UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| 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,<br><br>Plaintiffs,<br><br>vs.<br><br>AVRAHAM DICHTER, former Director of Israel's General Security Service,<br><br>Defendant. | Civil Action No. 1:05 CV 10270 (WHP)<br>ECF Case |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AVRAHAM DICHTER'S MOTION TO DISMISS THE COMPLAINT**

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This is a political case that does not belong in a federal court. Ostensibly a suit against a former Israeli official who appeared fleetingly in New York for a speech, it is one of a series of cases -- none successful -- attacking the policies of Israel in the war on terrorism. The complaint names the defendant by his position, former Director of Israel's Security Agency ("ISA"). And it spotlights the official State policy that purportedly gives rise to his liability, military action targeted at terrorist leaders.

Sovereign immunity precludes such assaults on foreign governments. Even if it were otherwise, plaintiffs still could not entangle this Court in foreign policy judgments reserved to the political branches. Indeed, plaintiffs seek to lure the Court into not just any foreign policy concerns, but as other courts have found, ones involving a singularly volatile region. Even as the President of the United States is proclaiming in the State of the Union Address that "the leaders of Hamas must recognize Israel, disarm, reject terrorism, and work for lasting peace," plaintiffs ask the Court to find that Israel's attack on a Hamas leader is a war crime.[1] The State of Israel has formally advised the Department of State that this request improperly involves "the U.S. courts in evaluating Israeli policies and operations in the context of an continuing armed conflict against terrorist operatives."[2] Israel expressed concern that such involvement "risks complicating or undermining the important political and diplomatic avenues that are currently being pursued" to end terrorism and bring peace to the region." *Id.* As Israel's protest indicates,

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[1] State of the Union Address by President George Bush, Jan. 31, 2006, *at* http://www.whitehouse.gov/stateoftheunion/2006/index.html.

[2] Letter from Daniel Ayalon, Ambassador of the State of Israel to the United States, to Mr. Nicholas Burns, Under-Secretary of State for Political Affairs, dated Feb. 6, 2006 (hereafter "State of Israel Letter," submitted herewith as Exhibit A to the Declaration of Jean Kalicki).

this Court is not the proper forum to adjudicate political claims, to prosecute some ideological struggle, or to conduct foreign relations.

## INTRODUCTION

Since it was founded more than 50 years ago, the State of Israel has weathered attacks threatening its very right to exist. The United States has stood with Israel through five declared wars and repeated terrorist assaults. With regard to the Israeli-Palestinian relationship, successive U.S. Administrations have lead diplomatic efforts. In 2001, the President sponsored the Mitchell Report, proposing specific steps by Israel and the Palestinian Authority to restart peace negotiations. And in 2003, President Bush set forth a "Roadmap for Peace," and has worked since to build support for it.

Although the United States has in fact brokered some agreements, a comprehensive peace, an end to the violence, has proved elusive. Israel still faces a war of terror. Congress in 2001 found that Israel confronted an "ongoing terror campaign often targeted at youth and families and perpetrated by Islamic fundamentalist groups Hamas" and others. H. Con. Res. 280, 107th Cong., 1st Sess. (2001). Similarly, in 1996, Congress found that Hamas had engaged in a "terrorist campaign designed to cause maximum carnage against the peaceful civilian population of Israel, including children, women, and the elderly," and that these terrorist attacks "are aimed not only at innocent Israeli civilians but also at destroying the Middle East peace process." H. Con. Res. 149, 104th Cong., 2d Sess. (1996). Thus, for the four-year period starting September 2000, the Israeli government reports 138 suicide bombings, 13,730 shooting attacks, and 313 rocket attacks, killing more than 1,084 Israelis and injuring more than 7,633, many

critically.[3] With a population of only 6.9 million -- a little over 2% of that of the United States -- Israel's casualties have been staggering. But the numbers of dead and injured still do not convey the full impact of the terror – the families shattered, the children orphaned, the fear enkindled by an enemy that vows -- in the words of a Hamas leader quoted by the U.S. Congress -- "not to leave one Jew in Palestine." S. Con. Res. 88, 107 Cong., 1st Sess. (2001).

All States have a basic right and duty to protect their citizens against terrorism. *See* United Nations S.C. Res. 1373 (2001). After the terrorist attack on the World Trade Center, President Bush affirmed that this country "has the sovereign authority to use force in assuring its own national security." President George Bush Address to the Nation (Mar. 17, 2003), *at* http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html. Israel, too, has sovereign authority to use force in assuring its national security, indeed, its national survival. Congress has recognized Israel's operations as "an effort to defend itself against the unspeakable horrors of ongoing terrorism ... aimed only at dismantling the terrorist infrastructure in the Palestinian areas." H.R. Res. 392, 107th Cong. (2002). Indeed, Congress specifically found that "Palestinian terrorism justifies Israeli counterterrorist operations as the response of a legitimate government defending its citizens." H. Con. Res. 280, *supra*. *See* H. Con. Res. 149, *supra* (reaffirming "full support for Israel in its effort to combat terrorism as it attempts to pursue peace with its neighbors in the region"). And the State Department has created a Joint Counterterrorism Group with Israel for the "development and facilitation of programs of

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[3] *See* "Four Years of Conflict," *at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Four+Years+of+Conflict+3-Oct-2004.htm; "Casualties Since September 29, 2000," *at* http://www1.idf.il/SIP_STORAGE/DOVER/files/7/21827.doc (last updated Jan. 15, 2006).

counterterrorism cooperation." Counterterrorism Cooperation Accord, U.S.-Isr., State Dep't No. 96-126 (Apr. 30, 1996).

From 2000 to 2005, defendant Dichter headed the Israeli Security Agency ("ISA"), which provided intelligence for Israel's defense against terrorist attacks by Hamas and others. This suit is a political broadside against that defense. It assails what it terms Israel's "targeted assassinations" of terrorists, characterizing them as systematic extra-judicial executions. Compl. ¶¶ 3, 17. Plaintiffs accuse Israel of "'preemptively' execut[ing] Palestinians it has alleged are involved in terrorism without bringing the victims before a fair legal process to examine the allegations against them." *Id.* ¶ 17. But plaintiffs do not claim themselves to have been targeted as terrorists. Rather, they claim to be civilians injured when an Israeli attack aimed at the military leader of Hamas was allegedly indiscriminate. They assert that this attack constituted a war crime, a crime against humanity and extrajudicial killing, among other things.

Rather than sue Israel directly, however, plaintiffs targeted defendant Dichter. The fortuity of his fleeting presence in New York apparently was so enticing that plaintiffs sued him even though they could not connect him to this attack other than "on information and belief," Compl. ¶¶ 37-40, 42-45. And even on information and belief, plaintiffs could not allege that Mr. Dichter knew civilians were present at the time of the attack. *Id.* ¶ 40 (alleging "actual and/or constructive knowledge"). It is thus telling that in his parallel suit in Israel, plaintiff Matar did not name Mr. Dichter, and instead sued only Israel and officers of the Israeli Defense Force.

As convenient a foil as Mr. Dichter may be, suing him cannot avoid the line of cases rejecting attempts to drag U.S. courts into the Middle East conflict. The U.S. District Court for the Western District of Washington, for example, recently dismissed a effort *by these same lawyers* to bar Caterpillar from selling bulldozers to Israel for use in the war on terror. The

Court declined to become enmeshed in a lawsuit that "challenges the official acts of an existing government in a region where diplomacy is delicate and U.S. interests are great." *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005), *appeal pending*. Likewise, the U.S. District Court for the District of Columbia rejected a suit against Israel and Mr. Dichter, among others, alleging war crimes and genocide through targeted killings, indiscriminate military action, and other asserted wrongdoing in the West Bank and Gaza. The Court stated that however plaintiffs characterized their suit, "the character of those claims is, at its core, the same: peculiarly volatile, undeniably political, and ultimately nonjusticiable." *Doe v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005). Other courts, too, have declined to second-guess military judgments or to intercede in issues encompassed within ongoing diplomacy.

The concerns expressed in those cases have the same force here. While plaintiffs cite Bush Administration criticism of the attack on Shehadeh, the issue here is not what position the Executive Branch took, but rather their exclusive right to take it. The importance of this point is clear from the Administration's full statements, not provided by plaintiffs, which deal with this issue in the context of the ongoing U.S. diplomacy seeking "the kind of reform, the kind of political progress, the kind of security for both parties that will make all these questions moot."[4] Plaintiffs ask the Court to interject its voice into these diplomatic efforts. The Government of Israel has formally advised the U.S. Department of State that such judicial intervention would run "counter to the ongoing Israel-US dialogue and the key diplomatic role of the US in the region." State of Israel Letter, *supra* n. 2. Moreover, proceeding with this case could set a precedent of individual liability for government policies which could be used against American

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[4] U.S. Dep't of State Daily Press Briefing (July 25, 2002), *at* http://www.state.gov/r/pa/prs/dpb/2002/12187.htm.

soldiers and government officials. The very counsel representing plaintiffs in this case have previously sued Secretary of Defense Rumsfeld, Attorney General Gonzales and others in Germany and elsewhere for actions relating to Iraq and the war on terror. Encouraging such suits is contrary to the stated policy of the United States.

The complaint thus should dismiss the case on two threshold jurisdictional grounds:[5]

> First, Mr. Dichter is immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 ("FSIA"). The State of Israel enjoys sovereign immunity, which Plaintiffs cannot circumvent by suing Israel's public servants. Their claims against Mr. Dichter are for official acts. Their suit is, through and through, an attack on Israel. Such an attack is not permitted in U.S. courts.
>
> Second, even if plaintiffs could overcome this barrier, this political suit, like the prior cases attacking Israel's policies, is not justiciable. It presents issues reserved to other branches of government. It would interfere with vital objectives of U.S. foreign policy. And it would intrude on the sovereignty of a foreign nation. Under both the political question and Act of State doctrines, the Court should not exercise jurisdiction.

## ARGUMENT

## I. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE MR. DICHTER IS IMMUNE FROM SUIT

### A. This Case is In Substance a Suit Against Israel, Subject to the Foreign Sovereign Immunities Act

The FSIA bars suit against foreign states and their agencies and instrumentalities. Because of this statute, plaintiffs could not sue Israel or the ISA. Plaintiffs thus proceed more obliquely, suing Mr. Dichter, the former head of ISA, for actions on behalf of Israel. The law, however, turns on substance, not form. Sovereign immunity extends to government officers for

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[5] This motion addresses whether the Court has power to hear the case. If need be, Mr. Dichter may move later, as Fed. R. Civ. P. 12(h)(2) permits, to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), for failure to exhaust local remedies, and for *forum non conveniens*.

acts on behalf of the State, as opposed to private action on their own behalf. Plaintiffs sue Mr. Dichter for official acts. They identify him by title in the caption of the complaint, and assail his implementation of official policies of the State of Israel. Thus, as the State of Israel advised the State Department, to allow a suit against Mr. Dichter is, in substance, "to allow a suit against Israel itself." State of Israel Letter, *supra* n. 2. The Supreme Court has held foreign states "presumptively immune from the jurisdiction of United States courts," and "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against [them]." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). The same is true for the ISA, which is within the Office of the Prime Minister and is considered "part of the 'foreign state' of Israel because its 'core functions' are governmental, not commercial." *Doe v. State of Israel*, 400 F. Supp. 2d at 101.

Nothing in the complaint touches on any of the exceptions under the FSIA. Alleging violations of international law does not negate the FSIA's protection. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1997); *Hirsch v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997); *accord Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989) ("[I]mmunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions."). Nor does sovereign immunity evaporate merely because plaintiffs invoke the Alien Tort Claims Act or the Torture Victim Protection Act. *See Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.)*, 978 F.2d 493, 497 (9th Cir. 1992) ("[T]he FSIA trumps the [ATCA] when a foreign state or ... an individual acting in her official capacity is sued."); H.R. Rep. No. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88 ("The TVPA is subject to restrictions in the [FSIA]."); S. Rep. No. 102-249 (1991), at 7 (same).

### B. Plaintiffs Sue Mr. Dichter in his Official Capacity

As many courts have recognized, sovereign immunity would be a hollow defense if plaintiffs could evade it by suing a senior official of the foreign government. The law sensibly foils this tactic. Sovereign immunity protects foreign officials acting on behalf of their governments, just as it protects those governments from suit based on the officials' acts. *See, e.g., In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005) ("a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly"); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286-87 (S.D.N.Y. 2001) ("individuals ... are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities"); *Lafontant v. Aristide,* 844 F. Supp. 128, 139 (E.D.N.Y. 1994) ("Because ... the TVPA applies to individuals while the FSIA applies to states and state actors, the TVPA will only apply to state actors when they act in their individual capacity....").

Thus, in deciding whether to dismiss based on sovereign immunity, courts "consider whether an action against the foreign official is merely a disguised action against the nation that he or she represents." *Park v. Shin,* 313 F.3d 1138, 1144 (9th Cir. 2002). To that end, federal courts have disregarded plaintiffs' labels that do not fit the facts alleged. For example, in *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283 (E.D.N.Y. Feb. 13, 1996), the plaintiff sued Moshe Shachal, Israel's Minister of Police, and former Prime Minister Rabin. The plaintiff alleged that while in Jerusalem, he was beaten by police at the direction of the defendants. The Court found the defendants immune from liability, even though the plaintiff purported to sue them individually:

> Although the complaint names the defendants in their individual as well as their official capacities, Tannenbaum alleges no acts

> committed directly by the late Prime Minister Rabin, nor any by Shachal, nor any by "John Doe" other than those committed "at the direction of" the other two defendants. Tannenbaum alleges only that defendant police officer "John Doe" was "acting at the direction of Defendants Rabin and Shachal," when he committed the acts of which plaintiff complains.... In short, Tannenbaum's claim is against the defendants in their official roles only and therefore, as agencies or instrumentalities of a foreign state under 28 U.S.C. §§ 1603(a) - (b).

*Id.* at *3. Similarly, in *El-Fadl v. Central Bank of Jordan,* the plaintiff claimed that Jordanian officials instigated an unwarranted investigation leading to his detention and torture by military police. 75 F.3d 668, 670 (D.C. Cir. 1996). Although plaintiff alleged these actions were undertaken "in an individual capacity," the D.C. Circuit rejected this label, holding the officials had acted on behalf of the sovereign and were entitled to immunity. *Id.* at 671. *Accord Askir v. Boutros-Ghali,* 933 F. Supp. 368, 370 n.3 (S.D.N.Y. 1996) (rejecting claims against U.N. official individually as "none of [his] alleged actions are outside of the scope of his official duties").

The recent decision of the District Court for the District of Columbia in *Doe v. Israel* is directly apposite here. In that case, Palestinian-Americans sued Israel, various agencies, sitting ministers and former officials -- including Mr. Dichter -- based on conduct in the West Bank. The suit invoked the same statutes plaintiffs invoke here. Further, it included the counts plaintiffs assert here -- extrajudicial killing, war crimes, cruel, inhuman or degrading treatment, wrongful death, battery, and negligence. Indeed, it specifically faulted the killing and wounding of civilians "during IDF missile, bomb and rocket attacks aimed at assassinating particular Palestinian individuals, often militants or activists," *Doe* Compl. ¶ 180, just as plaintiffs do here. And it purported to sue the individual defendants in both their official and personal capacities. In finding that the case was merely a "disguised action" against Israel itself, the Court was "mindful that foreign sovereigns are legal fictions to the extent that they can only act through

their individual officers." 400 F. Supp. 2d at 104. Thus, the Court held, "[a] suit against an individual officer of a nation who has acted on behalf of that nation is the functional equivalent of a suit against the state itself." *Id.* By contrast, "suits against officers in their personal capacities must pertain to private action -- that is, to actions that exceed the scope of authority vested in that official so that the official cannot be said to have acted on behalf of the state." *Id.*

Applying these principles to the claims against Mr. Dichter and other officials, the Court noted that "[t]o begin with, plaintiffs challenge the conduct of the Israeli occupation activities in the West Bank -- something that is an official policy of the sovereign State of Israel." *Id.* at 105. Further, the plaintiffs did not assert that the defendants "acted out of personal gain or for private motivation. All allegations stem from actions taken on behalf of the state and, in essence, the personal capacity suits amount to suits against the officers for being Israeli government officials." *Id.* Therefore, the defendants were within "the FSIA's protective umbrella." *Id.*

This Court should reach the same result here. Starting with the caption of the complaint, plaintiffs sue Mr. Dichter as "former Director of Israel's General Security Service."[6] Just as in *Doe,* they do not allege that he acted for personal gain or private motivation. Indeed, the Complaint does not specify a single concrete act Mr. Dichter took in connection with the incident, much less one in his personal or private capacity. Plaintiffs instead posit "on information and belief" that he "participated ... in the decision to carry out the attack," and they aver on that basis that he "had command responsibility for the attack," even though they allege the IDF conducted the attack, and that he was head of ISA, not IDF. Compl. ¶ 2. Plaintiffs also

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[6] That Mr. Dichter is no longer in office does not affect the FSIA analysis. *See In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 788-89 (S.D.N.Y. 2005) (relevant inquiry is whether acts "were undertaken at a time when the individual was acting in an official capacity").

assert "on information and belief" that "as Director of GSS [ISA], Defendant advocated using military aircraft to kill Shehadeh, despite actual and/or constructive notice" that individuals other than the Hamas military commander were present in the target area. *Id.* ¶ 40. The phrase "actual and/or constructive notice" is a hedge, connoting that -- even on information and belief -- plaintiffs cannot say Mr. Dichter knew civilians were present, but they believe he should have known. Based on these wispy assertions, plaintiffs allege -- again "on information and belief" -- that "acting singly and in concert with others, [Mr. Dichter] authorized, directed, planned, commanded, mastered, instigated, conspired, aided, abetted, incited, ratified, and failed to prevent" the attack, or to "report, discipline or punish his subordinates" involved in the attack. *Id.* ¶¶ 43, 45. Even setting aside for now the absence of "well pleaded facts"-- not to mention the impropriety of vilifying a public official for "war crimes" based on "information and belief"[7] -- these allegations address Mr. Dichter's official rather than his personal capacity. *See In re Terrorist Attacks*, 392 F. Supp. 2d at 553 (dismissing claims against Saudi officials where allegations on their face "center on [their] role" in government). Plaintiffs do not even intimate that Mr. Dichter acted outside the scope of his recognized authority as head of Israel's domestic security service. To the contrary, like *Doe,* the Complaint attacks Israeli policy, in particular its policy of targeting terrorist leaders, and tries to accuse Mr. Dichter of supporting and implementing it. *Cf. El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267 (D.D.C. 2005) (confirming President Clinton's immunity for missile strike on Sudanese pharmaceutical factory, even if intelligence linking it to terrorism was wrong); *Saltany v. Reagan*, 702 F. Supp.

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[7] *See generally Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 19 (D.D.C. 2000), *aff'd,* 35 Fed. Appx. 1 (D.C. Cir. 2002) (where complaint contains "numerous, sweeping allegations" concerning foreign government or its officials, "the Court must consider as true only the 'well-pleaded facts' set forth" in the complaint).

319 (D.D.C. 1988), *aff'd in relevant part, rev'd in part*, 886 F.2d 438 (D.C. Cir. 1989) (barring ATCA claims for civilian deaths and injuries resulting from U.S. military air strikes on Libya ordered by President Reagan).

Nor do plaintiffs allege, as in *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995), that Mr. Dichter's actions were "wholly unratified" by his government. Even if they had so alleged, Israel has publicly defended the attack at issue here.[8] It has also explicitly confirmed that any actions Mr. Dichter took were "in the course of [his] official duties, and in furtherance of official policies of the State of Israel." State of Israel Letter, *supra* n.2. Although the complaint here is insufficient on its face, the statement of a foreign government regarding its official's responsibilities, should the Court consider it, is entitled to "great weight" on a motion to dismiss based on sovereign immunity. *In re Terrorist Attacks,* 392 F. Supp. 2d at 551 (quoting *Leutwyler*, 184 F. Supp. 2d at 287); *Rein v. Rein*, No. 95 CV 4030, 1996 WL 273993, at *2 (S.D.N.Y. May 23, 1996); *Kline v. Kaneko,* 685 F. Supp. 386, 390 (S.D.N.Y. 1988).

The State Department has urged courts to be "especially careful" where a claim against a foreign official criticizes policies of a foreign state, because "denial of immunity in such circumstances would allow 'litigants to accomplish indirectly what the [FSIA] barred them from doing directly,' ... by the simple expedient of naming a high level foreign official as a defendant

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[8] *See, e.g.*, Israeli Ministry of Foreign Affairs, Statement by Prime Minister Sharon, July 23, 2002 ("Yesterday, we struck at the most senior member of Hamas' operational side .... This action, to my knowledge, is one of our major successes....), *at* http://www.mfa.gov.il/MFA/Government/Communiques/2002/Statement%20by%20PM%20Sharon%20-%20July%2023-%202002; Israeli Ministry of Foreign Affairs, Findings of the inquiry into the death of Salah Shehadeh, Aug. 2, 2002, *at* http://www.mfa.gov.il/mfa/government/communiques/2002/findings+of+the+inquiry+into+the+death+of+Salah+Sh.htm) (finding that procedures followed were proper and the attack eliminated a major terrorist leader, but that there were "shortcomings in the information available, and the evaluation of that information, concerning the presence of innocent civilians near Shehadeh").

rather than a foreign state." Statement of Interest of the United States, *Doe v. Liu Qi*, No. C 02 0672 CW, at 4-5 (N.D. Cal., Sept. 27, 2002) (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-02 (9th Cir. 1990)) ( "*Liu Qi* Statement"). Here, plaintiffs do just that. They launch against Mr. Dichter -- on information and belief, no less -- politically charged invective that they could not properly advance against Israel or the ISA. They cannot properly assert it against him either. The Court should dismiss the case for lack of subject matter jurisdiction.[9]

## II. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION UNDER THE POLITICAL QUESTION AND ACT OF STATE DOCTRINES

Apart from the bar of sovereign immunity, this case fails because it is a political exhibition, not a justiciable controversy. It poses a clear and present danger of interfering with U.S. foreign policy and infringing on the sovereignty of a close ally. Under the political question and Act of State doctrines, this Court should dismiss the complaint.

### A. The Complaint Raises Nonjusticiable Political Questions Reserved to the Executive Branch

#### 1. The political question doctrine has particular force in the area of foreign policy.

In cases involving foreign relations, the Second Circuit has assessed whether the issue before it is a political question committed to the Executive and Legislative Branches. In so doing, the Court has "consistently employed one or more of the 'six independent tests' identified

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[9] The case also should be dismissed because actions against "foreign states" as defined by the FSIA must be brought in the U.S. District Court for the District of Columbia, unless the events at issue occurred in the U.S. 28 U.S.C. § 1391(f)(4). As discussed above, the claim against Mr. Dichter is a claim against Israel. Venue in this District is thus improper. *Tannenbaum*, 1996 WL 75283 at *3 (Eastern District of New York was improper venue for action against Israeli officials).

by the Supreme Court in *Baker v. Carr*." *Whiteman v. Dorotheum GmbH & Co.*, 431 F. 3d 57, 70 (2d Cir. 2005). In particular, the Court has sought to determine whether there is:

> ... [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving [the issue]; or [3] the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id. See also Kadic*, 70 F.3d at 249; *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994). If any of these factors is present, the Court ordinarily should dismiss the case. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Although not every case touching on foreign relations raises nonjusticiable political questions, *Baker*, 369 U.S. at 211, courts have been particularly sensitive in this arena, where "many ... questions uniquely demand a single-voiced statement of the Government's views." *Id.* The Supreme Court long ago explained why judges should tread cautiously:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

*Chicago & S. Air Lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

### 2. Courts have avoided entanglement in political and military decisions, especially regarding the Middle East

In *Doe*, the U.S. Government made clear in briefs it filed that the Executive Branch is intricately involved in diplomacy in the Middle East, that the security issues are volatile and delicate, and that claims such as the ones asserted here would potentially disrupt the Executive's conduct of foreign affairs. In the U.S. Government's view, claims challenging Israeli actions in the West Bank and U.S. support for them implicate the *Baker* factors:

> [I]n order to award the Plaintiffs the relief they seek the Court would have to make findings and determinations respecting the nature and appropriateness of Israeli actions undertaken in the midst of an ongoing armed conflict abroad that the United States (through its political branches) is attempting to resolve. Such findings – which would have to assess the context and appropriateness of Israeli actions – themselves *would intrude upon the foreign policy prerogatives of the political branches* ....

Fed. Defs.' Mem. at 37-38 (emphasis added) (submitted herewith).[10]

The Government also invoked other factors under *Baker* regarding judicial competency to decide the same issues that are presented here:

> What constitute legitimate actions in furtherance of Israel's internal security or self-defense ... are determinations for the President to make, taking into account complex historical, diplomatic, military and factual circumstances that are only developed and accessible through the conduct of the Nation's diplomatic and military relationships. The same is true with respect to any assessments of Israel's human rights record. All such determinations, at core, include value-laden judgments based

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[10] The Supreme Court has recently confirmed that "federal courts should give serious weight to the Executive Branch's view of [an ATCA] case's impact on foreign policy," and should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez Machain*, 542 U.S. 692, 728, 733 n.21 (2004); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004) (statements by the Executive concerning "the implications of exercising jurisdiction over *particular* [foreign governments] in connection with *their* alleged conduct ... might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy").

> on complex factual circumstances that the President is uniquely qualified to make and that the courts are, as an institutional matter, uniquely unqualified to make in these circumstances.

Fed. Defs.' Mem. at 39.

The District Court in *Doe* agreed with this assessment. It found that,

> The first *Baker* factor is undeniably implicated here. It is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades. The region of the Middle East specifically, and the entire global community generally, is sharply divided concerning these tensions; American foreign policy has come under attack as a result. This Court has previously observed that "foreign policy is constitutionally committed to the political branches, and disputes over foreign policy are nonjusticiable political questions."

400 F. Supp. 2d at 111-112 (citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)). In *Doe*, as here, plaintiffs asked the Court to declare Israel's "self-defense policies" illegal. The Court declined, because "[w]hether plaintiffs dress their claims in the garb of RICO or other federal statutes, or the tort laws of various states, the character of those claims is, at its core, the same: peculiarly volatile, undeniably political, and ultimately nonjusticiable. A ruling on any of these issues would draw the Court into the foreign affairs of the United States, thereby interfering with the sole province of the Executive Branch." *Id.* at 112.

The Court also found that these claims implicated the third, fourth and fifth *Baker* factors. To determine whether Israel's conduct was tortious or illegal would, in the Court's judgment, usurp the roles of coordinate branches of government. It "would also implicitly condemn American foreign policy by suggesting that the support of Israel is wrongful. Conclusions like these present a potential for discord between the branches that further demonstrates the impropriety of a judicial decision on these quintessential political issues." *Id.* To answer the question, the Court found, would require it to assess whether Israel's actions were appropriate

"self-defense." *Id.* Again, "[s]uch a predicate policy determination is plainly reserved to the political branches of government, and the Court is simply not equipped with 'judicially discoverable or manageable standards' for resolving a question of this nature." *Id.* at 112-113.

The U.S. District Court for the Western District of Washington reached the same conclusion. There, the plaintiffs, represented by plaintiffs' counsel here, sought to enjoin Caterpillar from selling bulldozers to Israel because they were allegedly used, among other things, to violate the Geneva Convention and to commit extrajudicial killings. The Court declined. In its view, the lawsuit "challenges the official acts of an existing government in a region where diplomacy is delicate and U.S. interests are great." *Corrie*, 403 F. Supp. 2d at 1032. To issue the order requested, the Court found, "would certainly invade the foreign policy prerogatives of the political branches of government." *Id.*

*El-Shifa Pharmaceutical Industries* also dismissed claims, much like those asserted here, involving a U.S. missile attack allegedly based on flawed intelligence. The Court refused to consider the claims, finding that judgments regarding national security presented a political question. In particular, the Court held, the designation of the factory as a terrorist facility, "erroneous though it may have been, was made as part of a military response to the terrorist bombings of the U.S. embassies in Kenya and Tanzania. It is this type of delicate decision regarding national security, foreign relations, and global politics that is entrusted to the sole discretion of the executive." 402 F. Supp. 2d at 275. The plaintiff could not avoid the political question doctrine "by framing the claims using common tort principles." *Id.* at 274. Even if the information prompting the attack was wrong, the Court would not and could not weigh the intelligence underlying military decisions. Indeed, the Court noted, "[a] judicial inquiry into the reasonableness of the judgments made . . . could mimic the executive's role in formulating

foreign policy, could improperly interfere with the executive's role in commanding the country's military forces, and could require an inappropriate second-guessing of executive branch decisions." *Id.* at 275-76. It is no more appropriate, and the Court is no better situated, to second-guess targeting decisions of the Israeli military and the intelligence that informed them.

The Eleventh Circuit applied the same principles in *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997). There, Turkish sailors sued for injuries after a U.S. aircraft carrier mistakenly attacked their ship during a NATO exercise. The Court upheld dismissal on political question grounds, refusing to intrude on military judgments far less entwined with national policy than the ones at issue here. First, it found that the case, having arisen from a NATO exercise, implicated the relationship between the U.S. and its allies. The second *Baker* factor applied because assessing whether the Navy properly fired the missiles required a determination of how a "reasonable military force" should have acted. *Id.* at 1404. In the Court's view, it was "difficult to conceive of an area of governmental activity in which the courts have less competence," because "courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *Id.* The same problems implicated the third and fourth *Baker* factors, because the judgments sought "inevitably would require ... initial policy decisions of a kind appropriately reserved for military discretion," and would "express a lack of respect for the political branches of government." *Id.*

Although the Second Circuit has not considered a case faulting the military targeting decisions of a foreign government, it has articulated these same principles in cases involving military decisions by the United States. In *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), for example, the plaintiffs disputed the legality of U.S. military decisions regarding Cambodia during the Vietnam war, and in particular whether developments in Cambodia and

Vietnam had changed the situation since Congress authorized the war. The Court held, "[t]hese are precisely the questions of fact involving military and diplomatic expertise not vested in the judiciary, which make the issue political and thus beyond the competence of that court or this court to determine." 484 F.2d at 1310. While the Court might "agonize and bewail the horror of this or any war," the propriety of military decisions was a "bluntly political and not a judicial question." *Id.* at 1311. *Accord DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973). Similarly, in *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985), a British group challenged deployment of U.S. missiles in the United Kingdom. The Court found that the complaint raised "issues which have been committed by the Constitution to coordinate political departments ... and request[ed] relief which cannot be granted absent an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 37.

In other decisions, the Court of Appeals has recognized that claims involving foreign nations can "implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches," *Kadic*, 70 F.3d at 249, but in the particular case at bar did not do so. In *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44 (2d Cir. 1991), for example, the Court found the *Baker* factors inapplicable in a suit against the Palestine Liberation Organization for the hijacking of a passenger liner. The case did not involve the military decisions of a sovereign state allied with the United States, but rather a tort claim against a non-sovereign that by statute was a "terrorist organization." 22 U.S.C. § 5201. No political judgments reserved to the Executive Branch were necessary to assess acts that, by the defendant's own admission, constituted piracy. And there was no interference with foreign policy because Congress and the Executive had expressly endorsed such suits against terrorist organizations. *Klinghoffer*, 937 F.2d at 50. Aside from its familiar articulation of the framework for analysis, that case has no

bearing on this one. *Kadic*, too, was a faithful application of the principles dictating dismissal of this case. That suit involved an ongoing program of murder, torture and rape directed by a self-proclaimed president of a state the U.S. did not recognize. The Department of State had "expressly disclaimed any concern that the political question doctrine should be invoked." 70 F.3d at 250. That is far cry from this case, which focuses on a military targeting decision by a U.S. ally against a leader of an organization the U.S. has designated as terrorist, in a war on terror the U.S. supports, where the U.S. has previously expressed concern about judicial interference as it seeks to mediate a resolution of decades of conflict.

**3. The political question doctrine bars adjudication of this case**

The concern expressed by the Executive Branch is warranted. This is a time of both turmoil and opportunity in the Middle East, and the United States continues to pursue diplomatic avenues to peace. Pronouncements by the Court in these areas could complicate, if not thwart, initiatives by the Executive Branch. Indeed, Israel has formally objected to adjudication of this suit as an unwarranted interference in its conduct of security operations in the war on terror, and as a potential complication in its ongoing dialogue on Mideast peace. State of Israel Letter, *supra* n.2. Further, the Israeli Supreme Court is currently weighing challenges to Israel's policy of targeting terrorist leaders.[11] The U.S. Government has previously urged restraint in adjudicating ATCA claims where it could reflect disrespect for the judicial processes of other nations. *See* Statement of Interest of the United States, *Mujica v. Occidental Petroleum*, Civ. No. 03-2860 at 1-2 (C.D. Cal. Dec. 29, 2004) (submitted herewith). These concerns have particular resonance where foreign judicial proceedings are in the courts of a democratic ally.

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[11] Petition by the Public Committee Against Torture in Israel, High Court of Justice, Case No. 769/02 (final hearing held on 11 December 2005, awaiting judgment).

Although plaintiffs trumpet the Bush Administration's criticism of the attack on Shehadeh, Compl. ¶ 3, the Administration's comments in fact confirm the political nature of the issue and the ability of the Executive Branch to deal with it. The same State Department spokesman whom plaintiffs quote expressly stated, two days later, that the U.S. believed the issues should be addressed within a diplomatic, not a legal framework:

> *We're not seeing this as a legal issue.* We're not trying to find legalistic technicalities to hang Israel or its lawyers on. We're looking for ways of contributing to Israel's security and trying to help Israel achieve what it wants, and trying to help the Palestinians achieve their legitimate aspirations as well. And we're working very hard on the process of peace.

*See supra* n.4. Similarly, while plaintiffs quoted the White House Press Secretary, they omitted his statement seconds later reflecting that President was dealing with these events in the context of ongoing diplomatic efforts. Acknowledging Israel's "right to self-defense," he noted that "the President continues to call on all parties to honor their responsibilities, to make certain that the *political solutions* are found to bring peace to the region."[12] He stated further, "[w]e are dealing with the realities on the ground here in an area where it remains very important for people to remember the consequences of their actions. And those consequences have to always keep in mind the fundamental, overriding importance of finding a *political solution* to the violence in the region." *Id.* (emphasis added). The courts cannot maneuver through this diplomatic maze, and should be wary of hindering the efforts of the President to do so.

Proceeding with this case also could expose senior U.S. officials to suits in foreign courts arising out of their official acts. In an ATCA case against Chinese officials for persecuting the

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[12] White House Press Briefing, July 23, 2002, *at* http://www.whitehouse.gov/news/releases/2002/07/20020723-5.html (emphasis added).

Falun Gong, the U.S. Government asked the Court "to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy," including suits alleging international law violations against individuals "in carrying out their official functions under the Constitution, laws and programs of the United States." *Liu Qi* Statement, *supra*, at 8. This concern is palpable here, where plaintiffs' own counsel sued Secretary Rumsfeld and other U.S. officials in Germany for human rights violations in Iraq.[13] In Belgium, the U.S. exerted great diplomatic pressure for repeal of a law under which General Tommy Franks, President Bush, the Secretary of Defense and other top U.S. officials faced lawsuits for "war crimes" in Iraq or Afghanistan arising out of U.S. military operations or ongoing security sweeps in the midst of civilian populations.[14] Indeed, then-National Security Advisor Condoleezza Rice said that it could not be countenanced for an "ally" to permit such charges against "freely and democratically elected leaders."[15] Moreover, U.S. military operations sometimes result in unfortunate deaths or injuries of civilians, just as Israel's

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[13] *See* Center for Constitutional Rights website, http://www.ccr-ny.org/v2/reports/report.asp?ObjID=TCR1T9TuSb&Content=471. In this country, plaintiffs' counsel filed an ATCA complaint against Secretary Rumsfeld and military leaders attacking the treatment of prisoners at Guantanamo Bay. *Id.* at http://www.ccr-ny.org/v2/reports/report.asp?ObjID=7cqLkN05AO&Content=454. Advocacy groups have filed additional suits against Secretary Rumsfeld, CIA Director George Tenet, and military leaders in various federal courts.

[14] The State Department condemned the Belgian suit (since dismissed) as an "abuse of [Belgium's] legal system for political ends." Statement of Philip T. Reeker, Deputy State Department Spokesman (May 14, 2003), *at* http://www.state.gov/r/pa/prs/dpb/2003/20584.htm. The United States Government expressed similar views regarding suits in Belgium against President George H.W. Bush and other senior U.S. officials arising out of the 1991 Gulf War. *See* Interview with Secretary of State Colin L. Powell (May 18, 2003), *at* http://www.state.gov/secretary/rm/2003/18810.htm; Statement of State Department Spokesman Richard Boucher (Apr. 28, 2003), *at* http://www.state.gov/r/pa/prs/dpb/2003/20025.htm. Under significant pressure from the United States, Belgium amended its war crimes law to disallow such suits.

[15] Statement of National Security Advisor Condoleezza Rice, June 12, 2003, *at* http://www.whitehouse.gov/news/releases/2003/06/20030612-12.html.

operation against Saleh Shehadeh did.[16] The Administration has sought to protect American officials from liability for such events.[17] Congress has agreed, with a finding in federal legislation that "senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States." 22 U.S.C. § 7421(9).

The last thing that this Court, any court, would wish to do is interfere with the foreign policy of the United States and in particular with the search for peace in one of the most difficult areas of the world. This case -- from its overheated allegations of war crimes to its hyperbolic assault on the very core of Israel's efforts to defend itself against terrorism -- poses that risk. It seeks to embroil the Court in the foreign policy of the United States and in second-guessing the security policy of one its closest allies. The Court should not leap into that thicket. Plaintiffs should pursue their political goals in political forums, not here in a Federal Court.

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[16] *See, e.g.*, White House Press Briefing, Jan. 4, 2006, *at* http://www.whitehouse.gov/news/releases/2006/01/20060104-1.html (family of 12 in Iraq killed by U.S. pilots who targeted a house where they believed insurgents had taken shelter); "Pakistan Protests Airstrike," CNN, *at* http://www.cnn.com/2006/WORLD/meast/01/14/alqaeda.strike/index.html (18 people killed in U.S. air strike in Pakistan aimed at Al Qaeda's #2 leader, Ayman Al-Zawahiri). Given plaintiffs' assault on Israel's policy of attacking terrorist leaders, the U.S. justification of its air strikes is noteworthy. Defending the Iraq strike in early January, the White House said the U.S."target[s] the terrorists and the Saddam loyalists who are seeking to kill innocent civilians and disrupt the transition to democracy." White House Press Briefing, Jan. 4, 2006, *supra.*

[17] *See, e.g.*, Statement of Marc Grossman, Under Secretary of State for Political Affairs (May 6, 2002), *at* http://www.state.gov/p/9949.htm ("We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations. Our President is committed to a robust American engagement in the world to defend freedom and defeat terror; we cannot permit the [International Criminal Court] to disrupt that vital mission.").

### B. The Complaint Asks the Court To Judge the Legality and Validity of Sovereign Acts by Israel

The Act of State doctrine also mandates dismissal here. The doctrine applies where "the outcome of the case turns upon [] the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990). The Supreme Court has described the doctrine "as 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." *Id.* at 404 (quoting *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423 (1964)). The policies underlying the doctrine include "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *Id.* at 408.[18]

The Supreme Court has articulated a three-factor test for applying the Act of State doctrine, focusing on: (a) "the degree of codification or consensus concerning a particular area of international law," (b) the extent to which the issue "touch[es] ... sharply on national nerves," with greater justification for "exclusivity in the political branches" the more "important the

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[18] The doctrine extends to the governmental acts of State officials vested with sovereign authority. *See Bernstein v. Van Heyghen Freres Societe Anonyme,* 163 F.2d 246, 249 (2d Cir. 1947). As noted above, the alleged acts at issue here were official, not private.

Further, plaintiffs cannot evade the Act of State doctrine by claiming the bomb that injured them was dropped outside Israel's borders. They have sued a former official who served in Israel. Plaintiffs do not claim that Mr. Dichter piloted the plane over Gaza, or dropped the bomb, or conducted the reconnaissance. They charge him, as head of ISA, with such things as advocating, planning, commanding, failing to discipline -- all on information and belief, and none alleged to occur outside his offices in Jerusalem and Tel Aviv. In any event, whether Gaza is outside Israel's borders is itself a political question. As the Court found in *Doe*, "the Court is not competent to adjudicate whether the West Bank, in dispute for decades, belongs to the Israelis or the Palestinians." 400 F. Supp. 2d at 114 n.6. *See also Corrie*, 403 F. Supp. 2d at 1032 (applying Act of State doctrine to Israeli actions in West Bank).

implications of an issue are for our foreign relations," and (c) whether "the government which perpetrated the challenged act of state is no longer in existence." *Sabbatino*, 376 U.S. at 428. Of these factors, "[t]he 'touchstone' or 'crucial element' is the potential for interference with our foreign relations." *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981). The third factor clearly applies here: Israel is a stable democracy, with continuity of government. The second, critical *Sabbatino* factor -- the sensitivity of the issue for foreign relations -- is particularly compelling in this case, for the reasons addressed above.

The Second Circuit has not addressed the Act of State doctrine in a case like this one, involving a public official sued for implementing the policies of a democratic ally of the United States. *Kadic*, for example, involved acts "taken in violation of [the] nation's fundamental law and wholly unratified by that nation's government." 70 F.3d at 250. That is not the situation here, where the Israeli government, in targeting an individual terrorist, has stated that the acts in question were authorized, ratified, and reflective of official government policy. *See supra* nn. 2, 8.[19] Nonetheless, the principles the Court of Appeals has articulated, its recognition that "courts generally refrain from judging the acts of a foreign state within its territory," 70 F.3d at 250, are entirely in harmony with the law in other Circuits and dictate dismissal of this case.

Again, *Doe* properly applies the prevailing law. Assessing allegations that encompassed those advanced here -- including targeted killings and failure to prevent civilian casualties -- the Court recognized the infringement on Israeli sovereignty. Specifically, the Court held,

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[19] Nor does world opinion unanimously oppose Israel's conduct of the war on terror, such that the Act of State doctrine ought not to apply. *See Kadic*, 70 F.3d at 250 (dicta). The United States, for one, has repeatedly reiterated its support for Israel's right to take action against terrorism, even when it might question the wisdom of certain actions, to counter the existential threats it faces. *See, e.g., supra* pp. 2, 3, 21 & n.12. In this case, while the Administration was critical, it expressly did *not* challenge the legality of Israel's actions. *See supra* p. 21 & n.4.

> The actions challenged by plaintiffs are classic acts of state. Tort challenges brought against foreign military officials for such alleged harms as unlawful detention during a political revolution implore the courts to "declare invalid and deny legal effect to acts of a military commander representing the . . . government." Plaintiffs do not challenge the actions of third-parties in procuring the alleged unlawful acts; rather, they ask this Court directly to declare that they were treated illegally by Israeli defendants on Israeli soil. Such a determination would offend notions of international comity and sovereignty.

400 F. Supp. 2d at 113 (citations omitted).

These principles, and the reluctance of federal courts to review officially sanctioned military decisions of foreign governments recognized by the United States, are well-established. Thus, in *Saltany v. Reagan*, the Court dismissed ATCA claims against the United Kingdom arising out of civilian injury and death from U.S. military action against Libya. 702 F. Supp. at 320-21. The Court explained that "[w]hat is charged is, quite simply, Britain's complicity in an illicit act of war committed by the United States. By any definition that description of the United Kingdom's allegedly wrongful conduct constitutes an archetypal act of state." *Id.* Similarly, in *Roe v. Unocal Corp.*, the Court dismissed an ATCA claim that would "ultimately place the Court in the position of evaluating the legitimacy of orders directed to subordinate officers" of the Burmese military. 70 F. Supp. 2d 1073, 1079 (C.D. Cal. 1999). The Court reasoned that this process, necessitating discovery into, among other things, "details of their command structure and the authority of commanding officers," would place the court "in an unseemly, if not impossible position." *Id.* Because U.S. courts "rarely, if ever, entertain suits challenging the propriety of orders from the United States Armed Forces," the Court was "not persuaded that it should undertake such an inquiry with respect to a foreign military." *Id.* at 1080.

This case would require the same type of inquiry the Court in *Roe* found so problematic. Plaintiffs seek to hold liable a former high-level Israeli official, who oversaw intelligence and

domestic security, for the alleged act of the Israeli armed forces -- pursuant to decisions of Israeli political leaders -- in dropping a bomb in Gaza. To establish such "command responsibility" for purposes of the TVPA, plaintiffs would need to demonstrate at minimum that defendant either directly ordered or participated in these acts. *See* S. Rep. No. 102-249 (1991) at 8-9; *Ford ex rel. Estate of Ford v. Garcia,* 289 F.3d 1283, 1288-89 (11th Cir. 2002); *Hilao v. Estate of Marcos,* 103 F.3d 767, 779 (9th Cir. 1996). Plaintiffs no doubt would assert a need for discovery into the command structure and rules of engagement of Israeli military forces, what intelligence Israel gathered and how, the communications among field officers and their commanders up the line, and the discussions among political leaders in setting Israeli policy and authorizing its implementation in this case. No country -- not Burma, not Israel, not the United States -- would tolerate such a wholesale invasion of sovereignty.

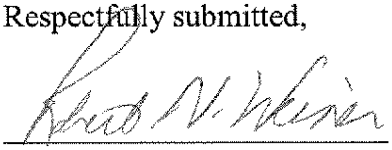
In sum, this case, no less than *Doe*, presses a frontal assault on Israel's policies and interferes with its sovereignty. Plaintiffs ask the Court to adjudicate the legal and political justification of security operations by a key U.S. ally in response to lethal attacks on its citizens. Their claims collide directly with the Act of State doctrine.

## CONCLUSION

For the reasons discussed above, Avraham Dichter's motion should be granted and the claims against him dismissed in their entirety.

Dated: February 22, 2005

Respectfully submitted,



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