Litigating the Arab-Israeli Conflict: The Politicization of U.S. Federal Courtrooms

Noura Erakat*

INTRODUCTION

Since the establishment of the State of Israel in 1948, Palestinians have constituted a nation living as refugees in exile, as civilians under military occupation, or as members of a global Palestinian diaspora. Without a state and a sovereign government, redressing claims of grave violations of international human rights against the Israeli government that both dispossesses and dominates them is an arduous challenge.[1] However, in the alternative to bringing claims in an Israeli court, Palestinians can also bring forth claims in U.S. courts pursuant to the Alien Tort Claims Act (ATCA).

The ATCA is an eighteenth-century statute made actionable in the present day by a Second Circuit Court decision that held that the statute grants subject matter jurisdiction in federal courts for violations of

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* Noura Erakat is currently an adjunct professor of International Human Rights Law in the Middle East at Georgetown University. Most recently, she served as Legal Counsel for a Congressional subcommittee in the House of Representatives. Noura writes regularly on international law and the Palestinian-Israel conflict. She was a Visiting Scholar at Georgetown's Center for Contemporary Arab Studies. After law school, the Academy for Educational Development awarded Noura a New Voices fellowship to do legal and grassroots advocacy on behalf Palestinian human rights. Noura earned her undergraduate degree and juris doctorate from the University of California at Berkeley. She would like to thank the Center for Contemporary Arab Studies, Georgetown University; the extraordinary JMEIL editorial team; Anna Sanders, whose magic performed on a flight to Tanzania proved invaluable; Arjun Sethi for reading every single one of her drafts; Professors Susan Akram, Richard Buxbaum, and Lama Abu Odeh for their meticulous critique; and Bassam Haddad who fueled the faith necessary to write on.

1. *See* Noura Erakat, *Paving New Paths to Accountability*, THE HUFFINGTON POST, March 3, 2009, *http://www.huffingtonpost.com/noura-erakat/paving-new-paths-to-accou_b_170612.html.*

customary international law.[2] While U.S. federal courts have, through the ATCA, become formally available for redressing violations of international human rights, Palestinians have found no judicial recourse in these courts almost without exception.[3] As defendants, Palestinians have no defenses available to them; as claimants, their claims do not withstand judicial scrutiny.

In late 2005, Palestinians[4] filed two ATCA cases: *Matar v. Dichter* and *Belhas v. Ya'alon*.[5] In *Matar v. Dichter*, plaintiffs brought suit against Avraham Dichter, the former director of Israel's General Security Services, the body allegedly responsible for preparing and approving the targeted killing of Salah Mustafa Shehadeh. On July 22, 2002, the Israeli Defense Forces bombed an apartment building in al-Daraj, a residential neighborhood in Gaza City. The midnight attack was intended to kill Shehadeh, an alleged Hamas leader who lived on the upper floor of the building. The one-ton bomb killed fourteen civilians, wounded 150 others, and seriously damaged the building as well as nearby structures. The plaintiffs in *Matar* were injured Palestinians, as well as Palestinians who were killed or injured by the attack. The case was barred from suit by both the political question doctrine and the Foreign Sovereign Immunities Act.

In *Belhas v. Ya'alon*, Lebanese citizens sued Moshe Ya'alon, head of Israeli Army Intelligence at the time of the Qana bombing. On April 18, 1996, Israeli forces shelled a United Nations Interim Forces in Lebanon (UNIFIL) compound in Qana, Lebanon during its "Grapes of Wrath" military operation. The compound provided refuge for nearly 600 Lebanese civilians and the shelling killed 106 civilians and injured

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2. Whether or not the Second Circuit was right to accept that ATCA offered subject matter jurisdiction and a private cause of action in *Filartiga v. Pena-Irala*, 630 F.2d 876, I believe that the ruling represents a positive development in the international human rights arena. It gives U.S. expression to the universal jurisdiction principle that some crimes are of such grave magnitude as to warrant their international prosecution and repression.

3. Palestinian defendants were spared prosecution by the D.C. Circuit Court in *Tel Oren v. Arab Libyan Republic* for lack of subject matter jurisdiction; namely, failure to demonstrate that terrorism constituted a violation of customary international law. 726 F.2d 774, 795 (D.C. Cir. 1984).

4. In *Belhas v. Ya'alon*, plaintiffs are Lebanese, and not Palestinian, civilians. To avoid using the cumbersome moniker, "Palestinians/Arabs" throughout the paper, I will refer to them as Palestinians except in those cases where only Lebanese civilians filed suit.

5. *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007); *Belhas v. Yaalon*, 515 F.3d 1279 (D.C. Cir. 2008).

hundreds of others. The suit alleged that Ya'alon's actions constitute war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman, or degrading treatment or punishment. The case was barred by the Foreign Sovereign Immunities Act and dismissed for lack of subject matter jurisdiction.

Palestinians have been defendants in numerous other cases involving the Arab-Israeli conflict beginning in 1984 in *Tel Oren v. Arab Libyan Republic.*[6] Since *Tel Oren*, they have been defendants in *Biton v. Palestinian Self-Government Authority* (2004), *Klinghoffer v. Lauro* (1991), *Almog v. Arab Bank* (2007), *Knox v. The Palestine Liberation Organization* (2004), and *Ungar v. PLO* (2005), among others.[7] With the exception of *Tel Oren*, Palestinians had no viable defenses available to them.[8] As I will demonstrate, the vulnerability of Palestinian defendants has been institutionalized by executive and legislative endorsement and by way of legislation.

The uniformity of judicial outcomes involving Palestinian plaintiffs and defendants is a function of their politicization, meaning their adjudication according to foreign policy interests irrespective of the legal questions at hand. As such, the politicization of cases involving the Arab-Israeli conflict and critical of Israeli occupation policies is indicative of the interlocking relationship between law and politics and is demonstrated by 1) undue deference to the Executive Branch; 2) legislative and executive endorsement of lawsuits against Palestinians; and 3) the supplanting of legal considerations for political ones in the application of the Foreign Sovereign Immunities Act as well as the political question doctrine.

In this paper I will demonstrate politicization of this sort by first discussing a brief history of the Arab-Israeli conflict and U.S. foreign policy. I will then review the Judiciary's historical limitations as a site for the vindication of individual rights despite its stated purpose. Thirdly, I will demonstrate that when the political question doctrine is

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6. *Tel Oren v. Arab Libyan Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984).

7. *Biton v. Palestinian Self-Gov't Auth.*, 310 F. Supp. 2d 172 (D.D.C. 2004); *Klinghoffer v. Lauro*, 937 F.2d 44 (2d Cir. 1991); *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Knox v. Palestine Liberation Org.*, 306 F.Supp. 2d 424 (S.D.N.Y. 2004); *Ungar v. Palestine Liberation Org.*, 402 F.3d 274 (1st Cir. 2005).

8. In *Tel Oren*, the court held that "terrorism" did not constitute a violation of customary international law. Therefore while ATCA provided subject matter jurisdiction, the plaintiffs failed to state a viable cause of action and the court dismissed their claim. 726 F.2d at 795.

applied to the same political context, the disparate outcome is contingent on the claims being made: in cases involving the Arab-Israeli conflict the judiciary views its adjudication as interference only in those cases that challenge Israel's occupation policies. I will then demonstrate how in cases critical of Israeli occupation policies the determination of foreign sovereignty is subject to political pressures despite the intent of Congress to insulate them from such pressures. Finally, I will examine how legislative and executive endorsement of suits for acts of international terrorism coupled with numerous statutes declaring Palestinian entities as terrorist ones work to overcome available defenses to Palestinian defendants in lawsuits accusing them of terrorism and seeking civil and criminal remedies. Examined separately, these outcomes may be plausible; however, in their totality, the absolute preclusion of judicial recourse merits inquiry and critique. These several parts demonstrate how the politicization of cases concerning the Arab-Israeli conflict transforms U.S. federal courts into insecure—and effectively hostile—sites for redressing the individual human rights violations of Palestinians.

I. BACKGROUND: THE ARAB-ISRAELI CONFLICT AND U.S. FOREIGN POLICY

In 1947, the United Nations (U.N.) passed Resolution 181 that called for the Partition of Palestine into a Jewish and a Palestinian homeland. The Resolution proposed that 55% of the land should go to the minority Jewish population while 45% of it should go to the majority Palestinian population.[9] Arab leaders rejected the Resolution and less than a year later, as a result of war, the State of Israel was established. The establishment of the Israeli state on 78% of historical Palestine resulted in the expulsion and displacement of 750,000 Palestinians and the demolition of nearly 400 Arab villages.[10] Many of the Palestinian refugees fled to the West Bank and the Gaza Strip, as well into the neighboring countries of Lebanon, Syria, and Jordan. Until 1967, the West Bank and the Gaza Strip remained under Jordanian and Egyptian authority, respectively. After the 6-day war in 1967, Israel occupied the Gaza Strip, the West Bank, East Jerusalem, the Golan Heights of Syria, and the Sinai Peninsula of Egypt.[11]

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9. DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 2 (1990).

10. ADALAH, INSTITUTIONALIZED DISCRIMINATION AGAINST PALESTINIAN CITIZENS OF ISRAEL 3 (Aug./Sept. 2001).

11. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian*

Israel did not annex the Occupied Territories because it did not want to upset its Jewish majority by absorbing the Arab-Palestinian populations of the West Bank and the Gaza Strip. Instead, it imposed martial law on the Arab-Palestinian inhabitants of the Occupied Territories by expanding its Emergency Regulations Laws, first enacted during the British Mandate in 1945 as a mechanism to suppress civilian uprising.[12] Israel continues to occupy the West Bank and the Gaza Strip in spite of U.N. Resolution 242 (1967), which called on Israel to immediately withdraw its armies from "territories occupied in the recent conflict."[13] 2009 marks the forty-second year of the Israeli occupation, making it the longest military occupation in modern history.[14]

Israel insists that military exigencies necessitate its occupation, but according to the 1980 Drobles Plan[15] the settlement and occupation of the West Bank are intended to prevent the establishment of a sovereign Palestinian state. According to Drobles, "the minority population will find it difficult to form a territorial and political continuity" if the population and the territory are cut off by Jewish settlements.[16] Belligerent occupation is recognized in international law as a temporary condition during which time peace and stability are restored.[17] However, as indicated by the Drobles Plan, Israeli military occupation intentionally frustrates Palestinian hopes of self-determination.

While the U.S. has been the self-appointed peace broker to the Arab-Israeli conflict since President Jimmy Carter facilitated the 1979 Israeli-Egyptian Peace Treaty, the U.S.'s role in the conflict has been far from neutral.[18] Instead, subsequent U.S. Administrations and Congresses have provided overwhelming and nearly unconditional support for Israel

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Territory, 44 HARV. INT'L L.J. 65, 79-81 (Winter 2003).

12. *Id.* at 81.

13. *Id.*

14. *Id.* at 68.

15. The Drobles Plan was prepared and named after Mattiyahu Drobles of the Settlement Department of the World Zionist Organization. It is regarded as the "Master Plan for the Development of Judea and Samaria," and details how settlement construction in the West Bank would prevent the independence and autonomous existence of Palestinians in the West Bank. *Id.* at 104.

16. *Id.*

17. *Id.* at 87 ("Belligerent occupation only vested the conqueror with temporary rights of administration pending a political solution.").

18. *See* NOAM CHOMSKY, FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL, & THE PALESTINIANS (1990).

in spite of its devastating human rights record.[19] Unequivocal U.S. support for Israel began in the aftermath of the 1967 war, which created a sense among many Americans that Israel was continually under siege by its Arab neighbors.[20] In June 1968, the Johnson Administration, with strong support from Congress, approved the sale of a supersonic aircraft to Israel and effectively established the U.S. precedent of supporting "Israel's qualitative military edge over its neighbors."[21]

America's unconditional support for an internationally recognized occupying power has made Israel the largest recipient of U.S. foreign aid since 1976 and the largest cumulative recipient since World War II.[22] America's unique relationship to Israel is also demonstrated by Israel's special benefits and favorable treatment under U.S. assistance programs unavailable to other countries.[23]

In addition to economic aid, unique U.S. support for Israel is evidenced by diplomatic favor. Between 1972 and 2003, the U.S. has been the lone veto of UN Security Council resolutions critical of Israel thirty-eight times. Of those, twenty-five concerned the Occupied Territories. [24] According to scholar, Ardi Imseis, Israel's consistent violation of the Geneva Conventions is largely attributable to external protection that its special relationship with the U.S. affords.[25] Likewise, the U.S.'s unique relationship to Israel permeates the walls of judicial "objectivity" in U.S. federal court cases involving the Arab-Israeli conflict. In effect, U.S. federal courts are unable to vindicate Palestinian

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19. Since 1967, the Israeli military has violated nearly every provision of the Fourth Geneva Convention. Human rights organizations worldwide, from Amnesty International to Israel's own B'tselem, as well as the U.S. government, have issued hundreds of statements and reports criticizing Israel's violations. Allegra Pacheco, *Flouting Convention: The Oslo Agreement*, in THE NEW INTIFADA: RESISTING ISRAEL'S APARTHEID 181 (Roane Carey ed., 2000).

20. JEREMY M. SHARP, U.S. FOREIGN AID TO ISRAEL 15 (Congressional Research Service Report for Congress, Jan. 2, 2008).

21. *Id.*

22. CLYDE R. MARK, ISRAEL: U.S. FOREIGN ASSISTANCE 1 (Congressional Research Service Report for Congress, Apr. 8, 2005).

23. *Id.* at 8.

24. Jewish Virtual Library, Vetoes of UN Resolutions Critical of Israel, http://www.us-israel.org/jsource/UN/usvetoes.html (last visited May 5, 2009).

25. Imseis, *supra* note 11, at 123 ("Israel has furnished the international community with little reason to believe that its consistent violation of [the Geneva Conventions] has been the result of anything other than a premeditated and deliberate policy course, limited only by the considerations of realpolitik and protected externally by its special relationship with the United States.").

individual human rights. In this regard Palestinians stand among other racial minorities whose individual rights were disavowed at the expense of furthering U.S. foreign and domestic policy, which I will discuss below.

II. THE JUDICIAL SYSTEM AS A SITE FOR THE VINDICATION OF INDIVIDUAL RIGHTS AND ITS LIMITS

A strict reading of the Constitution indicates that the Framers intended for the judiciary to be insulated from the political process in order to vindicate individual rights. Namely, in the landmark case *Marbury v. Madison*, Chief Justice Marshall made clear that courts have the power to exercise judicial review as established by Article III of the Constitution. Marshall wrote: "It is emphatically the province and duty of the judicial department to say what the law is."[26] Therefore, notwithstanding controversial matters, courts should not hesitate to adjudicate the rights of individuals.[27] Alexander Hamilton put forth a defense of the judiciary's independence in *The Federalist* where he explained that the Judiciary is always at risk of being overpowered and overwhelmed by the political interests of other branches of government. Contemporary legal scholars continue to affirm this notion. Paul Aloe argues that the essential judicial duty is to protect individual rights and that the distance created between federal courts and the political process enables the fulfillment of this duty.[28]

However, U.S. case law belies this intent and demonstrates that the judiciary is not insulated from the other branches of government but instead reflects and reifies the policies of those branches at the expense of vindicating individual rights.[29] Minority groups have borne the brunt

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26. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

27. Two prominent examples of a court adjudicating controversial matters are *Brown v. Board of Education*, 347 U.S. 483, and *Roe v. Wade*, 410 U.S. 113. In these cases, the Supreme Court did not punt the question of individual legal rights to another branch of government, notwithstanding the controversial character of both cases—racial integration in *Brown* and abortion as a privacy right in *Roe*.

28. *See* Paul Hubschman Aloe, Note, *Justiciability and the Limits of Presidential Foreign Policy Power*, 11 HOFSTRA L. REV. 517, 519 (1982); *See also* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT, 67-70 (1980).

29. *See Dred Scott v. Sandford*, 60 U.S. 393, 404-05 (1857) (affirming the inferiority of African-Americans as drawn from the Constitution); *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding racial segregation under the doctrine of "separate but equal"); *Johnson v. McIntosh*, 21 U.S. 543, 588-89 (1823) (establishing the "discover

of this process and their experience in the courtroom shatters the notion of blind justice.[30]

Perhaps no case better demonstrates this legacy than that of *Korematsu v. United States*.[31] In *Korematsu*, the petitioner did not leave his home as mandated by Civilian Exclusion Order No. 34, the executive decree that ordered all Americans of Japanese descent to leave their homes and report to "assembly centers," more appropriately known as "internment camps."[32] The military order stemmed from Executive Order 9066 which deemed necessary the removal and quarantine of Japanese-Americans in order to protect the U.S. against "espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities."[33] The lower courts found Mr. Korematsu in violation of the Order and the Supreme Court granted cert to review whether the Order violated Constitutional law for curtailing the civil right of a single racial group. The Supreme Court upheld the Order and declared that while racial animus is unconstitutional, effectuating military orders deemed necessary to ensure national security is not.[34] In effect, the Court accepted the military's reasoning without scrutiny and affirmed the views of the Executive Branch at the expense of individual rights.

Not all of the Justices accepted this reasoning. Justice Murphy, for example, dissented and protested that there is no relationship between Americans with "Japanese blood in their veins" and "the dangers of

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doctrine" which states that discovering a land inhabited by non-Europeans gives the discoverers "ultimate title" to the discovered land); and *United States v. Thind*, 261 U.S. 204, 214-15 (1923) (declaring that citizenship is not available to persons not of the Caucasian race).

30. *Id.*

31. 323 U.S. 214 (1944).

32. *Id.* at 215-16.

33. *Id.* at 217.

34. "Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders-as inevitably it must-determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot-by availing ourselves of the calm perspective of hindsight-now say that at that time these actions were unjustified." *Id.* at 223-24.

invasion, sabotage and espionage," except for racial animus.[35] Justice Murphy demonstrates that the Order is predicated on racial guilt as opposed to military necessity by scrutinizing the Commanding General's Final Report on the evacuation from the Pacific Coast area.[36] The Final Report is rife with sweeping characteristics of Japanese-Americans as "subversive" yet does not provide any reliable evidence of the group's disloyalty or any group behavior that could be characterized as a "special menace to defense installations or war industries."[37] In doing so, Justice Murphy makes abundantly clear that the wholesale exclusion of Japanese-Americans is based on racial and sociological prejudices rather than on military exigencies, and is therefore unconstitutional.

In *Korematsu* the Supreme Court, rather than exercise judicial scrutiny at a distance from the executive branch in general, and the military in particular, accepted the military's legal construction of an opposition between individual liberties and military exigencies. Yet, as demonstrated by Justice Murphy, there was the third option: to interrogate the legitimacy of the military orders in order to vindicate individual rights. The judicial legacy of considering the policies of other branches of government at the expense of individual rights considerations, informs the Palestinian experience in U.S. federal courtrooms especially in those cases critical of Israeli occupation policies.

III. BRINGING SUITS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW IN THE U.S.: THE ALIEN TORTS CLAIMS ACT

While I argue that cases involving Palestinians and the Arab-Israeli conflict further the legacy of those cases in which the judiciary reflects rather than challenges other branches of government at the expense of

35. *Id.* at 240 (Roberts, J., dissenting).

36. "That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting 'over 112,000 potential enemies ... at large today' along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group." *Id.* at 235-36 (Roberts, J., dissenting).

37. *Id.*

individual rights, the cases involving Palestinians are distinct for their foreign policy implications. Consequently, the judiciary's role as the adjudicator of individual rights is complicated by the separation of powers doctrine. This doctrine refers to a tenet of democratic governance in which the state is divided into several branches of government and each has independent powers and distinct responsibilities. In judicial matters, the separation of powers is upheld by the political question doctrine.

The political question doctrine prevents a court from adjudicating an issue that the Constitution textually commits to another branch of government.[38] The Constitution commits foreign relations to the executive and legislative branches, thus permitting them to determine what may be done in the exercise of this political power. Determining justiciability requires an analysis of the particular question posed, the history of its management by the political branches, its susceptibility to judicial handling in light of its nature and posture in the specific case, and the possible consequences of judicial action. In *Baker v. Carr* the Supreme Court articulated a test to determine the existence of a political question that would render a case nonjusticiable.[39]

Far from signaling the preclusion of cases involving foreign policy matters in U.S. federal courts, the Supreme Court in *Baker* cautioned that it would be "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[40] Therefore, a court can consider cases that have political implications so long as they surpass the hurdle of the *Baker* test. Notwithstanding the discrete nature of the *Baker* test, the scope of the political question doctrine remains a matter of controversy.[41] This controversy is most stark in ATCA cases

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38. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

39. A case involving a political question includes those featuring "(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or 2) a lack of judicially discoverable and manageable standards for resolving it; or 3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or 4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or 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." *Id.* at 217 (enumeration added).

40. *Id.*

41. Some commentators maintain a classic interpretation that there exists a political question where the Constitution has explicitly committed a political power to another branch of government. Lisa Rudikloff Price represents another strand of thought which

that allege violations of customary international law.

Enacted as a part of the Judiciary Act of 1789, the ATCA states, "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."[42] The ATCA's original purpose was to provide a cause of action for ambassadors in the U.S., for violations committed by pirates at sea, and for breaches of international treaties. The statute lay dormant for nearly two-hundred years before human rights practitioners on behalf of Paraguayan plaintiffs used it to sue a Paraguayan police officer for the alleged torture of the plaintiff's son in 1980.[43] In *Filartiga v. Pena-Irala*, the Second Circuit held that torture constituted a tort and awarded plaintiffs $10 million in civil damages.[44] It also recognized that the law of nations prohibits torture and that the ATCA provides a jurisdictional basis for suits in federal courts.[45]

Significantly, the Second Circuit held that the ATCA provided claimants a private cause of action for torture as a violation of the law of nations well before Congress enacted the Torture Victim Protection Act (TVPA) in 1991. Congress passed the TVPA in part to implement the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.[46] The TVPA makes torture and summary execution, done under the apparent or actual authority or the color of law of any foreign state, cognizable claims in United States courts.[47] The TVPA's legislative history indicates that it was passed to make sure that

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contends that the judiciary should only be constrained by prudential considerations when functional limitations of the judicial process make adjudicating a claim on the merits difficult. Lisa Rudikloff Price, *Note: Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT'L L. & POL. 323, 330 (2006). Yet another view holds that any case that touches on foreign policy matters should be categorically barred from adjudication irrespective of the factual conduct.

42. "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." 28 U.S.C. § 1350 (2000).

43. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

44. *Id.*

45. "Having examined the sources from which customary international law is derived, the usage of nations, judicial opinions and the works of jurists, we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." *Id.* at 885.

46. GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 38-39 (3d ed. 1996).

47. *Id.*

torturers could not find a safe haven in the United States.[48]

Filartiga has since produced a progeny of successful ATCA cases against foreign human rights violators who happen to be physically present in the U.S. Since 1980, human rights advocates have successfully filed suit against alleged human rights violators and argued that, in addition to torture, abuses including war crimes and crimes against humanity, genocide, cruel, inhuman, and degrading treatment, and summary execution, also constitute violations of international law and are therefore actionable pursuant to the ATCA in U.S. federal courts.[49]

At present, an alien can bring civil suit against another alien for a violation of customary international law committed outside the U.S., so long as personal jurisdiction is established. In 2005, Palestinians used this statute to file two suits against former Israeli officials.

A. ATCA and the Bush Administration

The utility of the ATCA as a human rights tool was threatened in 2004 when, at the urging of the Bush Administration,[50] the Supreme Court agreed to hear *Sosa v. Alvarez-Machain.*[51] Along with corporate interests that disdained the statute, the Bush Administration sought to weaken the ATCA by arguing that while it grants subject-matter jurisdiction, it does not afford claimants a private cause of action. Instead, the cause of action would have to be legislated by Congress just as it had done with torture when it passed the Torture Victim Protection Act.[52] In its decision, the Supreme Court affirmed that the ATCA

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48. S. REP. NO. 249 at 3 (1991), *quoted in* BORN, *supra* note 46, at 39 ("This legislation will do precisely that—by making sure that torturers and death squads will no longer have a safe haven in the United States.").

49. *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992).

50. EARTH RIGHTS INTERNATIONAL, IN OUR COURT: ATCA, SOSA, AND THE TRIUMPH OF HUMAN RIGHTS 12, July 2004, *available at* www.earthrights.org/files/Reports/inourcourt.pdf.

51. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *See also* EARTH RIGHTS INTERNATIONAL, *supra* note 50.

52. Department of Justice Brief for the Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 *quoted in* EARTH RIGHTS INTERNATIONAL, *supra* note 50 at 13; *see also* S. REP. NO. 249 (1991) (Congress passed the TVPA in part to implement the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The law makes torture and summary execution done under the apparent or actual authority or the color of law of any foreign state cognizable claims in United States courts. The TVPA's

provides a private cause of action but only for a limited number of claims. [53]

The Court held that when deciding whether or not a claim is actionable, federal courts "should require that any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[54] In effect, claims must meet the stringent "specific, universal, and obligatory" test.[55]

The Supreme Court in *Sosa* also held that courts should afford such case-specific deference to the political branches.[56] The Court explained "in such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[57] The problem is the absence of a clear standard that specifies which cases would merit such dismissal and instead the federal court must exercise its own discretion to determine when indeed foreign policy concerns would be threatened.

While the Court lists examples of such cases necessitating deference to the political branches,[58] it does not indicate which specific characteristics in those cases would be controlling, which doctrine should be cited, or which standards of review should be applied when considering other cases with foreign policy implications.[59] Despite their lack of greater judicial guidance, the majority made clear that respect for the Executive Branch should not be misapplied as a mandatory standard.[60] In *First National City Bank v. Banco Nacional de Cuba*, Justice Douglas cautioned that unquestioning deference to the executive branch would render the Court "a mere errand boy for the executive

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legislative history indicates that it was passed to make sure that torturers could not find a safe haven in the United States).

53. *Sosa*, 542 U.S. at 754.

54. *Id.* at 749.

55. For example, torture and genocide would pass this test because the conventions outlawing them have been ratified by 136 nations. BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 554 (1996).

56. *Sosa*, 542 U.S. at 733 n.21.

57. *Id.* at 754 (Ginsberg, J., concurring).

58. *See In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *see also Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

59. STEPHENS & RATNER, *supra* note 55, at 562.

60. *See Zchering v. Miller*, 389 U.S. 429 (1968).

branch which may choose to pick some people's chestnuts from the fire, but not others."[61]

The Bush Administration used this ambiguity, regarding the extent of deference to be afforded to the Executive branch, to weaken the ATCA. Since 2001, the Bush Administration has routinely submitted Statements of Interest requesting that courts dismiss ATCA claims for raising political questions.[62] In its Statements, the Executive routinely argues that adjudicating the case would interfere with foreign policy matters thereby necessitating dismissal.[63] In so doing the Bush Administration has politically interfered in ATCA cases in two ways: by urging the dismissal of cases based on political pressures imposed by foreign governments, and by suggesting that the State Department is better equipped than a court to determine matters of law.[64] In the first instance, the Executive impedes the court's exercise of its judicial independence; in the second, it obstructs the court's duty to determine "what the law is."

Despite the Bush Administration's consistent interventions in ATCA cases, not all courts have deferred to these Statements. In cases filed by Palestinians against Israeli defendants however, deference has been uniform. In large part this reflects the sentiment of a Judiciary and a broader American political establishment that sees Palestinians as racial minorities characterized by deviant behavior, namely prone to commit violent acts, thereby enabling its disregard for Palestinian rights. Rather than weigh those concerns in its judicial deliberation of ATCA claims and individual rights, the courts, in line with a broader political establishment, continue to ensure their foreign policy interests in the Middle East without regard for Palestinian rights enshrined by customary international law.

IV. THE POLITICAL QUESTION DOCTRINE AND ISRAEL

In *Matar* the plaintiff alleged that the targeted killing of Mr. Shehadeh constitutes an extrajudicial killing otherwise prohibited by the

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61. STEPHENS & RATNER, *supra* note 55, at 56.

62. *See* Aron Ketchel, *Note: Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act*, 32 YALE J. INT'L L. 191, 203 (2007).

63. Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of the State Department's "Statements of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 811 (2006).

64. *See* Ketchel, *supra* note 62, at 207.

TVPA. Since 1991, the TVPA has provided a private cause of action for torture inflicted under the color of law by alien plaintiffs who invoke ATCA, which provides subject matter jurisdiction for such claims. The Palestinian plaintiffs argued that because the TVPA provides for liability specifically where an "individual who, under actual or apparent authority or color of law, of any foreign nation. . . subjects an individual to extrajudicial killing. . .," that the claim is actionable against Dichter who ordered the killing in his capacity as a General Security Services director. The Southern District Court of New York did not agree.

Instead, the court characterized Dichter's military actions as part of Israel's foreign policy and therefore non-justiciable for raising a political question.[65] The court did not consider how the fact that Dichter's actions were done under the color of the law may be a requisite element of the TVPA thereby making the fact that it was done as part of Israel's foreign policy a hindrance to Israel's defense rather than a roadblock for the Palestinian plaintiffs. Nor did it consider other violations of customary international law committed by the Defendant. Instead the court only considered two documents demonstrating the U.S.'s diplomatic ties to Israel: the Statement of Interest submitted by the Department of State (DOS) as well as the letter sent from Israel's Ambassador to the DOS.

The court invited the DOS to submit its views on the matter, and the DOS urged the court to dismiss the case on sovereign immunity grounds.[66] On his own volition, Daniel Ayalon, then Israeli Ambassador to the United States, wrote a letter to Nicholas Burns, the United States' Undersecretary for Political Affairs, in which Ayalon characterized the Defendant's actions as official acts of the State of Israel.[67] After

65. *Matar*, 500 F. Supp. 2d at 291.

66. Statement of Interest of the United States of America Submitted to United States District Court Southern District of New York [hereinafter Statement of Interest], *quoted in Matar*, 500 F. Supp. 2d at 287 ("[F]oreign officials such as Dichter do enjoy immunity from suit for their official acts. This immunity is not codified in the FSIA, as Dichter has argued, but instead, is rooted in longstanding common law that the FSIA did not displace..." The Department went on to say that there is no private cause of action for the disproportionate use of military force in armed conflict. Finally, it asserted that the Government's concerns about judicial competence sound as well under the political question doctrine.).

67. "The lawsuit would embroil the U.S. courts in evaluating Israeli policies and operations in the context of a continuing armed conflict against terrorist operatives. [It] touch[es] directly upon issues related to the Middle East peace process and ongoing extensive diplomatic efforts...While ostensibly brought against Mr. Dichter...the []case [] challenge[s] sovereign actions of the State of Israel, approved by the government of

reviewing both documents, the court held that "plaintiff brought the action against a foreign official for implementing the *anti-terrorist policy* of a *strategic United States ally* in a region where diplomacy was vital, despite requests for abstention by the State Department and the ally's government."[68] The court found that a political question existed because "the defendant is a high ranking official of Israel, a United States ally."[69] In affording undue deference to the Executive branch, the court did not consider the relevant legal questions before it.

A. Undue Deference to State Department in Cases involving Israel

Executive Branch requests for dismissal should not be controlling in ATCA cases.[70] Commentators have cautioned that affording Statements conclusive deference would enable the politicization of the judiciary because justiciability would be subject to prevailing political views rather than to legal principles. Due to the lack of clear guidelines, commentators have suggested several formulations of appropriate standards including creating a legal standard for the ATCA as was done with the FSIA[71] and affording deference to the Executive branch only when there exist specific and foreseeable costs to the administration of foreign policy.[72] Today no such standards exist and instead courts have significant latitude in deciding whether a Statement should be afforded deference.

For example, in two cases unconnected to Palestinians, *Sarei v. Rio Tinto* and *Doe v. Liu Qi*, the Executive branch submitted a Statement. Unlike in *Matar,* however, the outcome of these cases was not based on conclusive deference to the Executive's Statement of Interest. The fact

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Israel in defense of its citizens against terrorist attacks...[A]nything Mr. Dichter...did in connection with the events at issue in the suit[] was in the course of [his] official duties, and in furtherance of official policies of the State of Israel." Letter from Daniel Ayalon, Israeli Ambassador to the United States, to Nicholas Burns, Undersecretary of Political Affairs, Feb. 6, 2006 at 2 [hereinafter Ayalon Letter], *quoted in Matar*, 500 F. Supp. 2d at 287.

68. *Matar,* 500 F. Supp. 2d at 296 (emphasis added).

69. *Id.* at 294.

70. *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1083 n.13 (9th Cir. 2006) (discounting a Department of State statement of interest that encouraged dismissal when the statement was outdated and the foreign state requested that the action proceed).

71. *See* Ketchel, *supra* note 62.

72. *See* Margarita Clarens, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT'L L. 415, 431 (2007).

that the courts in *Sarei* and *Liu Qi* were able to balance the interests of the Executive branch without deferring to it altogether, demonstrates that the *Matar* court's decision was not inevitable. The *Matar* court had the latitude to deliberate the legal matters put before it, but chose to conclusively defer to the Executive branch instead.

1. Sarei v. Rio Tinto

In *Sarei*, a group of Papua New Guineans sued a major mining company, alleging that the company had significantly destroyed their environment and caused severe health impacts that flamed a civil war in the Bouganville Region. The DOS urged for dismissal of the case explaining that it would threaten the United Nations initiated peace process. The district court dismissed the case for raising a political question as indicated by the Executive's Statement. The Ninth Circuit, however, reversed the dismissal and held that, while the Executive Branch's views should be afforded significant weight, the courts should not abdicate their judicial function. In *Sarei*, the court, rather than dismissing the case because the Executive Branch expressed concern that the case would interfere with foreign policy interests, decided that it had a responsibility to determine whether a political question existed. Instead of relying conclusively on the DOS's Statement, the Ninth Circuit considered whether there indeed existed a political question and found that the mere possibility of risk to the peace process did not rise to the level of constituting a political question. By reversing the district court's decision, the Ninth Circuit exercised its judicial independence and afforded due respect to the Executive branch.

2. Doe v. Liu Qi

In *Doe v. Liu Qi*, plaintiffs were members of the Falun Gong who endured torture, crimes against humanity and repression of their freedom of religion and belief. In 2002, they filed an ATCA suit against the Mayor of Beijing who was responsible for the police force that inflicted the harm against them. The DOS urged the court to dismiss the suit arguing that it would risk interfering with U.S.-China relations, raise the possibility of retaliatory suits against U.S. officials in China, and violate the Act of State doctrine, among other reasons. The court found the risk of interfering with the Executive branch to be "minimal" but that the Act of State doctrine is aggravated because the defendant is a sitting official. To balance these concerns, the court limited the judgment to declaratory relief for the plaintiffs' individual claims and barred their claim for

damages and injunctive relief.[73] The court held that declaratory relief would alleviate the risk of threatening foreign policy relations because "although the judicial act of declaring a foreign state's policy as violative of international law implicates the Act of State doctrine inasmuch as it entails ruling on the legality of an 'official act of a foreign sovereign performed within its own territory,' it does not command the state or its officials to do anything."[74] In distinguishing between declaratory and injunctive relief, the Northern District of California found a means to maintain its judicial independence while not threatening the Executive's foreign policy concerns. Like the Ninth Circuit, it did not afford conclusive weight to the Executive's Statement of Interest.

3. Executive Intervention in the case of Matar

As the cases of *Sarei* and *Liu Qi* demonstrate, intervention by the Executive branch need not be controlling. Still, in *Matar,* the court accepted the Executive's claim that adjudication of the case would interfere with the Administration's ability to manage the conflict by diplomatic means and availed itself of its responsibility to consider the legal questions raised by the case.[75] In particular, the court failed to consider how the character of the Palestinian Territories as "occupied" impacted the legal claim. Additionally, the Court allowed Israel's status as a "strategic U.S. ally" to obstruct its analysis of the applicability of the political question doctrine.

i. Israel's Role as a "strategic U.S. ally"

The *Matar* court reasoned that it risked embarrassment by criticizing an attack carried out by Israel, a "strategic U.S. ally."[76] However, the political question doctrine should not be based on the U.S.'s political relationships but instead on whether or not a court's judicial orders would contradict existing U.S. policies.[77]

In *Matar,* the ATCA provided judicially manageable standards

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73. *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1306 (2004).

74. *Id.*

75. Statement of Interest, *supra* note 66, at 45, *quoted in Matar*, 500 F. Supp. 2d at 295.

76. *Matar,* 500 F. Supp. 2d at 296.

77. *See Baker*, 369 U.S. at 217 (the sixth test prohibits the adjudication of cases that may cause "...embarrassment from multifarious pronouncements by various departments on one question."). *See also* the entire *Baker* test, *supra* note 39.

necessary for the consideration of legal questions. Whereas in the absence of such standards a court would have to exercise its own political judgment, here the Court only needed to perform a legal analysis. Moreover, because the U.S. Administration had not taken a stance in regard to the killing of Shehadeh, the court did not risk contradicting existing U.S. foreign policy and therefore risk embarrassment. In light of the judicially manageable standards as well as the absence of contradictory U.S. foreign policy, the case could have surpassed the hurdle of the *Baker* test and the Court could have considered the claim to determine what the law was and whose rights were violated, if any. Rather than evaluate the impact of its inchoate decision on the Executive branch, the District Court deferred to the Executive's preferences at the expense of the Palestinian plaintiffs' individual rights. In so doing, the Judiciary based its judicial veracity on the status of the Executive's relationships with the parties involved.

Israel may be unique for its favorable treatment, as the case of *Linder v. Portocarrero*[78] demonstrates. In *Linder,* the Eleventh Circuit Court of Appeals considered a tort claim that arose during the Nicaraguan civil war and implicated the U.S.'s ally, the Contras. The *Linder* court held that the case did not interfere with United States foreign policy because the case neither challenged the legitimacy of the United States' support of the Contras nor decided who was right and who was wrong in the war thereby sparing it from the political question doctrine.[79] Instead, the Court reasoned that it simply decided whether or not there was a tort violation in a single incident.[80] The Eleventh Circuit found that while acts of legitimate warfare cannot constitute the basis for individual liability, tort actions still provide an adequate remedy to non-combatant civilians injured by conflict.[81] Clearly this bore no impact on the Southern District Court of New York. Rather than perform the legal analysis necessary to apply the political question doctrine as was done by the *Linder* court, the *Matar* court punted its judicial duty to the Executive, demonstrating its inability to vindicate the individual rights of Palestinian aliens.

78. *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992).

79. *Id.*

80. *Id.*

81. *Id.*

ii. Israel's status as a foreign sovereign

The court again demonstrated its self-imposed limitations in its analysis of the relationship between Israel's sovereignty and the political question doctrine. In *Tel-Oren*, Judge Edwards emphasizes the standard for identifying a political question by drawing on *Banco Nacional de Cuba v. Sabbatino.*[82] In *Banco Nacional,* the political question doctrine applied only to "judicial review of the acts of recognized foreign governments committed *within their own territory.*" [83] The court does not question whether its judicial review of Israel's alleged violations evades the trappings of the political question doctrine because those violations took place in the Gaza Strip, considered to be part of the "Occupied Palestinian Territories."[84] A proper determination of the political question doctrine should have taken into account the status of the Gaza Strip as "occupied."

Although the plaintiffs argue that the Gaza Strip is occupied and therefore outside of Israel's territory,[85] the *Matar* court did not deliberate *Banco Nacional's* impact on the facts before it. Rather than consider this legal question, the *Matar* court deferred to the DOS's Statement of Interest. Failing to consider that alleged violations were committed in Occupied Territories, and not within Israel's "own borders" indicates the court's unwillingness to consider legal questions of an admittedly controversial issue. Instead, it felt more comfortable relying on the Executive's argument, which was similar to the Supreme Court's position in *Korematsu.* If *Matar* indeed raises a political question, it should withstand scrutiny. Here, however, scrutiny is supplanted by deference to the Executive Branch.

The court's choice to reify the Administration's position at the expense of deliberating individual rights reflects its lack of distance from the Executive branch, especially in light of those cases arising from the same political context. Federal courts have not invoked the political

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82. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

83. *Banco Nacional, quoted in Tel-Oren v. Arab Libyan Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984).

84. *See* International Court of Justice Advisory Opinion, "Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory," July 9, 2004, *available at* http://www.icj-cij.org/docket/files/131/1677.pdf; *see also* United Nations Security Council Resolutions 242, 338, 446, 484; *see also* Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention.

85. *See Matar v. Dichter*, Complaint No. 05CV10270, United States District Court Southern District of New York.

question doctrine in cases arising from the same political context, the Arab-Israeli conflict, but filed against Palestinians alleging harm caused by acts of international terrorism. [86] It would seem that in those cases, U.S. diplomatic efforts are not hindered by suits alleging misconduct by Palestinians, whereas in cases alleging harm caused by Israeli occupation policies, judicial deliberation amounts to interference with the Administration's diplomatic efforts. [87]

The *Matar* Court distinguished those cases filed against Palestinians and found that "none of [the other actions against former officials implicating their national policy] involved claims . . .with the unique foreign policy implications presented here. . .[namely,] the response to terrorism in a uniquely volatile region."[88] The text suggests that the discourse on terrorism gave the court *carte blanche* to disregard precedent that dealt with similar issues. Moreover, the DOS proffered this framework to the court indicating that the court adopted the Executive's framing of the matter. Extracting itself from executive control, the Court could have considered another framework that may have been more relevant beyond the tenure of the Bush Administration.

Attorney Brian C. Free, who served on the legal team that sued Exxon Mobil pursuant to ATCA, explains that political support for ATCA has differed dramatically among presidential administrations that have expressed divergent views on ATCA cases.[89] "If courts do not make justiciability determinations independent of executive control," he writes, "1350 may become little more than a political tool."[90] Here, the *Matar* court failed to consider the claims made by the Palestinian plaintiffs outside of the framework of Bush Administration's specific foreign policy concerns regarding its "war on terror," instead supplanting legal considerations for political ones. In doing so it served as an extension of the Executive branch; it became, as warned by Free, a

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86. *See* discussion *infra*, section VI, C, p. 153. *See also Biton v. Palestinian Self-Gov't Auth.*, 310 F. Supp. 2d 172 (D.D.C. 2004); *Klinghoffer v. Lauro*, 937 F.2d 44, 50 (2d Cir. 1991); *Almog v. Arab Bank*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); *Knox v. The Palestine Liberation Org.*, 306 F.Supp. 2d 424 (S.D.N.Y. 2004); and *Ungar v. PLO*, 402 F.3d 274 (1st Cir. 2005).

87. *See Matar*, 500 F. Supp. 2d at 295 (S.D.N.Y. 2008) (discussing *Biton*, *Ungar*, and *Klinghoffer*).

88. *Id.*

89. Brian C. Free, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claim Litigation*, 12 PAC. RIM. L. & POL'Y 467 (2003).

90. *Id.* at 484.

"political tool."

V. THE FOREIGN SOVEREIGN IMMUNITIES ACT

The application of the Foreign Sovereign Immunities Act (FSIA) to preclude suit against Israeli defendants demonstrates the extension of Executive prerogatives in the courtroom. In *Belhas*, the D.C. District Court held that the FSIA barred suit against the defendant because the Israeli Ambassador to the U.S. submitted a letter to the DOS asserting that the defendant's alleged violations constituted Israeli policy. The FSIA's application in *Belhas v. Ya'alon* is an exception among ATCA cases where an official violated his/her own domestic law. In similar cases not involving the Arab-Israeli conflict, the court did not accept the State's assertion as sufficient for establishing immunity, nor did it insist that the plaintiffs must first trigger an FSIA exception before considering the legality of the alleged violations.

A. Background

The FSIA provides foreign states a basic grant of sovereign immunity from the jurisdiction of U.S. Courts.[91] A foreign state cannot be sued in U.S. courts unless it waives its sovereign immunity or an exception to the FSIA applies. [92] Congress enacted the FSIA in 1976 and in so doing transferred the determination of sovereign immunity from the State Department to the court. Prior to 1976, a state's foreign sovereignty rested on its diplomatic relationship with the U.S.[93] Congress intended to insulate the determination of sovereignty from political pressures by way of legislation, and sought to protect litigants by ensuring that these decisions be made on "purely legal grounds and under procedures that ensure due process."[94] One FSIA drafter said a "primary objective" of the FSIA was to "depoliticize sovereign immunity

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91. 28 U.S.C. §§ 1602 *et seq.* ("A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.")

92. *See* Section 1605 which enumerates those exceptions including an exception for disputes arising from commercial activities [28 U.S.C. §1605(a)(2)] and those that arise from tortuous acts committed within the United States [28 U.S.C. §1605(a)(5)].

93. *See Schooner Exchange v. M'Faddon* (1812) (the Court established that federal courts have no jurisdiction over suits involving states "with whom the United States is at peace") *as quoted in Ungar v. PLO*, 402 F.3d 274, 283 (1st Cir. 2005).

94. H.R. REP. NO. 94-1487, at 7 (1976); S. REP. NO. 94-1310, at 9 (1976).

cases by transferring determinations of sovereign immunity from the State Department to the courts."[95] In light of this legislative history, the court's overemphasis on a letter submitted by the Israeli Ambassador to the U.S. raises serious questions about due process.

B. FSIA and Israeli Defendants

In the case against Ya'alon, the Israeli Ambassador submitted a letter to the DOS maintaining that adjudication of the claims would amount to a trial against Israel and making explicit that the alleged violations were officially authorized.[96] In response, the D.C. Circuit Court held that if Ya'alon's actions were done in an official capacity, then he was acting as an agency or instrumentality of a foreign state and was therefore immune from suit.[97] This afforded Ya'alon a presumption of immunity because the complaint alleged that Ya'alon "had command responsibility for the attack" and had ordered the alleged violation "under the color of Israeli law."[98] *Belhas* is unique for being afforded such a presumption. There have been at least six other cases that involved former officials much like Dichter and Ya'alon, and one case involving an existing official, and none of those cases were dismissed because the defendant's alleged violations represented a state policy or because the defendant was an agency or instrumentality of a foreign state.[99] Instead those courts found that sovereignty could not preclude

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95. Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L COMP. L.Q. 302, 403-05 (1986).

96. Ayalon Letter, *supra* note 67.

97. *Belhas*, 466 F. Supp. 2d 127, 130 (D.D.C. 2006). *See also Doe v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005) (relying on a precedent in the D.C. Circuit Court that held that "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.").

98. *Id.* at 131.

99. *Trajano v. Marcos*, 978 F.2d 493, 498 n.10 (9th Cir. 1992) (Marcos-Manotoc admitted acting in her own authority and not on the authority of the Republic of the Philippines. "Under these circumstances, her acts cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA."). *See also Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *McKeel v. Islamic Republic of Iran* 722 F.2d 582, 588 (9th Cir. 1983); *Xuncax*, 886 F. Supp. at 171; *Liu Qi*, 349 F. Supp. 2d at 1287 (No immunity where China "appears to have covertly authorized but publicly disclaimed the alleged human rights violations...by Defendants Liu and Xia and asserts that such violations are in fact prohibited by Chinese law."); *Calibiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996) (Defendant "[did] not claim that the acts of torture he is alleged to have committed fall within the scope of his authority.").

suit because the alleged violations in those cases were either committed in a personal capacity[100] or could not be considered official because they violated domestic law.[101] This finding suggests that a court must consider the legal scope of the acts while determining FSIA's applicability.[102]

However in *Belhas*, the court did not engage in this process and, rather than determine the applicability of the FSIA based on the nature of the alleged violations,[103] it held that the FSIA precluded suit based on Ya'alon's official capacity, and that consideration of the nature of the acts would require the plaintiffs to fit the violations within an enumerated exception to the FSIA.[104] The insistence on affording Ya'alon sovereign immunity without considering whether or not his acts can in fact be considered official can only be based on the weight afforded by the court to the Israeli Ambassador's letter to the DOS as well as to the DOS's letter to the court. The weight that a court affords to such letters is not uniform, as the following case of *Doe v. Liu Qi* suggests.[105]

1. Doe v. Liu Qi

In *Doe v. Liu Qi* the Government of China submitted a letter to the DOS that defended the Chinese defendants, urged dismissal of the suit, and asserted its sovereign immunity together with its governmental policy against the Falun Gong.[106] Similarly, the DOS submitted a Statement urging dismissal of the suit. The DOS's letter insisted that the FSIA barred the suit because no applicable exceptions to immunity applied and added that the Executive branch "has many tools at its disposal to promote adherence to human rights in China, and it will continue to apply those tools within the context of our broader foreign

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100. *See Trajano*, 978 F.2d 493 (1992).

101. *See Liu Qi*, 349 F. Supp. at 1287.

102. *See* discussion of official action in the political question context, *supra* pp. 139-41.

103. *Belhas*, 466 F. Supp. at 131 (The plaintiffs in *Belhas* attempted to rebut the presumption of immunity by making a similar argument: that Ya'alon acted outside the scope of his authority because his actions violated norms of Israel's domestic law).

104. *Belhas v. Ya'alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2008).

105. *Ya'alon*, 466 F. Supp. at 132.

106. *See* Center for Justice and Accountability, "Statement by the Chinese Government On Anonymous Persons v. Liu Qi Case" (July 9 2002) *available at* www.haguejusticeportal.net/.../LiuQi_StatementPRC_9-7-2002.pdf.

policy interests."[107] Despite the fact that the Defendant was an *acting* official, as opposed to a former one like Ya'alon, the Court held that the FSIA did not bar suit because the Plaintiffs demonstrated that the "alleged conduct for which the Defendants are responsible were inconsistent with Chinese law."[108] The Court also found it could balance U.S. foreign policy concerns and address the legal questions before it by limiting its judgment to declaratory relief for the plaintiffs' individual claims and barring their claim for damages and injunctive relief.[109]

There is very little distinction between *Liu Qi* and *Belhas*: in both cases, the defendant acted under the color of the law, the DOS intervened urging the court to dismiss the suit, and the implicated governments submitted a letter to DOS asserting that the alleged violations represented State policy. However the *Liu Qi* court chose to examine the nature of the alleged violations and in so doing found that they contravened Chinese law and therefore could not be considered official, notwithstanding the Defendant's status as an acting official. Undeterred by the FSIA, the *Liu Qi* court held that a balance could be struck between addressing U.S. foreign policy concerns and vindicating individual rights. In *Belhas*, however, the court held that the legal questions could not be considered at all because they represented State policy. The only substantial difference between these two cases is the U.S. Administration's affinity to the State parties. While DOS urged dismissal of the suit against China, it did not claim that China was a "strategic U.S. ally" as it did on behalf of Israel.

In the absence of any other judicial or substantive differences, the U.S.'s unique relationship to Israel stands out as the distinguishing factor affording immunity to Ya'alon and withholding it from Liu Qi. In light of this distinction, it would seem that the D.C. District Court punted the determination of sovereignty back to the DOS, the very site that Congress found inappropriate for its determination in 1976. The court had a duty to make a legal determination of sovereignty. Even if the alleged violations were committed in an official capacity, the Court should have considered whether or not they violated Israeli law and used an approach similar to the one adopted by the *Liu Qi* court. The D.C.

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107. Letter from The Legal Adviser, Department of State to Honorable Robert D. McCullum, Assistant Attorney General Civil Division, U.S. Department of Justice (Sept. 25, 2002) at 7.

108. *Liu Qi*, 349 F. Supp. 2d at 1287-88.

109. *Id.* at 1301-02.

District Court's blatant refusal to address the legal questions presented by *Belhas* is an indication of deference to the Executive branch and reinforcement of its preferences at the expense of individual rights.

The finding in *Belhas* suggests that cases brought against political allies will be barred from suit and cases brought against non-allies will be considered. In effect, determinations of foreign sovereign immunity will be subject to political pressures notwithstanding Congress's attempt to insulate it from such pressures. As a result of this politicization, Palestinian and Lebanese plaintiffs will be denied equal protection relative to similar alien claimants. The federal courts' reification of the Executive's Middle East agenda that deems Palestinian rights negligible is also evident in cases involving the Arab-Israeli conflict and filed against Palestinian defendants.

VI. LEGISLATING THE PATH TO SUCCESSFUL SUITS AGAINST PALESTINIANS

Palestinians seeking recourse in U.S. federal courts must clear hurdles in order to file suit against Israelis for violations of customary international law and, as the prompt dismissal of *Matar* and *Belhas* demonstrate, Palestinians have not been able to jump high enough. On the other hand, legislative and executive action has virtually ensured the success of cases filed *against* Palestinians. Congress legislated half of this assurance in its enactment of the Anti-Terrorism Act (ATA).

A. Liability for Terrorism: The Anti-Terrorism Act

The ATA refers to a collection of terrorism related provisions including the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"). Codified in Chapter 113B of title 18 United States Code ("USC"), the ATA provides U.S. nationals with civil remedies and criminal penalties for acts of international terrorism that cause death or injury to a claimant's person, business, or property.[110]

110. 18 U.S.C. § 113B(A)-(C) (2000).

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended--

The available claims are also actionable by the claimant's estate, survivors, or heirs.

While the ATA's definition of international terrorism does not limit terrorist actions to non-state actors, Section 2337 of the statute prohibits suits against any state actors.[111] In effect, no states or their instrumentalities can be held liable pursuant to the ATA with the exception of those "state sponsors of terror" that fall within the framework of the Flatow Amendment.[112] The Flatow Amendment created a private cause of action for acts of state sponsored terrorism against a designated state sponsor of terror.[113] Given their status as non-state entities, U.S. nationals can bring suit against the Palestinian Authority (PA) and the Palestinian Liberation Organization (PLO) even in the absence of the Flatow Amendment. The Amendment is nevertheless relevant because it demonstrates Congress's designation of terrorist acts by the identity of the actor and not the act itself.

Courts have interpreted the ATA as 'legislative and executive endorsement' of suits against (particular) foreign actors for their role in international acts of terrorism. Coupled with the Palestinian Anti-Terrorism Act the success of ATA suits against Palestinians is nearly guaranteed.

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum

111. "No action shall be maintained under section 2333 of this title against a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337.

112. *Id.* § 1605(1) (enumerating these exceptions as those seven states listed by the Department of State as state sponsors of terror: Iraq, Iran, Syria, Libya, Cuba, North Korea, and Sudan).

113. The Department of State designates Iran, Iraq, Syria, Sudan, Cuba, North Korea, and Libya as state sponsors of terror. *See also* JENNIFER K. ELSEA, LAWSUITS AGAINST STATE SUPPORTERS OF TERRORISM: AN OVERVIEW 5 n.3(a) (Congressional Research Service Report for Congress, May 27, 2005).

B. *Codifying terrorists: The Palestinian Anti-Terrorism Act and its antecedents*

The Palestinian Anti-Terrorism Act of 2006, which Congress passed and the Executive endorsed, both prohibited funding to the Palestinian Authority[114] and deemed the West Bank and Gaza Strip as terrorist sanctuaries.[115] The bill establishes that "the territory controlled by the Palestinian Authority should be deemed to be in use as a sanctuary for terrorists or terrorist organizations. . .."[116] In addition to demonstrating the Executive's views that Hamas's designation as a foreign terrorist organization rendered its governance and its electoral success illegitimate, the bill arbitrarily casts Palestinian entities, by virtue of being Palestinian and located in the Occupied Territories, as "terrorist" entities.

Well before Hamas's electoral victory, Congress and previous U.S. Administrations had codified Palestinians as terrorists. In 1990, in 22 United States Code Sections 5201-5203, Congress established that the PLO "and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States."[117] Combined, the ATA and the codification of Palestinian entities as terrorist ones, guaranteed the success of suits alleging harm caused by "Palestinian terrorism" by rendering the political question irrelevant.

C. *Palestinians and the Political Question Doctrine*

As discussed above, the political question doctrine prohibits courts from adjudicating an issue that is constitutionally committed to another branch of government. In the cases filed by Palestinians against Israelis, the court held that diplomacy, presumptively conducted by the Executive branch, was vital in the Middle East and therefore the doctrine precluded suit.[118] Significantly, cases arising from the same political context but filed against Palestinians are not hindered by the political question doctrine.

In *Efrat Ungar v. The Palestinian Liberation Organization*, three

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114. *See* S. 2370 109th Cong. (2006); H.R. 4681 109th Cong. § 3 (2006).

115. *See* S. 2370 109th Cong. (2006); H.R. 4681 109th Cong. § 4 (2006).

116. *Id.*

117. 22 U.S.C §5201(b) (1987).

118. *See Matar*, 500 F. Supp. 2d at 291.

Palestinian militants attacked Efrat, a U.S. citizen, and his family on the outskirts of East Jerusalem. The assailants killed Efrat's wife and son. The claim described the militants as members of Hamas, which is designated as a terrorist organization by the DOS.[119] Efrat brought suit against the PA and the PLO pursuant to the ATA. The Palestinian defendants argued that the suit hinges on a non-justiciable political question. The court summarily responded that:

> The defendants' position rests on a misunderstanding of the fundamental nature of this action. This is a tort suit brought under a legislative scheme that Congress enacted for the express purpose of providing a legal remedy for injuries or death occasioned by acts of international terrorism. The defendants are organizations that allegedly violated the statute. They have attempted to avoid liability by wrapping themselves in the cloak of sovereign immunity. The question we must answer, then, is whether the defendants have set forth sufficient evidence to support their claim of immunity—no more and no less.[120]

The First Circuit swiftly dismissed the applicability of the political question doctrine by citing legislative endorsement of such suits, namely the ATA. By legislating the ATA, the other branches of government explicitly placed foreign policy matters regarding acts of international terrorism within the legal province of the courts. In effect, the *Ungar* court did not need to consider whether the case before it raised an issue that was constitutionally committed to another branch of government. By endorsing such suits, other branches of government enable the judiciary to apply the political question doctrine to the same political context, the Arab-Israeli conflict, and achieve a disparate outcome.

Furthermore, congressional codification of Hamas as a terrorist organization deems the defendants members of a terrorist entity and therefore, their acts cannot be interpreted but as acts of terrorism. The fact that the attack constituted an *ipso facto* act of international terrorism due to the defendant's identity made the *Ungar* court's task less complicated. While I do not suggest that violence against civilians is justifiable, the courts' erasure and effective silencing of the Arab-Israeli context in which this violence occurs, has problematic implications.

In *Matar*, had the political context of the Arab-Israeli conflict not been considered intractable and within the exclusive purview of the Executive branch, the court would not have evaded the legal question

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119. *See* 8 U.S.C. § 1189; Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56,860, 56,861 (Oct. 2, 2003).

120. *Ungar*, 402 F.3d at 280.

before it by deferring to another branch of government. Absent the very context which the *Ungar* court felt appropriate to omit, the *Matar* court would have considered whether dropping a one-ton bomb on a residential home in the middle of the night constituted an extrajudicial killing prohibited by customary international law. In *Matar*, the Arab-Israeli conflict prohibited the court from considering the legality of the murder of fourteen civilians using sophisticated weaponry. Conversely, in *Ungar* the court deemed the same context irrelevant because Congress and the President declared such acts terrorism, the actors terrorists, and the claim justiciable.

In *Biton v. Palestinian Self-Government Authority* (2004),[121] the D.C. District Court affirmed this decision and the troubling construction, that certain acts are acts of terrorism, certain actors are terrorists, and therefore certain claims justiciable notwithstanding their foreign policy implications. The Southern District of New York in *Knox v. The Palestine Liberation Organization* (2004)[122] and the Eastern District of New York in *Almog v. Arab Bank* (2007)[123] upheld similar decisions.

1. Beyond the ATA: The looming politics of the Arab-Israeli conflict in non-ATA cases filed in U.S. federal court

There are at least two cases filed against a Palestinian defendant pursuant to a statute other than the ATA: *Tel Oren v. Libyan Arab Republic* and *Klinghoffer v. Lauro*. The latter case was brought after the enactment of the ATA but pursuant to a different statute and the former was brought before its enactment.

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121. *Biton*, 310 F. Supp. 2d at 176 (The ATA created a federal cause of action for acts of "international terrorism," a precisely-defined term. *See* 18 U.S.C. § 2331(1). In conjunction with that statute, the "common law of tort provides clear and well-settled rules on which the district court can easily rely.").

122. "The Court will not, and need not, endeavor to answer or otherwise lend its views towards these broader and intractable political questions, which form the backdrop to this lawsuit. This lawsuit will simply adjudicate whether and to what extent the Plaintiffs may recover against Defendants under certain causes of action for the violence that occurred in Hadera, Israel on the night of January 17, 2002.In this connection, the Court cannot ignore the incongruity and conflict with statutory intent that the Defendants' argument would countenance." *Knox v. PLO*, 306 F. Supp. 2d 424, 448 (S.D.N.Y. 2004).

123. *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 295 (E.D.N.Y. 2007) (finding that defendants only raised the political question doctrine during oral arguments and the court found that they did not present any of the factors that would merit dismissal pursuant to *Baker*. The court also referred to *Kadic* and held that a politically charged context does not transform the issue into a nonjusticiable one. "[T]he doctrine is one of 'political questions' not of 'political cases.'").

In *Klinghoffer*, the Second Circuit considered the PLO's liability for murder of an American citizen on the high seas. The plaintiffs filed a tort suit against the businesses that arranged their travel and those businesses subsequently impleaded the PLO seeking indemnification or contribution. The PLO argued that the volatile context in which the claim arose rendered it non-justiciable for raising a political question. The Second Circuit applied the *Baker* test and rejected this argument. [124]

The Court reasoned that the plaintiffs did not sue the PLO directly. Instead, the suit was filed against the owner of the Achille Lauro, the charterer of the hijacked vessel, and various other affiliated actors who then impleaded the PLO, seeking indemnification for tortuous interference with their business. The Court held that in light of these facts the suit was an ordinary tort suit for damages that involved the PLO and explained that,

> [T]he fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question . . ..[125]

The Second Circuit found the context, the Arab-Israeli conflict, to be irrelevant in the face of what it described as an "ordinary tort suit." This finding in *Klinghoffer* suggests that where there exist judicially manageable standards to consider a claim, there is no political question significant enough to render it non-justiciable. Notwithstanding its provision of judicially manageable standards, courts have consistently dismissed ATCA claims arising from the Arab-Israeli conflict on political question grounds. I suggest that the Palestinian identity of the defendant in *Klinghoffer* made the claims against them justiciable.

The Second Circuit adjudicated *Klinghoffer* only three years after the first expression of the ATA, which established the PLO as a terrorist organization. The Act was passed two years after the Achille Lauro hijacking and the findings in 22 U.S.C. §5201 suggest that the ATA was part of Congress's response to the hijacking at question in *Klinghoffer*. Section 5201(a)(2) states "the Palestine Liberation Organization. . .was directly responsible for the murder of an American citizen on the Achille Lauro cruise liner in 1985, and a member of the PLO's Executive Committee is under indictment in the United States for the murder of that American citizen."[126]

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124. *See Klinghoffer*, 937 F.2d 44, 50 (2d Cir. 1991).

125. *Id.* at 49.

126. 22 U.S.C. § 5201(a)(2).

The Second Circuit's reasoning in *Klinghoffer* suggests that the case was justiciable because it was an ordinary tort suit with judicially manageable standards. However, the ATA's legislative history makes clear that were it not for the identity of the defendants whom Congress had deemed a foreign terrorist organization, this case may have necessitated more deliberation of the political question doctrine. Instead, the court is able to circumvent a thorough analysis of the political question doctrine because of the Legislative and Executive branch support for this lawsuit against the PLO.[127] In *Klinghoffer,* the political overtones of the Arab-Israeli conflict outside the courtroom, namely the establishment of PLO as a terrorist organization and the categorization of its violent acts as terrorist ones, made the case viable.

2. Tel-Oren: The exception among suits filed against Palestinians for acts of international terrorism

Tel-Oren remains an exception among cases filed against Palestinians for acts of international terrorism. There, the D.C. District Court, for lack of subject matter jurisdiction and for raising a political question, spared Palestinian defendants prosecution. Significantly, neither the ATA nor the Palestinian Anti-Terrorism Act existed at the time of *Tel-Oren's* deliberation.

In *Tel-Oren*, survivors and representatives of those murdered in an 1978 armed attack on a civilian bus in Israel sued the PLO and several other defendants for compensatory and punitive damages pursuant to the ATCA. In concurring statements, the D.C. District Court justices affirmed the dismissal of the case but on different grounds.

In his concurring opinion, Judge Robb concluded, "Federal courts are not in a position to determine the international status of terrorist attacks."[128] He continues to explain that unraveling the web of terrorist networks to establish liability could produce unintended disclosures that would harm sensitive diplomacy. Judge Edwards disagreed, holding that because Congress had enacted a statute that empowered the judiciary to adjudicate violations of customary international law, the case did not

127. *Klinghoffer*, 937 F. 2d at 50 (finding support for suits seeking damages against the PLO as a terrorist organization in the attitudes of both the Executive and Legislative Branch toward terrorists as embodied in a letter from Abraham D. Sofaer, United States Department of State, Office of the Legal Adviser, to Justice Carmen B. Ciparick (Sept. 4, 1986) as well as U.S.C.A. § 2333(a) (1990) (providing a civil remedy in federal court for United States nationals injured by acts of international terrorism)).

128. *Tel-Oren*, 726 F.2d at 824.

implicate the separation of powers.[129] Edwards dismissed the case, not in the name of protecting diplomacy but for lack of subject matter jurisdiction. Notwithstanding the plaintiffs' arguments, he held that terrorism did not constitute a violation of customary international law.

Legislative and Executive action have since rectified the road blocks that impeded *Tel-Oren's* adjudication. By enacting the ATA, Congress and President Bush provided subject matter jurisdiction for acts of international terrorism. Moreover, by codifying Palestinian entities as terrorist ones, they have overcome the hurdles that Judge Robb once declared as harmful to sensitive diplomacy; there is no longer a need to unravel terrorist networks, they exist as such because they have already been declared as much. Significantly, even predating the enactment of the ATA and the Palestinian Anti-Terrorism Act, neither Justice argued that the Arab-Israeli conflict rendered the case non-justiciable for a political question. Still, the *Tel-Oren* decision remains the only suit alleging harm caused by "Palestinian terrorism" to be dismissed for raising a political question.

CONCLUSION

Notwithstanding its noble goal of vindicating individual rights irrespective of looming political interests, the Judiciary is not immune from the interests of the other branches of government. Far from being "blind," the Judiciary has consistently reflected the prerogatives of Congress and the President at the expense of individual rights. The experience of racial minorities in U.S. courtrooms most poignantly reflects this trend. In light of their experience in U.S. federal courts, it would seem that Palestinians are continuing the legacy of politically charged trials.

While cases involving Palestinians and the Arab-Israeli conflict may be afforded the veneer of objectivity, their judicial status is a result of politics outside the courtroom. Such politicization is evidenced by: 1) the disparate outcome of the application of the political question doctrine when applied to the same political context, namely the Arab-Israeli conflict: 2) the vulnerability of the determination of sovereignty to political pressures; and 3) the lack of viable defenses available to Palestinians as a function of legislative and executive endorsement of suits for acts of international terrorism coupled with numerous statutes

129. "Courts merely carry out the existing view of the legislature that federal courts should entertain certain actions that implicate the law of nations." *Id.* at 798.

declaring Palestinian entities as terrorist ones. Examined separately, these outcomes may be plausible; however in their totality, the absolute preclusion of judicial recourse merits inquiry and critique. These several parts demonstrate how the politicization of cases concerning the Arab-Israeli conflict transforms U.S. federal courts into insecure, and effectively hostile, sites for redressing the individual human rights violations of Palestinians.

Israel's unique relationship to successive U.S. governments seemingly makes it immune to judicial rebuke. This is a dire conclusion for Palestinians who suffer damages at the hands of the Israeli Army and lack viable tribunals in which to bring their claims. This stark conclusion makes apparent the need for political advocacy outside of the courtroom. More generally, these findings raise questions about the ability of the judiciary to be blind at all. If the judiciary was never intended to be objective, as its stained history in the U.S. suggests, than what is the greatest judicial recourse that can be expected among less powerful classes? In reference to Palestinians, what is the greatest judicial recourse that can be demanded from a stateless people?

The case of Palestinians in U.S. federal courtrooms may have broader implications for the realization of human rights among those populations lacking a state, power, or both. While I do not explore those implications here, it would seem that a stateless minority population living under military occupation or in a global diaspora, such as the Palestinians, are most dependent upon international legal structures and law for protection. However, as indicated by the Palestinian experience in U.S. federal courtrooms, it is precisely their powerless status that makes the full realization of those protections beyond reach.