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

United States Court of Appeals
for the
District of Columbia Circuit

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,

Plaintiffs-Appellants,

v.

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

Defendant-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)

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CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Plaintiffs-Appellants submit the following certification pursuant to D.C. Circuit Rule 28(a):

A. Parties and *Amici*

Plaintiffs-Appellants are citizens of Lebanon who were injured and/or had relatives injured or killed on April 18, 1996, when a UN compound in Qana, Lebanon was shelled. The named Plaintiffs in this class-action are: Saadallah Ali Belhas, Ali Saadallah Belhas, Ibrahim Khalil Hammoud, Raimon Naseeb al Haja, Hamidah Sharif Deeb, Ali Mohammed Ismail, Hala Yassim Khalil.

Defendant-Appellee is Moshe Ya'alon, a retired Lieutenant General in the Israel Defense Forces who was Head of Israeli Army Intelligence on April 18, 1996.

Plaintiffs have given consent to the Center for Justice and Accountability to file an amicus brief with this Court regarding the Torture Victim Protection Act.

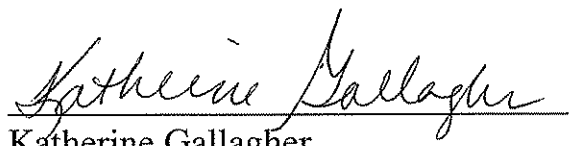
B. Ruling Under Review

The ruling under review is the Opinion of December 14, 2006 by Judge Paul L. Friedman of the United States District Court for the District of Columbia, dismissing Plaintiffs' claims on the basis of lack of subject matter jurisdiction due

to a finding of immunity and denying Plaintiffs' request for jurisdictional discovery.

C. Related Cases

There are no related cases.



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GLOSSARY

Ambassador's Letter:	Letter from Daniel Ayalon, Ambassador of Israel to Nicholas Burns, Under-Secretary for Political Affairs Dep't of State, Feb. 6, 2006
ATS:	Alien Tort Statute
FSIA:	Foreign Sovereign Immunities Act
ICC Statute:	Rome Statute of the International Criminal Court
ICTY Statute:	Statute of the International Cirminal Tribunal for the former Yugoslavia
IDF:	Israel Defense Forces
Nuremberg Charter:	Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279 (1945)
TVPA:	Torture Victim Protection Act
UNIFIL:	United Nations Interim Force in Lebanon

INTRODUCTION

This appeal arises out of the District Court's decision that Defendant Moshe Ya'alon was entitled to immunity for the April 18, 1996 attack on the United Nations (UN) compound in Qana, Lebanon that killed more than 100 Lebanese civilians who had taken shelter there, and injured many more. The attack on the United Nations compound and on the displaced Lebanese civilians was prohibited by customary international law, as well as Israeli law and policies.

Notwithstanding that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides jurisdiction over claims against former foreign officials for violations of the law of nations, including war crimes and crimes against humanity, and that the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note), provides liability for extrajudicial killings committed under the authority of a foreign nation, the District Court found that Defendant, a former official of the Israeli government, was entitled to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-11.[1] This finding directly contradicts Supreme Court precedent that defendants are not entitled to FSIA immunity if they are not instrumentalities of the foreign state when they are sued, and this Court's precedent that an individual defendant is not immune unless he was authorized in his official

[1]Pursuant to Local Rule 28(a)(5), pertinent statutes are set forth in Addendum A, attached hereto.

capacity to do the alleged acts. Because Defendant was sued as a former official, and acted outside the scope of his lawful authority, this Court should reverse.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1350, as well as 28 U.S.C. § 1331 and 28 U.S.C. § 1332. On December 14, 2006, Judge Paul L. Friedman issued a final order (JA-143) and opinion dismissing this case, which is the ruling under review. JA-144-155; *Belhas v. Ya'alon,* 466 F. Supp. 2d 127 (D.D.C. 2006). On January 12, 2007, plaintiffs filed a timely notice of appeal. JA-156-157. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Defendant is entitled to immunity under the FSIA from Plaintiffs' claims under the ATS and the TVPA.
2. Whether the District Court adopted an unreasonable interpretation of the TVPA that failed to give it effect.
3. Whether the District Court erred in looking outside of the pleadings on the issue of the Defendant's claim of immunity while denying Plaintiffs discovery on the same issue.

STATEMENT OF FACTS

The class action complaint alleges that Plaintiffs and their family members were attacked, without warning, in a longstanding compound of the United Nations

Interim Force in Lebanon (UNIFIL) where they had sought refuge. They had fled to the UN compound after warnings by the Israel Defense Forces (IDF) that those who remained in their villages or towns would be considered connected with Hezbollah. JA-16, ¶¶ 28, 30. The UN had maintained the UNIFIL compound in Qana staffed by Fijian peacekeepers since 1978. JA-15, ¶ 27.

On April 18, 1996, just after 2 p.m., the IDF shelled the UNIFIL compound. JA-17, ¶ 34. Plaintiffs are among the hundreds injured and/or who lost family members in the attack. Saadallah Ali Belhas, who had recently been hospitalized, took his family to the UN compound seeking safety from the IDF. JA-20, ¶¶ 57-58. His wife Zeineb and their children Ghaleb, Fayyad, Naylah, Fatimeh, Zahra, Amal, Mohamed, Ibrahim, and Kadijah were all killed in the April 18th attack. *Id.*, ¶ 59. Saadallah's son Ali Saadallah Belhas also could not leave the area, as he and his wife had a newborn son, so his family also took refuge in the UN compound. *Id.*, ¶¶ 54-55. The attack killed Ali Saadallah Belhas's wife Zahra, his daughter Fatimeh, his son Abbas, and his newborn son Hassan, who he witnessed being decapitated. *Id.*, ¶ 56. Ibrahim Khalil Hammoud sought refuge at the UN compound, where he suffered shrapnel wounds in his back and right leg for which he underwent two operations. JA-21, ¶¶ 61-62. He has since been disabled, and suffers ongoing pain. *Id.*, ¶ 62. Hala Yassim Khalil fled to the UN compound with 37 members of her family after the IDF warning. *Id.*, ¶ 63. Her brothers Ali and

Husaam and her uncle and his three children were killed. *Id.*, ¶ 65. Hala suffered from shrapnel in her eye and shoulder injuries, among other injuries. *Id.* Hamida Sharif Deeb lost her left arm and her right leg in the attack and is permanently disabled; her sister and two of her brother's children were killed. JA-11, ¶ 11; JA-22, ¶ 68. Ali Mohammed Ismail was injured in the attack and his wife, two children, and sister were killed. *Id.*, ¶ 69. Raiman Nasseb Al Haja was disabled by the attack and his mother was killed. JA-11, ¶ 10; JA-22, ¶ 70.

Plaintiffs alleged that Defendant unlawfully decided to shell a U.N. compound and the civilians, most of whom were women, children, and elderly people, he knew had taken shelter there. *See, e.g.*, JA-10, ¶¶ 1-2; JA-14, ¶ 22.[2]

[2] The Court largely disregarded Plaintiffs' allegations. Contrary to Plaintiffs' allegations, the Court asserts that the "bombing was the result of the conflict between Israel and Hezbollah." JA-146 (citing JA-15, ¶¶ 25, 30). First, the UN Compound was not bombed; it was shelled. JA-16, ¶ 30. Second, Plaintiffs did not allege that the attack was the "result of the conflict between Israel and Hezbollah," but in the Complaint paragraphs cited by the Court, Plaintiffs alleged that the IDF "stated that civilians who remained in their villages or towns would be considered connected with Hezbollah," JA-15, ¶ 25, and that a unit of the brigade subordinate to the command that took direction from Defendant was specially trained to combat Hezbollah. JA-16, ¶ 30. Furthermore, the Court gratuitously added that "Hezbollah has been designated by the United States government as a terrorist organization." JA-146, n.2 (citing Defendant's Memorandum of Law in Support of his Motion to Dismiss, at 1). Not only is this irrelevant to Plaintiffs' allegation that Defendant decided to shell civilians in a UN compound, but it was inappropriate for the Court to look to facts outside the pleadings, and the Court failed to note that Defendant's assertion did not relate to Hezbollah's status at the time of the 1996 attack. Notably, the Court does not mention that the attack killed over a hundred villagers, but incorrectly states that UN soldiers were killed, when they were in fact injured. JA-146; JA-9-10, ¶ 1.

Defendant, who at the time was head of the intelligence branch of the Israeli military, participated in the decision to target the UN compound, knowing that civilians had taken refuge in the UN compound. JA-10, ¶ 2; JA-14, ¶ 22; JA-18, ¶ 46; JA-19 ¶ 49. Official Israeli policy specifically prohibited harm to civilians in the course of IDF operations and prohibited the attack on UNIFIL forces. JA- 17, ¶ 38**.** The bombing of the UN compound was deliberate and intentional. JA-12, ¶ 15. *See also*, JA-10, ¶ 1; JA-19, 49; JA-25, ¶ 96; JA-26, ¶ 101; JA-27, ¶ 106; and JA-28, ¶ 111. IDF policy and practice was to issue warning signals before firing near UN compounds. JA-17, ¶¶ 38, 40-42. Defendant took no precautions to prevent civilian casualties from the shelling at Qana, and no warnings were issued. JA-17, ¶ 35; JA-19, 52. Official IDF policy also was to cease or redirect shelling when notified of proximity to a UN compound. JA-18, ¶ 43**.** The IDF continued to shell the compound even after it was specifically notified by UNIFIL that they were shelling a UN position in which civilians were taking shelter. JA-16, ¶ 36.

Plaintiffs submitted evidence from the UN Report on the attack that Israeli officials told UN investigators that "it was not Israeli policy to target civilians or the United Nations." JA-126, ¶ 8. Plaintiffs also submitted evidence that Defendant said that the "fact that civilians are evacuated from the villages into U.N. facilities was known to us from the second day of the operation. In the intelligence wing there was no discussion of whether there were two or six hundred

civilians in Qana. The relevant question is, was it correct to open fire in such circumstances?" JA-138.

SUMMARY OF ARGUMENT

The plain language of both the FSIA and the TVPA make clear that Defendant is not entitled to immunity from Plaintiffs' claims brought under the TVPA and the ATS. The Supreme Court in *Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 566-67 (2005), confirmed that statutes must be applied as written. The District Court failed to follow this basic rule of statutory construction in interpreting the FSIA and in disregarding altogether the language of the TVPA.

First, the District Court erred by extending the FSIA to provide immunity to former officials in a manner inconsistent with the statute's use of the present tense to limit its reach to agencies and instrumentalities at the time of suit. 28 U.S.C. § 1603(b)(2)("An 'agency or instrumentality of a foreign state' means any entity...which is an organ of a foreign state....") *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003) (whether a defendant is an instrumentality of a foreign state under the FSIA is determined by a defendant's status "at the time of the filing of the complaint"). Because Defendant is a former official, a claim against him is not a claim against the sovereign and any remedy which results could not result in a judgment against the sovereign.

Even if the FSIA is interpreted to apply to former government officials, it

does not apply to acts that were not lawfully authorized. *Jungquist v. Al Nayhan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997). The District Court applied the incorrect legal standard to determine that the FSIA applied, finding simply that if Defendant acted in his official capacity, he was immune, without any inquiry into whether he was lawfully authorized to attack the UN compound housing unarmed displaced civilians. JA-149; Sec. II (C), *infra*. The FSIA does not provide Defendant with immunity because his acts were outside the scope of his lawful authority under Israeli law and international law. A former official acting outside the scope of his lawful authority does not fall within the definition of "foreign State" under 28 U.S.C. § 1603(a) and therefore is not entitled to Immunity under the FSIA.

The Complaint alleges that the decision to shell the UN compound was unlawful. There is no evidence to the contrary. The letter from Israel's Ambassador (JA-35-38) ("Ambassador's Letter") did not state that the shelling of the UN compound – the act alleged in the Complaint – was lawfully authorized. Moreover, Israel has undertaken to abide by customary international law, including the Geneva Conventions. The shelling of the UN compound which was sheltering Lebanese civilians violated customary international law and, therefore, Israeli law. Moreover, the acts alleged violate *jus cogens* norms which are non-derogable. Israel has not and cannot nullify its obligations under customary international law.

Further, the District Court failed to consider the plain language of the TVPA

which created liability for persons acting with the "actual or apparent authority" of a state. 28 U.S.C. § 1350 (note), Sec. 2(a)(2). Applying the plain meaning of the TVPA to acts alleged, Defendant can be held individually liable because he participated in the decisions which led directly to extrajudicial killings. Defendant can be held liable even if he was acting within the scope of his authority, which Plaintiffs assert he was not.

Plaintiffs' allegations were, therefore, sufficient to establish subject matter jurisdiction over their claims because Defendant: (1) was no longer an official at the time of suit, and therefore cannot be immune under the FSIA (Sec. II (A), *infra*); (2) is alleged to have committed *jus cogens* violations which, by definition, fall outside the scope of his authority (Sec. Sec. II (C)(1), *infra*); (3) acted outside the scope of his authority under Israeli law (Sec. II (C)(2), *infra*); and/or (4) is liable under the plain language of the TVPA, which imposes liability on foreign officials who commit extrajudicial killings (Sec. III, *infra*).

To dismiss both the ATS and TVPA claims, the District Court looked outside the pleadings, relying on the claims in the Ambassador's Letter that the lawsuit purportedly challenges "sovereign actions of the State of Israel, approved by the government of Israel" in order to find that Defendant was immune. JA-146 (quoting JA-37). If the court looks outside the pleadings to determine whether Defendant acted within the scope of his lawful authority, then Plaintiffs must be

granted limited jurisdictional discovery to obtain facts relevant to what Defendant's lawful duties, powers and responsibilities were, and whether the challenged actions in fact fell within Defendant's duties, powers and responsibilities under the applicable law, i.e., whether they were within the scope of his lawful authority.

For each of the reasons stated above, this decision of the District Court must be reversed.[3]

STANDARD OF REVIEW

A question of statutory interpretation is subject to *de novo* review. *Kaseman v. District of Columbia*, 444 F.3d 637, 640 (D.C. Cir. 2006) (citing *Calloway v. District of Columbia*, 216 F.3d 1, 5 (D.C. Cir. 2000)). The District Court's holding that immunity under the FSIA was applicable to a former official of a foreign government was a matter of statutory interpretation of the FSIA and is subject to *de novo* review. The District Court's holding that immunity under the FSIA was applicable without regard to whether Defendant, a former official of a foreign

[3]The District Court did not reach the defenses of the political question and act of state doctrines which were also raised by Defendant. This suit is not barred by the political question doctrine because the issue of liability raised here is committed, by Constitution and statute, to the courts, and is otherwise justiciable. The Act of State Doctrine is inapplicable where, as here, the foreign state is acting outside of its own territory, and the acts at issue were *jus cogens* violations, and therefore not "official" acts.

government, acted without legal authority or beyond the scope of his authority is subject to *de novo* review. The District Court's holding that Plaintiffs' claims under the TVPA were barred by Defendant's immunity was a matter of statutory interpretation of the TVPA and is subject to *de novo* review.

The *de novo* standard of review is also applicable to the issue of whether the allegations of the Complaint viewed in light of the Ambassador's Letter are sufficient to preclude the application of immunity under the FSIA. *See, Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004) (citing *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1131-33 (D.C. Cir. 2004)) (reviewing *de novo* whether contradictions between allegations in complaint and facts recited in CIA and State Department documents sufficed to carry Libya's burden of proving conduct fell outside terrorism exception to FSIA).

The District Court's decision to deny discovery is reviewed for abuse of discretion. The District Court's factual determinations are reviewed under the clearly erroneous standard. *Ellipso, Inc. v. Mann*, 480 F.3d 1153 (D.C. Cir. 2007); *see also, In re Swine Flu Immunization Prod. Liab. Litig., v. United States*, 880 F.2d 1439, 1442-1443 (D.C. Cir. 1989) (assessing plaintiff's complaint and submissions by asking whether a reasonable fact-finder could rule in plaintiff's favor on discovery rule argument). The "'abuse-of-discretion standard includes

review to determine that the discretion was not guided by erroneous legal conclusions.'" *Koch v. Cox*, 489 F.3d 384, 388 (D.C. Cir. 2007) (citation omitted)

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE FSIA AND TVPA, DEFENDANT IS NOT ENTITLED TO IMMUNITY.

The District Court's dismissal of Plaintiffs' case required the interpretation of the FSIA and the TVPA. With regard to the issues raised in this case, the meaning of relevant statutory provisions is unambiguous. The Court's role in interpreting an unambiguous statute is clear: "As in all statutory construction cases, we begin with the language of the statute [the FSIA and the TVPA]. The first step [in statutory interpretation] 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Id. See also, Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 481 (D.C. Cir. 2007) (quoting *Qi-Zhuo v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995)(where "the plain language of the statute is clear, the court generally will not inquire further into its meaning, at least in the absence of a clearly expressed legislative intent to the contrary")). The "authoritative statement

is the statutory text." *Exxon Mobile Corp. v. Allapattah Servs., Inc*. 545 U.S. 546, 568 (2005). Although the District Court held that the FSIA barred Plaintiffs' claims for extrajudicial killing, war crimes and crimes against humanity under the TVPA and the ATS, it did not consider the plain language of the FSIA or the TVPA. The unambiguous meaning of the statutory language precluded dismissal on the basis of FSIA immunity.

Rather than applying the statutory language of the FSIA and the TVPA to give both their intended effect, the District Court applied the FSIA without regard for the plain language of the TVPA, essentially gutting its application. "'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.'" *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003) (quoting *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001)). The District Court's interpretation prevents the application of the TVPA to individuals acting with "actual authority" of a foreign nation. 28 U.S.C. § 1350 (note), Sec. 2(a)(2). A court must interpret a statute to avoid an absurd result. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). As set forth in Sections II and III, the FSIA and the TVPA may be harmonized to give effect to both.

II. THE FSIA DOES NOT PROVIDE IMMUNITY TO DEFENDANT.

A. The FSIA Does Not Apply to Defendants that Are Not an Agency or Instrumentality of the State at the Time of Suit, as in this Case.

The District Court erred in finding that Defendant was immune under the FSIA because he was "acting as an agency or instrumentality of the foreign state." JA-149. The Supreme Court has held that whether a defendant is an instrumentality of a foreign state under the FSIA is not determined by a defendant's status at the time they were *acting*, but rather "at the time of the filing of the complaint." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003); *see also, Republic of Austria v. Altmann*, 541 U.S. 677, 708 (2004) (Breyer, J., concurring) ("the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit.").

The FSIA requires that an agency or instrumentality "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof". 28 U.S.C. § 1603(b)(2). The Court in *Patrickson* held that "the plain text of this provision [§ 1603(b)(2)], because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478. *Patrickson* found that because the corporate defendants' relationship with Israel

"had been severed before suit was commenced," the defendants were not an instrumentality of the state, and therefore not entitled to immunity under the FSIA. *Id.* at 480.

The FSIA applies to foreign states and their political subdivisions and agencies or instrumentalities. 28 U.S.C. § 1603(a). This Court has found that "[a]n individual can qualify as an 'agency or instrumentality of a foreign state.'" *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (quoting 28 U.S.C. § 1603(b)). Thus, to enjoy immunity as an agency or instrumentality of a foreign state, individuals, like corporations, must satisfy § 1603(b)(2). To do so, an individual must show that he or she "is an organ of a foreign state," also a present tense requirement. 28 U.S.C. § 1603(b)(2). When Plaintiffs' Complaint was filed (and Defendant was served), Defendant was not an organ or instrumentality of a foreign state, but was retired from the Israel Defense Forces (IDF). JA-9; JA-12; JA-31-32. Defendant is therefore not immune under the FSIA.

B. The Former Official Defendant Is Not Entitled to Sovereign Immunity Because Plaintiffs' Case Does Not Seek Relief Against the Sovereign.

One of the purposes of the FSIA was to codify international law at the time of its enactment in 1976. *Permanent Mission of India to the UN v. City of New York*, 127 S. Ct. 2352, 2356 (2007) (looking to international law and practice at the time of the FSIA's enactment to support finding of no immunity). The

Restatement (Second) of Foreign Relations Law of the United States, in effect at the time the FSIA was enacted, made clear that a foreign state's immunity extended to "any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965). The effect of the exercise of jurisdiction over Defendant, or a judgment against him, would not be "to enforce a rule of law against the foreign state"; rather it would be to hold him personally liable for his acts. *Id.*

Foreign sovereign immunity is meant "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns." *Patrickson,* 538 U.S. at 479. "[I]mmunity relates to the prerogative right not to have sovereign property subject to suit". *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 438 (1964). Through this action, a court could not assess damages against Israel or enjoin acts of Israel.

Similarly in the domestic sphere, "the general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984) (emphasis in original); *see also, Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 687

(1949) ("it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign."). The rule regarding immunity "is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citation omitted). A suit against an individual who is no longer employed by the government cannot seek relief against the sovereign.

The FSIA is similarly inapplicable to Defendant Ya'alon because he was sued in his personal capacity, not in his "official capacity." Defendant was no longer a government official at the time he was sued, *see, e.g.*, JA-9, was personally served in the District of Columbia, JA-31-32, and was alleged to have acted unlawfully and contrary to Israel policy and practice. *See, e.g.*, JA-17, ¶ 38. This Court has found that a defendant sued in his "personal capacity" cannot be treated "as a 'foreign state' for purposes of personal jurisdiction."[4] *I.T. Consultants, Inc. v. Islamic Republic of Pak.*, 351 F.3d 1184, 1191 (D.C. Cir. 2003) (citing *I.T. Consultants, Inc. v. Islamic Republic of Pak.*, 2003 U.S. Dist.

[4] The FSIA service provisions do not distinguish between official and personal capacity defendants. 28 U.S.C. § 1608. The distinction derives from who *is* an agency or instrumentality of the foreign state – an individual defendant can be an agency or instrumentality in his official capacity, but not in his personal capacity. Moreover, a former official cannot be an agency or instrumentality of the foreign state. *See* Sec. II (C), *supra*.

LEXIS 23500 at *16). In *I.T. Consultants*, this Court highlighted that *Jungquist's* finding that individuals are considered "agencies or instrumentalities" applied only to individuals "acting *in their official capacities*." 351 F.3d at 1191 (citing *Jungquist*, 115 F.3d at 1027). *Nikbin v. Islamic Republic of Iran* also found that although an official sued in his *official* capacity was entitled to the same FSIA immunity protection afforded the foreign state, 471 F. Supp. 2d 53, 69 (D.D.C. 2007) (citing *Jungquist*, 115 F.3d at 1030), subject matter jurisdiction over federal claims against that *same* official sued in his *personal* capacity existed pursuant to 28 U.S.C. § 1331, and personal jurisdiction over the defendant was analyzed without regard to the FSIA. *Nikbin*, 471 F. Supp. 2d at 69, n.12. The FSIA is not applicable to Defendant, who was sued as a former official in his personal capacity.

C. The District Court Erred in Failing to Properly Assess whether Defendant's Actions were within the Scope of his Authority.

Even if Defendant were an agency or instrumentality of a foreign state when he was sued, he would not be immune under the FSIA because his acts were outside the scope of his lawful authority and thus he was not authorized to undertake such acts within his official capacity. The District Court erred in failing to inquire into the nature of the actions or the lawful authority of Ya'alon to take the actions that resulted in the shelling of a UN compound where civilians had

taken refuge. In *Jungquist*, this Court found that the defendant was *not* entitled to immunity under the FSIA for entering into a contract to pay for medical treatment through a government program, even if he was authorized to do so by his office, because he did so in exchange for plaintiff's silence, a "corrupt bargain" that could not have been authorized. 115 F.3d at 1028. The FSIA immunity inquiry for individuals must examine the *nature of the conduct* rather than the defendant's *motive* or simply his *status*. *Id.* ("the relevant inquiry in determining whether an individual was acting in an official capacity focuses on the nature of the individual's alleged actions, rather than the motives underlying them."). *See also*, *Herbage v. Meese*, 747 F. Supp. 60, 66-67 (D.D.C. 1990), *aff'd without opinion*, 946 F.2d 1564 (D.C. Cir. 1991).

Jungquist made clear that the "nature of the actions" means "whether the defendant was authorized in his official capacity to so interfere [with contractual relations, i.e., to engage in the action set forth in the complaint]." *Jungquist*, 115 F.3d at 1028 (*citing Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1992)). *See also*, *Barr v. Matteo*, 360 U.S. 564, 573-74 (1959) ("It is not the title of his office but the duties with which the particular officer … is entrusted — the relation of the act complained of to 'matters committed by law to his control or supervision'— which must provide the guide in delineating the scope of the rule which clothes official acts of the executive officer with immunity.") (quoting

Spalding v. Vilas, 161 U.S. 483, 498 (1896)).

Rather than looking to whether Defendant was lawfully authorized to act as he did, the District Court found he was entitled to immunity solely because his actions were taken in an "official capacity." JA-149. Plaintiffs alleged that Defendant unlawfully decided to shell a U.N. compound and the civilians he knew had taken shelter there, JA-10, ¶ 1; JA-15: ¶ 24, and that "the official policy of the government of Israel specifically prohibited harm to civilians in the course of IDF operations and prohibited the attack on UNIFIL forces." JA-17, ¶ 38.

The District Court erred in refusing to accept Plaintiffs' allegations that Defendant acted outside the scope of his lawful authority. Plaintiffs' allegations are sufficient to survive Defendant's Rule 12(b)(1) motion to dismiss. *See, Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 108-109 (D.D.C. 2006) (finding allegation that officials were acting within the scope of their authority sufficient to survive motion to dismiss amended complaint).[5] "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[5] To the extent Plaintiffs' allegations with regard to the scope of Defendant's authority are considered inadequate, Plaintiffs should be permitted to amend their complaint. *See, e.g., Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 17-18 (D.D.C. 2005) (court permitted plaintiffs to amend their complaint to allege that defendants acted within the scope of their employment with regard to the FSIA).

The District Court clearly failed to construe Plaintiffs' allegations in their favor and instead disregarded them in favor of Defendant's assertions. The District Court purportedly relied on Plaintiffs' allegations that Defendant, a retired Israeli military official, did the acts alleged while he was Head of Army Intelligence, had command responsibility for the attack, and acted under color of Israeli law, and that Plaintiffs did not allege that his acts were "personal or private[.]" JA-149 (citing JA-10,¶ 2; JA-14, ¶ 20; JA-15, ¶ 26).

Plaintiffs' allegation that Defendant acted under color of law does not mean that he acted in his official capacity or within the scope of his authority, or that he is entitled to immunity. "The mere fact that acts were conducted under color of law or authority, which may form the basis of state liability by attribution, is not sufficient to clothe the official with sovereign immunity." *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1282 (N.D. Cal. 2004); *see also, United States v. Emmanuel*, 2007 U.S. Dist. LEXIS 48510, at *39 (S.D. Fla. July 5, 2007) (allegation that defendant acted under color of law is not the equivalent of "acting in his official capacity as a sovereign."); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 n.8 (9th Cir. 1994) ("An official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under FSIA.").

The District Court's reliance on whether the acts were personal and private was also erroneous. The District Court conflated the issue of whether the conduct

was a private act taken in a defendant's *individual capacity* despite his being an official, with *Junquist's* concern about whether, in his *official capacity*, the defendant was authorized to take the action. The District Court failed to make the inquiry mandated by *Jungquist*: whether Defendant's acts were within the lawful realm of his duties, and whether they were legal under the laws of Israel. In *Jungquist,* this Court relied on *Chuidian v. Philippine Nat. Bank,* 912 F.2d 1095 (9th Cir. 1990), the first circuit case to apply the FSIA to individuals. *Chuidian* made clear that a government official would not be entitled to sovereign immunity "for acts not committed in his official capacity," *nor* for "acts beyond the scope of his authority." *Id.* at 1106. An official's acts are not attributable to the sovereign if he acts as a private individual or if he acts outside the scope of his authority.

El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668 (D.C. Cir. 1996) relied on the distinction between acts of a government official in his public-governmental/official capacity and those in his private/individual capacity. In *El-Fadl*¸ the plaintiff brought suit against Jordanian institutions and current officials for having his employment terminated from a subsidiary of a *privately* owned bank that had been placed into receivership. *Id.* at 670. The issue was whether in terminating the plaintiff, the official had acted in his official capacity as the Deputy Governor of the Central Bank of Jordan, or in his individual capacity, since he had been appointed to liquidate the private subsidiary. *Id.* at 671. The plaintiff did *not*

allege that the Jordanian official acted outside the scope of his authority. The Court concluded that defendant was immune because his acts in managing the subsidiary were "undertaken only on behalf of the Central Bank." *Id.* at 671. In other words, his acts were public acts in his official capacity as the Deputy Governor, rather than private acts in an individual capacity. No inquiry was made as to whether the acts were outside the scope of the official's authority.

As *Chuidian* explained, not only will sovereign immunity fail to attach when an official acts as a private individual but it "similarly will not shield an official who acts beyond the scope of his authority. 'Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do. . . .'" 912 F.2d at 1106 (quoting *Larson,* 337 U.S. at 689. *See also, Barr*, 360 U.S. at 572) (there is "a limitation upon the immunity that the official's acts must have been within the scope of his powers"); *Velasco v. Government of Indonesia*, 370 F.3d 392, 399-401 (4th Cir. 2004) (unauthorized acts, even if taken under color of law, cannot be imputed to the foreign state). *Chuidian* found that the defendant was immune because he had the power – the lawful authority - to act as he did; it had not been alleged that his "*actions* departed from his statutory mandate." *Chuidian*, 912 F.2d at 1107.

Here, Plaintiffs alleged that Ya'alon departed from his statutory mandate and

did not have the power, under the laws of Israel and customary international law, to undertake the actions he did – attacking civilians and a UN compound. Accordingly, the District Court's finding that Ya'alon was immune under the FSIA because his actions were taken in an official capacity was in error. JA-152.

Indeed, an analysis of the scope of a defendant's authority is mandated by this Court's decision in *Jungquist*, which approved of the district court's analysis focusing on whether the defendants were authorized to take the actions they took under the circumstances. *Jungquist*, 115 F.3d at 1028. This Court opined that "[t]he fact that there was some convergence between Sheikh Sultan's official and unofficial conduct does not cloak his unofficial acts with immunity under the FSIA." *Id*. In determining the immunity — or potential liability — of the other two defendants, the Court assessed whether the challenged actions "fell within their official duties". *Id*. The Court examined what actions fell within the job responsibilities of each Defendant based on his title and found they were "merely performing their official duties," and that there was no evidence that they had devised or agreed to the "corrupt bargain" entered into by the other defendant. *Id.* at 1029. The district court in *Jungquist*, unlike the District Court in this case, had granted limited jurisdictional discovery, which had provided information about the specific positions held by the defendants and the responsibilities, powers and authorities that flowed from those positions, thereby allowing the Court to conduct

the necessary analysis. *Jungquist v. Sheikh Sultan Bin Khalifa al-Nahyan*, 940 F. Supp. 312, 314 (D.D.C. 1996).

The District Court's reliance on *Doe v. Israel* is misplaced, as plaintiffs in that case did not allege that defendants acted outside the scope of their authority, or present legitimate claims against defendants in their personal capacities, as the conduct complained of was the official policy of Israel (which was also a defendant in the case). 400 F. Supp. 2d 86, 105 (D.D.C. 2005). Moreover, defendants (who were all officials at the time of suit) were served in their personal capacities in the same way that they were served in their official capacities (and therefore not properly served in their personal capacities). *Id.* at 101-104. Here, the conduct alleged - targeting civilians in a UN compound - is contrary to Israeli policy, and Defendant was personally served in D.C., in his personal capacity.

1. Defendant acted outside the scope of his authority under international law.

FSIA immunity does not encompass claims against individuals for violations of *jus cogens* norms, which can never be within the scope of an official's authority.[6] In *Hilao v. Estate of Marcos*, the Ninth Circuit found that "acts of

[6] *Jus cogens* norms, which are non-derogable norms under customary international law including such norms as the prohibition against genocide and torture, must prevail over any conflicting claim of immunity for the individual perpetrator. See, e.g., *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement (Dec. 10, 1998), reprinted in 38 I.L.M. 317, 349-350 (1999); *See also*

torture, execution, and disappearance were clearly acts outside of [former Philippines President Marcos'] authority as President . . . Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA." 25 F.3d at 1472. Even as then-President, Marcos could not "authorize" acts of extrajudicial killing, since such *jus cogens* violations, as alleged here, could not be lawfully authorized. Similarly, in *Cabiri v. Assasie-Gyimah,* the court noted that the defendant did not argue - "nor could he"- that torture fell within the scope of his authority or was permitted under his nation's laws, because no government asserts a right to torture. 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (citing *Filártiga v. Peña-Irala,* 630 F.2d 876, 884 (2d Cir. 1980)). *See also*, *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) ("officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts.)"); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination is "clearly contrary to the precepts of humanity as recognized in both national and international law" and so cannot be within an official's "discretionary" authority). *Cf. Siderman de Blake v. Republic of*

Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet (No. 3), [1999] 2 All E.R. 97, 179 [2000] 1 A.C. 147 (H.L.), Opinion of Lord Millett ("International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an *immunity* which is co-extensive with the obligation it seeks to impose.")

Argentina, 965 F.2d 699, 718 (9th Cir. 1992) ("[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act.").

The violations alleged by Plaintiffs, namely war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman or degrading treatment or punishment, are all prohibited under international law, and were prohibited under international law at the time the FSIA was enacted. *See, e.g.*, Nuremberg Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279 ("Nuremberg Charter"), art. 6; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516 (Aug. 12, 1949), Arts. 3, 27, 28 and 147. *See also*, Statute of the ICTY, U.N. Doc. S/RES/827 (1993), arts. 3 and 5; ICC Statute, U.N. Doc. A/CONF. 183/9, 17 July 1998, arts. 5, 7 and 8.

These prohibitions constitute *jus cogens* norms. *See, e.g., U.S. v. Yousef*, 327 F.3d 56, 106 (2d Cir. 2003) (crimes against humanity are norms which "now have fairly precise definitions and [have] achieved universal condemnation" so as to give rise to universal jurisdiction); *Hilao*, 25 F.3d at 1475 ("The prohibition against summary execution . . . is similarly [as torture is] universal, definable, and obligatory."); *Kadic v Karadžic,* 70 F.3d 232, 243 (2d Cir. 1995) ("offenses alleged [including war crimes and cruel, inhuman or degrading treatment] would violate the most fundamental norms of the law of war"); *Doe I v. Islamic Salvation Front*,

993 F. Supp. 3, 8 (D.D.C. 1998) (war crimes violate customary international law). *See also,* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) Secretary-General, 3 May 1993 (S/25704), ¶ 34 (the ICTY applies only those principles that are "beyond any doubt" part of customary international law). Indeed, the very action which underlies this case, the attack on Qana and the resulting civilian casualties, has been recognized as an illegal act under international law by the United Nations General Assembly. *See* JA-132-37 (General Assembly Resolution, A/RES/50/22-C, Apr. 25, 1996, and particularly JA-135, ¶ 3). *See also* ICC Statute, Art. 8(2)(b)(iii) and (iv).

a. International Law is consistent with the exclusion of *jus cogens* violations under the FSIA's application to individuals.

As noted above, the Supreme Court has looked to international law and practice to interpret the FSIA, because the FSIA was enacted to codify international law in relation to immunity for foreign states. *Permanent Mission*, 127 S. Ct. at 2356. Consideration of international law, including both at the time of the FSIA's enactment and as currently interpreted, confirms the principle that former officials are not immune for *jus cogens* violations. *See* Nuremberg Charter, art. 7("[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); *Attorney Gen. of the*

Gov't of Israel v. Eichmann, 36 I.L.R. 277, 310 (Supreme Court of Israel 1962) ("international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of 'international crime' that a person who was a party to such crime must bear individual responsibility for it. If it were otherwise, the penal provisions would be a mockery."); *Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie*, 78 I.L.R. 125 (Cass. Crim. France 1983). *See also In re Extradition of Demjanjuk*, 612 F. Supp. 544, 556 (D.C. Ohio, 1985); ICTY Statute (Art. 7(2)). Immunity is not available for the individual perpetrator of acts recognized as crimes by – and against – the international community; such acts cannot be attributable to the state due to the consensus among states that such acts are impermissible and illegal under all circumstances. Thus the state official cannot be afforded functional immunity for these acts. *See, e.g.*, Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium Case, 13 Eur. J. Int'l L. 853, 862 (2002); *Filártiga*, 630 F.2d at 889; *Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet* (No. 3), [1999] 2 All E.R. 97, 203, [2000] 1 A.C. 147 (H.L.), Opinion of Lord Browne-Wilkinson ("Can it be said that the commission of a crime which is an international crime against humanity and *jus cogens* is an act done in an official capacity on behalf of the state? I believe there to be strong

grounds for saying that the implementation of torture…cannot be a state function.").

Because such actions are not, and indeed, cannot be considered "sovereign acts" or "governmental acts", they cannot fall within the scope of an official's authority under international law. *See, e.g., Prosecutor v. Miloševic*, Case No. IT-02-54-PT, Decision on Preliminary Matters, ¶ 32 (Nov. 8, 2001) (quoting Nuremberg Judgement, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 ("He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.")); *Prosecutor v. Blaškic*, IT-95-14-AR, (Issue of *subpoena duces tecum*), ¶ 41 (Oct. 29, 1997) ("those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity").

The *jus cogens* acts alleged here are attributable to Ya'alon. Under international law, as it informs the understanding of the FSIA, Defendant is not entitled to immunity.

2. Defendant acted outside the scope of his authority under Israeli law.

Unlike other courts addressing *jus cogens* violations, *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), looked to the foreign state's law to determine

whether an official acted within the scope of his authority. In *Liu Qi*, the court found that two local governmental officials of China were not immune under the FSIA for TVPA and ATS claims because the alleged conduct was "not validly authorized under Chinese law." 349 F. Supp. 2d at 1266. Relying on *Chuidian* and *Hilao*, 25 F.3d at 1472, the court determined that defendants were not immune if either they did not act in their official capacity, *or* they acted outside the scope of their authority, *or* the acts were not validly authorized, i.e., legal. *Liu Qi*, 349 F. Supp. 2d at 1282. As in *Liu Qi*, the acts alleged here by Plaintiffs, including war crimes, are prohibited under the law (and policy) of the state governing the foreign actor.

Plaintiffs alleged that Defendant participated in the decision to shell a U.N. compound, knowing civilians had taken shelter there. JA-9-10, JA-14-15. In statements to the United Nations investigator appointed by the UN Secretary General, "Israeli officials emphasized that it was not Israeli policy to target civilians or the United Nations." JA-126, ¶ 8. Official Israeli policy specifically prohibited harm to civilians in the course of IDF operations and prohibited the attack on UNIFIL forces. JA-17, ¶ 38. Since it was not the sovereign's policy to target civilians or the U.N, the District Court erred in finding that Defendant's actions were "taken 'in furtherance of the interests of the sovereign.'" JA-152.

Israeli law incorporates customary international law, which thereby

constrains the conduct of Israeli officials. As the Israeli High Court of Justice held: "Indeed, every Israeli soldier carries in his pack the rules of customary public international law regarding the law of war, and the fundamental rules of Israeli administrative law."[7] Israel's incorporation of customary international law into Israeli law is automatic, unless customary international law conflicts with an existing domestic statute; if there is a conflict, statutes are to be read, whenever possible, as consistent with international law.[8] There is no evidence here that any such conflicting statute exists. Israel also observes the humanitarian portions of the Fourth Geneva Convention.[9]

Defendant violated standards of conduct imposed by customary international

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[7] *Mara'abe v. The Prime Minister of Israel*, HCJ 7957/04, para. 14 (High Ct. 2005) (Israel) (available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf) (quoting HCJ 393/82 *Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area*, 37(4) P.D. 785, 810).

[8] *The Public Committee Against Torture in Israel v The Government of Israel*, HCJ 769/02, para. 19 (High Ct. 2006) (Israel) (available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf). *See also Aita v. Regional Commander of Judea and Samaria*, HCJ 69/81, para. 12 (High Ct. 1983) (Israel) (available at http://elyon1.court.gov.il/files_eng/81/690/000/z01/81000690.z01.pdf).

[9] *Mara'abe*, CJ 2506/04, para. 57; *The Beit Sourik Case*, HCJ 2056/04, paras. 23-24 (High Ct.2004) (Israel) (available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf); *Yassin v. Commander of Kziot Military Camp*, HCJ 5591/02, para. 12 (High Ct. 2002) (Israel) (available at http://elyon1.court.gov.il/files_eng/02/910/055/a03/02055910.a03.pdf) (Fourth Geneva Convention applies).

law and these specific instruments. Specifically, as explained by the High Court of Justice, Israeli military personnel are under an affirmative duty, based on the Fourth Geneva Convention, to protect civilians from harm.[10] The assault on the United Nations compound and unarmed civilians is clearly contrary to the laws which Israel itself views as binding. As such, Defendant acted outside the scope of his lawful authority and is not immune.

III. THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANT WAS IMMUNE FOR CLAIMS BROUGHT UNDER THE TVPA.

The TVPA provides for claims against officials individually where they act outside the scope of their lawful authority by violating the *jus cogens* norms against torture and extrajudicial killings. This understanding of the TVPA is consistent with the FSIA. *See* Section II, C. Moreover, it is consistent with the decisions of other jurisdictions which have permitted TVPA claims against former foreign officials to proceed. *See, e.g., Arce v. Garcia***,** 434 F.3d 1254 (11th Cir. 2006) (TVPA claims against former Salvadoran officials); *Jean v. Dorelien***,** 431 F.3d 776 (11th Cir. 2005) (TVPA claims against former Haitian officials); *Cabello*

[10] *Physicians for Human Rights, et al., v. Commander of the IDF Forces in the Gaza Strip*, HCJ 4764/04 paras. 19-22, 58, 66-68 (High Ct. 2004) (Israel) (available at http://elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf); *accord, In re Yamashita*, 327 U.S. 1, 16 (1946) (commander had "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population").

*v. Fernandez-Lario*s, 402 F.3d 1148 (11th Cir. 2005) (TVPA claims against former Chilean officials); *Hilao v. Estate of Marcos***,** 103 F.3d 767 (9th Cir. 1996)(TVPA claims against former Philippine officials); *Abebe-Jira v. Negewo***,** 72 F.3d 844 (11th Cir. 1996) (TVPA claims against former Ethiopian official); *Abiola v. Abubakar,* 435 F. Supp. 2d 830 (N.D. Ill. 2006) *on remand from Enahoro v. Abubakar,* 408 F.3d 877 (7th Cir.2005) (TVPA claims against former Nigerian official).

These cases, like *Filártiga,* 630 F.2d 876, held that a former foreign official could be held liable for torture and extrajudicial killings which occurred outside the United States. The TVPA was enacted to ensure that cases like *Filártiga* could be heard in U.S. courts. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004). The District Court's decision would preclude exactly such cases.

The District Court's error began with its failure to even consider the plain language of the TVPA, or give it effect.[11] The unambiguous language of the TVPA provides for liability where an "*individual* who, *under actual or apparent authority or color of law*, of any foreign nation...subjects an individual to

[11] The District Court decided this case based on an interpretation of the TVPA and its relationship with the FSIA in opposition to the TVPA's plain meaning, and contrary to the rules of statutory construction. The District Court's reliance on *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996) and *Jungquist v. Al Nahyan*, 115 F.3d 1020 (D.C. Cir. 1997) to interpret the TVPA was misplaced, as neither case involved TVPA claims, as well as for the reasons noted *supra.*

extrajudicial killing....” 28 U.S.C. § 1350 (note), Sec. 2(a)(2) (emphasis added). The District Court’s erroneous extension of this Court’s interpretation of the FSIA to the TVPA undermines the specific provisions of the TVPA and fails to reconcile the two statutes in a manner which gives effect to both. Although the TVPA specifically imposes liability on foreign officials, effectively no present or former foreign official could be held liable under the District Court’s holding.

The TVPA, which imposes liability on individuals, clearly does not create a cause of action against a foreign state.[12] The term “individual” in the TVPA guards against the expansion of the act to foreign states. *See, e.g., Holland v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 40254, at *45 (D.D.C. Oct. 31, 2005) (holding that the TVPA did not apply against the government of Iran because it “authorizes a federal statutory cause-of-action against ‘[a]n individual’ who subjects victims to torture or extrajudicial killing.”)[13] The court in *Collett v. Socialist Peoples’ Libyan Arab Jamahiriya* found that the TVPA explicitly limits its applicability to individual defendants, dismissing plaintiff’s claims against the

[12] The TVPA requirement that an individual act under the authority or color of law of a foreign nation excludes claims for torture or killing by purely private actors. *Kadic v. Karadžic*, 70 F.3d 232, 245 (2d Cir. 1995). *See also, Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 121 n.11 (D.D.C. 2003) (affirming that no claim against a private actor was available under the TVPA because it “contains explicit language requiring state action”).

[13] The court found that the legislative history of the TVPA “indicates that Congress was quite emphatic in its intent that the TVPA was not to apply to foreign states.” *Id.*

foreign state and Colonel Qadhafi, over whom the court may not have had personal jurisdiction.[14] 362 F. Supp. 2d 230, 242 (D.D.C. 2005).

In *Pugh v. Socialist People's Liberation Arab Jamahiriya*, the court considered the TVPA and section 1605(a)(7) of the FSIA and held that both statutes "would be rendered a nullity by adopting defendants' view that the individual defendants cannot be held personally liable for actions taken 'for the furtherance of the Libyan state.'" 2006 U.S. Dist. LEXIS 8033, at *25 (D.D.C. May 11, 2006). *Pugh* noted that the TVPA imposes liability on government agents and officials because they have committed "their acts 'under actual or apparent authority, or color of law, of any foreign nation.'" *Id.* Noting that under *Acree v. Republic of Iraq*, 370 F.3d 41, 59 (D.C. Cir. 2004), "any suit against an official of a foreign state must be a suit in that official's *personal* capacity" (emphasis in original), *Pugh* concluded that a claim under either section 1605(a)(7) or the TVPA must be a personal capacity suit. *Id.*

Thus a TVPA claim is against an individual in his individual capacity, not against the sovereign. Plaintiffs' claims against Ya'alon are against him individually and not claims against the State of Israel. This is necessarily true here because Defendant was a former official at the time the Complaint was filed and

[14] The court continued that the legislative history "further indicated that the term individual is used to make crystal clear that foreign states or their entities cannot be sued under this bill under an circumstances: only individuals may be sued." *Id.*

served. His designation in the Complaint as a former official of the Israeli military was necessary to establish the jurisdiction for claims under the ATS and the TVPA for those violations which require state action. That allegation does not indicate that the suit was a claim against the State of Israel. *See supra* Sec. II (A).

Analysis of the plain language of the TVPA confirms that the statute provides a basis for individual liability against present and former officials. Each term used in the TVPA to describe those who may be liable under the TVPA has distinct, well-established meaning. When the TVPA unambiguously extends individual liability to government officials with "actual authority," the statute provides liability for an individual's acts done under the authority of the state. Under the TVPA's clear mandate, even if the Defendant were to provide evidence that he was "authorized" to participate in an "extrajudicial killing" (*i.e.*, that he had "actual" authority) by the Executive Branch of the Israeli government,[15] he would

[15] The TVPA defines an extrajudicial killing as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 28 U.S.C. § 1350 (note), Sec. 3(a). Even if the Executive branch of a foreign nation purports to "authorize" a killing, it is still actionable under the TVPA unless it was authorized by a court under the circumstances described. The TVPA further notes that an extrajudicial killing "does *not* include any such killing that, under *international law*, is *lawfully* carried out under the authority of a foreign nation." Id. (emphasis added). Here, the killings were unlawful under international law.

not be immune under the TVPA.[16] Nevertheless, because a TVPA action is against the individual it does not trigger sovereign immunity.[17]

The District Court further maintained that, under its application of the FSIA, the TVPA would continue to have effect because a claim could be brought under an exception to the FSIA. JA-151. But limiting the TVPA to FSIA exceptions essentially would defeat both the plain language of the statute and its purpose to provide a statutory basis for claims like those in *Filártiga.* The statutory exceptions cited by the District Court are inapplicable in such cases. The "commercial activities" exception, 28 U.S.C. § 1605(a)(2), would not encompass acts of torture and extrajudicial execution. *See*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993). The exception for declared state sponsors of terrorism, 28 U.S.C. § 1605(a)(7) would be inapplicable. The FSIA exception for tortious conduct "occurring in the United States," 28 U.S.C. § 1605(a)(5), clearly would not reach

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[16] Plaintiffs' Complaint clearly alleges that the decision was unlawful and contrary to Israeli policy and practice. JA-22-24; *see also*, *supra* Sec. II (C)(2). The Ambassador's Letter states in general terms that "*anything* []Gen. Ya'alon did in connection with the events at issue in the suit[] was in the course of [his] official duties, and in furtherance of official policies of the State of Israel." JA-37. The Ambassador's Letter does not provide evidence that Defendant had lawful authority for the acts alleged. The Ambassador's Letter fails to provide evidence that the attack on the UN compound and the civilians seeking shelter there was authorized by the State. Nevertheless it is clear that Defendant acted under color of law, as alleged by Plaintiffs. JA-10, ¶ 2; JA-12, ¶ 14. Under the TVPA, he can be held individually liable.

[17] As discussed above in Section II (C)(1), under international law, the state may not lawfully undertake *jus cogens* violations at issue here, such as extrajudicial killing, war crimes and crimes against humanity.

the type of conduct that *Filártiga* and its progeny have found is actionable. This would have the absurd result of excluding precisely those claims which the TVPA was intended to reach.

Because the result of this interpretation is unreasonable, the Court should reject it in favor of another which would produce a reasonable result. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-201 (1993). The failure to reconcile the FSIA and the TVPA has far-reaching and improbable implications. As noted above, the TVPA is consistent with the FSIA because it provides for claims against officials individually where an official acts outside the scope of his lawful authority by violating the jus cogens norms against torture and extrajudicial killings, and thus, the laws of the state that the official serves. *See supra* Sec. II(C)(1) and (2).

IV. THE DISTRICT COURT ERRED BY LOOKING OUTSIDE THE PLEADINGS WITHOUT GRANTING PLAINTIFFS' JURISDICTIONAL DISCOVERY REQUEST.

Although the District Court claims its finding that Defendant was immune since he acted in his official capacity was "a legal conclusion rather than a factual finding[,]" (JA-154),[18] it in fact looked outside the pleadings. The District Court

[18] The District Court purportedly relied on Plaintiffs' allegations that Defendant, a retired Israeli military official, did the acts alleged while he was Head of Army Intelligence, had command responsibility for the attack, and acted under color of Israeli law. JA-149 (citing JA-10, ¶ 2; JA-14, ¶ 20; JA-15, ¶ 26).

relied on the claims in the Ambassador's Letter that the lawsuit purportedly challenges "sovereign actions of the State of Israel, approved by the government of Israel in defense of its citizens against terrorist attacks" in order to find that Defendant was acting in his official capacity, and therefore immune. JA-146 (quoting JA-37); JA-149. The District Court also relied on the Ambassador's Letter insofar as it "opines that '[to] allow a suit against these former officials is to allow a suit against Israel itself.'" JA-146 (quoting JA-37). The legal opinion of an Israeli Ambassador on a matter of U.S. law is not entitled to any deference. *See, e.g., Republic of Aus. v. Altmann*, 541 U.S. 677, 701 (2004) (finding that even the legal arguments of the United States government "merit no special deference."). Indeed, despite the District Court's assertion that it was deciding an issue of law, the District Court clearly relied on Defendant's purported evidence and made improper factual findings, which – at best – support a finding that the Defendant was a government official at the time of alleged violations and was vested with *some* authority by the State of Israel to do *something*. The District Court noted that Defendant "has produced *evidence* stating that the Israeli government views the actions described in the complaint as 'sovereign action' and 'official state acts.'" JA-152 (quoting JA-37) (emphasis added).

The District Court's conclusion that the finding in *El-Fadl, supra,* applied "equally well to this case" further demonstrates that it looked at the Ambassador's

Letter as factual evidence: "'[i]n light of the *evidence* that [defendant] proffered to the district court and the absence of any showing by [plaintiff] that [defendant] was not acting in his official capacity, discovery 'would frustrate the significance and benefit of the entitlement to immunity from suit.'" JA-154 (quoting *El-Fadl v. Central Bank of Jordan*, 75 F.3d at 671 (emphasis added) (citing *Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d at 449* (further internal quotations and citations omitted))).

Even where a court considers materials outside the pleadings on a motion to dismiss for lack of jurisdiction, "the court must still 'accept all of the factual allegations in [the] complaint as true.'" *Jerome Stevens Pharms., Inc. v. FDA*, 402 F. 3d 1249, 1253 (D.C. Cir. 2005) (quoting *United States v. Gaubert*, 499 U.S. 315, 327 (1991)). *See also, Herbert v. Nat'l Acad. of Scis*., 974 F.2d 192, 198 (D.C. Cir. 1992). Plaintiffs alleged that Defendant unlawfully shelled a U.N. compound sheltering civilians, which was specifically prohibited by the official policy of Israel. JA-9-10, ¶ 1; JA-6, ¶ 22; JA-9, ¶ 38. The District Court therefore erred by not accepting as true Plaintiffs' allegations that Defendant acted outside the scope of his lawful authority.

The District Court's acceptance of the Ambassador's Letter as "evidence" was also error, the admission of which Plaintiffs objected to. JA-6. It is not a declaration itself or accompanied by a declaration, but is merely a "tab" to

Defendant's memorandum of law. JA-35-38. Furthermore, the Ambassador's Letter fails to identify Defendant's acts that were purportedly done in the course of his official duties, or what those duties were. The Ambassador's Letter does not state that Defendant had lawful authority to act as he did. Instead, the Ambassador's Letter baldly asserts that "anything" Defendant did "in connection with the events at issue" was in the course of his "official duties, and in furtherance of official policies". JA-37. The Ambassador's Letter does not claim, nor could it, that targeting the UN compound and hundreds of civilians was lawfully authorized.

Even if the Ambassador's Letter were considered competent and relevant evidence, it was error for the District Court to accept the Ambassador's assertion as a factual matter without permitting Plaintiffs to have limited jurisdictional discovery to discover the *factual* bases underlying its claims. The "court *must*...afford the nonmoving party 'an ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Prakash v. American Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984) (quoting *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 363 (D.C. Cir. 1982) (emphasis added)). *See also*, *Wilderness Soc. v. Griles*, 824 F.2d 4, 16 n.10 (D.C. Cir. 1987) (under Rule 12(b)(1), a district court "must give the plaintiff the opportunity to discover evidence relevant to his jurisdictional claim."). In *Crist v. Republic of Turkey*, 995 F. Supp. 5, 12 (D.D.C. 1998), the court recognized that "sovereign immunity is a

critical preliminary determination of subject matter jurisdiction and that the parties should be permitted a fair opportunity to engage in jurisdictional discovery so as to adequately define and submit to the court facts necessary for a thorough and complete consideration of the issue." Plaintiffs must be entitled to discover any relevant jurisdictional information, especially since the Court looked to Defendant's "evidence" to conclude that he acted in his official capacity.

Jurisdictional discovery should have been granted in order to determine whether Defendant was lawfully authorized by Israel to act as alleged, and thus whether he was immune under the FSIA (Sec. II (C), *supra*). "The determination of whether [defendants] are entitled to claim sovereign immunity because they were acting in their official capacities, and thus were agencies or instrumentalities of a foreign state, does require the court to apply law to facts." *Jungquist*, 115 F.3d at 1026. *See also, Liu Qi*, 349 F. Supp. 2d at 1283 (analyzing the "official's powers under the domestic law of the foreign state" to assess whether the official "acted within the scope of his authority and pursuant to an 'official mandate'") (citation omitted). Specifically, Plaintiffs should have been able to discover whether the challenged actions fell within the Defendant's duties, powers and responsibilities under applicable law, i.e., the scope of his lawful authority, and indeed *what* were Defendant's lawful duties, powers and responsibilities. *See supra* Sec. II (C) (discussing factual analysis conducted in *Jungquist* to decide

question of immunity).

As noted above, in *Jungquist* this Court had the factual information to adjudicate whether defendants were authorized to act in their official capacity because the district court had permitted limited jurisdictional discovery. *See Jungquist*, 115 F.3d at 1025, 1027. This Court in *Foremost-McKesson, Inc.* remanded for discovery regarding the jurisdictional FSIA issue, holding that "[f]urther fact-finding is clearly needed in the instant case; but in making the necessary preliminary determinations the District Court should closely control and limit the discovery and fact-finding so as to avoid 'frustrating the significance and benefit of ... immunity from suit.'" 905 F.2d at 449 (quoting *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988). In *El-Fadl*, this Court affirmed the dismissal on sovereign immunity grounds after defendant had submitted an *affidavit* regarding his *responsibilities*, and plaintiff had failed to present any evidence that the defendant was acting outside of his official capacity. *El-Fadl*, 75 F.3d at 671. An unsworn letter asserting sovereignty without discussing job responsibilities, as submitted here, hardly precludes jurisdictional discovery.

The District Court's reliance on *In re Papandreou*, 139 F.3d 247, 253-54 (D.C. Cir. 1998) is misplaced (JA-154), as in that case this Court merely reversed the district court's order permitting depositions of foreign ministers where

alternative means of discovery seemed possible. The District Court also erred in placing reliance on *Odilla Mutaka Mwani v. Osama Bin Laden* (JA-154), in which this Court refused to find denial of jurisdictional discovery was an abuse of discretion because plaintiffs' allegations regarding Afghanistan's conduct did not constitute commercial activity. 417 F.3d 1, 17 (D.C. Cir. 2005). Here, however, the Court denied discovery after looking outside the pleadings to conclusory "evidence" submitted by Defendant, drawing erroneous conclusions from some of Plaintiffs' allegations, and disregarding Plaintiffs' allegations that Defendant was not lawfully authorized to bombard civilians in a UN facility.

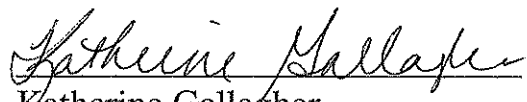
A court may be found to have abused its discretion if it lacked sufficient information to determine immunity. *See, Filus v. Lot Polish Airlines,* 907 F.2d 1328, 1333 (2d Cir. 1990) (reversing dismissal of plaintiff's claims under the FSIA as the district court did not have sufficient information to determine whether exceptions applied); *Foremost-McKesson,* 905 F.2d at 449 (reversing denial of motion to dismiss because a "dearth of fact-finding"); *Gilson v. Republic of Ireland,* 682 F.2d 1022, 1026 (D.C. Cir. 1982) (reversing dismissal of plaintiff's claims for lack of jurisdiction under the FSIA because "the facts as alleged -- and generously interpreted -- ma[de] a dismissal at least premature in light of the dearth of fact-finding done by the district court"). The determination of whether Defendant's acts were within the scope of his legal authority was essential to a

determination of Defendant's immunity under the FSIA and thus the District Court erred as a matter of law by failing to construe Plaintiffs' allegations in their favor. Further the District Court abused its discretion by relying on Defendant's "evidence" while denying Plaintiffs all jurisdictional discovery.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand to the District Court.

Respectfully Submitted,



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ADDENDUM OF PERTINENT STATUTES

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FOR ADDENDUM OF PERTINENT STATUTES

Alien Tort Statute, 28 U.S.C. § 1350

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Torture Victim Protection Act, 28 U.S.C. 1350 (note)

Torture Victim Protection Act of 1991. Act March 12, 1992, P.L. 102-256, 106 Stat. 73, provides:

"Section 1. Short title

"This Act may be cited as the 'Torture Victim Protection Act of 1991'.

"Sec. 2. Establishment of civil action

"(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation--

"(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

"(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) Exhaustion of remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

"(c) Statute of limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

"Sec. 3. Definitions

"(a) Extrajudicial killing. For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"(b) Torture. For the purposes of this Act--

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.".

Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-1611

28 U.S.C. § 1602
§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [et seq.].

28 U.S.C. § 1603
§ 1603. Definitions

For purposes of this chapter [28 U.S.C. §§ 1602 et seq.]--
(a) A "foreign state", except as used in section 1608 of this title [28 U.S.C. § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) An "agency or instrumentality of a foreign state" means any entity--
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 U.S.C. § 1332(c) and (e)] nor created under the laws of any third country.
(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604
§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter [28 U.S.C. §§ 1605-1607].

28 U.S.C. § 1605
§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
(3) in which rights in property taken in violation of international law are in issue and that property or any

property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607 [28 U.S.C. § 1607], or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 U.S.C. § 1101(a)(22)]) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 U.S.C. § 1608] is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was

involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following [46 U.S.C. Appx §§ 911 et seq.]). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)--
(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 [28 U.S.C. § 1350 note];
(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and
(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.
(1) In general.
(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604 [28 U.S.C. § 1604], but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.
(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.
(2) Sunset.
(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.
(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--
(i) create a serious threat of death or serious bodily injury to any person;
(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1695(a)(7) Note.

Liability of agents of state sponsors of terrorism to U.S. nationals. Act Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(c) [Title V, § 589], 110 Stat. 3009-172, provides:

"(a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [50 U.S.C. Appx § 2405(j)] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

"(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.".

28 U.S.C. § 1606

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 U.S.C. § 1605 or 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter [28 U.S.C. § 1605] had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for

service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from

attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter [28 U.S.C. §§ 1610 and 1611].

28 U.S.C. § 1610
§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter [28 U.S.C. § 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7) [28 U.S.C. § 1605(a)(7)], regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter [28 U.S.C. § 1605(a)(2), (3), (5), or (7), or 1605(b)], regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [28 U.S.C. § 1608(e)].

(d) The property of a foreign state, as defined in section 1603(a) of this chapter [28 U.S.C. § 1603(a)], used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d) [28 U.S.C. § 1605(d)].

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) [28 U.S.C. § 1605(a)(7)].

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2) (A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) [28 U.S.C. § 1605(a)(7)], the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.

28 U.S.C. § 1611

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter [28 U.S.C. § 1610], the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter [28 U.S.C. § 1610], the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter [28 U.S.C. § 1610], the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 [22 U.S.C. § 6082] to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

Certificate of Compliance with Rule 32(a)

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:

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Katherine Gallagher

Dated: August 30, 2007
New York, New York

Katherine Gallagher
Attorney for plaintiffs/appellants

CERTIFICATE OF SERVICE

United States Court of Appeals
for the District of Columbia Circuit
No. 07-7009
----------)
ALI SAADALLAH BELHAS, et al.,
Plaintiffs-Appellants,
v.
MOSHE YA'ALON,
Former Head of Army Intelligence, Israel,
Defendant-Appellee.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by CENTER FOR CONSTITUTIONAL RIGHTS, Attorneys for Appellants.

That on the **30th Day of August 2007**, I served the within **Brief for Plaintiffs-Appellants** upon:

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via Hand Delivering 2 copies.

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August 30, 2007