The Nonjusticiability of Palestine: Human Rights Litigation and the (Mis)application of the Political Question Doctrine

Gwynne Skinner
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By Gwynne Skinner*

I. Introduction

The political question doctrine is a problematic and an often misused or wrongly applied doctrine that frequently prevents United States federal courts from fulfilling their Article III responsibilities. Nowhere is this misapplication more prevalent than in human rights cases involving Palestine, and in particular, cases involving Israeli officials alleged to have committed violations of international law against Palestinians. United States courts consistently dismiss these cases as presenting nonjusticiable political questions.¹ In comparison, United States courts typically do not dismiss cases under the political question doctrine that are analytically and factually similar but involve actions by foreign officials or citizens of countries other than Israel.² Similarly, United States courts have inconsistently applied the political question doctrine in cases against the Palestinian Liberation

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* Assistant Professor of Clinical Law, Willamette University College of Law. M.St. International Human Rights Law (LL.M. equivalent), Oxford University, with Distinction; J.D., University of Iowa, with High Distinction; M.A. (American Studies) University of Iowa; B.A., Political Science, University of Northern Iowa, Highest Honors. The author was the plaintiffs' counsel in the case of Corrie v. Caterpillar, 503 F.3d 974 (9th Cir. 2007). This Article was prepared for presentation at the "Litigating Palestine" conference held at the University of California, Hastings College of the Law, March 20-21, 2011. I would like to thank all of those who participated in the conference.

¹. The courts also often find that such cases should be dismissed on other bases, such as the Act of State doctrine or due to foreign sovereign immunity.

². See discussion infra at 31-32. Cases against United States officials, however, are often dismissed under the political question doctrine, even though cases against foreign officials are not.
Organization (PLO) and corporations alleged to have aided and abetted Israeli practices that violated international law.3

As currently fashioned, the political question doctrine is vague and challenging for courts to apply, especially in cases in which foreign policy is a concern. Not only has this resulted in courts' inconsistent applications of the doctrine, but it has also allowed inappropriate biases and prejudices – whether conscious or not – to interfere with a court's decision to hear otherwise proper and justiciable cases.

The dismissal of what should otherwise be justiciable cases is in direct contradiction to what the founders of the United States so strongly desired for their new, young country – that the United States provide a forum and remedy for civil tort cases alleging violations of the law of nations.4 This desire to provide a remedy for violations of the law of nations was accomplished when Congress enacted the Alien Tort Statute5 (ATS) as part of the First Judiciary Act in 1789. The ATS gives federal courts jurisdiction over claims brought by aliens for torts in violation of “the law of nations,” now referred to as customary international law.6

This Article discusses in detail United States court decisions

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3. At the outset, I would like to note that I often agree with the courts' analyses when allowing cases, such as those against the PLO to proceed, as I believe the political question doctrine should be narrowly applied. My issues are with the cases involving Israeli actions that are routinely dismissed.

4. There is significant consensus among scholars that at the time of our country's founding, the founders sought to ensure that the young country would comply with the law of nations, which included providing a remedy for violations of the law of nations. See, e.g., Ralph G. Steinhart, The Alien Tort Claims Act; Theoretical and Historical Foundations of the Alien Tort Claims Act and its Discontents: A Reality Check, 16 ST. THOMAS L. REV. 585 (2004); William Dodge, The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context, 42 VA. J. INT'L L. 687, 705-08 (2002); Curtis A. Bradley, The Alien Tort Statute and Article III, 42 VA. J. INT'L L. 587 (2002).

5. 28 U.S.C. § 1350 (1789). The Alien Tort Statute (ATS) reads, “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.” The ATS was enacted as Section 9 of the Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) [hereinafter First Judiciary Act]. It was one of just a handful of statutes enacted at the time giving jurisdiction to the federal courts.

6. The terms “law of nations” and “customary international law” will be used interchangeably in this Article. The “law of nations” is generally equated with customary international law. See The Estralla, 17 U.S. (4 Wheat) 298, 307-08 (1819) (referring to non-treaty-based law of nations as the “the customary . . . law of nations”); Flores v. Southern Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 2003).
regarding the political question doctrine raised in human rights litigation and analyzes decisions in cases involving Palestine. Part II provides the framework and describes the origins of the political question doctrine. Part III summarizes the doctrine’s emergence and applicability in human rights litigation in the United States. Part IV discusses the contradictory and problematic dismissal of cases alleging Israeli illegal actions based on political question grounds. The Article argues that only when the political question doctrine is clarified, narrowed, or reformulated can cases arising in clearly political contexts be adjudicated with more analytical consistency, resulting in less biases and prejudices. Courts should dismiss using the political question doctrine only those cases that raise questions that the United States Constitution clearly and directly reserves for another branch of government, that is, questions for one of the political branches.

II. The Political Question Doctrine

A. Origins of the Political Question Doctrine: Marbury v. Madison

Just thirteen years after enactment of the ATS, the Supreme Court in Marbury v. Madison first articulated what we now refer to as the “political question doctrine” by stating the oft-quoted admonition, “questions, by their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made by this court.” This admonition has been cited by courts invoking the political question doctrine in dismissing numerous cases but often without understanding the entire context in which this sentence arose. Courts have typically ignored the other admonition contained in the opinion which directly follows: “but where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”

Although Marbury is best known for establishing the Supreme Court’s power of judicial review, the Court also established that discretionary performance of certain duties given to the executive branch in the Constitution that do not concern the rights of others are political issues and not reviewable by the Court. However, the Court

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8. Id. at 166.
9. Marbury, 5 U.S. at 166 (emphasis added) (“[These decisions] respect the nation, not individual rights, and being entrusted to the executive, the decision of the
made it clear that where such officers have a duty under the law, and where individual rights depend on that duty, breaching that duty entitles the individual to a remedy, the adjudication of which is not a political question.10

The *Marbury* court was most concerned with ensuring that courts do not impede the manner in which the executive branch performed its duties concerning matters in which it has discretion. It was not concerned with restraining courts from adjudicating whether the individual has a right and deciding the remedy. In fact, the sentence immediately preceding the oft-quoted admonition reads, “the province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.” Thus, what the Court meant by “questions, by their nature political” is not elusive; it meant those questions concerning the manner in which one of the other branches carries out its duties reserved to it alone by the Constitution. It did not mean questions involving the determination of legal duties, rights, and remedies. Importantly, the Court also clearly specified that “questions, by their nature political” did not mean decisions about “what the law is.” The Court opined that “what the law is,” is the sole responsibility of the judiciary, perhaps especially where such rulings might differ from the opinions of the Executive or Congress.

B. The Continued Development of the Political Question Doctrine

*Baker v. Carr* sets forth the modern political question doctrine.14 The Court explained that the inextricable presence of one of the following six situations, or factors, from the case may suggest that a political question exists ("Baker factors"): (1) a textually demonstrable constitutional commitment to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court’s undertaking independent executive is conclusive.

10. *Id.*
11. *Id.* at 170.
12. *Id.* at 177-78 (“It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is.”).
13. *Id.*
resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. The analysis of whether a political question exists in each case requires "a discriminating analysis of the particular question posed," including the history of its management by the political branches, its susceptibility to judicial handling, and the potential consequences of judicial action. This last factor is problematic because lower courts could interpret it to address concerns more prudential in nature than jurisdictional. However, this last factor should be interpreted simply to mean that the judicial action's consequences might indicate that the case involves a political question.

Baker recognized that in cases involving foreign relations, there will be occasions in which courts will not be able to try the issue: if there are no judicial standards for redress, if the case involves exercising discretion which is demonstrably committed to the legislative or executive branches or if there are unique questions demanding that the United States speak with one voice. However, the Baker court cautioned, "it is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." The political question doctrine "is one of 'political questions,' not one of 'political cases.'"

The political question doctrine reflects a concern for the separation of powers among the branches of the United States government. Ultimately, in outlining the six Baker factors, the Supreme Court attempted to explain the different situations in which a case might present issues that violate the separation of powers. A "yes" answer to any of these questions might indicate a separation of powers problem and a political question might exist. Thus, those six

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15. Id. at 217.
16. Id. at 211.
17. Id. (citing Doe v. Braden, 57 U.S. 635 (1854) (finding that the court could not determine the issue of whether a Spanish official had the authority to enter into a treaty with the United States, which effectively nullified the plaintiff's business deal involving property in Florida, because such was nonjusticiable as a question for the President and Senate)).
18. Id.
19. Id. at 217.
20. Id. (citing Powell v. McCormack, 395 U.S. 486, 518 (1969)).
questions must be viewed with the understanding of that specific goal: to help explore whether separation of powers is at issue. This ultimate concern is what should guide courts moving forward.

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III. The Political Question Doctrine in Human Rights Litigation

The political question doctrine emerged in human rights litigation in the United States through claims typically brought under the ATS and the Torture Victim Protection Act (TVPA). Since then, defendants have raised the political question doctrine in approximately thirty-four of these human rights cases. Of these

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21. The case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), was the first modern case to bring claims for violations of the laws of nations under the Alien Tort Statute (also referred to, especially in the earlier era of ATS litigation, as the Alien Tort Claims Act).


cases, courts have dismissed approximately fourteen – thus less than half – based on the political question doctrine. Of the fourteen cases, six were cases against United States officials and/or the United States.24

Of the remaining cases, six cases were against corporations or banks for aiding and abetting human rights violations. Four of these cases were properly dismissed under the political question doctrine because they involved World War II reparations that were the subject of negotiations and treaties between countries25 and one was an aberration that, given subsequent decisions regarding corporations, would likely have been decided differently. Lastly, there was Corrie v. Caterpillar Inc., which had an Israeli connection.26

Other cases dismissed on political question grounds included one against an Israeli official in Matar v. Dichter,27 one against Israel in Doe I v. Israel,28 and one against Japan in Hwang Geum Joo v. Japan.29 Importantly, of all the cases against foreign officials where the political question doctrine was raised,30 only the case of Matar


24. See Al-Aulaqi, 727 F. Supp. 2d 1; El-Shifa Pharm. Indus. Co., 607 F.3d 836; Harbury, 522 F.3d 413; Gonzalez-Vera, 449 F.3d 1260; Bancoult, 445 F.3d 427; Schneider, 310 F. Supp. 2d 251. Given that these cases involved officials arguably engaging in United States foreign policy, the dismissals based on political question doctrine is easier to defend analytically than those involving foreign officials.


26. 503 F.3d 974.

27. 563 F.3d 9.

28. 400 F. Supp. 2d 86.

29. 413 F.3d 45. The dismissal of this case can also be defended analytically, as the subject of the suit – compensation for women being forced into sexual slavery during World War II- had been the topic of negotiations and agreements by the Japanese government.

30. The four human rights cases where the political question doctrine was raised that involved foreign defendants (or defendants who were foreign officials at the time of the alleged abuses) but were all allowed to proceed against the individuals include Linder, 963 F.2d 332, involving claims against a Nicaraguan contra leader; Kadic, 70
against an Israeli official was dismissed as nonjusticiable.

A. The Earliest Cases Involving the Political Question Doctrine Were Against the PLO

Interestingly, two of the earliest cases alleging violations of the law of nations in which the defendant argued for dismissal based on the political question doctrine involved the Israeli-Palestinian conflict and were against the PLO. Neither was ultimately dismissed on that basis. The first was Tel-Oren v. Libyan Arab Republic, which involved survivors and representatives of those murdered in a 1978 armed attack on a civilian bus in Israel, was based on claims for violations of the law of nations and various treaties. Although other defendants were named, the case focused on the acts of the PLO and three different concurring opinions dismissed the case, each on different bases. Although the court dismissed on other grounds, a majority of the judges refrained from dismissing the claims against the PLO as nonjusticiable under the political question doctrine.

Judge Edward read the political question doctrine narrowly, rejecting the notion that courts should not hear cases simply because they arise in a political or highly charged context. He found that the separation of powers issue was not implicated in the case, and that the court was not being asked to review the exercise of authority constitutionally committed to another branch of United States government.

Judge Bork refrained from deciding if he would dismiss the case on the basis of the political question doctrine, noting that many of the concerns governing the issue of whether the political question

F.3d 232, a 1995 case involving war crimes and other human rights abuses by the self-proclaimed president of Serbia; Negewo, 72 F.3d 844, a 1996 case involving a former Ethiopian official accused of torture and cruel, inhumane, and degrading treatment, and Lizarbe, 642 F. Supp. 2d 473, a 2009 case involving a former Peruvian army lieutenant accused of torture and other abuses arising out of a massacre on a Peruvian village.

31. Tel-Oren, 726 F.2d at 775.
32. See id. at 385 n.1 (Edwards, J. concurring) and id. at 415 n.13 (Bork, J. concurring) (both noting that the claim against Libya was barred by the Foreign Sovereign Immunity Act, and claims against the other defendants were too insubstantial).
33. Id. at 823 (Robb, J., concurring in part) (noting he would have dismissed the case based on the political question doctrine alone).
34. Id. at 797.
35. Id.
The Nonjusticiability of Palestine doctrine would prohibit the suit were the same as those surrounding the question of whether the courts should use their common law powers to provide plaintiffs with a cause of action in the first place.\textsuperscript{36} Thus, he refrained from deciding the issue.

Judge Robb, who advocated dismissal on the grounds of nonjusticiability, opined that the case should be dismissed primarily because the issues involved and the topic of international terrorism were simply too complex for judicial competence or management.\textsuperscript{37} Moreover, the questions connected to international terrorism and how to respond were within the exclusive domain of the executive and legislative branches.\textsuperscript{38} He was also concerned that the establishment of jurisdiction over the PLO would give more recognition to the group than it deserved and would possibly provide a forum for "the exposition of political propaganda, and the debasement of commonly accepted notions of civilized conduct."\textsuperscript{39} In summary, he articulated that because of the horrible evil of terrorism and the complexity of terrorist networks, any response would need to be from the Executive or Congress. Thus, even though Judge Robb would have dismissed the case on political question grounds, unlike the cases involving Israeli conduct discussed infra, he would not have heard the case given his animosity against the PLO and all it stood for.

The next notable human rights case to address the political question doctrine was \textit{Klinghoffer v. S.N.C. Achille Lauro}, in which the PLO allegedly killed a Jewish-American passenger during the 1991 capture of an Italian passenger liner.\textsuperscript{40} The PLO denied any involvement in the hijacking or murder, and argued that its involvement was limited to securing the surrender of the hijackers and ensuring safe passage of the ship and its passengers.\textsuperscript{41} The PLO requested that the case be dismissed as a nonjusticiable political question, because it "raises foreign policy questions and political questions in a volatile context lacking satisfactory criteria for judicial determination."\textsuperscript{42} The court noted that the PLO described itself as

\begin{itemize}
\item \textsuperscript{36} \textit{Id.} at 803.
\item \textsuperscript{37} \textit{Id.} at 823-24.
\item \textsuperscript{38} \textit{Id.} at 826-27.
\item \textsuperscript{39} \textit{Id.} at 826.
\item \textsuperscript{40} \textit{Klinghoffer}, 937 F.2d at 47.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.} at 49.
\end{itemize}
the internationally recognized representative of the Palestinian people, that it had declared statehood, and that it had diplomatic recognition from some nations, excluding the United States.\textsuperscript{43} The court stated that “the fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a nonjusticiable political question.”\textsuperscript{44} Quoting Baker, the court noted that “the [political question] doctrine ‘is one of ‘political questions’, not one of ‘political cases’” and that the common law of tort provided clear, settled rules of law for judicially discoverable and manageable standards.\textsuperscript{45} There was no need for an initial policy decision concerning terrorism, the court opined, given that the PLO had maintained the acts were ones of piracy, the other branches had endorsed the concept of suing terrorist organizations, no prior political decisions had been made that would require questioning, and the lawsuit was consistent with the attitude toward terrorists.\textsuperscript{46} Given the uniformity of opinion regarding terrorism and that there was no potential for embarrassment or multifarious pronouncements by the Executive, Congress, or the courts on that issue, the court found that there was no need to find the case nonjusticiable under Baker and rejected the PLO’s motion to dismiss.\textsuperscript{47}

\textbf{B. Later Cases Against the PLO}

Despite substantial progress in relations between the United States and the PLO in the 1990s,\textsuperscript{48} courts continued to refuse to dismiss cases against the PLO on political question grounds. In Biton \textit{v. Palestinian Interim Self Gov't}, plaintiffs brought claims against the Palestinian National Authority (PA) and the PLO in connection with

\textsuperscript{43} Id. at 46.
\textsuperscript{44} Id.
\textsuperscript{45} Id. (citing Baker, 369 U.S. at 217).
\textsuperscript{46} Id. at 49.
\textsuperscript{47} Id. at 50.
\textsuperscript{48} The United States reversed its official position that the PLO is a terrorist organization. In 1993, Clinton announced the United States and the PLO would re-establish their dialogue. Arafat, on behalf of the PLO, participated in the 1993 negotiations and signing of Oslo Accords under President Clinton. That same year, Israel recognized the PLO as the representative of the Palestinian people. Other examples include the 1995 Interim Agreement between Israel and the Palestinians (represented by Arafat – PLO); the opening of the PLO Mission office in Washington D.C. in 1994; and representing the PLO in the United States.
the 2000 roadside bombing of a school bus transporting children and teachers from an Israeli settlement in Gaza. They alleged violations under various tort theories and under the Antiterrorism Act of 1991 (ATA). The defendants argued that the case should be dismissed on several bases, including the political question doctrine, because the allegations were political attacks upon the PA, the PLO, the President of Palestine, Yasser Arafat, and senior Palestinian officials. The allegations were too wide in scope to be justiciable, thus raising issues that were not appropriate or capable of judicial resolution. The court noted that the defendants "also remark that the conduct in question might be deemed an 'act of war' not subject to the ATA, and that Palestinian resistance and self-defense against Israel do not constitute terrorism."

Defendants relied heavily on *Linder v. Portocarrero.* In that case, a United States engineer in Nicaragua was allegedly tortured and killed by the Nicaraguan Democratic Force, which was part of the Contra movement. His family filed suit against three anti-government military organizations and several individuals for numerous state tort claims and claims under international law. The district court dismissed the claims under international law filed against the organizations on the basis of the political question doctrine. The Eleventh Circuit reversed with regard to the individual defendants, finding the state common law torts claims against them could go forward. Regarding the organizations, the appellate court affirmed the district court's decision, finding that the court adjudicating the claim is required "to measure and carefully assess the use of the tools of violence and warfare in the midst of a foreign civil war," and to inquire into "the relationship between

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49. 310 F. Supp. 2d at 175.
50. Id.
51. Id.
52. Id.
53. Id. at 183.
54. Id. at 175.
55. *Linder,* 963 F.2d at 332.
56. Id. at 333.
57. Id.
59. Id. at 337.
United States policy and the actions of the [C]ontras.”  

The *Biton* court found that the case did not present a nonjusticiable political question, stating:

Although the backdrop for this case—*i.e.*, the Israeli-Palestinian conflict—was extremely politicized, the circumstance alone is insufficient to make the plaintiffs' claims nonjusticiable. Indeed, “the fact that the issues ... arise in a politically charged context does not convert what is essentially an ordinary tort suit into a nonjusticiable political question.”

Similarly, in *Knox v. PLO*, a court refused to dismiss a case involving an American citizen killed in Israel during a terrorist attack in 2002. The decision was based on political question grounds, but at the same time recognized that the violence was part of an ongoing historical and complex political situation, and that the parties' legal skirmishes paralleled their struggles. The court recited the various accusations by each side regarding terrorism, illegal occupation, and excessive military force by Israel, then dispensed with the accusations so that it could focus on the rather simple question of whether a cognizable and valid claim existed. In refusing dismissal, the court noted that none of the controversial and intractable issues insusceptible to judicial decision were before it. In fact, the court found the case justiciable with no need to address “political questions which form the backdrop to this lawsuit.” It further opined that

Defendants' view essentially would ask the Court to hold that, even if the facts were to verify the accusations here, a wanton massacre of innocents would still be “non-justiciable.” This proposition cuts against the grain of what compels the business of the courts. It would rub every syllable of justice out of the concept of justiciability.

Like in *Biton* and *Knox*, in *Ungar v. PLO*, the First Circuit found that shooting victims' claims against the PLO were justiciable because

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60. *Biton*, 310 F. Supp. 2d at 184 (citing *Linder*, 963 F.2d at 335).
61. *Id.*
62. *Id.*
64. *Id.* at 429.
65. *Id.*
66. *Id.*
67. *Id.*
the fundamental nature of the action was a tort suit. The case involved the 1996 Hamas Islamic Resistance Movement's group shooting of a United States citizen, his wife, and their infant son while they were driving their car in Israel. In applying the Baker factors, the court refused to dismiss the case as nonjusticiable. First, the court found the lower court's immunity decision did not signal an official position regarding the recognition of Palestine or amount to an usurpation of another branch's power. Moreover, it found that the very purpose of the ATA was "to allow the courts to determine questions of sovereign immunity under a legal, as opposed to a political, regime." Secondly, that the court had appropriate standards for resolving the issue and was not making initial policy decisions outside of its judicial discretion. Lastly, the court found that it did not need to address the last three factors from Baker, reasoning that such analysis would only be appropriate "for judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such a contradiction would seriously interfere with important governmental interests." It found that this was not the case in the claims before it. The court concluded by stating:

The reality is that, in these tempestuous times, any decision of a United States court on matters relating to the Israeli-Palestinian conflict will engender strong feelings. Be that as it may, the capacity to stir emotions is not enough to render an issue nonjusticiable. For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones.

68. Ungar, 402 F.3d at 280.
69. Id. at 276.
70. Id. at 280-81.
71. Id. at 281.
72. Id.
73. Id.
74. Id. (citing Kadic, 70 F.3d at 249).
75. Id.
76. Id. at 281.
IV. The Courts Have Dismissed All Cases Alleging International Law Violations by Israel or Israeli Officials as Nonjusticiable Political Questions

The problem with the Baker factors as applied in human rights cases is that the factors are so vague and susceptible to misapplication that courts’ concerns with the political ramifications of a case, or the political context, seeps into their analysis and often leads them away from their Article III responsibilities to adjudicate cases properly before them. This can be seen in the courts’ dismissals on political question grounds of cases alleging Israeli violations of human rights in the Occupied Palestinian Territories (OPT). The opinions in these cases contain analyses that are inconsistent and intellectually problematic; they contradict the warnings in Baker and other cases that lawsuits should not be dismissed simply because they arise in political situations or have foreign policy ramifications. They also stand in stark contrast to other, similar cases. Below, I discuss the three cases that courts have dismissed as nonjusticiable political questions.

Doe I v. Israel

In Doe I v. Israel, several plaintiffs, including Palestinians living in the West Bank, Israel, and the United States, brought suit against numerous Israeli and United States defendants for a variety of international human rights law violations such as funding or assisting the settlement activity in the West Bank. The plaintiffs alleged that the West Bank was Palestinian land, that the Israeli government encouraged the illegal confiscation of the land for illegal settlement activity, and that the United States had turned a “blind eye” upon the illegal activity.

The district court granted motions to dismiss filed by contractor defendants and the United States federal defendants (including former President George W. Bush and former Secretary of State

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78. 400 F. Supp. 2d at 96.

79. Id. at 98.
Colin Powell). Concluding that plaintiffs had asked the court to decide a nonjusticiable political question, the court stated that “claims involving arms sales to Israel – which occurred pursuant to a sensitive and detailed statutory and regulatory scheme inextricably intertwined with critical foreign policy decisions – are nonjusticiable political questions better left to consideration by the political branches.” In 2005, the district court dismissed the case against the remaining, mostly Israeli defendants on several grounds, including the political question doctrine.

The dismissal of the case under the political question doctrine is the most defensible of all the cases regarding Israel’s activities discussed herein. However, the court’s decision was still problematic in many ways. Although the language used in the plaintiffs’ complaint did not help their cause, it is clear that the court was influenced in its analysis by the fact that Israel was the country whose conduct was at issue. Like most courts, it dutifully noted that the political question doctrine was truly about the separation of powers and recited the Baker factors. However, it then incorrectly called the Baker factors “categories” of nonjusticiability. The six items outlined in Baker are not categories, but factors to be considered when ascertaining whether the claim is a political question. Baker does not stand for the proposition that if a case “fits” into one of the categories, it should be dismissed. By conceptualizing them as “categories,” the court was expanding Baker, and thus the political question doctrine, well beyond its meaning and intention.

Moreover, the “categories” were conceptualized incorrectly. In its analysis, the court stated that the first Baker factor, a textually demonstrable constitutional commitment of the issue to a coordinate political department, was “undeniably” implicated in this case. It found that:

81. Id. at 15.
83. Id. at 111-12.
84. Id. at 98. The complaint alleged that Israel was a terrorist state, and characterized the settlements in the West Bank as “non- or quasi-governmental terrorist organizations.” Id.
85. Id. at 111.
86. Id.
87. Id. at 111-12.
It is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades. The region of the Middle East specifically, and the entire global community generally, is sharply divided concerning these tensions; American foreign policy has come under attack as a result.\(^\text{88}\)

This commentary demonstrates that the court was persuaded by the political nature of the case, not by having to decide a political question.

In finding that the first *Baker* "category" was implicated, the court concluded that it could not adjudicate the claims without ruling on the issue of to whom the West Bank "actually" belonged.\(^\text{89}\) Although it may initially appear that this is a legitimate concern of the court, the court’s concern was more related to the factual allegations contained in the complaint than with the law it would have had to decide. For example, although the plaintiffs alleged that the land on which the settlers established settlements was Palestinian land, it did not require the court to decide this issue as court are to assume allegations as true when deciding a motion to dismiss.\(^\text{90}\)

In any event, the analysis in *Baker* suggests that *Doe I* was justiciable. In *Baker*, the Supreme Court stated that "while the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory . . . once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."\(^\text{91}\) The United States executive branch (and even Israel) has consistently held that Israel does not have sovereignty over the Palestinian Territories, including the West Bank.\(^\text{92}\) Moreover, for decades the United States has maintained that the settlements are illegal; Israel is the occupier of that territory.\(^\text{93}\) Thus, the court should

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\(^{88}\) *Id.* at 112.

\(^{89}\) *Id.*

\(^{90}\) See *id.* at 98.

\(^{91}\) *Baker*, 369 U.S. at 212.


\(^{93}\) See generally *id.*; see also United States Department of Justice, Human Rights Report on Israel and the Occupied Palestinian Territories (2010),
have been able to adjudicate claims regarding the settlements based on customary international law (and the Fourth Geneva Convention).

_Doe I_ also involved allegations that Israel was a terrorist state and characterized the settlements in the West Bank as "non- or quasi-governmental terrorist organizations." However, the motion to dismiss did not require the court to decide whether Israel was a terrorist state or whether the settlements were terrorist organizations. Plaintiffs were asking the court to rule on whether they had stated a claim. In fact, the court was supposed to take the allegations contained in the complaint as true in ruling on its motion to dismiss. Yet, the court found that it could not rule on whether the allegations in the complaint had stated a legal, cognizable claim because doing so would be drawing the court into the foreign affairs of the United States.

In addition, the court mischaracterized some of the allegations and drew its own conclusions that seemed inapposite to what plaintiffs had alleged. For example, the court noted, "none of the materials for which the defendants' contributions were 'earmarked' available at http://www.state.gov/g/drl/rls/hrrpt/2010/nea/154463.htm (last accessed June 29, 2011). For example, in 1978, Herbert J. Hansel acting as the State Department Legal Advisor issued an opinion stating that the settlements were illegal under international law, an opinion that has not changed. Glenn Kessler, _Old Legal Opinion Raises New Questions_, THE WASHINGTON POST (June 17, 2009), http://www.washingtonpost.com/wpdyn/content/article/2009/06/16/AR2009061603285.html; see also Matt Skarzynski, & Holly Byker, _Israeli Statements on American Policy toward Settlements by United States Government Officials – 1968-2009_, CHURCHES FOR MIDDLE EAST PEACE, http://www.cmep.org/content/us-statements-israeli-settlements_short (outlining statements made by each administration on the settlements since the Johnson administration, all stating either that the settlements were illegal, or ill-advised) (last accessed June 11, 2011).

44. 400 F. Supp. 2d at 98.

45. The court clearly was bothered by the allegations made in the complaint, some of which, from both a practical and legal point of view are very troubling and problematic. However, the court could have taken other action regarding these allegations. For example, Federal Rule of Civil Procedure 12(f) allows the court, either upon motion or on its own, to "strike any redundant, immaterial, impertinent, or scandalous matter." Arguably, some of the allegations about Israel in the complaint were immaterial to the legal questions involved, such as whether Israel is a terrorist state.

46. _Doe I_, 400 F. Supp.2d at 100.

47. _Id._ ("In accordance with the more relaxed standards that apply to pleadings at the motion to dismiss stage, plaintiffs' factual allegations must be taken as true.") (citing Kowal v. MCI Comm. Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1989)).

48. _Id._
consisted of offensive or aggressive equipment, rather, the materials were all in the nature of protective and defensive equipment." Yet, in reaching this conclusion, the court cited sections of the plaintiffs' complaint wherein they make allegations nearly inapposite to what the court concluded:

These are not merely general contributions of funds, but rather are earmarked specifically for various military purposes, including dozens of bullet proof vests and body armor, night-vision goggles, armored jeeps and ambulances, floodlights, ballistic helmets, communications equipment, gun cabinets, generators, and even security fence repairs.

Thus, it is clear when reviewing this case the court was influenced by the fact that it was Israel's actions that were being sued upon.

Shortly thereafter, however, the court in *Vine v. Republic of Iraq* allowed a case against Iraq to go forward, rejecting the executive branch's argument that allowing the case to go forward would create a more unstable Iraq and thus impact foreign policy goals. The court found the case did not require an evaluation of any executive or congressional policy decision or value judgment. Rather, it involved the liability of a foreign sovereign. The court cited *Klinghoffer* in declining to "convert what is essentially an ordinary tort suit into a nonjusticiable political question" merely because its claims "arise in a politically charged context." On appeal, the D.C. Circuit agreed, refusing to dismiss the case against Iraq under the political question doctrine even though the executive and legislative branches' unequivocal position was that the case would interfere with the foreign policy of the United States in Iraq.

Later, in *Simon v. Iraq*, American citizens who were allegedly tortured and/or held hostage in Kuwait and Iraq during Gulf War brought personal injury actions against the Republic of Iraq, Iraq's security services, and Saddam Hussein. Iraq argued (in addition to arguments regarding the FSIA) that the claims should be barred under the political question doctrine. Iraq pointed to presidential

99. *Id.* at 99.
100. *Id.*
102. *Id.* at 20.
103. *Id.*
and congressional statements, executive orders, and an act passed by
the Foreign Relations Committee, all of which indicated that such
suits against Iraq threatened the orderly reconstruction of Iraq and
were thus contrary to the interests of the United States. Despite
that, the court still found that the political question doctrine did not
bar the claims, taking a very narrow reading of the political doctrine,
and held that the possibility a case may affect, or even contravene, the
foreign policy of the United States was not enough to render the case
nonjusticiable. Yet, the court still found that the political question
did not bar the claims, taking a very narrow reading of the
political question doctrine that the possibility a case may affect, or
even contravene, the foreign policy of the United States was not
enough to find the case nonjusticiable. The court noted that the case
did not require it to address any question constitutionally committed
to the political branches. Since the case presented issues
cstitutionally committed to the judiciary by Article III, “Congress
has given the courts of the United States the jurisdiction to decide the
legal issues and factual questions raised by the plaintiffs’ allegations,
which sound in tort; accordingly the courts have the duty to proceed
to the extent the actions are justiciable.”

This case appears, on its face, to contain a very different analysis
than that in the D.C. district court’s opinion in Doe v. Israel. An
argument can be made that in the early cases against the PLO and in
this case against Iraq the ATA provided for a tort action against these
countries or entities. On its face that seems to be an important
distinction; that argument is weakened, however, when one considers
that in cases against Israeli officials, the TVPA could also provide the
same remedy, and with regard to the State of Israel and corporations,

106. Id.
107. Id.
108. Id.
109. Id. It should be noted that a court also dismissed a case against Japan based
on, inter alia, the political question doctrine. In Hwang Geum Joo, a district court
had also dismissed an action against Japan by women who had been forced to be
“comfort women” during World War II on the grounds that certain treaties by
various countries, including the women’s countries and the United States, were
signed with Japan after WWII that attempted to resolve issues of the rights of each
country’s nations. 413 F.3d at 52-53. Moreover, opining on whether the appellants’
countries resolved their claims in negotiating peace treaties with Japan, was a foreign
policy issue, not a judicial issue. Id. In this way, this case is very similar to the
Burger-Fischer and Nazi Era Litigation cases.
the ATS would provide jurisdiction for common law claims. Thus, it seemed that the fact that a statute exists giving the plaintiffs the right to sue is not a persuasive argument against the political question doctrine.

**Corrie v. Caterpillar**

In 2001 in *Corrie v. Caterpillar*, the family of Rachel Corrie, a young United States woman protesting the demolition of civil homes in the OPT, and five Palestinian families, whose family members were injured or killed during the Israeli Defense Forces' (IDF) home demolitions, sued Caterpillar, Inc. for aiding and abetting human rights violations.111 The suit alleged that Caterpillar knew the bulldozers it sold to the IDF would be used to commit human rights and humanitarian law violations and yet sold the vehicles directly to the IDF.112 The complaint noted that the sale was not to the United States government for eventual sale to Israel through the Foreign Military Sales Program but rather a Direct Commercial Sale.113

The district court dismissed the case on several bases, including the political question doctrine.114 The court’s discussion of the political question doctrine (and Act of State doctrine which it seems to comingle with the political question doctrine) is problematic. It is apparent that the court dismissed the action because it was a “political case,” exactly what *Baker* prohibits courts from doing.

First, the court dutifully recited the oft-quoted parts of *Baker* and outlined the six *Baker* factors but dismissed the case with virtually no analysis.115 The court then focused on the request for injunctive relief enjoining the sale of bulldozers without addressing the damages portion of the case.116 Although one can potentially understand the court’s decision regarding the enjoinder as a “foreign policy decision” infringing on the prerogatives of the executive branch,117 the court’s decision regarding the damages portion of the

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111. 403 F. Supp. 2d at 1022-23.
112. *Id.*
113. *Id.* at 1023.
114. *Id.*
115. *Id.* at 1032.
116. *Id.*
117. *Id.* at 1023.
118. *Id.*
The Nonjusticiability of Palestine

The court agreed with Caterpillar that the lawsuit "challenge[d] the official acts of an existing government in a region where diplomacy is delicate and United States interests are great." Although it is unclear if this statement applied to the political question, the court erred to the extent that it relied on the circumstances in the "region" where the plaintiffs' injuries occurred to find their claims nonjusticiable. A "politically charged" context does not transform claims into political questions.

The court's reasoning is also problematic, because the State Department had criticized the types of demolitions at issue in the case. The logical extension of the court's reasoning is that any case alleging human rights violations for conduct even partly tied to United States funds should be dismissed – even in those cases where the United States Department of State has criticized the conduct at issue. The district court court's opinion can also be read as taking this position only in areas "where diplomacy is delicate and United States interests are great." This would mean that at a minimum all cases against private contractors in Iraq and Afghanistan (assuming all are paid with United States funds) alleging human rights violations should be dismissed on political question grounds, although none have been.

Similarly, if the court's analysis is correct, all cases

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119. Id. at 1032. The court could have dismissed only the portion of the complaint asking that the sales be enjoined, but rather dismissed the entire action, including the damages section.


121. Id.

122. See, e.g., Kadic, 70 F.3d at 249.


124. See discussion regarding these cases, infra, at 27-28.
against United States corporations in which the United States has not enjoined their behavior should be dismissed on political question grounds, at least in areas where “diplomacy is delicate and United States interests are great.” That would lead to an absurd result and would be contrary to what the courts have done regarding cases against corporations for aiding and abetting human rights violations.

On appeal, the Ninth Circuit confirmed the dismissal on political question grounds, without reaching the other issues in the case.\textsuperscript{125} Although the appellate court’s analysis was clearer than the district court’s, its holding still demonstrates incongruities that can only be explained by the involvement of Israeli actions. The court relied on the fact that United States funds ultimately paid for Israel’s purchase of the bulldozers in affirming the dismissal.\textsuperscript{126}

Plaintiffs acknowledged on appeal that the purchases occurred through the FMF program and that United States funds were likely used for the purchase.\textsuperscript{127} However, the plaintiffs argued that the decision to fund the bulldozers was not a United States foreign policy decision that would trigger the political question doctrine; the decision had been mischaracterized as an active decision by the United States government.\textsuperscript{128} Plaintiffs stated that the language used for the purchase indicated routine ministerial approval (akin to a “rubber stamp”), that the United States government had not known of the actual use for the bulldozers and had not specifically approved funding for the bulldozers to be used for the purposes which resulted in harm to plaintiffs.\textsuperscript{129} For example, in its amicus brief the State Department condemned the use of bulldozers in home demolitions.\textsuperscript{130}

\begin{itemize}
  \item \textsuperscript{125} Corrie, 503 F.3d at 977.
  \item \textsuperscript{126} Id. at 980 (“Undisputed evidence in the record suggests that the United States pays for every bulldozer the IDF purchases from Caterpillar.”). See also id. at 982 (noting that “the decisive factor” was that the United States paid for the Caterpillar sales to Israel) and id. at 978 (citing facts in the record establishing that Caterpillar sells the bulldozers directly to Israel, with Israel then getting approval from the Defense Security Cooperating Agency (DSCA), an arm of the Department of Defense, to use United States military aid money for funding the purchases, and a 2001 letter from the DSCA to the IDF approving the use of funds to purchase the bulldozers.).
  \item \textsuperscript{127} Id. at 978.
  \item \textsuperscript{128} Appellant’s Reply Brief, Corrie v. Caterpillar, 503 F.3d 974, 2006 WL 3380610 (Sept. 5, 2006) at *27.
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} Brief of the United States as Amicus Curiae in Support of Affirmance, Corrie, 503 F.3d 974 (No. 05-36210) 2006 WL 2952505, at *1.
\end{itemize}
Therefore, the plaintiffs argued that purchase could not be considered a “foreign policy determination” by the United States to create a political question that would make the case nonjusticiable.

The fact that this case involved Israel and Palestine clearly affected the court’s decision. Notably, the court found that it could not find for the plaintiffs without questioning or condemning United States foreign policy toward Israel.131 The court pointedly said that “in this regard, we are mindful of the potential for causing international embarrassment were a federal court to undermine foreign policy decisions in the sensitive context of the Israeli-Palestinian conflict.”132

Prior to Corrie, courts adjudicated the issue of nonjusticiability under the political question doctrine in six cases against corporations. In all but one of those cases,133 the courts rejected the argument that the cases should be dismissed on political question grounds, holding that it was only the corporations’ decisions that were at issue, not political policies.134 In refusing to dismiss the cases, the courts ignored the State Department’s requests for dismissals and fear of potential foreign policy consequences.

Since Corrie, courts have refused to dismiss every human rights case against a corporation that has raised nonjusticiability as a defense. They consistently held that the political question doctrine did not apply and so was not a basis for dismissal.135 This has included cases analogous to Corrie, in particular, cases accusing contractors of

131. Id.
132. Id.
133. Mujica, 381 F. Supp. 2d at 1164. After considering the courts’ analyses in the five other cases (and in the four corporate cases where the political question issue was raised), it appears Mujica was an aberration, and would likely have a different result if heard again today based on a number of decisions since Mujica. I would like to say the same thing about Corrie, but because it involves conduct by Israel, I am skeptical that is the case.
134. See Presbyterian Church of Sudan, 244 F. Supp. 2d at 347; In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7; Ibrahim, 391 F. Supp. 2d 10; Rio Tinto, 487 F.3d 1193.
135. See, e.g., Rio Tinto, 487 F.3d at 1208; South Africa Apartheid Litig., 617 F. Supp. 2d at 283-84; Al-Quraishi, 728 F. Supp. 2d at 714; Al Shimari, 657 F. Supp. 2d at 704; XE Services Alien Tort Litig., 665 F. Supp. 2d at 573. It should be noted that the Rio Tinto court attempts to distinguish Corrie by saying that the United States government “financed the conduct plaintiffs sought to challenge.” Rio Tinto, 2011 WL 5041927, *15. However, the United States government did not fund the demolitions; rather, United States funds were used to purchase the bulldozers used in the demolitions.
committing human rights violations in Afghanistan and Iraq.

In *Al-Quraishi v. Nikhla*, the court ruled that in cases involving private military contractors the presence of a political question turns on the level of actual control the military exerted over the contractor's actions that led to the allegedly tortious conduct.\(^\text{136}\) The court found that where the military was only minimally or peripherally involved in the contractor's actions or decisions, or only had control over a contractor at a general or theoretical level, the suit did not raise a political question.\(^\text{137}\) Only where the military in fact exerted controlling authority over a contractor's actions and those actions resulted in a tort, might the case be nonjusticiable.\(^\text{138}\) This same reasoning should have resulted in *Corrie* not being dismissed on political question grounds, given that the United States military did not exert control over the IDF.

In *Al Shamari v. CACI Premier Tech. Inc.*, the court refused to dismiss on political question grounds a case involving a United States government contractor performing interrogations and engaging in torture at Abu Gharib prison in Iraq.\(^\text{139}\) The court ruled that the plaintiffs were not challenging official United States policies or directives, but the day-to-day conduct of the contractors, which the United States government was not heavily involved in.\(^\text{140}\) Moreover, the court found that the United States government had already made a policy determination in enacting the ATS and that the political branches had already spoken out against torture. Of course, this is also true of the Israeli demolitions of civilian homes, but that made no difference to the court in *Corrie*.\(^\text{141}\)

**Matar v. Dichter**

In the 2007 case of *Matar v. Dichter*, plaintiffs brought suit against Avraham Dichter, the former director of the Israeli General Security Service (GSS).\(^\text{142}\) Plaintiffs were Palestinians or representatives of Palestinians injured or killed when the IDF bombed an apartment building in the Gaza City neighborhood of al-

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137. *Id.*
138. *Id.*
140. *Id.*
141. *Id.*
Daraj in an attempt to assassinate a suspected Hamas leader. They claimed Dichter planned, authorized, and directed the bombing and brought suit for violations of customary international human rights law. The allegations included war crimes, crimes against humanity, extrajudicial killing, and cruel, inhumane, and degrading treatment, in addition to several municipal torts.

The defendant moved to dismiss the case on the grounds that he had immunity under the Foreign Sovereign Immunities Act (FSIA) and that the case presented a nonjusticiable political question. The then-Israeli Ambassador to the United States conveyed “concerns regarding the fundamental inappropriateness and political nature of the action.” He also sent a letter to the State Department, filed with the court, stating that the lawsuit “would embroil the United States courts in evaluating Israeli policies and operations in the context of a continuing armed conflict against terrorist operatives,” and that it touched “directly upon issues related to the Middle East peace process and ongoing and extensive diplomatic efforts.” The letter further stated that all of Mr. Dichter’s actions were in the course of his official duties and in furtherance of official policies of the State of Israel.

After finding the case should be dismissed under the FSIA, the court stated that even if the FSIA were inapplicable, it would still dismiss the case based on the political question doctrine. The court’s political question doctrine analysis is unconvincing and problematic. It mindlessly sets forth the requisite and oft-quoted statements and factors but clearly does not engage in any intellectually honest analysis of those factors to the case before it, let alone a “discriminating analysis” of the question posed. Rather, it unabashedly ignores Baker’s caution that the political question doctrine “is one of ‘political questions,’ not one of ‘political cases.’”

143. Id. at 286-87.
144. Id. at 286.
145. Id. at 287. The defendant also moved to dismiss the case based on the act of state doctrine, but the court did not reach that issue.
146. Id.
147. Id.
148. Id.
149. Id. at 293.
150. Baker, 369 U.S. at 211.
151. Id. at 217.
That the court invoked the political question doctrine because of the political nature of the case seems abundantly clear from the opinion. It cited the fourth (expressing lack of due respect due coordinate branches) and sixth (potentiality of embarrassment from multifarious pronouncements) Baker factors as evidence that the case involved a political question.\textsuperscript{152} The court noted that the defendant was a high-ranking official of Israel, a United States ally, and that the lawsuit criticized military actions in furtherance of Israeli foreign policy, while ignoring the fact that the United States government itself had criticized the action.\textsuperscript{153} The court also highlighted the fact that the Israeli policy that was criticized “involved a response to terrorism in a uniquely volatile region.” The court further stated that “this court cannot ignore the potential impact of this litigation on the Middle East’s delicate diplomacy.”\textsuperscript{154}

The court blindly cited the State Department’s Statement of Interest in which it said that allowing the case to proceed would “undermine the Executive’s ability to manage the conflict at issue through diplomatic means, or to avoid becoming entangled at all.”\textsuperscript{155} The court did not even ask the State Department how, exactly, it would be undermined or even how allowing the case to proceed would have undermined the executive’s potential desire to avoid becoming entangled in the case. The court, citing Doe, stated that “consideration of the case against this unique backdrop would impede the Executive’s diplomatic efforts and, particularly in light of the Statement of Interest,” would cause the sort of intra-governmental dissonance and embarrassment that gives rise to the political question doctrine.”\textsuperscript{156} Yet neither the court nor the State Department indicated how exactly its diplomatic efforts would be impeded. The court simply gave complete deference to the State Department’s Statement of Interest.\textsuperscript{157} This is clearly inappropriate for a “discriminating analysis.” The conclusion that the Statement of Interest itself can be the source of the dissonance or embarrassment

\textsuperscript{152} Matar, 500 F. Supp. 2d at 294.
\textsuperscript{153} Id. at 295.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Baker, 369 U.S. at 294.
\textsuperscript{157} Id. This becomes abundantly clear when reading the opinion and its notation that in other cases, the State Department did not request the cases to be dismissed as a major distinction between it and other cases.
referred to in *Baker* is completely misguided and incredibly dangerous. The court did not describe how the litigation could impact the delicate diplomacy of the Middle East. The court noted that the Middle East is a region where “diplomacy is vital,”" yet the same can be said of many parts of the world where other conduct forming ATS claims have been found to be justiciable. Given that the court noted several times that Israel was an “ally,” (and a “strategic” one at that), the attention it gave to the region of the Middle East and the complete lack of any discriminating analysis indicates that there was one reason, and one reason alone, that the court dismissed the case: it involved Israel.

**IV. Courts Have Found Other Cases Against Non-United States Officials Be Justiciable**

In all other cases in which violations of human rights were against individuals who were not United States officials, even individuals ostensibly acting on behalf of their government, courts have refused to dismiss on political question grounds whenever that defense has been raised. For example, in *Linder*, the court rejected dismissal under the political question doctrine, because the claims challenged “neither the legitimacy of the United States foreign policy toward the contras, nor [did] it require the court to pronounce who was right and who was wrong in the Nicaraguan civil war." Relying on *Klinghoffer*, the court held the case to be an ordinary tort suit. In *Kadic v. Karadic*, the court held it would not interfere with important government interests. In *Abebe-Jira v. Negewo*, the court relied primarily on *Linder* in dismissing the political question

158. *Id.* at 296.

159. For example, see the *Tel-Oren, Klinghoffer, Biton, Knox*, and *Ungar* cases, discussed *supra* at 8-13, all of which concerned the same part of the world; and the cases discussed *supra* notes 30 and 137, concerning, *inter alia*, the former Yugoslavia (*Kadic*); Nicaragua (*Linder*), Peru (*Lizarbe*), Papa New Guinea (*Rio Tinto*), and South Africa (*South Africa Apartheid Litigation*).


162. 963 F.2d at 337.

163. *Id.* (citing *Klinghoffer*, 937 F.2d at 49-50).

164. 70 F.3d at 250. The Second Circuit allowed claims against Karadic, the self-described President of Serbia, for human rights violations to proceed because the United States' government had taken a public position against Karadic and the violations he engaged in.
argument, with little analysis.165

Finally, in *Lizarbe v. Rondon*, which arose after *Matar*, the court refused to dismiss a closely analogous case to *Matar* on the political question grounds.166 In *Lizarbe*, the plaintiff sued a lieutenant in the Peruvian army for torture and other torts arising out of a massacre of a Peruvian village.167 Just like in *Matar*, the defendant had been accused of directing a massacre that resulted in civilians' deaths and violations of customary international law. The court found *Lizarbe* justiciable because the defendant’s acts were not linked to any acts by the United States military; in fact, the military had condemned the acts. This was true despite the fact that Peru was an ally to the United States, and even though the United States gave financial support to the Peruvian army. The court cited *Cabello v. Fernandez-Larios*, which said that courts have consistently adjudicated ATS/TVPA claims brought against foreign military personnel whose units received support from United States sources similar to that which Peru received from the United States.168 Yet, the court found *Matar* nonjusticiable even though its only apparent difference from *Lizarbe* was that *Matar* involved Israel.

V. Conclusion

Although the differing facts of these cases make the political question issue complex, the courts' decisions in *Doe*, *Maher*, and *Matar* are analytically problematic. The fact that claims may arise out of ongoing conflicts in which the United States takes an interest does not render them nonjusticiable.169 Damages actions for incidents

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165. 72 F.3d at 848.
166. 642 F. Supp. 2d at 492.
167. Id.
168. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005). In *Cabello*, like many other cases, the defendant did not argue that the case was nonjusticiable under the political question doctrine; thus it is not discussed herein or included in the count of cases allowed to proceed where the political question doctrine is raised.
169. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2645 (2004) (rejecting separation of powers argument proffered to limit judicial review of “military decision-making in connection with an ongoing conflict”); *Ibrahim*, 391 F. Supp. 2d. at 16 (finding justiciable Iraqis' claims against private United States government contractors for torture during Iraq war); *Presbyterian Church*, 244 F. Supp. 2d at 347 (finding war crimes claims against Sudan and private corporation justiciable despite civil war context); *Linder*, 963 F.2d at 337 (complaint for the killing of a civilian by the Nicaraguan contras against individuals justiciable since it “challenges neither the
occurring in the context of the Israeli-Palestinian conflict should be justiciable, just as the Second Circuit found in *Klinghoffer*. In that case, while conceding that its decision would "surely exacerbate the controversy surrounding the PLO's activities," the court rejected the defendant's claim that the case should be dismissed as nonjusticiable simply because the case raised questions in a volatile context. The courts' opinions in the three cases involving Israel, *Doe*, *Maher*, and *Matar*, contradict the opinions of other cases involving the Middle East conflict where Israel was not a defendant.

The conflicting decisions and inconsistent analyses are partly the result of historically incongruent decisions regarding the political question doctrine. As Judge Bork once famously said, the "contours of the [political question] doctrine are murky and unsettled as shown by the lack of consensus among the members of the Supreme Court and among scholars." Part of the problem appears to be that the *Baker* test is vague and subject to misunderstanding and mischaracterization. Thus, it is no wonder courts have been inconsistent in their applications of the doctrine, especially when cases before them may have an impact on foreign affairs. This, combined with the very real, high passion and tensions associated with the Israeli-Palestinian conflict, has resulted in courts consciously or unconsciously finding that cases involving Israeli actions in Palestine are simply nonjusticiable. Israeli action in Palestine will continue to be deemed nonjusticiable until there is new, clearer authority on the application of the political question doctrine,

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170. *Klinghoffer*, 937 F.2d at 49. See also *Ungar*, 402 F. 3d at 280 (shooting victims' claims against PLO justiciable since the fundamental nature of the action was a tort suit); Sharon v. Time, 599 F. Supp. 538, 552 (S.D.N.Y. 1984) (libel suit regarding Sharon's role in the massacre of Palestinians was justiciable, since "individual rights in domestic affairs are at stake, even where the litigation touches upon sensitive foreign affairs concerns").

171. See, e.g., *Biton*, 310 F. Supp. 2d at 184 ("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."); *Knox*, 306 F. Supp. 2d 429 (finding no need to address "political questions which form the backdrop to this lawsuit," court found claims against the PLO not barred by the political question).

172. However, the courts do seem to becoming more consistent in their application more recently, at least with regard to non-United States officials, allowing such claims to proceed.

173. *Tel-Oren*, 726 F.2d at 803 n.8 (Bork, J. concurring in judgment).
especially as it applies to human rights cases taking place abroad. Only when the political question doctrine is clarified, narrowed, or reformulated, will cases arising in clearly political contexts be adjudicated with less contradiction and more analytical consistency.

Proposing such a new test is outside the scope of this Article. However, the Supreme Court should clarify that the political question doctrine is a jurisdictional doctrine guided by the separation of powers as outlined in the Constitution and not a doctrine that allows courts to dismiss cases out of prudential concerns. This clarification would allow the doctrine to be narrowed so that only cases asking a court to directly address a political question will be clearly reserved by the Constitution for one of the other branches. Only then can it be dismissed as nonjusticiable. Such measures would provide clear guidance, thus lessening the number of problematic dismissals in cases involving Israeli actions in Palestine. Actions by all countries should be governed by a rule of law consistently applied in our courts.

174. This is not to say that there might not be other doctrines of a prudential nature that might lead a court to refrain from hearing a case in very specific situations; but the political question doctrine should not be misused in this way.