UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RA'ED MOHAMAD IBRAHIM MATAR, et al., Plaintiffs, -against- AVRAHAM DICHTER, Defendant.	**05 Civ. 10270 (WHP)**

PLAINTIFFS' RESPONSE TO THE STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

The Statement of Interest ("SI") submitted by the United States seeks to "clarify its views" on two legal issues: whether foreign officials are immune from civil suit for official acts under common law, and whether there is a cause of action for the disproportionate use of force, issues not raised by Defendant. SI at 2. These legal arguments are not entitled to deference, but are refuted below. The U.S. takes no position on the "lawfulness" of the specific attack for which Plaintiffs seek to hold Defendant liable, reiterates its "serious objections" to the attack, and notes its repeated criticism of the "use of heavy weaponry in densely populated areas…." *Id.* To the extent that the SI undertakes to address foreign policy implications, it fails to present the required particularized analysis.

I. THE GOVERNMENT'S SUBMISSION IS NOT ENTITLED TO DEFERENCE.

A. The U.S.'s Legal Arguments Are Not Entitled to Deference, and Issues Not Raised By Defendant Should Not Be Decided.

The Court should decline to decide legal issues raised by the U.S. that have not been raised by Defendant. *See, e.g., Olmsted v. Pruco Life Ins. Co. of New Jersey*, 283 F.3d 429, 436 n.5 (2d Cir. 2002) (declining to consider SEC amicus brief solicited by court because it addressed a section of the statute not raised by plaintiffs). *See also Kreider v. County of Lancaster*, No. CIV.A.99-1896, 1999 WL 1128942, at *6 n.6 (E.D. Pa., Dec. 9, 1999) (refusing to address issues raised by Pennsylvania Attorney General's amicus urging dismissal under Rule 12(b)(6) because they had not been raised or briefed in defendants' 12(b)(1) motion). The U.S.'s arguments that Plaintiffs fail to state a claim and that Defendant is entitled to common law immunity were not raised or briefed by Defendant in his Rule 12(b)(1) motion. *See* Defendant's February 22, 2006 Notice of Motion to Dismiss, at 1; Memorandum of Law, at 6, n.5 (noting motion was jurisdictional only). Moreover, to the extent that the issue of immunity depends on

whether Defendant's conduct was "within the scope of his authority," and the issue of proportionality requires subjective analysis, they are questions of fact not appropriate for adjudication on a motion to dismiss. *See Jama v. U.S.*, 22 F.Supp.2d 353, 370-71 (D.N.J. 1998). The Court should decline to rule on these legal issues, as they are not properly before the Court.

If the U.S.'s legal arguments are considered, they are not entitled to any greater weight than the legal arguments of an *amicus curiae*; "they merit no special deference." *Republic of Aus. v. Altmann*, 541 U.S. 677, 701 (2004); *see also City of New York v. Permanent Mission of India to the United Nations,* 446 F.3d 365, 377, n.17 (2d Cir. 2006) (same when court solicits views).

B. The U.S.'s "Generic" and Speculative Foreign Policy Concerns Do Not Render this Case Non-Justiciable.

Had the State Department opined on the "implications of exercising jurisdiction over this *particular* [defendant] in connection with [*his*] alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Aus. v. Altmann*, 541 U.S. 677, 702 (2004). Even when the State Department expresses its views on foreign policy implications, they are not controlling, as it is the Court's responsibility to determine whether a political question is present. *Sarei v. Rio Tinto, PLC,* 456 F.3d 1069, 1081 (9th Cir. 2006); *see also Permanent Mission of India,* 446 F.3d at 377, n.17 (views are "entitled to consideration"); *Sosa v. Alvarez-Machain,* 542 U.S. 692, 733, n.21 (2004) (there is a "strong argument" views should be given "serious weight").

Although the Israeli Ambassador wrote the State Department expressing concerns that this case risks undermining U.S. diplomatic efforts to bring peace to the Middle East and end terrorism,[1] the U.S. declined to comment on those issues; instead it submitted a *legal* brief, with scant reference to speculative foreign policy concerns. Notably, the U.S. does not identify any

[1] Letter from Letter from Daniel Ayalon, Ambassador of Israel, to U.S. Ambassador Nicholas Burns, Under-Secretary for Political Affairs, U.S. Department of State (Feb. 6, 2006) at 1-2.

particular foreign policy implications specific to this case. It does not comment on the pending Act of State Doctrine (ASD), nor does it provide a particularized analysis of how this case might implicate the political question doctrine ("PQD"). The U.S. does not identify any Executive decisions that adjudication of Plaintiffs' claims would contradict,[2] or claim adjudication would "seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01-C9882, 2005 WL 2082846 at *3, *8 (S.D.N.Y. Aug. 31, 2005); *Doe v. Exxon Mobile*, (NO. 05-7162) 2007 WL 79007 (D.C. Cir. Jan 12, 2007). None of the factors enunciated in *Baker v. Carr*, 369 U.S. 186, 211 (1962) are implicated by the SI. It merely footnotes that there "would be a serious issue whether this *particular* case should be dismissed on political question grounds, as Dichter argues." SI at 51, n.56. Despite this terse comment, the U.S. declined the opportunity given by the Court to address how this *particular* case will interfere with U.S. foreign policy or disrupt the Executive's conduct of foreign affairs. *See* Def. Memo. at 13, 15.

The foreign policy considerations mentioned by the U.S. are too vague and speculative to implicate the PQD. Having "looked carefully at the United States' brief statement of potential foreign policy concerns associated with the assertion of jurisdiction" the Second Circuit in *Permanent Mission of India* found none of the issues, "presented in a largely vague and speculative manner, potentially severe enough or raised with the level of specificity required to justify presently a dismissal on foreign policy grounds." 446 F.3d at 377, n.17 (noting the U.S. "did not on its own initiative file a statement of interest, as it might have done").

The U.S. contends that there is a customary international law immunity for former

[2] *Whiteman v Dorotheum GMBH & Co.,* 431 F.3d 57, 59-60 (2d Cir. 2005), was dismissed on PQD grounds because the U.S. had entered into executive agreements respecting resolution of the claims, and had established an alternative international forum to consider them, which it had determined was superior to litigation. The court found that foreign policy would be "substantially undermined" by the litigation. *Id.* at 60. There is no such Executive decision here to contradict.

foreign officials' acts, including *jus cogens* violations, and that parting with that "international consensus would threaten serious harm to U.S. interests, by inviting reciprocation in foreign jurisdictions." SI at 22. Customary international law does not provide immunity in such circumstances, so the assertion that the Court would be parting with international consensus is inaccurate and thus there is no threat of harm to U.S. interests. *See* Sec. II. In seeking to stem the international trend of respect for human rights and the fight against impunity, the U.S. departs from this Circuit's long history to that effect. *See Filartiga v. Pena-Irala*, 610 F.2d 876 (2d Cir. 1980) (holding a former Paraguayan official liable for torturing a Paraguayan national in Paraguay under the Alien Tort Statute (ATS), 28 U.S.C. § 1350). Its dubious conjecture about potential suits against U.S. officials abroad does not pertain to this case, SI at 22, and does not even purport to implicate any of the *Baker* factors relevant to the PQD.[3]

The U.S. makes clear that 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." SI at 52, n.56 (emphasis added). Rather than discussing interests related to this case, the SI expresses general concerns about the precedential effect or "practical consequences" of recognizing such a cause of action under the ATS and Torture Victim Protection Act (TVPA), 28 U.S.C.§ 1350 note. SI. at 38, 42-47, 51. Contrary to the U.S.'s contention, SI at 42-44, U.S. courts have historically adjudicated claims arising in the context of military operations, both foreign and domestic. *See* Plaintiffs' April 26, 2006 Opposition to Defendant's Motion to dismiss ("Pls. Opp." at 16-19); See also Sec. III. While the SI argues that military proportionality

[3] The U.S. does not explain how this Court's application of the law could influence foreign courts or attorneys' general to disregard the laws of their own nations.

claims would present impractical discovery and judicial management issues, Plaintiffs have shown that universally recognized norms of international law provide manageable standards; any challenges or concerns that such claims would bring the Judiciary into conflict with the Executive, SI at 44-45, should be addressed on a case-by-case basis as the litigation proceeds. Pls. Opp. at 20-22. *See Sosa*, 542 U.S. 733 n.21. Potential conflicts are not grounds for rejecting a *Sosa* norm. Finally, Congress's decision not to give federal courts universal criminal jurisdiction over war crimes, SI at 45-46, is irrelevant to the scope of federal civil jurisdiction under the ATS. Contrary to the U.S.'s claim, this case does not require the Court to devise new causes of action, see SI at 46-47, but rather to enforce established fundamental norms.

II. DEFENDANT IS NOT ENTITLED TO IMMUNITY.

The U.S. argues that immunity should be granted regardless of whether an official is still in office and regardless of the violation alleged. SI at 31-32, 36-42. Neither international law nor federal common law provide immunity to foreign officials whose conduct violates the law of nations. *Sosa* repeatedly directs the inquiry into the contours of torts actionable under the ATS to international law, *Sosa*, 542 U.S. at 733-34, and reaffirms that international law is part of U.S. law. *Id.* at 729-30. It is therefore appropriate to look to international law for the scope of immunity for those violations.

A. Under international law, officials are not immune for conduct in violation of peremptory norms of customary law.

International law recognizes two forms of immunity, namely personal immunity and functional immunity. *See, e.g.,* Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int'l L. 853 (2002) ("Cassese on *Congo v Belgium*"); *see also Tachiona v. U.S.,* 386 F.3d 205, 218 (2d Cir. 2004) (distinguishing between diplomatic and functional immunity). Defendant is not entitled to

personal immunity, as it only covers heads of state, foreign ministers, diplomats and certain consular officials, and ceases to exist when the official leaves office.[4] Functional immunity applies to acts carried out by state officials in their official capacity, which "therefore must be attributable to the state." Cassese on *Congo v Belgium* at 862.

Acts recognized as crimes by – and against – the international community cannot be attributable to the state as a "state action" due to the consensus among states that such acts are impermissible and illegal under all circumstances, and thus the state official cannot be afforded functional immunity for these acts. *Id*; *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980). There is no immunity for acts constituting war crimes and crimes against humanity, as alleged here. *See, e.g., Prosecutor v. Blaškić*, IT-95-14-AR, (Issue of subpoena duces tecum), Oct. 29, 1997, 1997 WL 33774595, ¶41 (U.N. I.C.T. (App.)(Yug.))("*Blaškić* Decision").

The acts alleged here are attributable to Defendant: it was Dichter who participated in the decision to drop a 1000-kg bomb on a residential apartment building knowing it would result in civilian casualties. Contrary to the SI, at 27-28, "[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." The Trial of Major War Criminals Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, part 22, at 447 (1950), *cited in Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) ("*Tadić* Decision"). As demonstrated below, rather than establishing immunity for "official acts," international humanitarian law sets out a specific

[4] *See, e.g., Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, para. 51 (Judgment Feb. 14) ("*Yerodia* case"); Vienna Convention on Diplomatic Relations 500 UNTS 95, entered into force April 24, 1964. The rationale underlying personal immunity was to allow States to conduct their foreign relations by sending representatives to foreign states without fear of prosecution, and thus interference with their ability to work. *See, Yerodia* case, para. 53.

framework for individual responsibility regardless of official status.[5]

Plaintiffs allege violations of *jus cogens* norms, which are non-derogable. The prohibition of a *jus cogens* norm must prevail over any conflicting claim of immunity for the individual perpetrator. *See, e.g., Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317, 349-350 (1999) ("*Furundžija* Judgement"); 1969 Vienna Convention on Treaties, Article 53 (a treaty is void if it conflicts with a peremptory norm of general international law). Adherence to the hierarchy of international norms is critical to accurately enforce and protect the key underlying values and rules that States embrace. That immunity cannot be successfully invoked for *jus cogens* violations in this case reflects customary international law; it is not merely a "variation of the argument that 'wrongdoing is never authorized.'" SI at 27 (citations omitted).

International instruments demonstrate that no immunity – regardless of position – is provided for certain violations. *See, e.g.,* Charter of the International Military Tribunal of Nuremberg ("Nuremberg Charter"), 82 U.N.T.S. 280, art. 7; the ICTY (art. 7(2); *Furundžija* Judgement, 38 I.L.M. ¶ 140 ("Article 7(2) of the Statute [is] indisputably declaratory of customary international law.")), Rome Statute of the International Criminal Court ("ICC Statute"), art. 27, July 17, 1998, 2187 U.N.T.S. 90.[6] International practice confirms that

[5] Notably, the United Nations Convention on Jurisdictional Immunities of State and their Property, U.N. Doc. A/RES/59/38 (Dec. 16, 2004) ("UN State Immunity Convention"), *available at* http://untreaty.un.org/English/notpubl/English_3_13.pdf excludes reference to military action as a basis for immunity.

[6] "It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke the same consideration to avoid the consequences of this responsibility." Draft Code of Crimes Against the Peace and Security of Mankind, Commentary to Art. 7, para. 6, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf. The U.N. State Immunity Convention, SI 21 and 29, is understood only to codify the restrictive theory of immunity in relation to states engaging in commercial activities, as recognized by many states

impunity through immunity for serious violations of international law is inconsistent with the post-World War II.[7] States' prioritzation of individual human rights emerged in the1949 Geneva Conventions[8] and 1966 International Convention on Civil and Political Rights ("ICCPR").[9] The ICTY Appeals Chamber stated, "[i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. *Tadić* Decision, 35 I.L.M. at 52.

Through these treaties and affirmative steps taken to hold individuals accountable for serious violations of international law *without exception*, States expressed their intention to hold violators personally and individually accountable, and not allow them to hide behind the cloak of immunity. In order to avoid bringing the "U.S. sovereign immunity law into conflict with customary international law," SI at 19, this Court must determine that the scope of functional immunity does not expand so far as to cover former foreign officials for acts that have been universally condemned as the most serious violations of international law. Contrary to the U.S.'s argument (SI at 21), Plaintiffs do not seek to strip Defendant of immunity available under international law: neither personal nor functional immunity does, or indeed *can*, attach to the defendant in this case.

The U.S. cites an ICTY decision in the *Blaškić* case for the proposition that "foreign officials enjoy civil immunity for their official acts." SI at 20. That decision dealt with the issuance of a subpoena to compel the production of State documents *(see Prosecutor v. Krstić*,

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and reflected in the FSIA. David P. Stewart, *Current Development: The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194 (2005).

[7] *See Prosecutor v. Taylor*, Immunity from Jurisdiction, No. SCSL-2003-01-I (May 31, 2004).

[8] *See, e.g.,* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T.S. 3114 *entered into force* Oct. 21, 1950 ("GCIV").

[9] The early domestic authorities cited by the U.S., SI at 5-7, pre-date the recognition, and movement for the protection, of individual human rights. Furthermore, these are cases primarily addressing claims of State immunity or personal immunity, rather than functional immunity.

IT-98-33-A, Decision on Application for Subpoenas, Jul. 1, 2003, 2003 WL 23833766, ¶23 (U.N. I.C.T. (App.)(Yug.)). The Appeals Chamber subsequently clarified that its earlier statement in the *Blaškić* Decision -"[s]uch officials are mere instruments of a State and their official action can only be attributed to the State," SI at 20, citing *Blaškić* Decision, ¶38 - has a very limited application and does not even extend to calling a State official to calling a State official to testify. *Krstić,* 2003 WL 23833766 at ¶24. *See also Krstić* at ¶27. Most importantly, as noted above, the Appeals Chamber held that an immunity exception exists for war crimes, crimes against humanity and genocide. *Blaškić* Decision at ¶ 41.

In contrast to the U.S. argument that foreign jurisdictions support immunity, SI at 20-21, national practice supports the customary rule lifting immunity for state officials accused of committing *jus cogens* violations.[10] For example, in the absence of domestic immunity statutes, Italy and Greece looked to customary international law in deciding that immunity could not be granted to individuals alleged to have committed *jus cogens* violations. *See Ferrini v. Federal Republic of Germany* (Italian Court of Cassation) as discussed in Andrea Bianchi, *International Decision*, 99 Am. J. Int'l. L. 242 (2005) ; *Prefecture of Voiota v. Federal Republic of Germany*, No. 11/2000, May 4, 2000 (Hellenic Supreme Court) as discussed in Maria Gavouneli and Ilias Bantekas, *International Decision*, 95 Am. J. Int'l. L 198 (2001).

The cited cases from foreign jurisdictions which granted immunity in civil proceedings, SI at 21, do not apply, as they do not concern *jus cogens* violations or indeed, international

[10] *See, e.g., Attorney General of the Government of Israel v Eichmann*, 36 I.L.R. 277, 310 (Supreme Court of Israel 1962) ("international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of "international crime" that a person who was a party to such crime must bear individual responsibility for it. If it were otherwise, the penal provisions would be a mockery."); *Barbie* (France), 78 I.L.R. 125; *Regina v. Bartle*, 38 I.L.M. 581 (H.L. 1999)("*Pinochet* III")). *See also In re Extradition of Demjanjuk*, 612 F.Supp, 544, 556 (D.C. Ohio, 1985).

crimes. *See Jaffe v Miller*, 95 ILR 446, 460-62 (Ontario Court of Appeal, Canada 1993) (querying whether state officials lose immunity because acts involved "some illegality"). *Jones v. Minister of Interior* et *al.*, UKHL 26 (House of Lords, United Kingdom 2006), in interpreting an immunity statute, held that the state had no *obligation* to exercise jurisdiction. Plaintiffs do not assert that there is an *obligation* to exercise jurisdiction in cases where a *jus cogens* violation is alleged; they simply ask the Court to recognize existing ATS jurisdiction, rather than strip the court of such jurisdiction by functional immunity. Furthermore, if a violation was established and damages awarded against an official in office, the State would have to indemnify the official. Thus, immunity was permitted so as to protect the state rather than the individual.[11]

The distinction between criminal and civil proceedings suggested by the U.S. is not significant. SI at 29-30. Indeed, it has been suggested that civil proceedings, such as those pursued under the ATS since *Filartiga*, are "less intrusive than criminal proceedings" on foreign relations. Cassese on *Congo v Belgium*, at 859. U.S. courts have held that ATS and TVPA cases are intended to serve the same goal as criminal proceedings: to hold violators of the most fundamental international norms accountable and to bring justice to the victims. *See Filartiga,* 630 F.2d at 890. As Justice Breyer opined in his concurring opinion 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. *Sosa* 542 U.S. at 762.

The ICC blurs the line between purely criminal and civil proceedings, providing for

[11] *Church of Scientology v Commissioner of the Metropolitan Police*, 65 I.L.R. 193 (Federal Republic of Germany, Federal Supreme Court 1978) cited by the U.S. at 21, is similarly inapposite as that case deals with the transmittal of a report and writ by the Head of New Scotland Yard, pursuant to a bi-lateral treaty.

reparations for victims. ICC Statute, Articles 75 and 77(2). As the ICC came into force in 2002, it more accurately reflects current international views on the issue of reparations being borne by the individual perpetrator than the Fourth Hague Convention of 1907, Art.3, cited by the US. SI at 32. International treaties also provide for reparations for violations of international law. *See, e.g.,* Convention Against Torture, Art, 14; ICCPR, Art. 2(3), 9(5) and 14(6). Furthermore, as Justice Breyer commented in *Sosa* at 762-63, as civil actions can attach to, or be part of, criminal proceedings in certain national systems, it may be difficult or misleading to state that only a criminal action is available for certain violations in other systems: what begins as a criminal action may result in awarding damages in addition to, or instead of, imprisonment.

Serious violations of international law are not, by definition, the type of acts that generally *can* be carried out in a solely private capacity. To hold that the perpetrators or masterminds of such crimes can only be held accountable if they managed to commit them purely privately would make it nearly impossible to hold anyone accountable for genocide, torture, war crimes or crimes against humanity: this cannot be the intention of the international community. Equally, to hold that because such acts were carried out by a public official they are attributable to the State and thus that the public official is immune cannot be correct.

B. There Is No Common Law Immunity Available To This Defendant.

1. The U.S.'s Common Law Authority Does Not Entitle Defendant to Immunity.

Plaintiffs agree with the U.S. that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ l60l-l6ll does not apply to individuals, but it has provided no authority that there exists an "official-act" immunity that extends to individuals, particularly to former officials for conduct in violation of *jus cogens* norms. In fact, in *Filartiga,* the U.S. asserted that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility

of our nation's commitment to the protection of human rights." Memorandum for the United States as Amicus Curiae at 22-23 (Jun. 06, 1980) (Appellate Brief), 1980 WL 340146.

To support its "official-act immunity" argument, the U.S. cites cases in which a consular or diplomatic immunity was at issue. SI at 7-10, citing *Arcaya v. Paez*, 145 F. Supp. 464, 466-467 (S.D.N.Y. 1956) (finding no consular immunity but staying action due to diplomatic immunity); *Lyders v. Lund*, 32 F.2d 308 (N.D. Cal. 1929) (finding consular official defendant was not authorized to claim immunity on behalf of Denmark); *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960) (finding consular official immune); *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971) (finding Spain and its consular representative immune). These immunities are not available to Defendant, as they only cover consular and diplomatic officials, and cease when an official leaves office.

The U.S. simply provides *no* authority for its contention that consular officials "were viewed as possessing the same immunity as a state's non-diplomatic officers generally". SI at 7, citing *Arcaya* at 466-67. In *Arcaya*, consular immunity was only available if the consul acted "within the scope of his official authority." 145 F. Supp. at 470. The fact that consular immunity was only extended to such acts undermines the U.S. position that there was a separate "official-act immunity," or the consular immunity would have been pointless.[12]

The U.S. relies heavily on the unreported decision *Greenspan v. Crosbie*, No. 74-4734, 1976 U.S. Dist. LEXIS 12155 (S.D.N.Y. Nov. 23, 1976), in which the court accepted the State Department's Suggestion of Immunity for the individual defendants – three of the "highest

[12] Moreover, *Arcaya* found the consul was not immune because he did not have the *authority* to do the acts alleged, 145 F. Supp. at 470; the issue was not whether the acts were done in his "official" capacity, or in the exercise of his governmental functions. 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, the acts were not deemed within the scope of his authority. *Id.* at 470-71. *Arcaya* directly contradicts the argument that Defendant was authorized to act as he did. *See* Sec. II.A.2-3.

officials" of the Province of Newfoundland and Labrador. 1976 U.S. Dist. LEXIS at *1-*3. Defendant Moores was Premier of the Province, and although the specific posts of the two other individual defendants were not identified, *id.,* Defendant Crosbie was the Minister of Intergovernmental Relations. Sovereign Immunity, 1976 Dig. U.S. Prac. Int'l L. §7, 320 at 328. Although the court also failed to identify what immunity was granted, or provide analysis, it seems clear it was diplomatic immunity, since the suit was brought against the high-level officials while in office, apparently while visiting the U.S. 1976 U.S. Dist. LEXIS at *1-*3.

The SI maintains that the fact that the FSIA did not supplant diplomatic or consular immunities supports its "official-act" immunity position. SI at 16. The legislative history of the FSIA stated that it did not "affect either diplomatic or consular immunity," without any mention of a so-called "official-act" immunity. H.R. Rep. No. 94-1487 (1976), 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610. The U.S. has failed to identify the basis or form of immunity available to Defendant as a former official, much less provided any case that has applied such a common law immunity to persons charged with violations of *jus cogens* norms.

The Attorney General's opinions cited by the U.S. undermine its position that Defendant is entitled to common law *sovereign* immunity. SI at 6. The argument in 1 Op. Atty. Gen. 45 (1797) that the Governor had acted in his official capacity and therefore was only responsible to his own government was rejected by the Supreme Court in the precise case regarding which the Attorney General's opinion was issued. *Waters v. Collot*, 2 U.S. 247, 247-48 (1796). Refusing to discharge the former governor of Guadeloupe from his bail, the Court noted that "the rights of a fellow-citizen, and our respect for the sovereignty of a foreign nation, are equally involved." *Waters*, 2 U.S. at 247-48. The other Attorney General opinion cited contradicts the U.S. position that there exists an "official-act" common law immunity, as it opined that the "controversy is

entitled to a trial according to law". 1 Op. Atty. Gen. 81 (1797). Regardless, Attorney General opinions are not precedent, but merely responses to legal questions from the Executive Branch.

2. To The Extent There Is Immunity for the Official Acts of a Foreign Sovereign Under Common Law It Is Through Application of the ASD.

The classic expression of the ASD was made in *Underhill v. Hernandez*: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." 168 U.S. 250, 252 (1897); *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). *Underhill* describes the ASD as the "immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority".[13] *Underhill,* 168 U.S. at 252.

The ASD 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).[14] To the

[13] While acknowledging that *Underhill's* holding is "more widely cited as an expression" of the ASD, the U.S. claims it stands for a separate "official-act" immunity. SI at 6-7, n.4. The U.S. relies on dicta in *Sabbatino* that stated that *Underhill* "may be argued to be distinguishable on its facts" because "sovereign immunity provided an independent ground." *Sabbatino,* 376 U.S. at 430. Although the meaning of this characterization is unclear, it may refer to the common roots of sovereign immunity and the ASD, or to the holding in *Underhill* that the ASD applied to the commander of a revolutionary army in Venezuela since the revolution was successful and the revolutionary government was recognized by the United States. 168 U.S. at 252-53. Regardless, *Sabbatino*'s offhand characterization of *Underhill* does not support a distinct "official-act" common law immunity.

[14] Underlying both doctrines are international comity considerations. *See Oetjen v. Central Leather Co.,* 246 U.S. 297, 303-04 (1918) (ASD); *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 135-36 (1812) (sovereign immunity); *National City Bank of New York v. Republic of China*, 348 U.S. 356, 359 (1955) (sovereign immunity); *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 762 (1972) (recognizing shared policy considerations at the root of both); *Sabbatino,* 376 U.S. at 438 (acknowledging ASD "shares with the immunity doctrine a respect for sovereign states", as well as noting its separation of powers underpinnings). International comity is the "recognition which one nation allows within its

extent an "immunity" exists at common law for official acts of a foreign state, it *is* the ASD, under which Defendant is not entitled to immunity. Defendant failed to bear his burden to prove that the act at issue was an official public act done within Israel's own sovereign territory. *Sabbatino,* 376 U.S. at 401; *see* Pls. Opp. at 22-30.

As Plaintiffs demonstrated above, international law does not extend immunity to officials for violations of *jus cogens* norms. Courts applying the ATS have reached the same conclusion. "International law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law." *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 718 (9th Cir. 1992). Because *jus cogens* violations are not recognized as sovereign acts under international law, they "cannot constitute official sovereign acts" under the ASD. *Sarei*, 456 F.3d at 1085 (quoting *Siderman de Blake*, 965 F.2d at 718); *accord, Hilao v. Estate of Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1994) (acts not "official" or "public" under the ASD are not "public acts of the sovereign" for sovereign immunity purposes). *See also* Pls. Opp. at 25-27. As *Underhill* noted, the ASD applies only to "legitimate acts of warfare". 168 U.S. at 253.

FSIA jurisprudence, to the extent it might be considered applicable, does not immunize Defendant. "Sovereign immunity similarly will not shield an official who acts beyond the scope of his authority." *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990). "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do. . . ." *Chuidian*, 912 F.2d at 1106 (quoting *Larson v. Domestic & Foreign Corp*., 337 U.S. 682, 689 (1949) (domestic sovereignty)). That same year,

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territory to the legislative, executive or judicial acts of another nation…." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

the Ninth Circuit in *Hilao* treated former Philippines President Marcos's acts as "taken without official mandate" because plaintiffs alleged that torture and extrajudicial killings were committed under color of law at his direction (or with his approval). 25 F.3d at 1471. *See also Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996) (official not immune for torture because it exceeded the lawful boundaries of his authority). *See* Pls. Opp. at 6-12. The U.S. misplaces reliance on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), in which the Court only addressed whether the plaintiff's tort claim against the state came within the commercial activity exception of the FSIA. The discussion did not relate to the immunity of the individual sued.

3. Defendant Was Not Sued in His "Official Capacity," and Is Not Immune from Personal Liability.

Defendant was not sued while in office, and so not sued in his "official capacity." In deciding a case brought against an official in office, *Chuidian* looked to domestic sovereign immunity cases and recognized that "a suit *against* an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Id.* at 1101-1102 (emphasis added) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 690 n. 55, (1978)).[15]

The U.S. cites no case which holds that the immunity of the state and every official, much less former official, are coextensive. Indeed, it cites no policy reason why that should be. The fundamental distinction between personal and state liability is noted by the Restatement (Second) of Foreign Relations Law of the United States (1965), § 66(f), upon which the U.S. misplaces reliance (along with dicta in *Heaney* citing the same provision) to argue that a foreign

[15] Similarly in the domestic sphere, "[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar*, 330 U.S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949) (citing *Ex parte New York*, 256 U.S. 490, 502 (1921)). It is not *possible* to sue an individual in his official capacity if he no longer works for the government.

state's immunity extends to any official or agent of the state with respect to their official acts. SI at 8, *citing* 445 F.2d at 504. The Second Restatement states that a foreign state's immunity extends to "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." Second Restatement, § 66(f). The Restatement's commentary makes clear that "Public ministers, officials, or agents of a state described in Clause (f) of this Section do not have immunity from *personal* liability even for acts carried out in their *official capacity*, unless the effect of exercising jurisdiction would be to enforce a rule of law against the foreign state or unless they have one of the specialized immunities referred to above." *Id.* § 66 cmt. b (emphasis added). The effect of this Court's exercise of jurisdiction over Defendant, or a judgment against him, would not be "to enforce a rule of law against the foreign state"; rather it would be to hold him personally liable for his acts, whether or not carried out in his official capacity. Through this action, this Court cannot assess damages against Israel or enjoin acts of Israel; any judgment would need to be recovered against Defendant's personal assets, not those of a foreign sovereign.

Sovereign immunity jurisprudence and the comity considerations underlying it support the distinction between suits against personal and sovereign property. In *The Schooner Exchange*, the foremost explication of foreign sovereign immunity, the Court observed that foreign individuals visiting a nation are not exempt from its jurisdiction, as they are not "employed by" the foreign sovereign, "nor are they engaged in national pursuits." 11 U.S. at 144. The Court further noted the "manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation." *Id.* at 145; *see also Altmann*, *supra*, 541 U.S at 689, n.10. That fundamental focus on sovereign property – on whom the liability attaches

– persists to this day. *See Sabbatino*, 376 U.S. at 438 ("immunity relates to the prerogative right not to have sovereign property subject to suit").[16]

4. Defendant Is Not Immune From Claims Under the TVPA.

The TVPA is unambiguous in providing liability of persons who participate in torture and extrajudicial killing under actual or apparent authority of foreign law. *See* Pls. Opp at 12-14. Relying on interpretations of the Civil Rights Act, § 1983, the U.S. argues that the TVPA should be read "'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" SI at 33 (quoting *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (citations omitted)). Assuming that *Malley's* analysis of the Civil Rights Act did apply by analogy to the TVPA, Defendant would not be entitled to a federal common law immunity. To establish immunity under *Malley,* Defendant would first have to point to a common law privilege of absolute immunity for acts of torture and extrajudicial killing in existence in 1992 when the TVPA was enacted. 475 U.S. at 339-40. Second, Defendant would still bear the burden "of showing that public policy requires an exemption of that scope." *Id.* at 340. The U.S. has failed to establish either prong. In fact, the background for the passage of the TVPA was *Filartiga,* 630 F.2d 876*,* where a former foreign official was held liable for torture.[17]

Second, even assuming that the U.S. had met the hurdle of establishing an already

[16] In refusing to grant immunity, *Lyders*, cited by the U.S., differentiated between an action for which the defendant consular official would be liable and an action against the foreign state, "for which the foreign state will have to respond directly or indirectly in the event of a judgment," and found it was not clear that the liability did not belong to defendant, even though he had been sued "in his official capacity." 32 F.2d at 309.

[17] Congress enacted the TVPA to codify the cause of action recognized by this Circuit in *Filartiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. *Kadic* at 241. As interpreted by the Second Circuit, the language of the TVPA "under actual or apparent authority, or color of law, of any foreign nation was "intended to 'make[ ] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by purely private groups.'" *Id.* at 245. Therefore the implication of the U.S.'s argument that Congress intended that former government officials would be immunized makes little sense.

existing common law privilege, it could not – and did not even try to – establish that public policy required such an exemption. As *Malley* noted, the court would "not assume that Congress intended to incorporate every common-law immunity into the [statute] in unaltered form." 475 U.S. at 340. Moreover, as the Second Circuit held in *Wiwa v. Royal Dutch Petroleum,* 226 F.3d 88, 105 (2d Cir. 2000), the "evolution of statutory language [of the TVPA] seems to represent a more direct recognition that the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations."[18] This is no different for extrajudicial killing; reading into the TVPA an immunity for foreign officials acting within the scope of their offices would be contrary to the congressional intent as it was understood in *Wiwa.*[19]

III. THE CONDUCT ALLEGED VIOLATES THE LAW OF NATIONS.

The U.S. argues that Plaintiffs fail to state a valid cause of action under federal law. The U.S. mischaracterizes the claims that Plaintiffs are asserting as simply "disproportionate use of military force." *See* SI at 35. Plaintiffs assert claims for *inter alia* war crimes, crimes against humanity ("CAH") and extrajudicial killings. There can be no doubt that attacks against civilians and civilian objects come within the internationally recognized definitions of both war crimes and CAH. The bombing of civilians is an extra-judicial killing under both the ATS and the TVPA. Accordingly, the *Sosa* test is satisfied and dismissal at this stage would be inappropriate.

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[18] In fact, Congress knew how to explicitly preclude actions against an officer or employee of a foreign state acting "within his or her official capacity or under color of legal authority", and in fact did so in the Anti-Terrorism Act, 18 U.S.C. §§ 2331 et seq., § 2337 (passed in 1992, the same year, and by the same Congress, as the TVPA).

[19] To argue otherwise, the U.S. relies on a statement in the TVPA Senate Report that incorrectly quotes language purportedly 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) [FSIA's 'agency or instrumentality' definition]." SI at 43 (citing S. Rep. 102-249, at 8 (1991)). Because the quoted language, "admit some knowledge or authorization of relevant acts," is not found in the FSIA, it does not support the U.S. position that Congress intended for former foreign officials to be able to claim immunity under the TVPA.

The Second Circuit has held that war crimes and CAH are norms which "now have fairly precise definitions and [have] achieved universal condemnation" so as to give rise to universal jurisdiction, *U.S. v. Yousef*, 327 F.3d, 56, 106 (2d Cir. 2003) and are therefore actionable under the ATS. *See, e.g., Kadic,* 70 F.3d at 242. The U.S. does not argue that war crimes and CAH are not cognizable under the ATS; rather, it incorrectly asserts that Plaintiffs are urging the recognition of a new norm, namely prohibiting the use of disproportionate force. SI at 2.

The U.S. contention that the context of armed conflict precludes the application of claims under the ATS is simply contrary to precedent. *Id.* The precedents that establish war crimes as actionable under the ATS clearly contradict the U.S. position. *See, e.g., Kadic,* 70 F.3d at 243. Likewise the U.S. assertion that *Sosa* precludes claims "centering on a foreign government's treatment of foreign nationals in foreign territories" is contrary to precedent. SI at 38. *Sosa*, 542 U.S. at 732. *Sosa* cited with approval both *In re Estate of Marcos Human Rights Litig*., 25 F.3d 167 (9th Cir. 1994) and *Filartiga*, 630 F.2d at 890. *Id. Marcos* and *Filartiga* each involve a foreign government's treatment of foreign nationals in foreign territory, as does *Kadic*.

A. War Crimes and Crimes against Humanity

The specific norm prohibiting attacks on civilians as a war crime was included in early articulations of customary law, i.e., the Lieber Code,[20] the Brussels Conference of 1874, and the Hague Conventions of 1899 and 1907. The inclusion of this prohibition in article 6(6) of the Nuremberg Charter and later statutes of international criminal courts makes it clear that a breach of this norm entails individual responsibility. It has been codified in the 1949 Geneva Conventions (*see, e.g.* Articles 27, 32, 33, 53 and 147 of GCIV) and the 1977 Additional

[20] (Sec 1. #28) General Orders No. 100 art. 22, *reprinted in* Richard Shelly Hartigan, *Lieber's Code and the Law of War* (1983). Under Lieber's understanding of the laws of war, "proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial." is forbidden. Section IX, 148.

Protocols thereto.[21] *See also* ICC Statute, War Crimes, Art. 8(2)(b)(i) and 8(2)(b)(ii); Declaration of Professor Antonio Cassese, filed on Apr. 26, 2006.

The prohibition of attacks against civilians, as war crimes and crimes against humanity is included in the Statute of the ICTY, which has been entrusted by the Security Council to prosecute serious violations of international law, and which must apply only principles of customary international law. *See* Report of the Secretary-General Pursuant to Paragraph 2 of SC Res. 808 (1993) May 3, 1993 (S/25704), ¶34. As such, the ICTY has been recognized as an authoritative source of customary law. *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65, 82-84 (2d Cir. 2005) Under Article 3 of the ICTY Statute (war crimes), the prosecution has charged[22] – and the Tribunal has adjudicated – attacks on civilians in a number of cases. *See, e.g., Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, ¶54 (Dec. 17, 2004).

Military necessity does not permit the bombing of civilians. The 1949 Geneva Conventions and Additional Protocols require that all parties limit their attacks to specific military objectives; civilians and civilian objects must never be the object of an attack.[23] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. at ¶78 (July 8) The ICTY has consistently found attacks against civilians to be absolutely prohibited.[24] *See Prosecutor v. Blaškić*, IT-95-14-A, Judgement, (30 July 2004) ¶109. Indeed, challenges to the universality and specificity of this violation were recently rejected by the ICTY Appeals

[21] *See* Additional Protocol I to the Geneva Conventions ("Protocol I"), Arts. 51, 52, 57 and 85.
[22]The fact that the ICTY prosecutor has investigated alleged violations of international humanitarian law, and determined in some cases that no violations could be established, i.e., the 1999 NATO bombing campaign, SI at 41-42, and determined in other cases to issue indictments for attacks against civilians, i.e., *Galić*, proves the opposite point that the U.S. seeks to make: such determinations are, indeed, possible.
[23] Contrary to the U.S. assertion at SOI at 36, n.27, *Hamdan v. Rumsfeld* left open the issue of the enforceability of the Geneva Conventions by private parties. 126 S.Ct. 2749, 2794 (2006).
[24] Plaintiffs emphasize that their claims are for an *attack against civilians*, and not for "civilian causalities [that] frequently occur in armed conflict," as the U.S. asserts. SI at 42.

Chamber: "there is a well-worn line of jurisprudence interpreting Article 3 of the Statute, and an even cursory analysis of customary international law and important international humanitarian law instruments demonstrates that the crime of attack on civilians is quite specific." *Prosecutor v. Galić*, IT-98-29-A, Judgment, (Nov. 30, 2006) ¶125.

Galić, which dealt with the shelling and sniping of civilians in Sarajevo, is directly applicable to issues raised in this case. In addition to affirming the absolute prohibition on the targeting of civilians in customary international law, the Appeals Chamber held that the presence of a small number of combatants amongst a civilian population does not deprive a civilian population of its civilian character. *Id.* at 138. Those conducting an attack on a military object are required to determine whether it is likely to cause incidental loss of life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive compared to the concrete military advantage anticipated. Protocol I, Art. 57. In such cases, "an attack shall be *cancelled* or *suspended*". *Id.* (emphasis added). *See id.,* Art. 51. Defendant failed to make this determination. Accordingly, he violated the law of nations.

The U.S.'s argument that the subjectivity of proportionality and military necessity causes it to fail the *Sosa* test is flawed. Articulated norms often involve elements of subjectivity.[25] U.S. courts have adjudicated case implicating issues of military necessity. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *The Paquete Habana,* 175 U.S. 677, 712-13 (1900); *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) *In re Yamashita*, 327 U.S. 1 (1946). As the case of *Galic* clearly demonstrates there are applicable standard recognized in international law for

[25] For example, U.S. courts have recognized torture as clearly prohibited under customary international law, *see, e.g.*, *Filartiga v. Pena-Irala*. Torture is defined by "*severe* pain and suffering," which requires a subjective determination. 630 F.2d at 882-83 (emphasis added).

evaluating both the claim of military necessity and the issue of proportionality.[26] *Galić* at ¶132-33 (conducting a proportionality analysis related to sniping incidents to determine if attack was directed against civilians).

B. Extrajudicial Executions

U.S. courts hearing ATS cases have found claims for extrajudicial execution to be actionable.[27] *See, e.g*., *Filartiga* at 884; *Kadic*, 70 F.3d at 241; *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The prohibition against summary execution…is similarly universal, definable, and obligatory."). The bombing of a civilian apartment building falls with the conduct held to violate the prohibition against extrajudicial executions. *See Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778-79 (9th Cir. 1996); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1248 (S.D. Fla. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169-70 (D. Mass. 1995); *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994); *Sisso v. Islamic Republic of Iran*, 448 F. Supp. 2d 76 (D.D.C. 2006).

C. The TVPA Provides a Cause of Action for Civilian Deaths in This Case.

As the U.S. points out, the TVPA provides a cause of action for extrajudicial killing ("EK"), defined as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court..." 28 U.S.C. § 1350 note ("TVPA") § 3(a). Because the defendant's

[26] The recent decision by the Israeli High Court demonstrates that such evaluations are indeed judiciable. *Public Comm. Against Torture in Israel v. Israel*, HJC 769/02 (High Ct. 2006)(Israel) ¶58, *available at:* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

[27] The TVPA incorporates into U.S. law the definition of extrajudicial killing found in customary international law. S. Rep. No. 102-249, at 6 (1991) (footnotes omitted); *cf. id.* at 5–6 (justifying the enactment of the TVPA under Congress's constitutional power to "define and punish offenses against the law of nations"). The Senate, in explaining this definition, cited to the Geneva Conventions and, on the limits of the definition, to the European Convention on Human Rights. *See id*. at 6 nn. The House of Representatives' report on the TVPA also notes that the definition of extrajudicial killing was "derived from" Common Article 3 of the Geneva Conventions. H.R. Rep. No. H.R. 102-367(I), at 87.

conduct satisfies this definition,[28] including the intentional killing of persons playing no active part in hostilities,[29] no inquiry into proportionality is necessary in order to determine whether he is liable under the TVPA. The U.S.'s suggestion that cases involving the use of military force do not state claims under the TVPA is legally incorrect and inconsistent with case law finding liability for EKs in the course of military activity.

Defendant's conduct clearly falls within the prohibition against EK because it meets the statutory definition of EK and, contrary to the U.S.'s contention, was "deliberated." TVPA § 3(a).[30] The defendant participated in the decision to drop a 1000-kilogram bomb on an apartment building in one of the world's most densely populated residential neighborhoods at night, when it was reasonably certain that people would be present in their homes. Complaint at 21-22, 40. He had "actual and/or constructive notice that non-targeted individuals were present." *Id*. at 41. The defendant "took into consideration the possibility that...about ten civilians would be killed" but decided that the bomb should be dropped anyway. *Id*. at 42. That Defendant's conduct constitutes EK is consistent with the interpretation of that term in U.S. case law even when occurring in the context military activity. Cases under the TVPA, ATS and FSIA[31] make clear that the conduct alleged here falls within that norm. *See supra* III.A.

These allegations make clear that Defendant knew that his conduct was substantially certain to result in Plaintiffs' deaths and injuries. Plaintiffs thus clearly state the basis of a

[28] As discussed, the killings were deliberate, not authorized by any regularly constituted court, and in violation of international law. TVPA § 3(a).
[29] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949), Art. 3. *See also* S. Rep. No. 102-249, at 6 (1991) (TVPA based on Common Article 3); H.R. Rep. No. H.R. 102-367(I), at 87 (same).
[30] The U.S.'s assumption that the House Report says the exact opposite of what it does, SI, fn.33, is unfounded.
[31] The FSIA adopts the TVPA's definition of extrajudicial killing. 28 U.S.C. § 1605(e)(1).

"deliberated" attack against civilians.[32] *See* ICC Statute, Art. 30(2)(b) (defining "intent" as, *inter alia*, the awareness that a consequence will occur in the ordinary course of events). These principles of law rebut the U.S.'s contention that EK occurs only where a perpetrator has a specific intent to kill a specific victim. *See* SI at 47-49. Whether one issues an illegal order to kill specifically identified people or to knowingly inflict violence upon unspecified bystanders, one has in either case *intended* the deaths.[33]

The U.S.'s argument suggests that no fact patterns involving the use of military force would give rise to EK claims under the TVPA. SI at 47-50. Such an interpretation would read into the TVPA a premise clearly not intended by Congress, namely, that EKs committed through the use of military force are exempt from liability under the statute. This would be an absurd reading given that the TVPA defines EK draws on the laws of war, i.e., the Geneva Conventions, S. Rep. 102-249, and that EKs frequently occur in such contexts.

Finally, the U.S. argues that allowing plaintiffs to bring TVPA claims would create undesirable "practical consequences." SI at 50-51. This language refers to what a court may consider when determining whether a norm satisfies Sosa, *id*; it has nothing to do with the TVPA. As the U.S. concedes, the TVPA was passed *despite* concerns that it would interfere with foreign relations, due to Congress's desire to deter certain fundamental human rights abuses. S. Rep. 102-249; H. Rep. 102-367; SI at 50.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims should be allowed to proceed.

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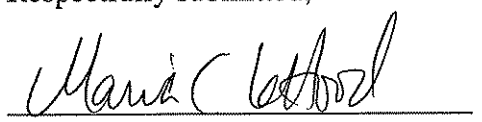
[32] *See* Restatement (Second) of Torts § 8A ("If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.").

[33] Even if Defendant specifically intended to kill one person and others were killed, the criminal and tort law doctrine of transferred intent would apply. *Yates v. Evatt*, 500 U.S. 391, 409 (U.S. 1991); *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

Dated: January 18, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of Plaintiffs' January 18, 2007, Plaintiffs' Response to the Statement of Interest of the United States of America to be served in accordance with the Federal Rules of Civil Procedure, the Southern District's Local Rules, and the Southern District's Procedures for Electronic Case Filing on this 18th day of January, 2007, in *Matar v. Dichter,* 1:05-cv-10270 (WHP), to:

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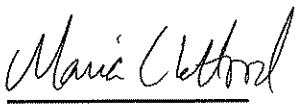

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