ORAL ARGUMENT SCHEDULED FOR DECEMBER 10, 2007

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)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

JUDITH BROWN CHOMSKY
LAW OFFICES OF JUDITH BROWN CHOMSKY
P.O. Box 29726
Elkins Park, PA 19027
(215) 782-8367

MARIA LAHOOD
KATHERINE GALLAGHER
JENNIFER GREEN
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6455

JAMES KLIMASKI
KLIMASKI & ASSOCIATES, P.C.
1625 Massachusetts Ave., NW, Suite 500
Washington, DC 20036-2001
(202) 296-5600

Attorneys for Plaintiffs- Appellants

November 15, 2007

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259

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.

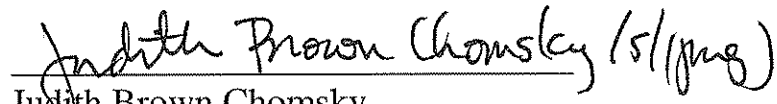
B. Ruling Under Review

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.



Judith Brown Chomsky
Counsel for Plaintiffs-Appellants

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SUMMARY OF ARGUMENT

In a brief filled with hyperbole and irrelevancy, defendant attempts to infuse legal issues with political passions and prejudices. Plaintiffs were unarmed civilians, killed and injured during a deliberate attack on the United Nations (UN) compound where they had taken shelter. Plaintiffs' claims arise out of a single incident of tortious conduct in violation of the law of nations. Such claims are committed to judiciary. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730-31 (2004). The case is not against Israel and does not challenge Israel's military policies or U.S. support for Israel.

Plaintiffs bring claims against a former foreign official in his individual capacity under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA). The District Court held that all claims were barred by the Foreign Sovereign Immunity Act (FSIA). However, under *Dole Food Company v. Patrickson*, 538 U.S. 468 (2003), the FSIA's immunities do not extend to former officials. Even though *Dole* was not cited to the District Court, the Court should apply *Dole* to its legal analysis.

In arguing that he is immune in perpetuity, defendant engrafts a distorted version of principles arising out of domestic concerns for federalism and separation

of powers onto foreign sovereign immunity and disregards the distinctions between these doctrines.

Defendant urges that the Court interpret the TVPA by consideration of selected parts of its legislative history. That history explicitly excludes former officials from immunity. Defendant is liable under the TVPA because Israel did not authorize the specific acts alleged. A general assertion by the foreign sovereign that whatever its former official did was authorized is insufficient for the purposes of the TVPA and inconsistent with its legislative history.

Defendant cites evidence not presented below and not properly before this Court to bolster his argument that the case is barred by the political question doctrine.[1] Ya'alon Brief (Ya'alon):x-xii, 3-4. This Court should decline to reach this fact dependent issue not decided below. *Committee for Creative Non-violence v. Turner*, 893 F.2d 1387, 1396 (D.C. Cir. 1990); *Lucas v. Hodges*, 730 F.2d 1493,

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[1]Defendant urges the Court to take judicial notice of numerous facts referenced in his brief that are outside the pleadings and were not considered by the District Court. Defendant cited some of these materials below, which Plaintiffs objected to. JA-6. Other materials are cited for the first time on appeal, despite being previously available. None of these materials are appropriate for judicial notice. *See* Fed. R. Evid. 201(b); *see also, Melong v. Micronesian Claims Com.*, 643 F.2d 10, 12, n.5 (D.C. Cir. 1980) ("Judicial notice was never intended to permit such a widespread introduction of substantive evidence at the appellate level, particularly when there has been absolutely no showing of special prejudice or need.")

1501 (D.C. Cir. 1984). Further this Court should refuse to consider the irrelevant and incompetent factual assertions about conduct, occurring years before and after the events at issue, and between parties other than those in the present case. *See* Ya'alon:4-6.

ARGUMENT

I. DEFENDANT YA'ALON IS NOT IMMUNE FROM SUIT.

A. Under *Dole*, Defendant is Not Entitled to Immunity.

1. The Court should consider the statutory construction of the FSIA in a manner consistent with the Supreme Court's decision in Dole.

Defendant urges this Court to misinterpret the FSIA contrary to Supreme Court precedent, arguing that the issue was not raised below. A manifest injustice would result if this Court ignored controlling precedent on a pure legal issue. This Court need not and should not do so.

Plaintiffs argued below that the FSIA's immunity did not extend to defendant. Although plaintiffs did not rely on *Dole* specifically, the applicability of the FSIA was squarely before the District Court and addressed below. Assuming that the arguments are so distinct that the applicability of *Dole* is a new legal issue, this Court should still consider *Dole's* construction of the FSIA. An appellate court may exercise its discretion to hear an issue not addressed below. *Singleton v.*

Wulff, 428 U.S. 106, 120-21(1976). "Exercise of that discretion is particularly appropriate where, as here, the question is a purely legal one...." *White v. United States Dept of Army*, 720 F.2d 209, 211 (D.C. Cir. 1983). *See also, Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003), citing *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 & n. 5 (D.C. Cir. 1992). Ignoring a new legal issue not dependent on any additional facts "would do nothing to preserve the integrity of the judicial process." *Time Warner Entertainment Co., L.P. v. F.C.C.*, 93 F.3d 957, 975 (D.C. Cir. 1996).

The issue of *Dole's* application to a *former* official is a pure matter of law which raises no issues of fact. The Complaint alleges defendant was retired. JA:12. The District Court adopted that as fact. JA:149. The Israeli Ambassador's Letter acknowledges the same. JA:34. As in *Kingman Park, Roosevelt* and *Time Warner,* the integrity of the judicial process would not be served by ignoring the Supreme Court's interpretation of the FSIA.

No case cited by defendant supports his contention that the Court should disregard plaintiffs' argument based on *Dole.*[2] In *District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1078 (D.C. Cir. 1984), this Court refused to

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[2]The plaintiff in *Horowitz v. Peace Corps.*, 428 F.3d 271, 282 (D.C. Cir. 2005) raised new claims under statutes which had not been considered by the district court.

consider, for the first time on appeal, a novel theory under which the defendant could be liable, because the theory depended on a fact not alleged. In *Nemarin v. Republic of Ethiopia*, 491 F.3d 470, 482-83 (D.C. Cir. 2007), the Court refused to consider plaintiffs' expropriation claims raised for the first time on appeal. In *United States ex rel Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir 2004), the Court declined to reach an issue not briefed on appeal. Defendant cites *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) for the proposition that a court will not address an issue "not presented with sufficient clarity." Ya'alon:13. However, the quote concerns a party's failure to make more than a conclusory argument in an appellate brief, not the failure to raise an issue in the district court.

The application of *Dole* is a pure issue of law which this Court must review *de novo*. Defendant has fully briefed his position regarding the impact of *Dole* and suffers no prejudice from this Court's consideration of the issue.

2. The FSIA does not apply to former government officials.

Dole held that the plain text of §1603(b)(a) of the FSIA requires that instrumentality status be determined at the time a suit is filed. *See* Appellants' Opening Brief (AOB):13-14. This Court has held that government officials, acting in their official capacity, are agencies or instrumentalities of the foreign state. *Jungquist v. Al Nahyan,* 115 F.3d 1020, 1027 (D.C. Cir. 1997); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996). Just as an entity loses immunity because it ceased to be an instrumentality of the sovereign, a former official must lose that immunity.[3]

Defendant maintains that *Dole's* interpretation of the meaning of the statute is "irrelevant." Ya'alon:17. The District Court found defendant immune because he acted in his official capacity and therefore was an instrumentality of the sovereign. Thus *Dole's* treatment of an instrumentality is most relevant.

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[3]*In re Terrorist Attacks on September 11, 2001,* 349 F. Supp. 2d 765 (S.D.N.Y. 2005) rejected the applicability of *Dole* to a case involving the immunity of former officials, but the court did not explain why *Dole* was inapplicable. The court did not apply FSIA immunity to the former officials as "agencies or instrumentalities" of a foreign state. Instead the court concluded that former officials were "the equivalent of the foreign state." *Id.* Defendant also argues that post-*Dole* "many courts have recognized the sovereign immunity for former official." None of the three cases cited, *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Matar v. Dichter,* 500 F. Supp. 2d 284, 295 (S.D.N.Y. 2007), *appeal docketed*, No. 07-2579-cv (2d Cir. June 15, 2007); *Doe v. Israel,* 400 F. Supp. 2d 86, 105 (D.D.C. 2005) discuss *Dole.*

Defendant seeks to avoid the impact of *Dole* by arguing that a suit against him is to be treated as "equivalent to one against the foreign state itself" rather than one against an agency or instrumentality of the sovereign. Ya'alon:16. The essential thrust of defendant's argument is that foreign military officials retain immunity under the FSIA in perpetuity while under *Dole*, an instrumentality will not be immune if at the time of the suit its status had changed. The FSIA language does not support defendant's position.

Defendant's contrary argument starts with *Transaero, Inc. v. La Fuersa Aero Boliviana*, 30 F.2d 148 (D.C. Cir. 2004), which deals with §1608(a) service. *Transaero* held that because the armed forces are so closely bound up with the structure of the state, they are to be considered as the "foreign state" itself, rather than a separate "agency or instrumentality" for the purpose of service. *Id.* at 154. Defendant leaps from *Transaero* to the conclusion that a military official has immunity equivalent to the foreign state. Ya'alon:17. However, *Transaero* concerned the government institution not individual officials, and service not liability. If all foreign government officials are to be considered the state itself for all purposes, 22 U.S.C. §§ 254a, *et seq.*, governing head-of-state and diplomatic immunity, would have no meaning or purpose.

Defendant wrongly contends that neither *El-Fadl* nor *Jungquist* hold that foreign officials are agencies or instrumentalities. Ya'alon:16-17. This Court has clearly held that "[a]n individual can qualify as an "agency or instrumentality of a foreign state." *El-Fadl,* 75 F.3d at 671. *See also, Jungquist,* 115 F.3d at 1027("Individuals acting in their official capacities are considered 'agenc[ies] or instrumentalit[ies] of a foreign state..."'); Ya'alon:11.

Defendant's policy argument is irrelevant. If an official is an instrumentality, then *Dole* applies because it is controlled by the statutory language. Defendant's attempt to draw a parallel to the immunity available to domestic officials was rejected in *Dole. Dole* held that, unlike the FSIA, the other immunities cited do not rest on the interpretation of a statute, 538 U.S. at 478-79, and that FSIA immunities are a gesture of comity and do not serve the same purposes that "other official immunities serve." *Id.* at 479. The Court concluded that FSIA immunities did not apply to former instrumentalities because any relationship "recognized under the FSIA" between the instrumentalities and the foreign sovereign had been severed before suit was commenced. *Id. Dole* looked to the plain language of the statute and declined to interpose additional policy concerns about the functioning of the foreign state such as defendant makes here about "chilling" foreign officials. Ya'alon:16.

Like the issue of qualified immunity considered in *Dole*, the common law doctrine of *respondeat superior* is not based on statutory interpretation and is not relevant to the Court's interpretation of FSIA's plain language. As *Totten* noted, the Court's "job is reading statutes as written, not rewriting them 'in an effort to achieve that which Congress is perceived to have failed to do.'" 380 F.3d at 467 (quoting *United States v. Locke,* 471 U.S. 84, 95 (1985)).

Defendant describes *Dole* as focused exclusively on the "conduct of business." Ya'alon:16. The determination of whether the bank was an instrumentality of the state was a distinct issue from the ruling, applicable here, that the FSIA extends immunity only to a foreign sovereign's instrumentalities and agencies at the time of suit. *Dole* clearly held that even if the defendant had prevailed in its argument on corporate structure, the defendant, as a former instrumentality, would not be entitled to immunity. 538 U.S. at 480.

B. Defendant is Personally Liable for Conduct Which Violates International and Israeli Law.

Defendant was sued in his personal capacity, personally served in the District of Columbia, JA:31-32, when he was no longer a government official, JA:9, and was alleged to have acted unlawfully and contrary to Israel policy and practice, JA:17, ¶38. The District Court incorrectly found that he was sued in his official capacity. JA:149. Plaintiffs seek damages from defendant personally not

from the state. As the Supreme Court explained:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.... Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." ... Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).

Despite allegations that defendant's conduct was unlawful and contrary to Israel's policy and practice, defendant argues that plaintiffs have not contended that his conduct was unratified. *But see*, AOB:19,30-31. Defendant claims that the attack on the UN compound was ratified by Israel based on the letter provided to the District Court from Israel's Ambassador (JA:34-36) which did not mention the shelling. Stating that "anything" defendant did was in the course of his official duties, JA:35, the Letter does not ratify the acts alleged.

Assuming he was sued in his official capacity, defendant bolsters his claim of absolute immunity with cases concerning immunity in contexts which are inapplicable to FSIA immunity. Defendant cites two cases dealing with issues of federalism. Ya'alon:23, citing *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89 (1984) (issue not immunity, but whether Eleventh Amendment precluded a federal court from enjoining a state government to abide by state law); *Ramey v.*

Bowsher, 915 F.2d 731 (D.C. Cir. 1990) (immunity due federal officials from liability for state-law torts).

Defendant argues that the "logic" of *Pennhurst* and *Ramey* requires a foreign official's immunity because his acts are attributed to the sovereign. Ya'alon:23. Defendant disregards the possibility that an official (but not the state itself) may be sued either in his official or personal capacity. *Graham*, 473 U.S. at 165-66. No case cited holds that an official is in the same position as the sovereign for all purposes.

Defendant also mistakenly relies on cases concerning immunities for U.S. officials, Ya'alon:24-27, which are distinct from those available to foreign officials. *Dole*, 538 U.S. at 479. These cases are also inapposite because they apply the political question doctrine to conduct by a U.S. official and do not implicate sovereign immunity. *Bancoult v. McNamara*, 445 F.3d 427, 429-30 (D.C. Cir. 2006), was a suit against the Defense Secretary for his direction of a military operation to clear an island for a military base. This Court held that the decision where to locate a military base was a non-reviewable exercise of the powers entrusted to the executive by the Constitution. *Id.* at 436. Similarly *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1261 (D.C. Cir. 2006) did not reach the question of whether the former Secretary of State was immune for actions

allegedly taken in support of the Pinochet regime. This Court noted that "[w]hatever Kissinger did as National Security Advisor or Secretary of State 'can hardly be called anything other than foreign policy.'" *Id.* at 1264. Defendant's suggestion that this case involved a discussion of the Secretary's "official capacity" is misleading.

Likewise, *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 273-76 (D.D.C. 2005), is irrelevant to the question of whether a foreign official acted within the scope of his authority. The question there was whether a particular policy decision "is textually committed to the Executive branch by the Constitution." *Id.* at 274.

Defendant's suggestion that *Saltany v. Reagan,* 702 F. Supp. 319 (D.D.C. 1988), stands for the proposition that any act taken by a foreign military official is entitled to absolute immunity is misleading. There was no challenge to the assertion that the defendant officials were acting within the scope of their official capacity and lawful authority. *Id.* at 321-22. The case turned on the fact that President Reagan, under Article II, section 2, of the Constitution, had absolute immunity from liability in private civil suits for damages and that military officials were carrying out the mission according to orders. *Id.*

C. Defendant is Liable Under the TVPA.

As the brief of Amicus Curiae Center for Justice and Accountability (CJA) details, the application of FSIA immunity to officials who committed the acts identified in the TVPA would deprive victims of the remedies contemplated by the statute, a remedy that has been provided by numerous courts. CJA:8-12. Because the FSIA is jurisdictional, it was incumbent on those courts to raise the immunity issue *sua sponte*, yet they did not. Defendant suggests that the holding below will not deny victims redress. Ya'alon:33. But *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579 (E.D. Va. Aug, 1, 2007), relying on *Belhas*, dismissed the claims of a torture victim because the Somali regime ratified the conduct of its former official.

The plain language of the TVPA provides that those who act under actual or apparent authority or under color of law may be liable for their participation in torture or extrajudicial killing. *Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546, 566-67 (2005), requires looking to the plain language of the statute to determine its meaning. *See also,* AOB:11-12,33-34. Nevertheless, defendant urges this Court to look to the legislative history in a very limited fashion.

The legislative history actually supports plaintiffs' contention that defendant is not immune under the TVPA and makes clear that Congress contemplated that

former officials would *not* be immune. The Senate Report states that " [T]he committee does not intend [sovereign, diplomatic, and head of state] immunities to provide *former* officials with a defense to a lawsuit brought under this legislation." S. Rep. No. 102-249, at 7-8 (emphasis added). In addition, the Report noted, "Excluded also from the calculation of the statute of limitations would be the period when a defendant has immunity from suit." S.Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991). If, as defendant contends, a former official remains immune from suit in perpetuity, the discussion in the Senate Report on tolling while a defendant is immune would be meaningless. Congress clearly did not intend that former officials be immune from liability under the TVPA.[4]

While ignoring the language of the Senate Report that excludes former officials from liability, defendant points to language in the Report that FSIA immunity would extend to an individual if the state "admit[ted] some knowledge or authorization of relevant acts." Ya'alon:22,30, quoting S.Rep. No. 102-249, at 8.[5]

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[4]The exclusion of former officials from immunity is consistent with *Dole's* holding that the FSIA does not provide immunity to entities which were no longer instrumentalities of a foreign sovereign at the time of suit.

[5] The TVPA Senate Report incorrectly quotes the FSIA as containing the language: "admit some knowledge or authorization of relevant acts." S.Rep. No. 102-249, at 8 (quoting 28 U.S.C. §1603(b)). This language appears nowhere in the FSIA or its legislative history, so does not support the position that Congress intended that former foreign officials be able to claim FSIA immunity.

The Report contemplates authorization of the specific act not a statement so general that the "relevant acts" are not mentioned. The Ambassador's Letter does not mention the Qana attack and therefore is not the ratification contemplated in the Report. The intentional shelling of a UN compound sheltering unarmed civilians is contrary to international law and Israeli law. *See* AOB:22-32. Defendant essentially argues that the Ambassador's Letter represents Israel's approval of that "relevant" act. This Court should not conclude that Israel has abandoned its own laws and the international consensus against such an attack.

Defendant's discomfort with the foreseeable result of the District Court's interpretation of the TVPA is reflected in his extended discussion of *Yousuf,* 2007 WL 2220579. Ya'alon:33-34. Defendant suggests that *Yousuf* could be decided one way because of the regime involved and that a different result could obtain where the foreign government is a "stable, democratically elected government." Ya'alon:34. Defendant's position is at odds with the FSIA which was enacted to stop the political influence in immunity determinations. *Republic of Austria v. Altmann*, 541 U.S. 677, 717 (2004). Defendant's suggested distinction recreates the political process that the FSIA replaced.

Reference to the Anti-Terrorism Act (ATA), 18 U.S.C. §2333, fails to bolster defendant's arguments concerning immunity under the TVPA. The ATA,

passed six months after the TVPA, explicitly precludes claims against a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority. 18 U.S.C. §2337(2). The same Congress which passed the TVPA clearly knew how to preclude suits against government officials. The fact that it did not do so in the TVPA supports plaintiffs' position that immunities should not be read into the TVPA.

D. The District Court Erred in Denying Jurisdictional Discovery.

The District Court went outside the pleadings to determine the issue of immunity. AOB:38-45. Plaintiffs seek limited discovery to determine whether defendant is entitled to immunity under the FSIA, *not* to determine Israel's position on this case (Ya'alon:34-35). Plaintiffs allege that defendant's actions did not and could not fall within the scope of his lawful authority under Israeli or international law and thus could not have been undertaken in his official capacity. To rule on this question, the court must know what acts fell within his lawful authority, information not contained in the Ambassador's Letter. This Court has granted jurisdictional discovery to determine whether challenged acts fall within the scope of an official's lawful authority. *See, Jungquist,* 115 F.3d at 314; *El-Fadl*, 75 F.3d at 671.

Defendant's contention that such an inquiry would "infringe" on Israel's military strategy or defense policy is mere speculation. Ya'alon:35-36. Defendant misplaces reliance on *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998), which did not preclude all discovery (as done here) but vacated an order permitting the depositions of government ministers because "the district court failed to consider less intrusive means of obtaining the information...." *Id.* at 250.

II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE POLITICAL QUESTION DOCTRINE.

A. The Court Should Not Consider the Issue Not Reached by the District Court.

As a preliminary matter, this Court should decline to rule on a factual issue that the District Court did not decide. *See, e.g., Zivotofsky ex rel. Ari Z. v. Secretary of State,* 444 F.3d 614, 620 (D.C. Cir. 2006) (case remanded to determine the applicability of political question doctrine previously presented to the district court but not decided); *Holcomb v. Powell*, 433 F.3d 889, 903-904 (D.C. Cir. 2006) (reversing and remanding to "permit the parties to address these heretofore unconsidered matters before the district court.").[6]

Remand is especially appropriate where the issue presented involves issues

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[6] *Warren v. District of Columbia*, 353 F.3d 36 (D.C. Cir. 2004), cited by defendant, remanded the Rule 12 (b) issue which the prevailing party defendant had not raised below.

of fact not resolved by the district court. *See, Committee for Creative Non-violence*, 893 F.2d at 1396; *Lucas*, 730 F.2d at 1501. Defendant's political question arguments are based on assertions of fact not considered by the District Court.

B. Plaintiffs' Claims Are Justiciable Under *Baker v. Carr.*

Defendant relies on sheer rhetoric to transform plaintiffs' justiciable statutory and international law claims into issues barred by the political question doctrine (Doctrine). Defendant utterly misapprehends the Doctrine by equating the separation of powers concerns underlying cases against the United States and its officials with plaintiffs' challenge to a former *foreign* official's conduct.

The Doctrine is "essentially a function of the separation of powers." *Baker v. Carr,* 369 U.S. 186, 217 (1962); *see also, Metzembaum v. Federal Energy Regulatory Commission*, 675 F.2d 1282, 1287 (D.C. Cir. 1982). The Doctrine ensures that courts adjudicate questions which are by nature legal, *i.e.*, they are competent to decide, not political, *i.e.,* issues committed to the "political" branches.

The Doctrine is "one of 'political questions,' not one of 'political cases.'" *Baker,* 369 U.S. at 217. "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Yet defendant argues that this Court should dismiss because the case involves a U.S.

ally from the Middle East. That plaintiffs' claims arise in the Middle East is irrelevant. Moreover, while plaintiffs allege that the shelling of the UN compound was outside defendant's authority, defendant's position assumes he was authorized to attack the UN compound.

As defendant correctly notes, *Baker* is the starting point for analyzing the Doctrine. Ya'alon:38-39. The six *Baker* factors "are probably listed in descending order of both importance and certainty." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). Defendant's assertion that the mere presence of any one factor is sufficient to require a political question dismissal is incorrect. Ya'alon:39. First, unless at least one of the *Baker* factors "is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." 369 U.S. at 217. Second, in recent history, the Supreme Court has only held cases non-justiciable where the first or second *Baker* factor was inextricable from the case.[7] *See, e.g., Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. v. Munoz-*

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[7] The cases cited by defendant support the conclusion that a political question dismissal must implicate one of the first two factors. *See, Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005)(because of treaties with Japan, issue was "a textually demonstrable constitutional commitment of the issue to a coordinate political department ...."); *Schneider v. Kissinger,* 412 F.3d 190, 194 (D.C. Cir. 2005)(under first *Baker* factor choice of means to implement U.S. foreign policy is in hand of the executive); *El-Shifa Pharm.*, 402 F.Supp. at 274 (U.S. executive's decision to bomb is committed to the executive branch).

Flores, 495 U.S. 385 (1990). An analysis of the *Baker* factors demonstrates that none is implicated by Plaintiffs' claims.

C. Plaintiffs' Claims Are Textually Committed to the Judiciary.

The first *Baker* factor, "whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department," is not present in this case. *Baker*, 369 U.S. at 217. Judge Edwards wrote that: "[T]he aim of section 1350 was to place in federal court actions potentially implicating foreign affairs...Indeed, the Supreme Court has at least twice cited section 1350 as a statutory example of congressional intent to make questions likely to affect foreign relations originally cognizable in federal courts." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 790, 797 (D.C. Cir. 1984) (Edwards, J., concurring). Tort issues are "constitutionally committed" to the judiciary. *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 49 (2d Cir. 1991). *See also, Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)(ATS suits committed to the judiciary).

Defendant relies on cases challenging *United States'* military actions abroad. Ya'alon:40-45. Actions by the United States are textually committed to the Executive not because they concern foreign relations, but because they are rooted in the President's Commander in Chief power under Article II, section 2 of the Constitution. *See* discussion of *Bancoult*, *Gonzalez-Vera v. Kissinger*, and *El-*

Shifa, supra at 11-12. These cases, which deal with U.S. actions rooted in the President's power under Article II, Sec. 2 of the Constitution, do not support defendant's position. The Doctrine, based on separation of powers and the prerogatives of the Executive under the Constitution, does not render claims non-justiciable simply because they implicate actions by a foreign government.[8]

D. Plaintiffs' Claims Require Legal, Not Policy Determinations.

The second *Baker* factor applies if there is a "lack of judicially discoverable and manageable standards for resolving" an issue, and the third factor is only present if it is impossible to decide an issue without "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. As *Kadic* found:

> *Filártiga* [*v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980)] established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.

70 F.3d at 249.

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[8]Even where the actions of the U.S. government abroad are at issue and where there is potential impact on foreign policy, claims which do not directly challenge Executive policy may be considered justiciable. *Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985). *See also, Ibrahim v. Titan Corp.,* 391 F. Supp. 2d 10, 15 (D.D.C. 2005); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 932 (D.C. Cir. 1988).

Defendant's arguments that the court cannot make the necessary determination and that discovery would be intrusive are speculative and premature. Ya'alon:45-46. "It is premature to conclude that essential evidence is undiscoverable merely on the basis of the complaint and related declarations in this case." *Arellano,* 745 F.2d at 1512; *see also, Attorney General v. The Irish People, Inc.*, 684 F.2d 928, 951 (D.C. Cir. 1982); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d at 16. Speculation about privileges "cannot justify squelching the plaintiffs' complaint prior to any fact-finding." *Arellano*, 745 F.2d at 1512.

E. That Plaintiffs' Claims Arise out of the Middle East or out of a Military Action Does Not Bar Adjudication.

Defendant argues that courts have avoided entanglement in political and military decisions in the Middle East, Ya'alon:40-47, a region that is "particularly volatile." *Id.* at 48. Defendant is incorrect; many claims arising out of the Middle East have been found justiciable. *Estate of Klieman v. Palestinian Auth.*, rejected defendants' argument that claims arising out of a bus bombing in Israel would burden the Middle East peace process. 424 F. Supp. 2d 153, 161 (D.D.C. 2006). *See also, Biton v. Palestinian Interim Self Gov't,* 310 F. Supp. 2d 172, 184 (D.D.C. 2004)(*Biton I*)("Although the

backdrop for this case – *i.e.*, the Israeli-Palestinian conflict – is extremely politicized, this circumstance alone is insufficient to make the plaintiffs' claims nonjusticiable"); *Biton v. Palestinian Interim Self-Government Auth.*, 412 F. Supp. 2d 1, 6 (D.D.C. 2005)(*Biton II*)("the basic elements of the claim lie in tort, not in the relations between Palestine and Israel"); *accord, Gilmore v. Palestinian Interim Self-Government Auth.*, 422 F. Supp. 2d 96, 99 (D.D.C. 2006). Other Circuits have found claims arising out of the Middle East justiciable, *e.g.*. *Klinghoffer,* 937 F.2d at 49; *Ungar v. Palestinian Liberation Org.,* 402 F.3d 274, 281 (1st Cir. 2005).

Defendant relies on three cases to argue that Plaintiffs' claims are non-justiciable. *Corrie v. Caterpillar* narrowly found the case non-justiciable because adjudication would require deciding that defendant should not have sold bulldozers where the Executive had determined that Israel "should purchase" the bulldozers and the U.S. had paid for the bulldozers. No. 05-36210, 2007 U.S. App. LEXIS 22133 at *23 (9th Cir. Sept. 17, 2007). There is no such contradictory Executive policy determination here. *See, infra* at 27.

Defendant points to *Matar v. Dichter*, 500 F. Supp. 2d. 284, which relied largely on a submission by the U.S. Government urging dismissal.

The district court found that the Government maintained that allowing that case to proceed "would undermine the Executive's ability to manage the conflict at issue through diplomatic means, or avoid becoming entangled in it at all." *Id.* at 295. *Matar's* reliance on the statement of interest highlights the absence of a statement of interest in this case.

Defendant relies heavily on *Doe v. Israel*, a suit against the State of Israel and current Israeli officials, including the Prime Minister (as well as President Bush) for damages for Israel's settlement activities, injunctive relief, and a declaration that Israel's "self-defense policies are tantamount to terrorism." 400 F. Supp. 2d 86, 112 (D.D.C. 2005). In contrast, this Court is asked to determine the liability of one individual for one act which has been condemned by the U.S., and is contrary to Israeli and international law. *See also*, AOB:24.

Defendant misplaces reliance on the military nature of the action and the surrounding conflict. Ya'alon:40-46. Courts have refused to apply the Doctrine to bar such claims, including those challenging *U.S.* military operations. *See, e.g., Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851)(U.S. soldier sued for trespass while in Mexico during Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878)(soldier was not exempt from civil

liability for violations if actions not done in accordance with the usages of civilized warfare); *The Paquete Habana*, 175 U.S. 677 (1900)(court imposed damages for seizure of two Spanish fishing vessels by U.S. forces during Spanish American War). *See also*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004)("The Constitution's allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to 'combat'" or from reviewing "military decision-making in connection with an ongoing conflict). *See also*, *Arellano*, 745 F.2d at 1511-15 (U.S. military's construction and operation of training camp in Honduras did not present political question). Courts have also refused to dismiss on political question grounds claims against foreign actors which arose during ongoing wars. *See, e.g.*, *Kadic*, 70 F.3d at 249-250 (former Yugoslavia); Ibrahim, 391 F. Supp. 2d at 17; (Iraq); *Presbyterian Church of the Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289, 347 (S.D.N.Y. 2003) (Sudan). No case supports a general principle requiring dismissals of all claims arising in the context of an ongoing war as non-justiciable.

F. Adjudication of Plaintiffs' Claims Would Not Contradict a Policy Determination, as No Contradictory Policy Determination Has Been Made.

Defendant argues incorrectly that the fourth through sixth *Baker* factors compel dismissal. Ya'alon:49. The "fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249. The fifth and sixth factors do not apply where a decision in an individual case will have "no consequences concerning 'political decisions already made' and will raise only the question of Defendants' alleged liability regarding this single bombing...." *Biton II*, 412 F. Supp. 2d at 6. Plaintiffs allege that, in violation of international law, defendant participated in attacking a UN compound where unarmed civilians had taken refuge. Adjudication of plaintiffs' claims regarding the Qana shelling would not "contradict prior decisions" taken by the Executive or Legislative branches.

In passing the TVPA, "Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts," and has "communicated a policy that such suits should not be facilely dismissed on

the assumption that the ostensibly foreign controversy is not our business." *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 106 (2d Cir. 2000). *See Klinghoffer*, 937 F.2d at 49-50 (political branches expressly endorsed suing terrorist organizations in federal court through ATA's passage; permitting adjudication "will not exhibit a lack of the respect due coordinate branches of government").

Similarly, the fifth *Baker* factor, "an unusual need for unquestioning adherence to a political decision already made," is not applicable here, as no prior political decision has been identified. *Baker*, 369 U.S. at 217. President Clinton's April 1996 statement to AIPAC describing the shelling of Qana as a "tragic misfiring" was not a political decision that must be adhered to, but rather a public remark about a factual issue. Ya'alon:50, n 19. His description of the attack as "self-defense" is an opinion on a legal matter which is not due any deference. *See Altmann*, 541 U.S. at 701. Moreover, President Clinton's statements about the shelling were ambivalent, as he told Arab-Americans that he was appalled about the Qana shelling and that the nation's silence about it would never happen again. JA:138. Defendant overstates the views of the U.S. State Department, which merely said that "Israel has made public its explanation for what happened" and that Israel

"said it was an error." Ya'alon:50. In the same document, the State Department affirmed that "the United States government certainly announced our very, very deep regret that the civilians died." Such comments are not a policy determination about the attack;[9] defendant's own source makes clear that Executive did not make a policy determination about responsibility for the incident. Ya'alon:50,n.19. A State Department official questioned the day after the incident said, "What the President did was, rather than blame-laying on one side or another, he underscored what has to happen now, looking proactively at the situation." *Id.*

Defendant also cites three U.S. House Resolutions that he claims preclude adjudication because they demonstrate the U.S. government's support of Israel's self-defense tactics. Ya'alon:7. None addresses the attack in Qana. or have any bearing on this case. Defendant also cites a U.S. vote against a U.N. General Assembly Resolution. Ya'alon:50. That Resolution included many issues unrelated to the Qana shelling, including a

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[9]The court in *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1179 (C.D. Cal. 2002), solicited the State Department's views because it "was hesitant to base conclusions regarding United States foreign policy on general comments made by the Secretary of State during an informal press conference." Here, the Israeli Ambassador notified the State Department of its concerns, and the State Department has declined to intervene.

declaration that Israel's administration of Jerusalem was unlawful. This vote does not support any inference about the U.S. foreign policy on the incident. Defendant does not argue that adjudication of this case will affect relations between the U.S. and Israel. The Executive's failure to submit a statement of interest in this case further demonstrates the absence of foreign policy concerns related to Plaintiffs' particular claims.

Resolution of plaintiffs' claims are not inextricable from the sixth Baker factor because it will not result in embarrassment from multifarious pronouncements by various departments on one question. *Baker*, 369 U.S. at 217. Because it is the court's constitutional role to resolve whether federal statutes have been violated, there is no potential for embarrassment. *Klinghoffer*, 937 F. 2d at 50 (no potential for embarrassment since claims were consistent with policy underlying statute); *Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir. 2005)("fulfilling [court's] constitutionally-mandated role to hear controversies properly before [it] does not threaten to cause embarrassment or multiple pronouncements").

To the extent defendant argues that permitting plaintiffs' claims to proceed would invite reciprocity in foreign jurisdictions, Ya'alon:51-54, that position has been rejected by the enactment of the ATS and the TVPA which

permit such claims. Moreover, a political branch's "power to protect itself" is not a *Baker* factor. *U.S. v. Munoz-Flores*, 495 U.S. 385, 392 (1990).

G. The Israeli Ambassador's Request for Dismissal is Not Due Deference.

Without reference to any *Baker* factor, defendant asks this Court to defer to the request of the Israeli Executive to dismiss the case. A foreign nation's policy interests are irrelevant to the separation of powers concerns underlying the Doctrine. "Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they tailor their rulings to accommodate a non-party." *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. dismissed in part, aff'd in part on other grounds*, 538 U.S. 468 (2003). "[T]he relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States." *Id.* at 804. "If courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation...." *Id.*

III. THE ACT OF STATE DOCTRINE DOES NOT BAR ADJUDICATION.

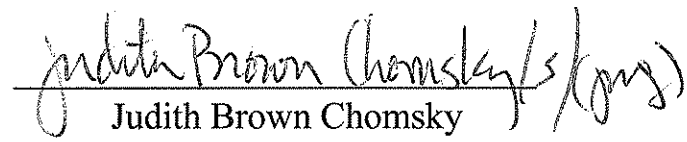
In a footnote, Defendant purports to seek affirmance of the District Court's dismissal under the act of state doctrine. Ya'alon:27, n.13. An issue raised only in a footnote of an appellate brief is not properly raised on appeal. *See, e.g., Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 93, n.3 (D.C. Cir. 2002). Even if the issue were properly before the Court, defendant has failed to meet his burden. The act of state doctrine precludes courts "from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). It does not apply here because the acts at issue were not done within Israel's "own territory." *See, e.g., El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 81 (D.D.C. 1999)(refusing to apply act of state doctrine to act occurring in the U.S. because it "applies only when the actions of the foreign state occur within that foreign state"), *rev'd in part on other grounds*, 216 F.3d 29 (D.C. Cir. 2000). The act of state doctrine also does not apply because the war crimes and other *jus cogens* violations at issue cannot be official "public acts." *See, e.g., Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1998)(extrajudicial killings including "bus bombings

and other acts of international terrorism are not valid acts of state of the type which bar consideration of this case").

CONCLUSION

For the foregoing reasons, plaintiffs respectfully ask this Court to reverse and remand to the District Court.

Respectfully submitted,



Judith Brown Chomsky

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Dated: November 15, 2007
New York, New York

Jennie Green
Attorney for plaintiffs/appellants