UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RA'ED MOHAMMAD IBRAHIM MATAR, on behalf of himself and his deceased wife Eman Ibrahim Hassan Matar, and their deceased children Ayman, Mohamad and Dalial; MAHMOUD SUBHAI AL HUWEITI, on behalf of his 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, vs. AVRAHAM DICHTER, former Director of Israel's General Security Service, Defendant.	Civil Action No. 1:05 CV 10270 (WHP) ECF Case

AVRAHAM DICHTER'S RESPONSE TO THE STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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The United States has filed a Statement of Interest detailing why proceeding with this case would undermine important interests of the U.S. Government. The Government's Statement brings to bear long experience with the relevant statutes and reflects the foreign policy expertise of the State Department, which would have to deal with the problems created by an erroneous result. Applying that experience and expertise, the Statement establishes not only that this Court lacks jurisdiction, but also that leaping over the jurisdictional barriers and litigating Plaintiffs' claims "could seriously harm U.S. interests." Statement of Interest of the United States of America ("S.I."), at 2.

In the last 14 months, three United States District Courts have dismissed cases attacking Israeli actions undertaken in its defense against terrorist attacks. *Doe v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005); *Belhas v. Ya'alon*, Civ. A. No. 05-2167 (PLF), 2006 WL 3628972 (D.D.C. Dec. 14, 2006). The U.S. Department of State now urges the same result here on the ground that Mr. Dichter "is immune from suit for the official acts alleged in this lawsuit." S.I. at 52. The Department is right. This case should be dismissed.

I. THE GOVERNMENT REAFFIRMS THAT ADJUDICATING THIS CASE WOULD INTERFERE WITH THE FOREIGN POLICY OF THE U.S.

A. The Government Has Identified Adverse Diplomatic Consequences of Litigating Plaintiffs' Claims, Warranting Application of the Political Question Doctrine

The United States argues, as Mr. Dichter did, that sovereign immunity protects him from liability and deprives this Court of jurisdiction over this case. The Government also contends that there is no private cause of action for alleged disproportionate use of military force in armed

conflict.[1] Given that the State Department advocates dismissal based on sovereign immunity, it reaches the issue of political question conditionally. In the view of the State Department, *if* the Court asserts jurisdiction and "*if* plaintiffs had a valid cause of action by which to bring their claims, there would be a serious issue whether this particular case should be dismissed on political question grounds, as Dichter argues." S.I. at 51 n.36 (emphasis added).

The Court could indeed decide this case based solely on sovereign immunity, as the District Court for the District of Columbia did just last month in dismissing parallel claims by the same counsel against an Israeli general. *Belhas*, 2006 WL 3628972, at *6. That Court noted that it had "no trouble dismissing a claim based on one jurisdictional bar rather than another." *Id.* (quoting *Center for Law & Ed. v. Dept. of Ed.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005)). The same logic, however, applies conversely to the political question doctrine. It, too, is jurisdictional and thus can be considered at the outset in addition to alternative jurisdictional grounds for the Court's decision. *See, e.g.*, *Whiteman v. Dorotheum GMBH & Co.*, 431 F.3d 57, 73 n.18 (2d Cir. 2005) (dismissing claims under political question doctrine and noting that sovereign immunity arguments "need not be the first in our order of consideration"); *Doe*, 400 F. Supp. 2d at 111-13 (dismissing claims against Israel and government officials based on sovereign immunity as well as the political question doctrine).

In this case, dismissal now based on the political question doctrine is particularly appropriate. The mere initiation of this litigation raised political questions. At the inception of this case and its companion in the District of Columbia (which the Court there dismissed), the

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[1] While Mr. Dichter agrees that Plaintiffs have no cause of action -- for many reasons in addition to those advanced by the Government -- he has moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. Thus, he does not address this or other issues regarding the merits at this stage. He reserves the right -- as he did in his opening brief -- to raise Fed. R. Civ. P. 12(b)(6) arguments as the Rules allow, should the Court determine it has jurisdiction. *See* Br. at 6 n.5.

Ambassador of Israel protested to the State Department regarding the "fundamental inappropriateness and political nature of these lawsuits." Kalicki Decl. Ex. A (Letter from D. Ayalon, Ambassador of Israel, to N. Burns, Under-Secretary of State for Political Affairs, Feb. 6, 2006) ("Israel Letter"). Among other things, this suit -- both intrinsically and expressly in alleging lack of adequate remedies in Israel, Compl. ¶¶ 44, 88 -- demeans the judicial system of a democratic ally, where the High Court has dealt cogently and thoroughly with many issues Plaintiffs raise.[2] The interference with foreign relations surely would intensify if the matter progressed. But this Court can and should dismiss this case now under the political question doctrine based on the current intrusion, as well as the potentiality -- indeed, certainty -- of a full-scale invasion in litigating this case.

Whether subjunctive or otherwise, the United States' Statement of Interest establishes that certainty, leaving no doubt, as Mr. Dichter contends, that adjudicating this case would create serious foreign policy concerns. The State Department, for example, both amplifies and particularizes the concern expressed by Mr. Dichter that proceeding with this case could expose senior U.S. officials to suits in foreign courts arising out of their official acts. The State Department warns that withholding sovereign immunity from a senior Israel official acting on behalf of his government "could seriously harm U.S. interests, by straining diplomatic relations and possibly leading foreign nations to refuse to recognize the same immunity for American

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[2] Just last month, for example, the High Court ruled that targeted killings could be challenged on a case-by-case basis in the Israeli courts, *see Public Comm. Against Torture in Israel v. Israel*, HJC 769/02 (High Ct. 2006) (Israel), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (official High Court translation), and separately ruled that the State of Israel could be sued for damages by civilians injured during army non-combat operations in the West Bank and Gaza. *See* "Israel Court Allows Some Suits by Palestinians Hurt by Army," N.Y. Times, Dec. 13, 2006, at A10, *available at* 2006 WLNR 21474565. As previously noted, Plaintiff Matar has already brought such a damages action against Israel (but not Defendant Dichter personally) in Israeli courts. Br. at 4.

officials." S.I. at 2. Noting the international consensus to protect such officials, the State Department offers its diplomatic judgment that "parting with this international consensus would threaten serious harm to U.S. interests, by inviting reciprocation in foreign jurisdictions." *Id.* at 22. Just as Mr. Dichter noted the potential for political suits abroad against U.S. officials -- citing one such a suit in Germany by these Plaintiffs' counsel against U.S. cabinet officers, Br. at 22 -- the State Department expresses particular concern regarding existing and potential suits against U.S. government employees. Indeed, the Department predicts, the "global leadership responsibilities of the United States [put] its officials . . . at special risk of being made the targets of politically driven lawsuits abroad -- including damages suits arising from alleged war crimes. The immunity defense is a vital means of deflecting these suits and averting the nuisance and diplomatic tensions that would ensue were they to proceed." S.I. at 22. The State Department therefore concludes that it is "*of critical importance* that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn." *Id.* (emphasis added).

The Government also expresses the same concerns Mr. Dichter advanced about Plaintiffs' focus on military targeting decisions. The Government points out that Plaintiffs' complaint "asks this Court to adjudicate the proportionality of a military targeting decision by a foreign nation, in order to determine whether the degree of force used was unjustified by any legitimate military objective." *Id.* at 35. The Government rightly worries that allowing these and similar claims "would threaten to enmesh the courts in policing armed conflicts across the globe -- a charge that would exceed judicial competence and intrude on the Executive's control over foreign affairs." *Id.* at 3. Moreover, it would "raise serious concerns about the respective roles of the judiciary and the political branches in addressing sensitive disputes regarding armed

conflicts abroad," *id.* at 37, and would "strain the competence of the judiciary." *Id.* at 42; *see also id.* at 44 (judges "are generally in a poor position to resolve such questions").

Mr. Dichter cautioned that discovery in this matter could invade Israeli sovereignty, with -- among other intrusions -- potential attempts to invade the inner councils of the Israeli government, to seek disclosure regarding the means the Israeli military had available to conduct the attack at issue, the weapons it could have employed, the accuracy of that weaponry, the troops available, and any other assets it had in the vicinity, to assess Israeli intelligence reports, and to explore Israel's assessment of the risks to its troops of alternative courses of action. Based on its experience, the State Department echoes these concerns. It observes that, "[i]nitially, discovery into the knowledge, planning, and motives behind a foreign military attack would tend to be impracticable: most, if not all, of the relevant evidence would be in the exclusive control of governments and officials beyond the jurisdiction of the federal courts; and the information at issue would presumably be mostly classified or otherwise privileged. But more fundamentally, given the lack of a specific, objective standard of decision, even if the relevant information were discoverable, its 'digestion' would in any event often be 'beyond judicial management.'" S.I. at 42-43 (citation omitted).

Finally, in discussing the factors set forth in *Baker v. Carr,* 369 U.S. 186 (1962), for identifying political questions, Mr. Dichter cited the need for the Government to speak with one voice on matters affecting U.S. foreign policy in the Middle East. The State Department, which should know, forcefully articulates that imperative. As the Government states:

> It is an unfortunate fact that violent conflict remains a virtual constant in human affairs and exists today in numerous parts of the world -- not only in Israel and the occupied territories, but also in Iraq, Afghanistan, Chechnya, Sudan, Kashmir, and elsewhere. Civilian casualties arising from these hostilities can generate considerable political and diplomatic controversy, as this case

> offers but one illustration. *When such controversy arises, it is important for the Executive to be able to speak for the government with one voice -- or, for that matter, to keep silent; given the global leadership role of the United States, its pronouncements can draw intense international scrutiny and carry significant political and diplomatic consequences.* To allow overseas hostilities to become fodder for federal lawsuits would invite a stream of unpredictable commentary from the courts, creating "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Moreover, such suits would subject the foreign states and officials involved to the burdens and embarrassments of litigation, leading to strains in U.S. relations. *In both respects, such litigation would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all.*

S.I. at. 44-45 (emphasis added).[3]

Lest there be any doubt as to the Government's intense concern that litigating this case would interfere with U.S. foreign policy and thereby pose political questions, the final footnote of the Statement of Interest brings the point home. After setting out the consequences discussed above of allowing litigation on the military targeting decisions of foreign governments, the Government, though still in the subjunctive, offers the legal framework for its position: "These same concerns -- over judicial competence and interference with the Executive's conduct of foreign affairs -- *sound as well under the political question doctrine*, *see supra* nn. 29 & 31; and *if plaintiffs had a valid cause of action by which to bring their claims, there would be a serious issue whether this particular case should be dismissed on political question grounds*, as Dichter argues." S.I. at 51 n.36 (emphasis added). Citing among other decisions *Doe v. State of Israel,* 400 F. Supp. 2d at 111-13, the Government notes that, "[o]ther courts have dismissed cases

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[3] Indeed, as Mr. Dichter also argued, the State Department predicts that such judicial involvement would "cause embarrassment to the Executive not only to the extent that those pronouncements might conflict with positions taken by the Executive in its conduct of foreign affairs, but also to the extent that they might conflict with actions taken by the Executive in its conduct of military operations." S.I. at 45 n.30; *see* Br. at 23.

arising out of foreign hostilities on political question grounds precisely to protect the prerogatives of the Executive Branch." S.I. at 51 n.36. *See also id.* at 45 n.31 ("As with justiciability concerns, concerns over the potential for judicial intrusion into sensitive areas of foreign policy have led courts to dismiss specific cases on political question grounds.").[4]

To be sure, the Government's concerns extend beyond this case. The State Department properly worries about the generic impact of a precedent allowing this type of claim against a public official for acts in his official capacity. But this case is both the focus of discussion and the exemplar of the risks the Government cites. The case would set the precedent the Government fears only because it concretely poses the issues and engenders the risks the Government identifies. The U.S. Statement of Interest thus corroborates and amplifies Mr. Dichter's showing that the political question doctrine bars adjudication of Plaintiffs' claims.

B. The Government's Assessment of the Consequences of Asserting Jurisdiction Is Entitled to Significant Weight

In determining the level of deference to accord the State Department's views, courts have distinguished between, on the one hand, statutory interpretation of the FSIA and, on the other, assessment of the consequences of asserting jurisdiction. As regards statutory interpretation, the State Department's legal view on the scope of the FSIA, though it receives "no special deference," is of "considerable interest." *Garb v. Poland*, 440 F.3d 579, 584 (2d Cir. 2006) (quoting *Republic of Austria v. Altmann,* 541 U.S. 677, 701 (2004)). But the Department's concerns about the diplomatic ramifications of allowing litigation against foreign sovereigns --

[4] The Government's articulation of these concerns -- the intrusion into the Executive's conduct of foreign relations, the assault on Israeli sovereignty -- similarly support the dismissal of Plaintiffs' claims under the Act of State doctrine. *See W.S. Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (the doctrine is "a consequence of domestic separation of powers, reflecting the 'strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs") (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)).

"the Executive Branch's view of the case's impact on foreign policy" -- merits "serious weight." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). *See also Altmann,* 541 U.S. at 701-02 (State Department's views on the "implications of exercising jurisdiction [could] well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"); *City of New York v. Permanent Mission of India,* 446 F.3d 365, 377 n.17 (2d Cir. 2006) (foreign policy concerns expressed by Government could justify dismissal under different facts, but were vague, speculative and inconsequential in that case); *Whiteman*, 431 F.3d at 73-74 (dismissing foreign sovereign in deference to Government's statement expressing concern about case's impact on foreign policy advanced by certain executive agreements); *In re South African Apartheid Litig.,* 346 F. Supp. 2d 538, 553-54 (S.D.N.Y. 2004) (opinions of Executive Branch "as to the foreign relations consequences of [an] action certainly deserve great weight").

The clear, definite, and urgent concerns the Government advances here contrast sharply with those the Court of Appeals found "vague and speculative" and not "potentially severe enough" in *City of New York v. Permanent Mission of India*, 446 F.3d at 377 n.17. That case addressed whether certain foreign missions to the United Nations were subject to property taxes, a far cry from the existential issues in this case involving defense against terrorism and the "special risk" that U.S. officials will face political trials in foreign countries for war crimes. S.I. at 22. In that case, the Government argued mildly that considerations of "diplomatic and foreign relations *counsel in favor* of a narrow reading of the immovable property exception to sovereign immunity." U.S. Letter, Feb. 23, 2006, at 9 (emphasis added) (attached). Here, by contrast, the State Department deems it of "critical importance" that the Court extend sovereign immunity. S.I. at 22. In that case, the Government worried that denying immunity in such tax disputes would be "particularly controversial" in the U.N. community, hinder U.S. efforts to assert

sovereign immunity in suits concerning unpaid taxes abroad, and "hamper the ability of U.S. missions abroad to buy, sell and construct diplomatic properties." U.S. Letter at 10. Here, by contrast, the State Department predicts that allowing a case like this one, attacking military targeting decisions, "would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all." S.I. at 45.[5] Given these distinctions, the Government never hinted that the tax controversy in *Permanent Mission* exceeded judicial competence or potentially raised political questions, while here the State Department judges the political question doctrine a "serious issue" should the case proceed. *Id.* at 51 n. 36. The concerns the Government articulates in this case are thus pressing and concrete. They deserve great weight.

II. THE STATEMENT OF INTEREST OF THE UNITED STATES REAFFIRMS THAT SOVEREIGN IMMUNITY BARS PLAINTIFFS' CLAIMS

A. The FSIA Does Not Abrogate Sovereign Immunity for Foreign Officials

As the United States demonstrates, there is neither evidence for nor logic to the claim that Congress, in enacting the FSIA, intended to eliminate *sub silentio* the long-recognized immunity for foreign officials. S.I. at 10. In the Government's words, "[g]iven that Congress expressly sought to preserve the pre-existing immunity rule for foreign states, it would be incongruous to believe that Congress simultaneously abrogated the long-standing immunity of individual foreign officials." *Id.* at 12. The Government also points out that "unless sovereign immunity extends to

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[5] That the Government's foreign policy concerns are contingent on whether the case proceeds on the merits does not in any way diminish their force. The only contingency is the disposition of this motion. If the Court allows the case to proceed, denying sovereign immunity to foreign officials and allowing examination of military targeting decisions, harm to U.S. interests is assured. The Court need not await further developments, as was necessary, by contrast, in *Doe v. Exxon Mobil Corp.*, No. 05-7162, 2007 WL 79007 (D.C. Cir. Jan. 12, 2007). There, the State Department's assessment of the foreign policy consequences of proceeding with the case depended on how it "might unfold in the course of the litigation" and the "nature, extent, and intrusiveness of discovery." *Id.* at *8 (denying petition for a writ of mandamus seeking dismissal on political question grounds).

individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA." *Id.* at 14. Mr. Dichter agrees. Rep. Br. at 3.

While the Government and Mr. Dichter thus reach the same conclusion -- the only conclusion compatible with the foreign policy of the United States -- they arrive by different routes. The Government reasons that the FSIA left intact the common law protection of foreign officials sued for acts on behalf of their government. Mr. Dichter contends that a foreign officer sued for official acts stands in the shoes of his government, and thus falls within the protection of the FSIA for "foreign states" and their "instrumentalities." 28 U.S.C. § 1603(a). As the Government recognizes, almost all the case law follows the rationale Mr. Dichter urges. Those cases include the companion case to this one, which was dismissed in the District of Columbia. *Belhas*, 2006 WL 3628972, at *4 (no basis in the FSIA "to treat individual officials differently from foreign states themselves"). *See also, e.g., Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990); *Doe*, 400 F. Supp. 2d at 104.

That said, the decision of the Second Circuit in *Tachiona v. United States,* 386 F.3d 205 (2d Cir. 2004), is consistent with the Government's position. The Court suggested there that the common law immunity for heads of state survived the FSIA, even though the statute was silent on the issue. *Id.* at 220-21. As implausible as it is to contend that Congress abrogated immunity for foreign officials without saying so, it is even more implausible to assert that Congress intended to eliminate immunity for some officials but not others, again without discussion.

Ultimately, the Court of Appeals in *Tachonia* did not decide the issue as to head of state immunity. *Id.* at 221. But the critical fact here in assessing the import of *Tachiona* is that the Court *extended* rather than curtailed immunity. The Court did not consider whether foreign officers other than heads of state can assert sovereign immunity for official acts, and it plainly

did not intend, *sub silentio*, to abrogate immunity for such foreign officials. Thus, *Tachiona* strongly supports applying sovereign immunity here, and, consistent with *Tachiona,* this Court could do so based on the majority rule advocated by Mr. Dichter.

Candidly, though, as a foreign official sued for official acts, Mr. Dichter is concerned more with the result -- whether he is immune from suit -- than with the choice of rationale. This Court, of course, has different responsibilities. But it has the option of fulfilling them by holding in the alternative.

B. The Torture Victim Protection Act Does Not Abrogate Sovereign Immunity for Foreign Officials

The Government confirms, as Mr. Dichter argued, that the TVPA did not eliminate sovereign immunity for foreign officials. As the Government notes, contrary to Plaintiffs' contentions, "the TVPA is not unambiguous, but is instead silent as to whether its provisions take precedence over the immunity of a foreign official where that immunity is validly asserted." S.I. at 33. Plaintiffs' contention that affording foreign officials sovereign immunity nullifies the TVPA is simply wrong. As the Government argues, and as the legislative history of the TVPA demonstrates, that statute will apply where a foreign state disowns the conduct alleged. But here, far from that circumstance, "there is no doubt that the official's conduct was performed on the state's behalf." S.I. at 34. Indeed, the State of Israel has specifically confirmed its responsibility for the attack at issue here. *See* Israel Letter.

There is in fact additional legislative history, beyond that cited by the Government, demonstrating that Congress did not understand the TVPA to displace sovereign immunity under the FSIA. The same Congress that enacted the TVPA in March 1992 passed the Anti-Terrorism Act in October 1992. *See* P.L. 102-572, 106 Stat. 4506 (1992). The Anti-Terrorism Act provided U.S. citizens a remedy for terrorist acts. But it did not allow claims against a "foreign

state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337. The Congressional reports on the Anti-Terrorism Act made clear that this restriction did not distinguish it from the TVPA or other laws. Rather, the Reports affirmed, "[t]his provision maintains the status quo, in accordance with the Foreign Sovereign Immunities Act, with respect to sovereign states *and their officials*." S. Rep. No. 102-342, at 47 (1992); H.R. Rep. No. 102-1040, at 7 (1992) (emphasis added). Indeed, accepting Plaintiffs' argument that the TVPA overrides sovereign immunity would mean that Congress gave foreign plaintiffs greater remedies under the TVPA than U.S. plaintiffs have under the Anti-Terrorism Act. That does not accord with common sense.

Paradoxically, the stridency of Plaintiffs' argument here seems inversely proportional to its legal support. Plaintiffs have cited no case holding that the TVPA displaced sovereign immunity for foreign officials. And at least one Court has held just the opposite. *Belhas*, 2006 WL 3628972, at *4. Moreover, like the Government here, the Court in *Belhas* also found no merit in Plaintiffs' corollary claim that affording the protection of sovereign immunity to foreign officials means that "no official acting on behalf of a foreign state can ever be sued under the TVPA." *Id.* To the contrary, the *Belhas* Court held, the FSIA has exceptions, such as waiver and actions by state sponsors of terrorism. In "a case where an FSIA exception applies, a foreign state official acting in his official capacity could be sued under the TVPA. Conversely, where no such exception applies, the courts of the United States lack jurisdiction to consider TVPA claims." *Id.* (citation omitted).

C. Plaintiffs Sue Mr. Dichter in His Official Capacity

The Government strongly supports Mr. Dichter's argument that Plaintiffs sue him in his official capacity. Just as Mr. Dichter contended, the Government maintains that "the official-

capacity test properly turns on whether the acts in question were performed on the state's behalf, such that they are attributable to the state itself -- as opposed to constituting private conduct. This test flows directly from the principle underlying immunity in foreign officials, which is that an official acting in an official capacity is a manifestation of the state, and as such the official's acts are attributable to the state rather than to the official personally." S.I. at 24. As Mr. Dichter also showed, "any contrary rule would create an easy end-run around the immunity of the state." *Id.* at 25. In the Government's view, "plaintiffs' complaint clearly concerns state conduct. . . . [T]he complaint itself makes plain that the challenged conduct was performed on Israel's behalf – as Israel itself has confirmed in a letter to the State Department from its ambassador." *Id.* at 26.

The Court in *Belhas* reached the precisely same conclusion about the parallel allegations there. The Court noted, "there is no question here that the defendant was acting solely in his official capacity. Not only does the complaint allege that he was acting under color of law," as the Complaint alleges here, "but defendant has produced evidence stating that the Israeli government views the actions described in the complaint as 'sovereign actions' and 'official state acts,'" citing the same letter from the Israeli Ambassador submitted with the briefs in this case. *Belhas*, 2006 WL 3628972, at *4.

Particularly if the Court agrees with the Government that the FSIA does not displace common law immunity for foreign government employees, then the Court should defer to the Department of State's views on the scope of that immunity. As demonstrated in the Government's Statement of Interest, the State Department historically handled determinations regarding common law immunity. S.I. at 7-10. The practice before enactment of the FSIA was for the Department to file suggestions of immunity in cases brought against foreign officials. *Id.*

at 8. Courts deferred to those suggestions. *See Abrams v. Societe Nationale des Chemins de Fer Francaise*, 332 F.3d 173, 187 (2d Cir. 2003) ("courts looked to [State Department] for guidance and generally acted in accordance with its policies"); *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thompson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960). Indeed, today, when the Department files a suggestion of immunity for heads of state under the common law rule, courts regard the Department's determination as dispositive. *See e.g.*, *Doe*, 400 F. Supp. 2d at 111 (when "the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases"); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994). Thus, even if it were not so clear that Plaintiffs charge Mr. Dichter for conduct in his official capacity, the determination of the State Department would resolve the issue.

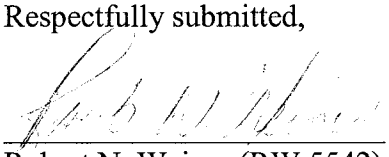
CONCLUSION

As we have previously underscored, the particularized discussion here of statutes, case law and doctrine should not obscure the overarching common-sense proposition that all of them highlight -- this Court is not the proper forum for foreign plaintiffs to challenge the way a

democratic U.S. ally defends itself overseas against an existential terrorist threat. The Statement of Interest of the United States reinforces that proposition and mandates dismissal of Plaintiffs' complaint.

Dated: January 18, 2007

Respectfully submitted,



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