

NOTES

“[J]UDICIAL [I]MPERIALISM”¹?

THE SOUTH AFRICAN LITIGATION, THE POLITICAL QUESTION DOCTRINE, AND WHETHER THE COURTS SHOULD REFUSE TO YIELD TO EXECUTIVE DEFERENCE IN ALIEN TORT CLAIMS ACT CASES

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I. INTRODUCTION

[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.²

For decades, foreign nationals alleging human rights abuses were frustrated by their inability to receive their idea of adequate redress in the courts of their own countries. Beset by ills such as environmental pollution

1. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., dissenting) (quoting Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 166 (2003)), *aff'd by an equally divided Court sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.).

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

triggered by aerial drug eradication programs,³ the murder of union leaders by right-wing paramilitary groups allegedly financed by multinational corporations (“MNCs”),⁴ and torture and deprivation in countries like South Africa, these plaintiffs were offered a glimmer of hope by a series of rulings in U.S. courts, which had purportedly opened up to them relief through a statute passed by the American Founding Fathers themselves.⁵ But that relief has often proven elusive, as courts have hesitated to grant redress for claims brought under what they see as an outdated statute.

Apartheid—a business, economic, and social system synonymous with racism, murder, torture, and repression that has been universally condemned by the United Nations, the United States, and the community of nations—arose in South Africa in 1948.⁶ One representative plaintiff provides a searing impression of the countless gross human rights abuses committed by the South African National Party from 1948 to 1993. Thirteen-year-old Hector Pieterse was shot and killed outside his school after peacefully protesting the apartheid regime.⁷ Receiving almost no relief from the current South African government, his mother, like so many others, joined the currently ongoing class action *In re South African Apartheid Litigation*⁸ in an effort to see justice brought against the thirty-four U.S. corporations known to have engaged in business with the South African government during this tumultuous time. The plaintiffs represent themselves, their deceased family members, and all victims of the apartheid regime, and they allege that without the support of MNCs such as Citigroup, Inc., JP Morgan Chase, Shell Oil, and Ford Motor Co., “apartheid would not have been possible.”⁹

3. See *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007).

4. See *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006).

5. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

6. Complaint & Jury Trial Demand at 1, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (No. 02 CV 4712), 2002 WL 32153622. For a thorough history of apartheid, see LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* (rev. ed. 1995).

7. The photograph of a bloody and dead Hector Pieterse, being carried in his friend’s arms after having been shot by the government during the 1976 Soweto uprising, has become an iconic image of the horrors of apartheid. See, e.g., CommonDreams.org, <http://www.commondreams.org/headlines02/0623-03.htm> (last visited Mar. 20, 2008).

8. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, *aff’d in part, vacated in part sub nom.* *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam), *aff’d by an equally divided Court sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.). The litigation is hereinafter referred to as “the South African litigation,” unless, for clarification purposes, the district court or appellate court case names are needed.

9. Second Consolidated & Amended Complaint at 7, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (No. 02 CV 4712), 2003 WL 25654354.

The plaintiffs brought suit under 28 U.S.C. § 1350, the Alien Tort Claims Act (“ATCA”),¹⁰ which provides relief for aliens suing for a tort that is a violation of either the law of nations or a U.S. treaty. The plaintiffs alleged that the torts in violation of the law of nations included gross human rights abuses such as forcible removals, forced labor, imprisonment, banishment, kidnapping, torture, disfigurement, murder, and massacres.¹¹ The claims are that the defendants profited from human rights violations committed by the apartheid government, that they knew that as a direct result of the support provided to that government the plaintiffs would be subjected to these crimes, and that they conspired with each other to profit from these human rights violations.¹² The defendants countered that (1) aiding and abetting is not a violation of an international norm recognized under the ATCA and (2) the political question doctrine bars the claims from adjudication.¹³

The use of the ATCA against MNCs in suits such as this one is a recent development in human rights law. Part II of this Note discusses the modern history of the ATCA, beginning in 1980 with the Second Circuit case *Filártiga v. Pena-Irala*, which held that an act of torture committed by a state official was a tort that violated the law of nations.¹⁴ The discussion then leaps forward to a 1995 Second Circuit case, *Kadic v. Karadžić*, which further expanded the scope of the ATCA by holding that the Act applied not only to state actors but also to private actors.¹⁵ Next, the discussion turns to the only recent Supreme Court case to address the ATCA, the 2004 decision *Sosa v. Alvarez-Machain*,¹⁶ which, while addressing some very foundational concerns in this developing area, left much open to future interpretation.

10. 28 U.S.C. § 1350 (2006); Complaint & Jury Trial Demand, *supra* note 6, at 4. The ATCA is also referred to as the Alien Tort Statute (“ATS”). One commentator noted that “[t]o underscore its importance, many who believe that the statute provides more than a jurisdictional grant refer to it as the ‘Alien Tort Claims Act (ATCA),’ while some of their opponents and some neutral observers settle for the term ‘Alien Tort Statute (ATS).’” Saad Gul, *The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350*, 109 W. VA. L. REV. 379, 380 n.2 (2007) (quoting Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 10 (2004)). Interestingly, the district court and the Second Circuit in the South African litigation refer to the statute as the ATCA, whereas the defendants in their petition for certiorari refer to it as the ATS.

11. Complaint & Jury Trial Demand, *supra* note 6, at 5, 15, 17.

12. *Id.* at 15–16.

13. Petition for a Writ of Certiorari at i, 13–15, 22, *Am. Isuzu Motors*, 128 S. Ct. 2424 (No. 07-919), 2008 WL 140514.

14. *Filártiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

15. *Kadic v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995).

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

Part III of this Note then looks at the aftermath of South Africa's apartheid regime, briefly discussing the remedies the South African government has provided for its citizens. Both the positions of the U.S.¹⁷ and South African governments with respect to this litigation are discussed. Both countries' governments opposed the litigation, relying in large part on the political question doctrine to justify a dismissal.

Part IV of this Note begins by discussing the seminal 1962 Supreme Court case *Baker v. Carr*,¹⁸ which remains the standard courts follow in determining whether or not an issue is barred from adjudication because it presents a political question. The complex question as to whether courts should address the political question or subject matter jurisdiction "at the threshold" is then considered. Because the Supreme Court has not definitively ruled on this issue, lower courts have come out with conflicting determinations.

Part V then explores the political question doctrine in the ATCA context by looking at the first three of six factors set forth by the *Baker* Court to be used in analyzing political question cases. In Part VI, this Note discusses deference and the fourth, fifth, and sixth *Baker* factors. Lastly, in Part VII, this Note attempts to formulate generic principles as to when deference to the executive is appropriate, and concludes by finding the South African litigation does not fall into any of those categories. Once the threshold examination of political question nonjusticiability is overcome, the next issue would be to determine whether or not the defendants may be held liable under the ATCA on the substantive issue of aiding and abetting violations of international norms, a complex question that will be left for another day.¹⁹

17. This is spelled out in the State Department's Statement of Interest ("SOI"). Note that this was the position under the Bush administration. No formal opinion under the Obama administration is likely to be provided. *See infra* Part III.D.

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

19. After finding that aiding and abetting did not violate an international norm, the district court dismissed the case. However, the Second Circuit reversed and found that aiding and abetting is indeed a violation of an international norm, which falls under the ATCA. The defendant corporations, predicting years and years of more litigation at the district and appellate court levels, appealed to the Supreme Court in a petition for a writ of certiorari so that the issue could be resolved definitively. As discussed in Part III.B, the appellate decision was affirmed pursuant to 28 U.S.C. §§ 1 and 2109 when, after four Justices recused themselves, the necessary quorum was not available to decide whether to accept the writ of certiorari. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.).

II. BACKGROUND ON THE ALIEN TORT CLAIMS ACT

The ATCA is over 200 years old and was originally passed by the First Congress as part of the Judiciary Act of 1789 to combat piracy.²⁰ The statute has been modified only slightly since then and currently 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.”²¹ Thus, plaintiffs suing under the ATCA must prove three elements: (1) they are aliens (2) suing for a tort (3) that violates either the law of nations or a U.S. treaty.²²

A. THE FIRST MODERN-DAY LANDMARK ATCA DECISION: *FILÁRTIGA V. PENA-IRALA*

Dormant from nearly the time of its inception until the 1980s, the statute was resurrected in the 1980 Second Circuit decision *Filártiga v. Pena-Irala*.²³ The action in *Filártiga* was brought by Paraguayan citizen Dr. Joel Filártiga, the father of the deceased Joelito Filártiga, against Americo Norberto Pena-Irala (“Pena”).²⁴ The plaintiff alleged that Pena, who was then the Paraguayan inspector general of police, kidnapped and tortured Filártiga’s seventeen-year-old son because his father was an opponent of President Alfredo Stroessner, the longtime dictator of Paraguay.²⁵ Holding Pena liable under the ATCA for Filártiga’s torture and death, the Second Circuit stated:

In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.²⁶

With this holding, the Second Circuit effectively revived the ATCA, opened the floodgates for plaintiffs to bring suits against human rights violators, and paved the way for suits implicating U.S. corporations, culminating in today’s massive litigation surrounding South Africa’s

20. *See Sosa*, 542 U.S. at 712–16.

21. 28 U.S.C. § 1350 (2006).

22. *See Kadie v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995).

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

24. *Id.* at 878.

25. *Id.*

26. *Id.* at 880.

apartheid regime and U.S. MNCs.

B. PRIVATE CITIZENS CAN BE HELD LIABLE UNDER THE ATCA

In 1995, the Second Circuit once again provided a landmark ATCA decision in *Kadic v. Karadžić*.²⁷ The plaintiffs in *Kadic* were Croats and Muslims from Bosnia-Herzegovina who were victims and representatives of victims of various atrocities that had been carried out by Bosnian-Serb military forces, including rape, forced prostitution, and torture.²⁸ The defendant was Radovan Karadžić, the president of the self-proclaimed Bosnian-Serb republic of “Srpska,” who held command authority over the Bosnian-Serb military forces and allegedly directed the human rights violations.²⁹ Karadžić argued that because he was a private individual, he could not be bound by the norms of international law.³⁰ The court disagreed, holding that nonstate actors could be held liable for certain violations of the law of nations because “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”³¹ The importance of this holding was that the door was now clearly open for plaintiffs to bring ATCA suits against private individuals, which corporations are considered to be. As one commentator noted, “ominously for corporations, *Karadžić* held that private actors could be held responsible for torts in violation of international law, either as accomplices, or directly as tortfeasors. Other circuits would eventually follow the Second Circuit’s lead.”³²

27. *Kadic*, 70 F.3d 232.

28. *Id.* at 236–37.

29. *Id.* at 237.

30. *Id.* at 239.

31. *Id.*

32. Gul, *supra* note 10, at 395. One such example of this is the Ninth Circuit case *Doe I v. Unocal*, where the court held that the corporation Unocal could be held liable under the ATCA for violations of international norms. *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), and *vacated*, 403 F.3d 708 (9th Cir. 2005) (en banc). The plaintiffs were citizens of Myanmar who alleged that Unocal was complicit in forced labor, rape, and murder during the construction of a Unocal pipeline project. *Id.* at 939–40. Before the case proceeded to trial, the parties reached an undisclosed settlement in 2005. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6. The *Unocal* case is seen as a success amongst human rights lawyers; according to Robert Benson, professor of law at Loyola Law School, Los Angeles, it “signals to corporations that this law is applicable to them, and they are going to face major litigation.” Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, <http://www.killercoke.org/unocalset.htm>.

C. 2004: THE SUPREME COURT VOICES ITS OPINION

Finally, in 2004, the ATCA came before the Supreme Court in *Sosa v. Alvarez-Machain*.³³ *Sosa* arose from an incident that took place in Mexico in 1985, when members of a Mexican drug cartel murdered an American Drug Enforcement Administration (“DEA”) agent.³⁴ Humberto Alvarez-Machain (“Alvarez”), a Mexican doctor, was believed to have been involved in the torture of the agent and was indicted by a Los Angeles grand jury.³⁵ Because he could not be extradited from Mexico, the DEA hired a group of Mexican nationals, including Jose Francisco Sosa, to kidnap Alvarez and bring him back to the United States, where he was then arrested.³⁶ After his motion for a judgment of acquittal was granted by the district court, Alvarez brought a suit under the ATCA against Sosa, alleging his kidnapping was a violation of customary international human rights law.³⁷

The major issue to be decided in *Sosa* was not whether Sosa could be held liable under the ATCA for arbitrary arrest or kidnapping, but rather how the Court’s interpretation of the ATCA would impact future claims brought against individuals and corporations for clear violations of accepted norms of international human rights. Thus, the question to be answered was the following: Could federal courts hear claims under the ATCA, or did Congress have to first pass legislation explicitly authorizing the adoption of causes of action?³⁸ The former was the plaintiff’s position, the latter the defendant’s.³⁹ Siding with the plaintiff, the Supreme Court, making its own interesting observation on the long dormancy of the Act, stated, “There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.”⁴⁰ It implied, however, that application of the statute was not unlimited, noting that “[t]he second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”⁴¹ And further reflecting a concern for rational balancing in applying the ATCA, the Court found that

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

34. *Id.* at 697.

35. *Id.*

36. *Id.* at 698.

37. *Id.*

38. *See id.* at 714.

39. *Id.* at 712.

40. *Id.* at 714, 719.

41. *Id.* at 720.

“[w]hile . . . we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely.”⁴²

The Court’s ruling, therefore, indicates that the ATCA is to be interpreted as a jurisdictional statute only, granting no new causes of action, but also that causes of action do exist under the ATCA without the need to enact further legislation.⁴³ After reviewing historical materials, the Court concluded that no specific grant of jurisdiction was required because “the statute was intended to have practical effect the moment it became law,” and that the common law provided a cause of action for certain violations of international law.⁴⁴

An issue for lower courts to wrestle with would thus be what exactly constitutes a violation of an international norm,⁴⁵ as the Court noted that “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”⁴⁶ Offering only slightly more guidance, the Court issued the following statement: “[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”⁴⁷

D. ATCA CLAIMS POST *SOSA*

Even with the Supreme Court’s guidance, U.S. courts were very reluctant at first to hear claims brought under the ATCA by aliens against major U.S. corporations.⁴⁸ Only slowly and occasionally have they been

42. *Id.* at 731.

43. *Id.* at 724.

44. *Id.*

45. As important as the *Sosa* decision is for plaintiffs bringing ATCA claims because of its holding that violations of international norms provide a cause of action under the statute, the actual outcome for the plaintiff in *Sosa* was not such a success. The Court held that Alvarez was not entitled to recover damages from *Sosa* under the ATCA because his brief arrest was not a violation of an international norm. *Id.* at 738.

46. *Id.* at 729.

47. *Id.* at 725. In other words, the only guidance the Court gave is that district courts should recognize present-day torts that correspond with Blackstone’s three primary offenses: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 724.

48. See Kelsey Deye, *Can Corporations Be Held Liable Under the Alien Tort Claims Act?*, 94 KY. L.J. 649, 661 (2005) (citing Lorelle Londis, Comment, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 142–43 (2005)).

receptive to such claims.⁴⁹ And while *Sosa* did not close the door on future claims, many have noted that it certainly has left the door only “slightly ajar,”⁵⁰ as courts have continued to find different reasons for dismissing ATCA complaints.

Even after *Filártiga* and *Sosa*, the federal courts had difficulty reconciling a 200-year-old statute with the modern-day concept of human rights litigation. Their discomfort in reaching the merits under this new regime was reflected in various technical reasons for dismissing the complaints, ranging from the state action doctrine to forum non conveniens. With time, however, each of these previous hurdles was overcome. Now, in the context of the South African litigation, another such roadblock looms—the political question and, in particular, how much deference courts should give to potential U.S. foreign policy concerns.

III. THE CONTEXT OF *IN RE SOUTH AFRICAN APARTHEID LITIGATION*: U.S. MNCS PROVIDE THE RESOURCES TO “LUBRICATE THE WHEELS AND MACHINERY OF RACISM, EXCLUSION AND REPRESSION”⁵¹

This Note does not attempt to thoroughly analyze the complex internal political issues the South African government faced at the end of apartheid, nor is it its place to criticize the choices the government made with respect to granting amnesty and reparations to its own people and corporations. It does, however, hope to point out that the U.S. corporations that benefited from the apartheid regime have not apologized to the people of South Africa or to the country’s Truth and Reconciliation Commission (“TRC”), but can still make amends with those they exploited.⁵² A judgment for the

49. A major victory for ATCA plaintiffs was the settlement reached in *Doe I. v. Unocal*. *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *and vacated*, 403 F.3d 708 (9th Cir. 2005) (en banc). For a discussion of the case, see *supra* note 32. However, in the only ATCA case that has gone to trial, in which the plaintiffs alleged that the Alabama coal company Drummond had hired Colombian paramilitaries to kill local labor leaders, the jury found in favor of the defendant corporation, and the Eleventh Circuit affirmed the trial court’s ruling. *Romero v. Drummond Co.*, No. CV-03-BE-0575-W, 2006 WL 5186500 (N.D. Ala. Apr. 19, 2006), *aff’d*, 552 F.3d 1303 (11th Cir. 2008).

50. See, e.g., Carolyn A. D’Amore, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 594 (2006).

51. Complaint & Jury Trial Demand, *supra* note 6, at 2.

52. These amends could be made, albeit unwillingly, through liability under the ATCA. As highlighted by the plaintiffs in the South African litigation:

Despite repeated demands, none of these companies have made or paid reparations, compensation or restitution to the South African population whose victimization and damages were made possible by them. And, none of these financial institutions or companies went

plaintiffs in this suit would give the people of South Africa their much needed and deserved monetary reparations.

A. BACKGROUND ON APARTHEID AND THE TRUTH AND RECONCILIATION COMMISSION

Apartheid, the system of legalized racial segregation enforced by the National Party of South Africa, arose in 1948 and officially ended in 1994 after a series of negotiations, beginning in 1991 and culminating with the swearing in of President Nelson Mandela on May 10, 1994.⁵³ For over forty years, black South Africans were relocated and confined, they faced harassment, torture, killings, and massacres, and “all means of crimes against humanity” were committed by the white minority.⁵⁴

In order to begin to heal the country after so many years of forced segregation and human rights abuses, the country’s interim Constitution of 1993 provided for the establishment of a Truth and Reconciliation Commission.⁵⁵ The TRC was set up with the goal “to document gross violations of all human rights abuses, irrespective of their perpetrators, and to make provision for amnesty for those who made full disclosure of such politically motivated human rights violations and to provide reparations for the victims of such abuses.”⁵⁶ To accomplish these three goals, South Africa avoided holding Nuremburg-like trials and instead sought to expose the truth, tell the stories of both the perpetrators and the victims, and grant both amnesty and reparations.⁵⁷

At first the idea was that reparations would take the form of honoring the victims—for example, through the erection of memorials and monuments—but the country soon realized that its struggling people needed more, and the TRC recommended that \$360 million be given to the

before the TRC to account for their wrongful acts or to any forum to have proper damages assessed against them.

Id.

53. THOMPSON, *supra* note 6, at 247–54.

54. Complaint & Jury Trial Demand, *supra* note 6, at 2.

55. Ann Skelton, *Restorative Justice as a Framework for Juvenile Justice Reform, A South African Perspective*, 42 BRIT. J. CRIMINOLOGY 496, 497 (2002).

56. Petition for a Writ of Certiorari, *supra* note 13, at app. E, at 299a, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919) (quoting Decl. of Penuell Mpapa Maduna) [hereinafter Brief of the Republic of South Africa] (Brief of the Republic of South Africa as Amicus Curiae, Submitted to the Second Circuit Court of Appeals on October 14, 2005).

57. Karen Cavanaugh, Note, *Emerging South Africa: Human Rights Responses in the Post-Apartheid Era*, 5 CARDOZO J. INT’L & COMP. L. 291, 302 (1997).

victims of apartheid.⁵⁸ The government of South Africa responded by offering \$3900 to each family of apartheid victims, a number significantly lower than that which was recommended.⁵⁹ Acknowledging the inadequacy of this amount, President Thabo Mbeki spoke before the national assembly in November 2007, stating, “We appreciate that our people understood and accepted that what reparations were disbursed consequent to the recommendations of the TRC, could only be symbolic as they could never comprehensively and adequately recompense any single person.”⁶⁰

In 2003 Archbishop Desmond Tutu, one of the spearheads of the TRC, brought to light a downside of the government’s “symbolic” reparations, the fact that many black South Africans are still struggling financially, when he stated:

Can you explain how a black person wakes up in squalid ghetto today, almost 10 years after freedom? Then he goes to work in town, which is still largely white, in palatial homes. And at the end of the day, he goes back home to squalor? I don’t know why those people don’t just say, “To hell with peace. To hell with Tutu and the truth commission.”⁶¹

Heeding those words, some South Africans looked for more than what the TRC and the government had offered them. In response to the announcement that the government would pay \$3900 to every family of apartheid victims, Ntombi Mosikare, whose nineteen-year-old brother was killed in a 1985 grenade attack against student leaders, stated, “We are not putting a price tag on our pain. We only want the country to acknowledge us. What they are giving us is too little.”⁶² In addition to insufficient reparations, some apartheid victims expressed discontent with the TRC’s goal of retelling and exposing their stories. As Terry Collingsworth, executive director of the International Labor Rights Fund, explained, “I have interviewed too many victims of human rights abuses, only to feel the frustration, if not the embarrassment, of explaining that their stories will be told to the world in reports.”⁶³

58. Ginger Thompson, *South African Commission Ends Its Work*, N.Y. TIMES, Mar. 22, 2003, at A5.

59. Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES, Apr. 16, 2003, at A7.

60. Petition for a Writ of Certiorari, *supra* note 13, at app. G, at 313a (Statement in National Assembly of President Mbeki, Dated November 8, 2007).

61. Thompson, *supra* note 58.

62. Thompson, *supra* note 59.

63. Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 185 (2002).

B. THE RISE OF THE LITIGATION AND PROCEDURAL HISTORY

Dissatisfied with the actions of the TRC and the South African government, the plaintiff class came together to seek relief from those who had economically benefited from years of torture, abuse, and forced labor: U.S. MNCs. The plaintiffs alleged that not only did these companies benefit from apartheid but that they also “fueled, facilitated and supported” the system.⁶⁴ U.S. banks provided the financing needed to support apartheid; computer technology and systems were provided so that the government could control the black majority through military, police, and population control systems; automotive companies provided vehicles to the military and police; and weapons companies provided the tools used by the police and military death squads.⁶⁵ The plaintiffs claimed that aiding and abetting the apartheid regime in such a way falls within the grasp of the ATCA, as such involvement of MNCs constitutes a clear violation of international norms.

As this Note goes to publication, this litigation has made its way through virtually the entire federal court system—from the district level to the Second Circuit, *almost* to the Supreme Court, and then back down to the district court. First dismissed by district court Judge John E. Sprizzo on November 29, 2004, on the grounds that aiding and abetting liability is not available under the ATCA,⁶⁶ the case was reversed and remanded by the Second Circuit, which held that the plaintiffs could indeed plead aiding and abetting under the ATCA.⁶⁷

The case took an interesting turn when the defendants appealed to the Supreme Court in the spring of 2008 for a writ of certiorari.⁶⁸ However, when four of the Justices recused themselves for personal conflicts, the Court could not meet the requirement of a quorum of six Justices to consider the petition.⁶⁹ Thus, the decision of the Second Circuit stood affirmed in a nonprecedential order, and the case was sent back to the district court.⁷⁰ It might have been thought that Judge Sprizzo, whose

64. Complaint & Jury Trial Demand, *supra* note 6, at 6.

65. *Id.* at 6–7.

66. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 549–50 (S.D.N.Y. 2004), *aff'd in part, vacated in part sub nom.* *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (*per curiam*), *aff'd by an equally divided Court sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.).

67. *Khulumani*, 504 F.3d at 260.

68. See Petition for a Writ of Certiorari, *supra* note 13.

69. *Am. Isuzu Motors*, 128 S. Ct. 2424.

70. *Id.*

opinion had been diametrically opposed to that of the Second Circuit, would likely find other grounds to dismiss the case. However, in a further unexpected twist, which is sure to not be the last in this litigation, Judge Sprizzo died on December 16, 2008, and the case was reassigned to his colleague, Judge Shira A. Scheindlin.⁷¹ It was clear at that moment that the outcome of the case would be drastically different from what anyone had expected.⁷²

C. THE SOUTH AFRICAN GOVERNMENT'S POSITION ON THE LITIGATION

The South African government's official position is that the suit is "bad for business," will deter foreign investment in the country, and runs counter to the theme of rebuilding. Specifically, the government has stated that "South Africa has chosen a policy of promoting economic growth, including by encouraging business investment, both foreign and domestic, rather than demanding reparations or seeking punishment from corporations that may have profited from or cooperated with the apartheid regime."⁷³

Then-Minister Penuell Mpapa Maduna issued a formal declaration in 2003 that presented his government's view of the suits, reaffirming the government's official policy of reparations over punishment, stating that "[t]he government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal."⁷⁴ He added, "If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do."⁷⁵

D. THE U.S. GOVERNMENT'S POSITION ON THE LITIGATION

The official position of the Bush administration was in accord with that of South Africa—that allowing this suit to continue would thwart the success of the policies of reconciliation and reparations that the South

71. Mark Hamblett, *Judge Narrows Claims in Apartheid Torts Case Against Multinational Corporations*, LAW.COM, Apr. 9, 2009, <http://www.law.com/jsp/law/LawArticlePC.jsp?id=1202429769165&slreturn=1>.

72. See *infra* text accompanying notes 226–27.

73. Brief of the Republic of South Africa, *supra* note 56, at 292a.

74. *Id.* at 305a.

75. *Id.* at 309a.

African government and its TRC have chosen. In addition, the United States felt that the suits would deter U.S. investment abroad in *any* country with an unstable government because of the threat that their citizens would bring ATCA lawsuits against the MNCs only for conducting business in a country where human rights abuses are being committed.⁷⁶

The State Department issued the following in an SOI detailing the U.S. government's position:

[W]e are sensitive to the views of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudication impedes South Africa's on-going efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.⁷⁷

This stance is not unique to the South African litigation—in fact, the Bush administration maintained the position that the ATCA is an improper tool for foreign plaintiffs wishing to pursue tort claims in U.S. courts.⁷⁸ As one observer described when discussing the administration's position with respect to the earlier case of *Sosa v. Alvarez-Machain*,

[T]he Bush Administration launched a full-scale assault on the statute, claiming that ATS cases were “incompatible with the textual commitment of the control over international relations to the political branches.” The Bush Administration lost this argument, however, as the Supreme Court rejected the Administration's characterization of the ATS and held instead that the statute provided jurisdiction for common law claims of violations of customary international law, when such violations were clearly defined and of sufficient magnitude.⁷⁹

In sum, the United States has used SOIs to urge the dismissal of

76. Petition for a Writ of Certiorari, *supra* note 13, at app. D, at 245a (Statement of Interest of the United States, Submitted to the District Court for the Southern District of New York on October 30, 2003). The SOI argued that

litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions.

Id. at 246a.

77. *Id.* at 245a.

78. Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department “Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 814 (2006).

79. *Id.* (quoting the Brief for the United States as Respondent Supporting Petitioner at 40, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339)).

ATCA cases many times in the past and continues to do so with this litigation. In an attempt to usurp the power granted to the courts, deference to the executive position was *expected* by the administration of the past eight years.

The plaintiffs filed a motion to resolicit the views of the U.S. government when President Bush left office and President Obama stepped in; they likely hoped that the “change” the Obama administration has promised the country would result in the issuance of a vastly different State Department SOI. Judge Scheindlin, however, denied this request.⁸⁰

E. A BRIEF RESPONSE TO THE U.S. GOVERNMENT’S CONCERNS

How much weight courts should give to the State Department’s SOI, the issue of “deference,” is discussed in the context of the political question doctrine in Part IV of this Note. However, it is of interest to digress for a moment and evaluate the merits of the U.S. government’s position. That is, are the fears espoused in the SOI valid?

1. The Lawsuit May Not in Fact Be Contrary to South Africa’s Goals

As former President of South Africa Nelson Mandela once famously stated, “Only the truth can put the past to rest.”⁸¹ Indeed, the end goals of forgiveness, reconciliation, and rebuilding can only be accomplished if the past is exposed rather than covered up and pushed out of the minds of victims and perpetrators alike. As described above, the South African government does not think that this litigation will help fulfill those goals. In the Maduna Declaration, the government stated that “the continuation of these proceedings, which inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid, will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction.”⁸² It is hard to reconcile this statement with that of the ultimate goals of the government—is litigation, and the endless discovery that goes along with it, not also about exposing the truth? Because MNCs played such a large part in the apartheid regime, the truth of their involvement would only help to

80. *In re S. African Apartheid Litig.*, Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524, 2009 WL 960078, at *32 (S.D.N.Y. Apr. 8, 2009) (“In light of this Court’s determination that the political question doctrine and international comity do not require dismissal, there is no need to re-solicit the views of the Executive Branch and the Government of South Africa.”).

81. *South Africans Reconciled?*, BBC NEWS, Oct. 30, 1998, <http://news.bbc.co.uk/2/hi/africa/142673.stm>.

82. Brief of the Republic of South Africa, *supra* note 56, at 308a.

complete the story.

2. The Lawsuit May Not Drastically Deter Investment

Rather than worrying about whether this suit's successful litigation would result in an overwhelming number of ATCA cases, this case can instead be viewed as having a potentially positive effect for foreign business—the reformation of MNCs' human rights practices abroad. Noting that the Nuremberg Tribunal successfully established the principle that private defendants who knowingly benefited from slave labor could be held liable, Collingsworth suggests that a similar standard should be established in ATCA cases.⁸³ Establishing a set standard, he argues, is necessary to set the boundaries for what are acceptable and unacceptable practices abroad.⁸⁴ This ties in with the idea that the continuation of this suit would not deter investment abroad because, once one case is litigated and a standard is finally firmly set, MNCs will be on notice as to what they cannot do abroad. With the implementation of a standard, MNCs would only have to fear liability abroad if they committed human rights abuses; therefore, if their practices were safe, they would be sheltered from liability. As Collingsworth stated, “Multinational firms would then be required to ensure that they were not knowingly participating in human rights violations—a standard with which it should be fairly easy to comply.”⁸⁵

With this background in mind, the next part of this Note explores the political question doctrine, which will be discussed in the context of the South African litigation in Part VII.

IV. THE POLITICAL QUESTION DOCTRINE

A. THE BIRTH OF THE POLITICAL QUESTION DOCTRINE: *BAKER V. CARR*

Lying dormant for the better part of two centuries was a doctrine that was to have an increasing impact on this new generation of ATCA cases. In the seminal 1803 case *Marbury v. Madison*, the Supreme Court interpreted Article III of the Constitution to grant the federal courts the power of judicial review.⁸⁶ This power was, however, found to have its limits, as some claims and questions were held to be more appropriately addressed

83. Collingsworth, *supra* note 63, at 191.

84. *Id.*

85. *Id.*

86. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

by the other branches of the government.⁸⁷ As Chief Justice John Marshall stated, the concept that has come to be known as the “political question doctrine” is the idea that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”⁸⁸ Thus, those nonjusticiable political questions, where adjudication by the courts would interfere with the policies or decisions of either the executive or legislative branches, should be left to those branches and kept out of the courts.

It was not until the 1962 Supreme Court decision *Baker v. Carr*, more than 150 years later, that specific guidelines were given for making the very difficult decision of when a claim presents this type of nonjusticiable political question.⁸⁹ The Court “described the doctrine as a function of the separation of powers”⁹⁰ and found that the determination of whether or not a matter has “been committed by the Constitution to another branch of government”⁹¹ is “a delicate exercise in constitutional interpretation, and is a responsibility of [the] Court as ultimate interpreter of the Constitution.”⁹² The Court finally provided guidance to the lower courts by setting forth six factors⁹³ to follow; therefore, whether or not a claim presents a nonjusticiable political question requires an application of this partially objective, partially subjective test.⁹⁴ The factors are

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due 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.⁹⁵

87. *Id.* at 169–70.

88. *Id.* at 170.

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

90. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1203 (9th Cir.), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007), *and remanded*, 550 F.3d 822 (9th Cir. 2008) (en banc).

91. *Baker*, 369 U.S. at 211.

92. *Id.*

93. The Court initially called the six factors “formulations” in *Baker*. *Id.* at 217. However, the Court subsequently described the criteria as “six independent tests” in *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

94. *Baker*, 369 U.S. at 211–12.

95. *Id.* at 217.

Only one of the factors needs to be met in order for a claim to be dismissed for nonjusticiability.⁹⁶

Courts must analyze each of the applicable factors, “[b]ut these tests are more discrete in theory than in practice, with the analyses often collapsing into one another.”⁹⁷ As to the relative importance of the six, the Supreme Court announced in *Vieth v. Jubelirer* that “[t]hese tests are probably listed in descending order of both importance and certainty.”⁹⁸

Prior to *Baker*, courts had been quick to jump to the conclusion that they could not hear a claim simply because it involved foreign relations.⁹⁹ However, *Baker* clarified this misconception, stating, “There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”¹⁰⁰

B. UNCERTAINTY OVER THE POLITICAL QUESTION DOCTRINE AND SUBJECT MATTER JURISDICTION

In the ATCA context, before beginning an analysis of the six factors, there is another question that needs to be answered: When in the course of the litigation should the political question be asked and answered—before or after subject matter jurisdiction is discussed? As the Second Circuit noted in the South African litigation, “This case has confronted our panel with a number of difficult and unsettled questions in a controversial area of the law.”¹⁰¹ The court’s evaluation could not have been more prescient, as the treatment accorded the political question doctrine presents a truly tangled web.

1. Confusion over When to Address the Political Question Doctrine and Deference in the South African Litigation

The district court in the South African litigation did not address the political question in its analysis but instead dismissed the claim after

96. *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005) (“Because any single test can be dispositive, we address each in our discussion.”).

97. *Id.* at 544.

98. *Vieth*, 541 U.S. at 278.

99. *See, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302–04 (1918).

100. *Baker*, 369 U.S. at 211 (footnotes omitted).

101. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 291 (2d Cir. 2007) (Hall, J., concurring), *aff’d by an equally divided Court sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.).

finding that there was no subject matter jurisdiction under the ATCA.¹⁰² When addressing the defendants' argument in that regard, the court simply stated in a footnote, "Defendants also argue that there is no case or controversy for this Court to hear . . . because the matter is a non-justiciable political question. Given the Court's finding that defendants are entitled to relief on other grounds, the Court need not address these remaining grounds for defendants' motion."¹⁰³ Thus, there was no *Baker* analysis undertaken at the district court level.

The Second Circuit majority followed suit in skirting the issue, arguing that because the district court did not reach the political question, neither would it, stating:

We decline to address these case-specific prudential doctrines [political question and comity] now and instead remand to the district court to allow it to engage in the first instance in the careful "case-by-case" analysis that questions of this type require. . . . On remand, the district court will have an opportunity to consider the guidance provided by our prior cases [for example, *Whiteman v. Dorotheum*] regarding the relevant weight of statements of interest submitted by the United States and other governments.¹⁰⁴

In his dissent, Judge Korman attempted (weakly) to argue that the district court did in fact address the political question because the court referred to *Sosa*'s mention of deference,¹⁰⁵ however, the majority easily (and correctly) countered, stating, "We see no reason to read the district court's citation to this part of *Sosa* as an indication that the court was also (and contrary to its explicit disclaimer) engaged in a consideration of the political question or other prudential doctrines."¹⁰⁶

Perhaps more convincingly, Judge Korman quickly¹⁰⁷ moved on to the argument that even if the district court did not analyze the political question, there is no reason that the Second Circuit should not have done so. To support this reasoning, he stated that "[w]hile cases may be found where we declined to reach an issue not addressed by the district court, we

102. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 543 (S.D.N.Y. 2004), *aff'd in part, vacated in part sub nom. Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, *aff'd by an equally divided Court sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424.

103. *Id.* at 543 n.4 (citation omitted).

104. *Khulumani*, 504 F.3d at 263.

105. *Id.* at 307 (Korman, J., dissenting).

106. *Id.* at 262 (per curiam).

107. Even Judge Korman quickly shied away from his argument with the concessive comment that he was "unwilling to burden this opinion any further on this score." *Id.* at 307 (Korman, J., dissenting).

have held expressly that we are ‘free to affirm a district court decision . . . even [on] grounds not relied upon by the district court.’”¹⁰⁸

The petitioners hitched themselves to this more persuasive portion of Judge Korman’s argument, stating, “[T]he importance of the interests at stake here means that the Second Circuit should have resolved this issue—which does not require development or consideration of a factual record—regardless of whether the district court addressed it.”¹⁰⁹ The persuasive argument is that “[c]ompelling considerations rooted in the Constitution’s allocation of foreign affairs authority to the Executive Branch and Congress should have led the court of appeals to address *at the threshold* the matter of deference to political branches.”¹¹⁰ This observation leads logically into a discussion of the next issue, which is less case specific and has more ramifications for all ATCA cases involving potential political questions: Where exactly on the procedural spectrum should the political question be addressed, and what kind of legal “animal” is it—jurisdictional, “on the merits,” or somewhere in between?

2. The Political Question Should Be Answered at the Threshold

“‘[I]t is hardly novel for a federal court to choose among threshold grounds’ for declining to reach the merits, even if those grounds are not, strictly speaking, jurisdictional.”¹¹¹

Justiciability—the political question doctrine analysis—should be answered before the jurisdiction issue is determined.¹¹² With little guidance from the Supreme Court as to which question to analyze first, courts addressing ATCA claims have treated the matter each in their own way, with the Second Circuit, as noted above, choosing not to address the political question at all. The petitioners pointed out the need for the Supreme Court to issue a holding to clarify this confusion, stating:

The Second Circuit accordingly erred when it refused to address the deference question. Correction of that error by this Court would reconcile the differing approaches of the court below and the District of Columbia [*Hwang Geum Joo v. Japan*] and Ninth Circuits [*Corrie v.*

108. *Id.* (citation omitted) (quoting *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 134 (2d Cir. 2007)).

109. Petition for a Writ of Certiorari, *supra* note 13, at 19.

110. *Id.* at 17.

111. *Id.* (quoting *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005)).

112. The jurisdiction at issue in the South African litigation is the aiding and abetting claim under the ATCA.

Caterpillar], providing valuable instruction on how the lower courts should treat matters of such sensitivity.¹¹³

The District of Columbia Circuit chose to address the political question first in *Hwang*, stating, “[W]e need not resolve the question of the district court’s subject-matter jurisdiction [under the FSIA statute] . . . before considering whether the complaint presents a nonjusticiable political question.”¹¹⁴ Finding a political question existed, the court never reached the subject matter jurisdiction issue. Calling the political question a “threshold” one, the court quoted *Ruhrgas AG v. Marathon Oil Co.*: “It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.”¹¹⁵

Taking a different approach, the Ninth Circuit in *Corrie* interpreted the political question doctrine to mean that if a case presented a political question, the court lacked subject matter jurisdiction to hear the claim,¹¹⁶ stating, “We must decide whether the presence of a political question deprives a court of subject matter jurisdiction. To the extent the answer to that question is ‘unclear,’ we now hold that it does.”¹¹⁷ While this ultimate holding differs from *Hwang*, the Ninth Circuit also addressed the political question at the threshold.

On the other hand, a decade earlier in 1995, the Second Circuit in *Kadic v. Karadžić* found that there was not only subject matter jurisdiction (because the plaintiffs successfully pleaded a violation of the law of nations),¹¹⁸ but also that the issue presented no political question that would bar adjudication because no *Baker* factor was implicated.¹¹⁹ Upon finding subject matter jurisdiction first, the court “proceed[ed] to consider whether, even though the jurisdictional threshold is satisfied in the pending cases, other considerations relevant to justiciability weigh against permitting the suits to proceed.”¹²⁰ It went on to hold that the political question doctrine—a “nonjurisdictional, prudential doctrine[.]”—did not bar the plaintiffs’ claim.¹²¹ Because the court found that both thresholds were overcome, it did not matter which one was analyzed first. Thus, the issue of the

113. Petition for a Writ of Certiorari, *supra* note 13, at 19.

114. *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005).

115. *Id.* (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)).

116. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007).

117. *Id.* at 980 (citation omitted).

118. *Kadic v. Karadžić*, 70 F.3d 232, 243 (2d Cir. 1995).

119. *Id.* at 249–50.

120. *Id.* at 249.

121. *Id.*

appropriateness of analyzing subject matter jurisdiction first was never questioned.

The law in the Second Circuit, however, became muddled. It would implicitly appear, after *Kadic*, that subject matter jurisdiction is addressed first, then the political question doctrine. However, courts in the circuit have not necessarily read that to be so. For example, in *In re Nazi Era Cases*, a 2001 case from New Jersey, the district court found that “[w]hile questions of subject-matter jurisdiction are conventionally the first that a court should consider, justiciability is also a threshold question. Given the dispositive nature of the Court’s justiciability analysis, any jurisdictional questions that may exist in this case need not be reached.”¹²² And in the 2005 case of *Whiteman v. Dorotheum GmbH & Co. KG*, the Second Circuit itself compounded the confusion by commenting, “We have previously held that a federal court may consider ‘threshold’ non-merits grounds for dismissing a claim—including, for example, deference to the foreign affairs powers of the Executive pursuant to the ‘political question’ doctrine—before determining whether it has subject-matter jurisdiction to consider that claim.”¹²³ However, in his concurrence in the South African litigation, Judge Hall appears to revert back to the *Kadic* approach:

The dissent contends that the district court lacked subject matter jurisdiction as a result of certain justiciability doctrines, such as case specific deference, the political question doctrine, and international comity. Respectfully, this contention is in error. In *Baker v. Carr*, the Supreme Court distinguished between the two. The evidence, *vel non*, of subject matter jurisdiction is simply a question . . . of whether a claim rises under federal law. If subject matter jurisdiction exists, a court may then—and only then— inquire as to the applicability of any of the various justiciability doctrines: . . . [T]he dissent [therefore] errs in conflating the anterior question of the existence of subject matter jurisdiction with the posterior question of justiciability.¹²⁴

Clearly, this is an area which cries out for guidance from above. However, because of its unique impact on both tangential and substantive

122. *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 374 n.6 (D.N.J. 2001) (citation omitted). The court referred to *United States v. Sperry Corp.*, 493 U.S. 52, 66 (1989), a non-ATCA case in which the Supreme Court found that “it would be inappropriate” to address Sperry’s claim that § 502 was enacted in violation of the Origination Clause of Article I, Section 7 of the Constitution “before [deciding] the threshold question of justiciability.”

123. *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 73 n.18 (2d Cir. 2005) (citing *Can v. United States*, 14 F.3d 160, 162 n.1 (2d Cir. 1994)).

124. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 291 (2d Cir. 2007) (Hall, J., concurring) (citations omitted), *aff’d by an equally divided Court sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.).

aspects of a case, the political question should indeed be answered at the threshold.

3. The Political Question and Deference Are Not Two Distinct Doctrines

Then there is the further confusion as to whether the political question and deference to the executive branch are two issues or one. Some, including the petitioners in the South African litigation, seem to imply the former, mirroring the logic of the dissent in *Whiteman* that criticized the majority for “conflating” the two doctrines, stating that “an ambiguous association between the (mandatory) political question doctrine and the (discretionary) doctrine of executive deference pervades the majority opinion.”¹²⁵

The majority in the South African litigation, however, dismissed this argument in noting: “Th[e] policy of ‘[j]udicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential justiciability doctrine known as the “political question” doctrine.’”¹²⁶ The bottom line is that deference to the executive is not a new doctrine, but rather has been considered by the courts to be a part of the political question doctrine.

V. A BRIEF ANALYSIS OF THE FIRST THREE *BAKER* FACTORS IN THE ATCA CONTEXT AND THEIR NONAPPLICATION TO THE SOUTH AFRICAN LITIGATION

We now come to the application of the *Baker* criteria themselves. It is useful in this context to take note of the distinction recognized by the Ninth Circuit in *Corrie v. Caterpillar*, which will be discussed in Part VII.B: “We have accordingly pointed to Justice Powell’s view that the first three *Baker* factors focus on the constitutional limitations of a court’s jurisdiction, while the final three are ‘prudential considerations [that] *counsel* against judicial intervention.’”¹²⁷ Consistent with that logic, this Note will treat the first three *Baker* factors rather summarily¹²⁸ and proceed to the more

125. *Whiteman*, 431 F.3d at 82 (Straub, J., dissenting).

126. *Khulumani*, 504 F.3d at 261 (quoting *Whiteman*, 431 F.3d at 69).

127. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007) (quoting *Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005)).

128. Judge Sheindlin similarly passed over the first three factors quickly, observing, “The first three *Baker* factors will almost never apply in ATCA suits, which are committed to the judiciary by statute and utilize standards set by universally recognized norms of customary international law.” *In re S. African Litig.*, Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524, 2009 WL 960078, at *29 (S.D.N.Y. Apr. 8, 2009).

relevant, and unanswered, issue that the petitioners had hoped the Supreme Court would face in the South African litigation—the “prudential” aspect of the political question deference argument.¹²⁹

A. FACTOR ONE

The first *Baker* test is whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”¹³⁰ What might be thought to be the most objective—and easiest to dispose of—factor turns out to require some extrapolation. The Ninth Circuit in *Alperin v. Vatican Bank* observed that it could “divine no explicit constitutional reference that is applicable to this case”¹³¹ but then agreed with Justice White’s concurrence in *Nixon v. United States* that “there are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment. . . . The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution.”¹³²

There is, in fact, no specific clause in the Constitution that explicitly grants the political branches control over all aspects of foreign relations.¹³³ However, in cases involving foreign relations, like all ATCA claims, the courts recognize that there is a “general commitment of foreign relations to the political branches”¹³⁴ but emphasize that “whether a court should defer to the political branches is a case-by-case inquiry.”¹³⁵

In the context of ATCA claims, the first *Baker* factor seems to have been definitively resolved by both the Second and Ninth Circuits. As the Ninth Circuit’s *Sarei v. Rio Tinto, PLC* opinion summarizes the position: “In *Alvarez-Machain v. United States*, we adopted the Second Circuit’s holding that the resolution of claims brought under the ATCA has been constitutionally entrusted to the judiciary.”¹³⁶

129. See *infra* Part VII.

130. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

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

132. *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 240–41 (1993) (White, J., concurring)).

133. *Id.* Other courts have come to similar conclusions. *E.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1192 (C.D. Cal. 2005) (“As noted by *Alperin*, there is no explicit, textually demonstrable commitment of foreign policy to the political branches of the United States.” (citation omitted)).

134. *Alperin*, 410 F.3d at 549.

135. *Id.*

136. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1203–04 (9th Cir.) (citation omitted) (citing *Alvarez-Machain v. United States*, 331 F.3d 604, 615 n.7 (9th Cir. 2003), *rev’d*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007), and *remanded*,

B. FACTOR TWO

The second *Baker* test is whether or not there is “a lack of judicially discoverable and manageable standards for resolving [the case].”¹³⁷ The *Alperin* court expanded upon this concept, stating:

The crux of this inquiry is . . . not whether the case is unmanageable in the sense of being large, complicated or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is “principled, rational, and based upon reasoned distinctions.”¹³⁸

ATCA claims, like the Nazi-era cases, generally involve a very large class of plaintiffs with multiple complicated fact situations. The *Alperin* court asked “whether the courts are capable of granting relief in a reasoned fashion or, on the other hand, whether allowing the Property Claims to go forward would merely provide ‘hope’ without a substantive legal basis for a ruling.”¹³⁹ Calling the Holocaust litigation a “behemoth of a case,”¹⁴⁰ the court nevertheless found that the case passed the second test and noted that “courts have repeatedly risen to the challenge of handling cases involving international elements as well as massive, complex class actions.”¹⁴¹ Moreover, since the time *Baker* was decided in 1962, the courts have been faced with continuingly more complex litigation.¹⁴² The South African litigation, while monstrous, does not present a case of any greater complexity than the Nazi-era (or similar) cases such that the courts cannot manage it.

C. FACTOR THREE

The third *Baker* factor appears to be the most elusive and underscrutinized of the six, perhaps because the lower courts have been unable to intuit exactly what the *Baker* Court had in mind from its own

550 F.3d 822 (9th Cir. 2008) (en banc).

137. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

138. *Alperin*, 410 F.3d at 552 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)).

139. *Id.* at 553.

140. *Id.* at 554.

141. *Id.*

142. In fact, the *Kadic* court went so far as to comment that our decision in *Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch.

Kadic v. Karadžić, 70 F.3d 232, 249 (2d Cir. 1995).

sparse treatment of the issue. *Alperin*, in a single dismissive line, simply found the factor inapplicable (to adjudication of wrongful deprivation of property),¹⁴³ citing *Aktepe v. United States*, which, in an equally dismissive fashion, found that resolution of that case (regarding naval training drills) would “inevitably . . . require that courts make initial policy decisions of a kind appropriately reserved for military discretion.”¹⁴⁴

D. FACTORS NOT APPLICABLE TO THE SOUTH AFRICAN LITIGATION

In support of their motion to dismiss, the defendants in the South African litigation focused on the first two *Baker* factors, and in particular on the first. Citing *In re Nazi Era Cases*,¹⁴⁵ a case easily distinguishable from their own, they argued that foreign affairs are entrusted to the political branches alone.¹⁴⁶ Secondly, and again attempting to draw comparisons between Nazi-era cases and their own, they argued that the litigation simply was too large to possibly adjudicate, thus implicating the second *Baker* factor.¹⁴⁷

However, in the time between the filing of the motion to dismiss and the filing of the petition for certiorari, the tune of the defendants’ arguments changed. In the interim, the Supreme Court decided *Sosa* and placed a far heavier emphasis on deference in ATCA cases,¹⁴⁸ therefore implicating the last three factors as opposed to the first three the defendants had previously relied on. This issue is discussed in the next parts.

VI. BAKER FACTORS FOUR, FIVE, AND SIX AND DEFERENCE TO THE EXECUTIVE BRANCH: “[T]HE CONSTITUTION DOES NOT RELEGATE US TO THE SIDELINES. WE ARE A PLAYER IN ADJUDICATING CLAIMS, AND A CRUCIAL ONE AT THAT.”¹⁴⁹

The underlying pillar of deference to the executive branch under the political question doctrine, and in fact the only justifiable rationale for

143. *Alperin*, 410 F.3d at 555.

144. *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997).

145. *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001). This case is discussed Part VII.C *infra*.

146. Memorandum of Law in Support of Defendants’ Joint Motion to Dismiss at 20, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (MDL No. 1499, 02 Civ. 4712, 02 Civ. 6218, 02 Civ. 10062, 03 Civ. 1023, 03 Civ. 1024, 03 Civ. 1025, 03 Civ. 1026, 03 Civ. 4524), 2003 WL 25654355.

147. *Id.* at 25–26.

148. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–38 (2004).

149. *Alperin v. Vatican Bank*, 410 F.3d 532, 558 n.16 (9th Cir. 2005).

inserting “politics” into otherwise legitimate judicial proceedings, is that in certain *limited* instances foreign policy considerations of the U.S. government may, unfortunately, trump individual litigants’ rights to a hearing on the merits. That being said, the *Baker* Court’s admonition that not all cases that touch on foreign relations lie outside the judiciary’s grasp, cited at the outset of this Note, must be kept firmly in mind.

It is clear then that entertainment of the South African litigation will rise or fall upon a more subjective parsing of the legal arguments of the fourth through sixth *Baker* factors, and that it is through these more subjective factors that additional general principles of deference can be constructed. *Baker* recognized just how sophisticated this process might be:

Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the judicial branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.¹⁵⁰

The last three factors, in particular, turn on questions that “uniquely demand single-voiced statement of the Government’s views.”¹⁵¹

The mechanism for raising these issues is an explicit statement by the executive branch and State Department, and SOIs have been recognized as the critical vehicle for that expression. Indeed, the *Sarei* court went so far as to state, “We first observe that without the SOI, there would be little reason to dismiss [a] case on political question grounds, and therefore that the SOI must carry the primary burden of establishing a political question.”¹⁵² In the ATCA context, these statements generally list reasons why it would show a lack of respect to either the legislature or the executive if the courts adjudicated a case (implicating the fourth factor), why the courts should defer to a political decision already made by one of the other branches (dealing with the fifth factor), or why it would be an embarrassment to the United States for the courts to take the case and potentially rule in a way that is contrary to the position of one of the other branches (focusing on the sixth factor).¹⁵³

150. *Baker v. Carr*, 369 U.S. 186, 211–12 (1962).

151. *Id.* at 211.

152. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1206 (9th Cir.), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007), *and remanded*, 550 F.3d 822 (9th Cir. 2008) (en banc). The “burden” has been found to be a concrete one. *See id.* at 1206–07 (“Nor do we see any ‘unusual need for unquestioning adherence’ to the SOI’s nonspecific invocations of risks to the peace process.” (quoting *Baker*, 369 U.S. at 217)).

153. *See, e.g., Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983–84 (9th Cir. 2007) (finding that the fourth, fifth, and sixth factors barred adjudication); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp.

Prior to *Sosa*, “some courts found a nonjusticiable political question [simply] where the State Department had indicated that a judicial decision would impinge upon important foreign policy interests.”¹⁵⁴ That view has changed, and now the courts “must first decide how much weight to give the State Department’s statement of interest.”¹⁵⁵

Furthermore, the executive branch’s expression is no longer to be viewed as automatically dispositive.¹⁵⁶ Rather, the courts adopt an approach voiced effectively in *Sarei* that,

[g]uided by separation of powers principles, as well as [case precedent], we conclude that although we will give the view in the SOI “serious weight,” it is not controlling on our determination of whether the fourth through sixth *Baker* factors are present. Ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding.¹⁵⁷

A. RESERVATIONS OVER SOIS

Again, it must be highlighted that courts have shown a number of reservations toward SOIs. One commentator noted that “the courts typically [have not] accepted an executive branch statement based on speculation over future consequences, particularly when the passage of time would allow the court to evaluate whether the concerns expressed by the executive appeared likely to arise in the litigation.”¹⁵⁸ He added the warning that “[b]ecause State Department interests change as administrations and policies change, State Department submissions may lead to inconsistent outcomes—sometimes in the same case.”¹⁵⁹ The foreign interests on which the policy is premised may change so that

when State Department interest in a case is predicated upon a statement from a foreign government, and the foreign government later repudiates this statement, the Ninth Circuit has noted that such a change illustrates

2d 1164, 1193–94 (C.D. Cal. 2005) (holding that the fourth and fifth factors were both implicated).

154. *Sarei*, 487 F.3d at 1205.

155. *Id.* at 1204.

156. The dissent in *Whiteman* noted: “As is clear from the language of . . . *Sosa*, the Supreme Court has indicated that, in some cases, executive statements of interest might be entitled to significant weight, but it has declined to specify how and when this rule might apply.” *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 82 (2d Cir. 2005) (Straub, J., dissenting).

157. *Sarei*, 487 F.3d at 1205 (citation omitted).

158. *Baxter*, *supra* note 78, at 828 (footnote omitted).

159. *Id.*

why it is inappropriate to assign “final and conclusive weight” to a State Department statement of interest as establishing a political question.¹⁶⁰

Finally, *Sarei* cautioned that SOIs need to also be reviewed for arbitrariness, citing to a line of cases, including *Matimak Trading Co. v. Khalily*, which observed that “an unexplained change in stance . . . might under different circumstances require further inquiry of its ulterior motives.”¹⁶¹

B. FACTORS FOUR, FIVE, AND SIX

The lines between the fourth, fifth, and sixth *Baker* factors are, perhaps expectedly, blurred, as they speak of overlapping concepts of lack of respect, adherence to political decisions, and avoidance of potential embarrassment.¹⁶² Pivotal to all, however, is the definable, active, and defensible policy of the U.S. government.

1. The Fourth Factor

The first of the more subjective criteria is the fourth *Baker* factor, which addresses “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.”¹⁶³ The difficulty here is how exactly courts should, and do, define “lack of respect.” The Supreme Court has given little guidance on this factor, leaving much room for the courts to interpret it as they see fit.

A key point, however, is that the mere fact that the executive branch does not wish a suit to proceed will not automatically make the suit nonjusticiable under the theory that its continuation would indicate a lack of respect. Through SOIs, the executive branch often voices its opinion when it feels that an ATCA claim is inappropriate and should be dismissed because of various foreign policy reasons. As the court noted in *Sarei*, “we are confident that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear.”¹⁶⁴ Yet the Second

160. *Id.* at 833 n.144 (quoting *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1083 n.13 (9th Cir. 2006), *withdrawn*, 487 F.3d 1193 (9th Cir.), *reh’g en banc granted*, 499 F.3d 923 (9th Cir. 2007), and *remanded*, 550 F.3d 822 (9th Cir. 2008)).

161. *Sarei*, 487 F.3d at 1205 (quoting *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 82 (2d Cir. 1997), *abrogated on other grounds by J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88 (2002)).

162. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

163. *Id.*

164. *Sarei*, 487 F.3d at 1206.

Circuit went further, noting that “even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication.”¹⁶⁵ And while the court in *Sarei* did not decide one way or the other whether a court’s decision to adjudicate a claim against the protest of the executive branch was *in and of itself* disrespectful and warranting of dismissal, it noted that the court in *Kadic* determined that it would not be.¹⁶⁶

2. The Fifth Factor

The fifth *Baker* factor calls for dismissal in cases where there is “an unusual need for unquestioning adherence to a political decision already made.”¹⁶⁷ This criterion is slightly more akin to the first three in that it is somewhat less subjective. Because of its apparent call for an explicit indisputable mandate, it is therefore understandable that few courts have been called upon to address it (and then only fleetingly).¹⁶⁸

3. The Sixth Factor

The sixth and final factor, and perhaps the most subjective and vague, focuses on “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”¹⁶⁹ Thus, the sixth factor would seem to require two findings: first, that there has been a previous pronouncement by another branch of government that a judicial finding could possibly contradict; and second, that if the judiciary does contradict that pronouncement, the inconsistency would be an embarrassment to the U.S. government.¹⁷⁰

In this regard, courts first look to whether or not there are other firm negotiations or agreements between the U.S. government and the foreign government with respect to the issue before the court or whether any future

165. *Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

166. “We need not determine whether a refusal to honor an explicit request to dismiss would constitute sufficient ‘disrespect’ to warrant dismissal under this factor, although we note the Second Circuit’s conclusion in *Kadic* that it would not.” *Sarei*, 487 F.3d at 1206 n.14 (citing *Kadic*, 70 F.3d at 250).

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

168. See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 557–58 (9th Cir. 2005); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 (2d Cir. 1991); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046–47 (9th Cir. 1983).

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

170. What exactly amounts to an “embarrassment,” and whether the Court in *Baker* meant an embarrassment that would come from losing the respect of foreign governments or of foreign citizens, is unclear.

agreements seem likely. For example, the court in *Alperin* held that the sixth factor was not implicated because no other “government negotiations, agreements, or settlements are on the horizon.”¹⁷¹

In contrast, in *In re Nazi Era Cases*, discussed below in Part VII.C, the court found that the sixth factor was implicated when claims were brought against German companies for crimes committed during World War II.¹⁷² Because a foundation to provide compensation to victims of the Nazi era who had claims against these companies had already been established, the court reasoned that the existence of this foundation, along with numerous treaties and agreements,¹⁷³ were clear showings that the claims should not be litigated.¹⁷⁴ Rather, the court felt these claims should be submitted to the foundation and stated that “the potential for embarrassment to the United States grows larger with each day that cases such as Plaintiff’s remain active in our nation’s courts”¹⁷⁵ because the suits were clearly contrary to established agreements.

Keeping in mind these examples highlighting the courts’ various interpretations of the *Baker* factors, this Note next attempts to outline the proper application of the concept of deference within the last three factors.

VII. WHEN DEFERENCE TO THE EXECUTIVE BRANCH IS APPROPRIATE

In the context of ATCA cases, deference to the executive and legislative branches under the final three *Baker* factors has been applied in a suit directly against a foreign government involving the appropriateness of its post-WWII peace treaties,¹⁷⁶ in a suit implicating actual congressional foreign policy decisions,¹⁷⁷ and in suits where nonjudicial relief is available and more appropriate.¹⁷⁸ However, application of the doctrine where the only defendants are private U.S. citizens (including MNCs) with no link to government-made policy or decisions has not been specifically addressed by the Supreme Court.

171. *Alperin*, 410 F.3d at 558.

172. *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 382–83 (D.N.J. 2001).

173. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 265–72 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 447 (D.N.J. 1999).

174. *In re Nazi Era Cases*, 129 F. Supp. 2d at 383.

175. *Id.*

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

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

178. *See, e.g., Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *In re Nazi Era Cases*, 129 F. Supp. 2d 370.

In this final part, this Note addresses the issue left open for interpretation in *Sosa* by the Supreme Court's cryptic observation, in a passing bit of dicta, regarding the pending South African litigation:

[T]here are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission. . . . The United States has agreed. . . . In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.¹⁷⁹

While this statement may initially sound ominous to the plaintiffs' position in the South African litigation, it cannot be read as an official foreshadowing of what courts might ultimately hold. As the Second Circuit stated in the South African litigation, "We reject the proposition endorsed by [the dissent] that the Supreme Court, in a footnote written while deciding a different case, would instruct us on how to decide this case, which was not before it."¹⁸⁰

This part addresses the fact that the Supreme Court noted the necessity for deference to the executive without giving clear guidelines as to when exactly deference is appropriate. The South African litigation offers an ideal vehicle for evaluating when deference should *not* be given: when rather than being "political," the executive branch's goal would appear to be more commercial—to protect powerful U.S. MNCs from damaging suits.¹⁸¹ Thus, the argument is not that the political question doctrine is inappropriate and should be changed or discarded, but rather that its application should not be influenced by the executive unless very limited, specific circumstances warranting executive intrusion are present.

A. DEFERENCE IS APPROPRIATE IN SUITS AGAINST A FOREIGN GOVERNMENT

The plaintiffs in *Hwang Geum Joo v. Japan* were women from China,

179. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (citations omitted).

180. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 261 n.9 (2d Cir. 2007) (per curiam), *aff'd by an equally divided Court sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.).

181. One commentator noted, "In a classic case of the tail wagging the dog, businesses with clout appear able to convince foreign governments and the State Department that a private lawsuit . . . would cause geo-political, diplomatic, and financial calamities, even when such lawsuits concern the fundamental human rights of individuals." Baxter, *supra* note 78, at 831.

Taiwan, South Korea, and the Philippines, who were allegedly subjected to sexual slavery and torture before and during WWII.¹⁸² They brought their claims under the ATCA against the country of Japan.¹⁸³ The issue before the court was “whether the series of treaties Japan concluded in order to secure peace after World War II foreclosed the appellants’ claims.”¹⁸⁴ The court noted that “all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war” were expressly waived by article 14 of the 1951 peace treaty between Japan and the Allied powers.¹⁸⁵

The treaty waived all claims from nationals of Allied power countries, but the appellants in this case were women from China, Taiwan, and South Korea; therefore, they argued that their claims were not waived because their governments were not parties to the treaty.¹⁸⁶ However, those governments later entered into various peace treaties with Japan, some of which noted that “any problem arising . . . shall be settled in accordance with the relevant provisions of the [1951] Treaty.”¹⁸⁷

The State Department issued an SOI, which the court called “thorough and persuasive,”¹⁸⁸ urging that allowing this case to proceed would greatly interfere with the ability of the president of the United States to conduct the country’s foreign relations.¹⁸⁹ The D.C. Circuit deferred to the executive branch’s judgment and held that “the appellants’ complaint presents a nonjusticiable political question, namely, whether the governments of the appellants’ countries resolved their claims in negotiating peace treaties with Japan.”¹⁹⁰ The court aptly noted that “it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits.”¹⁹¹ To allow foreign nationals to use the ATCA in U.S. courts in order to sue a foreign government with whom the United States has treaties would surely cause chaos and interfere with the executive

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

183. *Id.*

184. *Id.* at 49.

185. *Id.* (quoting Hwang Geum Joo v. Japan, 332 F.3d 679, 685 (D.C. Cir. 2003), *vacated*, 542 U.S. 901 (2004) (mem.)). *See also* Treaty of Peace with Japan art. 14, Sept. 8, 1951, 3 U.S.T. 3169.

186. Hwang Geum Joo, 413 F.3d at 49.

187. *Id.* at 50 (quoting Treaty of Peace Between the Republic of China and Japan, Japan-P.R.C. (Taiwan) art. XI, Apr. 28, 1952, 138 U.N.T.S. 37).

188. *Id.* at 48.

189. *Id.*

190. *Id.* at 52–53.

191. *Id.* at 50.

branch's foreign policy decisions. Thus, deference to the executive's position was appropriate here.

B. DEFERENCE IS APPROPRIATE WHERE *SPECIFIC* U.S. GOVERNMENT POLICY DECISIONS ARE IMPLICATED

The plaintiffs in *Corrie v. Caterpillar* were family members of victims killed when the Israeli Defense Force ("IDF") demolished homes in the Palestinian Territories.¹⁹² They brought various claims under state, federal, and international laws¹⁹³ against the defendant, Caterpillar, Inc., for manufacturing the bulldozers used to demolish the homes.¹⁹⁴ While Caterpillar manufactured the bulldozers, the U.S. government paid for each of the machines that the IDF received.¹⁹⁵ The plaintiffs alleged that Caterpillar had actual and constructive notice that the IDF would use the equipment to destroy homes in the Palestinian Territories.¹⁹⁶ The Ninth Circuit observed that it would be impossible for the plaintiffs to allege both that Caterpillar was aware of the IDF's use of the bulldozers but that somehow the U.S. government was unaware of their purpose.¹⁹⁷ Thus, the court was faced with a political question, as "each claim unavoidably rests on the singular premise that Caterpillar should not have sold its bulldozers to the IDF. Yet these sales were financed by the executive branch pursuant to a congressionally enacted program"¹⁹⁸

Finding that the first, fourth, fifth, and sixth *Baker* factors were implicated,¹⁹⁹ the court drew a distinction between this case and *Sarei*, where it had previously found that the action brought did not present a nonjusticiable political question.²⁰⁰ The court wrote,

The United States was implicated in the [*Sarei*] litigation only through its filing of a Statement of Interest at the request of the district court. This is a sizable step removed from the current proceedings where the

192. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977 (9th Cir. 2007).

193. The court did not reach the merits of these claims because it first concluded that the claims presented nonjusticiable political questions: "Plaintiffs' action cannot proceed because its resolution would require the federal judiciary to ask and answer questions that are committed by the Constitution to the political branches of our government." *Id.*

194. *Id.*

195. *Id.* at 978.

196. *Id.* at 977.

197. *Id.* at 982 n.7.

198. *Id.* at 982.

199. *Id.* at 983.

200. *Id.* at 983 n.8.

United States is a direct actor, having funded Israel's purchase of the bulldozers in question.²⁰¹

Because the U.S. government and its policy decisions toward Israel would essentially be put on trial if the case were to go forward, the case was properly dismissed.

C. DEFERENCE IS PROPER WHERE THERE IS A MORE APPROPRIATE FORUM FOR RELIEF OR THE CONTINUATION OF THE LITIGATION STANDS IN THE WAY OF SUCH RELIEF

Deference to the executive's view is also proper in situations where there are other, more appropriate arenas for plaintiffs to seek relief. Post-apartheid South Africa and post-Nazi Germany offer many similarities because of the large number of people injured and the gross human rights violations committed by both governments. Unlike the post-apartheid situation in South Africa, when numerous class actions were brought in the United States against German companies ("German Industry") that committed wrongs during the Nazi era, Germany and the United States worked together to create a German foundation called "Remembrance, Responsibility and the Future" (the "Foundation") to begin to compensate victims.²⁰² Deputy Secretary of the Treasury Stuart E. Eizenstat worked with American plaintiffs' lawyers, German companies, and the German government, and in July 2000 the German parliament passed a law creating the Foundation.²⁰³ Approximately \$4.3 billion was contributed in equal shares by the German government and German Industry, to be used to make payments to individual Nazi-era victims with claims against German Industry.²⁰⁴ In *In re Nazi Era Cases Against German Defendants Litigation*, the district court deferred to the opinion of the executive, filed in an SOI, that the case should be dismissed, reasoning that "all claims against German companies arising from their involvement in the Nazi era . . . should be pursued through the Foundation instead of the courts."²⁰⁵

201. *Id.*

202. *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 378–79 (D.N.J. 2001).

203. *Id.* at 378–79.

204. *Id.* at 379.

205. *Id.* at 380 (quoting Decl. of Stuart E. Eizenstat ¶ 28 (attached as Ex. 1 to the SOI of the United States)). Acknowledging the part that the plaintiffs played in the formation of the Foundation, the court commented:

It must be noted that but for Plaintiff's claims, and the claims brought in the other actions that have been dismissed voluntarily, the Foundation would not exist. As was aptly put by Plaintiff, until the lawsuits in the United States were filed, German Industry denied the slave laborers' claims for over half a century. Only the pressure of litigation brought about

While the court did defer to the government's position, and rightly so, it noted:

Neither the Executive Agreement nor the Statement of Interest filed by the government in this case provide an independent basis for dismissal of Plaintiffs' claims, in the way that a treaty, executive order, or federal statute would. Instead, the Executive Agreement and Statement of Interest vividly demonstrate that a commitment has been made by the Executive branch to resolve claims . . . politically, on an intergovernmental level. This is in keeping with almost six decades of treaties and agreements that have been orchestrated by the political branches of government, and committed to Germany for implementation.²⁰⁶

Thus, the court did not dismiss the case simply because the executive wanted it to do so; that was simply one *consideration* in its analysis, which also included looking at years of treaties and agreements between the United States and Germany.

Another Nazi-era claims case, *Whiteman v. Dorotheum GmbH & Co. KG*, presented a claim which called for dismissal because it was the last block in the way of the implementation of the General Settlement Fund ("GSF"), a fund set up through the cooperation of the United States and Austria, similar to Germany's Foundation, where victims of Nazi-era Austria could seek relief.²⁰⁷ In an SOI, the executive urged the dismissal of property claims against Austria, as it was a precondition to the establishment of the GSF that all Nazi-era claims in the United States against Austria and Austrian companies be dismissed.²⁰⁸ The Second Circuit continued the trend of deferring to the executive in stating, "[W]e defer to a United States statement of foreign policy interests *in this particular case*, which is the one remaining litigation obstacle to the implementation of the GSF Agreement."²⁰⁹

The court therefore made it clear that it was deferring in that particular case, not every time an SOI was issued, because the litigation was the only barrier left in the way for the plaintiffs and other victims.

the . . . contribution of German Industry which now aims to provide a measure of moral accountability. . . . [T]he almost \$4 Billion in total payments to be made by the Foundation is unprecedented.

Id. at 389.

206. *Id.* at 378.

207. *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 65 (2d Cir. 2005).

208. *Id.* at 63.

209. *Id.* at 73.

D. *MUJICA* IMPROPERLY DEFERS TO THE EXECUTIVE

The case *Mujica v. Occidental Petroleum Corp.* presents a situation where a court succumbed to executive pressure and dismissed the plaintiffs' ATCA claims on political question grounds. After conducting a *Baker* analysis, the district court determined that the fourth *Baker* factor supported the application of the political question doctrine and dismissed the plaintiffs' ATCA claims because, agreeing with an SOI, "[t]he litigation would interfere with [the State Department's] approach to encouraging the protection of human rights in Colombia."²¹⁰ This case involved a suit brought by Colombian nationals against the American companies Occidental Petroleum Corp. and AirScan, Inc.²¹¹ However, it is important to note that the companies operated an oil production facility and pipeline in Colombia in a joint venture with the Colombian government.²¹² The plaintiffs alleged that the defendants participated in a bombing by the Colombian Air Force ("CAF") that was intended to protect Occidental's oil pipeline from left-wing insurgents but left innocent civilians injured and dead.²¹³ They sought to recover under the ATCA for the injuries and deaths of family members that occurred during this bombing.

The *Mujica* court made a distinction between foreign policy decisions and domestic ones. Reiterating what other circuits have found, the court stated that it "pays particular attention to the fact that this case involves foreign relations, an area over which the Executive has a great deal of responsibility."²¹⁴ The court then went on to analyze the case simply as one of foreign policy because of the implications the suit would have had on current U.S.-Colombian relations.²¹⁵ Therefore, in dismissing the claims, the court asserted that it would show a "lack of respect" (*Baker* factor four) to the executive to allow the case to proceed because it was the place of the executive, not the judiciary, to handle relations with Colombia.²¹⁶ However, it made a perhaps unintentional concession:

[T]his case may not present a "pure issue" of foreign policy as Defendant is an American corporation located in Los Angeles (less than twelve miles from this courthouse). There may be a substantial degree to which

210. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005).

211. *Id.* at 1168.

212. *Id.*

213. *Id.*

214. *Id.* at 1194.

215. *Id.* at 1194–95.

216. *Id.* at 1194.

the alleged actions of an American corporation abroad is a domestic concern as well.²¹⁷

The *Mujica* court then blithely found applicability of the fifth *Baker* factor “[f]or similar reasons” in a terse footnote, accepting at face value the executive’s “indicat[ion] that it wishes to pursue non-judicial methods of remedying the wrongs.”²¹⁸ On the other hand, the court found, inconsistently, no potential for embarrassment as “proceeding with the instant case would not similarly erode the standing of the President,”²¹⁹ and it made the further observation (tucked into its analysis of the sixth *Baker* factor) that “[t]o the extent that the instant case would involve the examination of the actions of the Colombian military, the United States has already expressed disapproval of the CAF’s actions by ending military assistance to the unit involved in the bombing.”²²⁰

E. DEFERENCE TO THE EXECUTIVE IS *NOT* APPROPRIATE WHERE THE DEFENDANT IS A PRIVATE U.S. CITIZEN OR U.S. MNC: A REEXAMINATION OF THE SOUTH AFRICAN LITIGATION

Next, this Note will show that the political question doctrine does not bar adjudication of the South African litigation because it is easily distinguishable from the cases previously cited where the courts found that dismissal was appropriate. However, in their petition to the Supreme Court, the defendant corporations in the South African litigation relied only on the two cases *Hwang Geum Joo v. Japan* and *Corrie v. Caterpillar*, which are easily distinguishable from their own, to support the claim that their case should be dismissed based on the political question doctrine.²²¹ Once again, one needs to bear in mind the principle that all issues involving foreign affairs are not the same and thus cannot be treated the same. In the context of the South African litigation, and other potential suits involving MNCs that have allegedly committed torts in foreign countries, there are strong reasons, discussed above in Part VI.A, for courts not to follow exactly the opinions set forth in SOIs submitted by the executive.

1. *Hwang Geum Joo v. Japan*

The major difference between *Hwang Geum Joo v. Japan* and the

217. *Id.* at 1194 n.24.

218. *Id.* at 1194 n.25.

219. *Id.* at 1195.

220. *Id.*

221. Petition for a Writ of Certiorari, *supra* note 13, at 17–22.

South African litigation is clear from simply looking at the parties named in the cases—the former is a suit with a country as the defendant, the latter is one against private U.S. MNCs. The fears courts face in adjudicating cases against a foreign government are not present in the South African litigation, as there is a major difference between a suit implicating actions of a former government, condemned by all governments of the world including its own current one, and a suit against a country. For this reason, the comparison between *Hwang Geum Joo* and the South African litigation is improper, as the two do not share such similar facts so as to be dismissed for the same reasons.

2. *Corrie v. Caterpillar*

Also cited by the petitioners was *Corrie v. Caterpillar*, which again is easily distinguishable, as that suit implicated the U.S. government as opposed to private U.S. corporations. Its adjudication would have required the courts to pass judgment on the U.S. government's decision to sell bulldozers to the IDF; contrast that with the South African litigation, which does not force courts to pass judgment on any actual decision made by the U.S. government, as the U.S. government has also condemned the acts committed by South Africa under apartheid.

3. Nazi-Era Claims Cases

At first blush, the fact situation in the Nazi-era claims cases and the South African litigation are the most similar of all the ATCA cases. However, a major distinction between the Nazi-era cases, where deference to the executive SOIs was properly given, and that of the South African litigation, where deference should not be given, is clear because no treaty, agreement, or foundation looms on the horizon between U.S. MNCs and their victims. Reparations for apartheid victims from their own government are miniscule, and reparations from U.S. MNCs, the defendants in this case, are nonexistent. Thus, to quote language used by the *Alperin* court, this is “the only game in town” for the plaintiffs.²²²

4. *Mujica v. Occidental Petroleum Corp.*

Lastly, even if one were to agree with the rationale the *Mujica* court used to bar the plaintiffs' claims in that case, that same rationale does not apply to the South African litigation. The State Department in *Mujica*

222. See *Alperin v. Vatican Bank*, 410 F.3d 532, 558 n.16 (9th Cir. 2005).

thought that the litigation would interfere with ongoing broader initiatives to protect human rights in Colombia, whereas there is no such concern in this case. This litigation involves past harms committed by U.S. corporations during a previous regime; thus, there is no fear that present-day human rights practices would be affected by the case.

Like the defendants in *Mujica*, the defendants in the South African litigation are also major U.S. corporations. Certainly the quantity of and high profile of the defendants gives the case much more of a domestic flavor than a suit involving just one U.S. corporation. The United States has a great interest, domestically, in making the suits disappear. Therefore, what has occurred amounts to the executive having filed an SOI regarding an issue that greatly implicates domestic policy concerns, and as such, deserves less weight than an SOI filed in a case of pure foreign policy.

VIII. CONCLUSION

The fact situation presented by the South African litigation is easily distinguished from that of any of the Alien Tort Claims Act cases previously dismissed under the political question doctrine and the concept of deference. Those other cases all fell within arguably legitimate foreign relations prerogatives of the executive branch since they involved foreign government defendants or actions undertaken by corporate defendants in the implementation of express, enunciated U.S. government policy. The South African litigation has neither underpinning.

First and foremost, the suit is against U.S. MNCs, not against the South African government, neither the current one nor the previous one. While the actions of the National Party during apartheid would, of course, be central to the trial, those actions have actually been strongly criticized by the U.S. government.²²³ Secondly, no U.S. government decisions or policies come into play because the suit is based on the actions of private citizens. And unlike a similar Nazi-era claim case against German Industry, there is no better forum for victims to seek redress, as no fund has been established. Finally, this litigation involves past harms, committed during a previous regime in which U.S. corporations were complicit; thus, there is

223. As one commentator noted in reference to another ATCA case where the U.S. government had condemned the country in which the alleged torts had occurred, "Given the extensive condemnations that the United States government has already issued, any criticism . . . that would arise as a result of the adjudication of this case would be a mere drop in the bucket." Baxter, *supra* note 78, at 828 n.119 (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 346 (S.D.N.Y. 2005)).

no fear that present-day human rights practices in South Africa will be negatively affected by the case.

The petitioners seeking certiorari selectively quoted language from *Hwang Geum Joo* that supports deference to the executive branch:

[T]he D.C. Circuit found dispositive the Executive's statement that continued litigation would be detrimental to U.S. foreign policy, holding that "[t]he Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine."²²⁴

They cited similar language in *Corrie*, adding that "the Ninth Circuit . . . determined that '[a] court could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy.'"²²⁵

However, the petitioners clearly overstepped when they overlooked the fact-specific nature of those rulings to support a broader proposition as to the general applicability of deference to the executive. The body of case law convinces otherwise. Once again, one needs to bear in mind the principle that all issues involving foreign affairs are not the same and thus cannot be treated the same. In the context of the South African litigation, and other potential suits involving MNCs which have allegedly committed torts in foreign countries, there are strong reasons, centering around the basic rights of human beings to have a place to bring their claims against their abusers, for courts not to follow exactly the opinions set forth in SOIs submitted by the executive.

Contrary to the petitioners' implications, there should be no dispute that the Supreme Court should one day be reluctant to apply deference under the ATCA where (1) defendants are businesses (that is, nongovernments) that are (2) conducting commercial enterprises not at all in furtherance of explicit U.S. government policy. On this point, at least, the lower courts appear to have been consistent—and that consistency should be maintained. Indeed, in the South African litigation, Judge Sheindlin, in her April 8, 2009, Opinion and Order, found all six of the *Baker* factors to be inapplicable.²²⁶ Her rather summary assessment

224. Petition for a Writ of Certiorari, *supra* note 13, at 17 (quoting *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005)).

225. *Id.* at 18 (quoting *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007)).

226. *In re S. African Apartheid Litig.*, Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524, 2009 WL 960078, at *30–*32 (S.D.N.Y. Apr. 8, 2009).

supports the conclusion to which this Note eventually comes; however, a thorough review of the six factors remains relevant. We have seen time and again in litigation that passes through many courts and before many different judges that a lower court's opinion will likely not survive each level of review. Judge Sheindlin will likely not be the last judge to voice an opinion on aiding and abetting liability or the political question doctrine, whether in the context of this case or in someone else's courtroom. This Note's analysis, therefore, seeks to provide a guideline as to when a court should find that one or more of the *Baker* factors prevents an ATCA suit from proceeding. The ATCA provides potential relief in a unique arena and, as the *Kadic* court opined, "[J]udges should not reflexively invoke th[is] doctrine[] to avoid difficult and somewhat sensitive decisions in the context of human rights."²²⁷

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