

CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO
RULE 34(j) OF THE GENERAL RULES FOR THE D.C. CIRCUIT
U.S. COURT OF APPEALS

In the

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FILING DEPOSITORY

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 07-7009

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

Appellants,

v.

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

Appellee.

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

BRIEF OF APPELLEE MOSHE YA'ALON

Robert N. Weiner
Jean E. Kalicki
Matthew A. Eisenstein
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Tel: (202) 942-5000

October 15, 2007

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and *Amici*

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

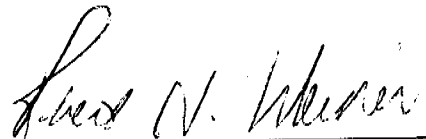
B. Ruling Under Review

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

C. Related Cases

There are no related cases.

Dated: October 15, 2007.



Robert N. Weiner
ARNOLD & PORTER LLP

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SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

STATEMENT OF FACTS

Since it was founded more than 50 years ago, the State of Israel has weathered attacks threatening its very right to exist. The United States has stood with Israel through five declared wars and repeated terrorist assaults. With U.S. support, Israel has signed peace treaties with Egypt and Jordan and has established diplomatic relations with several other countries in the Middle East. Further, the United States has brokered many discussions to limit hostilities across Israel's northern border with Lebanon. With regard to the Israeli-Palestinian relationship, the United States has played a key role in the diplomatic efforts, from the Declaration of Principles by Israel and the PLO at the White House in 1993 to this day.

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

