UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RA'ED MOHAMMAD IBRAHIM MATAR, on behalf of himself and his deceased wife Eman Ibrahim Hassan Matar, and their deceased children Ayman, Mohamad and Dalial; MAHMOUD SUBHAI AL HUWEITI, on behalf of his himself and his deceased wife Muna Fahmi Al Huweiti, their deceased sons Subhai and Mohammed, and their injured children, Jihad, Tariq, Khamis and Eman; and MARWAN ZEINO on his own behalf, Plaintiffs, vs. AVRAHAM DICHTER, former Director of Israel's General Security Service, Defendant.	Civil Action No. 05 CV 10270 (WHP) ECF Case

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

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Plaintiffs ask the Court to ignore the potential threat this case poses to the foreign policy of the United States, to turn a blind eye to the expressed concerns of the U.S. and Israeli governments, and effectively to nullify the sovereign immunity statute. This brief will refute each of Plaintiffs' arguments in turn, but this particularized exercise should not obscure the overarching, common-sense point: This Court is not the proper forum for foreign plaintiffs to challenge the way a democratic U.S. ally defends itself overseas against an existential terrorist threat, especially where the Executive, in its diplomatic efforts to bring peace to the Middle East, has addressed the incident at issue.

To evade this point, Plaintiffs first attempt to cast aside the public record reflecting the U.S. foreign policy interests at stake. They seek to re-label a motion under Fed. R. Civ. P. 12(b)(1), urging the Court to decline jurisdiction over a political question, as a motion to dismiss under Rule 12(b)(6) for failure to state a claim. And because, as Plaintiffs spin it, this motion arises under Rule 12(b)(6), the Court may not consider evidence. This position is wrong.[1] The lone case Plaintiffs cite, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996), does not mention Rule 12. The Court's observation that the political question doctrine is prudential rather than jurisdictional signals only that it addresses whether courts *should* exercise jurisdiction rather than whether they *can*. The Court did not suggest that the doctrine relates to the legal sufficiency of the claims. Indeed, in deciding whether the *Kadic* case presented a political question, the Court considered extrinsic evidence, conclusively refuting Plaintiffs' argument here. *Id.* at 250.

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[1] *See U.S. v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *6 (S.D.N.Y. Apr. 12, 2002) (Rule 12(b)(1) applies because act of state and political question doctrines treated as "principles of abstention [that] present a threshold issue: whether or not to exercise the court's jurisdiction"); *Schlesinger v. Reservists Comm.*, 418 U.S. 208, 215 (1974) (presence of political question "prevent[s] the power of the federal judiciary from being invoked by the complaining party"); 5B Wright & Miller, Fed. Practice and Procedure: Civil 3d § 1350, at 100-02.

Rule 12(b)(1), however, does not justify Plaintiffs' request for discovery. Such discovery would infringe on Israeli sovereignty in a highly sensitive area of any government's operations and potentially precipitate diplomatic concerns. *See* pp. 11-12, *infra*. Because of such concerns, courts have been reluctant to grant jurisdictional discovery on Foreign Sovereign Immunities Act ("FSIA") issues. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) (courts must be mindful to "protect[] a sovereign's or sovereign's agency's legitimate claim to immunity from discovery," so discovery "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination") (citation omitted); *In re Terrorist Attacks*, 392 F. Supp. 2d 539, 575 (S.D.N.Y. 2005) ("discovery regarding [Saudi bank's] FSIA defense would necessarily subject the Kingdom to discovery, which the court is hesitant to do unnecessarily"); *see also In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998) ("a trial court should ... normally consider other potentially dispositive jurisdictional defenses before allowing FSIA discovery").

Common sense suffers again in Plaintiffs' argument that the FSIA does not apply to officials acting on behalf of foreign governments. For that proposition, Plaintiffs cite *Tachiona v. U.S.*, 386 F.3d 205 (2d Cir. 2004). But the Court concluded there that it had "no occasion to decide" whether the FSIA applied. 386 F.3d at 221; *see also Kensington Int'l Ltd, v. Societe Nationale des Petroles du Congo*, No. 05 Civ. 5101, 2006 WL 846351, at *13 (S.D.N.Y. Mar. 31, 2006) (Second Circuit "has not clearly addressed this issue"). Judges in this District -- seven of them -- have consistently found that the FSIA applies in this context,[2] as have at least five other Circuits.[3]

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[2] *In re Terrorist Attacks*, 392 F. Supp. 2d at 551; *Kato v. Ishihara*, 239 F. Supp. 2d 359, 362 (S.D.N.Y. 2002); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286-87 (S.D.N.Y. 2001); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 (S.D.N.Y.

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In any event, logically, the FSIA must protect foreign officials sued for official acts. As the Court held in *Doe v. State of Israel*, foreign sovereigns "can only act through their individual officers." 400 F. Supp. 2d 86, 104 (D.D.C. 2005). Therefore, denying those officers sovereign immunity for official acts would be "a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." *Chuidian*, 912 F.2d at 1102; *cf. Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (under 11th Amendment, a suit against state officials in their official capacity ... is no different from a suit against the State itself.... A different rule ... would ... circumvent congressional intent by a mere pleading device.") (citations omitted).[4]

Plaintiffs' fallback position -- that Mr. Dichter did not act in an official capacity because illegal conduct cannot be official -- is also meritless. To begin with, Plaintiffs' arguments outrun their Complaint. Their brief says that "intentional bombing of a civilian apartment building in a crowded neighborhood is a clear violation of customary international law and hence Israeli law." Mem. at 9. But their Complaint does not allege that Mr. Dichter bombed a civilian building, intentionally or otherwise. It alleges that the agency Mr. Dichter headed provides "intelligence," that it identifies the individuals -- terrorist leaders -- whom the Air Force

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1996); *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995); *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981).

[3] *See Velasco v. Gov't of Indonesia*, 370 F.3d 392, 402 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002); *Byrd v. Corporacion Forestal*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990). Plaintiffs rely on *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005), but the foreign State there, unlike Israel here, voiced no position on the immunity of its former official.

[4] Because a State can act only through its officials, those officials are "instrumentalities" (28 U.S.C. § 1603(a)) of the State within the normal meaning of the word. *See* W. Statsky, *West's Legal Thesaurus & Dictionary* 416 (1989) ("a means or agency"); *Ballantine's Law Dictionary* 641 (3d ed. 1969) ("a means of accomplishment").

attacks, and that it approves firing at the individual, though the decision whether to fire rests with the Air Force "based on environmental conditions at the time of the attack." Compl. ¶¶ 37, 38. Without specifying what Mr. Dichter himself *did*, the Complaint asserts -- on information and belief -- that he did it "despite actual *and/or constructive notice* that nontargeted individuals were present in the densely populated neighborhood of al-Daraj." Compl. ¶ 40 (emphasis supplied). Thus, even on information and belief, Plaintiffs could not muster a straightforward allegation that Mr. Dichter engaged in "the intentional bombing of a civilian apartment building in a crowded neighborhood." Mem. at 9.

Nonetheless, on that counterfactual premise, Plaintiffs proffer a legal opinion that the bombing violated Israeli and international law, and thus, they say, Mr. Dichter could not have acted in an official capacity.[5] The Supreme Court has rejected the parallel argument under the 11th Amendment. In the Court's view, if actions of a state official were deemed to fall outside official capacity because they violate state law, "a plaintiff would need only to claim a denial of rights protected or provided by statute in order to override sovereign immunity. Except in rare cases it would make the constitutional doctrine of sovereign immunity a nullity." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984); *see also Ramey v. Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (if official capacity was "coextensive with the official's lawful conduct, then immunity would be available only where it is not needed"). The same logic

[5] Neither Plaintiffs nor the declarant disclose that he filed a similar declaration in the case pending against Israel before the High Court there, challenging targeted attacks on terrorists. Such a disclosure would have highlighted that Mr. Dichter is sued here as a proxy for the Israeli government. It would have demonstrated that Israel's attacks on terrorists reflect the policy of the Israeli government, which it is defending in the High Court. *See* Amos N. Guiora, Legislative and Policy Responses to Terrorism, A Global Perspective, 7 San Diego Int'l L.J. 125, 146 (2005) (discussing Israel's submission to the High Court). And it would have underscored the disrespect Plaintiffs' Complaint evinces for the judicial processes of a democratic ally. Defendant objects to the declaration as irrelevant, but especially given the litigation in Israel, is able readily to offer a definitive rebuttal if and when the Court so desires.

applies under the FSIA, particularly given that foreign States *themselves* have immunity for those same acts even if they did violate national or international law. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997).

Under the FSIA, as under the 11th Amendment, conduct is in an official capacity if the actions were "neither personal nor private but were undertaken only on behalf of" the sovereign. *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *cf. Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (under 11th Amendment, action falls within "official capacity" if it involves a "policy or custom" for which the government is a "moving force"). In applying that test, the legality of the official's conduct may be one piece of evidence. But the more significant -- potentially definitive -- evidence is the view of the official's government. Thus, in *Doe v. Qi*, on which Plaintiffs rely, the Court quoted the conclusion in the Senate Report on the Torture Victim Protection Act (TVPA) that "FSIA immunity would extend to an individual if the state 'admit[ted] some knowledge or authorization of relevant acts.'" 349 F. Supp. 2d 1258, 1288 n.20 (N.D. Cal. 2002) (*quoting* S. Rep. No. 102-249 at 8). In that case as well as the others Plaintiffs cite, the government of the defendant official either denied that he acted within his authority, *see id.* at 1287; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Trajano v. Marcos*, 978 F.2d 493, 498 n.11, 500 (9th Cir. 1992), or was silent, *Xuncax v. Gramajo*, 886 F. Supp. 162, 176 n.10 (D. Mass. 1995), sometimes because the official did not advance the claim, *Cabiri*, 921 F. Supp. at 1198; *see also Kadic*, 70 F.3d at 250 (finding that defendant's actions were "wholly unratified" by his government). Indeed, if official capacity turned solely on legal authority, there would have been no reason for these courts even to have considered the foreign State's position. The proper test, then, is whether Mr. Dichter acted on behalf of Israel. Under

Plaintiffs' own allegations, whatever Mr. Dichter did was on behalf of the State of Israel, pursuant to official "policies" that Plaintiffs attack. Compl. ¶¶ 16-19; Cassese Decl. ¶¶ 8-33.

To sustain their untenable reading of the FSIA, Plaintiffs exaggerate Defendant's position as insulating the Nuremberg defendants from scrutiny. Mem. at 10-11. Invoking Nuremberg is not only inapt, but frankly, offensive. Israel is a democratic ally, founded out of the ashes of the Holocaust, and the U.S. has repeatedly characterized its actions against terrorists as legitimate self-defense.[6] Moreover, the issue at Nuremberg was not whether Nazi war criminals were immune from private lawsuits under the FSIA, but whether they should answer to a world tribunal. *Cf. Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir. 2001) ("although *jus cogens* norms may address sovereign immunity in contexts where international law itself provides immunity, e.g., the Nuremberg proceedings," they "do not require Congress (or any government) to create jurisdiction" in its own courts); *Smith*, 101 F.3d at 242-45; *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173 & n.1 (D.C. Cir. 1994).

Again trying to put blinders on the Court, Plaintiffs urge it to disregard the legislative history stating that the TVPA is not intended to displace the FSIA, because, they say, the statutory language purportedly makes clear that it does preempt. But that "clear" language says nothing about the FSIA. As the Supreme Court has held, "when two statutes are capable of co-

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[6] *See, e.g.*, Remarks by Pres. George Bush, May 18, 2004, at http://www.whitehouse.gov/news/releases/2004/05/20040518-1.html ("Israel is a democracy and a friend, and has every right to defend itself from terror"); *id.*, Apr. 14, 2004, at http://www.whitehouse.gov/news/releases/2004/04/20040414-2.html ("Israel will retain its right to defend against terrorism, including to take actions against terrorist organizations"); White House Press Briefing, July 23, 2002, at http://www.whitehouse.gov/news/releases/2002/07/20020723-5.html (acknowledging Israel's "right to self-defense," in the specific context of the attack on Shehadeh); "U.S. Diplomatic Efforts in the War Against Terrorism," Hearing before the Comm. on Int'l Relations of the House of Reps., 107th Cong., 1st Sess., Oct. 24, 2001 (Secretary of State Powell testifying, with respect to "targeted killings," that "Israel has the right to defend itself in the way it sees fit and appropriate") ("Powell Statement, Oct. 2001"); *see also* H.R. Res. 392, 107th Cong. (2002); H. Con. Res. 280, 107th Cong. (2001).

existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The two statutes here can co-exist. Leaving the FSIA intact does not, as Plaintiffs claim, exempt all TVPA claims against foreign officials acting with "actual authority." In addition to cases where the foreign governments subsequently waive sovereign immunity or disavow the acts of their officials, the FSIA has important exceptions. The Court may have jurisdiction in such cases, but not here.

Perhaps Plaintiffs' gravest assault on common sense is their insistence that this Court disregard the letter of the Israeli Ambassador to the Undersecretary of State. In that letter, the Ambassador affirmed that the attack in question was a sovereign act of Israel, and that any actions by Mr. Dichter were in the course of his "official duties, and in furtherance of official policies of the State of Israel." Kalicki Decl. Ex. A (Letter from D. Ayalon, Ambassador of Israel, to N. Burns, Under-Secretary of State for Political Affairs, Feb. 6, 2006) ("Israel Letter"). Judges in this District have given significant weight to similar submissions. *See In re Terrorist Attacks*, 392 F. Supp. 2d at 551; *Leutwyler*, 184 F. Supp. 2d at 287-88; *Rein v. Rein*, No. 95 CV 4030, 1996 WL 273993, at *2 (S.D.N.Y. May 23, 1996); *Kline*, 685 F. Supp. at 390. Nonetheless, ignoring those precedents, Plaintiffs claim that this Court cannot consider the letter because it renders a "legal opinion" on Mr. Dichter's actions, and the Ambassador is not a lawyer. The Ambassador's legal training is irrelevant. He plainly is not speaking for himself. He is conveying the official position of Israel, which is what Ambassadors do. *See, e.g., Jota v. Texaco Inc.*, 157 F.3d 153, 163 (2d Cir. 1998) ("traditional authority of ambassadors [is] to represent the state's position before foreign courts").[7] And Israel's position is not a legal

[7] Should the Court nonetheless wish further confirmation of Mr. Dichter's authority, Israel is prepared to make a formal *amicus* submission.

opinion, but a governmental statement of policy.

The same apparent detachment from reality infects Plaintiffs' discussion of the political question doctrine. Contrary to Plaintiffs' suggestion, many courts have held that the doctrine has particular force in foreign relations. *See, e.g.*, *Bancoult v. McNamara*, No. 05-5049, 2006 WL 1042356, at *4 (D.C. Cir. Apr. 12, 2006) (national security and foreign relations are "the quintessential sources of political questions"); *Wang v. Masaitis*, 416 F.3d 992, 1002 (9th Cir. 2005) ("the Supreme Court has reasonably invoked the political question doctrine distinctly in the area of foreign affairs"). Further, Plaintiffs' assertion that courts have often interceded in the Middle East is illusory. None of the cases Plaintiffs cite was against a sovereign state or its official.[8] None attacked the policies of a U.S. ally. None evoked a governmental protest from the ally that the case "runs counter to the ongoing ... dialogue" with the U.S. and "the key diplomatic role" the U.S. has played. *See* Israel Letter. And none arose against the backdrop of a recent case, presenting many of the same claims, where the U.S. government warned that "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 ... would intrude upon the foreign policy prerogatives of the political branches." Fed. Defs.' Mem., *Doe v. State of Israel*, Civ. No. 1:02 CV 01431 (D.D.C.), Oct. 31, 2002.

Plaintiffs' attempt to distinguish *Doe v. Israel* likewise falls flat. Unlike this case, Plaintiffs assert, Doe sought damages, injunctive relief, and a declaration deriding Israel's

[8] Three of the cases were against nongovernmental organizations under the Antiterrorism Act, for their sponsorship of terrorism. *See Ungar v. Palestinian Lib. Org.*, 402 F.3d 274 (1st Cir. 2005); *Linde v. Arab Bank*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005); *Biton v. Palestinian Interim Self Gov't*, 310 F. Supp. 2d 172 (D.D.C. 2004). The fourth was brought *by* a foreign official, availing himself of the U.S. courts. *Sharon v. Time*, 599 F. Supp. 538 (S.D.N.Y. 1984).

policies on the West Bank. But it was not the relief sought in *Doe* that implicated political questions, but rather the route necessary to arrive at the relief, which required the Court to assess Israel's national security policies. *See, e.g.*, *Doe*, 400 F. Supp. 2d at 112 ("The Court cannot find that plaintiffs state a RICO claim unless the Court implicitly determines that the Israeli settlement activities are illegal or tortious. That ... is a foreign relations determination to be made by the Executive or Legislative Branches...."). Plaintiffs seek to send this Court down that same route, claiming that not only Israel's attacks on terrorist leaders, but also any resulting civilian casualties, are illegal "extrajudicial killings." *See, e.g.*, Compl. ¶¶ 17-18, 86.

Nor can Plaintiffs so easily shrug off the turbulence of the Middle East. The Court's conclusion in *Doe* that the parallel claims there were "peculiarly volatile, undeniably political, and ultimately nonjusticiable," 400 F. Supp. 2d at 112, did not relate, as Plaintiffs imply, to the emotional state of the parties. It related to the ever-present prospect of violence and the precarious state of diplomatic efforts to bring peace. And it related to a core issue in the ongoing dispute in the Middle East, Israel's need and right to defend itself. *See id.* That is the issue on which Plaintiff would have this Court speak -- not in a vacuum, but an echo chamber.

Plaintiffs next surmise that adjudicating this case would not interfere with U.S. foreign policy because the State Department "condemned" the attack at issue in 2002. Mem. at 22, 29-30. This supposition is both inaccurate and at odds with common sense. It is inaccurate because the Department made clear in July 2002 that it did not challenge the *legality* of Israel's attack -- the issue Plaintiffs seek to litigate -- but rather its utility in furthering the peace process.[9] The

[9] Addressing the attack on Shehadeh on July 25, 2002, the State Department spokesman stated, "We're not seeing this as a legal issue.... 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." U.S. Dep't of State Daily Press Briefing (July 25, 2002), at http://www.state.gov/r/pa/prs/dpb/2002/12187.htm.

State Department has consistently taken this approach, focusing on practical diplomatic goals while affirming that Israel's so-called "targeted killings" fall within its right of self defense:

> [Israel] is a democratic state. *It has a right to defend itself in the way that it sees fit and appropriate.* But we have felt that targeted assassinations, however much the state of Israel believes they are appropriate and uses their forces to conduct such activities, we believe that those kinds of activities are hurtful to the overall process.

Powell Statement, Oct. 2001, *supra* n.6 (emphasis added).

The President has repeatedly supported Israel's conduct of the war on terror. *See* n.6, *supra*. Congress likewise has supported Israel's policies. In May 2002, the House of Representatives reaffirmed its "solidarity with Israel as it takes necessary steps to provide security to its people by dismantling the terrorist infrastructure in the Palestinian areas." H.R. Res. 392, 107th Cong. (2002). Just weeks after the attack at issue here, Congress appropriated $200 million to assist Israel in combating international terrorism. Pub. L. 107-206, 116 Stat. 820 (2002). Congress has since reiterated its support for Israel in the war on terror at least 11 times.[10]

Specifically as regards the legality of attacks on terrorist leaders, the United States would be hard-pressed to take a different view, as it follows the same approach.[11] Thus, Plaintiffs ask this Court to adopt a position different from that of the Executive Branch on an issue of foreign

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[10] *See* Pub. L. 109-102, 119 Stat. 2172, 2180, 2191-92 (2005); Pub. L. 109-13, 119 Stat. 231, 264 (2005); S. Res. 27, 109th Cong. (2005); H.R. Res. 575, 109th Cong. (2005); Pub. L. 108-447, 118 Stat. 2809, 2975-76, 2987 (2004); Pub. L. 108-199, 118 Stat. 3, 150, 163 (2004); H.R. Res. 713, 108th Cong. (2004); H. Con. Res. 460, 108th Cong. (2004); Pub. L. 108-11, 117 Stat. 559, 577 (2003); Pub. L. 108-7, 117 Stat. 11, 166, 176 (2003); H.R. Res. 294, 108th Cong. (2003).

[11] *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). Indeed, according to Plaintiffs' declarant, Mr. Cassese, international law would allow the U.S. to attack Osama bin Laden only when he was actively shooting at or bombing civilians, appeared to be carrying concealed weapons, or ignored a summons to show he is not planning an imminent terrorist assault. That, most definitely, is not the position of the U.S. government.

policy, precisely what *Baker v. Carr* seeks to avoid. And Plaintiffs' position would expose U.S. military officers to liability. For example, in January 2006, a U.S. air strike, like the Israeli strike at issue here, targeted Al Qaeda's second in command, Ayman Al-Zawahiri, but instead killed 18 civilians in the house he supposedly was visiting. On Plaintiffs' theory, relatives of those civilians could sue senior U.S. intelligence officials who "participated" in the political and military decision to strike. Compl. ¶ 39.

In any event, Plaintiffs' argument is a *non sequitur*. Even if the State Department *had* challenged the legality of the Shehadeh attack -- which it did not -- intervention by the judiciary still would interfere with U.S. foreign policy. The State Department has repeatedly urged courts not to adjudicate cases even though the Executive Branch had condemned the practices at issue. *See, e.g.*, Statement of Interest, *Doe v. Qi*, No. C 02 0672 CW, at 7-8 (N.D. Cal. Sept. 27, 2002) (despite many U.S. condemnations of violations of the "basic human rights of Falun Gong practitioners in China," litigating claims against Chinese officials could "detract from, or interfere with, the Executive Branch's conduct of foreign policy"). As noted previously, the question here is not what position the Executive Branch took, but their exclusive right to take it. The Executive Branch conducts foreign policy not merely by making press statements, but by negotiation and persuasion in the political arena. Here, the State Department addressed the issue in that arena, as part of the U.S. diplomatic efforts to achieve peace in the Middle East.

Finally, Plaintiffs' own declaration belies their assertion that this Court could easily adjudicate the issues in this case. The declaration asserts that the legality of the Shehadeh attack depends upon "the relationship between the means used to achieve the objective and the established purpose of the action," "the choice of means which are the least injurious to individual rights," and "the balance between the damages caused and benefits gained." Cassese

Decl. ¶ 32. If that were so, how would the Court determine the relationship between the "objective and the established purpose of the action"? Would Plaintiffs be allowed to explore the discussions in the inner councils of the Israeli government for this purpose, or, for the jurisdictional discovery they seek? Could they inquire about Mr. Dichter's discussions with the Prime Minister? With military leaders? Would the Court allow discovery into the means the Israeli military had available to conduct the attack, the weapons it could have employed, the accuracy of that weaponry, the troops available, and any other assets it had in the vicinity? Would the Plaintiffs be entitled to explore Israel's assessment of the risks to its troops of trying to arrest Mr. Shehadeh? In determining whether the means employed were the "least injurious to individual rights," would Plaintiffs be allowed to inquire into Israeli intelligence regarding the bombing site? Would Mr. Dichter be expected to reveal evidence allowing Plaintiffs to assess the reliability of the intelligence? Could Plaintiffs ask about spies? Satellite imagery? The gathering, decryption, and analysis of data? And to assess the benefits gained from the action, would Plaintiffs be able to depose Mr. Dichter on any terrorist plans by Hamas that Israeli intelligence uncovered? On the evaluation by intelligence operatives of whether the assault on Shehadeh would disrupt or prevent specific terrorist attacks? Would Mr. Dichter be required to expound on the information Israel had collected on Shehadeh and how it was collected?

Even minimal foresight shows that this case does not involve mere routine application of settled legal principles. Even minimal foresight lays bare the potential infringement on Israel's sovereignty, interference with U.S. foreign policy, and entanglement in issues beyond judicial competence. It defies reality to pretend that a case against a high official of a close ally -- who is now in the Israeli Cabinet as Minister of Public Security, working with the U.S. on preventing terrorism -- raises no serious foreign policy issues. Nor is it is credible to suggest that the

inquiry calls on routine judicial skills. That is why, in similar cases, courts consistently have refused to intercede. *See, e.g.*, *Aktepe v. U.S.*, 105 F.3d 1400, 1404 (11th Cir. 1997) (dismissing claims requiring court to determine how a "reasonable military force" should have acted in mistaken U.S. attack on Turkish ship); *El-Shifa Pharm. Indus. Co. v. U.S.*, 402 F. Supp. 2d 267, 275-76 (D.D.C. 2005) (dismissing claims requiring court to "inquir[e] into the reasonableness of the judgments" by U.S. military and intelligence officials in launching missile strike on Sudanese pharmaceutical plant mistakenly identified as terrorist facility). Plaintiffs have articulated no reason why inquiries into military targeting decisions of foreign States would be *more* appropriate for U.S. courts than identical inquiries into U.S. military targeting decisions, which courts repeatedly have declined to hear.

Plaintiffs' arguments regarding the Act of State doctrine are similarly infirm. Plaintiffs contend that the Act of State doctrine does not apply because the bombing occurred in Gaza. But, as noted, the Complaint does not allege that Mr. Dichter carried out the attack, dropped the bomb, or did anything outside Israel. None of the cases Plaintiffs cite are on point. Two, *U.S. v. Giffen*, 326 F. Supp. 2d 497 (S.D.N.Y. 2004), and *Risk v. Kingdom of Norway*, 707 F. Supp. 1159 (N.D. Cal. 1989), *aff'd*, 936 F.2d 393 (9th Cir. 1991), involved claims against officials who, unlike Mr. Dichter, acted outside the state. A third, *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-22 (2d Cir. 1985), turned on the situs of debts negotiated and payable in New York, raising issues not germane here. But the key point is that the Doctrine does not hinge on a metaphysical inquiry regarding where an official acted when making decisions *in* Israel that allegedly had their effect *outside* Israel. Nor should the Court focus on abstruse line-drawing regarding Israel's control over Gaza in 2002. Rather, the Court should look to the fundamental purpose of the Act of State Doctrine.

The Doctrine "demands a case-by-case analysis of the extent to which in the context of a particular dispute separation of powers concerns are implicated." *Allied Bank*, 757 F.2d at 522. As this Court has noted, the Doctrine is "a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Giffen*, 326 F. Supp. 2d at 502 (quoting *W.S. Kirkpatrick & Co., Inc. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990)). On its face, the Complaint here challenges policies formulated at the highest levels of the Israeli government to attack terrorist leaders who were killing Israeli civilians. *See* Compl. ¶¶ 16-20, 36-45; *see also* Cassese Decl. at 2. The Act of State doctrine was designed to prevent exactly this line of attack. *See Jiminez v. Aristeguienta*, 311 F.2d 547, 557 (5th Cir. 1962) (defining the Doctrine as "essentially the principle that conduct of one independent government cannot be questioned by the courts of another"); *see also Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) (applying Doctrine to Israeli actions in West Bank because the "military orders" occurred in Israel). As discussed above, allowing that attack, that infringement on Israeli sovereignty, would indeed hinder the conduct of foreign affairs.

One final point warrants comment. Plaintiffs suggest that if the State Department were concerned about this case, it would file a brief here, as it did in the cases Defendant cited. But in *Doe v. State of Israel*, the U.S. filed as a defendant. And in *Doe v. Qi*, 349 F. Supp. 2d at 1264, and *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1169 (C.D. Cal. 2005), the courts asked the State Department for its views. The Court has made no such request here. The inference Plaintiffs draw is therefore spurious. The concerns the Government expressed in these cases, particularly in *Doe v. State of Israel,* apply on their face to Plaintiffs' claims here. No decision prevents the Court from considering them. Of course, should it wish to do so, this Court

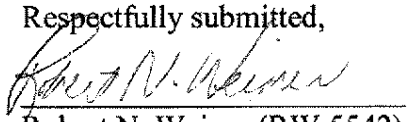
has discretion to ask the State Department to speak in this case regarding the potential impact of the suit on the U.S. foreign policy. *Kadic*, 70 F.3d at 250 (court "inquire[d] whether the United States wished to offer any views concerning any of the issues raised"); *Mujica*, 381 F. Supp. 2d at 1169 (granting request to solicit State Department's views).

CONCLUSION

For these reasons, Defendant Dichter's motion to dismiss should be granted.

Dated: May 19, 2006

Respectfully submitted,



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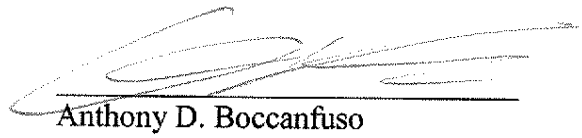
CERTIFICATE OF SERVICE

I, Anthony D. Boccanfuso, the undersigned attorney at law duly admitted to practice in the State of New York, respectfully show that on the 19th day of May, 2006, the annexed **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF AVRAHAM DICHTER'S MOTION TO DISMISS THE COMPLAINT** was served by hand upon:

Jennifer M. Green, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012



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