07-2579-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-2579-cv

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

(*caption continued inside front cover*)

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

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

JOHN B. BELLINGER, III,
Legal Adviser,
Department of State

JEFFREY S. BUCHOLTZ,
Acting Assistant Attorney General

DOUGLAS N. LETTER,
Appellate Litigation Counsel

LEWIS S. YELIN,
Attorney, Appellate Staff
Civil Division,
Department of Justice

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York,
Attorney for Amicus United States
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2701

SERRIN TURNER,
DAVID S. JONES,
Assistant United States Attorneys

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.

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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.

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

Preliminary Statement

Pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29(a), the United States respectfully submits this *amicus* brief in support of affirmance.

Plaintiffs sue Avraham Dichter, former Director of the Israeli General Security Service, for his role in a 2002 military attack in the Gaza Strip. The attack struck an apartment building where Saleh Mustafa Shehadeh, a leader of the armed wing of the Hamas terrorist organization, had been determined by Israeli intelligence to be at the time. Shehadeh was killed, but a substantial number of civilians were also killed or wounded. Plaintiffs, surviving victims of the attack, seek to hold Dichter personally liable—in an American court—for these civilian casualties.

The United States voiced strong public criticism of the Shehadeh attack at the time, specifically objecting to the use of heavy weaponry in a densely populated area. This *amicus* brief, however, is not about the United States' position on the attack. Rather, it concerns the defendant's immunity from suit for his official acts on behalf of a foreign sovereign—an issue with ramifications extending far beyond the confines of this case. Allowing foreign officials to be sued in U.S. courts for their official conduct would depart from customary international law, aggravate our relations with the foreign states involved, and potentially expose our own officials to similar suits abroad. The principle of foreign official immunity serves as a vital protection against such interference by private litigants with the Executive's conduct of foreign affairs.

The district court was correct to dismiss the case on immunity grounds, but the court erred in basing its decision on the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. The immunity of individual officials is governed not by the FSIA but by principles of foreign official immunity as recognized

by the Executive. In articulating those principles, the Executive acts against the backdrop of international law—which it recognizes and develops in conducting the United States' relations with other states—and the Executive is uniquely positioned to consider how its stance will affect the Government's ability to assert immunity on behalf of U.S. officials sued in foreign courts. Before the FSIA, the courts deferred conclusively to the Executive on questions concerning the immunity of foreign sovereigns and their officials, out of respect for the Executive's foreign affairs powers under the Constitution. The enactment of the FSIA in 1976 was meant to displace that practice for foreign states, but—critically for this case—not for foreign officials, whose immunity rests upon related, but separate, principles.

As evidenced by its text and legislative history, the FSIA addresses only the immunity of foreign states and their agencies and instrumentalities; it does not address the immunity of individual officials. Under separation of powers principles, a clear statement is required in a statute before courts may find a legislative intent to restrict an authority traditionally exercised by the Executive. There is no clear statement in the FSIA that Congress intended to supplant the Executive's traditional authority to recognize the immunity of foreign officials. Accordingly, that authority continues to reside in the Executive as it did before the FSIA.

The Executive need not appear in each case in order to assert the immunity of a foreign official, but where it does so appear, its determination is conclusive. Here, the Executive filed a Statement of Interest in the

proceedings below recognizing Dichter's immunity from this suit. As explained therein, Dichter is immune because he is sued for conduct clearly attributable to the State of Israel. Indeed, Israel has expressly protested in diplomatic correspondence that to allow these proceedings to go forward "is to allow suit against Israel itself." (JA-440).

While plaintiffs argue that Dichter cannot invoke immunity for alleged violations of *jus cogens* norms, the Executive does not recognize any exception to a foreign official's immunity for civil suits alleging *jus cogens* violations. Contrary to plaintiffs' contentions, the recognition of such an exception by the United States would be out of step with international law and could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis. The Executive's determination on this point, as with its ultimate determination that Dichter is entitled to immunity, must be respected.

Finally, Dichter's immunity is not trumped by the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note. The TVPA merely creates a cause of action; it does not contain any clear statement that it limits immunity, as required to give rise to such a limitation. Moreover, the legislative history makes clear that Congress intended the statute to be read in harmony with relevant immunity principles.

Accordingly, this Court should affirm on the ground that Dichter is immune from this suit under foreign official immunity principles recognized by the Executive.

ARGUMENT

Defendant Is Immune from This Suit

A. Foreign Official Immunity Is Controlled Not by the FSIA but by Principles of Customary International Law as Recognized by the Executive.

1. Before the FSIA, Courts Deferred to Executive Determinations of Immunity for Foreign Officials.

The immunity of foreign officials from suit in U.S. courts is rooted in the more general customary international law doctrine of foreign sovereign immunity, first enunciated in American jurisprudence in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). There, Chief Justice Marshall held that, as "a matter of comity, members of the international community"—including the United States —"had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases." *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004). The opinion further explained that "wrongs committed by a sovereign" generally raise "questions of policy [rather] than law," and hence "are for diplomatic rather than legal discussion." *Schooner Exchange*, 11 U.S. at 146; *see also In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[S]ensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision.").

For this reason, in suits brought against foreign sovereigns prior to the FSIA, courts routinely deferred to "suggestions of immunity" by the Executive. *Schooner Exchange*, 11 U.S. at 147; *see Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943). When the Executive declined to appear in such suits, courts would decide the foreign state's immunity, but "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Hoffman*, 324 U.S. at 35. The Supreme Court made clear that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.*; *see also Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358-59 (2d Cir. 1964) (holding that, where no suggestion of immunity is received, "the court must decide for itself whether it is the established policy of the State Department to recognize claims of immunity of this type.").

This deferential judicial posture was not merely discretionary; it was rooted in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Given the Executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman*, 324 U.S. at 36; *see also Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne*, 730 F.2d 195, 198 n.4

(5th Cir. 1984) ("*Schooner* rested on the theory of separation of powers, under which potentially embarrassing foreign affairs were the domain of the executive branch.").

The immunity of a foreign sovereign was, early on, generally understood to encompass not only the state, heads of state, and diplomatic officials, but also other officials insofar as they acted on the state's behalf. For example, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit against a Venezuelan general for actions taken in his military capacity, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders." *Id.* at 252. In the decades immediately preceding the FSIA as well, courts deferred to Executive suggestions recognizing foreign officials as immune for their official acts, *see Greenspan v. Crosbie*, No. 74 Civ. 4734 (JCM), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960), and where no suggestion was made, they followed the same general rule of decision, *see Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (noting the immunity owed to foreign officials for their official acts).

2. The FSIA Codified the Immunity of Foreign States, but Did Not Affect the Executive's Constitutional Authority to Recognize the Separate Immunity of Foreign Officials.

a. For much of the Nation's history, the Executive followed an absolute theory of foreign sovereign immunity, "under which a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Permanent Mission of India to the U.N. v. City of N.Y.*, 127 S. Ct. 2352, 2356 (2007). Under that theory, it was relatively easy for courts to determine immunity "in conformity to the principles accepted by" the Executive, *Hoffman*, 324 U.S. at 35.

In 1952, however, in recognition of developments in international law, the State Department adopted a "restrictive" rule of foreign sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity. *See generally Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976). Application of this rule "proved troublesome,"as sovereign and commercial acts were sometimes difficult to distinguish. *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Moreover, because courts had to determine immunity for themselves when the Executive did not appear, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Id.*

At the urging of the Executive, Congress worked to remedy this problem by enacting the FSIA in 1976. The

FSIA codified the restrictive rule of foreign sovereign immunity in line with prevailing international practice and set forth "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden*, 461 U.S. at 489. The statute thereby charged the courts with making immunity determinations in specific cases against foreign states, applying the principles adopted by the political branches.

b. The text and the history of the FSIA make clear, however, that Congress separated the immunity of *foreign states and their agencies or instrumentalities* on the one hand from the immunities of *foreign officials and heads of state* on the other. Only the immunity of the former is addressed by the statute. Thus, the recognition of immunity for foreign officials and heads of state remains within the authority of the Executive, as before the FSIA.

The FSIA's text nowhere purports to address the immunity of individual foreign officials. Rather, it speaks only to the immunity of "foreign state[s]" and includes within the definition of "foreign state" any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). As this Court has already noted, these are "terms not usually used to describe natural persons." *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004).

The statutory term "agency or instrumentality" in particular cannot properly be read to include individual officials. The term is defined as:

> any *entity*—
>
> (1) which is a *separate legal* person, *corporate or otherwise*, and
>
> (2) which 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, and
>
> (3) which is neither a citizen of a State of the United States *as defined in section 1332(c) and (e) of this title* [providing, in pertinent part, that corporations shall be deemed citizens of any U.S. state where they are incorporated], nor *created* under the laws of any third country.

28 U.S.C. § 1603(b) (emphases added). Even if an individual might in some other context be encompassed by the term "agency or instrumentality" (although usually a natural person would be referred to as an "agent"), the statutory definition here makes clear that the term applies only to corporate and other organizational entities, not individuals. *See Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). Had Congress meant the FSIA to codify the immunity of foreign officials as well, it would have used ordinary terminology to make its intention clear. *Id.*

This reading of the FSIA's text is repeatedly confirmed by its legislative history. For example, in clarifying that the FSIA would not affect diplomatic or consular immunity, the House report states that the

statute "deals only with the immunity of foreign states." H.R. Rep. No. 94-1487, at 21 (1976). Further, in acknowledging that the statute does not address questions of discovery, the report explains that "[e]xisting law appears to be adequate in this area," and specifically cites the protection afforded by "official immunity." *Id.* at 23 ("[I]f a plaintiff sought to depose a diplomat . . . or a high-ranking official of a foreign government, diplomatic and official immunity would apply."). Similarly, in outlining courts' authority under the FSIA to order an injunction or specific performance against a foreign state, the report cautions that "this is not determinative of the power of the court to enforce such an order" because "a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction." *Id.* at 22.

All of these passages show that Congress understood the immunity of states and their agencies and instrumentalities under the FSIA to be distinct from the immunities of individual officials, which Congress saw no need to codify or disturb. In contrast to cases involving states and their agencies and instrumentalities, which had proven problematic under the restrictive theory, cases concerning individual foreign officials were relatively rare, had not presented significant doctrinal difficulties in the past, and were simply not the impetus for the new legislation. *Cf. Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 290 (S.D.N.Y. 2001) (stating that issues regarding head-of-state immunity "were not yet 'in the air' as part of the underlying concerns that prompted the FSIA nor in the debate and deliberations that accompanied the enactment"), *rev'd in part on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

Under separation of powers principles, the only permissible inference from the FSIA's silence concerning the immunity of foreign officials is that Congress did not attempt to supplant the Executive's long-recognized authority to recognize and define their immunity, as informed by customary international law. "When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear." *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991); *see also United States v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision.").* The FSIA makes clear Congress's intention to codify the immunity rules governing *foreign states*; but Congress did not indicate *any* intention to eliminate the Executive's long-established authority and practice as to the immunity of foreign officials.

c. Other courts have mistakenly held that the FSIA does regulate the immunity of foreign officials. In

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* Similarly, insofar as principles of foreign sovereign immunity were applied by the courts in a common law manner in pre-FSIA cases where the Executive did not appear, the FSIA should not be found to have displaced that practice with respect to foreign officials in the absence of a clear statement. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles . . . .").

particular, in *Chuidian v. Philippine National Bank*, the Ninth Circuit adopted a strained reading of the FSIA, holding that its coverage extends to a foreign official as "an agency or instrumentality of a foreign state." 912 F.2d 1095, 1101-03 (9th Cir. 1990).

In so ruling, the *Chuidian* court rejected the Government's argument that the FSIA did nothing to change preexisting practice concerning foreign official immunity. *Id.* at 1102. The court opined that Congress did not intend a "bifurcated approach to sovereign immunity"—under which courts would determine the immunity of foreign states, and the Executive would continue to determine the immunity of foreign officials —because "every indication shows that Congress intended the Act to be comprehensive." *Id.* The court recognized that the statute does "not explicitly include individuals within its definition of foreign instrumentalities," but it was persuaded that Congress intended to transfer foreign official immunity determinations to the courts because "[n]owhere in the text or legislative history does Congress state that individuals are not encompassed within the section 1603(b) definition." *Id.* at 1101.*

* Other courts of appeals have followed *Chuidian*, though with little independent analysis and without the benefit of briefing from the Government. *See Guevara v. Republic of Peru*, 468 F.3d 1289, 1305 (11th Cir. 2006); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*,

But *Chuidian*'s analysis is precisely backwards. Absent a clear statement from Congress, courts may not construe a statute as attempting to restrict Executive authority, especially when that authority is constitutionally grounded. *See supra* at 12; *cf. Olegario v. United States*, 629 F.2d 204, 227-28 (2d Cir. 1980) (upholding Executive action in the face of congressional silence because it was "based on policy considerations traditionally, although not exclusively, associated with the executive branch").

Chuidian's analysis is also inconsistent with other courts' holdings that, notwithstanding the FSIA, the Executive retains the authority to assert the immunity of foreign heads of state—the availability of which does not turn on the immunity of the foreign state itself under the FSIA. *Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) ("Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch."); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (same); *see also Tachiona*, 386 F.3d at 220 ("We have some doubt as to whether the FSIA was meant to supplant the 'common law' of head-of-state immunity,

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75 F.3d 668, 671 (D.C. Cir. 1996). *But see Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005) (rejecting *Chuidian*'s holding that the FSIA applies to individuals). Likewise, the district court here followed *Chuidian* without any attempt to address the Government's criticism of the decision. *See Matar v. Dichter*, 500 F. Supp. 2d 284, 289 n.2 (S.D.N.Y. 2007).

which generally entailed deference to the executive branch's suggestions of immunity.").

Chuidian's approach not only undermines a function traditionally exercised by the Executive under our constitutional framework; it also yields troubling practical consequences. Specifically, construing the FSIA's "agency or instrumentality" definition to cover individual officials would categorically subject those officials to suit whenever a foreign agency or instrumentality is subject to suit under an FSIA exception. *See Chuidian*, 912 F.2d at 1103-06 (considering, after finding the FSIA to govern defendant official's immunity, whether any of the FSIA's exceptions were met). Under this approach, for example, a foreign official would always be subject to suit *personally* for a *state*'s commercial transactions. *See* 28 U.S.C. § 1605(a)(2).

Yet, there clearly are circumstances in which foreign offficials are protected by official immunity even when the state itself lacks immunity for the underlying conduct. Indeed, the Executive has asserted foreign official immunity in such circumstances in the past. *See Greenspan*, 1976 WL 841, at *2 (deferring to suggestion of immunity for foreign officials involved in state commercial activity even though the foreign state was not itself immune). Moreover, consular officials, former diplomatic officials, and officials of international organizations all enjoy immunity for acts performed in the exercise of their official functions, and their immunity is not limited by the exceptions applicable to

foreign states under the FSIA.* Analogously, under the Federal Tort Claims Act, a federal official cannot be sued for his official conduct even where the United States itself may be held liable. *See* 28 U.S.C. § 2679(d). It is unclear why any different rule should apply in the context of foreign official immunity.

The United States asserts immunity for its own officials when they are sued in foreign courts, and thus it is important that this issue be resolved by the Executive, after careful consideration of both international law and foreign policy consequences—including, importantly, the impact on the United States' ability to shield its officials from liability in foreign jurisdictions in cases where the United States itself is subject to suit. *Chuidian*'s approach pays no heed to such considerations and instead extends the FSIA's exceptions to individual officials simply as a collateral consequence of its counter-textual construction of the statute.

Equally troubling, *Chuidian*'s approach would also seem to imply that an individual official's personal property qualifies as property of a state "agency or instrumentality," making it subject to attachment under the FSIA. Significantly, the FSIA affords litigants broader rights to attach the property of state agencies or instrumentalities compared to property of

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* *See* Vienna Convention on Consular Relations ("VCCR"), arts. 43(1), 45, *done* Apr. 24, 1963, 21 U.S.T. 77; Vienna Convention on Diplomatic Relations ("VCDR"), arts. 32, 39(2), *done* Apr. 18, 1961, 23 U.S.T. 3227; International Organizations Immunities Act ("IOIA"), 28 U.S.C. § 288d(b).

states themselves, *see* 28 U.S.C. § 1610; and it also allows for punitive damages against agencies or instrumentalities but not against states themselves, *see id.* § 1606. Were individual officials considered "agencies or instrumentalities" under the FSIA, litigants in any FSIA action would therefore have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize potential recovery and circumvent the FSIA's limitations on attachment and damages against the state.

Yet another problem is raised by the parties' briefs in this case. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Supreme Court held that, because the FSIA's "instrumentality" definition is phrased in the present tense, an instrumentality's status under the FSIA—that is, whether it is majority-owned by a foreign state—must be assessed at the time of suit rather than the time of the conduct at issue. *See id.* at 478. Plaintiffs argue by analogy that former officials such as Dichter cannot invoke the FSIA's protections if the officials were not employed by the state at the time of suit. *See* Pls.' Br. 13-16. However, the Executive recognizes that foreign officials retain immunity for their official acts after leaving their positions and views any contrary rule as rife with potential to disturb foreign relations. Indeed, if plaintiffs were correct, every official act of a foreign state could be made the subject of litigation in our courts as soon as one of the officials involved left his post. Such a rule would have

very significant reciprocal implications in foreign courts for former officials of the United States.*

These practical problems vividly illustrate that the FSIA was not designed to govern foreign official immunity, and that *Chuidian*'s attempt to stretch the statute to cover individual officials is ill-considered. By unmooring foreign official immunity from its anchor in the Executive, and instead tying it rigidly to the FSIA and its treatment of the distinct immunity of the state, the *Chuidian* approach generates immunity rules that stray from those recognized by the Executive. That, in turn, carries potentially problematic consequences for the Executive's conduct of foreign affairs and its ability to ensure U.S. compliance with, and appropriately shape, international law.

Precisely to avoid such results, courts historically deferred to the Executive's authority to articulate customary international law in this area. *Hoffman*, 324 U.S. at 35. Accordingly, this Court should hold that the Executive retains that authority with respect to the immunity of foreign officials, as before the FSIA.**

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* Moreover, any FSIA-based exception to immunity for former foreign officials would deviate sharply from the immunities enjoyed by diplomats, consular officials, and officials of international organizations, all of whom retain forms of functional immunity after leaving their posts. *See* VCCR, art. 39(2); VCDR, art. 53(4); *De Luca v. United Nations Org.*, 841 F.Supp. 531, 534 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir.1994).

** Even if the FSIA did govern foreign official immunity, however, Dichter would be immune because,

B. Dichter Is Immune under Principles of Customary International Law as Recognized by the Executive.

Here, the Executive informed the district court of its determination that, because Dichter is sued for official acts taken on behalf of Israel, he is immune under principles long recognized by the Executive. *See* Statement of Interest ("SOI") 4-27. When the Executive

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as the district court found, no FSIA exception applies here. *Dichter*, 500 F. Supp. 2d at 292–93. Plaintiffs do not contest that finding but instead argue that, under *Patrickson*, former officials cannot invoke FSIA immunity. *See* Pls.' Br. 13-16. However, *Patrickson* turned on "the plain text" of the FSIA's "agency or instrumentality" definition, *id*. at 478, insofar as it is couched in the present tense as an entity that "*is* an organ of a foreign state . . . a majority of whose share or other ownership interest *is* owned by a foreign state," 28 U.S.C. § 1603(b)(2) (emphasis added). *See* Pls.' Br. 14. Foreign states do not own shares in natural persons, and thus natural persons do not come within this definition, as we have explained. Nonetheless, if the definition is to be read to encompass individual officials despite its plain text, then it makes no sense to follow the plain text selectively in a way that deprives former officials of immunity. Indeed, such a reading would be inconsistent with the principal reason that courts have construed the FSIA to cover individual officials: to prevent "a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the [FSIA] barred them from doing directly." *Chuidian*, 912 F.2d at 1102.

informs a court of its determination that a head of state or other foreign official is immune, courts have not second-guessed that determination. This was the general rule for Executive suggestions of immunity before the FSIA, and it continues to apply in suits against foreign officials, since the statute did not change pre-FSIA practice as to foreign officials.

This Court's decision in *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971), illustrates pre-FSIA practice. There, the Executive asserted immunity for the Government of India. *Id.* at 1199. The plaintiffs argued that the Court should not recognize the Executive's assertion of immunity, because, they claimed, the suit involved commercial and not public acts, and so did not come within the restrictive theory. *Id.* at 1200. In an earlier case, this Court had previously attempted to distinguish between public and commercial acts. *See id.* (discussing *Victory Transp.*, 336 F.2d 354). The *Isbrandtsen Tankers* Court explained that, "[w]ere we required to apply this distinction, as defined [in *Victory Transport*], to the facts of the present case, we might well find that the actions of the Indian government were . . . purely private commercial decisions." *Id.* But "[i]n situations where the State Department has given a formal recommendation . . . the courts need not reach questions of this type. The State Department is to make this determination, in light of the potential consequences to our own international position. Hence, once the State Department has ruled in a matter of this nature, the judiciary will not interfere." *Id.* at 1201 (citing *Hoffman*, 324 U.S. at 35).

The Government's statement of interest below explained the principles underlying the Executive's immunity determination in this case. Thus, it explained that the Executive generally recognizes foreign officials to enjoy immunity from civil suit with respect to their official acts—even including, at least in some situations, where the state itself may lack immunity under the FSIA. *See* SOI at 2, 10-19. It further clarified that whether acts are official "turns on whether the acts in question were performed on the state's behalf, such that they are attributable to the state itself." *Id.* at 24; *see generally id.* at 23-27. And the statement of interest underscored that the Executive does not recognize an exception to foreign official immunity for alleged *jus cogens* violations, *id.* at 27-33, or alleged violations of the TVPA, *id.* at 33-35. The Executive did, however, recognize that a foreign official may be sued for an official act where the foreign state chooses to waive the official's immunity. *Id.* at 31.

These are principles to which future courts may refer in making immunity determinations in suits against foreign officials in which the Executive does not appear. *See Hoffman*, 324 U.S. at 35; *Victory Transp.*, 336 F.2d at 359.* And they are the principles that

* The Executive may in future cases recognize further exceptions to foreign official immunity. However, we stress that the above principles are susceptible to general application by the judiciary without the need for recurring intervention by the Executive, particularly in the form of suggestions of immunity filed on a case-by-case basis. The Executive also retains the prerogative to inform the courts that it

governed the Executive's determination here. Under this Court's clear precedent, that determination is conclusive. *See Isbrandtsen Tankers*, 446 F.2d at 1201 ("[W]e have no alternative but to accept the recommendation of the State Department.").

Plaintiffs contend that international law does not allow for immunity for alleged *jus cogens* violations; but it is the Executive's view of customary international law that is determinative in this suit. *See Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law."). The Executive is responsible for complying with the United States' international obligations. Moreover, it is responsible for asserting immunity for U.S. officials abroad and must integrate those assertions with the approach to be followed at home—knowing that any refusal by the United States to afford foreign officials immunity could prompt foreign jurisdictions to respond in kind when U.S. officials are sued in their courts, *see Boos v. Barry*, 485 U.S. 312, 323-24 (1988); *Garb v. Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006). Thus, courts have deferred to the Executive's conclusion that customary international does not recognize any *jus cogens* exception to foreign official immunity. *See Ye*, 383 F.3d at 627 ("The Executive Branch's

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declines to recognize immunity in a particular case, notwithstanding the default principles, based on foreign policy considerations and the Executive's understanding of international law.

determination that a foreign leader should be immune from suit even when the leader is accused of acts that violate *jus cogens* norms is established by a suggestion of immunity. We are no more free to ignore the Executive Branch's determination than we are free to ignore a legislative determination concerning a foreign state.").

As the Government's statement of interest explains, that conclusion is firmly established in customary international law, which has long recognized the immunity of foreign officials from civil suit for their official acts. *See* SOI at 19-23. As stated in one prominent holding, concerning the immunity of foreign officials from civil process:

> State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity." This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

Prosecutor v. Blaskic, 110 I.L.R. 607, 707 (1997) (I.C.T.Y. 1997) (citing cases).

Indeed, there is broad agreement in international law that, where a foreign state is immune, "[t]he foreign state's right to immunity cannot be circumvented by suing its servants or agents." *Jones v. Ministry of Interior*, UKHL 26, ¶ 10 (House of Lords, United Kingdom 2006) (citing cases). There is no

dispute that Israel would be immune from this suit were it the defendant, since the FSIA includes no exception for alleged *jus cogens* violations. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997). Under customary international law, then, that immunity cannot be circumvented by suing Dichter for the same conduct. Indeed, other jurisdictions have specifically rejected arguments for a *jus cogens* immunity exception—whether it is a foreign state or its officials that are sued—given the lack of support for such an exception in customary international law. *See* SOI at 29-30. Plaintiffs' reliance on the immunity decisions of international *criminal* tribunals is not to the contrary, as international law recognizes that criminal proceedings are "categorically different" from civil suits for purposes of foreign official immunity.* *Jones*, UKHL 26, ¶ 19.

The Executive does not wish to disturb this international consensus—particularly by recognizing a *jus cogens* exception in a civil suit such as this, essentially challenging a military targeting decision made by a high-ranking foreign official. To allow this kind of suit to go forward in our courts—with the potential for discovery and passing of judgment

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* By the same token, the Executive's recognition of foreign official immunity in the civil context does not imply that foreign officials are entitled to immunity in domestic criminal cases brought by the United States—where, in choosing to prosecute, the Executive has determined that the foreign official is not immune from prosecution.

concerning the foreign state's intelligence-gathering and the political and military decision-making of its top officials—would intrude on core aspects of the foreign state's sovereignty and give rise to serious diplomatic tensions. Moreover, our courts would be turned into a forum for challenging the proportionality of military actions throughout the world. Such a deviation from the international norm would create an acute risk of reciprocation by foreign jurisdictions. Given the global leadership role of the United States, our own officials are at special risk of being subjected to politically driven lawsuits abroad in connection with controversial U.S. military operations. Recognition of immunity in this case is thus critical to foreign policy interests within the province of the Executive.

C. The TVPA Does Not Override the Immunity of Foreign Officials.

Plaintiffs lastly argue that, even if Dichter's acts were official, he is nevertheless subject to liability under the TVPA. Pls.' Br. 28-31. According to plaintiffs, because "the plain language of the TVPA contemplates that foreign officials may be liable" under the statute, it must be read to trump the immunities that such officials otherwise might be able to claim. *Id.* at 30. Plaintiffs' logic would imply that no foreign officials—even heads of state and diplomats—may be immune from suit under the statute. But there is no reason to believe that Congress meant to effect such a sweeping change to existing immunity practices. The statutory text does not express such an intention, and the legislative history specifically disavows it.

Contrary to plaintiffs' contentions, the TVPA is not unambiguous, but is instead silent as to whether it limits the immunities of foreign officials. Because the statute does not directly address the question, it must be read in harmony with relevant immunity rules. *Cf. Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("Although [§ 1983] on its face admits of no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' ") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Indeed, *Schooner Exchange* itself instructs that courts may not infer a rescission of foreign sovereign immunity unless expressed by the political branches "in a manner not to be misunderstood." *Schooner Exchange*, 11 U.S. at 146. Similarly, absent a clear statement, courts must not interpret a statute as attempting to limit the authority of the Executive to recognize and define the immunity of foreign officials. *Armstrong*, 924 F.2d at 289.

Legislative history cannot be used to establish the clear congressional intent required to limit the Executive's constitutional authority to determine the immunity of foreign officials. *See Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 73 (2d Cir. 1994) (where a clear statement rule applies, "reference to legislative history and other extrinsic indicia of congressional intent, including administrative interpretations, [is] prohibited"). But, to the extent that legislative history is relevant, the TVPA's legislative history does not demonstrate such intent. To the contrary, in addition to clarifying that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity," the legislative history also reflects the understanding that TVPA suits could be barred by

foreign official immunity where applicable. H.R. Rep. 102-367(I), at 5 (1991); *see* S. Rep. 102-249, at 8 (1991).*

The legislative history indicates that Congress believed that such immunity would be difficult to establish in cases where true torture or extrajudicial killing occurred—since states would rarely "admit some knowledge or authorization of relevant acts." S. Rep. 102-249, at 8; *cf. Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (" 'Where reports of torture elicit some credence, a state usually responds by denial . . . .' ") (quoting United States *amicus* brief). But the converse implication is that where, as here, there is no doubt that the official's conduct is attributable to the state, Congress understood that the official could validly assert an immunity defense. Indeed, although plaintiffs say that "[t]he majority of cases brought under the TVPA have permitted claims against former officials to proceed," Pls.' Br. 29, they do not cite a single case in which the statute has been found to trump any type of immunity, let alone cases in which

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* The House and Senate reports apparently followed *Chuidian* (which had been decided a short time before) in tracing foreign official immunity to the FSIA's "agency and instrumentality" definition. *See id.* (citing the FSIA). This TVPA legislative history, however, is not a reliable guide to the interpretation of the FSIA. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13 (1980) ("[S]ubsequent legislative history provide[s] an extremely hazardous basis for inferring the meaning of a congressional enactment.").

the statute has been found to trump the Executive's determination that a foreign official is immune.

Plaintiffs' protestations notwithstanding, reading the statute in harmony with the immunities of foreign officials does not "render the TVPA a dead letter," *id.* at 30. Under the immunity principles recognized by the Executive, suit under the TVPA may lie with respect to acts performed "under color of law" but that are not properly attributable to the state, *see* TVPA § 2(a)—in which case foreign official immunity would not attach in the first instance. Plaintiffs may also sue officials under the statute even for their official acts where the parent state has waived their immunity. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (allowing TVPA suit to proceed against former head-of-state where foreign state had expressed "agreement that the suit . . . proceed," 25 F.3d 1467, 1472 (9th Cir. 1994)). And a foreign official will be subject to liability under the TVPA in any case where the Executive informs the court that it has decided not to recognize the foreign official's claim of immunity from suit. Although plaintiffs obviously desire the TVPA to apply more broadly, even to clearly official conduct as to which immunity has been validly asserted, the statute cannot be so construed in the absence of any clear statement by Congress to that effect.

Conclusion

For the above reasons, the Court should affirm the district court's order of dismissal on immunity grounds.*

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* Given Dichter's immunity, the Court need not decide any other threshold issue. *See Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) (courts may choose among threshold grounds for dismissal). Although below the Government also argued that plaintiffs' claims are not cognizable under federal common law or the TVPA, that issue goes to the merits rather than jurisdiction and is not properly addressed at the threshold stage. *See generally Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-15 (2006) (failure to state a claim does not generally affect subject matter jurisdiction); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004) (whether international law claim is cognizable under federal common law is separate from whether jurisdiction exists under ATS). Should the Court for any reason find that it must address the merits of plaintiffs' claims in this appeal, however, we respectfully suggest that the Court order supplemental briefing from the parties and the Government.

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Respectfully submitted,

MICHAEL J. GARCIA,
United States Attorney for the
Southern District of New York,
Attorney for Amicus United States

SERRIN TURNER,
DAVID S. JONES,
Assistant United States Attorneys

JOHN B. BELLINGER, III,
Legal Adviser, Department of State

JEFFREY S. BUCHOLTZ,
Acting Assistant Attorney General

DOUGLAS N. LETTER,
Appellate Litigation Counsel

LEWIS S. YELIN,
Attorney, Appellate Staff,
Civil Division, Department of Justice

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6,910 words in this brief.

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York

By: SERRIN TURNER,
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION

Case Name: Matar v. Dichter

Docket Number: 07-2579-cv

I, Karen Wrightson, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 12/19/2007) and found to be VIRUS FREE.

/s/ Karen Wrightson
Karen Wrightson
Record Press, Inc.

Dated: December 19, 2007