IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

TEÓFILA OCHOA LIZARBE, in her individual capacity and in her capacity as PR,	)	
CIRILA PULIDO BALDEÓN, in her individual capacity and in her capacity as PR,	)	**Civil Action No. 8:07-cv-01809**
Plaintiffs,	)	**Honorable Peter J. Messitte**
v.	)	
JUAN MANUEL RIVERA RONDÓN,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE LETTER TO THE COURT FROM PERUVIAN AMBASSADOR

Plaintiffs oppose the motion by Defendant Juan Manuel Rivera Rondón ("Rivera Rondón") to strike the letter sent to the Court by the Honorable Felipe Ortiz de Zevallos, Peruvian Ambassador to the United States.

Ambassador Zevallos addressed the Court on a narrow question: whether or not the actions of the Peruvian Army that led to the torture and deaths of numerous civilians, including the deaths of Plaintiffs' decedents, in the Accomarca Massacre, were in fact duly authorized by the democratically-elected government of Peru. The Ambassador states unequivocally that the government of then President Alan Garcia did not authorize the killing of civilians by the Army. That is an entirely fitting subject for the Peruvian government's official representative to the United States to bring before the Court in this case, in which a former Peruvian Army officer alleged to have participated in the Accomarca Massacre seeks to shield himself with Peru's immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"), on

the purported ground that he acted pursuant to the lawful authority of the Peruvian government. Defendant's reasons for seeking to have the Ambassador's letter stricken from the record are baseless.

First, paragraph 80 of the Complaint alleges that Defendant's "acts and omissions were outside the scope of [his] lawful authority and were not authorized by international or Peruvian law." Against that backdrop, the message from Ambassador Zevallos is highly relevant to Defendant Rivera Rondón's sovereign immunity defense, which rests on the proposition that orders issued by Defendant's superiors in the Peruvian Army constitute lawful authorization from the Peruvian government for Defendant to participate in the planning and implementation of the horrific acts alleged in the Complaint. *See* Motion ¶¶ 7 (and its subparts), 9, 12. Ambassador Zevallos's letter indicates very clearly that the premise of Defendant's sovereign immunity argument has no basis in fact. Indeed, it explains that the Peruvian Army's operation at Accomarca was completely contrary to the Garcia government's stated policy of "respect for civil liberties and the human rights of Peruvian citizens." Zevallos Letter, April 3, 2008, ¶ 2 (Paper no. 35). It is appropriate for the Court to consider the Ambassador's letter, particularly in the context of a motion to dismiss based on Defendant's FSIA jurisdictional defense, given the liberal standard that attaches to allegations of a complaint in such circumstances. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). Moreover, because Rivera Rondón's FSIA defense turns on a question of Peruvian law, namely his authority to take the actions alleged in the Complaint, the Court has broad discretion to consider the letter. *See United States v. Mitchell*, 985 F.2d 1275, 1280 (4th Cir. 1993) (acknowledging that courts have "broad discretion . . . in considering evidence" on matters of foreign law).

Second, Defendant's contention that there is "no authority whatsoever for this letter from a third party to be accepted or considered by the Court," Motion ¶ 3, is plainly wrong. Indeed, Rivera Rondón has relied extensively on two cases in his motion papers, and at oral argument, in which the court placed great weight on just such a letter from the Israeli Ambassador to the United States that supported the defendants' claims that they acted in an official capacity with governmental authorization. Motion to Dismiss at 19-21, citing *Belhas v. Ya'alon,* 466 F. Supp. 2d 127 (D.D.C. 2006), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008), and *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007). In neither of these cases was the foreign government a party to the litigation and in each case the Ambassador's letter was made part of the record and was considered by the court in resolving the factual dispute over the defendant's claim of foreign sovereign immunity.[1]

Defendant's request that the Court give no weight whatsoever to the views of the Peruvian Ambassador and, by extension, his government is precisely the opposite of what is appropriate in these circumstances. In *Matar*, the court assigned "great weight" to the Israeli Ambassador's letter as evidence on the issue of whether the defendant in that case acted within the scope of his official duties. 500 F. Supp. 2d at 291 ("Courts assign 'great weight' to the opinion of a sovereign state regarding whether one of its officials was acting within his official scope.") (citing *In re Terrorist Attacks of Sept. 11, 2001*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005); *Rein v. Rein*, 1996 WL 273993, at *2 (S.D.N.Y. May 23, 1996)). Similarly, the D.C. Circuit's decision in *Belhas*, particularly the concurring opinion of Judge Williams, makes clear that the "official capacity" issue under the FSIA is one of fact, for which such a letter may well

[1] The same letter was filed in support of the defendant's motion to dismiss in both *Belhas*, No. 05-cv-02167, Paper no. 6, (D.D.C. filed Feb. 21, 2006), and *Matar*, No. 05-cv-10270, Paper no. 18, (S.D.N.Y. filed Feb. 22, 2006). A copy of that letter is attached hereto as Exhibit A.

shed light on whether the foreign state in fact authorized the acts complained of. 515 F.3d at 1284, 1292-94.

Nor is there merit to Rivera Rondón's contention that Ambassador Zevallos's letter "offers nothing more than an opinion on one of the ultimate legal issues for the Court to decide." Motion ¶ 11. That position is directly contradicted by *Matar* and *Belhas* and is not supported by the law in this Circuit. *See United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006) (holding that "questions of fact that are committed to resolution by the jury are the proper subject of opinion testimony"). The propriety of the Court's reliance on the Ambassador's views should be free from doubt where, as here, the opinion goes to a fact put in issue by Defendant's motion to dismiss.

For much the same reason, the Court should reject Rivera Rondón's contention that the letter ought to be stricken because it is "unsworn" and "not properly part of the record." Motion ¶ 3. The Israeli Ambassador's letter in *Matar* and *Belhas* was not "sworn," but it became part of the record when submitted to the court, as is the case here. In considering issues of foreign law, this Court has previously relied on an unsworn communication from a nonparty that was even more informal in nature than the letter from the Peruvian Ambassador in this case. *VanGrack, Axelson & Williamowsky, P.C. v. Estate of Abbasi*, 261 F. Supp. 2d 352, 356, n. 4 (D. Md. 2003) (Messitte, J.) (email from Judicial Reform Specialist of The World Bank describing position of Provisional High Court official in Pakistan). Furthermore, Rivera Rondón submitted unsworn and extra-record materials – newspaper articles – in support of his motion to dismiss, and he is therefore not in a position to object to the Ambassador's letter on these grounds. *See* Motion to Dismiss at 6 n.3 (quoting *Houston Chronicle* and *New York Times* articles attached to the motion to dismiss).

As we emphasized during oral argument, Plaintiffs' opposition to the motion to dismiss is not dependent on the Ambassador's letter. The letter is merely an additional reason for finding that, at a minimum, there is a factual dispute as to Rivera Rondón's defense that he was acting in an official capacity, and the Court must resolve that dispute in Plaintiffs' favor at this stage of the proceedings. Moreover, since Defendant has failed to state any valid reason why the letter should not be considered by the Court in deciding Defendant's motion to dismiss, he has failed to carry his burden on the motion to strike. There is simply no justification for striking the letter, which would be seen as an unwarranted affront to the Ambassador and his government.

CONCLUSION

For all of the foregoing reasons, Plaintiffs urge the Court to deny Defendant Rivera Rondón's motion to strike.

Respectfully submitted,

/s/

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DATED: April 28, 2008

EXHIBIT A

AMBASSADOR OF ISRAEL
WASHINGTON, D.C.

שגריר ישראל
וושינגטון

February 6, 2006

Ambassador Nicholas Burns
Under-Secretary for Political Affairs
The Department of State
Washington, D.C.

Re: *Matar v. Dichter*, Civ. No. 05-10270 (S.D.N.Y.)
Belhas v. Ya'alon, Civ. No. 05-02167 (D.D.C.)

Dear Ambassador Burns,

I wish to draw your attention to the above-referenced lawsuits recently filed in U.S. federal district courts against Avraham Dichter, former Director of Israel's Internal Security Agency and Moshe Ya'alon, former head of Army Intelligence for the Israeli Defense Forces.

Both suits, filed by the same counsel, seek to hold former senior officials of the Government of Israel *personally liable* for casualties resulting from military actions undertaken by the State of Israel in defending against terrorism. The *Matar* case involves military action undertaken in Gaza in July, 2002 against Saleh Mustafa Shehahdeh, the military commander of the Hamas terrorist organization. The *Belhas* case concerns an incident in April, 1996 in which casualties resulted from return fire directed against targets and rocket launch sites of the Hezbollah terrorist organization located, quite deliberately, in very close proximity to the United Nations compound in Qana.

Israel fully respects the United States legal system and the independence of its judiciary. At the same time, I feel obliged to convey to you our concerns regarding the fundamental inappropriateness and political nature of these lawsuits.

As you know, the State of Israel has long welcomed a dialogue with the United States, through diplomatic and political channels, about the terrorist threat confronting both our countries, and the proper measures for securing the safety of our citizens while upholding the rule of law and minimizing harm to others from military and security operations. We acknowledge also the critical leadership role of the United States in advancing the peace process between Israel and its neighbors.

The attempts to draw US courts into the adjudication of these cases runs counter to the ongoing Israel-US dialogue and the key diplomatic role of the US in the region.

These lawsuits would embroil the U.S. courts in evaluating Israeli policies and operations in the context of an continuing armed conflict against terrorist operatives. They touch directly upon issues related to the Middle East peace process and ongoing and extensive diplomatic efforts, led by the US government, to end terrorism and bring peace and stability to Israel's relations with Lebanon and with the Palestinian side.

As such, the cases raise quintessentially political questions, in which judicial interference is improper, impracticable and risks complicating or undermining the important political and diplomatic avenues that are currently being pursued.

While ostensibly brought against Mr. Dichter and Gen.Yaalon personally, these cases challenge sovereign actions of the State of Israel, approved by the government of Israel in defense of its citizens against terrorist attacks. They attempt to circumvent Israel's sovereign immunity for official state acts.

The plaintiffs could not sue Israel directly in the U.S. courts for its military and security policies, and have consequently sought to directly sue senior Israeli officials, both of whom continue to play a prominent role in Israeli public life. However, anything Mr. Dichter and Gen. Ya'alon did in connection with the events at issue in the suits was in the course of their official duties, and in furtherance of official policies of the State of Israel. To allow a suit against these former officials is to allow a suit against Israel itself.

Both cases also raise significant concerns in that they appear to be part of a deliberate, and potentially expanding, agenda on the part of some private groups to import political conflicts into foreign courts or to use lawsuits as a means for advancing certain political or propaganda objectives. We know that the US itself has had to confront similar misuse of legal avenues in cases brought against its own officials in foreign countries, some of which have been brought by the very same lawyers behind the cases against Mr. Dichter and Gen. Yaalon.

AMBASSADOR OF ISRAEL
WASHINGTON, D.C.

שגריר ישראל
וושינגטון

We have brought these cases to the attention of the relevant legal officials in the State Department, but given the sensitive political issues raised by the cases and their potential diplomatic implications we considered it appropriate to address you directly as well, and to place our concerns on record.

Please accept, sir, the assurances of my highest consideration.

Sincerely,

Daniel Ayalon

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