause of action would entail troublesome practical (and potentially constitutional) problems as between the courts and the Executive, this Court should not recognize a federal common law cause of action for plaintiffs' claims.

B. The TVPA Provides a Narrow Cause of Action That Does Not Encompass Claims for Civilian Casualties Resulting from the Disproportionate Use of Military Force

Just as the Court should not create a cause of action for the disproportionate use of military force under federal common law, nor should it read such a cause of action into the TVPA. As the *Sosa* Court noted, the TVPA "is confined to specific subject matter" – namely, torture and "extrajudicial killing." 542 U.S. at 728. While plaintiffs construe the statute's prohibition of "extrajudicial killing" to cover the deaths of non-targeted civilians in armed conflict, the statute was not intended to sweep so broadly.[32]

The statutory text indicates that Congress understood "extrajudicial killing" to be an especially grave offense, entailing more than unintentional civilian deaths. Thus, the term "extrajudicial killing" is defined in the statute as "a *deliberated* killing not authorized by a previous judgment pronounced by a regularly constituted court . . . ." TVPA § 3(a) (emphasis added). The term "deliberated," while to some extent ambiguous, suggests that Congress intended only to reach killings that are specifically intended, and not the collateral consequence

[32] This case does not involve whether the TVPA would create a cause of action for the targeted killing of Shehadeh himself, and the United States therefore is not addressing that question in this brief.

of action taken for some other purpose. *See* TVPA House Report at 5, 1992 U.S.C.C.A.N. at 87 ("The inclusion of the word 'deliberated' is sufficient . . . to [exclude] killings that lack the requisite extrajudicial intent, such as those caused by a police officer's authorized use of deadly force.").[33] Moreover, the statute's prohibition on "extrajudicial killing" cannot be read in isolation, but rather must be read in the context of the statute as a whole. *See John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993) (stating that a court's examination of statutory language is "guided not by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy") (internal quotation marks omitted); *Deal v. United States*, 508 U.S. 129, 132 (1993) (stating as a "fundamental principle of statutory construction" that the meaning of statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used"). The fact that the TVPA pairs "extrajudicial killing" with torture indicates that the conduct Congress sought to reach was on a moral par with torture, and that both offenses involve unlawful conduct purposefully undertaken to cause harm to a specific victim – death in the case of extrajudicial killing, and physical and mental pain or suffering in the case of torture. *See* TVPA § 3(b) (defining torture to involve such harm of an individual where the harm is "intentionally inflicted on that individual").

The legislative history squarely confirms these conclusions. Both the House and Senate reports repeatedly use the term "extrajudicial killings" interchangeably with "summary

[33] While the Report says "include" rather than "exclude," the context in which the statement occurs makes clear that this is a typographical error.

executions." *See* TVPA House Report at 3-4; TVPA Senate Report at 3-5.[34] The term "summary execution" plainly implies a specific intent to kill, as the examples given in the legislative history illustrate. Thus, the House Report explains that the statute was intended to codify the holding of *Filartiga v. Pena-Irala*, *supra*, in which the Second Circuit allowed an alien to bring suit under the ATS over the death of a family member who had been "tortured to death" by an official of a foreign government. TVPA House Report at 3-4, 1992 U.S.C.C.A.N. at 86. The Senate Report likewise explains that the statute is targeted at acts of such depravity, citing a report that in the year preceding the statute's enactment there were "100 deaths attributed to torture in over 40 countries and 29 extrajudicial killings by death squads." TVPA Senate Report at 3. These acts are of a different order compared to unintended civilian deaths resulting from military operations, which the term "summary execution" simply does not fit.

As further made clear in the legislative history, the statute singles out "summary executions" along with torture because Congress viewed both as uniquely incontrovertible human rights violations. *See* TVPA House Report at 2, 1992 U.S.C.C.A.N. at 85 ("Official torture and summary execution violate standards accepted by virtually every nation."); TVPA Senate Report at 8 ("[N]o state officially condones torture or extrajudicial killings."); 135 Cong. Rec. H6423, H6424 (daily ed. Oct. 2, 1989) (statement of Rep. Fascell) ("We cannot allow individuals to get away with conduct that violates the most basic human rights."); 134 Cong. Rec. H9692 (daily ed. Oct. 5, 1988) (statement of Rep. Leach) ("We are dealing with one of the most awful crimes imaginable to the human mind, that of torture."); 133 Cong. Rec. S3900

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[34] *See also* TVPA Senate Report at 4 (explaining that the statute accords with a revised draft of the Restatement of Foreign Relations Law of the United States, described as providing that "there should be a cause of action where a state practices '[summary] murder'").

(daily ed. Mar. 25, 1987) (statement of Sen. Leahy) ("Torture and extrajudicial killing are the most insidious forms of human rights violations . . . ."). Yet, again, there is no such categorical consensus concerning what acts are prohibited by the principle of proportionality. Thus, interpreting the TVPA to cover non-purposeful civilian casualties caused by the use of military force would transform a statute intended to supply an "unambiguous" cause of action, TVPA House Report at 3, into one requiring highly debatable applications of international law. Congress did not intend to authorize such a judicial venture into unknown territory. *See Sosa*, 542 U.S. at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field [including the TVPA] have not affirmatively encouraged greater judicial creativity.").

Indeed, allowing plaintiffs to bring their claims under the auspices of the TVPA would give rise to the same undesirable "practical consequences" that would follow were plaintiffs' claims recognized under federal common law: it would invite a flood of cases seeking for the federal courts to regulate the proportionality of military operations in armed conflicts worldwide. There is no reason to believe that Congress intended to so burden the courts, or to create such potential for conflict with the Executive's management of foreign affairs. Indeed, at the time the TVPA was enacted, the Executive expressed serious concern that cases brought under the statue could complicate diplomatic relations with other nations. *See* TVPA Senate Report at 14-15. In response, the proponents of the statute stressed that it was intended to be of narrow scope and was not anticipated to give rise to a large number of cases. *See* 137 Cong. Rec. S1369, S1378 (daily ed. Sep. 25, 1991) (statement of Sen. Specter) ("Let me emphasize that the bill is a limited measure. It is estimated that only a few of these lawsuits will ever be brought."); 135 Cong. Rec.

H6423, H6424 (daily ed. Oct. 2, 1989) (statement of Rep. Bereuter) ("The Torture Victim Protection Act is very specific and narrowly drawn legislation, and as such is unlikely to result in an inappropriately large number of lawsuits.").[35] Yet plaintiffs' reading of the statute would put the courts in the position of having to field all manner of disputes arising from foreign armed conflicts – disputes that generally lie beyond the competence of the judiciary to resolve and that are rife with potential for foreign-policy conflicts of precisely the kind the Executive forewarned against. Congress plainly had no such far-reaching agenda in enacting the statute. Accordingly, the Court should not construe the TVPA to provide a cause of action for plaintiffs' claims.[36]

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[35] Along similar lines, President George H.W. Bush emphasized that courts should take care not to exceed the narrowly drawn bounds of the statute:

> There is . . . a danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery. Such potential abuse of this statute undoubtedly would give rise to serious frictions in international relations and would also be a waste of our own limited and already overburdened judicial resources. . . . It is to be hoped that U.S. courts will be able to avoid these dangers by sound construction of the statute and the wise application of relevant legal procedures and principles.

Statement by President George Bush upon Signing H.R. 2092 (Mar. 12, 1992), 1992 U.S.C.C.A.N. 91 (paragraph structure altered).

[36] These same concerns – over judicial competence and interference with the Executive's conduct of foreign affairs – sound as well under the political question doctrine, *see supra* nn. 29 & 31; and if plaintiffs had a valid cause of action by which to bring their claims, there would be a serious issue whether this *particular* case should be dismissed on political question grounds, as Dichter argues. *See Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 655 (2d Cir. 1988) ("In determining whether a case presents a non-justiciable political question, the court must first make a 'discriminating inquiry into the precise facts and posture of the particular case.'") (quoting *Baker*, 369 U.S. at 217). Other courts have dismissed cases arising out of foreign hostilities on political question grounds precisely to protect the prerogatives of the Executive Branch. *E.g., Doe I*, 400 F. Supp. 2d at 111-13 (dismissing claims arising from Israeli-Palestinian conflict found to interfere with Executive's foreign-policy prerogatives); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp.2d 1164, 1195 (C.D. Cal. 2005) (dismissing claim arising from bombing campaign in Colombia found to interfere with (continued…)

CONCLUSION

For the reasons above, the United States takes the view that the defendant is immune from suit for the official acts alleged in this lawsuit and that plaintiffs' complaint fails in any event to state a valid federal cause of action.

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Executive's right to respond to human rights violations); *Linder v. Portocarrero*, 747 F. Supp. 1452, 1468-69 (S.D. Fla. 1992) (dismissing claims arising from Contras' operations in Nicaragua found to interfere with Executive's ability to conduct foreign policy in a civil war). However, the Court need not reach this issue. The problem with the plaintiffs' case – and the United States' interest in its dismissal – is generic: recognition of a private cause of action for the disproportionate use of military force would create a systemic and continuing source of justiciability problems for the courts and conflicts with the Executive's conduct of foreign policy. Because there is no reason for the courts to recognize such a cause of action, whether under federal common law or the TVPA, these difficulties can and should be *categorically* avoided.