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

OPENING BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This appeal is from *Matar v. Dichter,* No. 05-10270, 2007 U.S. Dist. LEXIS 31946 (S.D.N.Y. May 2, 2007), decided by Judge William H. Pauley, III. SA-1-20.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §1350 (the Alien Tort Statute ("ATS")), 28 U.S.C. §1331, and 28 U.S.C. §1367. On May 2, 2007, Judge Pauley issued a final memorandum and order dismissing this case (SA-1-20), which is the ruling under review. Judgment was entered on May 15, 2007 (SA-21), and Plaintiffs filed their Notice of Appeal on June 14, 2007. A-162. This Court has jurisdiction over this appeal under 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Whether the District Court erred in finding that Defendant, sued as a former official of a foreign government, is entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602-11.
2. Whether, in dismissing on immunity grounds, the District Court adopted an unreasonable interpretation of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 (note), that failed to give it effect.
3. Whether the District Court erred in finding that the political question doctrine bars adjudication of this case.

4. Whether the District Court erred in looking outside of the pleadings while denying Plaintiffs' request for discovery.

STATEMENT OF THE CASE

Plaintiffs, Palestinian civilians who were injured and/or who represent those who were injured or killed in the attack that is the subject of this class-action, appeal from the decision dismissing claims against Avraham (Avi) Dichter, former director of the Israeli General Security Service ("GSS"). The Complaint alleges that Defendant is responsible for deciding to drop a bomb on an apartment building, killing fifteen persons, including eight children, and injuring over 150 others.

Plaintiffs filed their Complaint on December 7, 2005, bringing claims for violations of customary international law under the ATS, namely war crimes, crimes against humanity, cruel, inhuman or degrading treatment or punishment, and extrajudicial killing; extrajudicial killing claims under the TVPA; and state law claims for wrongful death, negligence, public nuisance, battery, and both intentional and negligent infliction of emotional distress.

Defendant filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) on February 22, 2006, arguing that (1) he is immune from suit under the FSIA; (2) the action presents a non-justiciable political question; and (3) the action implicates the act of state doctrine. Submitted with his Motion was a letter to the State Department from Daniel Ayalon, then-Israeli Ambassador to the United States. A-43-45 ("Ambassador's Letter"). Oral argument on

Defendant's Motion was heard on May 31, 2006.

On July 20, 2006, the District Court issued an order inviting the State Department to "state its views, if any" on Defendant's motion to dismiss. A-103-104. On November 17, 2006 the State Department submitted a Statement of Interest ("SOI"). A-105-165.

On May 2, 2007, Judge Pauley granted Defendant's Motion, finding that Defendant was acting in his official capacity and was therefore entitled to immunity under the FSIA, and that the political question doctrine warrants dismissal. SA-1-20.

STATEMENT OF THE FACTS

On July 22, 2002, just before midnight, a one-ton bomb was intentionally dropped on an apartment building in the densely populated residential neighborhood of al-Daraj in Gaza City in the Occupied Palestinian Territory. A-19¶21-22. Fifteen people, including eight children, were killed and more than 150 were injured in the attack, which was condemned by the United States. A-13¶1. Eight adjoining and nearby inhabited apartment buildings were also destroyed. A-19¶24.

Defendant, then-Director of the GSS, participated in the decision to authorize the attack of the apartment building in order to effectuate a "targeted assassination" against one person in the building. A-22¶39. Defendant advocated using military aircraft for the attack despite knowing that other

civilians, including the target's wife, were present in the building. A-22¶40-41. The fact that about ten civilians would be killed was factored into the decision, but Defendant still authorized, directed, planned, ratified and/or failed to prevent the attack. A-22¶42-43.

Plaintiffs include Ra'ed Matar, whose wife and three children (ages 5, 3 and 1½ years) were killed, as well as his sister (10), niece (2 months) and grandmother. A-20¶26-27. Plaintiff Mahmoud Al Huweiti's wife (30) and two sons (4½ and 5½), were killed in the attack, four of his children were injured, and his home was destroyed. A-20¶28. Three members of the Shehadeh family were killed: Salah Mustafa (49), his wife (45) and their daughter (15). A-20¶30.

Plaintiff Marwan Zeino is one of the more than 150 Palestinian civilians who was injured in the attack. His spinal vertebrae were crushed and he sustained injuries all over his body; he remains unable to work, due to mobility constraints and pain. A-21¶35.

The Israeli State Prosecution is establishing an independent commission to investigate the circumstances surrounding this attack.[1]

SUMMARY OF THE ARGUMENT

The District Court erroneously found that Defendant was entitled to immunity under the FSIA. First, this Court's precedent suggests that the FSIA

[1] Yuval Yoaz, "Panel to look into civilian deaths in 2002 IAF attack on Shehadeh," *Haaretz* (9/17/2007), available at http://www.haaretz.com/hasen/spages/904481.html.

does not apply to individuals, so would not apply to Defendant. *See Tachiona v. Mugabe,* 386 F.3d 205, 220-21 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 2020 (2006).

Second, because Defendant was a former official when sued, the District Court's finding contravenes Supreme Court precedent that defendants are only entitled to FSIA immunity if they are instrumentalities of the foreign state when they are sued. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003).

Third, in jurisdictions where the FSIA has been applied to individual defendants, they are not immune unless authorized in their official capacity to act as alleged. *See, e.g., Chuidian v. Phil. Nat'l Bank,* 912 F.2d 1095 (9th Cir. 1990); *Leutwyler v. Al-Abdullah*, 184 F. Supp. 2d 277 (S.D.N.Y. 2001). The District Court applied the incorrect legal standard, finding that if Defendant acted in his official capacity he was immune, without inquiring into whether he was lawfully authorized to drop a one-ton bomb on a residential building knowing many civilians could be harmed. The act alleged violated *jus cogens* norms from which derogation is not permitted. The Ambassador's Letter did not claim that the specific act alleged was lawfully authorized. A-44.

Fourth, the District Court failed to consider the plain language of the TVPA which created liability for individuals who subject others to extrajudicial killings under the "actual or apparent authority" of a foreign state. 28 U.S.C. §1350 (note), Sec. 2(a)(2). Defendant is individually liable under the plain meaning of the TVPA, which was enacted to ensure that U.S. courts could hear

cases like *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980), which found that a former foreign official could be held liable for torture and extrajudicial killing abroad.

The District Court also erroneously concluded that the political question doctrine bars adjudication of this case, failing to properly analyze Plaintiffs' claims under the *Baker* factors. Such analysis shows that resolution of Plaintiffs' claims would not contradict prior political branch decisions, nor otherwise implicate separation of powers concerns. The Court erroneously deferred to the U.S. government's request for dismissal and generic concerns regarding the implications of a cause of action for the disproportionate use of force, and to the Israeli government's request to have the case dismissed, which is irrelevant to the political question analysis.

Finally, the District Court looked outside the pleadings to factual assertions in the Ambassador's Letter that the lawsuit purportedly challenges "sovereign actions of the State of Israel, approved by the government of Israel." SA-3 (quoting A-44). If the court looks outside the pleadings to determine whether Defendant acted within the scope of his lawful authority, Plaintiffs must be granted limited jurisdictional discovery to obtain facts regarding whether the challenged acts fell within Defendant's lawful duties, powers and responsibilities.

For these reasons, the District Court's decision must be reversed.

STANDARD OF REVIEW

The grant of a Rule 12(b) Motion to Dismiss is subject to *de novo* review. *Allaire Corp. v. Okumus,* 433 F.3d 248, 249-250 (2d Cir. 2006). *See also, Ehrenfeld v. Mahfouz*, 489 F.3d 542, 547 (2d Cir 2007)(question of statutory interpretation is subject to *de novo* review). All allegations in the complaint must be accepted as true and all inferences drawn in Plaintiffs' favor. *Allaire Corp.,* 433 F.3d at 249-250; *Caiola v. Citibank*, *N.A.,* 295 F.3d 312, 321 (2d Cir. 2002).

In reviewing a Rule 12(b)(1) dismissal on appeal, factual findings are reviewed for clear error and legal conclusions *de novo. Zappia Middle East Construction Company Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 249 (2d Cir. 2000).

The denial of discovery is reviewed for abuse of discretion, and to the extent that a discovery request was not properly considered, it is subject to *de novo* review. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 175-76 (2d Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE FSIA PROVIDES IMMUNITY TO DEFENDANT.

A. The FSIA Does Not Apply to Individuals.

The plain and unambiguous language, legislative history and intended purpose of the FSIA all indicate that the statute does not apply to individuals.

See Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005). Although this Court has not ruled directly on this question, *Tachiona* examined both the statutory language and legislative history of the FSIA and suggested that it does not apply to individuals. 386 F.3d at 220-221.

"Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992); *see also, Barnhart v. Sigmon Coal Co., Inc*., 534 U.S. 438, 450 (2002)("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.")(internal quotation omitted). The unambiguous language of the FSIA provides that a "foreign state" is immune from suit unless certain exceptions apply. 28 U.S.C. §1602. Defendant did not meet his burden in establishing a prima facie case that he satisfies the FSIA's definition of foreign state. *Virtual Countries, Inc., v. Republic of S. Africa*, 300 F.3d 230 (2d Cir. 2002).

Congress explicitly defined "foreign state" as including a "political subdivision" or "agency or instrumentality." 28 U.S.C. §1603(a). As this Court has found, the terms used to define "agency or instrumentality" in §1603(b) – any "entity" which is a "separate legal person, corporate or otherwise" *and* an "organ of a foreign state" or a "majority of whose shares" is "owned" by a foreign state — are "not usually used to describe natural persons." *Tachiona*, 386 F.3d at 221. *See also, Patrickson,* 538 U.S. at 474 (2003)(finding "Congress

had corporate formalities in mind" when it drafted the FSIA, in its discussion on "instrumentalities").

The Seventh Circuit rejected the argument that "separate legal person" includes a natural person, opining:

> [I]f it was a natural person Congress intended to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons, which are subject to suit. Given that the phrase "corporate or otherwise" follows on the heels of "separate legal person," we are convinced that the latter phrase refers to a legal fiction – a business entity which is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

Enahoro, 408 F.3d at 881-882; *see also, Xuncax v. Gramajo*, 886 F. Supp. 162, 175 (D. Mass. 1995). Because the plain language of the statute is unambiguous and applies only to foreign states and not individuals, and the present case is against Dichter individually, Defendant cannot claim immunity under the FSIA.

The District Court was incorrect in finding that "the only issue before the Court of Appeals in *Tachiona* was whether head-of-state immunity is governed by the FSIA or the common law." SA-9. As is clear from the analysis it performed, this Court questioned the plaintiffs' argument that head-of-state common law immunity was supplanted by the FSIA precisely *because* it did not think the FSIA governed the immunity of individual officials, including – but not limited to – heads of state. *Tachiona*, 386 F. 3d at 220-21. If it did not intend to address the larger question of the application of the FSIA to individuals, as opposed to simply a sub-class of individuals i.e., heads of state, it

would *not* have contrasted its conclusion regarding the plain-language of the FSIA with a case dealing with a lower-level government official– "But see, e.g., *Chuidian*…" *Tachiona*, 386 F. 3d at 221. That this Court did not follow the analysis done in other heads of state cases cited by the District Court, in which the courts forewent any analysis under the FSIA after finding that suggestion of immunities filed by the Executive were dispositive, only supports the conclusion that *Tachiona* was addressing the broader issue of immunity to individuals and not the narrower issue of the FSIA's applicability to heads of state. SA-9 (citing *e.g.*, *Lafontant v. Aristide*, 844 F. Supp. 128, 135-137 (E.D.N.Y. 1994); *Leutwyler*, 184 F. Supp. 2d at 280). Since *Tachiona,* only one other district court in this Circuit has applied the FSIA to individuals, and it failed to consider *Tachiona* or its reasoning. *See In re: Terrorist Attacks*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

The District Court erroneously relied on case-law derived primarily from *Chuidian* to find that individuals could claim immunity under the FSIA despite its unambiguous language and consistent statutory scheme. *See* SA-6-11. *Enahoro* found that an agency or instrumentality "does not explicitly include individuals who either head the government or participate in it at some level." 408 F.3d at 881. *Chuidian* found that because the FSIA and its legislative history did not *expressly exclude* individuals, they could be included to comport with the domestic principle that a suit against a U.S. official in his/her official capacity is essentially a suit against the United States (912 F.2d at 1101), which

Enahoro found "upside down as a matter of logic," and contrary to the burden of proof, which falls on defendant to show it is a foreign state. 408 F.3d at 882.

Tachiona also found that the FSIA legislative history suggests that it does not govern the immunity of heads of state "or other foreign officials." *Id.* There is no indication in the legislative history that the FSIA was intended to apply to foreign officials (let alone *former* foreign officials); on the contrary, it clearly states that the FSIA would not govern the immunity of diplomatic or consular representatives. *See Tachiona*, 386 F.3d at 221 (citing H.R. REP. NO. 94-1487, at 21 (1976)("House Report")).

The intent of the drafters to limit immunity to actual "agencies and instrumentalities" is unambiguous. The legislative history specifies that a "separate legal person" includes a "corporation, association, foundation, or another entity, under the law of the foreign state where it was created, [that] can sue or be sued in its own name." House Report, at 15. Congress set out the intended application of the FSIA by listing examples of what could constitute an 'agency or instrumentality of a foreign state': "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a government procurement agency or a department of ministry which acts and is suable in its own name." *Id*. at 15-16. Natural persons or any reference to government officials are conspicuously absent from this list.

A primary purpose of the FSIA was to codify the "restrictive theory" of immunity, which, in breaking with the "absolute theory of sovereign immunity," allows foreign states to be sued under certain circumstances. *Permanent Mission of India to the UN v. City of New York*, 127 S. Ct. 2352, 2356-2357 (2007); *see also,* House Report at 7-8 (listing purposes of the FSIA as codifying restrictive principle of sovereign immunity; insuring that restrictive principle of immunity is applied in U.S. courts by transferring determination of sovereign immunity from executive to judicial branch; providing procedures for service of foreign state; and remedying, in part, difficulties obtaining judgment against foreign state). Thus, the FSIA was focused on the liability of the state *qua* state. Even if the language were somehow ambiguous, there is nothing in the legislative history to suggest an intention to extend immunity to natural persons.

The FSIA is the sole basis for jurisdiction over a foreign state. *See* 28 U.S.C. §§1604 and 1330(a). If "foreign state" were read to include individuals, then cases could only be brought against foreign officials if the acts alleged fit into one of the exceptions in 28 U.S.C. §§1605-1607. As the range of cases against current and former officials that have been allowed to proceed under jurisdictional bases other than the FSIA demonstrate – and the qualifying language that has been added to the immunity analysis ("official capacity" or "scope of authority") to allow those cases to go forward – such a conclusion is as illogical as it is incorrect. *See* Sections I(C) and II.

B. The FSIA Does Not Apply to Defendants that Are Not an Agency or Instrumentality of the State at the Time of Suit, as Here.

Even if the FSIA were found to apply to individuals, the District Court erred in granting FSIA immunity to Defendant because he was not a government official when the complaint was filed. The Supreme Court has held that whether a defendant is an instrumentality of a foreign state under the FSIA is not determined by a defendant's status at the time of their alleged conduct, but rather "at the time of the filing of the complaint." *Patrickson*, 538 U.S. at 480. In *Republic of Aus. v. Altmann*, the Supreme Court confirmed that under *Patrickson* "whether an entity qualifies as an 'instrumentality' of a 'foreign state'…depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." 541 U.S. 677, 698 (2004); *id.* at 708 (Breyer, J., concurring)("the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit."). Foreign sovereign immunity "aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Id.* at 696 (quoting *Patrickson*, 538 U.S. at 479). *See also, Abrams v. Societe Nationale Des Chemins De Fer Francis*, 389 F.3d 61, 64 (2d Cir. 2004)(finding that *Patrickson* "unequivocally" held that "an entity's status as an instrumentality of a foreign state should be 'determined at the time of the filing of the complaint'").

Patrickson applied the FSIA's plain language. The FSIA defines an agency or instrumentality as any "entity" that "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof". 28 U.S.C. §1603(b)(2). The Court held that "the plain text of this provision [§1603(b)(2)], because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." *Patrickson*, 538 U.S. at 478. *Patrickson* found that because the corporate defendants' relationship with Israel "had been severed before suit was commenced," the defendants were not an instrumentality of the state, and therefore not entitled to immunity under the FSIA. *Id.* at 480.

If the FSIA applies to an individual as an "agency or instrumentality" of the foreign state, individuals, like corporations, must satisfy 28 U.S.C. §1603(b)(2). To do so, an individual has to show that he or she "*is* an organ of a foreign state." Id. (emphasis added). When Plaintiffs' Complaint was filed (and Defendant was served), Defendant was "no longer in the service of the Israeli government." A-13; A-38. Defendant is therefore not immune under the FSIA.

In re Terrorist Attacks incorrectly analyzed this issue, refusing to apply *Patrickson* and granting an individual defendant immunity. 349 F. Supp. 2d at 788-789. Without looking to the Supreme Court's analysis in *Patrickson* and the present tense requirement of §1603(b)(2), *In re Terrorist Attacks* relied

instead on cases that found that the FSIA applies to individuals without having addressed whether the FSIA applies only to agencies or instrumentalities of a foreign state at the time the complaint is filed. It relied on cases decided before *Patrickson*, with the exception of one case that did not mention *Patrickson*. *Id.* at 788 (citing *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-399 (4th Cir. 2004)). Moreover, the decision's value is greatly undermined, considering the defendant was Prince Turki, who was not only a Prince, but was also the Saudi ambassador to the United Kingdom at the time the complaint was filed, not a *former* official. *Id.*

Moreover, because Dichter was personally served as a former official, he was necessarily sued in his personal capacity, not in his "official capacity," further illustrating the inapplicability of the FSIA. A-38. A defendant sued in his "personal capacity" cannot be treated "as a 'foreign state' for purposes of personal jurisdiction." *I.T. Consultants, Inc. v. Islamic Republic of Pak.*, 351 F.3d 1184, 1191 (D.C. Cir. 2003).

The rule regarding immunity "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,' 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)(first citation omitted)(quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *see also, Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984)("general

criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought"). "[I]mmunity relates to the prerogative right not to have sovereign property subject to suit." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 438 (1964). Through this action, a court could not assess damages against Israel or enjoin acts of Israel. The effect of exercising jurisdiction over Defendant or imposing a judgment against him would be to hold him personally liable for his acts, not "to enforce a rule of law against the foreign state." Restatement (Second) of Foreign Relations Law of the United States §66(f)(1965)(clarifying that foreign sovereign immunity extended to an official's acts in his official capacity "if the effect of exercising jurisdiction would be to enforce a rule of law against the state").

C. The District Court Erred in Failing to Assess whether Defendant's Actions were within the Scope of his Authority.

Even if Defendant were considered to fall within the FSIA, he would not be immune because his acts were outside the scope of his lawful authority, and thus were not undertaken within his official capacity. Courts finding that the FSIA immunizes individuals have only done so when their actions fall within the scope of their lawful authority. *See, e.g., Velasco v. Government of Indonesia,* 370 F.3d 392, (4th Cir. 2004)(FSIA "does not immunize an official who acts beyond the scope of his authority")(citing *Chuidian,* 912 F.2d at 1106); *Byrd v. Corporacion Forestal y Industrial de Olanco S.A.,* 182 F.3d 380 (5th Cir. 1999)(FSIA extends to individuals acting within their official capacity,

but not when individual officer acts beyond his official capacity); *Keller v. Central Bank of Nigeria,* 277 F.3d 811 (6th Cir. 2002)(same).

Chuidian limited the FSIA's application to acts by officials within the scope of their authority and consistent with their legal mandate. 912 F.2d at 1101-03; *see also, Hilao v. Estate of Marcos*, 25 F.3d 1467, 1470-72 (9th Cir. 1994)(former President acting under color of authority, but not within official mandate, not entitled to FSIA immunity); *Jungquist v. Al Nayhan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997)(relevant inquiry to determine whether an individual acting in an official capacity focuses on the nature of the individual's alleged actions); *Cabiri v. Assasie-Gyimah,* 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996)(defendant does not, and cannot, claim that acts of torture fall within the scope of his authority or are permitted under Ghanaian law); *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988)(assessing whether defendants acting within their official capacity by reviewing affidavits that set forth duties and scope of authority under Mexican law). The FSIA therefore does not apply to officials' acts that are beyond the scope of their authority.

The District Court failed to inquire into the nature of the actions or the limits of Dichter's lawful authority. Rather than looking to whether Defendant was lawfully authorized to act as he did, it found he was entitled to immunity solely because his actions were taken in an "official capacity," erroneously focusing simply on his status at the time of the conduct alleged. SA-11. *See Barr v. Matteo,* 360 U.S. 564, 573-74 (1959)("It is not the title of his office but

the duties with which the particular officer … is entrusted — the relation of the act complained of to 'matters committed by law to his control or supervision'— which must provide the guide in delineating the scope of the rule which clothes official acts of the executive officer with immunity.")(internal citations omitted). Plaintiffs alleged that Defendant decided to drop a bomb on a residential building in the middle of the night, knowing that there were civilians inside, in violation of the law of nations, which is incorporated into Israeli law. *See The Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02 (High Ct. 2006)(Israel) Judgement of December 14, 2006 at ¶60 ("*Targeted Assassination Judgement*")(the determination of whether a preventative strike is legal depends on whether the standards of customary international law allow that strike).[2] No immunity attaches under the FSIA for acts that could not have been legally authorized. *See Jungquist*, 115 F.3d at 1028 (finding that although defendant might have been authorized to make payments, he could not have been authorized to make bribes).

The District Court erred by disregarding Plaintiffs' allegations that Defendant acted outside the scope of his lawful authority. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (allegations of complaint should be construed favorably to the pleader). Plaintiffs' allegations that Defendant acted unlawfully in deliberately dropping a bomb on an apartment building inhabited

[2] Available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

by civilians are sufficient to survive Defendant's Rule 12(b)(1) motion to dismiss. *See, e.g.,* A-13; A-23-24. *See Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 108-109 (D.D.C. 2006)(finding allegation that officials were acting within the scope of their authority sufficient to survive motion to dismiss amended complaint under §1605(a)(7) of the FSIA).[3]

The District Court misconstrued Plaintiffs' allegation that "Defendant developed, implemented, and escalated the practice of 'targeted killings'" to mean that Defendant participated in formulating and implementing "Israel's official anti-terrorist strategy." SA-11 (citing A-19¶19). It also misconstrued general assertions about Defendant's status contained in the Ambassador's Letter. SA-11-12; *see* Section IV. Reliance on *Doe v. Israel,* in which plaintiffs sued the State of Israel and current officials complaining of the official policy of Israel, was misplaced, as plaintiffs did not allege that defendants acted outside the scope of their authority or present legitimate claims against (or properly serve) defendants in their personal capacities. 400 F. Supp. 2d 86, 101-105 (D.D.C. 2005).

The District Court misinterpreted *Leutwyler* to require "personal or private" acts to avoid FSIA immunity. SA-11 (citing 184 F. Supp. 2d at 287). The plaintiff in *Leutwyler,* who had photographed the Royal Family of Jordan,

[3] If Plaintiffs' allegations regarding the scope of Defendant's authority are considered inadequate, they should be permitted to amend their complaint. *See Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 17-18 (D.D.C. 2005)(permitting plaintiffs to amend complaint to allege that defendants acted within scope of their employment).

sued the Queen's employees alleging breach of contract and defamation, arguing that they acted in their individual rather than official capacities because the photographs were personal and private. 184 F. Supp. 2d at 287-288. The court found that even if the Royal Family was photographed as private citizens, the subsequent acts giving rise to the plaintiff's claims – protecting the Queen's public image – were carried out within the scope of defendants' official responsibilities. *Id.* at 289. That defendants cannot assert FSIA immunity for their personal or private acts does not alter the fact that they also cannot assert FSIA immunity for acts that are not lawfully authorized.

The District Court's reliance on *Belhas v. Ya'alon,* 466 F. Supp. 2d 127 (D.D.C. 2006), *appeal docketed*, No. 07-7009 (D.C. Cir. Jan. 12, 2007) to query whether the acts were personal and private was similarly erroneous. SA-11. *Belhas* conflated the question of whether the conduct of an official was a private act taken in defendant's *individual capacity*, with *Junquist's* concern about whether, in his *official capacity*, the defendant was authorized to take the action. *Belhas* at 130-131. The District Court failed to make the inquiry mandated by *Chuidian*: whether Defendant's acts were within the lawful realm of his duties. *Chuidian* made clear that a government official would not be entitled to sovereign immunity "for acts not committed in his official capacity," *or* for "acts beyond the scope of his authority." 912 F.2d at 1101-03.

Belhas relied in part on *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996), which, like *Leutwyler,* addressed the distinction between acts

of a government official in his public-governmental/official capacity and those in his private/individual capacity. The plaintiff did not allege that the official acted outside the scope of his authority, and no inquiry was made on this point. Immunity was permitted because the official's acts in managing a private subsidiary were "undertaken only on behalf of [Jordan's] Central Bank," meaning his acts were public acts in his official capacity as the Deputy Governor, rather than private acts in an individual capacity. *El-Fadl,* 75 F.3d at 671. As *Chuidian* explained, not only will sovereign immunity fail to attach when an official acts as a private individual but it "similarly will not shield an official who acts beyond the scope of his authority. '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. . . .'" 912 F.2d at 1106 (quoting *Larson,* 337 U.S. at 689). *See also, Velasco*, 370 F.3d at 399-401 (unauthorized acts, even if taken under color of law, cannot be imputed to the foreign state). *Chuidian* found that the defendant was immune because he had the power – the lawful authority - to act as he did; it had not been alleged that his "*actions* departed from his statutory mandate." *Chuidian,* 912 F.2d at 1107.

Here, Plaintiffs alleged that Dichter's actions - bombing a residential building knowing that civilians were inside – were a departure from his statutory mandate as he did not have the authority, under Israeli law and customary international law, to undertake such actions. Accordingly, the

finding that Dichter was immune under the FSIA because his actions were taken in an official capacity was in error.

1. Defendant acted outside the scope of his authority under international law.

The Supreme Court has looked to international law and practice at the time of the FSIA's enactment to decide immunity questions under the FSIA, since it was enacted to codify international law in relation to immunity for foreign states. *Permanent Mission*, 127 S. Ct. at 2356. FSIA immunity does not encompass claims against individuals for violations of *jus cogens* norms, which can never be within the scope of an official's authority.[4] In *Hilao v. Estate of Marcos*, the Ninth Circuit found that "acts of torture, execution, and disappearance were clearly acts outside of [former President Marcos'] authority as President . . . Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA." 25 F.3d at 1472. Even as President, Marcos could not "authorize" acts of extrajudicial killing, since such *jus cogens*

[4] *Jus cogens* norms, which are non-derogable norms under customary international law must prevail over any conflicting claim of immunity for the individual perpetrator. *See, e.g., In re "Agent Orange" Product Liab. Litig.*, 373 F. Supp. 2d 7, 131 (E.D.N.Y. 2005) *appeal docketed*, No. 05-1953-CV (2d Cir. Sept. 30, 2005). *See also Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet* (No. 3), [1999] 2 All E.R. 97, 179 [2000] 1 A.C. 147 (H.L.)("*Pinochet (3)*"), Opinion of Lord Millett ("International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an *immunity* which is co-extensive with the obligation it seeks to impose.")

violations could not be lawfully authorized. Similarly, in *Cabiri*, the court noted that the defendant did not argue - "nor could he"- that torture fell within the scope of his authority or was permitted under his nation's laws, because no government asserts a right to torture. 921 F. Supp. at 1198 (citing *Filártiga,* 630 F.2d at 884). *See also*, *Enahoro*, 408 F.3d at 893 (Cudahy, J., dissenting)("officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts.)"); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980)(assassination is "clearly contrary to the precepts of humanity as recognized in both national and international law" and so cannot be within an official's "discretionary" authority); *Cf., Kadić v. Karadžić,* 70 F.3d 232, 239 (2d Cir. 1995) ("certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals")

The violations alleged by Plaintiffs, including war crimes, extrajudicial killing, and crimes against humanity, are all prohibited under international law, and were prohibited under international law at the time the FSIA was enacted. *See, e.g.,* Nuremberg Charter, 82 U.N.T.S. 279 (1945)("Nuremberg Charter"), art. 6; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 (Aug. 12, 1949), arts. 3, 27, 28 and 147. *See also*, Statute of the ICTY, U.N.Doc. S/RES/827 (1993), arts. 3 and 5; ICC Statute, U.N.Doc. A/CONF.183/9, July 17, 1998, arts. 5, 7 and 8.

These prohibitions constitute *jus cogens* norms. *See U.S. v. Yousef*, 327 F.3d 56, 106 (2d Cir. 2003)(crimes against humanity are norms which "now have fairly precise definitions and [have] achieved universal condemnation" so as to give rise to universal jurisdiction); *Kadić,* 70 F.3d at 243 ("offenses alleged [including war crimes and cruel, inhuman or degrading treatment] would violate the most fundamental norms of the law of war"); *Hilao*, 25 F.3d at 1475 ("prohibition against summary execution . . . is similarly [as torture is] universal, definable, and obligatory"). Accordingly, the acts alleged cannot constitute official acts of a foreign state, as no state can adopt such acts as official policy. *See, e.g., Filártiga*, 630 F.2d at 889; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699*,* 718 (9th Cir. 1992)("[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act").

Consideration of international law, including both at the time of the FSIA's enactment and as currently interpreted, confirms the principle that former officials are not immune for *jus cogens* violations. *See* Nuremberg Charter, art. 7("[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment"); ICTY Statute (Art. 7(2))(same). The District Court therefore erred in finding that "[w]ithdrawal of immunity would constitute a deviation from the international norm." SA-10 (citing A-135). Rather than conduct its own assessment of international law, the District Court erroneously accepted the Government's legal conclusion, which

is not entitled to deference. *Altmann,* 541 U.S. at 701. International law does not provide immunity for the individual perpetrator of acts recognized as crimes by – and against – the international community; such acts cannot be attributable to the state due to the consensus among states that such acts are impermissible and illegal under all circumstances. Thus the state official cannot be afforded functional immunity for these acts. *See* 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, 862 (2002); *Filártiga*, 630 F.2d at 889; *Pinochet (3)*, Opinion of Lord Browne-Wilkinson ("Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong grounds for saying that the implementation of torture…cannot be a state function.").

Because such actions are not, and indeed cannot be, considered "sovereign acts," they cannot fall within the scope of an official's authority under international law. *See Prosecutor v. Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Matters, ¶32 (Nov. 8, 2001)(quoting Nuremberg Judgement, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 ("He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.")); *Prosecutor v. Blaškić*, IT-95-14-AR, (Issue of *subpoena duces tecum*),

¶41 (Oct. 29, 1997)("those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity").

2. Defendant acted outside the scope of his authority under Israeli law.

Unlike other courts addressing *jus cogens* violations, *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), looked to the foreign state's law to determine whether an official acted within the scope of his authority. In *Liu Qi*, two local governmental officials of China were not immune under the FSIA for TVPA and ATS claims because the alleged conduct was "not validly authorized under Chinese law." *Id.* at 1266. The court determined that defendants were not immune if they did not act in their official capacity, *or* they acted outside the scope of their authority, *or* the acts were not validly authorized, i.e., legal. *Id.* at 1282. As in *Liu Qi*, the acts alleged here by Plaintiffs, including war crimes, are prohibited under the law of the state governing the foreign actor.

As recently affirmed by the Israeli High Court of Justice, Israeli law incorporates customary international law, which thereby constrains the conduct of Israeli officials. *See Targeted Assassination Judgement*, ¶¶17-20. Israel also observes the humanitarian portions of the Fourth Geneva Convention, which has been found to apply to areas under belligerent occupation, including Gaza. *See, e.g.,* Cassese Decl., A-48.

Defendant violated standards of conduct imposed by customary international law and these specific instruments. Specifically, Plaintiffs allege that Defendant directed and ordered a "targeted assassination" that did not properly take into account the fundamental principles of proportionality and distinction. *See Targeted Assassination Judgement*, ¶41 (recognizing the principle of proportionality as a general principle of international law); Cassese Decl., A-50-54; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J., ¶78 (July 8)(recognizing principle of proportionality as a "cardinal principle" of customary international law).

As the High Court of Israel held, the legality of a particular "preventative strike" must be determined on a case-by-case basis: "[W]e cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international law regarding international armed conflict allow that preventative strike or not." *Targeted Assassination Judgement*, ¶60. A central question in such an analysis is the harm done to civilians not taking part in hostilities. The High Court gave some parameters as to when a targeted assassination would violate the principle of proportionality:

> Take the usual case of a combatant, or a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed. The hard cases are those that are in the space *between the extreme examples*.

Targeted Assassination Judgement, ¶46 (citations omitted)(emphasis added). Plaintiffs have alleged that the bombing from the air of the apartment building in al-Daraj – a "targeted assassination" that resulted in the death of fifteen people and the injury of more than 150, i.e., an "extreme example" –violated customary international law, and as such, was illegal under Israeli law.

Under the case-law of Israel, immunity cannot attach for violations of international law. As the Supreme Court of Israel held in *Attorney Gen. of the Gov't of Israel v. Eichmann*, "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." 36 I.L.R. 277, 310 (Supreme Court of Israel 1962).

II. THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANT WAS IMMUNE FROM SUIT UNDER THE TVPA.

In holding that a foreign official acting in his official capacity is immune, the District Court failed to consider the plain language of the TVPA or the contradiction between its conclusion and the explicit purpose of the TVPA.

In the seminal case, *Filártiga v. Peña-Irala,* this Court established that a former Paraguayan official could be held liable under the ATS for his participation in the torture of a citizen of Paraguay. 630 F.2d 876, 884 (2d Cir.

1980). "The *Filártiga* Court concluded that acts of torture committed by *State* officials violate 'established norms of the international law of human rights, and hence the law of nations'." *Flores v. Southern Peru Copper*, 414 F.3d 233, 244 (2d Cir. 2003), citing *Filártiga,* 630 F.2d at 880 (emphasis added). After subsequent decisions in the D.C. Circuit challenged the basis of *Filártiga,* Congress enacted the TVPA to codify this Court's holding in *Filártiga. Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004); *Kadić*, 70 F.3d at 241. Under the District Court's analysis, TVPA cases for torture and extrajudicial killing against foreign officials, like *Filártiga,* are precluded, as such officials would be protected from suit by FSIA immunity. The District Court's analysis is against the weight of authority, inconsistent with the plain language of the TVPA and contrary to Congressional intent.

The majority of cases brought under the TVPA have permitted claims against former foreign officials to proceed. *See, e.g., Cabello v. Fernandez-Lario*s, 402 F.3d 1148 (11th Cir. 2005)(TVPA claims against former Chilean officials); *Hilao v. Estate of Marcos***,** 103 F.3d 767 (9th Cir. 1996)(TVPA claims against former Philippine officials); *Abiola v. Abubakar,* 435 F. Supp. 2d 830 (N.D. Ill. 2006) *on remand from Enahoro,* 408 F.3d 877 (TVPA claims against former Nigerian official). *But see, Belhas,* 466 F. Supp. 2d at 130-31; *Yousuf v. Samantar*, No. 04-1360, 2007 U.S. Dist. LEXIS 56227 (E.D. Va., Aug. 1, 2007), *appeal docketed,* No. 07-1893 (4th Cir. Sept. 14, 2007) (relying on *Belhas*).

The District Court's error began with its failure to consider the plain language of the TVPA, or give it effect: "An individual who, under actual or apparent authority, or color of law, of any foreign nation…subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages…." 28 U.S.C. §1350 (note), sec. 2(a). *Kadić* looked to the TVPA's plain language imposing liability on those who acted "under actual or apparent authority, or color of law, of any foreign nation," as well as the legislative history to confirm that this language 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." 70 F.3d at 245 (citing, H.R. REP. NO. 367, 102d Cong., 2d Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87). Because those who act with "actual authority" are almost certain to be government officials, the plain language of the TVPA contemplates that foreign officials may be liable. Moreover, TVPA claims are against individuals and not against the state. *See Holland v. Islamic Republic of Iran*, No. 01-1924, 2005 U.S. Dist. LEXIS 40254 *45 (D.D. C. Oct. 31, 2005)(use of "individual" in the TVPA guards against expansion to foreign states). Even if the FSIA applies to individuals in their official capacity, it does not apply to claims under the TVPA, which are against individual officials in their individual capacity. *See* Section I(B). To hold otherwise would in effect render the TVPA a dead letter.

"The first step [in statutory interpretation] 'is to determine whether the

language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart,* 534 U.S. at 450 (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997)). Instead of considering the plain meaning of the TVPA's specific language, the District Court accepted the extension of the FSIA to effectively *all* individual officials and left operable only TVPA claims falling under the FSIA exceptions. It found there was no conflict between its application of immunity to those acting in their official capacity and the TVPA because "where an FSIA exception applies, a foreign state official acting in his official capacity could be sued under the TVPA." SA-8 (internal citations omitted). But limiting the TVPA to FSIA exceptions essentially would defeat both the plain language of the statute and its purpose to provide a statutory basis for claims like those in *Filártiga,* to which no exception would apply. The "commercial activities" exception, 28 U.S.C. §1605(a)(2), would not encompass acts of torture and extrajudicial execution. *See Saudi Arabia v. Nelson,* 507 U.S. 349 (1993). The exception for declared state sponsors of terrorism, §1605(a)(7) would be inapplicable in many of these cases. The FSIA exception for tortious conduct "occurring in the United States," §1605(a)(5), clearly would not reach the type of conduct that *Filártiga* and its progeny have found actionable. The District Court's decision would have the absurd result of excluding precisely those claims which the TVPA was intended to reach.

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE POLITICAL QUESTION DOCTRINE.

The District Court erroneously found that Plaintiffs' claims were non-justiciable political questions, substituting "political" concerns for the particularized analysis required under *Baker v. Carr,* 369 U.S. 186 (1962). Despite the absence of a prior political decision that Plaintiffs' claims would contradict and disregarding that Plaintiffs' ATS and TVPA claims are constitutionally committed to the judiciary, the District Court erroneously found that the fourth and sixth *Baker* factors preclude adjudication. Instead, the District Court deferred to the requests for dismissal by the U.S. Executive and the Ambassador's Letter, and substituted generalized requests for case-specific concerns. The District Court further erred by finding that Plaintiffs' claims are not solely against Defendant for the attack at issue, and by relying on potential diplomatic concerns in a "uniquely volatile region." Finally, the District Court erred procedurally by reaching the political question doctrine after finding that it lacked subject matter jurisdiction under the FSIA, and by looking outside the pleadings, despite treating it as a Rule 12(b)(6) issue on Defendant's Rule 12(b)(1) Motion.

A. Plaintiffs' Claims Are Justiciable Under the *Baker v. Carr* Factors.

The political question doctrine, which is "essentially a function of the separation of powers," is "one of 'political questions,' not one of 'political

cases.'" *Baker,* 369 U.S. at 217. The doctrine ensures that courts adjudicate questions which are by nature legal, i.e., they are competent to decide, not political, i.e., issues committed to the "political" branches. "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. The District Court, however, conflated the justiciability doctrine with a concern for "political" considerations, finding that Plaintiffs' claims against a "high-ranking official of Israel, a United States ally," challenged "military actions" involving the "response to terrorism in a uniquely volatile region," that elicited requests for dismissal from the U.S. government and Israel. SA-16-18. The District Court erred in concluding that because this case may touch foreign relations, it "lies beyond judicial cognizance." *Baker*, 369 U.S. at 211.

The District Court found that "[t]he *Baker* factors--and particularly factors four and six--*strongly suggest* that this action involves a political question." SA-16 (emphasis added). Unless at least one of the *Baker* factors "is *inextricable* from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Baker*, 369 U.S. at 217 (emphasis added). The District Court failed to conduct any "discriminating inquiry into the precise facts and the posture of [this] particular case." *Id.* The six *Baker* factors "are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). "In recent years, the Supreme Court has only applied the political question doctrine to cases

implicating the first two *Baker* criteria." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.,* 438 F. Supp. 2d 291, 297 (S.D.N.Y. 2006)); *see, e.g., Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. v. Munoz-Flores*, 495 U.S. 385 (1990); *Nixon v. U.S.*, 506 U.S. 224 (1993); *Goldwater v. Carter*, 444 U.S. 996 (1979). The District Court did not analyze the first most significant *Baker* factors; such analysis demonstrates that none is implicated by Plaintiffs' claims. It also failed to properly analyze the fourth and sixth factors, let alone find that they were "inextricable" from this case.

The first *Baker* factor is not present in this case. The "dominant consideration in any political question inquiry is [the first factor,] 'whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991)(internal citations omitted)(finding challenge to foreign aid program did not usurp political branches' foreign policy). Noting that this first *Baker* factor is of "particular importance," *Klinghoffer v. S.N.C. Achille Lauro* found that tort issues are "constitutionally committed" to the judiciary. 937 F.2d 44, 49 (2d Cir. 1991); *see also, Kadić,* 70 F.3d at 249 (ATS suits committed to the judiciary). The judiciary cannot shirk its constitutional responsibility "to interpret statutes" merely because a "decision may have significant political overtones." *Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

The second factor applies if there is a "lack of judicially discoverable and manageable standards for resolving" an issue, and the third factor is only

present if it is impossible to decide an issue without "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

As this Court found in *Kadić:*

> *Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch.

70 F.3d at 249.

The District Court erred by ignoring this Court's directive that the "fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadić*, 70 F.3d at 249. The District Court did not find that adjudicating Plaintiffs' claims would "contradict prior decisions" taken by the Executive. In fact, the Executive did not identify any prior decisions, or any alternate processes it has established to resolve Plaintiffs' claims.

In re MTBE found plaintiffs' claims justiciable because there was "no sign that Congress or the President has set up an alternative forum or entered into an agreement to resolve plaintiffs' product liability claims outside the

judicial process". 438 F. Supp. 2d at 303; *accord, Whiteman v. Dorotheum GMBH & Co.,* 431 F.3d 57, 59-60 (2d Cir. 2005) (finding that litigation would "substantially" undermine foreign policy because the U.S. had entered into executive agreements to resolve plaintiffs' claims and had established an alternative international forum to consider them).

Plaintiffs' claims are not inextricable from the fourth *Baker* factor because the court may undertake an "independent resolution without expressing lack of the respect due coordinate branches of government." *See Klinghoffer,* 937 F.2d at 49-50 (finding that since political branches expressly endorsed suing terrorist organizations in federal court through passage of Anti-Terrorism Act, permitting adjudication "will not exhibit a lack of the respect due coordinate branches of government"). The Executive and Legislative branches have spoken in enacting the ATS and TVPA. In passing the TVPA, "Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts," and has "communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business." *Wiwa v. Royal Dutch Petroleum,* 226 F.3d 88, 106 (2d Cir. 2000).[5]

Resolution of Plaintiffs' claims is similarly not inextricable from the sixth *Baker* factor because it will not result in embarrassment from multifarious

[5] Similarly, the fifth *Baker* factor, "an unusual need for unquestioning adherence to a political decision already made," is not applicable here, as no prior political decision has been identified. *Baker,* 369 U.S. at 217.

pronouncements by various departments on one question. *Baker,* 369 U.S. at 217. Because it is the court's constitutional role to resolve whether federal statutes have been violated, "'there is no possibility of multifarious pronouncements" on this question." *I.N.S. v. Chadha*, 462 U.S. 919, 941 (1983)(no possibility of multifarious pronouncements since the constitutionality of a statute is for the court to resolve). *See also, Klinghoffer,* 937 F. 2d at 50 (no potential for embarrassment since claims were consistent with policy underlying statute); *Alperin v. Vatican Bank,* 410 F.3d 532, 558 (9th Cir. 2005)("fulfilling [the court's] constitutionally-mandated role to hear controversies properly before [it] does not threaten to cause embarrassment or multiple pronouncements"). Moreover, the "absence of executive and legislative action obviates concern" with regard to the sixth *Baker* factor. *In re Agent Orange*, 373 F. Supp. at 72.

B. To the Extent the U.S. Government Expressed Foreign Policy Concerns, They Are Not Case Specific, and Do Not Warrant Dismissal.

Where 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. *See, e.g., Sosa,* 542 U.S. at 733, n.21 (there is a "strong argument" that the Executive's "view of the case's impact on foreign policy" should be given "serious weight"); *City of New York v. Permanent Mission of India to the UN*, 446 F.3d 365, 377, n.17 (2d Cir. 2006), *aff'd on other grounds,* 127 S. Ct. 2352 (2007)("the executive branch's

views on matters implicating relations with foreign states are entitled to consideration").

There can be no conflict with executive statements of policy on these facts because the government condemned the conduct at issue. The Bush Administration condemned this "deliberate attack against a building in which civilians were known to be located." A-14¶3. The Government's SOI reiterated its "serious objections" to the attack, and noted its repeated criticism of the "use of heavy weaponry in densely populated areas…." A-114-15.[6] There has been no pronouncement by the Executive (or Congress) supporting the deliberate bombing of a civilian apartment, the specific act at issue here. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc*., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) ("Given the extensive condemnations that the United States government has already issued, any criticism of Sudan that would arise as a result of the adjudication of this case would be a mere drop in the bucket.").

The SOI sought to "clarify" the Government's "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

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[6] The U.S. State Department found that the Israeli security forces' bombing of the "densely populated" Al-Daraj neighborhood "put large numbers of civilian lives in jeopardy…where civilian casualties were likely" and that Israel had used "imprecise, heavy weaponry in operations [in such attacks]…*in contravention of their own rules of engagement*" (emphasis added). 2002 State Department Country Report on Human Rights Practices in Israel and the Occupied Territories, available at http://www.state.gov/g/drl/rls/hrrpt/2002/18278.htm.

disproportionate use of force, issues not raised by Defendant. A-115. These legal arguments do not express a contrary executive branch enunciation of policy which would be the concern of a political question analysis. Furthermore, the Government's legal arguments "merit no special deference." *Altmann,* 541 U.S. at 701.

The SOI addressed the political question doctrine in a footnote, observing only that "if plaintiffs had a valid cause of action by which to bring their claims, "there would be a serious issue whether this *particular* case should be dismissed on political question grounds, as Dichter argues." A-164, n.56. The District Court erred in attributing to the Government positions it declined to take: how this *particular* case could interfere with U.S. foreign policy or disrupt the Executive's conduct of foreign affairs. The District Court erroneously found that the "State Department has advocated *forcefully* for the dismissal of this action based *in part* on foreign policy concerns." SA-18 (emphasis added).

The District Court erroneously cited the SOI as contending that "the *claims asserted by Plaintiffs* 'threaten to enmesh the courts in policing armed conflicts across the globe--a charge that would exceed judicial competence and intrude on the Executive's control over foreign affairs.'" SA-17 (quoting A-116)(emphasis added). It also erred in citing the SOI as claiming that "[a]llowing *this case* to proceed 'would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all.'" SA-17 (quoting A-158)(emphasis added). The SOI did

not argue that these ramifications would follow from Plaintiffs' specific claims; it argued that they would follow if the court were to recognize a cause of action for the disproportionate use of force. SA-17. The SOI 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." A-165, n.36 (emphasis added). Such broad foreign policy concerns are not the "case-specific" type that should arguably be given "serious weight." *Sosa,* 542 U.S. at 733, n.21. General arguments regarding foreign policy implications of causes of action cannot be the subject of the political question doctrine, which requires a "discriminating inquiry into the precise facts and posture of the particular case". *Baker,* 369 U.S. at 217; *see,* Section III(A); *see also, Permanent Mission of India,* 446 F.3d at 377, n.17 (finding that none of the potential foreign policy concerns in the United States' statement "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").[7]

[7] Notably, the Supreme Court in *Permanent Mission* decided to allow the case to proceed without the majority even acknowledging the United States Amicus brief that had asserted that permitting the type of suit at issue "would adversely affect the Nation's foreign relations". Brief for the United States as Amicus Curiae Supporting Petitioners, *Permanent Mission of India v. City of New York*, 127 S. Ct. 2352 (2007)(No. 06-134), 2007 U.S. S. Ct. Briefs LEXIS

Even if deference were due the Executive's view that a cause of action for disproportionate use of force would intrude on foreign affairs (which is not case-specific), and even assuming that would implicate a *Baker* factor (which it does not), the District Court still erred in dismissing all of Plaintiffs' claims. Defendant did not move to dismiss on the basis that Plaintiffs failed to state a cause of action for the disproportionate use of force, so it was not before the District Court. A-39; *see also,* Defendant's Response to the Statement of Interest of the United States of America, (1/18/07)(Docket #40) ("Defendant's SOI Response"), at p.2, n.1. A proportionality analysis is not relevant to most of Plaintiffs' claims, which include extrajudicial killings, war crimes, and crimes against humanity. For example, war crimes include attacks directed at civilians or civilian objects, which are absolutely prohibited without exception, without regard to any proportionality analysis. Cassese Decl., A-51. Certainly the TVPA's prohibition on extrajudicial killing does not take into consideration whether the killing was "proportionate." 28 U.S.C. 1350 (note).[8] No foreign policy concern related to Plaintiffs' particular claims has been identified.[9]

217, at **2. In *Sosa,* 542 U.S. 692, the Court rejected the Executive's argument that permitting any ATS human rights claim was "incompatible" with the political branches' foreign affairs authority. Brief of the United States Supporting Petitioner at 40-46, *available at* www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-0339.mer.aa.pdf.

[8] The SOI's assertion and the District Court's deference is particularly ironic since the Israeli High Court of Justice has found that bombing a building from the air harming scores of residents is clearly disproportionate. *Targeted Assassination Judgement*, ¶46. The High Court also rejected the Israeli Government's argument that the issues were non-justiciable, finding that 1) the

C. **The District Court Erroneously Deferred to Requests for Dismissal by the U.S. Executive and the Israeli Ambassador.**

The District Court erroneously deferred to the opinions of the Israeli Executive and the U.S. Executive that the case should be dismissed. *See, e.g.,* SA-16 ("Israel and the State Department…urge dismissal of this action"); SA-18 (distinguishing cases because they did not "elicit a request for dismissal from the Department of State and the government of the foreign state"). The District Court failed to execute its constitutionally mandated role of adjudicating Plaintiffs' statutory claims out of deference to the purported desires of a foreign Executive and the U.S. Executive. *Cf., First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972)(Powell, J. concurring)("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine."). *See also, Ungaro-Benages v. Dresdner Bank* 379 F. 3d 1229,

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doctrine does not apply to the enforcement of human rights; 2) the questions were legal, not political (despite the likelihood of political implications), including the question regarding norms of proportionality; 3) international courts have decided the same types of questions; and 4) judicial review of conduct ensures objective *ex post* examinations function properly. *Id.* at ¶¶47-54.

[9] To the extent the District Court considered the SOI's concerns that allowing Plaintiffs' claims to proceed would invite reciprocity in foreign jurisdictions (SA-10), this Court has rejected that position. *See Permanent Mission,* 446 F.3d at 377, n.17; *see also,* Letter from United States to the Honorable Roseann B. MachKechnie (Feb. 23, 2006) (attachment 1 to Defendant's SOI Response). A political branch's "power to protect itself" is not a *Baker* factor. *U.S. v. Munoz-Flores*, 495 U.S. 385 (1990)(finding that Congress acted unconstitutionally would not show "lack of respect").

1236 (11th Cir. 2004)("A statement of national interest alone. . .does not take the present litigation outside of the competency of the judiciary," so as to constitute a political question).

The U.S. Executive's desire to have a case dismissed is not entitled deference – such deference would undermine the separation of powers concerns the political question doctrine is intended to protect. "[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* [defendants] in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Altmann*, 541 U.S. at 702. It is the *State Department's* views on the *implications* of exercising jurisdiction over a *particular* defendant for his conduct that *might* be entitled to deference as the Executive's *judgment* on a specific foreign policy question.

The District Court erroneously relied on *Kadić*'s recognition "that the State Department had 'expressly disclaimed any concern that the political question doctrine should be invoked.'" SA-18 (quoting *Kadić,* 70 F.3d at 250). *Kadić* does not stand for the proposition that governmental requests for dismissal require deference; the State Department's opinion merely reinforced its decision that the claims were justiciable. *Kadić*, 70 F.3d at 250 ("an assertion of the political question doctrine by the Executive Branch…would not necessarily preclude adjudication").

A foreign government's desire to have a case dismissed is also not entitled deference. The District Court substituted the required political question doctrine analysis with a concern that the Complaint criticizes actions done "on behalf of Israel and in furtherance of Israeli foreign policy." SA-16. Its assertion that the acts were done in furtherance of Israeli "foreign" policy is not based on the record, and demonstrates a misapprehension of the scope of the political question doctrine.[10] A *foreign* nation's policy interests are irrelevant to the separation of powers concerns underlying the political question doctrine.[11] A foreign executive's desire to have a case dismissed, as articulated in the Ambassador's Letter, should be accorded no weight. "Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they tailor their rulings to accommodate a non-party." *Patrickson v. Dole Food Co*., 251 F.3d 795 (9th Cir. 2001), *cert. dismissed in part, aff'd in part on other grounds,* 538 U.S. 468 (2003). "[T]he relevant question is not whether the

[10] Moreover, the District Court unquestioningly and erroneously accepted the Ambassador's claim that "anything" Defendant did was done "on behalf of Israel" and in furtherance of "official" policies, without any analysis of what acts were actually being challenged. SA-16 (citing A-44). *See, e.g.,* Section IV.

[11] The District Court cited no authority to support taking judicial notice of the "official policy and opinion" of a *foreign* government (SA-16, n.4), which may be subject to reasonable dispute since it is not "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The District Court further erred in taking judicial notice of Israel's official policy and opinion without permitting Plaintiffs the "opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." Fed. R. Evid. 201(c). Plaintiffs objected to the admission of the Ambassador's Letter. A-7.

foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States." *Id.* at 804. "If courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation…." *Id.*

D. The District Court Erroneously Found that Plaintiffs' Claims Are Not Solely Against Defendant.

The District Court plainly erred in finding that "Plaintiffs do not limit their claims to the Defendant or the al-Daraj bombing." SA-16; *see also,* SA-18 (distinguishing justiciable cases because they were not "asserted against a sovereign state"). Plaintiffs only brought claims against Defendant Dichter and only for the attack that injured them and killed their loved ones. *See, e.g.,* A-13-15¶¶1-8; A-19-21¶¶21-35; A-22-23¶¶39-45. *See also,* A-88:20-22 ("This case here is seeking damages for one attack against one individual, not against the state."); A-82:11-16 ("we are not challenging the policy"). In order to support its finding, the District Court disregarded Plaintiffs' allegations in their 128 paragraph Complaint and counsel's statements and instead cited three contextual paragraphs found in the "Background" and "General Allegations" sections. A-16-17 (citing A-18¶17; A-19¶19; A-25¶63).

The District Court's analysis is inconsistent with *Planned Parenthood Federation, Inc. v. Agency for International Dev.*, which held that "non-justiciable attacks" in a complaint do not place plaintiffs' challenge "beyond

judicial cognizance," where the "precise issue" in question is justiciable. 838 F.2d 649, 655 (2d Cir. 1988). *See also, Knox v. PLO*, 306 F. Supp. 2d 424, 428-29 (S.D.N.Y. 2004)(overlooking collateral allegations, including that the Palestinian Liberation Organization ("PLO") and the Palestinian Authority ("PA") "have carried out terrorist attacks as an established and systematic policy and practice and as a means of achieving their political goals," finding the precise questions at issue – whether plaintiffs stated a cause of action arising out of an attack – were justiciable). "On the contrary, the complaint is narrowly focused on the lawfulness of the defendants' conduct in a single incident." *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992). *Linder* found torture and murder claims against individual defendants justiciable even though a civil war was in progress and the acts were allegedly "part of an overall design to wage attacks…as a means of terrorizing the population." *Id.* at 336.

The District Court's reliance on *Aktepe v. United States,* 105 F.3d 1400 (11th Cir. 1997), is misplaced. The plaintiffs' purported attempt to cast their case against the U.S. as a "common negligence action directed at lower-level military operatives" did not relate to whether the US was the defendant, but to the nature of their allegations, which challenged the Navy's practices and "communication, training, and drill procedures." 105 F.3d at 1404. The court noted that the Constitution reserves responsibility for developing U.S. military training procedures with the political branches, *id.* at 1403, a separation of

powers concern not implicated in Plaintiffs' claims against a foreign individual defendant.

E. The "Volatility" of the Region is Irrelevant to the *Baker* analysis.

To find a political question, the District Court relied on the "volatile" nature of the region and the potential impact on U.S. diplomacy there. SA-17. Although the Ambassador's Letter asserted that *Plaintiffs' case* touches on issues related to the peace process and ongoing diplomatic efforts, the U.S. declined to comment on those issues, focusing instead on potential ramifications of a cause of action for the disproportionate use of force. A-44; A-157-58. The District Court relied on two district court cases from other circuits that touch on Israeli actions. It found that it could not "ignore the potential impact of this litigation on the Middle East's delicate diplomacy." SA-17 (citing *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005)). The Ninth Circuit's affirmance in *Corrie* does not support the District Court's analysis. The Ninth Circuit declined to find relevant implications for "delicate diplomacy," but narrowly found the case non-justiciable because the Executive had already made a policy determination that Israel "should purchase" the bulldozers and the U.S. had paid for the bulldozers, and adjudicating the case would require the court to decide that defendant should not have sold Israel bulldozers. *Corrie v. Caterpillar*, No. 05-36210, 2007 U.S. App. LEXIS 22133 at *23 (9th Cir. Sept. 17, 2007). There is no such contradictory Executive policy in this case.

Finding this case would "impede the Executive's diplomatic efforts" and cause "dissonance and embarrassment," the District Court also relied on *Doe v. Israel,* in which plaintiffs had sued the State of Israel and current Israeli officials, including the Prime Minister (as well as President Bush) for damages for Israel's settlement activities, injunctive relief, and a declaration that Israel's "self-defense policies are tantamount to terrorism." 400 F. Supp. 2d 86, 112 (D.D.C. 2005). In contrast, Plaintiffs here ask this Court to determine the liability of one individual for one act which has been condemned by the U.S., and is contrary to Israeli as well as international law. In finding that Plaintiffs' claims against Dichter for this attack would impede U.S. diplomatic efforts in the Middle East, a position the U.S. Government did not assert, the District Court substituted *its* foreign policy judgment for that of the political branches.

Claims are not rendered non-justiciable because they arise in a "volatile" or "politically charged" context. *Klinghoffer* rejected defendant's assertion that the case was non-justiciable because it raised foreign policy questions in a volatile context, even where its decision relating to the PLO attack on a passenger vessel would "surely exacerbate the controversy surrounding the PLO's activities." 937 F.2d at 49. *See also, Ungar v. Palestinian Liberation Org.,* 402 F.3d 274, 281 (1st Cir. 2005)(finding claims against PLO and PA for a killing in Israel justiciable); *Biton v. Palestinian Interim Self Gov't,* 310 F. Supp. 2d 172, 184 (D.D.C. 2004)("Although the backdrop for this case - *i.e.*, the Israeli-Palestinian conflict - is extremely politicized, this circumstance alone is

insufficient to make the plaintiffs' claims nonjusticiable"). The proposition that "a wanton massacre of innocents" would be non-justiciable "cuts against the grain of what compels the business of the courts." *Knox*, 306 F. Supp. at 448; *see also, Sharon v. Time*, 599 F. Supp. 538, 552 (S.D.N.Y. 1984). The principle in these cases applies equally to killings of Palestinians as it does to killings by Palestinians. To deem the claims of civilian victims of a conflict non-justiciable because of what side of a line they fall would be to render what should be a legal decision into a political one. "[J]udges should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in [the] context of human rights." *Kadic*, 70 F.3d at 249.

F. Courts Routinely Adjudicate Claims Arising From Military Actions

To the extent the District Court placed reliance on the "military" nature of the action "criticized" (SA-16), or that it arose out of a conflict (SA-17), such factors do not bar adjudication on political question grounds. Courts have refused to apply the political question doctrine to bar claims regarding even U.S. military operations. *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992)(holding that "federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians"); *In re Agent Orange*, 373 F. Supp. 2d 64 (political question did not bar claims against U.S. corporations that manufactured and supplied herbicides to the U.S. and South Vietnam governments); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C.

2005)(no political question for torture and war crimes claims against U.S. military contractors); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1511-15 (D.C. Cir. 1984), *vacated,* 471 U.S. 1113 (1985), *dismissed on other grounds*, 788 F.2d 762 (D.C. Cir. 1986)(U.S. military's construction and operation of training camp in Honduras did not present political question). Courts have refused to dismiss on political question grounds even when claims arise during ongoing wars. *See, e.g., Kadic,* 70 F.3d at 249-250 (former Yugoslavia); *Ibrahim*, 391 F. Supp. 2d at 17; (Iraq); *Presbyterian Church*, 244 F. Supp. 2d at 347 (Sudan civil war).

The Supreme Court has repeatedly permitted actions to be brought even against U.S. soldiers and officials for wrongful or tortious conduct taken in the course of warfare. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851)(U.S. soldier sued for trespass while in Mexico during Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878)(soldier was not exempt from civil liability for violations if actions not done in accordance with the usages of civilized warfare); *The Paquete Habana*, 175 U.S. 677 (1900)(court imposed damages for seizure of two Spanish fishing vessels by U.S. forces during Spanish American War). *See also*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004)("The Constitution's allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to 'combat'" or from reviewing "military decision-making in connection with an

ongoing conflict"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

G. The District Court's Political Question Dismissal Was Procedurally Erroneous.

The District Court found it "would" dismiss on political question grounds if the FSIA did not apply. SA-15; SA-5, n.1. Because the District Court found it lacked subject matter jurisdiction under the FSIA, it erred in reaching the political question issue. "[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp*., 127 S. Ct. 1184, 1193 (2007).

The District Court also erred by dismissing Plaintiffs' claims on political question grounds under Rule 12(b)(6) on Defendant's Rule 12(b)(1) jurisdictional motion without distinguishing between them, deciding it would dismiss "regardless of which rule applies." SA-5, n.1.[12] "Dismissal on jurisdictional grounds and for failure to state a claim are analytically distinct, each bearing different burdens and implicating different legal principles." *Johnsrud v. Carter,* 620 F.2d 29, 32-33 (3d Cir. 1980). Under Defendant's Rule 12(b)(1) Motion, Plaintiffs' claims "should not be dismissed on jurisdictional

[12] The District Court found that "a motion to dismiss on political question grounds is appropriately analyzed under *Rule 12(b)(6)*." SA-5, n.1 (citing *In re MTBE,* 438 F. Supp. 2d at 294-95); *see also, Kadic*, 70 F.3d at 249 (political question doctrine is a "nonjurisdictional, prudential doctrine[]"); *Baker,* 369 U.S. at 198-99 (finding jurisdiction before proceeding to justiciability, and finding the distinction between the two significant).

grounds unless they are unsubstantial and frivolous." *Baker*, 369 U.S. at 199. Despite Defendant's jurisdictional motion and concession that the "Government's foreign policy concerns are contingent on whether the case proceeds on the merits" (Defendant's SOI Response, p.9, n.5), the District Court dismissed the political question issue under Rule 12(b)(6), erroneously looking outside the pleadings. *See, In re MTBE*, 438 F. Supp. 2d at 295 ("for a motion to dismiss on nonjusticiability to succeed, it must be clear *from the Complaint* that the case involves or requires determination of an inextricably linked political question")(emphasis added). *See also* sec.IV.

IV. THE DISTRICT COURT ERRED BY LOOKING OUTSIDE THE PLEADINGS WITHOUT GRANTING PLAINTIFFS' JURISDICTIONAL DISCOVERY REQUEST.

The District Court erroneously denied Plaintiffs' request for discovery, purportedly relying on "evidence" presented by Defendant that he acted "only" in his official capacity and the purported "absence of factual allegations presented by plaintiff[s] to indicate otherwise." SA-3, fn.3. (quoting *Rein v. Rein*, No. 95-4030, 1996 U.S. Dist. LEXIS 6967, at * 7 (S.D.N.Y. May 23, 1996)). The "evidence" was the Ambassador's Letter. SA-11 (citing A-44). The legal opinion of a foreign Ambassador on a matter of U.S. law is not entitled to any deference. *Cf., Altmann*, 541 U.S. at 701 (finding that even the legal arguments of the United States "merit no special deference"). Even where a court considers materials outside the pleadings on a motion to dismiss for lack

of jurisdiction, courts still "credit a plaintiff's averments of jurisdictional facts as true." *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003)(citation omitted); *See also, Jerome Stevens Pharms., Inc. v. FDA*, 402 F. 3d 1249, 1253 (D.C. Cir. 2005)(quoting *United States v. Gaubert*, 499 U.S. 315, 327 (1991)). Plaintiffs alleged that Defendant's actions were unlawful (A-21-36), and therefore they fell outside the scope of his lawful authority.

The District Court also erroneously relied upon the Ambassador's Letter to conclude that Israel had "expressly ratified" Defendant's actions that such actions were acting pursuant his official duties. SA-12. The Ambassador's Letter baldly asserts that "anything" Defendant did "in connection with the events at issue" was in the course of his "official duties, and in furtherance of official policies." A-44. It does not claim, nor could it, that dropping a one-ton bomb on an apartment building was lawfully authorized. At best the Ambassador's Letter supports a finding that Defendant was a government official at the time of alleged violations and was vested with *some* authority by the State of Israel to do *something*. An unsworn letter asserting sovereignty without discussing job responsibilities, as submitted here, hardly precludes jurisdictional discovery.

"[C]ourts have required that evidence submitted outside the pleadings be 'competent.'" *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986). Even if the Ambassador's Letter were considered competent and relevant evidence, it was error for the District Court to accept the Ambassador's

assertion as a factual matter without permitting Plaintiffs to have limited jurisdictional discovery to discover the *factual* bases underlying its claims. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 208-09 (finding "the district court improperly denied plaintiffs the opportunity to engage in limited discovery" to establish the court's jurisdiction over a defendant). Specifically, Plaintiffs should have been able to discover whether the challenged actions fell within Defendant's duties, powers and responsibilities under applicable law, i.e., the scope of his lawful authority, and indeed *what* were Defendant's lawful duties, powers and responsibilities. "The determination of whether [defendants] are entitled to claim sovereign immunity because they were acting in their official capacities, and thus were agencies or instrumentalities of a foreign state, does require the court to apply law to facts." *Jungquist*, 115 F.3d at 1026. *See also, Kline*, 685 F. Supp. at 389; *Liu Qi*, 349 F. Supp. 2d at 1283.

Furthermore, courts "have required that the party asserting jurisdiction be permitted discovery of facts demonstrating jurisdiction, at least where the facts are peculiarly within the knowledge of the opposing party." *Kamen*, 791 F.2d at 1011. *See also Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004). Because the exact nature of Defendant's actions and the extent to which they were undertaken in his official capacity and within his lawful authority are facts "peculiarly within the knowledge" of Defendant, jurisdictional discovery is necessary in this case.

A court may be found to have abused its discretion if it lacked sufficient

information to determine immunity. *Filus v. Lot Polish Airlines,* 907 F.2d 1328, 1333 (2d Cir. 1990)(reversing dismissal of plaintiff's claims under the FSIA as the district court did not have sufficient information to determine whether exceptions applied). Whether Defendant's acts were within the scope of his legal authority was essential to a determination of Defendant's immunity under the FSIA and thus the District Court erred as a matter of law by failing to construe Plaintiffs' allegations in their favor. *See, In re Terrorist Attacks*, 349 F. Supp 2d at 792; *In re Terrorist Attacks*, 440 F. Supp. 2d 281 (S.D.N.Y 2006)(limited jurisdictional discovery granted to determine whether bank qualified an "instrumentality" under FSIA); *Gilson v. Republic of Ireland,* 682 F.2d 1022, 1026 (D.C. Cir. 1982)(reversing dismissal of plaintiff's claims for lack of jurisdiction under the FSIA because "the facts as alleged – and generously interpreted – ma[de] a dismissal at least premature in light of the dearth of fact-finding done by the district court"). Indeed, in the very case cited by the District Court, *Rein*, the defendants had filed affidavits upon which the court relied to determine whether the specific challenged acts were taken within the scope of defendants' authority. 1996 U.S. Dist. LEXIS 6967 at * 4-5. No such affidavits are before the Court in this case, and thus there is nothing for the Plaintiffs in this case to rebut or undermine. For the same reason, the District Court's reliance on *El Fadl* is misplaced, as dismissal on sovereign immunity grounds was affirmed after defendant submitted an affidavit regarding his responsibilities and the plaintiff failed to present any evidence that the

defendant was acting outside of his official capacity. *El-Fadl,* 75 F.3d at 671.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand to the District Court.

Dated: September 24, 2007
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' opening 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 13,929 words (including footnotes), which is within 14,000 words.

__/s/ Maria C. LaHood_
Maria C. LaHood

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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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