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Political Question or Judicial Query: An Examination of the Modern Doctrine and Its Inapplicability to Human Rights Mass Tort Litigation

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I. INTRODUCTION

The United States judiciary is caught in a unique quandary. In the balance between our system of national and international justice and the respect that our system demands the nation pay to the procedural guidelines it instills, the court faces the grand challenge of equitably solving claims resulting from human rights atrocities.[1] Yet it remains unresolved whether the court will be able to fulfill its role and ensure such equity.[2]

In the wake of the explosive Holocaust litigation, the court may at long last be told that it must stay its hands from such a noble task.[3] The responsibility that corporations have taken for these violations, resulting in settlement of claims and damages, faces compromise by a smug affirmation that these cases do not belong in our courts.[4] Refusal by our judiciary to adjudicate these wrongs will affect more

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1. *See infra* note 4 for a list of several recent and currently pending international human rights violation cases.

2. The recently dismissed cases *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999), and *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999), illustrate the fragile nature of class actions brought on behalf of victims of human rights atrocities in response to violations of customary international law. The dismissal of these two cases is the impetus for this article.

3. The Federal District Court of New Jersey dismissed both *Iwanowa* and *Burger-Fischer* for want of justiciability under the doctrine of political question. *See Iwanowa*, 67 F. Supp. 2d at 489; *Burger-Fischer*, 65 F. Supp. 2d at 284-85.

4. Holocaust survivors and decedents of Holocaust victims brought claims against Swiss banks including Union Bank of Switzerland, Credit Suisse, and Swiss Bank Corporation to recover money deposited on the eve of the Holocaust, as well as damages from their active finance and knowing acceptance of profits derived from looted assets and slave labor. *See* Amended Complaint, Weisshaus v. Union Bank of Switz. (E.D.N.Y. Oct. 3, 1996) (No. 96-CV-4849); Amended Complaint, Friedman v. Union Bank of Switz., (E.D.N.Y. filed Oct. 21, 1996) (No. 96-CV-5161); Amended Complaint, World Council of Orthodox Jewish Cmtys., Inc. v. Union Bank of Switz., (E.D.N.Y. filed July 1997) (No. 96-CV-5161); consolidated as Telling-Grotch v. Union Bank of Switz., (E.D.N.Y) (No. 96-5161). The resulting settlement yielded a $1.2 billion sum for the class members to divide. *See* Settlement Agreement at 9, 13-14, *In re* Holocaust Victims Assets, (No. CV-96-4849) (E.D.N.Y., Settlement Jan. 26, 1999). The court appointed Judah Gribetz as special master to work out the fairest plan of allocation of settlement funds. *See* Letter from Cohen, Milstein, Hausfeld & Toll, (April 20, 1999) (on file at firm's website: www.cmht.com (to Potential Members of the Class re: Holocaust-Related Litigation)). Other settlements are also currently pending against French banks. *See* Frederic Bichon, *French Banks Craft Accord on Jewish Assets*, AGENCE FRANCE-PRESSE, March 24, 1999 *available in* 1999 WL 2569848. The settlement agreement

than the families hurt by this scar in our world's history.[5] If the ability to litigate these claims in United States courts is lost, so too is lost any true form of enforcement of international human rights laws.[6] Consequently, the powerful arm of the Alien Tort Claim Act ("ATCA"),[7] though extended, will remain unable to cover past victims and other would-be victims.[8] Without remedy, law is dead:

> Indeed, it is well accepted in rights theory that where there is no remedy for a claim of right, the existence of the correlative right is tenuous at best. The imposition of obligations within a legal framework therefore gives rights practical authority and places interests on a higher plane of legal prescription. In a class action human rights case, once it is determined that international law binds the private corporate actor to

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resulting from a class action brought by nearly 10,000 victims of human rights violations against Ferdinand Marcos in the Philippines yielded $1.2 billion in exemplary and $765 million in compensatory damages. *Hilao v. Marcos*, 103 F.3d 767, 772 (9th Cir. 1996); K. Lee Boyd, *Collective Rights and Corporate Compliance: Class Adjudication of International Human Rights in U.S. Courts*, 1999 B.Y.U. L. REV. 1139, 1153 n.50.

5. The Holocaust claimed the lives of over six million Jews, accounting for two-thirds of the Jewish population in Europe. *United States Holocaust Memorial Museum, at* <http://www.ushmm.org/outreach/fsol.htm> (last visited Jan. 11, 2001). The "Final Solution," the plan instituted by the Nazis to exterminate the Jewish population, resulted in the deaths of over three million Jews in gas chambers in extermination camps. *Id.* Other Jews faced death by shooting conducted by mobile killing squads. *Id.* "In its entirety, the 'Final Solution' consisted of gassings, shootings, random acts of terror, disease, and starvation that accounted for the deaths of about six million Jews–two-thirds of European Jewry." *Id.*

6. *See* Boyd, *supra* note 4, at Part IV.

7. 28 U.S.C. § 1350 (1994). The ATCA provides: "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." *Id.*

8. For a thorough discussion of the ATCA, see THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999). *See also* Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 351-68 (1997) (delineating the ATCA requirements). Brad Kieserman presents a compelling argument for the shortcomings of the ATCA and the necessary amendments to remedy the problem in his article, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U.L. REV. 881, 887-88 (1999):

> Only one ATCA suit against a private corporate defendant, however, has survived even a motion for summary judgement. This dearth of sustainable cases against private defendants flows from a combination of vague statutory language and judicial interpretations imposing a state action requirement for most claims. Ultimately, this conflict over the meaning and application of the statute weakens the effectiveness of ATCA litigation in two ways. First, the statute fails to define actionable claims with sufficient precision to serve as the basis for a well-pleaded complaint or provide meaningful guidance for lawful transnational corporate conduct. Second, courts apply inconsistent judicial interpretations of American constitutional standards to determine whether U.S.-based MNCs are liable for the actions of foreign sovereigns affecting their own nationals. Thus, because our domestic law does not incorporate specific "alien torts" or regulate the relationship between U.S.-based corporations and their foreign host-governments, MNCs can evade liability for their role in overseas human rights violations.

Id.

> respect human rights, then the granting of a remedy solidifies the corporations's legal duty. Accordingly, when a group remedy is enforced through the class action suit, the group's collective rights are grounded in a legal norm.[9]

The true hope of eliminating future human rights violations will arrive only through corporate compliance with existing international laws preventing multinational corporations from engaging in alliances with corrupt governments that cruelly and inhumanely violate human rights norms.[10] Norm enunciation is only possible as a by-product of this process.[11]

The Federal District Court of New Jersey recently dismissed two exemplary cases, *Iwanowa v. Ford Motor Co.*[12] and *Burger-Fischer v. Degussa.*[13] Joining all persons similarly situated, Iwanowa represented the Plaintiff class in an action against Ford Werke and Ford Motor Company, alleging that Defendants forced the class to perform slave labor.[14] Seeking disgorgement of profits, damages to compensate for the reasonable value of her labor, and damages for subjecting her to such inhumane conditions, Iwanowa made claims both against Ford Werke for the human rights abuses and against Ford Motor Co., as part owner of the company during World War II.[15] The Ford Defendants moved to dismiss under multiple grounds; the court denied their motion to dismiss for lack of subject matter jurisdiction under the law of nations[16] but granted their motions to dismiss

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9. Boyd, *supra* note 4, at 1182.
10. *See id.* at 1193-1200.
11. *Id.* at 1213.
12. 67 F. Supp. 2d 424 (D.N.J. 1999).
13. 65 F. Supp. 2d 248 (D.N.J. 1999).
14. *Iwanowa*, 67 F. Supp. 2d at 434. The class consisted of thousands of people subjected to slave labor by Ford Werke between 1941 and 1945. *Id.*
15. *See id.* at 431-32. Ford Motor Co.'s ownership of Ford Werke during the World War II period was between 52% and 75% of its outstanding shares. As a consequence of the slave labor Ford Werke instituted between 1939 and 1943, its profits doubled. *Id.* at 433. By 1941, Ford Werke completely became a military operation, manufacturing solely military trucks. *Id.* at 432. Its production of three-ton military trucks accounted for approximately 60% of all the German army's World War II supply. *Id.*
16. *Id.* at 434, 438. The court found that, under the ATCA, it could properly claim jurisdiction for claims arising under customary international law. *See id.* at 438-39. Furthermore, Plaintiffs' claims properly relied upon the law of nations, law evidenced by the Hague and Geneva Conventions. *See id.* at 439. Finding that the ATCA conferred jurisdiction over the court, the court analyzed the requisite elements for finding such jurisdiction: "(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)." *Id.* (quoting *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)).

Finding the first two prongs easily satisfied, the court then discussed the Nuremberg Tribunals, holding that the World War II enslavement, deportation, and extermination of civilians violated customary international law and constituted crimes against humanity. *Id.* at 440-41. The court also examined case law, repeatedly holding that slave labor and genocide fundamentally violate the law of nations. *See id.*

on grounds that the statute of limitations barred all claims,[17] that the complaint

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In response to the use of ATCA to bring the action, Defendants claimed that it does not grant the court jurisdiction because there is no private right of action under the Act and it applies only to state actors. *See id.* at 441. The court first rejected Defendants' understanding of the ATCA, in which they claimed that district court jurisdiction over aliens' claims brought under the law of nations is proper only in instances where Congress expressly enacts specific legislation enabling the courts to adjudicate these claims, as narrow and disunified from the current stance of courts. *See id.* at 441-42. The majority of courts find, in opposition to Defendants' view, that "the ATCA provides both subject matter jurisdiction and a cause of action for claims alleging violations of customary international law." *Id.* Furthermore, the court noted that had Congress intended something other than this interpretation of the Act, it likely would have amended it to reflect the proper interpretation. *See id.* at 442-43. Additionally, the court found that the language of the Act, which requires an act "committed in violation" of a norm, conforms with the notion that Congress did not intend that aliens, before claiming relief under ATCA, be compelled to use an enabling statute to assert their claim. *Id.* at 443.

The court next addressed Defendants' second assertion, that the ATCA applies only to state actors, "because such norms bind only states and its agents, not private corporations such as Defendants." *Id.* Relying on the Second Circuit's decision in *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995), the court concluded that there exists some conduct which violates the law of nations irrespective of whether the actor is acting on behalf of a state or simply as a private individual. The court further reasoned that even courts that found the ATCA was not implicated in instances where the actor was a private individual recognized the potential applicability in other cases. *See id.* at 443-45. The court agreed with *Kadic* and held that in cases such as this one involving genocide and war crimes, the ATCA provides a cause of action against the private actor. *See id.* at 445. Furthermore, the court reasoned that Defendants' act of deporting civilians to slave labor camps was a war crime, thereby qualifying the case for federal jurisdiction under the ATCA. *See id.* The court rationalized its finding against contrary findings in other circuits by: showing that the *Kadic* decision is more current than the other decisions and therefore controls; reasoning that "the Ninth Circuit later distanced itself from its statement in *In re Estate of Ferdinand E. Marcos* that only state actors are liable for violations of international law"; and recognizing that none of the cases which refused to acknowledge a private ACTA cause of action involved slave labor. *Id.* at 445.

At the end of its discussion, the court found that although it held there is a private cause of action under the ATCA, the issue was not relevant to the case at bar because Defendants conceded that they were de facto state actors, which made them liable "under all possible interpretations of the ATCA." *Id.* at 445-46. However, this assertion does not negate the importance of the decision for purposes of future human rights claims brought under the ATCA.

17. *Id.* at 461-69, 475. The court discussed the statute of limitations in three sections: claims made under the law of nations, claims under U.S. law, and claims under German law. *Id.*

The court found that claims made under the law of nations against Ford Werke and Ford Motor Co. were subject to a ten-year statute of limitation because, although the ATCA does not contain a limitation, the court chose to use the most analogous statute, the Torture Victim Protection Act, providing that ten-year period. *Id.* at 462. Additionally, the court held that claims against Ford Motor Co. were not subject to tolling under any treaty because the company is a U.S. company. *Id.* at 466-67. Furthermore, the court rejected Plaintiff Iwanowa's claim that she did not bring the claim against Ford Motor Co. on time because the court would have dismissed them under Rule 19 for failure to join a necessary party or for interference with a treaty's deferral scheme. *Id.* However, the court held that Plaintiffs' claims against Ford Werke were tolled by the Paris Reparations Treaty from 1945 until 1953 and by the London Debt Agreement from 1953 to 1991. *Id.* at 463-65 (refusing, however, to hold that the statute of limitations was further tolled until 1997, when a court explicitly held that the 2+4 Treaty lifted the London Debt Agreement and thereby stopped the tolling). *Id.* at 465-66. Additionally, the court found that equitable tolling, alleged by the Plaintiff class to extend the limitation period, did not apply because Plaintiffs failed to allege the requisite elements of misrepresentation and concealment. *Id.* at 467-68.

Examining the statute of limitations on claims brought under U.S. law, the court found all claims expired under the state statutes. *Id.* at 472-76. Furthermore, the court refused to toll the statute of limitations because Plaintiffs alleged only tolling under German law in her complaint. *Id.* at 475-76. Accordingly, the court refused to address the issue. *Id.*

failed to state a claim under which relief could be granted,[18] that the claims were nonjusticiable,[19] and that resolution of the suit would violate international comity.[20] The district court dismissed Iwanowa's action with prejudice for failure to state a claim on which relief could be granted, as well as for nonjusticiability of the claims.[21]

Burger-Fischer v. Degussa was consolidated from class actions against Degussa AG, Degussa Corporation (Degussa AG's American subsidiary, wholly-owned by Degussa),[22] and Siemens AG.[23] The Plaintiff class alleged violations of customary international law and German law for refining gold seized from Nazi

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Finally, the court examined the statute of limitations on claims brought under German law. *See id.* at 476-82. The court found that German law mandated the use of the expired German statute of limitations. *Id.* at 476-77. Additionally, the court rejected Iwanowa's argument that the German statute of limitations provision, mandating the return of property which was wrongly acquired even after the statute has run, protected her claims. *Id.* at 477-79.

18. *Id.* at 434, 446-61. Defendants made several motions to dismiss for failure to state a claim upon which relief can be granted on many grounds under Fed. R. Civ. P. 12(b)(6). *See id.* Their claims included that the Paris Reparations Treaty subsumed Iwanowa's claims, that the claims were time-barred, and that the U.S.S.R. waived her claims. *See id.* at 446.

The Paris Reparations Treaty does not preserve a cause of action by Iwanowa and the class. *See id.* at 448-51. The only provision in the Treaty which preserved the right for individual victims to bring claims against the German Government required that the individual be a "nonrepatriable victim of German Action." *Id.* at 450-51 (quoting Paris Reparations Treaty, Part I, Art. 8, § I). Because Iwanowa failed to allege that status, the court assumed instead that she was subject to the general provision:

> The Signatory Governments agree among themselves that their respective shards of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war.

Id. at 449 (quoting Paris Reparations Treaty, Part I, Art. 2.A). Accordingly, the Treaty barred her claims. *See id.* at 451. For a thorough discussion of Defendants' motion to dismiss alleging that the action is time-barred, see *supra* note 17.

The final 12(b)(6) motion Defendants brought alleged that under the U.S.S.R. Waiver, a treaty under which the nation agreed to waive all further reparations from the G.D.R., the signatories waived not only the country's right to seek more payments from Germany, but also the right for Soviet citizens to file slave labor claims against Germany or its corporations. *See Iwanowa*, 67 F. Supp. 2d at 468-69. The court denied the motion, reasoning that Defendants cited no German civil law to support that position, and the Waiver, even if it might potentially apply in some instances, failed here because it does not apply to German companies. *See id.*

19. *Iwanowa*, 67 F. Supp. 2d at 432, 434, 483-89. This paper primarily discusses the impropriety of dismissing human rights cases for nonjusticiability under the political question doctrine. Examining the *Iwanowa* and *Burger-Fischer* cases is instructive to understand the rationale of the court in applying the doctrine and why that reasoning is improper and erroneous, both for these cases and for other human rights mass tort litigation. For a thorough discussion of the political question doctrine and the rationale for finding it inapplicable in these cases, see *infra* Parts III & IV.

20. *Iwanowa*, 67 F. Supp. 2d at 431-32, 434, 489-91.

21. *Id.* at 432, 489-90.

22. *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248, 250 n.1 (D.N.J. 1999).

23. *Id.* at 250.

concentration camp victims, fully knowing its source; manufacturing Zyklon B, the gas used in gas chambers for mass executions; and, on the part of Siemens, using slave labor provided by the Nazi regime.[24] Seeking damages or restitution against Degussa for both refining victims' stolen gold and for providing Zyklon B to the Nazis, as well as damages from Degussa and Siemens under a compensation theory for slave labor and oppressive conditions in which Defendants compelled them to work, the Plaintiff class brought their actions under federal question jurisdiction,[25] diversity jurisdiction,[26] and supplemental jurisdiction.[27] The court held that the claims were sustained by a post-war treaty and dismissed them for lack of justiciability under the political question doctrine.[28]

This article discusses the implications of the political question doctrine on mass tort claims stemming from international human rights violations, concluding that the use of the doctrine is inappropriate for both practical procedural reasons and for policy reasons. Part II defines and analyzes the political question doctrine, outlining its current direction in the context of human rights mass tort litigation. Part III discusses the recent history of human rights litigation in the context of class actions litigated in U.S. courts. Part IV discusses whether the political question doctrine is truly at issue in these human rights cases, concluding that the doctrine is not relevant, while Part V asserts that even if the court does legitimately get to the political question doctrine issue, then it does not apply.

II. HISTORY AND MODERN MOVEMENT OF THE POLITICAL QUESTION DOCTRINE

A. *Constitutional Grounding*

Regarded as "the most confusing of the justiciability doctrines,"[29] the political question doctrine emerged in 1803 in *Marbury v. Madison*.[30] The Supreme Court

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24. *Id.*
25. 28 U.S.C. § 1331 (1994).
26. 28 U.S.C. § 1332 (1994).
27. 28 U.S.C. § 1367 (1994).
28. *See Burger-Fischer*, 65 F. Supp. 2d at 282.
29. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.6.1, at 143 (3d ed. 1999). Chemerinsky considers the political question doctrine the most confusing because it is a misnomer in that courts frequently decide political issues. *Id.* at 144. Citing *United States v. Nixon*, 418 U.S. 683 (1974), Chemerinsky illustrates that the title of the doctrine does not correlate strictly to its meaning, as the Supreme Court has long participated in the political process. *Id.* (citing *Nixon v. Herndon*, 273 U.S. 536 (1927), as an example of the Supreme Court participating in the political process by ending racial discrimination in primaries and elections). Additionally, Chemerinsky finds the doctrine to be so confusing because the Court's definition of the doctrine has changed considerably since the genesis of the idea. *Id.* For further discussion regarding the evolution of the doctrine, see *infra* note 30.
30. *Id.*; *Marbury*, 5 U.S. (1 Cranch) 137, 170 (1803). Chemerinsky claims that, since *Marbury*, the Court's then-narrow definition and application of the political question doctrine continually faced expansion to reach its present definition and application, which includes claims of constitutional violations resulting

envisioned the doctrine as something quite distinguishable from the modern understanding, finding:

> [T]he political branches of government were compelled to accept judicial review and judicial supremacy in the adjudication of interbranch disputes. At the same time, the Court made a promise to restrain itself and refrain from deciding cases dealing with the exercise of, to use Chief Justice Marshall's turn of phrase, "important political powers."[31]

However, the Court's opinion in *Luther v. Borden*[32] laid the foundation upon which the Court bases the modern conception of the political question doctrine.[33] In *Luther*, the Court declined to reach issues regarding "political rights and political questions,"[34] finding that the claims challenging the martial law instituted by the State were nonjusticiable because they challenged competent authority vested in the charter government.[35]

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in specific injury. CHEMERINSKY, *supra* note 29, § 2.6.1, at 145. Chemerinsky quotes the Court as it first defined the political question doctrine, through the opinion of Chief Justice Marshall, writing for the Court in *Marbury*:

> By the constitution [sic] of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . . The subjects are political. . . . [B]eing entrusted to the executive, the decision of the executive is conclusive. . . . Questions, in their nature political, or which are by the constitution [sic] and laws, submitted to the executive, can never be made in this court.

Id. at 144 (quoting *Marbury*, 5 U.S. at 165-70). Chemerinsky further explains that the Chief Justice confined the doctrine to cases which would question the President's unlimited discretion. *Id.* at 145. Specifically, *Marbury*'s definition prevented the possibility of alleging a constitutional violation in any area where the President maintains, under the Constitution, plenary authority. *Id.* Modernly, a wider definition of political question creates a second layer of analysis (whereas under *Marbury*, any time a plaintiff had standing, the political question doctrine could not bar his claim), under which the doctrine now includes individuals who claim constitutional violations where they suffered a specific injury. *Id.* Chemerinsky opines that what makes the doctrine even more confusing is the lack of explicit language by the Court to explain its differing interpretations and uses of the doctrines. *See id.* at 145-46.

31. David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1441-42 (1999). Bederman's article examines the use of the political question doctrine in the adjudication of cases dealing with treaty rights and finds that "there is very real cause for concern in unbridled judicial deference to executive branch decision making in the foreign relations area." *Id.* at 1440.

32. 48 U.S. 1 (7 How.) (1849).

33. *See* CHEMERINSKY, *supra* note 29, at 150-51.

34. *Luther*, 48 U.S. at 46.

35. *See id.* at 34, 46-47. Plaintiffs sued for trespass, to which Defendants responded that, as members of the state's military, they were simply trying to protect the state from potential insurrection after a competent authority declared the State subject to martial law. *Id.* at 34. Before the Court was willing to regard the merits of the case, it found it must assume "its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction." *Id.* at 39. Therefore, the ramifications of deciding the

Taking a closer look at the power disbursement of government, the Court recognized its role as one which "presupposes an established government," the authority of which, should it be annulled, would devastate also the power of the courts.[36] Additionally, the Court had a vested interest in staying its hands from these issues as a necessary requirement to ensure cooperation among the various governmental powers, which, in turn, protects its judicial authority.[37] Reasoning that under the separation of powers inherent in our Constitution Congress is granted the authority to ensure a republican government,[38] the *Luther v. Borden* Court gave great merit to preservation of each branch's power as preventative against anarchy,[39] holding that the judiciary would overstep its boundaries should it decide whether the people of the state properly displaced the existing charter government.[40]

After *Luther v. Borden*, courts generally found Guarantee Clause questions nonjusticiable based on the political question doctrine,[41] until the 1962 *Baker v. Carr* decision.[42] Faced with an issue regarding the constitutionality of a reapportionment statute, the *Baker* Court found the Equal Protection Clause claim justiciable, reversing the district court's dismissal of the claim as a political

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"existence and authority" of the charter government extended, in the Court's eye, to questioning the central powers of the government, and forced the deduction that, if the charter government was not in existence during the alleged trespass, then that same government's legislation, taxes, salaries, compensations, and judgments of its courts were decidedly void. *Id.* at 38-39. Specifically, Plaintiffs called into question the "existence and authority of the government under which defendants acted," because Plaintiffs believed that Defendants were actually the ones in opposition to lawful State authority. *Id.* at 35.

36. *Id.* at 40.

37. *See id.*

38. *Id.* at 42; U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). In a 1795 act, Congress acted within their constitutionally granted power and provided that the President possessed authority to enlist, on behalf of any state, the aid of the militia of any other states necessary to suppress an insurrection. *Luther*, 48 U.S. at 43.

39. *See Luther*, 48 U.S. at 43. The Court reasoned:

> If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

Id.

40. *Id.* at 35, 47. Plaintiffs argued that the people of Rhode Island annulled the charter government before Defendants allegedly trespassed, and therefore, Defendants acted improperly under current law. *Id.* at 35. The Court did not reach the issue because they found it reserved to the political power rather than to the judicial power, therefore binding the Court to accept the political decision as the "paramount law of the state." *Id.* at 39. "Judicial power presupposes an established government capable of enacting laws and enforcing their execution . . . ." *Id.* at 40.

41. PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 433 (4th ed. 1998).

42. 369 U.S. 186 (1962).

question.[43] Reasoning that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question," the Court found Defendants' line of reasoning, in which they analogized apportionment cases to generally nonjusticiable Guarantee Clause claims, unsound and conclusory.[44] The Court heeded Plaintiffs' protest to this characterization of their claim by recognizing that the Guarantee Clause cases dismissed on justiciability grounds were dismissed based on the "relationship between the judiciary and the coordinate branches of the Federal Government, and not [on] the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[45]

B. The Political Question Test Emerges

In its *Baker* decision, the Court outlined a new test, under which courts must find one of a set of factors present in a manner that renders it "inextricable from the case at bar" in order to find the case nonjusticiable as a political question.[46] Justice Brennan, writing for the Court, outlined the factors:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department;[47] or a lack of judicially discoverable

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43. *Id.* at 187-88. The complaint alleged that the 1901 statute caused malapportionment of the General assembly of Tennessee. *Id.* at 192-93. Claiming that the malapportionment created unequal protection of the laws for voters in more populous districts (because they were not given representatives based on population), Plaintiffs sought: a declaration that the statute was unconstitutional; an injunction prohibiting Defendants from using the unconstitutional statute to conduct any further elections; and an ultimatum that, should the General Assembly not now enact a valid reapportionment statute, then the district court would assume the responsibility itself, by either mathematically reapportioning under a constitutional formula or by forcing Defendants to conduct all future legislative elections at large. *Id.* at 194-95. The district court dismissed the action on two grounds, finding that the court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. *Id.* at 196. The Court found problematic the district court's failure to distinguish in its reasoning between these two grounds. *See id.*

44. *See id.* at 209. Defendants argued that apportionment cases necessarily involve the constitutional right that guaranties a republican form of government and that courts hold Guarantee Clause claims nonjusticiable based on the political question doctrine. *See id.*

45. *Id.* at 210. Defendants argued specifically that their claim was justiciable as an equal protection violation and that, if able to show the requisite discrimination, the relief to which such violation would entitle them remains unchallenged by any related political rights. *Id.* at 209-10.

46. *See* LOW & JEFFRIES, *supra* note 41, at 434.

47. *Baker*, 369 U.S. at 217. This factor replaced the previously held standard that required a "textual commitment." Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 217 (1987). The appropriate inquiry is, in essence, whether the question at issue before a court is "more properly decided by a coequal branch of our Government." Davis v. Bandemer, 478 U.S. 109, 122-23 (1986).

This factor is arguably linked to the second factor: evidence that there is a lack of judicially

> and manageable standards for resolving it;[48] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;[49] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;[50] or an unusual need for unquestioning adherence to a political question already made;[51] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[52]

Chemerinsky concludes that the Court's factors represent a grand failing to articulate what the doctrine is and when it applies.[53] He reasons that the lack of constitutional text dictating judicial review or limitations thereof indicates that

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manageable standards implies that there is likely a textually demonstrable commitment to another branch of government. *See* Nixon v. United States, 506 U.S. 224, 228-29 (1993). Ultimately, *Baker* asks not for the determination that the Constitution vests exclusive power in a branch of government over a particular area, but rather "whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power." *Id.* at 240 (White, J., concurring).

In *Goldwater v. Carter*, Justice Powell concluded that there was no textually demonstrable constitutional commitment to the President to terminate treaties. 444 U.S. 996, 999 (1979) (Powell, J., concurring). *Davis v. Passman* held similarly that where this requirement is not met by the text of the Constitution,

> [W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

442 U.S. 228, 242 (1979).

In determining whether this factor applies, courts must first interpret the text in question and second, determine whether the issue is textually committed–and, if so, to what extent. *See* Powell v. McCormack, 395 U.S. 486, 519 (1969). For a discussion of the applicability of this factor to the international human rights violations in question, see *infra* Part V.A.

48. *Baker*, 369 U.S. at 217. The Court has held that where there exist judicially discoverable and manageable standards for resolving claims, "[t]hose standards forestall reliance by this Court on nonjudicial 'policy determinations' or any showing of disrespect for a coordinate branch." I.N.S. v. Chadha, 462 U.S. 919, 942 (1983). In *Goldwater v. Carter*, Justice Powell found it permissible for courts to inquire whether the President could terminate a treaty in compliance with the Constitution without first obtaining congressional approval. *Goldwater*, 444 U.S. at 999. According to Justice Powell, such an inquiry was permissible because it did not review the President's role or activity in foreign affairs, but instead only questioned the separation of power between Congress and the President. *Id.* For a discussion of the applicability of this factor to the international human rights violations in question, see *infra* Part V.B.

49. *Baker*, 369 U.S. at 217. For a discussion of the applicability of this factor to the international human rights violations in question, see *infra* Part V.C.

50. *Baker*, 369 U.S. at 217. For a discussion of the applicability of this factor to the international human rights violations in question, see *infra* Part V.D.

51. *Baker*, 369 U.S. at 217. For a discussion of the applicability of this factor to the international human rights violations in question, see *infra* Part V.E.

52. *Baker*, 369 U.S. at 217. For a discussion of the applicability of this factor to the international human rights violations in question, see *infra* Part V.F.

53. CHEMERINSKY, *supra* note 29, at 145-46.

these standards are inadequate as a measuring device of justiciability.[54]

C. Use of the Doctrine in Foreign Affairs

The murky nature of the political question doctrine remains despite decades of decisions since first mentioned in *Marbury v. Madison*[55] and first fully invoked in *Luther v. Borden*.[56] Modernly, the doctrine is experiencing heightened vitality in foreign affairs.[57] The doctrine serves as a protectorate over United States foreign policy decisions, shielding executive and legislative decisions from litigation regarding the propriety of their respective actions.[58] Many of these decisions concern wartime decisions, such as those made during the Vietnam War, for example, when a class of taxpayers challenged the American war effort by naming President Nixon and Melvin Laird, then Secretary of the Department of Defense, as defendants in *Atlee v. Nixon*.[59] In this class action to enjoin the spending of tax dollars on the Vietnam War effort, the Court affirmed the district court's decision to dismiss the case against the President, thereby shielding him from suit.[60] The Court's decision centered around ensuring his ability to carry out his presidential duties without being distracted by court appearances to defend his actions.[61]

A recent foreign affairs case, *767 Third Avenue Associates v. Consulate General of the Socialist Federal Republic of Yugoslav*, illustrates the varied contexts in which courts invoke the political question doctrine.[62] In this case, the district court held that the political question doctrine prevented litigation regarding unpaid balances on rental property.[63] After Yugoslavia erupted in civil war, the United States government expressed its disapproval of the country's actions by ordering Yugoslav New York offices to close, terminate operations, and force all staff to leave the country.[64] Thereafter, the owners of the rented property brought actions against the individual Yugoslav governmental agencies for the

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54. *Id.*
55. 5 U.S. (1 Cranch) 137 (1803). *See supra* notes 30-31 and accompanying text.
56. 48 U.S. 1 (7 How.) (1849). *See supra* notes 32-40 and accompanying text.
57. *See* LOW & JEFFRIES, *supra* note 41, at 444 (discussing the application of the doctrine as a measure to defeat litigation questioning the legality of foreign policy adopted by the U.S. government).
58. *See id.*
59. *See* 336 F. Supp. 790, 791 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973).
60. *Id.* at 792.
61. *See* id.
62. *See* 60 F. Supp. 2d 267 (S.D.N.Y. 1999).
63. *Id.* at 269.
64. *Id.*

unpaid rent remaining on their leases.[65]

After settlement procedures were unsuccessful with two of the agencies, this action commenced for the rent due in its entirety against the tenant agencies and the five new Yugoslav states.[66] The district court found the claims nonjusticiable as against the state Defendants under each of the six *Baker v. Carr* factors.[67] Relying on *Can v. United States*,[68] the court found that successorship questions were untouchable by the court because their nature destined them for settlement by negotiation, international institutional procedures, war, and similar resolution techniques, thereby meeting the second and third factors of the *Baker* test–"lack of judicially discoverable and manageable standards for resolving" claims and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[69] Furthermore, the court found both the percentage of each successor's liability and the date of each successor's successorship to be political questions.[70] With regard to the first and fourth factors, the court found "a textually demonstrable constitutional commitment of the issue to a coordinate political department" factor met by Article II, which grants the executive branch the authority to recognize foreign governments and thereby exemplifies "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."[71] Finally, the court analyzed the fifth and sixth *Baker* factors as the "risk of inconsistency among United States governmental bodies."[72] Primarily, concerns that the judiciary not encroach upon executive or legislative turf drove the court to find both "an unusual need for unquestioning adherence to a political decision already made" and "the potentiality of embarrassment from multifarious pronouncements by various

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65. *Id.*

66. *Id.* The five state Defendants included: the Federal Republic of Yugoslavia, the Republic of Bosnia-Hercegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, and the Republic of Slovenia. Plaintiffs included the state Defendants in the action on the grounds that they inherited the liabilities of the Socialist Federal Republic of Yugoslavia. *Id.*

67. *Id.* at 272.

68. *See* 14 F.3d 160, 163 (2d Cir. 1994).

69. *See Third Ave. Assoc.*, 60 F. Supp. 2d at 272. In reaching this conclusion, the Court quoted the *Can* court:

> [C]ourts have no standards for judging a claim of succession to a former sovereign, even where that succession is only to property rather than to government power. The recognition of any rights of succession to a foreign sovereign's power or property is in the first instance constitutionally committed to the executive branch of government, not to the judiciary.

Id. (quoting *Can*, 14 F.3d at 163).

70. *Id.* at 273.

71. *Id.* at 274-75. Article II vests in the President the authority to make treaties, *see* U.S. CONST. art II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," U.S. CONST. art II, § 3. These two powers implicitly carry with them the general rule that only the President has the power to recognize foreign governments.

72. *Third Ave. Assoc.*, 60 F. Supp. at 275.

departments on one question."[73] Consequently, the court stayed its hands from resolution of these issues.[74]

Justice Powell's review of *Goldwater v. Carter* added another dimension to the already puzzling *Baker* factor test.[75] Justice Powell found that *Baker* mandated three basic inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?[;] (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?[;] (iii) Do prudential considerations counsel against judicial intervention?"[76] However, Justice Powell's analysis, which discusses some, but not all, of the *Baker* criteria, leaves unanswered the basis upon which the Court analyzed only certain of the *Baker* factors.[77]

The modern trend of these cases has done very little to clarify the murky nature of the political question rule or solidify the manner in which courts should examine the factors' applicability to a set of given facts. In *United States v.*

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73. *Id.* The court reached this conclusion in light of the potential conflict between courts addressing the allocation of assets between Yugoslav successors. *Id.*

74. *See id.* The court added an interesting caveat to its opinion:

> Consequently, allocation of SFRY [Socialist Federal Republic of Yugoslavia] assets or liabilities became a political question in this court once the other district courts so held, even if this court believed that it otherwise would not be a political question. While the traditional process of conforming judicial rulings–circuit efforts to resolve district court splits; Supreme Court efforts to resolve circuit splits–is far from an ideal way to conduct foreign policy, the Second Circuit at least has authority, unlike this court, to prevent inconsistent foreign affairs pronouncements within this district and circuit. To the extent that the prior political question holdings in this district are incorrect, only the Second Circuit, not this court, can issue a holding that conforms the district courts and thus reduces the amount of dangerous inconsistency that the judiciary would be inserting into United States policy regarding SFRY succession.

Id. at 275-76.

The tragedy of this opinion is that the court appears to not really believe in the decision it made. Maybe the outcome here is right, but the ramifications of the decisions may be much greater than intended because courts will ultimately compromise justice if they follow this quality of shallow reasoning that allowed them to placidly agree with other districts. In cases where aberration of human rights inspires litigation, such self-serving reasoning by courts may cause problems beyond the contemplation of the district court when it was dealing with a squabble over unpaid rent.

Assuming that the Southern District of New York Court got it right here, the facts in this case absolutely distinguish its finding of political question from any possible holding in the mass tort human rights cases. The action here, brought by American citizens against the Yugoslav governmental agencies, was the result of the United States government forcing them to evacuate the country. *See supra* notes 62-65 and accompanying text. *Iwanowa*, *Burger-Fischer*, and other human rights mass tort cases are instead the product of systematic abuses of international law, resulting in egregious harm. The judiciary simply cannot equitably apply the political question doctrine to these claims. *See infra* Part IV.

75. 444 U.S. 996 (1979).

76. *Id.* at 998.

77. *Id.* After considering only the three inquiries previously enumerated, Justice Powell ended his analysis without addressing the other *Baker* factors.

Munoz-Flores, the Supreme Court clarified that, contrary to the government's argument that where individual rights are not involved there exists no right to the constitutional separation of powers protections, the identity of the litigant in a case is immaterial to the political question doctrine.[78] Although ultimately the Court found the doctrine not implicated, the Court's only real contribution towards any sense of clarity the doctrine may possess was its analysis of the prong of the *Baker* test that renders nonjusticiable any case that expresses a "lack of . . . respect" for a coordinate branch of government.[79] Specifically, the Court found the government's allegations that adjudication of the issue would disrespect the House of Representatives by questioning their legislative authority or the propriety of a bill they passed to be insufficient grounds for rendering the issue a political question.[80]

In 1993, the Court again addressed the political question issue in *Nixon v. United States*, holding that the Court must stay its hands from the issue of a Senate Rule's constitutionality.[81] There, the Court emphasized the importance of first interpreting the text of the Constitution and determining "to what degree the issue is textually committed."[82] Furthermore, the Court found that textual commitment is not wholly separate from the determination that there is a "lack of judicially discoverable and manageable standards for resolving" the conflict–it may be that the lack of judicial manageability is determinative in finding a textual constitutional commitment to a government branch.[83] Despite the clarity of the Court's assertion that the *Baker* factors overlap significantly and are interdependent, the failure of the Court to explain the implications of the relationships and how courts should interpret the factors based on the relationships between them serves only to confound the ability of lower courts to apply the law.[84]

III. RECENT HISTORY OF HUMAN RIGHTS MASS TORTS

Collectivized human rights claims recently appeared on the U.S. judicial docket, introducing a new form of class action. This emergence has caused much

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78. 495 U.S. 385, 393-94 (1990).

79. *See id.* at 390.

80. *Id.* at 390-391. Munoz-Florez was prosecuted for helping aliens evade immigration officers. *Id.* at 388. He moved to correct his sentence, claiming that the judgment against him, provided for by a House bill, violated the Origination Clause. *Id.* The government asserted that to invalidate a bill passed by the House on Origination Clause grounds would demonstrate disrespect for Congress' judgement. *Id.* at 390. The Court refused to heed the government's reasoning, finding "such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality." *Id.* at 391. What is most startling about this opinion, however, is that after more than twenty-five years since the *Baker* factors emerged, in an effort to "clarify" the murky law preceding it (dating back to *Marbury v. Madison*), the law was muddled enough over this issue that a fundamental function of the judiciary, to test the constitutionality of congressional enactments, was called into question. *See id.*

81. 506 U.S. 224, 226 (1993).

82. *See id.* at 228.

83. *See id.* at 228-29.

84. *See id.*

debate over whether U.S. courts provide an appropriate forum for this litigation.[85] These cases allege systematic conduct by defendant corporations, giving rise to a class of people harmed by that conduct.[86]

A. Holocaust Litigation

Recent cases include claims by Holocaust survivors or families of those killed in the Holocaust, claiming international human rights violations, such as slave labor, looting of assets, murder, and torture.[87] Settled claims, including those stemming from the Swiss Bank cases, act as an encouragement for other human rights victims to file claims seeking restitution and for defendant corporations, once served, to settle claims.[88] Over forty other corporations are defendants in actions currently pending in federal courts.[89]

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85. Some academics advocate the litigation of these claims in U.S. courts because, through judicial enforcement, corporations may be forced to comply with international human rights law. The resulting norm enunciation creates a remedy for those who might otherwise receive no recovery for damages they incurred as a result of gross violations of human rights. *See* Boyd, *supra* note 4, at 1173-89.

86. *See* Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 332-33 (1998). Ramasastry's article explores the Swiss Bank litigation and other human rights violations by corporations, calling courts to more clear and effective legal standards and international legal mechanisms. *Id.* at 449-54.

87. *See* Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *In re* Austrian and German Bank Holocaust Litigation, 80 F. Supp. 2d 164 (S.D.N.Y. 2000); *In re* Nazi Era Cases Against German Defendants Litig., 2000 WL 1876641 (D.N.J. Dec. 5, 2000); *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. 96 Civ. 4849); Iwanowa v. Ford Motor Corp., 67 F. Supp. 2d 424 (D.N.J. 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997); Aguinda v. Texaco, 1994 WL 142006 (S.D.N.Y. 1994).

88. This proposition illustrates the importance of the doctrine's applicability to cases involving international human rights abuses. Dismissing these claims as nonjusticiable will thwart the goals of corporate compliance. Absent measures encouraging and ensuring corporate compliance, the pattern of human rights abuses will likely continue and perhaps augment. For a discussion concerning the role of corporate compliance as a form of norm enunciation, see Boyd, *supra* note 4, at 1193-1200.

89. The list includes: Adam Apel AG; Albert Ackerman G m b H & Co KG; Alcatel Sel AG; Audi AG; BASF AG; Bayer AG; Bayeriche Motoren Werke AG; Beiersdorf AG; Robert Bosch G m b H; Hugo Boss AG; Continental AG; Daimler-Benz AG; Daimler-Chrysler AG; Deutsche Lufthansa AG; Diehl G m b H & Co.; Dunlopp AG; Durkopp AG; Durkopp Alder AG; Dycherhoff AG; Ford Werke AG; Franz Haniel & Cie AG; Fried Krupp AG AG Hoesch-Krupp; Heidelberger Zeurent AG; Henkel KGAA; Hoechst AG; Leica Camera AG; Leonard-Moll AG; Magna International, Inc.; Man AG; Mannesman AG; Optische Werke G. Rodenstock; Phillip Holzman AG; Rheinmetal Group; Schering AG; Steir-Daimler-Puck AG; Stiftung & Co.; Thyssen AG; Varta AG; VIAG; Voest AG; Volkswagen AG; Wurttembergissche Metallwarenfabrick AG. Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 281-82 (D.N.J. 1999).

B. *Cultural Genocide*

Other human rights violations include claims brought by indigenous people for cultural genocide and environmental damages.[90] For example, in *In re Estate of Marcos*, a class of victims tortured during a period of martial law brought an action against Ferdinand Marcos, former president of the Philippines, for human rights violations.[91] After his second (and, under then current Filipino law, last) constitutional term of presidency, Marcos declared a state of martial law on the land and rewrote his country's constitution to accommodate his harsh practices, thereby ensuring compliance of the people with his regime.[92]

The class action against him resulted from human rights violations including rape, torture, and confinement that occurred during interrogations conducted to investigate opposition to his regime.[93] Both the district court and two circuit courts validated a statistical sampling method of arriving at damages which the Plaintiff class won for the violations.[94] The Ninth Circuit affirmed the judgment against the estate and refused to heed the estate's due process challenges against the statistical sampling method.[95]

Another example of the cultural genocide cases brought as human rights mass torts, *Kadic v. Karadzic*, was the result of the "genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death" suffered by Croat and Muslim citizens of Bosnia-Herzegovina.[96] Plaintiffs alleged that these acts were part of a "genocidal campaign" during the Bosnian civil war.[97] The Second Circuit reversed the lower court's ruling that there was

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90. *See* Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997), *cert. denied*, 724 So. 2d 734 (La. S. Ct. 1998); Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.* Jota v. Texaco, Inc., 157 F.3d 153 (2nd Cir. 1998); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re* Estate of Marcos, 910 F. Supp. 1460 (D. Haw. 1995), *aff'd sub nom.* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

91. 910 F. Supp. at 1461-62 (D. Haw. 1995).

92. *Id.* at 1462-63.

93. *Id.* at 1463.

94. Hilao v. Estate of Marcos, 103 F.3d 767, 782-83 (9th Cir. 1996); *see* Trajano v. Marcos, No. 86-2448, 1989 WL 76894 (9th Cir. July 10, 1989). *Trajano* is a consolidated appeal challenging district court holdings in California and Hawaii which found Plaintiffs' claims nonjusticiable under a doctrine which parallels the political question doctrine. *See id.* at *1-2. The district courts used the act of state doctrine because they claimed the "inquiry these cases would require into the official acts of a foreign head of state was beyond the capacity or function of the federal courts." *See id.* at *2. The Ninth Circuit disagreed, finding instead that once a dictator is no longer in dictatorship, he may be reached judicially. *See id.* Furthermore, the court found that there was no need to prevent the government of either the Philippines or the United States, where he resided until his death, from being embarrassed by the litigation. *See id.*

95. *Hilao*, 103 F.3d at 782-87.

96. 70 F.3d 232, 236-37 (2d Cir. 1995), *cert. denied* 518 U.S. 1005 (1996).

97. *Id.* at 237.

no subject matter jurisdiction and remanded the case to the district court for a determination of Karadzic's liability.[98] These cases are instructive in that they illustrate the startling nature of the human rights mass tort cases and the correlating need for remedy.

IV. POLITICAL QUESTION: A QUERY THE COURT NEED NOT MAKE

In the confusion surrounding the political question doctrine and its application, scholars and all students of the law must pause to ask why our courts apply this doctrine and what ends it serves. The most troubling question regarding the doctrine is why simply giving deference to the other branches of the government is not adequate to meet its goals.[99] Its application to cases involving treaties is instructive, particularly in the arena of human rights mass tort litigation, because treaties often lie at the heart of the relationship between the involved countries.[100] "The presence or absence of treaty rights in various contexts has proven to be an intensely contentious issue, a paradigmatic political question."[101]

In Professor Bederman's article detailing the problems with application of the political question doctrine to cases involving treaty rights, he reminds us of the origins of the doctrine.[102] The political question doctrine envisioned by Chief Justice Marshall was a simple one: "[T]he political branches of government were compelled to accept judicial review and judicial supremacy in the adjudication of interbranch disputes . . . [and] the Court made a promise to restrain itself and refrain from deciding cases dealing with the exercise of . . . 'important political powers.'"[103] It is here that Professor Bederman summarizes our courts' application of the doctrine as an effort "to duck a whole panoply of important issues."[104]

Professor Bederman clearly articulates the fundamental dysfunction of the doctrine by illustrating that the doctrine actually facilitates commission of an evil it supposedly aims to prevent.[105] Namely, it gives both the executive and legislative branches "the power to dictate [their] own exclusive competence in

98. *Id.* at 236. The Second Circuit found subject matter jurisdiction over Plaintiffs' claims, personal jurisdiction over Karadzic, and justiciability of the claims. *Id.* at 238-50. The court's reasoning for holding the claims justiciable and refusing to dismiss under the political question doctrine are discussed *infra*, notes 154-58 and accompanying text.

99. Bederman, *supra* note 31, at 1439-40.

100. *See id.* at 1440. Professor Bederman describes the exponential growth of this type of litigation involving treaties over recent years.

101. *Id.*

102. *Id.* at 1442.

103. *Id.*

104. *Id.*

105. *See id.* at 1442-43.

various realms of policy and governance," because it removes from the judiciary the capacity to decide the scope of its powers and vests all decision-making in the other branches.[106]

Iwanowa and *Burger-Fischer* both relied heavily on the international tribunals governing international relations with the countries against whom their grievances lay.[107] Treaties were at the heart of the use of the political question doctrine in both *Burger-Fischer*[108] and *Iwanowa*.[109] In *Iwanowa*, the court held that the doctrine barred adjudication of the claims under at least four of the *Baker* factors, largely based on treaties and tribunals into which the United States previously entered.[110]

The District Court of New Jersey's application of the political question doctrine to human rights mass torts in *Iwanowa* and *Burger-Fischer* is instructive in analyzing why the query is neither appropriate nor, if made, correctly analyzed. This section will trace the reasoning of the *Iwanowa* and *Burger-Fischer* courts and then explain the rationale for the basic rule and why, in human rights mass tort litigation, the political question doctrine is a nonissue.

A. Application of the Rule in International Human Rights Cases: Landmark Dismissals

Iwanowa Defendants Ford Motor Co. and Ford Werke A.G. moved to dismiss the class action against them based on the political question doctrine.[111] Defendants asserted that the action was nonjusticiable because the "2 + 4 Treaty"[112] with Germany completely settled the issue of reparations, making their claim a political question subject to resolution solely by the executive branch.[113]

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106. *See id.* at 1442-45.

107. *See* Iwanowa v. Ford Motor Co., 67 F.2d 424, 447-60 (D.N.J. 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 262-72 (D.N.J. 1999). Some scholars argue the merits of adopting a political question doctrine for use in the World Court. *See* Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81, 81-82 (1999). The U.N. Charter "does not lodge exclusive, authoritative powers of interpretation in any single organ," and therefore the doctrine is not necessary to clarify where those lines lie. *See id.* at 82. Furthermore, by "internationalizing" the doctrine, the conflict between the discretion of the Security Counsel and challenges to that discretion, both of which seem valid, may arrive at last at resolution. *See id.*

108. *See* 65 F. Supp. at 262-73.

109. *See* 67 F. Supp. 2d at 457-60.

110. *Id.* at 483-89.

111. *Id.*

112. The "2+4 Treaty" refers to the Treaty on the Final Settlement with Respect to Germany, September 12, 1990, 29 I.L.M. 1196. *Burger-Fischer*, 65 F. Supp. 2d at 272. The Treaty neither abolished the previous agreements nor added any additional terms regarding reparations. *Id.* Rather, the Treaty simply represented the final peace treaty, leaving in tact the Transition Agreement and the bilateral treaties. *Id.* at 279.

113. *See Burger-Fischer*, 65 F. Supp. 2d at 256. In response, Plaintiffs contended: the Treaty did not subsume the claims, in accord with the decision by the German Federal Constitutional Court; that Plaintiffs' private law claims for disgorgement of profits were not for war reparations and therefore could not be

Plaintiffs relied on the 1953 London Debt Agreement, which carved out an exception against waiver of claims made by private parties against German corporations, as long as the parties could bring these claims after final resolution of reparations issues.[114] However, the New Jersey District Court found Plaintiffs' argument unsatisfactory because it ignored the Transition Agreement of 1954, dealing with reparations definitively.[115] The court reasoned that the Transition Agreement governed the claims here because the agreement "recognized that the victims of Nazi oppression could never be fully compensated for their losses"[116] and therefore held that all reparation claims "shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements governing the matter."[117] Accordingly, the court found the claims nonjusticiable political questions.[118]

In determining whether or not the political question inquiry is necessary, the *Iwanowa* court delineated reasons the judiciary should stay its hands from adjudicating foreign policy questions:

> (1) the relevant materials in a case involving foreign policy will likely come from a multitude of sources, including U.S. and foreign sources, which might be voluminous and thus, potentially unmanageable for individual courts to handle; (2) there is a distinct possibility that the parties might not be able to compile all of the relevant information, thus making any attempt to justify a ruling on the merits of an issue that will affect the nation, difficult and imprudent; (3) courts cannot predict the international consequences flowing from a decision on the merits; (4) there might not be any standards for courts to apply in issuing a decision on the merits; and (5) courts addressing questions of foreign policy are

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considered subsumed by the Treaty anyway; and the Treaty could not subsume legal claims made by stateless persons seeking relief for customary international human rights law violations. *Id.* at 256-57.

114. *Id.* at 277-78. The London Debt Agreement deferred all claims arising out of World War II by countries and nationals of countries with which Germany was either at war or occupied. *See id.* at 268. The purpose of the Treaty was to allow the German economy to stabilize and to "integrate it into the community of free nations." *Id.* The Treaty intended to grant Germany the opportunity to gain foreign credit, but did nothing to alter the previously drafted, yet not in effect, Transition Agreement. *Id.* at 269.

115. *Id.* at 277-78. In the Transition Agreement, the guiding reparations Treaty, Germany agreed to provide restitution to "adequately compensate" victims it persecuted based on race and religion. *Id.* at 268 (citing "Transaction Agreement," Oct. 23, 1954, 332 U.H.T.S. 219, Ch. 6, art. 1). The idea of the Treaty was to enable Germany to recover financially and stabilize so that the country would be able to provide restitution to its victims. *Id.* at 278.

116. *Id.* at 278.

117. *Id.* (quoting "Transition Agreement," Oct. 23, 1954, 332 U.H.T.S. 219, Ch. 6, art. 1).

118. *Id.* at 282. The court found each of the *Baker* indicia of political question to be present to some extent. For a full discussion, see *infra* Part V.

> faced with the task of reviewing initial determinations made by the political branches of government, determinations which are constitutionally committed to those branches.[119]

The district court's decision to inquire into the justiciability of the claims came as a result of reasoning that the nature of foreign policy is "political,"[120] likely because the nature of the suit involved international law and implicated foreign policy.[121]

In *Burger-Fischer*, the court arrived at the *Baker* factors as well, but after a much more thorough, four-part analysis of the appropriateness of the inquiry.[122] First, the court determined that the issues at bar were ones involving customary international law.[123] Second, the court analyzed the private nature of the claims in the context of reparations.[124] The court distinguished the *Burger-Fischer* class claims from claims brought in *Filartiga* and *Kadic*, both of which were justiciable, because the claims at issue evolved out of "corporate action constituting an integral part of Germany's war effort."[125] Furthermore, the court reasoned that the international law claims at issue now belonged to the victims' state, because they arose during the course of war.[126] To support their assertion, the court relied on a Supreme Court case from 1796, *Ware v. Hylton*,[127] in which the Court established both that governments representing individuals may assert war-related claims, rather than individual citizens themselves, and that the peace settlement at issue extinguished all claims relating to war.[128]

The absurdity of the comparison is self-evident: Claims litigated out of the Revolutionary War and the Treaty of 1783 at its conclusion are fundamentally different from claims arising from Hitler's systematic executions of Jews. The former claims arose out of typical casualties of war, while the later claims arose out of the Nazi regime's killing spree, which actually spawned World War II, rather than resulted from the War.[129] The district court failed to consider the circumstances under which the 1796 opinion was issued and instead continued its analysis by considering *Dames & Moore v. Regan*,[130] in which a plaintiff sued the Iranian government, attaching property to ensure judicial resolution.[131] The 1980

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119. *Iwanowa*, 67 F. Supp. 2d at 484 (internal citations omitted) (citing *Atlee*, 347 F. Supp. at 702).
120. *See id.* at 485.
121. *See id.* at 484-85.
122. *See* 65 F. Supp. 2d at 272-82.
123. *Id.* at 272-73.
124. *Id.* at 273-76.
125. *Id.* at 273.
126. *Id.*
127. 3 U.S. 199 (1796) (addressing the Treaty of 1783 ending the Revolutionary War).
128. *See Burger-Fischer*, 65 F. Supp. 2d at 273-74.
129. *See United States Holocaust Memorial Museum, at* <http://www.ushmm.org/outreach/fsol.htm> (last visited Jan 11, 2001).
130. 453 U.S. 654 (1981).
131. *See Burger-Fischer*, 65 F. Supp. 2d at 274.

negotiations between the United States and Iran regarding the embassy hostage crisis yielded a treaty which, among other effects, dissolved the attachments Plaintiff held against Iran.[132] The *Burger-Fischer* court attempted to use the *Dames & Moore* decision, which held that Congress permitted the President to make the treaty and it was binding over Plaintiff's case, by analogy to illustrate that this action was nonjusticiable and was a matter governed exclusively by the treaty at issue.[133] However, this reasoning is flawed for similar reasons: the evil that *Dames & Moore* sought to cure was an attachment on a parcel of property, the evil in *Burger-Fischer* and other human rights mass tort litigation is genocide, slave labor, and torture.[134] The comparison is preposterous and purports to equate humanity and dignity with property rights.[135] As the *Burger-Fischer* court itself noted, *Dames & Moore* "did not involve a total war and negotiation of reparations. Its holdings are of limited usefulness in the present case."[136] After taking care to define "reparations" as inclusive of all damages suffered as a consequence of war, the court concluded that forced slave labor claims are included in that classification.[137] However, the court refused to heed the reasoning of Plaintiffs' expert, Dr. Wolf:

> World War II and the accompanying acts of war must be clearly distinguished from the unprecedented acts of extermination of the Nazi regime based on racial motives. The mere temporal coincidence of racial persecution and acts of war cannot lead to the conclusion that these racial acts of persecution constitute typical acts of war and therefore the damages arising out of these acts are covered by the reparation claims. The indirect connection does not justify viewing these damages as war damages.[138]

The court replied to his assertion, stating that even under this reasoning, only a small percentage of slave labor claims would merit protection, completely overlooking Dr. Wolf's statement that these claims are primarily adjudicative not because of their nature, but rather because they occurred as a result of an

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132. *See id.*
133. *Id.* at 274-75.
134. *See id.*
135. *See id.* at 275.
136. *See id.* (citing the Treaty of Peace Between the Allied and Associated Powers of Germany, June 28, 1919, art. 232, Annex I, § 8.2 Bevans 142).
137. *Id.* at 275-76.
138. *Id.*

extermination effort and not as a natural by-product of war.[139] As the third part of its inquiry, the court examined the effect of the Post War Treaties on the justiciability of the case.[140] After tracing the history of the treaties governing relations among the previously warring nations, the court concluded that the Transition Agreement[141] both governed the relations between the countries and sustained all claims arising out of the war.[142] Finally, the court analyzed the German cases on point and determined that any adjudications in those cases did not affect the viability of individual claims in United States courts.[143] Accusing Plaintiffs of trying to "refashion" the reparations schemes in agreements made between foreign powers, the court refused to entertain any legitimizing factor which might lead to adjudication.[144]

B. Egregious Human Rights Violations: A Class of Its Own

Although in times of war, government, not individuals, decides fairness of the measures that nations negotiate, precedent exists under which courts can, in opposition to the New Jersey District Court decisions of *Iwanowa* and *Burger-Fischer*, find that the political question doctrine does not apply in the context of international human rights mass tort litigation.[145] In *Republic of the Philippines v. Marcos*,[146] the Ninth Circuit held that the case was, in fact, justiciable, and the political question doctrine did not apply, based upon the nature of the lawsuit.[147] The court reasoned, "[b]ribetaking, theft, embezzlement, extortion, fraud, and conspiracy to do these things are all acts susceptible of concrete proofs that need not involve political questions."[148] Both *Iwanowa* and *Burger-Fischer*, as well as all other human rights mass tort cases, receive protection under this reasoning.[149] The correlation is obvious: claims for torts are simply claims for torts. There is nothing political in their nature; their adjudication is as straight-forward as it would be were the violations alleged under state law instead of customary international law,[150] by only American parties.[151]

More compelling for purposes of analogy to currently pending human rights litigation is the Ninth Circuit's observation that Marcos "was not the state, but the

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139. *Id.* at 276.
140. *See id.* at 276-79.
141. *See supra* text accompanying notes 116-17.
142. *Burger-Fischer*, 65 F. Supp. 2d at 278-79.
143. *Id.* at 279.
144. *See id.* at 281.
145. *See* Republic of the Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988).
146. This case was later consolidated on appeal.
147. *Marcos*, 862 F.2d at 1361. For the factual basis of the lawsuit, see *supra* notes 90-95 and accompanying text.
148. *Id.*
149. *See id.*
150. *See* Boyd, *supra* note 4, at 1141.
151. *See Marcos*, 862 F.2d at 1361.

head of the state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law."[152] The parallel here is equally unambiguous: private individuals and corporations should be held liable for acts done under the auspice of government, just as they would be were the acts done absent any connection to any government or political party.[153]

The Second Circuit, in *Kadic v. Karadzic,* also refused to apply the political question doctrine to violations of international law.[154] Before embarking on a discussion of the six *Baker* factors,[155] the court clarified that the use of the political question doctrine as applied in *Tel-Oren v. Libyan Arab Republic*[156] did not dictate its use in the case at bar.[157] Instead, the court emphasized: "Not every case 'touching foreign relations' is nonjusticiable."[158]

The basic rule of the political question doctrine regarding war-time matters and litigation stemming therefrom simply does not apply in international human rights mass torts because these crimes go beyond what is typical in war; slave labor, genocide, and ethnocide are not typical war time casualties and should not be treated as such. To do so serves to encourage corporations to act at will rather than to comply with international law.[159]

Furthermore, many international human rights mass tort cases are brought under the ACTA.[160] The mere fact that these cases "may involve matters of foreign law" does not mandate dismissal under the political question doctrine.[161] There exists no precedent to dismiss ATCA cases simply because they claim jurisdiction under this statute.[162] In his article published the month the New Jersey District Court decided *Iwanowa* and *Burger-Fischer*, Professor Bederman drew attention to the fact that no ATCA case to date had been dismissed for

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152. *Id.*
153. *See id.*
154. *See* 70 F.3d 232, 248-50 (2nd Cir. 1995). For a discussion of the facts and court holding, see *supra*, notes 96-98 and accompanying text.
155. *See id.*
156. 726 F.2d 774 (D.C. Cir. 1984).
157. *Kadic*, 70 F.3d at 249. The courts found that the use of the political question doctrine in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 775, did not control the court here and particularly looked on the "constitutional underpinnings" argument of Judge Bork and Judge Robb with disdain. *See Kadic*, 70 F.3d at 249.
158. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 211 (1962) and Lamont v. Woods, 948 F.2d 825, 831-32 (2d Cir. 1991)).
159. *See* Boyd, *supra* note 4, at 1210-12.
160. *See supra* note 16 and accompanying text.
161. Bederman, *supra* note 31, at 1474.
162. *See id.*

nonjusticiability.[163] The justiciability of these cases did not surprise him:

> There is no unique or problematic element in a treaty rights case that would indicate that the executive branch should suggest to a court that it is deserving of such a fate. Even if the executive branch were to join a defendant in making such a suggestion in an ATCA case, I do not believe that a court should defer in such an instance.[164]

V. WHERE THE QUERY IS MADE, THE DOCTRINE DOES NOT APPLY

Applying the *Baker* factors to the international human rights mass tort cases, no factor is "inextricable from the case at bar" and therefore mandates a finding of nonjusticiability based on the political question doctrine.[165]

A. Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department[166]

The Constitution at no point delegates the determination of whether international human rights victims have the right to sue for this egregious level of personal injury to another branch of government, forbidding the judiciary from touching the issue.[167] The Second Circuit in *Kadic* reasoned that the answer to the question of which department of the government has the duty to handle the human rights atrocities is obvious–the judiciary.[168]

In the recently dismissed *Iwanowa* and *Burger-Fischer* cases, the district court held in both instances that the power over foreign policy matters rests with the President.[169] The *Iwanowa* court asserted, "[t]he nature of war is such that the governments of the victorious nations determine and negotiate the resolution of the claims of their nationals by way of agreements between the nations involved or affected by the war," relying on treaties as evidence.[170] However, the court failed to consider that the claims far exceed what is normal in the "nature of war."[171] After listing numerous treaties, the court made a conclusory statement that the claims are necessarily committed to the "political branches" of the government because the "nature of war" lends itself to agreements between nations, with which

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163. *See id.*
164. *Id.*
165. *See* LOW & JEFFRIES, *supra* note 41, at 434.
166. *Baker*, 369 U.S. at 217.
167. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 14 at 85 (5th ed. 1994).
168. *See* Kadic v. Karadzic, 70 F.3d 232, 249 (2d. Cir. 1995).
169. *See* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 282-83 (D.N.J. 1999); Iwanowa v. Ford Motor Co., 57 F. Supp. 2d 424, 485 (D.N.J. 1999).
170. *Iwanowa*, 67 F. Supp. 2d at 485.
171. *See id.*

the judiciary may not interfere.[172] The court also dropped a footnote in support of its statement that reparations claims have always been the concern of the executive branch.[173] The court noted that slave labor claims, such as those brought by the Plaintiff class, have always been considered reparations by Germany.[174]

B. Lack of Judicially Discoverable and Manageable Standards for Resolving Claims[175]

Rationally, courts with human rights mass torts on their dockets should have great difficulty justifying dismissing cases as political questions based on the grounds that no judicially discoverable and manageable standards exist for resolving the controversy. The very nature of this litigation, as class actions, is certainly manageable for the same reasons that other mass torts are manageable: once a class is certified under Rule 23, there is no reason to suspect that it will then be unmanageable.[176] The requisite elements of certification, numerosity, commonality, typicality, and adequacy ensure that actions will be manageable by the courts.[177] Furthermore, courts adjudicating mass torts frequently employ other procedural tools and techniques designed to ease the judicial process of litigating mass torts, including appointing special masters for the damages phase of trials,[178] using systems of collective recovery to compensate victims,[179] as well as instituting

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172. *See id.*

173. *Id.* at n.4.

174. *Id.* The court offers no explanation for why the vague statement, "the concept of reparations claims encompasses all international law claims for compensation related to war [including] individual claims by injured citizens of victorious powers," should dictate this country's view of these claims or necessarily confine all injury within the German contemplation. *See id.*

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

176. *See* FED. R. CIV. P. 23.

177. *See id.* 23(a). These requirements in full:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. For an excellent discussion of the merits of adjudicating international human rights atrocities through the class action mechanism see generally Boyd, *supra* note 4. Professor Boyd details the utility of the class action as providing a unique forum for plaintiffs unavailable in other domestic courts. Her article articulates the manner in which a procedural mechanism affects substantive rights, by illustrating through cultural genocide, Holocaust, and environmental human rights cases the power of the class action to ensure corporate compliance with human rights norms. *See id.*

178. *See generally* Sol Schreiber & Laura D. Weissbach, *In re Estate of Ferdinand E. Marcos Human Rights Litigation: A Personal Account of the Role of the Special Master*, 31 LOY. L. REV. 475 (1998).

179. *See* MANUAL FOR COMPLEX LITIGATION § 33.2 (3d ed. 1995) (stating that the creations of funds and schedules of compensation is determined by aggregate procedures).

a fluid recovery system, under which damages are aggregated for purposes of determining liability.[180]

Courts have recognized in ATCA cases the utility of the class action. The *Kadic* court reasoned, "our decision in *Filartiga* 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."[181] Additionally, the Second Circuit reasoned that the presence of any judicial standards undermines any claim that the issues are constitutionally reserved to another branch of the government.[182] In pending and future human rights litigation, this analysis should instruct courts on proper use of the doctrine: Where the court is capable of discerning the standards, it should interpret that ability as a primary indicator of justiciability.[183]

The *Iwanowa* court viewed Plaintiffs' claims as too demanding on the judiciary, producing a "daunting task."[184] However, the court failed to enumerate any concerns which the proposed methods discussed would not easily resolve.[185] The *Burger-Fischer* court also found that the case was unmanageable, relying primarily on the confidential nature of some of the evidence the court would need to examine in order to adjudicate the claims.[186] This reasoning wholly lacks merit; should the parties bringing the action not want that "confidential information" divulged, they should opt out of the class, and information which corporations against whom liability is sought do not want publicly known is irrelevant.[187]

C. The Impossibility of Deciding the Case Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion[188]

Regarding the fourth through sixth *Baker* factors, the Second Circuit relied on the Supreme Court's admonition in both *Japan Whaling Ass'n v. American Cetacean Society*[189] and *Baker*[190] when reasoning "[d]isputes implicating foreign policy concerns have the potential to raise political question issues, although, as the Supreme Court has wisely cautioned, 'it is error to suppose that every case or

180. *See* 2 NEWBURG ON CLASS ACTIONS §§ 10.16-10.19 (3d. ed. 1995).
181. Kadic v. Karadzic, 70 F.3d 232, 249 (2d. Cir. 1995).
182. *Id.*
183. *See id.*
184. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 489 (D.N.J. 1999).
185. *See supra* notes 169-74 and accompanying text.
186. *See* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 283 (D.N.J. 1999).
187. *See id.*
188. Baker v. Carr, 369 U.S. 186, 217 (1962).
189. 478 U.S. 221, 229-30 (1986).
190. 369 U.S. at 211.

controversy which touches foreign relations lies beyond judicial cognizance.'"[191] In *Burger-Fischer*, the district court concluded that a policy determination by the President preceded any decision that the court might make.[192] However, the court referred to the policy determination here as the President's treaty negotiation with foreign powers.[193] One has nothing to do with the other. No party has asked "whether the President could have extracted a more favorable settlement"; instead, the Plaintiff class seeks to recover for the slave labor Defendants instituted against them collectively and individually.[194]

D. Impossibility of a Court's Undertaking Independent Resolution Without Expressing Lack of the Respect Due Coordinate Branches of Government[195]

The *Iwanowa* court also found this criterion met, reasoning that under the U.S. position that World War II claims be resolved "through government-to-government negotiations," slave labor claims brought by individual victims demonstrated a fundamental disrespect for the political branches of government.[196] However, this assessment assumes that the claims arise out of the war itself and that they are covered by the negotiations governing general war damages.[197] Both assumptions are erroneous.[198] The claims brought by the Plaintiff class are beyond the contemplation of any agreements between the governmental powers and, in fact, beyond the nature of war.[199]

E. Unusual Need for Unquestioning Adherence to a Political Question Already Made[200]

This interest is not implicated in *Iwanowa* and *Burger-Fischer*. It is likely not in issue generally in human rights mass tort litigation because these cases are the first to hold that the political question doctrine disqualifies the Holocaust litigation

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191. Kadic v. Karadzic, 70 F.3d 232, 249-50 (2d Cir. 1995) (internal quotations omitted) (quoting *Japan Whaling Ass'n*, 478 U.S. at 229-30).
192. *See* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 283 (D.N.J. 1999).
193. *See id.* at 283 (citations omitted).
194. *See id.*
195. Baker v. Carr, 369 U.S. 186, 217 (1962).
196. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 486-87 (D.N.J. 1999).
197. *See id.*
198. *See supra* notes 170-72.
199. *See id.*
200. *Baker*, 369 U.S. at 217.

from adjudication.[201]

F. The Potentiality of Embarrassment from Multifarious Pronouncements by Various Departments on One Question[202]

Iwanowa found this factor implicated, holding that judgment "would inevitably embarrass and undermine our executive branch's authority in foreign affairs."[203] The court offered no explanation for its assessment, but clearly the claims here were for individual human rights torts against private corporations, although collectivized, rather than actions against foreign governments for war reparations.[204] Accordingly, this factor has no application in human rights mass torts.

Analyzing the six *Baker* factors reveals a paradox that remains unsolved by the court.[205] Application of the political question doctrine demands that one of the three branches of government ultimately decide the scope of all three branches' powers.[206] Though the basis for the doctrine supposedly lies in the separation of powers, the doctrine actually works to strip two of the branches of power while vesting the ultimate decision of delegation in one branch.[207] Clearly, the framers intended the courts, under the doctrine of judicial review, to be the "ultimate arbiters of interstitial disputes in the constitutional scheme."[208] However, it is equally clear that, under the political question doctrine, the judiciary is stripped of any potential decision making power regarding the scope of its powers.[209]

VI. CONCLUSION

In the aftermath of the *Iwanowa* and *Burger-Fischer* district court decisions, the political question doctrine rests in a precarious position. With appeal by the Plaintiff classes around the corner, the applicability of the doctrine to international human rights cases may soon reach resolution. The ramifications of that decision will be far reaching, influencing not only the use of the doctrine domestically and abroad, but international relations as well. Most importantly, it will set the tenor for the U.S. role in enforcing international human rights law.

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201. *See* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 281-85 (D.N.J. 1999); *Iwanowa*, 67 F. Supp. 2d at 489.
202. *Id.*
203. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 487 (D.N.J. 1999).
204. *See id.* at 487-88.
205. *See* Bederman, *supra* note 31, at 1445.
206. *Id.*
207. *See id.*
208. *See id.* at 1443.
209. *See id.* at 1445.

At some point, it is certain that the Supreme Court will have occasion to hear this important issue. At that time, should it consider the nature of these claims for what they are–egregious violations of the basic rights of humanity, rather than war-time casualties–it will certainly be wary of dismissing accountability for corporations and corrupt leaders who might hope to hide under the protective umbrella of the political question doctrine. Instead, courts should shield those who need it: the victims of international human rights abuses.

NANCY S. WILLIAMS[210]

210. J.D., Pepperdine School of Law, 2001. To Professor K. Lee Boyd, who introduced me to the field of International Human Rights, I give my deepest gratitude for teaching, encouraging, and challenging me as a student and as a friend.