07-2579-cv

United States Court of Appeals

for the

Second Circuit

RA'ED IBRAHIM MOHAMAD MATAR, on behalf of himself and his deceased wife Eman Ibrahim Hassan Matar, and their deceased children Ayman, Mohamad and Dalia, MAHMOUD SUBHAI AL HUWEITI, on behalf of himself and his deceased wife Muna Fahmi Al Huweiti, their deceased sons Subhai and Mohammed and their injured children, Jihad, Tariq, Khamis, and Eman and MARWAN ZEINO, on his own behalf,

Plaintiffs-Appellants,

– v. –

AVRAHAM DICHTER, former Director of Israel's General Security Service,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL RULES AND STATUTES

LEGISLATIVE MATERIALS

FOREIGN CASES

INTERNATIONAL DOCUMENTS

OTHER SOURCES:

INTRODUCTION

Plaintiffs suffered the death of their loved ones and other injuries when Defendant decided to drop a one-ton bomb on their homes, an attack that was condemned by the U.S. Executive and is being criminally investigated by Israel. Throughout his brief ("DB"), Defendant attempts to send one message: this is not a case against him, but a case against Israel, so Israel's immunity must extend to him. DB:11-16. His protests to the contrary do not alter the reality that this is a suit against Defendant Dichter in his *personal* capacity, seeking a remedy from him *individually*, and not from the State of Israel. Appellants' Opening Brief ("AOB"):15-16.

The United States Executive, through its *Amicus* Brief ("USB"), also trumpets one theme—albeit one with broad implications: the Executive alone is empowered to determine individual immunity, and define and interpret international law. This Court should not cede its constitutionally-mandated power to the Executive. *Sosa v. Alvarez-Machain* found that federal courts have jurisdiction to hear claims by aliens seeking redress for violations of a core class of international law violations. 542 U.S. 692, 712 (2004). The Court further confirmed – contrary to the Executive's argument (USB:3) – that federal courts are both empowered and obligated to determine the scope and content of customary international law. *Sosa*, 542 U.S. at 724-725.

Defendant and the U.S. seek a rule under which the immunity of any foreign government officials would be decided by the foreign governments or

the Executive. USB:21-22, fn.*. That rule is incompatible with this Court's long history of holding former foreign officials found in this country liable for violations of customary international law. *See, e.g., Filártiga v. Peña-Irala,* 630 F.2d 876, 887 (2d Cir. 1980).[1]

I. DEFENDANT IS NOT IMMUNE FROM SUIT

A. Defendant is Not Entitled to Immunity Under the FSIA.

Defendant does not challenge Plaintiffs' contention that the unambiguous language, legislative history and intended purpose of the FSIA all support that it does not apply to individuals, *see* AOB:7-12, a position with which the U.S. agrees. *E.g.,* USB:3, 9-12. *See also,* Sovereign Immunity, 1976 Dig. U.S. Prac. Int'l L. Appendix, at 1020(noting the FSIA "does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities.") Rather, Defendant merely cites *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 160-161 (2d Cir. 2007), which acknowledged the Circuit-split, and remanded for consideration of the issue.

If the FSIA is found to apply to individuals, they must either be considered "political subdivisions" or "agencies or instrumentalities" of the state under the statute. 28 U.S.C. §1603. Courts finding that the FSIA applies to individuals sued in their official capacity have found that they are "agencies or instrumentalities" of the state under 28 U.S.C. §1603(b). *See, e.g., Chuidian v.*

[1] *Filártiga* was the backdrop for the passage of the TVPA. S. Rep. No. 102-249, at 4 (1991)("Senate Report").

Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990). Defendant accepts this finding by the District Court, DB:11 (citing A-6), yet maintains that he is the equivalent of Israel.[2] DB:11-16.

Despite Defendant's assertion to the contrary, he is not a foreign state, and provides no authority to support that he is. Under the FSIA, a foreign state "includes" its political subdivisions or agencies or instrumentalities. 28 U.S.C. §1603(a). This "is not equivalent to saying that a foreign state *is* or *is defined as* an agency or instrumentality." *Filler v. Hanvit Bank,* 378 F.3d 213, 219 (2d Cir. 2004). Only the state itself is the state. "[T]he use of the term 'includes' implies that agencies and instrumentalities, as well as political subdivisions, are subsumed within the 'foreign state,'" not equivalent to the foreign state. *Id.*

Dole Food Co. v. Patrickson held that under the FSIA "instrumentality status is determined at the time of the filing of the complaint." 538 U.S. 468, 480 (2003). *See* AOB:13-15. It is undisputed that Defendant was no longer a

[2] Defendant relies heavily on *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005), for the proposition that he is the practical equivalent of the state. DB:12, 15. This language originated in *Chuidian*, which recognized that domestic cases *against* individuals in their official capacity are the practical equivalent of suits against the sovereign. 912 F.2d at 1101-02 (citing *Monell v. Department of Social Services*, 436 U.S. 658, 690 n. 55, (1978)). *Chuidian*'s discussion was in support of its finding that the FSIA applies to individuals in their official capacity, not in support of immunity for all "official" acts for former officials.

government official when the complaint was filed.[3] A:13-15,38,43; DB:3,11; SA:2. Yet Defendant asks this Court to ignore *Dole* and the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)(quoting *Mullen v. Torrance*, 22 U.S. 537, 539 (1824)).

Defendant incorrectly argues that he must be treated as the state because where a defendant "performs a core governmental function," this Court has treated "the suit as equivalent to one against the foreign state itself, rather than against an instrumentality." DB:20 (citing *Garb v. Republic of Poland,* 440 F.3d 579, 595 (2d Cir. 2006)). *Garb* decided the defendant Ministry of the Treasury was not an "agency or instrumentality" because it was not a "separate legal person" from the state under §1603(b)(1). 440 F.3d at 591, 598. In determining that the Ministry was not an instrumentality, *Garb* relied on evidence that it did not hold property separately from the state. *Id.* at 592, 595, 595 n.19, 596 n.21. Although Dichter argues that he shares Israel's immunity, he does not claim that he is the same "legal person" as Israel or that his assets are the same as Israel's.

Defendant's attempt to limit *Dole* to corporations also fails. The corporate structure discussion he relies on does not relate to the issue of whether immunity is governed by status at the time of the conduct or of suit, but relates to the Supreme Court's alternate reason for affirmance, namely that the state

[3] Defendant's return to government employment after the complaint was filed and served is irrelevant under *Dole,* and he has not argued that such status provides him with any other immunity. DB:22.

itself must own a majority of a corporation's shares for it to be an instrumentality. DB:18 (citing *Dole*, 538 U.S. at 474).

Nothing in the Court's reasoning regarding the time to determine a defendant's status as an instrumentality turned on the nature of the defendant. Indeed, every domestic case the Court cited in rejecting defendants' comparison to domestic immunity was against individual officials, yet the Court did not distinguish them on that basis, instead focusing on the non-statutory basis and purpose of domestic immunities. *Dole*, 538 U.S. at 478-79.

The policies underlying foreign sovereign immunity identified by the Supreme Court further support *Dole's* application to individuals. Foreign sovereign immunity "is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns." *Id.* at 479. A foreign sovereign does not suffer the same inconvenience in a suit against a former official in his "personal" capacity as it would in a case seeking relief against the state. AOB:15-16; *see also Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985). FSIA immunity, a statutory immunity created by the political branches, also does not implicate separation of powers concerns behind presidential immunity. *Id.* at 479-80.

Defendant urges this Court to apply the FSIA contrary to Supreme Court precedent, arguing that the issue was not raised below. Plaintiffs have not

raised new claims or issues on appeal, but cite *Dole* to support their argument that the FSIA does not immunize Defendant, an issue that was raised and squarely addressed below.[4] "Arguments made on appeal need not be identical to those made below…if the elements of the claim were set forth below and additional findings of fact are not required." *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982).

Defendant's reliance on *Kraebel v. New York City Dep't of Housing Pres. and Dev.* is inapposite, as the plaintiff there raised a new constitutional claim on appeal that had not been in her complaint nor mentioned below. 959 F.2d 395, 401 (2d Cir. 1992). Plaintiffs do not seek to add claims, or rely on constitutional or statutory provisions not previously advanced, but cite a new case in support of their argument that a statute raised by Defendant is inapplicable.[5]

Even if the arguments below were so disparate that *Dole*'s applicability is considered a new legal issue, this Court should exercise its discretion to hear it "to avoid a manifest injustice" or because the "argument presents a question of law and there is no need for additional fact finding." *Sniado v. Bank Austria*

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[4] Plaintiffs emphasized below that Defendant was a *former* official. Opp'n Mot. Dismiss 1, 11, 17, 30.

[5] Similarly, in *Caiola v. Citibank, N.A.*, plaintiff had failed to argue below that a statute applied retroactively, even after the district court had ordered briefing on the impact of the statute on the precise issue. 295 F.3d 312, 327-28 (2d Cir. 2002).

AG, 378 F.3d 210, 213 (2d Cir. 2004). *See also Hormel v. Helvering*, 312 U.S. 552 (1941)(general rule that appellate courts will decline to hear issues not raised below is to afford parties the opportunity to offer all relevant evidence in the trial court).

Dole's application to individuals raises no factual issues, but is a pure question of law to be reviewed *de novo*. That Defendant was a *former* government official when the complaint was filed and served has been alleged by Plaintiffs, conceded by Defendant and the Israeli Ambassador, and found by the District Court. Since applying *Dole* requires no fact-finding and the issues have been fully briefed on appeal, Defendant suffers no prejudice from this Court's consideration of *Dole*, whereas manifest injustice could result if it is not considered.[6]

B. Purportedly Acting in "Official Capacity" is Not Equivalent to Acting within the Scope of Lawful Authority or Mandate.

Defendant emphasizes Plaintiffs' reference to his position at the time of the conduct alleged and their assertion that he acted under color of law. DB:22-23. He does not provide evidence, however, that his *specific* acts fell within the

[6] In *First City, Texas-Houston, N.A. v. Rafidain Bank*, plaintiff argued that defendant's appeal was untimely because it effectively appealed an earlier order, rather than the denial of a motion to vacate that order, but plaintiff had not challenged the motion as untimely. 281 F.3d 48, 52 (2d Cir. 2002). This Court found the appeal timely, but ruled in favor of plaintiff, causing no manifest injustice by deciding the appeal. *Id.* at 53, 55.

scope of his lawful authority or mandate under Israeli law. *See* AOB:26-28; 53-55.[7]

Cases against the U.S. and U.S. officials are inapposite to foreign sovereign immunity and the question of whether a former foreign official acted within the scope of his authority. These cases examine whether the acts in question fell within the Constitutional powers entrusted to the Executive–an analysis that cannot be extended to foreign officials and is distinct to whether such officials were acting within their lawful mandate. *See, El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 273-76 (D.D.C. 2005); *Saltany v. Reagan,* 702 F. Supp. 319 (D.D.C. 1988). *See* sec. II.B., *infra.*

The ATA, passed by the same Congress as the TVPA, fails to bolster Defendant's immunity arguments, as it explicitly precludes claims against a foreign state or its agencies, officers or employees acting within their official capacity or under color of legal authority. 18 U.S.C. §2337(2). While the ATA and the TVPA seek redress against different violators, the same Congress intended that each Statute have the same effect: holding those responsible for torture and extrajudicial killings accountable. It is not for the current Administration to abrogate that mandate.

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[7] In *Arcaya v. Paez*, the consul was not immune because the acts alleged were not within the scope of his official authority. 145 F. Supp. 464, 470 (S.D.N.Y. 1956). The court made this finding despite the Government of Venezuela's assertion that his acts were within his duties as an agent of the government, and that he would have been remiss in carrying out his official instructions had he not. *Id.* at 470-71.

Defendant misplaces reliance on a statement in the TVPA Senate Report that purports to quote language from the FSIA which is not actually in the FSIA: "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)." DB:31(citing Senate Report, at 8). Because the quoted Senate Report language is not found in §1603(b) or anywhere else in the FSIA, it cannot be used to support the position that former foreign officials can claim FSIA immunity for extrajudicial killings. Legislative materials are not controlling where they are contradictory or ambiguous. *United States v. Dickerson,* 310 U.S. 554, 562 (1940).

C. There is No "Common Law Immunity" which Bars Adjudication of This Case.

On appeal, Defendant seizes an alternate theory for immunity not argued in his motion to dismiss but advanced only by the U.S. Statement of Interest ("SOI").[8] Defendant does not provide any authority that there exists a common-law "official act" immunity that extends to all officials, much less to former officials for conduct in violation of *jus cogens* norms. *See* DB:12.

[8] Defendant's assertion that he argued common-law immunity below is specious, DB:15,n.10, as he did not argue it in his Motion, his Reply, or at oral argument, but merely noted his agreement with the result (immunity) of the SOI in his Response. 9-10.

Neither federal common law nor international law provides immunity to former foreign officials whose conduct violates the law of nations.

In arguing not only that a common-law immunity exists, but that the Executive alone can determine the law in individual immunity cases, the U.S. seeks to undo legal developments of the past century and return to a time when politics, rather than the equal application and protection of the law, decide whether victims of gross human rights abuses are afforded redress. The Executive seeks to strip the courts of their Article III powers, arguing for the exclusive role in determining immunity for tort claims. A primary reason for enacting the FSIA was to de-politicize immunity cases. *See Verlinden B.V. v. Cent. Bank of Nig*., 461 U.S. 480, 487-88 (1983)(noting that "diplomatic pressure" and "political considerations" often played a determinative factor in whether suggestions of immunity were issued, leading to "governing standards [that] were neither clear nor uniformly applied"). *See also* H.R. Rep. No. 94-1487, at 7 (1976)("A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby…assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process").[9] The

[9] *Spacil v. Crowe's* discussion of the relationship between the Judiciary and Executive in determining the immunity of foreign states or personal immunity is irrelevant to a post-FSIA case against a former foreign official who does not enjoy personal immunity, as is analysis of that relationship in the context of the Administrative Procedure Act. 489 F.2d 614 (5th Cir. 1974), USB:22.

shift from absolute to limited immunity also reflects "growing concern for individual rights and public morality." *Victory Transport Inc. v. Hudson*, 336 F.2d 354, 357 (2d Cir. 1964).

Such principles as the separation of powers and independence of the judiciary dictate that it is for the Judiciary, [10] and not the Executive, to determine the law, including customary international law. *See Alperin v. Vatican Bank,* 410 F.3d 532, 538 (9th Cir. 2005); *In re Agent Orange Prod. Liab. Litig*., 373 F. Supp. 2d 7, 69-70 (E.D.N.Y. 2005)("The judiciary is the branch of government to which claims based on international law has been committed").

Cases examining the immunity for foreign *states*, as opposed to foreign officials—let alone *former* foreign officials—are inapposite. The immunity of states is distinct from that of officials; no case cited holds that an official is in the same position as the sovereign for all purposes. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996)(DB:24 and USB:24), is inapposite, as jurisdiction was sought under various exceptions to the FSIA, which is not the case here.

[10] *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)(the U.S. government "has been emphatically termed a government of laws, and not of men").

Holding *individuals* responsible for *jus cogens* violations is the norm under international law, *see* AOB:23-26; immunity is not.[11] The distinction between criminal and civil proceedings is not significant. *See* USB:24. As Justice Breyer opined in *Sosa:*

> The fact that this procedural consensus exists [that universal jurisdiction exists to prosecute a subset of universally-condemned behavior] suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. 542 U.S. at 762.[12]

Customary international law does not recognize immunity for all government officials – particularly in cases that include serious violations of international law, such as this.[13] As the ICTY Appeals Chamber held: "[i]t would be a travesty of law and a betrayal of the universal need for justice,

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[11] *See Prosecutor v. Tadić*, IT-94-1-AR72, Appeal on Jurisdiction, ¶128(Oct. 2, 1995)("*Tadić* Decision")(citations omitted)("[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced").

[12] *Jones v. Ministry of Interior*, [2006] UKHL 26 (appeal taken from Eng.) is therefore inapt. USB:23-24. Furthermore, this case is inapposite as it is a statutorily-based analysis of immunity for both the State and government officials apparently sued in their official-capacity. *Jones*, ¶¶2-3.

[13] Here, neither Defendant nor the U.S. has established that a norm of immunity for all government officials exists. *See* Statute of the International Court of Justice, art. 38; *Sosa*, 542 U.S. at 712.

should the concept of State sovereignty be allowed to be raised successfully against human rights." *Tadić* Decision,¶58.

Customary international law recognizes personal immunity for limited classes of persons, namely diplomats, consular officials or heads of state, and cease when an official leaves office. The cases cited by the U.S. apply to these distinct classes of individuals, to which Defendant neither belongs nor argues that he belongs. *See* USB:7, citing *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960)(finding consular official immune); *Heaney v. Gov't of Spain*, 445 F.2d 501 (2d Cir. 1971)(finding Spain and its consular representative immune); *see also* USB:22-23, citing cases related to foreign states or heads of state. In *Greenspan v. Crosbie*, the court accepted the State Department's Suggestion of Immunity for the individual defendants – three of the "highest officials" of the Province of Newfoundland and Labrador, including Province Premier and Minister of Intergovernmental Relations. No. 74-4734, 1976 U.S. Dist. LEXIS 12155 at *1-*3 (S.D.N.Y. Nov. 23, 1976); Sovereign Immunity, 1976 Dig. U.S. Prac. Int'l L. §7, at 328. It appears clear that the immunity at issue in *Greenspan* was diplomatic immunity, as the district court relied on a case in which service upon an individual with diplomatic immunity was found to be improper for its finding that service upon the high-level officials while visiting the U.S. was "patently improper." 1976 U.S. Dist. LEXIS at *6.

Discussion of the inapplicability of the FSIA to foreign officials related only to heads of state, diplomats or consular representatives because those were

the only foreign officials covered by any immunity under customary international law/common-law. *See, e.g.*, H.R. Rep. No. 94-1487 at 21 (1976) and Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary, 93d Cong. 16 (1973). If such a blanket-immunity for all foreign officials existed, then such personal immunities would not be necessary.[14]

The Executive's claim that all foreign officials enjoy civil immunity for their official acts under international law is unsubstantiated. USB:23 (*citing Prosecutor v. Blaškić*, IT-95-14-AR, Issue of *subpoena duces tecum* (Oct. 29, 1997)("*Blaškić*"). The issue in *Blaškić*–the issuance of a subpoena to a State or State official for the production of State documents–is fundamentally different than the matter at hand: individual responsibility for the most serious violations, namely war crimes and crimes against humanity.[15] The ICTY Appeals

[14] Upon establishment of the United Nations, a form of diplomatic immunity was extended to its officers for those acts "necessary for the independent exercise of their functions", *see, e.g.,* Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, Feb. 13, 1946, §22, or "in respect of words spoken or written and all acts performed by them in their official capacity." *Id.,* §18(a)–the latter being analogous to the immunity granted to legislators under the Speech or Debate Clause, U.S. CONST. art.1, §6, cl.1, and not a basis for the whole-sale invocation of immunity for all government officials. The immunity recognized in *De Luca v. United Nations Org.,* 841 F. Supp. 531 (S.D.N.Y. 1994), USB:18,fn.*, is thus a treaty-based immunity, not a common-law immunity. *See also United States v. Fitzpatrick*, 214 F. Supp. 425, 430-31 (S.D.N.Y. 1963)(international instruments and treaties provide immunity for those acts necessary to carry out function).

[15] *Church of Scientology v. Comm'r of the Metro. Police* , 65 I.L.R. 193 (F.R.G. Federal Sup. Ct. 1978), A-134, is similarly inapposite (addressing

Chamber clarified that its statement in *Blaškić* that officials are "instruments of the state" related to the production of documents, not to immunity for serious international law violations. *See* AOB:25-26; *Blaškić* Decision,¶41.

Underhill v. Hernandez, 168 U.S. 250 (1897) does not support the Executive's claim that sovereign immunity extends beyond the state and individuals with personal immunity. USB:7. *Underhill* provides the classic expression of the act of state doctrine, the "immunity of individuals from suits brought in foreign tribunals for acts done *within their own States*, in the exercise of governmental authority". 168 U.S. at 252(emphasis added); *see also Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 451 (2d Cir. 2000). The act of state doctrine was "originally linked with principles of sovereign immunity." *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-22 (2d Cir. 1985). To the extent "immunity" exists at common-law for official acts of a foreign state, it *is* the act of state doctrine, under which Defendant is not entitled to immunity. Although the District Court did not reach Defendant's argument below, he failed to prove that the act at issue was an official public act done within Israel's own sovereign territory, and has foregone the issue on appeal.

Allowing cases like this to go forward will not open the floodgates and allow cases to proceed against U.S. officials that would otherwise be barred, as

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transmittal of a report and writ by the Head of New Scotland Yard, pursuant to a bi-lateral treaty).

the U.S. predicts. USB:16, 22. Longstanding doctrines such as *forum non conveniens*, international comity, act of state, and exhaustion,[16] none of which has been argued here, will protect U.S. officials from inappropriate claims.[17]

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE POLITICAL QUESTION DOCTRINE.

Defendant argues that Plaintiffs' justiciable statutory and international law claims are barred by the Political Question Doctrine ("Doctrine") by trying to equate the separation of powers concerns underlying cases against U.S. officials with Plaintiffs' challenge to a former *foreign* official's conduct. The division of Constitutional powers among the three co-equal branches of our government *cannot* require that a case properly before the judiciary be dismissed because the Executive branch submits that it should, because cases of its kind may have indirect effects on foreign relations, or because it displeases an ally that is generally supported by the political branches.

The Doctrine "focuses on the nature of the *issue* presented to the court." *DaCosta v. Laird*, 471 F.2d 1146, 1152 n.10 (2d Cir. 1973). In order to

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[16] Such doctrines are analogous to the international law doctrine that states shall prosecute if the home-state is unwilling or unable to prosecute the crimes. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, arts. 1 and 17.

[17] This Court has expressly endorsed the use of U.S. courts, where and as appropriate, to seek redress for the most egregious violations. *See Wiwa v. Royal Dutch Petroleum,* 226 F.3d 88, 105 (2d Cir. 2000)("the present law [i.e., the TVPA], in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits [for torture and extrajudicial killings].")

determine whether a *political* question is at issue, this Court must inquire at the outset what question must be decided. *See, id.* at 1154. A political question—an issue that cannot be resolved by the court—has not been identified by the Defendant, the U.S., or the District Court in this case. The issue in this case is whether the attack on Plaintiffs constitutes a war crime or extrajudicial killing, and whether liability attaches to Defendant, a former foreign official at the time of suit.[18]

A. The Executive Branch's Position on the Law of Immunity Does Not Create a Political Question.

The U.S. *Amicus* Brief does not mention the Doctrine, much less assert that this case presents a political question. Nor did it take a position in the SOI on whether this case presented a political question. A-164,fn.36. Although the Executive does not articulate any specific foreign policy at issue in this case, its concern is evidently that immunity will be denied U.S. officials who might be sued abroad if the Court does not adopt the Executive's position on immunity law. *See, e.g.,* USB:3. The concern expressed is a matter for the Legislature to decide. The Court's obligation is to apply the laws enacted by Congress.

[18] Although the District Court improperly reached the Doctrine because it had already determined that it lacked jurisdiction, AOB:51, application of the Doctrine, a threshold question, *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994), could be decided *instead* of the jurisdictional immunity issue as long as certain requirements were met. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp*., 127 S. Ct. 1184, 1194 (2007)(threshold issue heard where jurisdictional issue presented an issue of first impression and jurisdictional discovery would have burdened defendant with expense and delay).

Whether denying Defendant immunity would depart from customary international law is a determination for the judiciary to make, not the Executive, despite its contention to the contrary. USB:22; *see* sec. I.C, *supra.* The U.S. essentially claims that *all* individual immunity decisions are political, not legal, claiming the constitutional authority to recognize and define the immunity of foreign officials, without reference to constitutional text. USB:8;26. To the extent the Executive can suggest head of state and diplomatic immunity, this power derives from its Article II, §3 constitutional authority to receive ambassadors and other public ministers. *See, e.g., In re Baiz,* 135 U.S. 403, 418-19 (1890); *see also Tachiona v. Mugabe,* 386 F.3d 205, 212-13 (2d Cir. 2004). It does not provide the Executive with the power to extend immunity to other foreign officials or former officials. As noted above, it is not the Executive's prerogative to determine FSIA immunity or the immunity of a *former* foreign official under common-law, which are determinations for the judiciary. *See* sec. I.C., *supra.* "[I]interpretation of the FSIA's reach" is a "pure question of statutory construction . . . well within the province of the Judiciary." *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)(internal citation omitted).

The Executive argues that to "allow this *kind of suit* to go forward in our courts…would intrude on core aspects of the foreign state's sovereignty and give rise to serious diplomatic tensions." USB:24-25. The U.S. provides no details regarding what "tensions" might ensue if "high-ranking" foreign officials could be held liable for extrajudicial killings and war crimes. The U.S. does not

mention its relationship with Israel specifically, much less claim that this lawsuit would damage relations with Israel if permitted to proceed. Nor does the U.S. contend, as Defendant does, that a pronouncement by the Court "in these areas could complicate, if not thwart, the initiatives by the Executive throughout the region." DB:56. The Executive's concerns are too vague and speculative to justify dismissal. AOB:39-40.

It is the Court's prerogative to reject the Executive's concerns. *See, e.g., City of New York v. Permanent Mission of India*, 446 F.3d 365, 377 n.17 (2d Cir. 2006), *cited in* AOB:40,fn.7; *In re Agent Orange Prod. Liab. Litig.,* 373 F. Supp. 2d at 42, 72 (finding claim against Agent Orange manufacturers did not present non-justiciable political question, despite Attorney General's assertion that "judicial review would impermissibly entrench upon the Executive's Commander-in-Chief authority, and run afoul of basic principles of separation of powers and the political question doctrine"). A court need not defer to an SOI that fails to identify specific U.S. policies that will be hindered as a result of judicial review. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 U.S. Dist. LEXIS 18399 at *28-30 (S.D.N.Y. 2005). Moreover, a foreign government's submission is considered in light of the "seriousness of the alleged past events" and the "public's interest in vindicating the values advanced by the lawsuit." *Id.* at *24-*25 (letter from Canadian government disregarded in light of allegation that defendant Canadian energy company was complicit in genocide and crimes against humanity in Sudan).

Finally, the U.S. seeks immunity for fear of U.S. officials "being subjected to politically driven lawsuits abroad." USB:25. It is unclear how recognizing immunity here might prevent any such lawsuits. This Court has rejected a similar reciprocity argument related to granting immunity. AOB:42,fn.9. *See also* sec.I.C., *supra.*[19]

Defendant's contention that the State Department has asserted that targeted assassinations fall within Israel's right of self-defense is not supported by the cited statement of the Secretary of State that although Israel has a right to defend itself, the Department believes that Israel's targeted assassinations harm the peace process.[20] DB:48. Defendant's reference to a July 23, 2002

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[19] The U.S. acknowledges that it is improper at this stage for the Court to address its argument in the SOI that Plaintiffs' causes of action require a proportionality analysis and are thus not cognizable. USB:29,fn.*. Whether Plaintiffs' claims (for war crimes and extrajudicial killing) require recognition of a *new* cause of action that might have collateral consequences or lead to reciprocation against U.S. officials abroad is thus not properly before this Court.

[20] Defendant urges the Court to take judicial notice of various statements and other "facts" that are outside the pleadings and were not considered by the District Court. DB:1,fn.1. Defendant cited some of these materials below, to which Plaintiffs objected. A-7. Other materials are cited for the first time on appeal, despite being previously available. None of these materials is appropriate for judicial notice. *See* Fed. R. Evid. 201(b); AOB:44,fn.11. *See also Melong v. Micronesian Claims Com.*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980) ("Judicial notice was never intended to permit such a widespread introduction of substantive evidence at the appellate level, particularly when there has been absolutely no showing of special prejudice or need.") *See also, Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998). Where the Government has submitted its views to the court, there is even less reason to look to informal sources. *See, e.g., Whiteman v. Dorotheum GmbH & Co. KG,* 431 F.3d 57, 72 (2d Cir. 2005); *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1179 (C.D. Cal. 2002)(court refused to base conclusions

Department of State Briefing that said there was not yet a report that the Arms Export Control Act had been violated, (DB:8,fn.6, DB:48), is irrelevant to the resolution of Plaintiffs' claims against Defendant. Defendant's argument that *anything* he did in the name of fighting terrorism could not have been unlawful or unjustifiable, and that Congress's recognition of Israel's right to defend itself is a blank check for any and all operations, must be rejected. DB:5.

B. That Defendant Was a Government Official from an Allied Government When He Decided to Militarily Attack Plaintiffs Does Not Render Their Claims Non-Justiciable.

Defendant asserts that Plaintiffs' claims necessitate political judgments about foreign policy without identifying what political judgment is required or what foreign policy is at issue, attempting to draw sweeping inferences from narrow cases. DB:39-40.[21] Defendant fails to demonstrate that any of the factors enunciated in *Baker v. Carr* are inextricable from Plaintiffs' claims. 369 U.S. 186, 217 (1962). The Supreme Court has only applied the Doctrine in three areas of foreign policy: 1) when war begins or ends;[22] 2) recognition of

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regarding U.S. foreign policy on Secretary of State's general comments during an informal press conference), *reh'g en banc granted by* 499 F.3d 923 (9th Cir. 2007).

[21] For example, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), decided the judiciary was incompetent to adjudicate challenges to a final order by the Civil Aeronautics Board that had been amended and approved by the President in his discretion.

[22] The power to declare war is vested in Congress. U.S. CONST. art. I, §8.

foreign governments and related questions about diplomatic immunity;[23] and 3) ratification and rescission of treaties.[24] Erwin Chemerinsky, *Federal Jurisdiction* §2.6.4, at 162-163 (5th ed. 2007). Federal courts have also applied the Doctrine to challenges to the president's war powers. *Id.* at 163. Defendant primarily relies on cases falling within this last category – cases attempting to enjoin U.S. Executive officials from engaging in war. DB:41-42.

As this Court made clear, Article II, §2 of the Constitution provides a "specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief." *DaCosta v. Laird*, 471 F.2d at 1154.[25] Defendant, a *foreign* official, misplaces reliance on cases against the U.S. or U.S. officials challenging the president's war powers. *See Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34, 37 (2d Cir. 1985)(complaint to enjoin U.S.

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[23] The power to receive ambassadors and other public ministers is vested with the Executive. U.S. CONST. art. II, §3. *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994), cited at DB:40, falls into this area of foreign affairs, as it rejected plaintiffs' claims seeking title as successors in interest to former South Vietnam's assets seized by the U.S. because the issue was inextricable from the President's power to recognize foreign governments under Article II of the Constitution.

[24] The power to make treaties is vested with the Executive, and the power to ratify them is vested with the Senate. U.S. CONST. art. II, §2. The courts are vested with the power to interpret treaties. U.S. CONST. art. III, §2.

[25] Judicial determination of whether there has been some action by Congress sufficient to authorize or ratify military action is not barred by the Doctrine. *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971).

president from deploying cruise missiles raised issues committed by the Constitution to the political branches and request for injunctive relief implicated the third *Baker* factor).[26] *See also*, *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 269, 274 (D.D.C. 2005)(U.S. is immune for claims regarding bombing of Sudanese pharmaceutical plant, and claims "likely" raise a political question, as Article II, § 2 of the Constitution commits such decisions to the Executive).[27] Unlike cases challenging the U.S. Executive's war powers, the first *Baker* factor does not apply to Plaintiffs' claims against a foreign official, as their resolution is constitutionally committed to the judiciary, not the political branches. AOB:34.[28]

The second *Baker* factor is similarly inapplicable here, as Plaintiffs do not ask for a political determination that a war has expanded, but a legal determination regarding one attack, for which there are judicially discoverable

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[26] Defendant cites *Greenham* asserting application of the third *Baker* factor, but fails to identify what initial policy determination is required here. DB:42.

[27] But "courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians". *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992).

[28] Defendant misplaces reliance on *Whiteman*, which did not apply the first *Baker* factor, but only found that the fourth *Baker* factor applied because resolution was impossible without disrespecting the Executive's long-standing foreign policy to resolve World War II claims through executive agreements rather than litigation, and plaintiffs' claims were the sole barrier to implementing the executive agreement, which was urgent given the survivors' ages. 431 F.3d at 59, 72-73; *see* AOB:35-36. Where such circumstances are not present, plaintiffs' claims should be addressed. *See Garb,* 440 F.3d at 584, n.6.

and manageable standards to resolve. AOB:34-35;49-50. Defendant misplaces reliance on cases that necessitated determinations of whether a U.S. war had sufficiently escalated or changed so as to require additional congressional authorization. *See DaCosta*, 471 F.2d at 1154-55(question of whether President's military operation was an escalation of the Vietnam War (and therefore not congressionally authorized) was political because there were no manageable judicial standards to resolve whether the operation was an "'escalation' of the war or [] merely a new tactical approach within a continuing strategic plan."); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973)(not within court's "competence to determine that the bombing of Cambodia is a 'basic change' in the situation and…not a 'tactical decision'").

The constitutional war powers of the U.S. Executive do not cover military decisions by foreign officials, including those from allied governments. Defendant relies on Israel's status as a U.S. ally, but cites no authority to support special treatment to be given allies (DB:37,41,43,47,55), and the U.S. never mentions that Israel is an ally, much less notes that any significance should be given to this status. Indeed, "[t]hat the United States and Israel are close allies with good relations is reason to adjudicate this suit rather than to abstain." *Sharon v. Time, Inc*., 599 F. Supp. 538, 551 (S.D.N.Y. 1984).[29]

[29] Defendant contends that *Doe v. Israel* applied the third, fourth, and fifth *Baker* factors, but *Doe* purported to apply the sixth *Baker* factor, not the fifth. 400 F. Supp. 2d 86, 112 (D.D.C. 2005). Neither Defendant nor *Doe*

Defendant's argument that he cannot be liable for extrajudicial killings or war crimes carried out in the military context is without merit. *See, e.g.,* DB:55. *See* AOB:49-51. "The definition of 'extrajudical killing' is specifically derived from common article 3 of the Geneva Conventions of 1949." 137 Cong. Rec. S1378 (1991); *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3 §1(d), Aug. 12, 1949, 75 U.N.T.S. 287 ("Fourth Geneva Convention"). Defendant's repeated reference to a "battlefield" is irrelevant to the Doctrine, as well as inapplicable to the densely populated residential area of Al-Daraj neighborhood in Gaza City, as it has been alleged by Plaintiffs (A-16,22,35), and has repeatedly been described by the State Department. *See* USB:2; A-115; *see e.g.,* U.S. Department of State Daily Press Briefing, Jul. 23, 2002, *available at* http://www.state.gov/r/pa/prs/dpb/2002/12098.htm, cited at DB:8,n.6, DB:48. Furthermore, by definition war crimes are generally committed in the military context, rendering Defendant's argument absurd. *See, e.g.,* Fourth Geneva Convention, art. 2.

Finally, Defendant's arguments that the Court cannot make the necessary determination and that discovery would be intrusive are speculative and premature at this point in the litigation. DB:53-55. "It is premature to conclude that essential evidence is undiscoverable merely on the basis of the complaint

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embellishes upon or distinguishes among these factors, thus providing no persuasive authority.

and related declarations in this case." *Arellano v. Weinberger*, 745 F.2d 1500, 1513 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985). The court should "address discovery disputes as they arise, and [] not engage in speculative or conjectural analysis of requests which may never be made." *Karl v. Asarco, Inc*., 1997 U.S. Dist. LEXIS 16145 at *3 (S.D.N.Y. 1997)("to the extent that plaintiff seeks to challenge discovery which may be proposed in the future, the issue is not ripe at this time"). *See also, Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005) (valid claims should not be dismissed "at this early stage in anticipation of obstacles that may or may not arise"). Speculation about privileges "cannot justify squelching the plaintiffs' complaint prior to any fact-finding." *Arellano*, 745 F.2d at 1513.

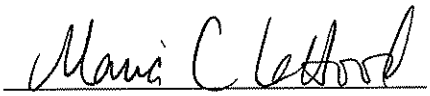
It is the Court's duty to interpret federal statutes and customary international law, and it "should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in [the] context of human rights." *Kadic*, 70 F.3d at 249.

CONCLUSION

When Defendant decided to bomb an apartment building knowing there were civilians inside who would be killed, Dichter violated statutory and international law which this Court is empowered to adjudicate. For the reasons herein, this Court should reverse and remand to the District Court.

Dated: January 22, 2008
New York, New York

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I, Maria C. LaHood, hereby certify that the foregoing Appellants' reply brief complies with the requirements of F.R.A.P. 32(a)(7) because according to the word count of the word processing system used to prepare it, it contains 6,984 words (including headings and footnotes), which is within 7,000 words.

Maria C. LaHood

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