CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(j) OF THE GENERAL RULES

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In the

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 07-7009

ALI SAADALLAH BELHAS; SAADALLAH ALI BELHAS; IBRAHIM KHALIL HAMMOUD; RAIMON NASEEB AL HAJA; HAMIDAH SHARIF DEEB; ALI MOHAMMED ISMAIL; and HALA YASSIM KHALIL,

Appellants,

v.

MOSHE YA'ALON, Former Head of Army Intelligence, Israel,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IN CASE NO. 1:05-CV-2167
(HON. PAUL L. FRIEDMAN, JUDGE)

BRIEF OF APPELLEE MOSHE YA'ALON

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October 15, 2007

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a), the undersigned, counsel of record for Appellee Moshe Ya'alon, certifies as follows:

A. Parties and *Amici*

All parties, intervenors, and amici appearing before the District Court and in this Court are listed in the Brief for Plaintiffs-Appellants at page i.

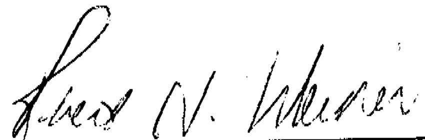
B. Ruling Under Review

A reference to the ruling at issue appears in the Brief for Plaintiffs-Appellants at page i.

C. Related Cases

There are no related cases.

Dated: October 15, 2007.



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SUMMARY OF THE ARGUMENT

This is a political case by Lebanese plaintiffs against an Israeli general for injuries resulting from a battle on the Lebanese border between Israel and the terrorist organization Hezbollah. The suit is one of a series of cases seeking to exploit U.S. courts as a platform for attacking Israel's conduct of the war on terrorism. Like every other court asked to consider these attacks, the District Court found that it was not a proper forum.

In appealing that decision, Appellants ask this 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 Foreign Sovereign Immunities Act (FSIA). This brief will refute each of Appellants' arguments in turn, but this particularized exercise should not obscure the overarching, common-sense point. Article III courts are not the appropriate place for plaintiffs from overseas, who allegedly were injured overseas, to challenge the way a democratic U.S. ally defends itself overseas, against terrorist attacks overseas. This is especially true where, as here, the Executive Branch, in its diplomatic efforts to bring peace to the Middle East, has publicly and officially taken a position in direct conflict with the one Appellants advance.

Struggling to avoid this common sense result, Appellants lead with an argument that is not only wrong, but also barred. They claim that the right of a foreign official to invoke sovereign immunity for official actions in service of his government disappears the moment the official retires. Appellants neglect to note that they failed to raise this issue below. That failure precludes their advancing it here. In any event, the argument is wrong. If the law were as Appellants claim, the statute would be entitled the Foreign Stay of Prosecution Act, rather than the Foreign Sovereign Immunities Act.

The arguments that Appellants did raise below, and that the District Court rejected, fare no better here. Although Appellants identify General Ya'alon in the caption of the Complaint by his official position, allege he had command responsibility for an attack during a major Israeli military operation, and contend he acted under color of Israeli law, they nonetheless assert that he did not act in an official capacity. Their rationale is that General Ya'alon's alleged acts could not have been official because they were illegal, and thus necessarily beyond his authority. But experience teaches that plaintiffs do not sue for actions they claim were legal. Lawsuits necessarily involve conduct alleged to be wrongful. Appellants thus would leave the FSIA toothless, unavailable precisely where needed.

Maintaining this detachment from common sense, Appellants urge the Court to ignore what the government of Israel specifically states it authorized General Ya'alon to do, and to focus instead on what Appellants say his authority should have been. Thus, in claiming that they can overpower the immunity of a sovereign nation merely by accusation on information and belief, Appellants brush off the confirmation of the Israeli Ambassador that this suit "challenge[s] sovereign actions *of the State of Israel, approved by the government of Israel* in defense of its citizens against terrorist attacks." JA-37 (emphasis supplied). Moreover, they suggest that their allegations trump the contrary foreign policy position of the President of the United States that the incident at issue was a "tragic misfiring in Israel's *legitimate exercise of its right to self-defense.*"[1] On the issue whether Israel authorized any actions by General Ya'alon, the position of the "authorizer" prevails. In the conflict between Appellants' foreign policy views and those of the President, the views of the Executive Branch prevail.

[1] U.S. Dep't of State, *The U.S. and Israel: Continuing To Build the Peace in the Middle East President Clinton Remarks to the American-Israeli Public Affairs Committee Policy Conference*, Dispatch Magazine, vol. 7, no. 18, April. 29, 1996, *available at* http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1996/html/Dispatchv7no18.html (emphasis added). This Court may take judicial notice of the governmental pronouncements cited here. Fed. R. Evid. 201; *Phillips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979) (a court may take judicial notice of "matters of general public record").

Issues of sovereign immunity and justiciability arise frequently in this Circuit. The law is well-developed and definitive. It recognizes that plaintiffs cannot sue foreign officials for authorized acts on behalf of their governments. It also confirms that federal courts are not a proper mill for the grinding of political axes. The District Court correctly dismissed the Complaint, and its judgment should be affirmed.

STATEMENT OF FACTS

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 U.S. support, Israel has signed peace treaties with Egypt and Jordan and has established diplomatic relations with several other countries in the Middle East. Further, the United States has brokered many discussions to limit hostilities across Israel's northern border with Lebanon. With regard to the Israeli-Palestinian relationship, the United States has played a key role in the diplomatic efforts, from the Declaration of Principles by Israel and the PLO at the White House in 1993 to this day.

But a comprehensive peace, an end to the violence, has proven elusive. Since September 2000, for example, terrorists have killed more

than 1,134 Israelis[2] and injured more than 7,633, many critically.[3] With a population of only 7.1 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 children orphaned, the livelihoods lost, the fear enkindled.

Israel has faced repeated terrorist attacks across its borders as well. In the mid-1990s, Hezbollah militias, in attacks Appellants blandly describe as "oppos[ing] the Israeli occupation," Compl. ¶ 28, rained Katyusha rockets on towns and civilian areas in northern Israel. As the U.S. Congress has found, the "Israeli-Lebanese border and much of southern Lebanon is under the control of Hizballah, which continues to attack Israeli positions, allows Iranian Revolutionary Guards and other militant groups to operate freely in the area, and maintains thousands of rockets along Israel's northern border, destabilizing the entire region." Pub. L. 108-175, 117 Stat. 2482 (2003); *see also* S. Res. 82, 109th Cong. (2005) ("Hezbollah has continued to carry out attacks against Israel and its citizens.").

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2 *See* Israel Ministry of Foreign Affairs, *Victims of Palestinian Terror Since September 2000*, *available at* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm (last updated Sept. 2007).

3 *See* Israel Defense Forces, *Casualties Since September 29, 2000*, *available at* http://www1.idf.il/SIP_STORAGE/DOVER/files/7/21827.doc (last updated Jan. 2006).

With regard to the incidents at issue here, Hezbollah terrorists launched hundreds of Katyusha rocket attacks from Lebanon between 1994 and mid-April 1996, causing some 20,000 to 30,000 Israeli civilians to flee their homes.[4] On April 11, 1996, the IDF launched a major military operation "Grapes of Wrath," counterattacking with artillery fire. Compl. ¶¶ 28-29. Appellants appear to acknowledge that this operation was governmental and not for the personal benefit of General Ya'alon, the head of military intelligence. Further, Appellants allege that at the outset of the operation, the IDF warned civilians to leave the areas from which Hezbollah attacked. *Id.* ¶ 30. Appellants apparently view this announcement as an official act by Israel as well.

Although many civilians heeded the IDF's advance warning, Hezbollah continued to attack Israel from areas where civilians remained. As the U.S. State Department concluded, on April 18, 1996, Hezbollah fired from within 300 yards of the United Nations compound at Qana.[5] The return fire from Israel hit the compound, resulting in civilian casualties. In

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[4] *See* U.S. Dep't of State, *Israel and the Occupied Territories: Report on Human Rights Practices for 1996*, Jan. 30, 1997, *available at* http://www.state.gov/www/global/human_rights/1996_hrp_report/israel.html.

[5] U.S. Dep't of State Press Briefing, May 6, 1996, *available at* http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1996/9605/960506db.html.

contrast to their characterization of the overall military initiative and the other actions by the IDF, Appellants assert that this return fire was not an official act on behalf of Israel.

As tragic as this incident is, all States have a basic right and duty to protect their citizens against terrorism. *See* United Nations S.C. Res. 1373 (2001). Congress also has formally 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. Con. Res. 392, 107th Cong. (2002). Echoing the conclusion of the Executive Branch in this case, Congress found that terrorist attacks on Israel "justif[y] Israeli counterterrorist operations as the response of a legitimate government defending its citizens." H. Con. Res. 280, 107th Cong. (2001); *see* H. Con. Res. 149, 104th Cong. (1996) (reaffirming "full support for Israel in its effort to combat terrorism as it attempts to pursue peace with its neighbors in the region")

From 1995 to 1998, as the Head of Army Intelligence in the Israeli Defense Forces, General Ya'alon, oversaw the gathering of intelligence for the defense of Israel against terrorist attacks by Hezbollah and others. This suit is a political broadside against that defense and the intelligence analysis that underlay the IDF's targeting decisions. Ignoring the official statement

by the government of Israel taking responsibility for "incorrect targeting based on erroneous data,"[6] ignoring President Clinton's statement that the fire was misdirected,[7] ignoring the determination of the State Department that the incident was accidental in the course of Israel's self defense, Appellants allege that the incident was an indiscriminate or deliberate assault on civilians, not authorized by or undertaken on behalf of Israel. Compl. ¶¶ 1, 35.

Rather than sue Israel directly for its alleged "pattern and practice of systematic human rights violations," Compl. ¶ 91, Appellants named General Ya'alon. The fortuity of his visiting fellowship in the District of Columbia apparently was so enticing that Appellants sued him even though they could not connect him to this attack other than by virtue of his official title, if that. *Id.* ¶ 20. Appellants do not allege a single fact suggesting that General Ya'alon personally intended IDF forces to shell the United Nations compound or that he actually knew civilians were present at the targeted location. Rather, Appellants allege that because of his position as head of

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[6] Israel Ministry of Foreign Affairs, *Response to UN Secretary's Report of Kana Incident*, May 9, 1996, *available at* http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/Terrorism%20from%20Lebanon-%20Hizbullah/RESPONSE%20TO%20UN%20SECRETARY-S%20REPORT%20ON%20KANA%20INCIDENT.

[7] U.S. Dep't of State, Dispatch, *supra* note 1.

Army Intelligence, *id.* ¶¶ 23, 24, General Ya'alon had either "constructive notice" *or* "actual notice" that civilians were sheltered at the Qana compound. *Id.* ¶¶ 22, 23, 37, 46; *see also id.* ¶ 52 ("knew or should have known"). Appellants also do not allege that General Ya'alon was present at the battle, or that he fired the barrage, or that he gave the order to fire. Rather, they assert that General Ya'alon -- though an intelligence officer -- authorized or ratified *or* was "*otherwise responsible*" for the attack, *id.* ¶ 22 (emphasis added), thereby committing, among other things, a war crime, a crime against humanity and extrajudicial killing.

As convenient a foil as General Ya'alon may be by virtue of his presence here, suing him cannot avoid the line of cases rejecting attempts to nullify the FSIA and, specifically, blocking efforts to drag U.S. courts into the Middle East conflict. In the parallel case that Appellants' counsel brought alleging similar claims against another Israeli official involved in Israel's defense against terrorism, the U.S. District Court for the Southern District of New York refused to "ignore the potential impact of this litigation on the Middle East's delicate diplomacy." *Matar v. Dichter*, 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007). Similarly, Judge Bates of the District Court here rejected a suit against Israel and current and former senior officials that alleged war crimes and genocide in the West Bank and Gaza, finding the

claims at their core, "peculiarly volatile, undeniably political, and ultimately nonjusticiable." *Doe v. State of Israel,* 400 F. Supp. 2d 86, 112 (D.D.C. 2005). The U.S. Court of Appeals for the Ninth Circuit reached the same judgment, affirming dismissal of an effort by Appellants' counsel here to bar Caterpillar from selling bulldozers to Israel for use in the war on terror. *Corrie v. Caterpillar, Inc.*, --- F.3d ---, 2007 WL 2694701 (9th Cir. Sept. 17, 2007). Any decision, the Court found, was beyond the role of the courts and should emanate from the political branches. *Id.* at *7.

The concerns expressed in those cases have the same, if not greater force here. As in those cases, Appellants would eviscerate the FSIA, bring the Court into conflict with the conclusions of Congress and the Executive Branch, and override the position of the Israeli government. In addition, they would set a precedent of individual liability for official government policies and military targeting decisions that could jeopardize American soldiers and government officials.[8] Encouraging such suits is contrary to the stated policy of the United States.

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[8] Indeed, the very counsel representing Appellants in this case sued former Secretary of Defense Rumsfeld, former Attorney General Gonzales and others in Germany -- again, unsuccessfully -- for actions relating to Iraq and the U.S. war on terror.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT GENERAL YA'ALON IS IMMUNE FROM SUIT

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

The FSIA bars suits against foreign states and their "agencies and instrumentalities." 28 U.S.C. § 1603. Because of this statute, Appellants could not sue Israel or the IDF. Appellants thus proceeded more obliquely, suing General Ya'alon, the former head of Army Intelligence, for actions on behalf of Israel. The law, however, turns on substance, not form.

Sovereign immunity extends to government officers for acts on behalf of the State, as opposed to private actions on their own behalf. The District Court recognized that individuals acting in their official capacities are considered "agencies" or "instrumentalities" of a foreign state within the meaning of 28 U.S.C. § 1603. JA-148-149 (citing *Jungquist v. Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997)); *see El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996). The District Court also noted that because a state can only act through its officials, "[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." JA-149 (quoting *Doe*, 400 F. Supp. 2d at 104). The Court found this point especially strong with

regard to a military official, because the "armed forces are as a rule so closely bound up with the structure of the state that they must *in all cases* be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of a state." JA-148 (quoting *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 153 (D.C. Cir. 1994)).

Thus, this suit against General Ya'alon is in substance a suit against the State of Israel, and "a foreign state is presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Because the FSIA is the sole basis for jurisdiction for a suit against a foreign state, the Court lacks subject matter jurisdiction unless one of the exceptions in the FSIA applies. *See id.* As nothing in the Complaint touches on the exceptions enumerated in the FSIA, Appellants try to invent new ones. First, they claim that sovereign immunity extends only to current, not former officials. Second, they assert that General Ya'alon did not act in an official capacity because Appellants chose to allege that he acted illegally. And third, they contend that the Torture Victim Protection Act (TVPA) preempts the Foreign Sovereign Immunities Act. None of these arguments has the slightest merit.

B. General Ya'alon, as a Former Israeli Military Officer, is Immune from Suit for His Official Acts

1. Appellants Failed to Argue Below that the FSIA Does Not Apply to Former Officials

For the first time on this appeal, Appellants assert -- as their principal argument, no less -- that General Ya'alon cannot invoke the FSIA because he retired from service in the Israeli government. It is well established that, absent exceptional circumstances, a party cannot raise legal issues on appeal that it failed to raise in the District Court. *See Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 483 (D.C. Cir. 2007); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) (need to raise grounds in trial court "is not a mere technicality but is of substance in the administration of the business of the courts") (citation and internal quotation omitted). Indeed, this Court has required not just that appellants have raised an issue in the court below, but that they have done so with sufficient clarity to have allowed the District Court to consider and rule on the issue. *See, e.g., United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004); *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003). Appellants filed a 48 page brief, an 11 page evidentiary argument, a 16 page affidavit, and 19 pages of other exhibits in the District Court. They can present no "compelling argument"

why they failed to raise this point below. *See Horowitz v. Peace Corps*, 428 F.3d 271, 282 (D.C. Cir. 2005). Having neglected to advance the point even vaguely, much less with the requisite clarity, Appellants have waived it.

2. The FSIA Applies to Former Government Officials

Appellants' decision to forego this argument in the District Court was the right call, as it misreads the law. In particular, Appellants misunderstand *Dole Food Co. v. Patrickson,* 538 U.S. 468 (2003). The Court there had to determine whether a corporation was an instrumentality of the state under 28 U.S.C. § 1603 because a "majority of [its] shares or other ownership interest is owned by a foreign state." The question presented was whether, in making that determination, the Court should consider the stock ownership as of the time a complaint is filed or as of the time of the conduct challenged. The Court held that the foreign government must own a majority of the stock when the complaint is filed, because immunity extends to an entity that "is" an instrumentality of the foreign state. Appellants argue that this same analysis applies to foreign officials -- immunity turns on whether they are government officials at the time of the suit. The argument misses the point of *Dole.*

In assessing questions of stock ownership and control by foreign governments, the Court looked to established principles of corporate law and

emphasized that "[i]n issues of corporate law structure often matters." 538 U.S. at 474. Under the accepted principles of corporate law, current shareholders are insulated from direct liability for a judgment against a corporation, but may ultimately bear the burden through diminished value of their stock. Former shareholders are not liable directly or indirectly. And because they are not liable, sovereign immunity is unnecessary to protect a former shareholder that is a sovereign state. There is no doctrine of *respondeat superior* for former shareholders. If the *current* shareholders are not sovereign states, then the lawsuit is not in substance one against a state entity.

The situation is quite different with regard to foreign officials sued for implementing the policy of the foreign state. There are no issues of corporate structure or formality. Although Appellants assert that the State does not bear the potential liability for such a suit, they cite nothing to support that assertion. In fact, in contrast to corporate law, the black letter law is that an employer is generally liable for the acts of employees undertaken on its behalf. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or

employees in the scope of their authority or employment."); Restatement (Third) of Agency § 7.07. Adherence to corporate formality is not relevant.

Formality aside, the point here is that a case against a former government employee for official acts on behalf of and authorized by the foreign state is a suit against the state itself. The Court in *Dole* recognized the importance of substance versus form in discussing the immunity of U.S. officials from suit for their official acts, which is necessary to "prevent the threat of suit from 'crippl[ing] the proper and effective administration of public affairs.'" *Dole*, 538 U.S. at 479. In suggesting that foreign sovereign immunity is not meant to avoid chilling the conduct of foreign states, the Court was speaking in the context of a corporate entity in commerce. The Court in no sense blessed a cavalcade of lawsuits against former officials for carrying out the foreign and military policies of their governments.

The focus in *Dole* on the conduct of business was not surprising, given that the analysis whether an entity is an "instrumentality" of a foreign state has generally occurred in the commercial arena. Where the defendant performs a core governmental function, this Court has treated the suit as equivalent to one against the foreign state itself, rather than against an instrumentality. *See Transaero,* 30 F.3d at 153. *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996), is not to the contrary. The foreign

official there worked for the Bank of Jordan. And in *Jungquist*, the Court noted the definition of instrumentality, but did not fully analyze its applicability, because, in the Court's judgment, the defendant was not sued for official acts. 115 F.3d at 1027-30. General Ya'alon, as a military officer, performed core governmental functions. Thus, Appellants' disquisition on the meaning of "is" in Section 1603 is irrelevant.

Not surprisingly, Appellants cite no case holding that sovereign immunity is unavailable to former government officials. The one lower court that considered the argument flatly rejected it. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 788-89 (S.D.N.Y. 2005) (relevant inquiry is "whether the acts in question were undertaken at a time when the individual was acting in an official capacity"). Many other cases have recognized sovereign immunity for former officials, with no intimation that their current employment status was an issue. *See, e.g.*, *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Matar*, 500 F. Supp. 2d at 295; *Doe*, 400 F. Supp. 2d at 104-105.

Were the law otherwise, foreign sovereign immunity would be largely useless. To attack the official policies of a foreign nation, a plaintiff could simply wait for some official tangentially linked to those policies to retire, suffer defeat in an election, or take a job outside government. Democratic

governments cannot bind their employees to lifetime servitude, yet a state's immunity from challenges against its official policies would evaporate the moment the officials through whom it necessarily acted left government service. As the example of General Ya'alon suggests, plaintiffs would claim free rein to target some former official, no matter how remote his or her connection with the offending policy, over whom they could obtain personal service. Sovereign immunity would be a misnomer, for the FSIA would no longer provide immunity for foreign states. At best it would afford a stay of prosecution, and not much of one at that.

In sum, if Appellants had raised this issue, the District Court would properly have rejected it.

3. Appellants Sued General Ya'alon in his Official Capacity

Judge Friedman did have the opportunity to consider -- and reject -- Appellants' argument that they did not sue General Ya'alon in his official capacity. As the District Court found, "[i]t is clear from the complaint (including the case caption) that defendant is a retired Israeli military official who is being sued solely for actions taken in his official capacity." JA-149. Thus, the District Court noted, Appellants alleged that "'General Ya'alon had command responsibility for the attack[,]' Compl. ¶ 2, and 'participated

in the decision to shell the UN compound at Qana.' There is no allegation that defendant's activities were 'personal or private' in nature. On the contrary, plaintiffs themselves allege that defendant 'was acting under color of Israeli law.' Compl. ¶ 26." JA-149.

As the District Court correctly recognized, the Complaint attacks Israeli policy and official action -- the shelling of sites in Lebanon used for launching rocket attacks into Israel -- and, with the hedging invocation of "information and belief," accuses General Ya'alon of supporting, implementing, or not preventing it. Appellants do not claim that General Ya'alon's actions were somehow "unratified" by his government.[9] In fact, Israel has publicly defended the Qana shelling, while regretting the loss of civilian life that resulted from a targeting error.[10] The Israeli government

[9] *See, e.g., Kadic v. Karadzic,* 70 F.3d 232, 250 (2d Cir. 1995) (allowing ATCA claims to proceed against self-proclaimed leader of "state" the U.S. government did not recognize, whose actions were "wholly unratified" by the recognized government of Bosnia-Herzegovina).

[10] *See* Israel Ministry of Foreign Affairs, *Cabinet Communique*, April 21, 1996 (noting Prime Minister's characterization of "Operation Grapes of Wrath" as "a war of no alternative which enjoyed the support of the entire government") (*available at* http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/Terrorism%20from%20Lebanon-%20Hizbullah/CABINET%20COMMUNIQUE%20-%2021-Apr-96); *see also* Israel Ministry of Foreign Affairs, *Address by Prime Minister Shimon Peres to the Knesset on the IDF Operations in Lebanon*, April 22, 1996 (expressing Prime Minister's "feelings of appreciation to the IDF, to the Chief-of-Staff, to the General Staff, to the Northern Command and to the commanders and soldiers of the air force, ground forces and the navy, for acting responsibly and firmly" in Operation Grapes of Wrath) (*available at* http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/

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has also explicitly confirmed that any actions General Ya'alon took were "in the course of [his] official duties, and in furtherance of official policies of the State of Israel." JA-37. The statement of a foreign government regarding its official's responsibilities is entitled to "great weight." *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005). Added to that weight are the conclusions of the Executive Branch of the U.S. government, which treated the shelling as an official act -- legitimate self-defense "of the State of Israel."[11]

Sovereign immunity would offer foreign states scant protection if plaintiffs could evade it by suing a senior government official. 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.*, *Jungquist*, 115 F.3d at 1027; *El-Fadl*, 75 F.3d at 671.

Thus, in deciding whether to dismiss based on sovereign immunity, courts "consider whether an action against the foreign official is merely a

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Terrorism%20from%20Lebanon-%20Hizbullah/PM%20PERES%20TO%20THE%20KNESSET%20ON%20THE%20IDF%20OPERATIONS%20IN%20L).

[11] U.S. Dep't of State, Dispatch, *supra* note 1.

disguised action against the nation that he or she represents." *Park v. Shin,* 313 F.3d 1138, 1144 (9th Cir. 2002). Courts in this Circuit have not hesitated to disregard plaintiffs' labels that do not fit the facts alleged. For example, in *El-Fadl*, the plaintiff claimed that Jordanian officials had instigated an unwarranted investigation of his activities, leading to his detention and torture by Jordanian military police. 75 F.3d at 670. Although the plaintiff alleged these actions were undertaken "in an individual capacity," this Court rejected this label. Rather, the Court found the officials immune from liability because "the only evidence in the record" showed that they had acted on behalf of the sovereign and not in their purely personal capacities. *Id.* at 671.

In determining whether an official acted on behalf of the government, the legality of his or her conduct may be one piece of evidence. But the more significant -- potentially definitive -- evidence is the position of the official's government. Its view as to what it authorized is authoritative. In this regard, Appellants miscite *Jungquist*. This Court found there that a member of the royal family of Abu Dhabi was not entitled to immunity precisely because the Abu Dhabi government did not do what Israel did here. Abu Dhabi "would have no part" in the actions at issue, that is, the government neither authorized nor ratified them. 115 F.3d at 1028. It

followed that the acts were not in furtherance of the interests of the sovereign but were "personal and private action." *Id.* Nowhere does the case state, imply, or even hint at the proposition Appellants tout, that an allegation of illegality nullifies sovereign immunity for actions authorized and ratified by foreign governments.

Likewise, in *Doe v. Qi*, on which Appellants rely, the Court quoted the statement 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. 2004) (quoting S. Rep. No. 102-249, at 8 (1991)). In that case, as well as the others Appellants cite, the government of the defendant official either denied that the official 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 v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996); *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

allegations regarding the absence of legal authority, the courts would have had no reason even to consider the foreign state's position.

The judicial focus on substance rather than form, on determining whether an action against a foreign official is merely a disguised action against his employer, is consistent with the treatment of immunity under the Eleventh Amendment. The Supreme Court has recognized that if actions of a state official were deemed to fall outside official capacity simply because they violate the law, as Appellants urge here, "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 Sch. & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984). This Court has agreed. *See 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.") (citation omitted).

The same logic applies under the FSIA, particularly given that foreign states themselves have immunity even for acts that violate national or international law. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994); *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d

52, 60 (D.D.C. 2001), *aff'd*, 413 F.3d 45 (D.C. Cir. 2005); *Denegri v. Republic of Chile*, Civ. A. No. 86-3085, 1992 WL 91914, at *3 (D.D.C. Apr. 6, 1992).[12] Under the FSIA, as under the Eleventh 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*, 75 F.3d at 671; *cf. Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (under Eleventh Amendment, action falls within "official capacity" if it involves a "policy or custom" for which the government itself is a "moving force").

In other contexts as well, involving claims against U.S. officials like the claims alleged here, this Court has rejected precisely the type of argument Appellants advance. In *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006), for example, indigenous residents of the Chagos Archipelago who were forcibly displaced in the 1960s by a U.S. military

[12] Appellants ignore this line of cases in invoking Nuremberg to argue that "consideration of international law ... confirms the principle that former officials are not immune for *jus cogens* violations." App. Br. at 27. Apart from the offensiveness of invoking Nuremberg in a case involving Israel, the reference is entirely inapt. 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 the question is whether 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). The U.S. courts have repeatedly confirmed that sovereign immunity under the FSIA survives even *jus cogens* allegations. *Id.*; *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996); *Princz*, 26 F.3d at 1173, 1174 n.1.

base sued former senior officials of the U.S. Departments of Defense and State. They alleged, among other things, torture, genocide, and inhuman treatment. *Id.* at 431. They argued that the political question doctrine did not apply because the defendants violated international law and human rights, and hence acted *ultra vires.* The Court disagreed, finding that the scope of the defendants' employment encompassed "conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." *Id.* at 437-38 (quoting Restatement (Second) of Agency § 229(1)). Because the defendants were authorized to depopulate the islands, the "use of harsh measures" in doing so was incidental to their employment and not *ultra vires. Id.* at 438.

Similarly, in *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006), the plaintiffs argued that Henry Kissinger, as Secretary of State and National Security Adviser, was complicit in human rights violations by the Pinochet regime in Chile. *Id.* at 1264. This Court held that the alleged conduct fell within the scope of employment. *Id.* Although the Court could "imagine a case in which a rogue agent commits an act so removed from his official duties that it cannot fairly be said to represent the policy of the United States," Kissinger's alleged acts furthered that policy. *Id.*

In particular, courts in this Circuit have confirmed that decisions authorizing military action to combat terrorist threats, and the intelligence underlying those decisions, are inherently official. Individual government employees are not personally liable even when civilians are harmed. In *El-Shifa Pharmaceutical Industries Co. v. United States,* 402 F. Supp. 2d 267, 275 (D.D.C. 2005), the Court dismissed claims arising out of the President's decision to destroy a Sudanese pharmaceutical plant with cruise missiles, based on intelligence indicating it was a chemical weapons-related facility. The Court found that even though the President's conclusion may have been erroneous and the intelligence faulty, his decision nonetheless was a "policy judgment" fully within his authority as Commander in Chief of the armed forces, for which he enjoyed absolute immunity from suit." *Id.* at 271.

Similarly, in *Saltany v. Reagan,* 702 F. Supp. 319 (D.D.C. 1988), *aff'd in relevant part, rev'd in part,* 886 F.2d 438 (D.C. Cir. 1989), the Court rejected claims for civilian deaths and injuries resulting from U.S. military air strikes ordered by President Reagan on targets in Libya. Unfortunate as it was there -- and here -- that civilians were harmed, the court found it "manifest" that "civilian or military officials of the United States government who are alleged to have planned and/or executed the air strikes [on Libya] ordered by the President ... did so in their official capacities," and

thus were entitled to immunity. *Id.* at 321.[13] Under these principles, military and civilian leaders of our allies, when acting comparably on behalf of *their* states against terrorist threats, are engaged in official conduct and are entitled to immunity under the FSIA.

The District Court thus applied the proper test -- whether based on the allegations of the Complaint, General Ya'alon acted on behalf of Israel. The Court's conclusion that he did is unassailable.

C. The TVPA Does Not Preempt the Foreign Sovereign Immunities Act

The District Court properly held that the Torture Victim Protection Act does not strip sovereign immunity from foreign officials acting on behalf of their governments. The TVPA allows suits against certain officials

[13] The conclusion that military actions involving air strikes are quintessential government acts applies under the act of state doctrine. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1190 (C.D. Cal. 2005) (in act of state context, claims arising from bombings by Columbian Air Force "involve[d] official acts because ... [p]rivate citizens do not generally have the ability to maintain an air force and authorize the use of military force") (citations omitted). Appellants therefore cannot properly challenge military decisions formulated at the highest ranks of the Israeli government to protect its citizens against terrorist attacks. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (doctrine reflects "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" conduct of foreign affairs). Appellants cannot evade this conclusion by claiming the shells that injured them landed outside Israel's borders. App. Br. at 9 n.3. Absent allegations that General Ya'alon did anything outside Israel, or even that Israel's artillery was stationed outside its borders when fired, the metaphysical inquiry Appellants would require -- whether a governmental action occurred where it was initiated or where it had impact -- ignores the fundamental purpose of the act of state doctrine. The doctrine thus provides an alternative basis for affirming here.

who, acting with "actual authority," commit torture or extrajudicial killing. Therefore, Appellants assert, Congress, in enacting the TVPA, must have intended to override sovereign immunity for such officials even if they did their government's bidding, lest there be no one who could ever be liable. Seeking once again to put blinders on the Court, Appellants urge it to disregard the express statements in the legislative history of the TVPA that the statute did not displace sovereign immunity for foreign officials. Those statements are off-limits, Appellants say, because the statutory language purportedly makes clear that the TVPA does preempt sovereign immunity. To hold otherwise, they claim, would emasculate the TVPA.

To begin with, Appellants' premise is wrong. As the District Court found, leaving the FSIA intact does not 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, *see, e.g.*, *Hilao*, 25 F.3d at 1472; *Trajano*, 978 F.2d at 498; *Doe v. Qi*, 349 F. Supp. 2d at 1257, the FSIA has important exceptions. For instance, it denies immunity for acts by designated state

sponsors of terror and for acts committed in the U.S.[14] As the Supreme Court has held, "when two statutes are capable of co-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.

Moreover, the supposedly "clear" language of the TVPA says nothing about sovereign immunity. The TVPA has been on the books for almost 15 years, yet Appellants cite not a single case holding that it overrides the FSIA nor in any way acknowledging the "clarity" Appellants claim is dispositive. To the contrary, cases decided since the TVPA have recognized that sovereign immunity applies. The Court in *Doe v. Israel* held that sovereign immunity protected Israeli officials accused of violations of the TVPA. 400 F. Supp. 2d at 104. In *In re Terrorist Attacks*, the Court upheld sovereign immunity for two Saudi princes accused of financing, conspiring to commit, and aiding and abetting terrorism in violation of the TVPA and other statutes. 392 F. Supp. 2d at 553-54. And in *Doe v. Qi*, the Court held that sovereign immunity would bar a claim against a foreign official under the

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[14] Indeed, one of the cases on which Appellants rely involves just such a designated state sponsor of terror. *See Nikbin v. Islamic Republic of Iran*, 471 F. Supp. 2d 53 (D.D.C. 2007).

TVPA if, as the Senate Report on the TVPA concluded, the officials' government "admit[ted] some knowledge or authorization of relevant acts." 349 F. Supp. 2d at 1288 n.20 (quoting S. Rep. No. 102-249, at 8).

The Court in *Doe v. Qi* correctly read the legislative history in this regard. Congress made clear in enacting the TVPA that it understood the FSIA would provide official immunity in the rare cases where foreign States *did* invoke sovereign immunity on behalf of their officials and expressly confirmed authorization or ratification of the officials' acts. The House Report explained that "the TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976," H.R. Rep. No. 102-367(1), at 5, restrictions that could only relate to official immunity, since the Report also confirmed that the TVPA did not even purport to authorize suits against States themselves. *Id.* ("Only 'individuals,' not foreign states, can be sued under the bill"). The Senate Report was even more explicit, stating that "to avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state," which, as the *Qi* Court recognized, would require the state to affirm its knowledge and authorization of the acts at issue. S. Rep. No. 102-256 (1991) (emphasis added). That is precisely what Israel did in this case, JA-37, and precisely what distinguishes this case from

the others Appellants and amicus cite, where no such confirmations of authority were made by foreign states on behalf of their former officials.

Enactment of the Anti-Terrorism Act in October 1992, six months after adoption of the TVPA, further illuminates Congress's intent to preserve the FSIA. *See* Pub. L. 102-572, 106 Stat. 4506 (1992). The Anti-Terrorism Act provided U.S. citizens a remedy for terrorist acts. But the Act did not allow claims against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337. The Congressional reports on the Anti-Terrorism Act made clear that this restriction did not distinguish it from the TVPA or other laws. Rather, the Reports affirmed, "[t]his provision maintains the status quo, in accordance with the Foreign Sovereign Immunities Act, with respect to sovereign states *and their officials*." S. Rep. No. 102-342, at 47 (1992); H.R. Rep. No. 102-1040, at 7 (1992) (emphasis added). Indeed, accepting Appellants' argument that the TVPA overrides sovereign immunity would mean that Congress gave foreign plaintiffs greater remedies under the TVPA than it gave U.S. plaintiffs under the Anti-Terrorism Act. That, too, offends common sense.

The claim of Appellants and their amicus that the District Court's reasoning would have precluded other cases under the TVPA ignores the patent limits on the Court's decision here. Indeed, unlike this case, none of the cases that Appellants and amicus assert would have been barred by the District Court's interpretation (App. Br. at 32-33, CJA Br. at 8-12) involved an attempt by a former official to invoke sovereign immunity. None involved a foreign s*tate* that clearly asserted sovereign immunity to protect the former official. And none involved confirmation by the foreign government that the individual's actions were authorized, taken in his official capacity, and ratified. *See, e.g., Arce v. Garcia,* 434 F.3d 1254 (11th Cir. 2006) (sovereign immunity not claimed and government of El Salvador did not suggest it had authorized or ratified defendant's acts); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (same in context of Chile); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (same in context of Haiti); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (same in context of Ethiopia); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005) (same in context of El Salvador); *see also Hilao*, 25 F.3d at 1472 (government of Philippines expressly denied that the official acted within his authority or was entitled to share the State's sovereign immunity).

At the head of the parade of TVPA claims the District Court's opinion supposedly bars is *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579 (E.D. Va. Aug. 1, 2007). In that case, the plaintiffs alleged that a former Somalian defense minister and prime minister tortured and executed prisoners. Whatever the merits of those claims, or of the Court's disposition of them, it is not at all clear that the result here dictated the result there. To be sure, the "Transitional Federal Institutions" (TFI) governing Somalia informed the Court that the defendant acted in his official capacity. *Id.* at *11. And the Court found that factor compelling in distinguishing cases where foreign states had disclaimed any authorization or ratification. *Id.* at *13. But the organization that submitted its views was, as described by the CIA World Fact Book, a "transitional governing entity with a five-year mandate . . . [which] continues to struggle to establish effective governance in the country."[15] *See also* U.S. Dep't of State, Consular Information Sheet, Oct. 4, 2007 (TFG established to guide country "through a transitional process" and "lacks governance capacity.").[16] This Court need not

[15] CIA World Fact Book, Somalia, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/so.html#Govt transitional.

[16] *Available at* http://travel.state.gov/travel/cis_pa_tw/cis/cis_1023.html. *See also* U.S. Dep't of State, Background Note, Somalia ("Although the U.S. never formally severed diplomatic relations with Somalia, the U.S. Embassy in Somalia has been closed since the collapse of the Siad Barre government

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determine the proper scope of judicial inquiry on this issue in *Samantar*. The point is that this case -- involving a stable, democratically elected government of a U.S. ally -- is a far cry from that one. This case does not foretell some impending legal apocalypse.

In sum, since the TVPA was enacted in 1992, no case under it has proceeded against a foreign official where the government employer supported the official's invocation of sovereign immunity and took "ownership" of the acts alleged. Yet, far from being "gutted" by this limitation, the TVPA has spawned a great deal of litigation. To borrow a phrase from Mark Twain, Appellants' reports of the TVPA's "death are greatly exaggerated."

D. The District Court Did Not Abuse its Discretion in Denying Jurisdictional Discovery

Appellants assert that they were entitled to jurisdictional discovery because the District Court considered the Israeli Ambassador's statement that the artillery shelling in question was "approved by the government of Israel" and that any actions by General Ya'alon were "in the course of [his] official duties, and in furtherance of official policies of the State of Israel."

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in 1991") (*available at* http://www.state.gov/r/pa/ei/bgn/2863.htm).

JA-37. Appellants argue that the Ambassador's Letter was not qualified as a legal opinion, but was simply an assertion of fact, as to which they were entitled to discovery.

This argument fundamentally misunderstands the nature of the Ambassador's Letter. It was offered not as a legal opinion or as the statement of a fact witness, but as the official position of the State of Israel. Within the United States, Ambassadors are entitled to convey the official positions of the States they represent. *See, e.g., Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295-96 (11th Cir. 1999) (ambassadors represent "the sending State in the receiving State") (citation omitted); *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"). The Ambassador did what the Senate Report on the TVPA invited. On behalf of the State of Israel, he confirmed the government's knowledge and authorization of any relevant acts by General Ya'alon. *See* S. Rep. 102-256, *supra*.

Moreover, neither Rule 12(b)(1) nor the law of this Circuit requires district courts to offer jurisdictional discovery, particularly on sensitive FSIA matters, when such discovery appears unnecessary to the court's determination. Even limited discovery in this case would have infringed on

Israeli sovereignty in core areas of any government's operations -- military strategy and tactics, intelligence, weapons capability and defense policy. Israel already had protested that infringement. JA-37. Because of such concerns, courts have been reluctant to grant jurisdictional discovery in cases involving foreign sovereigns. Indeed, in *In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998), this Court issued a writ of mandamus barring depositions of ministers of the Greek government on jurisdictional issues. Although the depositions sought evidence relevant to FSIA issues, the Court held that "[r]elevance ... is not enough. Because sovereign immunity is an immunity from suit ... a district court authorizing discovery to determine whether immunity bars jurisdiction must proceed with circumspection, lest the evaluation of the immunity itself encroach unduly on the benefits the immunity was to ensure." 139 F.3d at 253.

Here, the District Court did not abuse its discretion in determining that discovery would serve no valid purpose. Israel had already officially confirmed that the artillery firing in question was a "military action[] undertaken by the State of Israel in defending against terrorism," that it was a "sovereign act[] of the State of Israel, approved by the government of Israel in defense of its citizens against terrorist attacks," and that anything General Ya'alon did occurred in the course of his official duties and

implemented official policies of the State. JA-37. Discovery to establish that Israel was wrong about its own policy, mistaken that it approved the shelling, or ineffectual in ratifying General Ya'alon's actions, would have been futile. It would have "frustrate[d] the significance and benefit of entitlement to immunity from suit." *El-Fadl*, 75 F.3d at 671 (no FSIA discovery absent showing that defendant Deputy Governor of Jordan acted outside his official capacity) (citation omitted); *Mwani v. bin Laden,* 417 F.3d 1, 17 (D.C. Cir. 2005) (no abuse of discretion in denying FSIA discovery where lower court did "not see what facts additional discovery could produce that would affect our jurisdictional analysis") (citation omitted); *see also Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 15 (D.D.C. 2003) (no FSIA discovery absent "showing that any of Prince Turki's alleged actions were taken other than in his official capacity").

II. THE POLITICAL QUESTION DOCTRINE ALSO BARS ADJUDICATION OF THIS CASE

Apart from sovereign immunity, this case fails because it is a political exhibition, not a justiciable controversy. It poses a clear and present danger of conflicting with determinations of the Executive Branch, interfering with U.S. foreign policy, and infringing on the sovereignty of a close ally. Having dismissed this case under the FSIA, the District Court did not reach

this issue. But it is still an appropriate ground for affirming the District Court's judgment. *See Warren v. Dist. of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004) ("In this court, the general rule is that a prevailing party may defend the judgment on any ground decided or raised below.").

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

The political question doctrine is "a natural outgrowth of fidelity to the concept of separation of powers. It is based upon respect for the pronouncements of coordinate branches of government that are better equipped and properly intended to consider issues of a distinctly political nature." *Doe*, 400 F. Supp. 2d at 111. The Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1982), serves as "the starting point for analysis under the political question doctrine." *Hwang Geum Joo v. Japan,* 413 F.3d 45, 48 (D.C. Cir. 2005). The *Baker* Court identified six categories of nonjusticiable political questions:

> ... [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.

369 U.S. at 217. The *Baker* test does not *balance* these factors. Rather, it assesses whether *any* factor is present. If so, then the Court should dismiss the case. *See Hwang Geum Joo,* 413 F.3d at 48; *Schneider v. Kissinger,* 412 F.3d 190, 194 (D.C. Cir. 2005); *El-Shifa Pharm.,* 402 F. Supp. 2d at 274 ("If even one of these elements is present, 'then adjudication of the case may be said to require resolution of a political question which is nonjusticiable and hence not reviewable by a court.'") (quoting *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1159 (D.D.C. 1991)).

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).

This Court has agreed. In three recent cases, the Court has affirmed that national security and foreign relations are "the quintessential sources of political questions," *Bancoult*, 445 F.3d at 433, that "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government," *Schneider,* 412 F.3d at 194, and that courts cannot decide claims calling "into question foreign policy decisions textually committed to the political branches." *Gonzalez-Vera*, 449 F.3d at 1264-65.

2. Courts have Avoided Entanglement in Political and Military Decisions, Especially Regarding the Middle East

The U.S. Court of Appeals for the Ninth Circuit recently invoked the political question doctrine in dismissing another case attacking Israeli

policies. The plaintiffs, represented by Appellants' counsel here, sought to enjoin Caterpillar from selling bulldozers to Israel under U.S. defense programs, because the bulldozers were allegedly used, among other things, to violate the Geneva Convention and to commit extrajudicial killings. The District Court declined, and the Court of Appeals affirmed. *Corrie v. Caterpillar Inc.*, --- F.3d ---, 2007 WL 2694701 (9th Cir. Sept. 17, 2007). The Court of Appeals observed that, "[i]t is not the role of the courts to indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide. 'Any such policy condemning the [Israeli government] must first emanate from the political branches.'... Plaintiffs may purport to look no further than Caterpillar itself, but resolving their suit will necessarily require us to look beyond the lone defendant in this case and toward the foreign policy interests and judgments of the United States government itself." *Id.* at *7.

The U.S. District Court for the Southern District of New York reached the same conclusion in another suit attacking Israel's defense against terrorism, again brought by the same counsel. Plaintiffs, residents of Gaza, sued the former head of Israeli General Security Service for his alleged role in the bombing of an apartment building in Gaza that caused civilian casualties. The Court dismissed the case based both on sovereign immunity

and the political question doctrine. Citing the letter from the Israeli Ambassador and a Statement of Interest submitted by the U.S. Department of State, the Court found that,

> The *Baker* factors-and particularly factors four and six-strongly suggest that this action involves a political question. The defendant is a high-ranking official of Israel, a United States ally. The Complaint criticizes military actions that were coordinated by Defendant on behalf of Israel and in furtherance of Israeli foreign policy. For this reason, both Israel and the State Department, whose opinions are entitled to consideration, urge dismissal of this action.

Matar, 500 F. Supp. 2d at 294.[17]

The Court was particularly cognizant of the political volatility in the Middle East, which heightened the risks and amplified the consequences of any missteps. Thus, the Court found it significant that "the Israeli policy criticized in the Complaint involves the response to terrorism in a uniquely volatile region. This Court cannot ignore the potential impact of this litigation on the Middle East's delicate diplomacy." *Matar*, 500 F. Supp. 2d at 295. The Court was influenced in this assessment by the views of the Department of State that the plaintiffs' attack on Israel's defense against

[17] The U.S. Department of State filed a Statement of Interest at the request of the District Court in *Matar*. The District Court did not issue such a request in this case.

terrorism "threaten[s] to enmesh the courts in policing armed conflicts across the globe -- a charge that would exceed judicial competence and intrude on the Executive's control over foreign affairs," and that allowing the case to proceed "would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled in it at all." *Id.* (quoting U.S. Gov't Statement of Interest at 3, 45). Against this "unique backdrop," the Court concluded, consideration of the case "would impede the Executive's diplomatic efforts and, particularly in light of the Statement of Interest, would cause the sort of intragovernmental dissonance and embarrassment that gives rise to a political question." *Id.*

Judge Bates in *Doe* arrived at the same conclusion. The Court found:

> 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 that actions Israel justifies as self-defense in fact were 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 the legality of Israeli conduct in the West Bank and Gaza would, in the Court's view, usurp the roles of other 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.* at 112. 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.

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 regarding the El-Shifa plant 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 the targeting decisions of the Israeli military and the intelligence that informed them.

The perils this case presents would multiply as it progressed. Appellants filed a declaration below asserting that the legality of the artillery response here depends, among other things, on whether those who "plan or decide upon an attack" take "all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life." JA-110. Further, Appellants claimed, when "a choice is possible between several military objectives for obtaining a similar military advantage," the objective selected must be the one expected to cause the least civilian casualties. JA-111.

If that is true, how is a District Court to determine what precautions were "feasible" in the midst of artillery exchanges? Would the Court allow discovery into the means the Israeli military had available for the attack, the weapons it could have employed, how long it would have taken to deploy other weapons, the accuracy of that weaponry, the troops available, the level of acceptable casualties by Israeli troops and civilians? Could the Court assess whether other types of artillery or ammunition would have been effective against the Hezbollah guns? Would the Court or the jury balance

the political, military or human consequences of not silencing the Hezbollah artillery against the risks to noncombatants posed by a particular choice of weaponry or ammunition? Would Appellants be able to inquire about the types of telemetry, software, and other targeting technology that Israel employs in its weaponry? Would Appellants be able to depose senior military personnel regarding the intelligence they provided and received, including the sources and reliability? Would General Ya'alon or other military commanders be required to disclose Israeli strategy in dealing with Hezbollah? Or Israel's policies and tactics in responding to terrorist attacks? Would Appellants be allowed to explore the discussions in the inner councils of the Israeli government for this purpose, or as part of the virtually identical jurisdictional discovery they seek?

Even minimal foresight shows that this case does not involve merely routine application of settled legal principles. Even a glancing preview lays bare the potential infringement on Israel's sovereignty, the interference with U.S. foreign policy, and the entanglement in issues beyond judicial competence. It defies reality to pretend that a case against a high official of a close ally raises no serious foreign policy issues. Nor is it is credible to suggest that the inquiry calls on conventional judicial skills. That is why, as discussed above, courts consistently have refused to intercede in similar

cases involving actions by the U.S. military. Appellants have articulated no reason why inquiries into military targeting decisions of foreign allies would be *more* appropriate for U.S. courts than identical inquiries into U.S. military targeting decisions, which courts repeatedly have declined to hear.

3. The Political Question Doctrine Bars Adjudication of this Case

Like these prior cases, this suit implicates the factors set forth in *Baker*. It focuses on

— a military targeting decision,

— by a key U.S. ally,

— against rocket launch sites of an organization the U.S. has designated as terrorist,

— in a region that is particularly volatile,

— where the U.S. government has stated that the incident was "legitimate self-defense" by Israel, and

— where Israel has protested the potential interference in its sovereignty and Middle East diplomacy.

The first *Baker* factor applies because this matter involves political judgments about foreign policy, committed by the Constitution to the Executive. The second factor -- lack of judicially manageable standards -- applies because the Court would have to evaluate a military targeting

decision and assess whether Israel acted in legitimate self-defense. For the reasons stated above, those are not judgments suited for the courts.

The third through sixth *Baker* factors are also compelling. This is a time of both turmoil and opportunity in the Middle East, including in both Lebanon and Israel. Conflict between Israel and Hezbollah flared within the last year in Lebanon, resulting in loss of life, destruction of property, and political instability. The United States, Israel, and others continue to pursue diplomatic avenues to peace. Among other things, the United States continues to urge that Hezbollah militias be disarmed, as part of Lebanon's transition to a democracy free of Syrian control.[18] Pronouncements by the Court in these areas could complicate, if not thwart, the initiatives by the Executive Branch in Lebanon and throughout the region. Indeed, Israel has formally objected at the highest levels to adjudication of this suit as an unwarranted interference in its conduct of military and security operations in the war on terror, as an intrusion into its sovereignty, and as a potential complication in its ongoing dialogue on Mideast peace. JA-36-38.

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[18] *See* United Nations S.C. Res.1559 (2004); U.S. Dep't of State Daily Press Briefing, June 7, 2005, *available at* http://www.state.gov/r/pa/prs/dpb/2005/47320.htm (noting that Hezbollah remains "a designated Foreign Terrorist Organization," that "armed groups cannot work outside the rule of law" in any democratic society, that "Hezbollah and its armed militia are not controlled by institutions that are responsive to the will of the Lebanese people," and that "[s]imply put, Hezbollah makes Lebanon and its people less secure, not more secure").

Moreover, as noted, the Executive Branch has made its position on the Qana incident clear, that Israel intended to target rocket launch sites, not the U.N. compound, that Hezbollah bore responsibility, and that Israel acted in "self-defense."[19] The U.S. government also left no doubt that it addressed this incident not as a legal dispute, but rather in the political context of ongoing diplomacy. Immediately after the incident, the State Department spokesman highlighted the U.S. government's broader agenda of peace in the region: "The situation in the Middle East is among the most volatile situations the United States confronts anywhere in its diplomacy.... What we've got to do is to stop the shelling on both sides of the border, shelling that began, of course, with Hizbollah attacks on civilian populations in Israel."[20] In furtherance of that goal, the Secretary of State went to Israel and Syria, and negotiated a ceasefire. In addition, the United States blocked a resolution in the United Nations Security Council and voted against one in the United Nations General Assembly condemning Israel's acts as illegal, precisely the determination Appellants sought from the District Court.[21]

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[19] U.S. Dep't of States, Dispatch, *supra* note 1; U.S. Dep't of State Daily Press Briefing, Apr. 19, 1996, *available at* http://www.hri.org/news/usa/std/1996/96-04-19.std.html.

[20] *Id.*

[21] *See* U.N. voting record for A/RES/50/22C, *available at* http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=108V0691N26Y9.82&

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Thus, for the District Court to have adjudicated Appellants' claims would have disregarded "an initial policy determination" by the Executive Branch, exhibited "lack of the respect due coordinate branches of government," potentially disavow[ed] "a political decision already made," and risked embarrassing the United States with "multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 210. To find, as Appellants assert, that Israel through General Ya'alon "act[ed] deliberately [in] shelling the United States (UN) compound at Qana," Compl. ¶ 1 -- notwithstanding the conclusion of the President and Department of State to the contrary -- would interfere with the efforts of the Executive Branch to provide "a single-voiced statement of the Government's views" in delicate matters of foreign affairs. *Baker*, 369 U.S. at 211; *see also Schneider*, 412 F.3d at 196 (cautioning that "[i]t is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role" in the conduct of foreign policy).

Proceeding with this case also could expose senior U.S. officials to suits in foreign courts arising out of their official acts. Plaintiffs' own

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counsel sued then-Secretary Rumsfeld and other U.S. officials *in Germany* for human rights violations in Iraq.[22] 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.[23] 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."[24] Moreover, U.S. military operations sometimes result in unfortunate deaths or injuries of civilians, just as Israel's

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[22] *See* Center for Constitutional Rights website, http://www.democracyinaction.org/dia/organizations/ccr/campaign.jsp?campaign_KEY=325. In this country, plaintiffs' counsel filed an ATCA complaint in the District of Columbia against former 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 former Secretary Rumsfeld, former director of the CIA George Tenet, and military leaders in various federal courts.

[23] The State Department condemned the Belgian suit (which has since been dismissed) as an "abuse of [Belgium's] legal system for political ends." Statement of Philip T. Reeker, Deputy State Department Spokesman, May 14, 2003, *available at* http://www.state.gov/r/pa/prs/dpb/2003/20584.htm. The United States Government expressed similar views of the impropriety of suits in Belgium against former President George H.W. Bush and other senior U.S. officials arising out of the 1991 Gulf War. *See* Statement of State Department Spokesman Richard Boucher, April 28, 2003, *available at* http://www.state.gov/r/pa/prs/dpb/2003/20025.htm. The Belgian suits ultimately were dismissed after Belgium amended its war crimes law, under significant pressure from the United States.

[24] Condoleezza Rice, National Security Advisor, Remarks at Town Hall Los Angeles, June 12, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/06/20030612-12.html.

operation against Hezbollah sites in Lebanon did.[25] After an errant U.S. bomb struck a crowded market in Baghdad in 2003, for example, the Secretary General of the U.N. expressed "increasing concern over civilian casualties of the conflict in Iraq" and pointedly reminded "belligerents that they should respect international humanitarian law."[26] The Administration has sought to protect American officials from liability for such events.[27] 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

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[25] *See, e.g.*, Carlotta Gall, *Airstrike by U.S. Draws Protests from Pakistanis*, N.Y. Times, Jan. 15, 2006 (U.S. airstrike in Pakistan aimed at Al Qaeda leader Ayman al-Zawahiri kills 18 civilians); White House Press Briefing, Jan. 4, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/01/20060104-1.html (family of 12 killed by U.S. pilots who targeted a house where they believed insurgents had taken shelter). Given plaintiffs' attack on Israel's shelling at Qana, the Administration's justification of the strikes in Pakistan and Iraq are noteworthy. The U.S. military, the White House said of the Iraq strike, "target[s] the terrorists and the Saddam loyalists who are seeking to kill innocent civilians and disrupt the transition to democracy." *Id.*

[26] *Annan 'increasingly concerned' by civilian casualties in Iraq,* UN News Centre, March 26, 2003, *available at* http://www.un.org/apps/news/story.asp?NewsID=6571&Cr=iraq&Cr1=relief.

[27] *See, e.g.*, Marc Grossman, Under Secretary of State for Political Affairs. Remarks to the Center for Strategic & Int'l Studies, May 6, 2002, *available at* http://www.state.gov/p/us/rm/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.").

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. *See Matar*, 500 F. Supp. 2d at 292-95; *Doe*, 400 F. Supp. 2d at 111-112. This case -- from its overheated allegations of war crimes to its hyperbolic assault on Israel's efforts to defend itself against terrorist attacks -- poses that risk. It seeks to embroil the Court in the foreign policy of the United States and in second-guessing the security policy and military intelligence practices of one its closest allies. The Court should not leap into that thicket. Plaintiffs should pursue their political goals in political forums, not in a federal court.

CONCLUSION

For the reasons stated above, the District Court's order of dismissal should be affirmed.

Dated: October 15, 2007.

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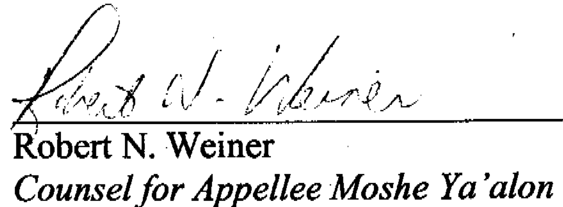
PERTINENT STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), Appellee Moshe Ya'alon states that the pertinent statutes are contained in the addendum to the Brief for Appellants.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,288 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32. In making this certification, the undersigned has relied upon the word count of the word-processing system used to prepare this brief.

2. This brief complies with the typeface requirements of D.C. Circuit Rule 32(a)(1) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2003 in 14 point, Times New Roman.



Dated: October 15, 2007.
Washington, D.C.

Robert N. Weiner
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellee Moshe Ya'alon were served by first-class mail, postage prepaid, this 15th day of October, 2007, on:

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