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## A Political Embarrassment: Jurisdiction and the Alien Tort Statute, Foreign Sovereign Immunities Act, and Political Question Doctrine

Stewart Pollock

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***A POLITICAL EMBARRASSMENT: JURISDICTION AND THE  
ALIEN TORT STATUTE, FOREIGN SOVEREIGN IMMUNITIES  
ACT, AND POLITICAL QUESTION DOCTRINE***

STEWART POLLOCK\*

TABLE OF CONTENTS

INTRODUCTION .....226

I.MECHANISMS FOR FOREIGN PLAINTIFFS’ REDRESS IN U.S.  
COURTS .....229

    A. *The Alien Tort Statute* .....230

    B. *The Foreign Sovereign Immunities Act*.....234

        1. *Commercial Activity Exception* .....236

        2. *Expropriation Exception*.....238

        3. *State Sponsors of Terrorism Exception* .....239

    C. *The Political Question Doctrine* .....240

II.COURTS ARE INAPPROPRIATELY USING THE POLITICAL  
QUESTION DOCTRINE TO AVOID DECIDING INTERNATIONAL  
HUMAN RIGHTS CASES.....242

    A. *In ATS Cases Against Foreign Sovereigns, Applying  
        the Political Question Doctrine is Improper* .....243

    B. *Even Where the FSIA is NOT Implicated, Applying the  
        Political Question Doctrine is Inappropriate* .....251

CONCLUSION .....261

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## INTRODUCTION

Imagine a scenario where a government has inflicted horrific violence on its own citizens. Imagine that this violence amounts to a crime against humanity, and perhaps even genocide. It shouldn't be hard to imagine such a scenario. Throughout the twentieth century, numerous governments were involved in egregious violations of human rights, often committed against their own citizens.<sup>1</sup> Is there—and should there be—legal recourse in U.S. courts for the victims of such violence?

The Alien Tort Statute (ATS)<sup>2</sup> establishes federal jurisdiction over extraterritorial violations of international law,<sup>3</sup> enabling victims of torture, genocide, crimes against humanity, and war crimes to bring civil suits in U.S. federal courts.<sup>4</sup> Though the statute, by its terms, applies broadly to torts in violation of international law, courts exercise “judicial caution”<sup>5</sup> in determining whether a cause of action is cognizable under the ATS. The Supreme Court's recent proclamation that an otherwise valid cause of action under the ATS is subject to the presumption against extraterritoriality has further limited access to U.S. courts for victims of international human rights violations.<sup>6</sup>

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1. See U.N. Secretary-General, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780*, ¶¶ 151–305, U.N. Doc. S/1994/674 (May 27, 1994).

2. 28 U.S.C. § 1350 (2006). The ATS is also referred to as the Alien Tort Claims Act. AM. LAW SOC'Y OF INT'L LAW, BENCHBOOK ON INTERNATIONAL LAW III.E-2 (Diane Marie Amann ed., 2014) [hereinafter BENCHBOOK], available at [http://www.asil.org/sites/default/files/benchbook/ASIL\\_Benchbook\\_Complete.pdf](http://www.asil.org/sites/default/files/benchbook/ASIL_Benchbook_Complete.pdf); see also, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (referring to the ATS as the “Alien Tort Claims Act”).

3. 28 U.S.C. § 1350 (2006). The Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, codified at note following 28 U.S.C. § 1350 (2006), is another significant tool for litigating violations of human rights in U.S. courts, although it cannot be used as the cause of action against a state. See *Mohamed v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).

4. BENCHBOOK, *supra* note 2, at III.E-7–8.

5. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

6. See discussion of *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013), *infra* Part I.A.

Where the plaintiff alleges a tort in violation of international law recognized by the ATS against a foreign state, the plaintiff must also establish an exception to the Foreign Sovereign Immunities Act (FSIA),<sup>7</sup> which generally provides immunity to foreign sovereigns.<sup>8</sup> Thus, although the ATS gives the U.S. courts jurisdiction over cases involving international human rights violations, the FSIA is often a substantial barrier for victims seeking to obtain civil remedies in the U.S.<sup>9</sup>

Even where the requirements of the ATS are met and an exception to the FSIA is found, a court may decline to hear a case it deems a nonjusticiable political question.<sup>10</sup> The political question doctrine is rooted in the principles of separation of powers and judicial restraint,<sup>11</sup> and its basic premise is that courts should not hear cases that would prevent the political branches, i.e. the legislative and executive branches, from fulfilling their duties.<sup>12</sup> The doctrine arises when the judiciary and the political branches have overlapping responsibilities, such as when judicial review implicates foreign affairs, as is often the case when a victim of human rights violations seeks redress against a foreign nation in U.S. courts.<sup>13</sup>

This article argues that U.S. courts are inappropriately applying the political question doctrine to dismiss international human rights cases. The severity of the wrongs speaks to the need for justice. Human rights violations occur every day in countries around the world.<sup>14</sup> These violations are committed by individuals, groups, and states, and create an uncountable number of victims.<sup>15</sup> The political

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7. 28 U.S.C. §§ 1391(f), 1441(d), 1602–1611 (2006).

8. *Id.* § 1604; BENCHBOOK, *supra* note 2, at III.E-12.

9. *See infra* Part I.B.

10. *See infra* Part I.C.

11. Eric Gruzen, Comment, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?*, 14 TRANSNAT'L LAW. 207, 226 (2001).

12. *See Baker v. Carr*, 369 U.S. 186, 210–11 (1962).

13. *See, e.g.*, cases cited *infra* Part II.

14. *Human Rights Issues*, AMNESTY INT'L USA, <http://www.amnestyusa.org/our-work/issues> (last visited May 25, 2015).

15. *See, e.g.*, U.N. Secretary-General, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780*, ¶¶ 310–314, 319, U.N. Doc. S/1994/674 (May 27, 1994) (discussing extent of harms

branches have given these victims the right to seek legal recourse in U.S. courts through the ATS and the FSIA exceptions.<sup>16</sup> U.S. courts, however, have declined to hear cases involving egregious wrongs cognizable under the ATS—such as crimes against humanity, war crimes, and genocide—because adjudication might impede on politically sensitive issues.<sup>17</sup> The judiciary’s excessive deference to the executive branch on issues properly before the court results in uneven application of the law, is contrary to the purpose of the ATS and FSIA, and deprives victims of human rights violations of redress in U.S. courts.

Part II.A of this article argues that in ATS cases against foreign sovereigns, any application of the political question doctrine is improper.<sup>18</sup> Where an ATS case is filed against a foreign sovereign, the plaintiff must show that an FSIA exception to immunity applies.<sup>19</sup> Because the legislative process for the enactment of the ATS and FSIA involved an intentional delegation of certain international issues to the courts,<sup>20</sup> cases that fall within the bounds of those statutes

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caused by human rights violations, including crimes against humanity and genocide).

16. See 28 U.S.C. §§ 1350, 1605–1605a (2006).

17. Gwynne Skinner, Comment, *The Nonjusticiability of Palestine: Human Rights Litigation and the (Mis)Application of the Political Question Doctrine*, 35 HASTINGS INT’L & COMP. L. REV. 99, 102 (2012).

18. Courts may use the political question doctrine to dismiss cases before hearing them on their merits in order to promote judicial economy. See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007). However, this article argues that it is doctrinally improper to use the political question doctrine to dismiss FSIA and ATS cases before hearing them on their merits, because such dismissal would misapply the separation of powers doctrine. See discussion *infra* Part.II.A.

19. 28 U.S.C. §§ 1391(f), 1441(d), 1602–1611 (2006).

20. See H.R. REP. NO. 94-1487, at 7 (1976), available at <http://heinonline.org/HOL/Page?handle=hein.leghis/fsiv0001&id=1&collection=leghis&index=leghis/fsiv#113> (explaining that a “principal purpose” of the FSIA was to transfer sovereign immunity determinations from the executive branch to the judicial branch); S. REP. NO. 94-1310, at 12 (1976), available at <http://heinonline.org/HOL/Page?handle=hein.leghis/fsiv0001&id=1&collection=leghis&index=leghis/fsiv#176> (explaining that federal district courts’ subject matter jurisdiction extended “to any claim with respect to which the foreign state is not entitled to immunity” under the FSIA) (emphasis added)). Because the ATS was enacted as part of the Judiciary Act of 1789 rather than as an independent act,

should be considered *prima facie* justiciable. In other words, the FSIA exceptions represent the political branches' determination that, in certain instances, the adjudication of an ATS claim against a foreign sovereign is proper. Thus, where a plaintiff has properly pleaded an ATS claim and an exception to the FSIA, engaging in a political question doctrine analysis is duplicative, and the claim should not be dismissed based on separation of powers concerns.

Part II.B argues that even in ATS cases that do not implicate the FSIA, the application of the political question doctrine is problematic because courts apply it inconsistently to avoid hearing cases involving international human rights violations. Although a political question doctrine analysis is not necessarily duplicative in these cases—and thus seems more appropriate, this doctrine should not be utilized as a means to grant excessive deference to the executive branch. By inappropriately dismissing claims in this context, courts have increasingly deprived foreign plaintiffs of redress in U.S. courts for international wrongs perpetrated by—or even merely implicating—the U.S. or its political allies.

## I. MECHANISMS FOR FOREIGN PLAINTIFFS' REDRESS IN U.S. COURTS

To understand the problem addressed in this article, an overview of the ATS, the FSIA, and the political question doctrine is necessary. As mentioned, the ATS gives the U.S. courts subject matter jurisdiction over torts involving violations of international law.<sup>21</sup> Where the defendant is a foreign sovereign, the FSIA is invoked as a defense, and the plaintiff must establish that an exception applies.<sup>22</sup> The political question doctrine reflects concerns of judicial restraint

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legislative documents suggesting Congress' intent in codifying the statute do not exist. JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL32118, *THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS* 2 (2003). Notably, however, some theorize the ATS was intended to bestow American courts with "universal jurisdiction" to specifically address "crimes that are so egregious as to be the object of universal concern, regardless of the situs of the offense and the nationalities of the offenders or victims." *Id.* at 10.

21. 28 U.S.C. § 1350 (2006).

22. *See, e.g.*, *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982). *See also* 28 U.S.C. §§ 1391(f), 1441(d), 1602–1611 (2006) (articulating exceptions).

and separation of powers<sup>23</sup> that this article argues need not be considered in ATS cases implicating the FSIA, and it is increasingly inappropriately invoked to dismiss cognizable ATS claims.

### A. *The Alien Tort Statute*

The full text of the 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.”<sup>24</sup> This language enables U.S. courts to adjudicate cases arising out of violations of the law of nations.<sup>25</sup> Despite the apparent breadth of the ATS, it was invoked infrequently as a basis for jurisdiction for almost two centuries after its enactment.<sup>26</sup>

*Filartiga v. Peña-Irala* was the first modern case to invoke the ATS as the basis for human rights litigation.<sup>27</sup> There, the plaintiff alleged that the defendant, a Paraguayan police officer, had tortured her brother on behalf of the government.<sup>28</sup> She argued that the claim fell within the purview of the ATS because the defendant’s conduct violated international law.<sup>29</sup> Thus, one of the central issues in *Filartiga* was whether the ATS applied to all violations of international law or only those recognized at the time the ATS was enacted.<sup>30</sup>

In 1789, the only recognized violations of international law were piracy, violations of safe conduct, and infringements on the rights of ambassadors.<sup>31</sup> By 1980, however, international law had developed significantly and, largely in response to World War II, had expanded

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23. Gruzen, *supra* note 11, at 226.

24. 28 U.S.C. § 1350 (2006).

25. The term “international law” is used to refer to what was then known as the “law of nations.” See BENCHBOOK, *supra* note 2, at III.E-5; see also *Filartiga v. Peña-Irala*, 630 F.2d 876, 877 (2d Cir. 1980) (recognizing the nation’s observation of “norms of international law, formerly known as the law of nations”).

26. *Filartiga*, 630 F.2d at 887.

27. See generally *Filartiga*, 630 F.2d 876.

28. *Id.* at 878.

29. *Id.* at 879.

30. *Id.* at 880–84.

31. *Id.* at 880; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

to include many new prohibitions.<sup>32</sup> The plaintiff in *Filartiga* relied on a violation of the *jus cogens* norm against torture, a violation that did not exist in 1789.<sup>33</sup> Finding that torture was cognizable under the ATS, the court held that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”<sup>34</sup>

In the first U.S. Supreme Court case directly addressing the scope of the ATS, *Sosa v. Alvarez-Machain*, the Court set forth a framework for determining whether a tort claim based on violations of international law is cognizable under the ATS.<sup>35</sup> In *Sosa*, a Mexican drug cartel kidnapped and executed a U.S. Drug Enforcement Administration special agent.<sup>36</sup> Following an investigation into the death of the agent, the U.S. discovered that a Mexican doctor, Humberto Alvarez-Machain, had revived the agent in order to continue torturing him.<sup>37</sup> As a result, the U.S. hired a group of bounty-hunter Mexican nationals to bring Alvarez-Machain to the U.S. to stand trial.<sup>38</sup>

The Court held that claims under the ATS must “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 . . . .”<sup>39</sup> Justice Breyer also reiterated the Court’s position that “to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy.”<sup>40</sup> Thus, under *Sosa*, the ATS provides a cause of action for any violation of international law that is as specifically defined as those recognized in 1789.<sup>41</sup> In light of that

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32. *Filartiga*, 630 F.2d at 880–84.

33. *See id.* at 882.

34. *Id.* at 881.

35. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

36. *Id.* at 697, 702.

37. *Id.* at 697; BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 18 (2d ed. 2008).

38. *See Sosa*, 542 U.S. at 698.

39. *Id.* at 725.

40. *Id.* at 760 (Breyer, J., concurring).

41. *See id.* at 725; *id.* at 760 (Breyer, J., concurring).



rule, because the twenty-four hour unauthorized detention was not a sufficiently universally recognized violation of international law in 2004, the Court rejected Alvarez-Machain's claim.<sup>42</sup>

In the only other U.S. Supreme Court decision on the scope of the ATS, *Kiobel v. Royal Dutch Petroleum*, the Court held that the presumption against extraterritoriality applies to ATS claims.<sup>43</sup> In *Kiobel*, Nigerian citizens claimed that Dutch, British, and Nigerian oil companies had aided and abetted the Nigerian Government in violently suppressing peaceful demonstrations opposing oil development.<sup>44</sup> The plaintiffs claimed that defendants' acts included crimes against humanity; torture; cruel, inhumane, and degrading treatment; unlawful killing; forced exile; destruction of property; and violations of the rights to life, liberty, and security.<sup>45</sup>

The Court of Appeals originally affirmed dismissal of plaintiffs' claims on the grounds that no norm imposed liability on corporations for violations of the law of nations.<sup>46</sup> The appellate court reasoned that, because corporate personhood was neither readily discernible nor universally recognized, there was no "specific, universal, and obligatory"<sup>47</sup> norm imposing liability on corporations for violations of customary international law.<sup>48</sup>

The Supreme Court affirmed, holding that the presumption against extraterritoriality warranted dismissal, and avoided ruling on the issue of corporate liability.<sup>49</sup> The presumption against extraterritoriality is the principle that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>50</sup> Courts apply this presumption when a statute does not explicitly address the question of

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42. *Id.* at 733–34, 738.

43. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1661–62 (2013).

44. *Id.* at 1662.

45. *Id.* at 1663.

46. *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 145 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

47. *Id.* at 120 (quoting *Sosa*, 542 U.S. at 732).

48. *Id.* at 127–28.

49. *Kiobel*, 133 S. Ct. at 1669.

50. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 248 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted)).

extraterritoriality.<sup>51</sup> Because there was no such express statement in the single sentence that constitutes the complete text of the ATS, the Court applied the presumption against extraterritoriality and, finding no basis on which to rebut it, declined to extend the ATS to wholly extraterritorial conduct.<sup>52</sup> Accordingly, the Court held that claims pursued under the ATS must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial[ity].”<sup>53</sup>

After *Kiobel*, plaintiffs may bring an ATS case based on sufficiently defined violations of international law so long as the alleged conduct sufficiently touches and concerns U.S. territory.<sup>54</sup> Thus, any *jus cogens* violation,<sup>55</sup> such as war crimes, crimes against humanity, torture, and racial discrimination, could be the basis for a plaintiff’s claim so long as there is a sufficient nexus with the U.S. to satisfy the “touch and concern” standard.

The presumption against extraterritoriality has not meant an end to ATS suits. Since the *Kiobel* decision, courts have applied the “touch and concern” standard with varying, and even inconsistent, outcomes.<sup>56</sup> Because the “touch and concern” test is vague, and the U.S. Supreme Court’s decision in *Kiobel* does not give much guidance

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51. BENCHBOOK, *supra* note 2, at II.A-12–13.

52. *Kiobel*, 133 S. Ct. at 1669.

53. *Id.*

54. *Id.* (citing *Morrison*, 561 U.S. 247).

55. That is, a violation of “‘a norm accepted and recognized by the international community of States as a whole . . . .’” *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331).

56. *Compare Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 315–24 (D. Mass. 2013) (finding jurisdiction under ATS over a U.S. corporation that allegedly aided and abetted human rights violations), *and Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (finding jurisdiction under ATS over foreign defendants involved with bombing outside U.S. embassy in Kenya), *with Kaplan v. Cent. Bank of Islamic Rep. of Iran*, 961 F. Supp. 2d 185, 205 (D.D.C. 2013) (declining to find jurisdiction under the ATS for an attack that affected some Americans, but was planned and executed completely on foreign soil, did not “touch and concern” the United States), *and Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013) (declining to apply the “touch and concern” analysis, because all relevant conduct occurred abroad).

to lower courts,<sup>57</sup> it will probably be some time before the meaning of this requirement becomes clear.<sup>58</sup>

### B. *The Foreign Sovereign Immunities Act*

Sovereign immunity originates in the notion that the “king can do no wrong.”<sup>59</sup> The most well-known, early case to discuss sovereign immunity was *Schooner Exchange v. McFaddon*.<sup>60</sup> That decision created a case-by-case standard for the adjudication of issues of sovereign immunity.<sup>61</sup> Under this approach, courts would defer to the executive branch on whether to grant sovereign immunity.<sup>62</sup>

In 1952, the State Department issued a letter establishing its general position on foreign sovereign immunity, known as the Tate Letter, which provided the basis for judicial application of foreign sovereign immunity.<sup>63</sup> During this time, the immunity granted to foreign sovereigns was limited to acts by the sovereign that were the type exclusively reserved to sovereigns, as distinguished from suits brought against a sovereign acting in a private, commercial capacity.<sup>64</sup> Thus, until the FSIA was passed in 1972, sovereign immunity was determined primarily by the executive branch.<sup>65</sup>

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57. Indeed, the various concurring opinions in *Kiobel* further muddy the water. In addition, the Court left open the issue of corporate liability. See *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 458–61 (S.D.N.Y. 2014) (discussing *Kiobel*’s impact on corporations and applying the “touch and concern” test to a corporate defendant).

58. Predicting how narrow or broad the next U.S. Supreme Court decision on “touch and concern” will be and analyzing the different circuits’ interpretations are beyond the scope of this article, but will be key for plaintiffs trying to assert jurisdiction under the ATS. Given the lack of legal context of this phrase, one reasonable way that the Court could interpret the phrase would be to consider it a “nexus” requirement, such as that used in applying the FSIA. See *infra* Part I.B.1.

59. Gruzen, *supra* note 11, at 227 (citations omitted).

60. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

61. Y. David Huang, Note, “*Direct Effect in the United States*” Under the Foreign Sovereign Immunities Act After *Cruise Connections v. Attorney General of Canada*, 3 GEO. MASON J. INT’L COM. L. 179, 182 (2011).

62. BENCHBOOK, *supra* note 2, at II.B-2.

63. Carolyn J. Brock, Note, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT’L L. 795, 800–01 (1990).

64. See Gruzen, *supra* note 11, at 240.

65. See Brock, *supra* note 63, at 802–03.

In 1972, at the behest of the Secretary of State and the Attorney General,<sup>66</sup> the decision about whether to extend sovereign immunity was taken out of the hands of the Executive and entrusted to the judiciary.<sup>67</sup> Congress enacted the FSIA, which provided a statutory basis and firm standards for determining sovereign immunity,<sup>68</sup> thus removing the need for a case-by-case analysis by the Executive. Moreover, the FSIA was a proclamation by the political branches that courts had the authority and duty to decide whether sovereigns were entitled to immunity, regardless of the inherent and possibly negative effect on foreign affairs.<sup>69</sup>

Under the FSIA, foreign sovereigns, as well as their political subdivisions, agencies, and instrumentalities, are presumed immune from civil liability in U.S. courts.<sup>70</sup> Although the FSIA does not bar a cause of action, it limits the jurisdiction of U.S. courts to hear claims against foreign states.<sup>71</sup> However, the FSIA lists several exceptions, where the sovereign is not afforded immunity.<sup>72</sup> Indeed, Congress

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66. *Id.* at 800, 802–03; *see also* Letter from Richard J. Kleindienst, Attorney Gen., & William P. Rodgers, Sec’y of State, to Spiro Agnew, President of the Senate, & Carl Albert, Speaker of the House, (Jan. 22, 1973), *reprinted in* 12 I.L.M. 118, 120 (1973) [hereinafter Kleindienst Letter].

67. Brock, *supra* note 63, at 802–03.; *see also* Rep. of Austria v. Altmann, 541 U.S. 677, 699 (2004) (noting that one principal purpose of the FSIA was “eliminating political participation in the resolution of such claims.”).

68. *See* 28 U.S.C. §§ 1391(f), 1441(d), 1602–1611 (2006).

69. *See* Verlinden V.B. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (“In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to ‘[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.’”) (quoting H.R. Rep. No. 94-1487, at 7 (1976)).

70. *See* 28 U.S.C. § 1604 (2006); *Altmann*, 541 U.S. at 691. The FSIA does not apply to individual government officials. *See* Samantar v. Yousuf, 560 U.S. 305, 310 (2010) (citation omitted).

71. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026–27 (9th Cir. 2010).

72. 28 U.S.C. § 1605 lists the exceptions to immunity: waiver, commercial activity, expropriation, immovable property, money damages related to the death or injury of an individual in the U.S. caused by a foreign sovereign, enforcement of arbitration agreements, terrorism, and commercial maritime liens. 28 U.S.C. § 1605 (2006).

intended for the FSIA to be the sole basis for obtaining jurisdiction over a foreign state in our courts.<sup>73</sup>

### 1. *Commercial Activity Exception*

The Commercial Activity Exception states:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.<sup>74</sup>

Courts have defined the sometimes blurred distinction between commercial and sovereign acts of states by requiring that the exception requires that: (1) the conduct was commercial;<sup>75</sup> (2) the commercial conduct had a direct effect in the U.S.;<sup>76</sup> and (3) there was a nexus between the commercial conduct and the harmful effect in the U.S.<sup>77</sup>

To determine whether conduct should be considered commercial, courts typically apply the “private person” standard created by the Second Circuit Court of Appeals in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*.<sup>78</sup> That case involved a contract dispute between the Federal Republic of Nigeria and several private sellers of cement.<sup>79</sup> The Second Circuit looked to the legislative history of the Commercial Activity Exception, and found that Congress deliberately “left the meaning open and . . . ‘put (its) faith in the U.S. courts to work out progressively, on a case-by-case basis the distinction

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73. *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

74. 28 U.S.C. § 1605(a)(2) (2012).

75. *Tex. Trading & Milling Corp. v. Fed. Rep. of Nigeria*, 647 F.2d 300, 307–08 (2d Cir. 1981).

76. *Rep. of Arg. v. Weltover*, 504 U.S. 607, 609, 611–12 (1992).

77. *Saudi Arabia v. Nelson*, 507 U.S. 349, 370 (1992).

78. *Tex. Trading & Milling Corp.*, 647 F.2d at 309.

79. *Id.* at 304–05.

between commercial and governmental.”<sup>80</sup> The court alternately defined commercial activity as “one in which a private person could engage.”<sup>81</sup>

In *Republic of Argentina v. Weltover*, the Supreme Court adopted the “private party” test and clarified the standard for determining whether conduct has a “direct effect” within the U.S.<sup>82</sup> The Supreme Court defined commercial activity as “the *type* of actions by which a private party engages in . . . commerce.”<sup>83</sup> In *Weltover*, the issue before the Court was whether Argentina was subject to suit under the FSIA for a breach of contract claim arising out of its default on certain bonds.<sup>84</sup> Argentina had issued the bonds as part of a plan to stabilize its currency—a purpose that was clearly in the nature of sovereign activity; however, the conduct fell within the Commercial Activity Exception because private parties commonly issue debt instruments similar to these bonds.<sup>85</sup> The Court continued on to state that although the “direct effects” test cannot be satisfied by trivial conduct, the commercial conduct does not need to be substantial or foreseeable.<sup>86</sup> Because New York was the place of performance for the contract and Argentina had begun repayment, the Court held that Argentina’s conduct had a direct effect within the U.S.: “Money that was supposed to have been delivered to a New York bank was not forthcoming.”<sup>87</sup>

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80. *Id.* at 309 (quoting 1976 Hearings at 53 (testimony of Monroe Leigh). *Accord*, House Report at 6615; Hearings on H.R. 3493 Before Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary, 93d Cong., 1st Sess. 16 (1973) (“1973 Hearings”) (testimony of Charles N. Brower, Legal Adviser, Department of State).

81. *Tex. Trading & Milling Corp.*, 647 F. 2d at 309 (citing Hearings at 24 (testimony of Monroe Leigh), 53 (same); 1973 Hearings at 15 (testimony of Charles N. Brower)).

82. *Rep. of Arg. v. Weltover*, 504 U.S. 607, 611–12 (1992).

83. *Id.* at 614 (internal quotation marks omitted) (citing BLACK’S LAW DICTIONARY 270 (6th ed. 1990)).

84. *Id.* at 609.

85. *Id.* at 615–16.

86. *Id.* at 618.

87. *Id.* at 619; *see also* *Ampac Grp., Inc. v. Rep. of Honduras*, 797 F. Supp. 973, 977 (S.D. Fla. 1992) (confirming that “an effect is ‘direct’ if it follows as an immediate consequence of the defendant’s activity” (quoting *Rep. of Arg. v. Weltover*, 504 U.S. 607, 618 (1992))); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994) (holding that the Commercial Activity

In *Saudi Arabia v. Nelson*, the Supreme Court held that the Commercial Activity Exception required a nexus between the commercial activity that was the basis for the invocation of the exception and the directly harmful effect within the U.S.<sup>88</sup> In *Nelson*, an American employee of a hospital in Saudi Arabia was detained and tortured by the Saudi Arabian Government.<sup>89</sup> The U.S. Supreme Court dismissed the case based on lack of jurisdiction because the case did not fall within the Commercial Activity Exception.<sup>90</sup> The plaintiff argued that agents of the hospital recruited him and that, therefore, the direct effect was felt within the United States.<sup>91</sup> However, the Court found this direct effect insufficient to establish subject matter jurisdiction, because the alleged commercial activity, “purchasing supplies and equipment for the hospital, had no nexus with the personal injuries alleged in the complaint.”<sup>92</sup> Thus, there must be some nexus between the two elements—the injury and the commercial activity—before a U.S. court will hear an ATS case against a foreign sovereign under this exception.<sup>93</sup>

## 2. *Expropriation Exception*

The Expropriation Exception applies to substantial and non-frivolous claims against a foreign state for taking property in violation of international law.<sup>94</sup> A taking contravenes international law if (1) it does not serve a public purpose; (2) it discriminates against or singles out aliens for regulation by a state; or (3) the foreign government does not pay just compensation.<sup>95</sup> The exception normally applies where the plaintiff is not a citizen of the defendant country at the time of the

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Exception “withdraws immunity in cases involving essentially private commercial activities of foreign sovereigns that have an impact within the United States”) (citations omitted).

88. *Saudi Arabia v. Nelson*, 507 U.S. 349, 354–55 (1992).

89. *Id.* at 352–53.

90. *Id.* at 351.

91. *Id.* at 354–55.

92. *Id.* at 354–55 (internal citation omitted).

93. *See generally Nelson*, 507 U.S. 349.

94. 28 U.S.C. § 1605(a)(3) (2012).

95. *Altmann v. Rep. of Austria*, 317 F.3d 954, 968 (9th Cir. 2002).

taking.<sup>96</sup> As will be discussed in detail in Part II.A., this exception applied, and thus the FSIA did not bar the action, in the recent case of *Davoyan v. Republic of Turkey*, where plaintiffs alleged the Ottoman Empire stripped ethnic Armenians of their property in violation of international law.<sup>97</sup>

### 3. *State Sponsors of Terrorism Exception*

In 1996, the political branches of the U.S. government amended the FSIA to add an additional tool for courts to hold foreign sovereigns accountable for violations of international law.<sup>98</sup> The State Sponsors of Terrorism Exception enables U.S. citizens to bring personal injury claims against foreign sovereigns in cases involving “torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act . . . by an official, employee, or agent” of a foreign state, in the course and scope of office.<sup>99</sup> The exception was developed in response to the hi-jacking of Pan Am Flight 103 over Lockerbie, Scotland.<sup>100</sup> During that hi-jacking, Libyan terrorists detonated a bomb that killed 259 passengers and crew, destroyed the plane, and rained wreckage onto the village of Lockerbie, killing eleven civilians.<sup>101</sup> After an investigation, U.S. authorities concluded the terrorists were acting on behalf of the Libyan government.<sup>102</sup> The State Sponsors of Terrorism Exception was thereafter enacted to provide U.S. victims a mechanism to obtain civil damages against the Libyan government.<sup>103</sup>

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96. *Siderman de Blake v. Rep. of Arg.*, 965 F.2d, 699, 711 (quoting *Chuidian v. Philippine Nat’l Bank*, 912 F.3d 1095, 1105 (9th Cir. 1990)).

97. *See infra* Part II.A.

98. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214 (codified at 28 U.S.C. § 1605(a)(7), *amended by* Nat’l Defense Auth. Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3 (current version codified at 28 U.S.C. § 1605A (2012))).

99. 28 U.S.C. 1605A(a)(1) (2012).

100. STEPHENS ET AL., *supra* note 37, at 94–96.

101. *Id.*

102. *Id.*

103. *See generally* 28 U.S.C. § 1605A(a)(2)(a) (2012) (discussing plaintiffs recourse under the exception). Because the act occurred over Scotland—a foreign state—the U.S. plaintiffs were required to offer Libya an opportunity to arbitrate the claim. *See id.* § 1605A(a)(2)(A)(II)(iii).



Unlike the Commercial Activity Exception, the state sponsorship exception requires the direct involvement of the executive branch; the U.S. State Department must designate a state as a state sponsor of terrorism for a plaintiff to invoke this exception.<sup>104</sup> Accordingly, jurisdiction over claims arising under this exception will exist where “the foreign state was designated as a state sponsor of terrorism at the time [of the terrorist act] . . . or was so designated as a result of such act . . . .”<sup>105</sup> At present, Iran, Sudan, and Syria are the only states designated as state sponsors of terrorism.<sup>106</sup>

Importantly, the exception’s requirement of executive designation indicates that the power to adjudicate terrorism cases was *not* delegated exclusively to the judiciary. Rather, the exception makes explicit that the Executive must make an initial policy decision by way of a state sponsorship designation.<sup>107</sup> Yet, the text of the statutory exception reflects that the legislative branch acknowledges and is responsive to the needs of the judiciary effectively to adjudicate violations of international law; the judiciary should, therefore, not infer the requirement of an initial policy determination unless it has been specifically imposed by the legislature.

### C. *The Political Question Doctrine*

The political question doctrine is a judicially created doctrine rooted in principles of separation of powers and judicial restraint.<sup>108</sup> Where ruling on an issue would require a political determination, the judiciary may invoke this doctrine to avoid ruling where it is more appropriate under the circumstances to defer to the political branches.<sup>109</sup> Importantly, however, the separation of powers works in

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104. *Id.* § 1605A(a)(2)(a).

105. *Id.*

106. *State Sponsors of Terrorism*, U.S. DEPT. OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited May 29, 2015). Iraq was removed from the list in 2004, Libya in 2006, and North Korea in 2008; Cuba was removed from the list in May 2015. *See generally id.*

107. *Id.* § 1605A(a)(2)(a). In this regard, the State Sponsors of Terrorism Exception is distinct from the Commercial Activity and Expropriations Exceptions, which do not require any “direct action” by the Executive in order for the courts to determine immunity.

108. *Baker v. Carr*, 369 U.S. 186, 210 (1962)

109. *Id.* at 213–14.

both directions: “If courts are unfit to conduct foreign policy, so too are foreign policy experts unfit to vindicate individual rights.”<sup>110</sup> Where individual rights are interlinked with foreign affairs, a balancing of the overlapping responsibilities of each branch is required to determine whether the issue is justiciable.<sup>111</sup>

This doctrine of justiciability traces back to *Marbury v. Madison*, although “its modern formulation comes from *Baker v. Carr*.”<sup>112</sup> In *Marbury*, the Supreme Court distinguished political questions from questions of individual rights, holding that only the latter were justiciable.<sup>113</sup> “The distinction is intuitively sound—no one would doubt that courts are expert at remedying individual wrongs, and it is scarcely more controversial to point out that judicial review makes the judiciary a natural agent to protect constitutional guarantees against the tyranny of the majority.”<sup>114</sup> As noted, however, the modern preeminent case on the political question doctrine is *Baker v. Carr*.<sup>115</sup> In *Baker*, the Supreme Court articulated six independent tests to determine whether an issue is a nonjusticiable political question, listing them in descending order of importance and certainty.<sup>116</sup>

Under *Baker*, a court should defer to the political branches on an issue when there is found:

[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

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110. Developments in the Law—Access to Courts, *The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1193, 1200 (2009) [hereinafter HARV. Note].

111. See *id.* at 1201–04.

112. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Thomas R. Sutcliffe, Note, “*The Nile Reconstituted*”: *Executive Statements, International Human Rights Litigation, and the Political Question Doctrine*, 89 B.U. L. REV. 295, 300 (2009).

113. *Marbury*, 5 U.S. at 177.

114. HARV. Note, *supra* note 110, at 1200.

115. *Baker v. Carr*, 369 U.S. 186, 217 (1962); Sutcliffe, *supra* note 112, at 300–01.

116. *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004). See also *Baker*, 369 U.S. at 217 (enumerating the six tests for justiciability).

a court's undertaking independent resolution without expressing lack of the respect due 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.<sup>117</sup>

The first three parts of the *Baker* test concern the separation of powers; the last three concern issues of respect.<sup>118</sup> Dismissal on the basis of the political question doctrine is appropriate only if one of these formulations is “inextricable” from the case.<sup>119</sup>

## II. COURTS ARE INAPPROPRIATELY USING THE POLITICAL QUESTION DOCTRINE TO AVOID DECIDING INTERNATIONAL HUMAN RIGHTS CASES

Where individual rights are interlinked with foreign affairs, as is the case with ATS claims, courts should balance the overlapping responsibilities of each branch of government to determine whether an issue is justiciable. At present, however, courts have unnecessarily complicated and confused the analysis of ATS claims by squarely addressing the political question doctrine. In ATS cases where the defendant is a sovereign state, thus implicating the FSIA, courts should *not* apply the political question doctrine, because the policy considerations underlying that doctrine are sufficiently addressed as part of the FSIA analysis. Where the FSIA is *not* implicated, judicial deference to the executive branch through the application of the political question doctrine should be minimized. Doing so would ensure that victims of human rights violations' ability to bring suit in U.S. courts is determined based on legal standards rather than on the executive branch's desire to prevent adjudication of suits for political reasons.

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117. *Baker*, 369 U.S. at 217.

118. *See* *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

119. *Baker*, 369 U.S. at 217; *Vieth*, 541 U.S. at 278.

*A. In ATS Cases Against Foreign Sovereigns, Applying the Political Question Doctrine is Improper*

Narrowly construing the FSIA and ATS, combined with liberally construing the political question doctrine, improperly allows the executive branch to exert excessive control over ATS cases, and precludes victims of horrific, unlawful, state-sanctioned violence from obtaining justice. Although the normative argument that applying the political question doctrine to human rights cases brought under the ATS creates a barrier to justice for victims is obvious,<sup>120</sup> the doctrinal arguments are perhaps more compelling. One primary purpose of the FSIA was to “eliminate[e] political participation in the resolution of such claims.”<sup>121</sup> Therefore, courts should not defer to the executive branch by dismissing an FSIA case as a nonjusticiable political question. Indeed, the separation of powers is not a one-way street.<sup>122</sup>

Courts should apply the clear standards articulated in the FSIA rather than defer to the Executive on a case-by-case basis. Excessive deference to the executive branch on issues properly before the court necessarily results in uneven application of the law, and is contrary to the legislative purposes of the ATS and the FSIA. Indeed, applying the political question doctrine in ATS cases against foreign sovereigns improperly allows for variances in judicial deference to the Executive resulting from political prejudices for or against the particularly involved nation.<sup>123</sup> In addition, applying the political question doctrine to dismiss ATS claims does not comport with the purpose of the doctrine. The policy justifications for the political question doctrine already overlap with those of the FSIA; thus, those policy considerations are sufficiently addressed as part of the FSIA analysis, and judicial imposition of an additional political question doctrine analysis is duplicative. In other words, whether the judiciary may appropriately review a challenged sovereign state act is precisely the

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120. Due to disparities in power, victims of egregious violations of international law already face uphill battles in bringing suit against their governments; indeed, evidence is likely in the hands of the state, and some suits are brought decades after the violations actually occurred. *See* Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003).

121. *Rep. of Austria v. Altmann*, 541 U.S. 677, 699 (2004).

122. *See Skinner*, *supra* note 17, at 102; HARV. Note, *supra* note 110, at 1200.

123. *See Skinner*, *supra* note 17, at 100.

question the exceptions to the FSIA's implementation of the restrictive theory of sovereign immunity are intended to address. That implementation, too, is pursuant to standards articulated by the political branches. Accordingly, the need for a political question doctrine analysis is obviated by FSIA's own terms.

In *Davoyan v. Republic of Turkey*, the District Court for the Central District of California engaged in this inappropriate duplicative analysis in deciding "whether it had jurisdiction under the FSIA and, if so, whether other concerns warrant dismissal."<sup>124</sup> Plaintiffs asserted claims under the ATS against the Republic of Turkey, or its predecessor government under the Ottoman Empire, which moved for dismissal for lack of subject matter jurisdiction under the FSIA.<sup>125</sup> The court found that the FSIA did *not* bar the action, because the Expropriation Exception applied where the *pleadings* present a cognizable claim that the defendants had taken property in violation of international law.<sup>126</sup> However, the district court dismissed the case, holding that it could not adjudicate the matter because the alleged violation of international law—genocide—was too political a determination.<sup>127</sup> The district court believed that adjudication would "involve judicial interference in foreign affairs," and that it "[could not] resolve such an inherently political question that our Constitution

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124. *Davoyan v. Turkey*, No. CV 10-05636 DMG-SS, slip op. at 1 (C.D. Cal. March 26, 2013), *appeal docketed*, No. 13-55742 (9th Cir. May 2, 2013).

125. *Id.* at 2, 8. While it was, in fact, the bank defendants who moved for dismissal under the FSIA, they were treated by the court as instrumentalities of the Republic of Turkey, and presumed immune. *Id.* at 9. Thus, the discussion *infra* refers to defendants as the Republic of Turkey.

126. *Id.* at 15, 18, 21–22. In determining whether it had jurisdiction under the Expropriation Exception, the court had to determine whether Plaintiffs' property was taken in violation for international law. *Id.* at 15. However, "[f]or a jurisdictional challenge to the pleadings under the FSIA, the Court need not decide whether the taking *actually* violated international law; as long as a claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of . . . jurisdiction." *Id.* (internal quotation marks omitted).

127. *Id.* at 25. Although the court found that plaintiffs established subject matter jurisdiction under the FSIA *on the pleadings*, the court explained that, moving forward, "to establish subject matter jurisdiction under the FSIA, Plaintiffs must prove that the actions of the Republic of Turkey and its predecessor state, the Ottoman Empire, amounted to 'genocide,' because only that type of egregious conduct would violate international law." *Id.* at 15, 23.

reserves for the other two coordinate branches of government.”<sup>128</sup> Absent an executive statement indicating that the political branches believed the defendants had committed genocide, the court refused to permit the plaintiff to use genocide as the basis for the claim.<sup>129</sup>

The district court’s application of the political question doctrine in *Davoyan* is flawed in that it: (1) afforded double-deference to the Executive, contrary to separation of powers; (2) allowed the court to improperly avoid its duty to adjudicate the case; and (3) mischaracterized the question of whether conduct amounts to genocide as “too political a determination,” notwithstanding the clear and manageable judicial standards for making such a determination.

First, applying the political question doctrine was duplicative in light of the court’s finding that an exception to the FSIA applied. The court’s belief that it needed executive permission to hear the case was, in fact, contrary to separation of powers, because the FSIA analysis already reflected proper deference to the executive branch. For that reason, the court inappropriately deferred to the Executive by dismissing the case as a political question.<sup>130</sup>

Additionally, deferring to the political branches with regard to FSIA cases defies the purpose of the FSIA and the restrictive theory of sovereign immunity.<sup>131</sup> By dismissing the case based on the political question doctrine, the district court disregarded the FSIA’s restrictive theory of sovereign immunity and, rather, imposed the former requirement of an individualized executive determination regarding immunity. Such an interpretation is contrary to the principle of separation of powers: the political branches traditionally enact legislation, which the courts then apply.<sup>132</sup>

Second, by dismissing the action, the *Davoyan* court refused to fulfill its responsibility to adjudicate a matter properly before it.

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128. *Id.* at 25.

129. *Id.*

130. The FSIA reflects the intent of the political branches to delegate resolution of certain cases relating to foreign sovereigns to the judiciary, even though these cases inherently touch on foreign affairs. *See supra* Part I.B.

131. *See Brock, supra* note 63, at 802–04; *see also* Kleindienst Letter, *supra* note 66 (noting that the practice prior to the enactment of FSIA put the State Department “in the difficult position of effectively determining whether the plaintiff will have his day in court”).

132. *See Skinner, supra* note 17, at 102.

Where a statute grants the court jurisdiction over particular subject matter and articulates standards for adjudication, courts should hear those cases on their merits in compliance with Article III of the U.S. Constitution.<sup>133</sup> The FSIA and ATS provide courts with the authority and necessary standards to decide these cases, notwithstanding the fact that they inherently touch on foreign affairs.<sup>134</sup> Therefore, the court's application of the political question doctrine to these claims was improper.

Third, notwithstanding that the political question doctrine should not have even been considered, the *Davoyan* court misapplied it.<sup>135</sup> By finding that the determination as to whether conduct amounts "genocide" was reserved to the political branches of government, the court affirmatively based its dismissal on executive inaction—namely, the absence of an executive statement. This was improper. Admittedly, where a case is brought under the State Sponsors of Terrorism Exception to the FSIA, explicit executive action is necessary for the judiciary to hear it.<sup>136</sup> Here, however, the court found the Expropriation Exception applied; therefore, it should *not* have dismissed the case based on inaction by the executive branch.

More specifically, by predicated jurisdiction on an executive statement that the defendant's conduct amounted to genocide, the court incorrectly applied the standard regarding executive statements. The absence of executive action is not dispositive on the political question issue. Rather, where the Executive has remained silent, the question is whether the claim is of the type committed to the political branches for resolution.<sup>137</sup> In such circumstances, the courts need not apply a policy of case-specific deference to the political branches.<sup>138</sup> Because there was no executive action in *Davoyan*, the court should have focused its analysis to the type of claim asserted—genocide.

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133. *See id.*

134. 28 U.S.C. § 1350 (2006) (ATS); 28 U.S.C. § 1391 (2012) (FSIA).

135. This reflects a disturbing trend of courts applying the political question doctrine mechanically to avoid hearing ATS cases, discussed *infra*.

136. Importantly, cases brought or pursued under *other* FSIA exceptions do not contain a similar requirement. *Compare* 28 U.S.C. § 1605(a)(2) (2012), *and id.* § 1605(a)(3), *with id.* § 1605A(a)(2).

137. *Alperin v. Vatican Bank*, 410 F.3d 532, 549–51 (9th Cir. 2005).

138. *Id.* at 556 (citing *Sosa v. Alvarez-Maachain*, 542 U.S. 692, 733 n.21 (2004)).

Genocide is a violation of universally recognized norms of international law—precisely the type of claim the ATS was designed to pursue.<sup>139</sup> Accordingly, a claim of genocide is *not* the type committed to the political branches for resolution, and the judiciary may properly decide such a case.

The judiciary has clear standards for determining whether conduct amounts to genocide, which “obviates any need [for the judiciary] to make initial policy decisions of the kind normally reserved for nonjudicial discretion,” and further reduces concerns that the claim “relate[s] to matters that are constitutionally committed to another branch.”<sup>140</sup> As the *Davoyan* court acknowledged in its analysis, “It is settled in the Ninth Circuit that genocide violates international law.”<sup>141</sup> In addition to norms of international law, judicially discoverable and manageable standards for adjudicating the issue of genocide are contained in the Genocide Convention, an international treaty to which the U.S. is a party.<sup>142</sup> Therefore, the claim in *Davoyan* simply required the court interpret and apply the law; the case was improperly dismissed as a nonjusticiable political question.<sup>143</sup>

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139. See BENCHBOOK, *supra* note 2, at III.E-7–8.

140. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (citing *Nixon v. United States*, 506 U.S. 224, 227–29 (1993)).

141. *Davoyan v. Turkey*, No. CV 10-05636 DMG-SS, slip op. at 20 (C.D. Cal. March 26, 2013), *appeal docketed*, No. 13-55742 (9th Cir. May 2, 2013) (citing *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011) (en banc), *vacated on other grounds*, 133 S. Ct. 1995 (2013) (“Claims of genocide, therefore, fall within the limited category of claims constituting a violation of internationally accepted norms for [Alien Tort Statute] jurisdiction.”)).

142. See *Kadic*, 70 F.3d at 241–42 (noting that the Genocide Convention entered into force for the United States on Feb. 23, 1989, and “provides a . . . specific articulation of the prohibition of genocide in international law”). See generally Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. A/RES/260(III) (Dec. 9, 1948) (the Genocide Convention).

143. The task before the *Davoyan* court was similar to that required of the Supreme Court in *Japan Whaling Association*, which was held justiciable and properly adjudicated by the Supreme Court. See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“[U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”).



The misapplication of the political question doctrine in *Davoyan* is not an anomaly. In *Hwang Geum Joo v. Japan*, women from China, Taiwan, South Korea, and the Philippines, alleging they had been compelled to provide sexual services for Japanese soldiers during World War II, attempted to sue the Japanese government in a U.S. court under the ATS.<sup>144</sup> Initially, the district court held that the alleged conduct did not fall within the Commercial Activity Exception, and dismissed the case for lack of jurisdiction under the FSIA.<sup>145</sup> On appeal, the appellate court declined to rule on whether Japan's conduct fell within the Commercial Activity Exception, but dismissed the case under the political question doctrine.<sup>146</sup> Subsequently, the court was criticized for being overly deferential to the Executive in refusing to hear the case on its merits: "Rather than taking responsibility for any substantive decision, [the court] used the political question doctrine to shift decision-making responsibility to the executive."<sup>147</sup>

These cases, and others like them, represent a recent and flawed development in the application of the political question doctrine as a mechanism to dismiss human rights claims for fear of impeding upon the separation of powers.<sup>148</sup> As discussed *supra*, where an ATS case implicates the FSIA, the legislature has already addressed issues of separation of powers and given courts the means to adjudicate these claims. The judiciary should recognize that these statutes give the courts the power and responsibility to hear cases where jurisdiction is proper under the ATS and FSIA.

Applying the political question doctrine in cases against foreign sovereigns is also problematic in that it is often unevenly applied based on the political value of the relationship between the U.S. and the involved foreign state.<sup>149</sup> For example, although some court, as in

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144. *Hwang Geum Joo v. Japan*, 413 F.3d 45, 46 (D.C. Cir. 2005).

145. *Id.* at 46–47. The district court alternatively held that the complaint presented a nonjusticiable political question. *Id.* at 47.

146. *Id.* at 47, 52–53.

147. Cheah Wui Ling, *Walking the Long Road in Solidarity and Hope: A Case Study of the "Comfort Women" Movement's Deployment of Human Rights Discourse*, 22 HARV. HUM. RTS. J. 63, 89 (2009).

148. *See id.*

149. *See Skinner, supra* note 17, at 100 ("[The political question doctrine] has . . . allowed inappropriate biases and prejudices—whether conscious or not—to

*Davoyan*, invoke the political question doctrine to avoid reaching the merits of a case, other courts opt to apply the doctrine “lightly” or decline to utilize the doctrine altogether.

In *Vine v. Iraq*, the district court rejected Iraq’s argument that the case presented a nonjusticiable political question, because allowing the case to go forward would undermine the efforts of the President and Congress to create a stable Iraq.<sup>150</sup> In affirming the district court’s rejection of Iraq’s political question argument, the appellate court reasoned on appeal that:

To be sure, the foreign policy considerations Iraq raises are important, as the President’s actions and statements make clear. But Iraq has not explained how adjudicating the question . . . requires the court to address any question the Constitution commits to the political branches. Indeed, Iraq does nothing more than assert that this action may affect the foreign relations of the United States, but that is surely not enough.<sup>151</sup>

Thus, the political question doctrine was not applied as a bar to the plaintiffs’ claims against Iraq notwithstanding foreign policy considerations and the President’s position that “the threat of a monetary judgment against Iraq contravenes the foreign policy of the United States.”<sup>152</sup>

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interfere with a court’s decision to hear otherwise proper and justiciable cases.”); *see also* Adam N. Schupack, Note, *The Arab-Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207, 233–36 (2010) (discussing how in civil litigation related to the Arab-Israeli conflict, courts do not apply the political question doctrine uniformly and are sensitive to surrounding politics); Noura Erakat, *Litigating the Arab-Israeli Conflict: The Politicization of U.S. Federal Courtrooms*, 2 BERKELEY J. MIDDLE E. & ISLAMIC L. 27, 29 (2009) (“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.”).

150. *Vine v. Iraq*, 459 F. Supp. 2d 10, 19–20 (D.D.C. 2006), *rev’d in part sub nom.* *Simon v. Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev’d sub. nom.* *Iraq v. Beaty*, 556 U.S. 848 (2009) *and vacated*, 330 F. App’x 3 (D.C. Cir. 2009) *and aff’d sub nom.* *Simon v. Iraq*, 330 F. App’x 3 (D.C. Cir. 2009).

151. *Simon*, 529 F.3d at 1197.

152. *Id.* The Supreme Court later reversed the appellate court decision, finding that the President had suspended the applicable FSIA exception with respect to Iraq, and thus the court lacked jurisdiction to hear the claims. *Beaty*, 556 U.S. at

Courts have unevenly applied the political question doctrine depending not only on the foreign entity involved, but also on the type of claim pursued. As one commentator noted:

U.S. courts do not apply the political question doctrine uniformly to refrain from involvement in all cases involving the Arab-Israeli conflict. Despite the particularly contentious nature of the conflict, when plaintiffs have sued under the [ATS] and the state sponsor of terrorism exception to the FSIA, courts have refused to dismiss the cases on political question grounds.<sup>153</sup>

It has also been suggested that “[p]olitical considerations underlie these decisions, and the courts have largely deferred to the judgment of at least one of the political branches in deciding whether to rule on these cases.”<sup>154</sup> In other words, whether a court applies the political question doctrine to dismiss a case may be influenced by policy judgments implicit either in Congress’ decision to enact statutes under which certain, but not other, foreign sovereigns may be sued, or in the Executive’s decision to intercede only in some cases but not others.<sup>155</sup>

The uneven application of the political question doctrine for political reasons demonstrates the problem of granting excessive deference to the Executive with regard to dismissing ATS and FSIA claims. Applying the political question doctrine to FSIA cases results in undue deference to the executive branch and supplants legal considerations for political ones.<sup>156</sup> The ability of plaintiffs to sue foreign sovereigns in U.S. courts should be determined based on applicable legal standards provided in the ATS and the FSIA, rather than the political value of the relationship between the U.S. and the foreign state defendant.

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856–57, 866. Thus, the Supreme Court did not reach the political question issue. *See id.* at 848.

153. Schupack, *supra* note 149, at 234.

154. *Id.* at 235.

155. *See id.*

156. *See* Erakat, *supra* note 149, at 29.

*B. Even Where the FSIA is NOT Implicated, Applying the Political Question Doctrine is Inappropriate*

Where the FSIA analysis is not triggered—as in cases against U.S. defendants rather than foreign sovereigns<sup>157</sup>—the political question analysis is not necessarily duplicative. However, the recent trend of broadly invoking the political question doctrine represents a troubling departure from political question doctrine precedent holding that merely because a dispute involves a political question does not mean that it necessarily should be dismissed as nonjusticiable.<sup>158</sup> As discussed *infra*, applying the political question doctrine as a de facto bar to ATS cases against the U.S. and its political allies contravenes the doctrine’s underlying purpose. More specifically, although *foreign* relations are generally committed to the political branches of government, the *Baker* Court cautioned that not all questions involving political issues are nonjusticiable.<sup>159</sup> Indeed, *Baker* instructs courts to perform a case-by-case analysis to determine whether the question posed lies beyond judicial cognizance.<sup>160</sup> Thus, in domestic ATS cases involving human rights, deference to the executive branch through the application of the political question doctrine should be minimal.

The first *Baker* factor—constitutional commitment of an issue to a coordinate branch<sup>161</sup>—should *never* warrant dismissal where a plaintiff pleads a cognizable claim under the ATS for human rights violations. As the Court of Appeals for the Second Circuit noted, “[T]he department to whom [an ATS suit] has been ‘constitutionally committed’ is none other than our own—the Judiciary.”<sup>162</sup> Indeed, the first Congress enacted the ATS as part of the First Judiciary Act in

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157. It is likely that future ATS cases will increasingly involve U.S. defendants in light of the requirement imposed in *Kiobel* that the alleged harm “touch and concern” U.S. territory. *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659, 1669 (2013). Such a requirement is necessarily a lesser hurdle in cases where one or more parties are based in the U.S.

158. *E.g.*, *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 229-30 (1986) (citing *Baker v. Carr*, 369 S. Ct. 691, 706–07 (1969)).

159. *Baker v. Carr*, 369 U.S. 186, 210-12 (1962).

160. *Id.*

161. *Id.* at 217.

162. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

1789 to provide a forum and remedy for this category of cases.<sup>163</sup> Thus, ATS claims involve liability “under a well-defined statutory scheme—a statutory scheme that was enacted by both houses of Congress and signed by the President,”<sup>164</sup> and are *not* nonjusticiable political questions.

Several courts addressing domestic ATS claims have focused analyses on foreign policy decisions implicated by the ATS claim in concluding that dismissal was warranted because foreign policy decisions are constitutionally committed to other branches. In *Schneider v. Kissinger*, a D.C. circuit court dismissed a case brought against the U.S. and the former U.S. National Security Advisor, finding that the claims involved nonjusticiable political questions of foreign policy.<sup>165</sup> There, plaintiffs were the children of a Chilean general who was kidnapped and killed by plotters of the September 11, 1971 Chilean coup.<sup>166</sup> Seeking relief under the ATS, the plaintiffs alleged that, in furtherance of the military coup, the U.S. defendants had caused the kidnapping, torture, and killing of their father in violation of international law.<sup>167</sup> The case was dismissed under the political question doctrine on the basis that the claims challenged U.S. foreign policy decisions within the exclusive province of the political branches.<sup>168</sup>

A year later, in *Gonzalez-Vera v. Kissinger*, the D.C. circuit court reaffirmed the reasoning of *Schneider*, finding allegations that the U.S. government was liable to victims of human rights abuses allegedly carried out in concert with the Chilean government presented a nonjusticiable political question.<sup>169</sup> As in *Schneider*, the *Gonzalez-Vera* plaintiffs sued the U.S. and former Secretary of State and National Security Advisor for measures allegedly taken to

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163. Skinner, *supra* note 17, at 100.

164. Vine v. Iraq, 459 F. Supp. 2d 10, 20 (D.D.C. 2006), *rev'd in part sub nom.* Simon v. Iraq, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd sub. nom.* Iraq v. Beaty, 556 U.S. 848 (2009) and *vacated*, 330 F. App'x 3 (D.C. Cir. 2009) and *aff'd sub nom.* Simon v. Iraq, 330 F. App'x 3 (D.C. Cir. 2009).

165. Schneider v. Kissinger, 412 F.3d 190, 198, 200–01 (D.C. Cir. 2005).

166. *Id.* at 191.

167. *Id.* at 191–92.

168. *Id.* at 195, 198.

169. Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006).

implement U.S. policy with respect to Chile.<sup>170</sup> Finding the claims indistinguishable from those advanced in *Schneider*, the court dismissed the case because the challenged actions “were inextricably intertwined with the underlying foreign policy decisions constitutionally committed to the political branches.”<sup>171</sup>

Again, the court held similarly in *Bancoult v. MacNamara*.<sup>172</sup> In *Bancoult*, former residents of the Chagos Archipelago sued senior officials in the U.S. Departments of Defense and State under the ATS for allegedly forcibly removing them from their homes in order to construct a military base.<sup>173</sup> The plaintiffs alleged that the U.S. conduct in the removal process constituted “forced relocation; torture; racial discrimination; cruel, inhuman, or degrading treatment; genocide; intentional infliction of emotional distress; negligence; trespass; and destruction of real and personal property.”<sup>174</sup> Although conceding that the decision to establish the military base was a nonjusticiable political question, the plaintiffs claimed that the manner in which the policy decision was implemented was distinct from the policy itself and thus was reviewable.<sup>175</sup> Relying on *Schneider*, the *Bancoult* court found that “the specific steps taken to establish the base did not merely touch on foreign policy, but rather constituted foreign policy decisions themselves,” and therefore affirmed the lower court’s dismissal of the case as a nonjusticiable political question.<sup>176</sup>

The reasoning in *Schneider* and *Gonzalez-Vera* created an insurmountable barrier for victims of human rights violations occurring during the 1970 Chilean coup; in effect, the court in both cases applied the political question doctrine and executive deference in a manner that precluded the plaintiffs from asserting ATS claims in U.S. courts. The *Bancoult* court further reduced the ability of foreign plaintiffs to gain relief against U.S. defendants in U.S. courts under the ATS by interpreting nonjusticiable foreign policy decisions to

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170. *Id.* at 1261.

171. *Id.* at 1263–64 (internal quotation marks omitted).

172. *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006).

173. *Id.* at 429–31.

174. *Id.* at 431.

175. *Id.* at 436.

176. *Id.* at 437–38.

include—not only the foreign policy decision itself—but also the manner in which foreign policy decisions are implemented.<sup>177</sup>

Collectively, these cases demonstrate the misapplication of the political question doctrine as to U.S. domestic defendants. As the Supreme Court reaffirmed in *Japan Whaling Association*, even though the Constitution committed foreign affairs to the executive and legislative branches, the judiciary remains capable of analyzing purely legal questions.<sup>178</sup> Moreover, the Supreme Court has explicitly stated that the executive branch's views on legal questions “merit no special deference.”<sup>179</sup> Therefore, ATS claims are not and should not be adjudicated nonjusticiable political questions.

In contrast to the aforementioned cases, the court in *Alperin v. Vatican Bank* properly recognized the judiciary's ability to decide cases involving political issues.<sup>180</sup> There, Holocaust survivors sued the Vatican for conversion, unjust enrichment, restitution, an accounting, and human rights and international law violations.<sup>181</sup> While many of the claims “tinge[d] [the] . . . case with political overtones,” the Court of Appeals for the Ninth Circuit found that the property claims could clearly be resolved by the judiciary.<sup>182</sup> Although the court recognized that “management of foreign affairs predominantly falls within the sphere of the political branches and the courts consistently defer to those branches,” the court stated, “[W]hether a court should defer to the political branches is a case-by-case inquiry because ‘it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.’”<sup>183</sup> Because there was neither an executive agreement nor other declaration from the State Department concerning the resolution of the property claims, the court found no reason for the

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177. *Id.* at 436–38.

178. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986) (citing *Baker v. Carr*, 369 S. Ct. 691, 706-07 (1969)).

179. *Rep. of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

180. *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

181. *Id.* at 538.

182. *Id.* at 551–52, 558.

183. *Id.* at 549 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

judiciary to defer resolution of those issues to a coordinate branch of government.<sup>184</sup>

The second *Baker* factor—“a lack of judicially discoverable and manageable standards for resolving the issue”<sup>185</sup>—also fails to justify the dismissal of ATS cases involving human rights violations. *Kadic* reaffirmed that, indeed, “universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating [ATS] suits.”<sup>186</sup> The judiciary is capable of hearing tort cases and may do so, consistent with the Constitution, even where the tort is a violation of international law.<sup>187</sup> Still further, the *Sosa* court held that violations of international law that are as universally recognized and specifically defined as the original violations of the law of nations were in 1789 may properly serve as the basis for establishing original jurisdiction of U.S. federal courts.<sup>188</sup>

The third *Baker* factor prevents courts from hearing disputes where resolution would require the judiciary to make an initial policy determination because policy determinations should be made by the political branches.<sup>189</sup> Arguably, this factor is never implicated in a case brought under the ATS in light of the *Kadic* decision, because where judicially discoverable and manageable standards exist,<sup>190</sup> the need for an initial policy determination by the courts is obviated: that determination has already been made by the political branches. Thus, in the context of human rights adjudication under the ATS against U.S. defendants, the first three *Baker* factors should never warrant dismissal.

By contrast, ATS claims involving executive action—or executive inaction—pose particular separation of powers concerns. Where there is some prior action by the executive branch—such as a treaty, agreement, or statement of interest—the remaining *Baker* factors are

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184. *See id.* at 558.

185. *Baker*, 369 U.S. at 217.

186. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (relying on *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980)).

187. *Filartiga*, 630 F.2d at 885.

188. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

189. *Baker*, 369 U.S. at 217.

190. *See Kadic*, 70 F.3d at 249.



implicated.<sup>191</sup> More specifically, factors four through six may become relevant to a discussion of the political question doctrine “only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.”<sup>192</sup> Therefore, whether an ATS claim that implicates prior action by the executive branch is a nonjusticiable political question depends on factors including the nature of executive action involved, the type of judicial review, and the circumstances of the claim.<sup>193</sup>

Because “the courts have the authority to construe treaties and executive agreements,”<sup>194</sup> cases involving treaties or executive agreements are not inherently nonjusticiable political questions. For example, where the Executive has entered into an executive agreement with a foreign sovereign, courts are capable of assessing whether the agreement is valid in light of potentially conflicting obligations under an international treaty.<sup>195</sup> It would be improper, therefore, for the court to dismiss such a case under the political question doctrine. Additionally, notwithstanding existing executive agreements, claims may be found justiciable where judicial resolution would “not require the refashioning of agreements by coordinate branches of government,”<sup>196</sup> but rather, simply require interpreting and applying the law.<sup>197</sup> Comparably, an executive statement of interest—whereby the executive branch, acting through the State Department, expresses its opinion on the implications of exercising jurisdiction over a particular case—or a lack thereof, would not necessarily preclude or demand adjudication.<sup>198</sup> Notwithstanding, an executive statement of

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191. *See generally id.*

192. *Id.*

193. *See infra* notes 194–211 and accompanying text.

194. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

195. *Id.*

196. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 71 (E.D.N.Y. 2005), *aff’d sub nom. Viet. Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008).

197. *Japan Whaling Ass’n*, 478 U.S. at 230.

198. *Rep. of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004); *Alperin v. Vatican Bank*, 410 F.3d 532, 556 (9th Cir. 2005); *see also Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 n.12 (11th Cir. 2004) (“the executive’s statement of interest is entitled to deference, [but] it does not make the litigation

interest is entitled to respectful consideration and would carry weight in evaluating the *Baker* factors generally.<sup>199</sup> In practice, however, despite the option to ignore executive statements, “the political question framework is such a vacuous standard that once an executive statement enters the picture it effectively subsumes the entire analysis.”<sup>200</sup>

A particular claim may present a nonjusticiable political question, however, where the President has precluded it by entering into executive agreements or treaties with foreign sovereigns.<sup>201</sup> Similarly, a nonjusticiable political question may be found where the Executive has entered into executive agreements *directly related to* the subject matter of the case, and passing judgment would conflict with the Executive’s ability to resolve extraordinarily sensitive issues on a massive scale.<sup>202</sup> In such circumstances, courts may find decline to hear the case because an unusual need exists for adherence to a previously made political decision.<sup>203</sup>

The absence of executive action, however, is not dispositive on the political question issue; in light of executive inaction, the question returns to whether the claim is of the type committed to the political branches for resolution.<sup>204</sup> Courts should not attempt to construe executive silence as “an implicit endorsement, an objection, or simple indifference. At best, this silence is a neutral factor.”<sup>205</sup> Moreover, where the executive branch remains silent, courts “need not apply . . .

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non-justiciable”). The Court in *Altmann* distinguished between the United States’ views on issues of statutory construction, which the Court noted were well within the province of the judiciary and would be afforded no special deference, and the State Department’s views on “the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct,” which “might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.” *Altmann*, 541 U.S. at 701-02.

199. *Altmann*, 541 U.S. at 701-02; *Alperin*, 410 F.3d at 556.

200. Sutcliffe, *supra* note 112, at 319 (“Because the fourth Baker factor offers no considerations with which to offset executive statements, these statements become a law unto themselves.”).

201. See, e.g., *Alperin*, 410 F.3d at 549-551.

202. See, e.g., *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284-85 (D.N.J. 1999).

203. See, e.g., *id.*

204. *Alperin*, 410 F.3d at 550-51.

205. *Id.* at 556.

a policy of case-specific deference to the political branches.”<sup>206</sup> Accordingly, courts should not dismiss cases based on the political question doctrine where dismissal either has not been requested or where the judiciary’s responsibility to hear the case outweighs the Executive’s interest.

By contrast, courts should grant some deference to executive agreements.<sup>207</sup> The court in *In re Agent Orange Product Liability Litigation* noted that the judiciary may pass judgment on cases involving executive agreements without necessarily expressing a lack of respect for the political branches.<sup>208</sup> There, the court noted that judicial resolution would not “require the refashioning of agreements by coordinate branches of government.”<sup>209</sup> Rather, the question for the court was simply one of interpreting and applying international law.<sup>210</sup> The U.S. District Court for the Eastern District of New York held that it had jurisdiction over the claims, because the executive agreements “between the present Vietnam government and the United States cited by defendants address[ed] property that was expropriated or nationalized by Vietnam and future research—they [did] not address any issue raised in [the] case.”<sup>211</sup> Undoubtedly, deference to an executive statement is important, because the Constitution does delegate foreign affairs power to the political branches.<sup>212</sup> However, where no executive statement or other indication that the Executive’s

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206. *Id.* at 557 (quoting *Sosa v. Alvarez-Maachain*, 542 U.S. 692, 733 n.21 (2004)).

207. *See Rep. of Austria v. Altmann*, 541 U.S. 677, 702 (2004); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235–36 (11th Cir. 2004).

208. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 71–72 (E.D.N.Y. 2005), *aff’d sub nom. Viet. Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008).

209. *Id.* at 71.

210. *Id.*; *see also Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

211. *Agent Orange*, 373 F. Supp. 2d at 71.

212. U.S. CONST., art. I–II; *Baker v. Carr*, 369 U.S. 186, 211–13 (1962); *see also Veith v. Jubelirer*, 541 U.S. 267, 277 (“Sometimes . . . the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches.”).

interests outweigh those of the judiciary exists,<sup>213</sup> courts should not dismiss cases under the political question doctrine.

Although cases involving U.S. defendants may arguably be nonjusticiable political questions under the sixth *Baker* factor—the potential for embarrassment<sup>214</sup>—this is the weakest factor,<sup>215</sup> and is a particularly weak justification for dismissing cases involving grotesque violations of human rights. Assuming *arguendo* such a justification does exist, dismissing all ATS suits against the U.S. and its officials raises normative concerns due to the denial of justice for victims of wrongful conduct committed in violation of international law.

Even more troubling, is that courts have blindly deferred to executive requests for dismissal based on this weak justification of political embarrassment when the U.S. is not a defendant.<sup>216</sup> For example, the Court of Appeals for the Ninth Circuit dismissed an ATS case alleging the wrongful death of sixteen Palestinians and one American.<sup>217</sup> In *Corrie v. Caterpillar, Inc.*, seventeen members of the plaintiffs' families were killed when the Israeli Defense Forces (IDF) demolished homes in the Palestinian Territories using bulldozers manufactured by Caterpillar, a U.S. corporation, and paid for by the U.S. government.<sup>218</sup> The plaintiffs claimed that Caterpillar provided the IDF with equipment it knew would be used to further its home destruction policy in the Palestine Territories, a policy that violated international law.<sup>219</sup> Therefore, plaintiffs argued that Caterpillar aided and abetted those violations.<sup>220</sup>

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213. See generally, e.g., *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 16 n.7 (D.D.C. 2013) (discussing the role of the court in weighing relative interests of political branches); *Omar v. Harvey*, 416 F. Supp. 2d 19, 29 (D.D.C. 2006) (weighing plaintiff's harm against potential harm to the Executive's exercise of war powers), *vacated by* *Muaf v. Green*, 553 U.S. 674 (2008).

214. *Baker*, 369 U.S. at 217.

215. See *Vieth*, 541 U.S. at 278 (noting that the *Baker* factors are likely listed in descending order of importance).

216. See, e.g., *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007).

217. *Id.* at 977.

218. *Id.* at 977–78.

219. *Id.* at 977, 979.

220. *Id.*

Relying on the fact that the U.S. had paid for the bulldozer, the court found the claims presented a nonjusticiable political question.<sup>221</sup> Notwithstanding the fact that the U.S. government was not a defendant in the case, the court reasoned, “It is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States’ decision to pay for the bulldozers which allegedly killed the plaintiffs’ family members.”<sup>222</sup> Because the “[p]laintiffs’ claims [could] succeed only if a court ultimately decide[d] that Caterpillar should not have sold its bulldozers to the IDF,”<sup>223</sup> granting relief to the plaintiffs would purportedly require the judiciary to “implicitly question[], and even condemn[], United States foreign policy toward Israel.”<sup>224</sup> Concluding that “[i]t is not the role of the courts to indirectly indict Israel for violating international law with military equipment the United States government provided and continues to provide,”<sup>225</sup> the court dismissed the case under the political question doctrine.<sup>226</sup>

The court’s decision in *Corrie* was based on its belief that adjudication of the controversial case would conflict with the separation of powers by undermining the ability of the political branches to conduct foreign affairs.<sup>227</sup> The court was heavily influenced, however, by the Executive’s request for dismissal, leading one commentator to criticize the court for failing to “trace[] the chain of logic by which hearing the case in question would foster ‘embarrassment’; instead [the court] merely followed the State Department’s advice that it would.”<sup>228</sup> It is improper for a court to rely on such an executive statement of interest to decline to exercise jurisdiction without engaging in the discriminating analysis the political question doctrine demands.<sup>229</sup> Rather, while an executive

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221. *Id.* at 982–84.

222. *Id.* at 982.

223. *Id.*

224. *Id.* at 984.

225. *Id.*

226. *Id.*

227. *See id.* at 982–84.

228. HARV. Note, *supra* note 110, at 1199.

229. *See Rep. of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004); *Corrie*, 503 F.3d at 982; *Alperin v. Vatican Bank*, 410 F.3d 532, 556 (9th Cir. 2005); *see also Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 n.12 (11th Cir.

statement of interest is entitled to respectful consideration and carries weight in evaluating the *Baker* factors,<sup>230</sup> the *Corrie* court should independently have decided whether hearing the case would foster embarrassment, as the State Department claimed.<sup>231</sup> Still further, *Corrie* implicated U.S. policy with Israel, a foreign sovereign in favor of which there is a judicial trend of disproportionately dismissing cases as nonjusticiable political questions.<sup>232</sup> Accordingly, the court's failure to engage in the appropriate case-by-case analysis illustrates the prejudicial application of the political question doctrine resulting from excessive deference to the Executive. For that reason, applying the political question doctrine to dismiss these cases is inappropriate.

### CONCLUSION

*Davoyan* was among the earliest cases brought under the ATS and Expropriation Exception to the FSIA and dismissed under the political question doctrine.<sup>233</sup> Yet, *Davoyan* illustrates the dangerous trajectory of this doctrine. Courts should rectify this problematic development to ensure not only that victims are afforded access to justice regardless of the political importance of their alleged aggressors, but that the doctrines are applied coherently and consistently as against all foreign sovereigns. In addition to limiting the application of the political

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2004) ("the executive's statement of interest is entitled to deference, [but] it does not make the litigation non-justiciable").

230. *Altmann*, 541 U.S. at 701–02; *Alperin*, 410 F.3d at 556.

231. See HARV. Note, *supra* note 110, at 1198–99.

232. See, e.g., *Klinghoffer v. S.N.C. Achilles Lauro*, 937 F.2d 44, 49 (2d Cir. 1991); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 (D.C. Cir. 1984); *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 178 (D.D.C. 2004).

233. Compare *Davoyan v. Turkey*, No. CV 10-05636 DMG-SS, slip op. at 20 (C.D. Cal. March 26, 2013), *appeal docketed*, No. 13-55742 (9th Cir. May 2, 2013) (citing *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011) (en banc), *vacated on other grounds*, 133 S. Ct. 1995 (2013) ("Claims of genocide, therefore, fall within the limited category of claims constituting a violation of internationally accepted norms for [Alien Tort Statute] jurisdiction.")), with *Altmann*, 541 U.S. 677 and *Alperin*, 410 F.3d 532.

question doctrine, the political branches could consider widening the FSIA or the ATS.<sup>234</sup>

The ATS and FSIA provide an important mechanism for victims to vindicate violations of international law and be restored to their original position. The recent trend of federal courts to use the political question doctrine to avoid hearing these claims is disturbing. It denies those victims the right to have their cases heard and be granted civil damages to help repair the wrongs that they have suffered. Moreover, it is disturbing at a doctrinal level: this is a misapplication of the political question doctrine. That doctrine was intended to ensure the of separation of powers. Unfortunately, it is now being used to avoid the embarrassment of the U.S. and its political friends when those branches or governments have violated international law. This is not an issue of separation of powers because the judiciary is not attempting to fill the role of those branches or governments. Rather, it is the proper role of the judiciary to pass judgment on the lawful or unlawful nature of those acts.

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234. Unfortunately, this may run afoul of the recent International Court of Justice decision in *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, ¶ 80 (Feb. 3, 2012), *available at* <http://www.icj-cij.org/docket/files/143/16883.pdf>.