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

In the

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 07-7009

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

Appellants,

v.

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

Appellee.

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

BRIEF OF APPELLEE MOSHE YA'ALON

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October 15, 2007

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and *Amici*

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

B. Ruling Under Review

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

C. Related Cases

There are no related cases.

Dated: October 15, 2007.

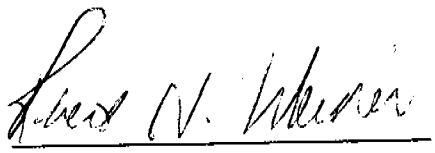

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes:

Legislative Materials:

Rules:

TABLE OF AUTHORITIES (cont'd)

Page(s)

Page(s)

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.

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

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

STATEMENT OF FACTS

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

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

than 1,134 Israelis[2] and injured more than 7,633, many critically.[3] With a population of only 7.1 million -- a little over 2% of that of the United States -- Israel's casualties have been staggering. But the numbers of dead and injured still do not convey the full impact of the terror – the children orphaned, the livelihoods lost, the fear enkindled.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

2. The FSIA Applies to Former Government Officials

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

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

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

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

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

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

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

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

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

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

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

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

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

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