THE JUDICIAL EXPANSION OF AMERICAN EXCEPTIONALISM

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I. INTRODUCTION

After World War II, the rise of international human rights law has gradually eroded what remained of national sovereignty, as a defense against the intervention of other states. In the modern era, there is a growing sentiment that when the gravest human rights violations such as genocide, crimes against humanity, ethnic cleansing, and war crimes occur, the international community has a "responsibility to protect" the victims of those crimes if the victims' own government is unwilling or unable to do so.[1] While much of the scholarship on the responsibility to protect focuses on the international community's ability to engage in military intervention to carry out its obligations, the doctrine actually provides a menu of options that intervening States can employ to prevent serious abuses of human rights, including diplomatic measures, economic sanctions, and, notably for the purposes of this article, legal accountability in judicial fora.[2] Thus, in the modern era, States have greater latitude than ever before to

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1. The responsibility to protect doctrine was first outlined in 2001 in a report commissioned by the Canadian government. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [*hereinafter* ICISS Report]. In 2005, more than 150 heads of state and government unanimously endorsed it at the U.N. World Summit. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter World Summit Outcome]. Since that time, it has gained increasing prominence as a guiding principle. Indeed, in September 2011, Secretary-General Ban Ki-moon stated, "Our debates are now about how, not whether, to implement the responsibility to protect." Garth Evans, End of the Argument: How We Won the Debate Over Stopping Genocide, FOREIGN POL'Y (Dec. 2011), *available at* http://www.foreignpolicy.com/articles/2011/11/28/gareth_evans_end_of_the_argument; *See also* Jordan Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 CORNELL INT'L L.J. 1, 7-8 (2013).

2. ICISS Report, at ¶1.38. *See also* Ved Nanda, *The Future under International Law of the Responsibility to Protect after Libya and Syria*, 21 MICH. ST. INT'L. L. REV 1, 5 (2013) ("The ICISS's 'responsibility to protect' concept comprises three distinct responsibilities: the responsibility to prevent, the responsibility to react (which in extreme cases may include military intervention), and the responsibility to rebuild after military intervention. The responsibility to prevent focuses on the importance of early warning mechanisms and conflict prevention, and on the use of diplomatic, economic, and military means to contain a conflict before it escalates."); World Summit Outcome, *supra* note 1, at ¶ 139.

intervene in the sovereign affairs of other States when human rights violations have occurred. Yet, the "when" and "how" of justifying intervention in any form on the basis of human rights remains murky and States across the globe are charting their own course through unsure waters. In this article, I will argue that the United States has inconsistently fulfilled its responsibility to protect, evoking this doctrine as a basis for intervention only when it has a national interest at stake, and that this approach to human rights protection is improperly extending to the judiciary.

This unbalanced invocation of the responsibility to protect aligns with many of the critiques levied against the United States for its shifting commitment to international human rights law more generally. Indeed, since World War II, the United States has emerged as a controversial figure, leading the charge for the development of international law but then failing to sign or ratify major treaties that would provide accountability for human rights violations within its own borders.[3] The American approach to international law is even more striking when compared to its European allies who have increasingly waived their sovereign rights in favor of greater European integration and stronger formations of international law.[4] Critics have thus accused the United States of American Exceptionalism – "the idea that the United States is different from the rest of the world and unbound by the rules it promotes" – and have claimed that the U.S. has co-opted human rights for its own purposes.[5] While these critiques primarily focus on the U.S.'s desire to exempt itself from human rights enforcement at home, the selective enforcement of human rights law presently extends beyond its borders, in part as response to the emergence of the responsibility to protect. As will be explored further below, recent rhetoric by U.S. government officials reveal that the United States is conditioning its enforcement of human rights law abroad on the existence of a U.S. national interest, thereby sending the message that state actors who act contrary to U.S. interests are exceptionally more deserving of punishment for human rights violations — thus, effectively draping a veil of immunity over its allies. In particular, U.S. politicians have repeatedly invoked this approach when engaging in humanitarian military interventions overseas, most recently when making the case for military strikes in Syria.[6] In essence, the question of whose

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3. Risa Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 153-54 (2008); MICHAEL IGNATIEFF, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (2005). Douglas J. Sylvester, Comment, *Customary International Law, Forcible Abductions, and America's Return to the "Savage State,"* 42 BUFF. L. REV. 555, 612 (1994) ("The United States has played a tremendous role in developing the current system of international law, creating a body of law that is largely a reflection of American interests and philosophies." Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 NYU L. REV. 1971, 1982 (2004) ("More than any other single country, the United States is responsible for the existing international legal system, which naturally makes it rather hard for other states to understand how we can act as if that legal system does not apply to us.")

4. Rubenfeld, *supra* note 4, at 1981.

5. *Id*.; Austeen Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 101, 113 (2013). *See generally* JAMES PECK, IDEAL ILLUSIONS: HOW THE U.S. GOVERNMENT CO-OPTED HUMAN RIGHTS (2010); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

6. President Barrack Obama explained that the motivation for intervening in Syria "has to do with not only international norms but also America's core self-interest." Interview by Judy Woodruff

human rights deserve this country's protection is becoming an expressly political one, driven by national interest.

But the United States Supreme Court's recent opinion in *Kiobel v. Royal Dutch Petroleum Co*. is striking evidence that this emerging American norm, which I will refer to as "nationalistic human rights protection," is creeping into a realm where politics should have no bearing: the judiciary.[7] In *Kiobel*, the majority of the Court held that the presumption against extraterritoriality[8] was applicable to the Alien Tort Statute (ATS),[9] a statute that courts had previously interpreted to provide jurisdiction for civil suits seeking damages for human rights violations occurring abroad.[10] In arriving at this decision, Chief Justice John Roberts, who delivered the majority opinion of the Court, emphasized the fear that the adjudication of claims under the ATS in federal courts would have negative consequences on foreign relations and "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs."[11] At the same time, the Court left open the possibility that claims could overcome the presumption against extraterritoriality if they "touch and concern the territory of the United States. . . with sufficient force."[12] Thus, the Court foresaw instances where ATS claims could have so strong a nexus to the United States that there would be no doubt about its interest in the matter.

While the majority opinion suggested a need for a strong U.S. connection as a condition for jurisdiction under the ATS, a concurring opinion, written by Justice Breyer and joined by Justices Sotomayor, Ginsburg, and Kagan, "interpret[ed] the statute as providing jurisdiction only where distinct American interests are at issue."[13] These Justices favored the adoption of a clear standard that would grant extraterritorial jurisdiction under the ATS, *inter alia*, when "the defendant's conduct *substantially and adversely* affects an important American national interest."[14] Given the inherent fuzziness of the "touch and concern" test, domestic courts may well look to this four-justice concurrence when determining whether human rights claims under the ATS are justiciable. At least one court already has.[15]

& Gwen Ifill with Barrack Obama, President of the United States, PBS News Hour (Aug. 28, 2013), *available at* http://www.pbs.org/newshour/bb/white_house/july-dec13/obama_08-28.html. After imposing a no-fly zone in Libya, President Obama explained to the American public that the United States had a "strategic interest" in protecting the Libyan people from mass violence and that there was a "price for America" if it failed to intervene. President Barack Obama, Remarks by the President in Address to Nation on Libya (Mar. 28, 2011), *available at* http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript.

7. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

8. The presumption against extraterritoriality is a canon of statutory interpretation that provides "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." The canon's purpose is "to protect against unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

9. 28 U.S.C. § 1350.

10. *See generally*, *Kiobel*, 133 S. Ct. 1659.

11. *Id*. at 1664. (quoting Sosa v. Alvarez–Machain, 542 U.S. 692, 727 (2004)).

12. *Id*. at 1669.

13. *Id*. at 1674 (Breyer, J., concurring).

14. *Id*. at 1671 (Breyer, J., concurring) (emphasis added).

15. Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013). *See also* Mohammadi v. Islamic Republic

This opinion raises more questions than it resolves. Although the Supreme Court adopted this threshold for the adjudication of ATS claims in US courts in an attempt to limit "unwarranted judicial interference in the conduct of foreign policy,"[16] to what extent does this standard inherently require the judiciary to intervene as a political actor on the international stage? Furthermore, if U.S. courts, guided by the language in the four justice concurrence, dismiss cases because they are considered to be contrary to U.S. national interest, would this legitimize critiques that the United States is co-opting human rights to support actions undertaken with political motives instead of humanitarian ones? In this article, I will trace the emergence of the United States' nationalistic protection of human rights and examine the ramifications of the judicial adoption of this approach to the adjudication of human rights claims. I argue that not only would conditioning judicial human rights protection on national interest be antithetical to the underlying principles of human rights, but it would also run afoul of the political question doctrine. I further suggest that Congress should correct this unclear and potentially problematic test by adopting a standard for jurisdiction that would allow the United States to more consistently fulfill its obligations under the responsibility to protect. Specifically, Congress should adopt legislation that would allow U.S. courts to adjudicate human rights claims under the ATS when other States who might be in a better position to do so are unwilling or unable.

Part II describes the historical context that gave rise to the gradual replacement of the non-interventionist default with the protection of individual human rights abroad. In particular, it will focus on the development of the responsibility to protect, highlighting how it provides a broad array of actions, including judicial action, to protect individuals from grave human rights abuses. Part III traces the role of the United States in the development of human rights law and examines the critiques that the United States has used human rights as a tool to pursue its own national interests, especially in its justification of military interventions abroad. Part IV describes how *Kiobel*, if interpreted in line with the four justice concurrence, represents a formal expansion of American Exceptionalism into the judiciary and outlines why that violates the central tenets of human rights law and the political question doctrine. Part V suggests that Congress should remedy the problem created by *Kiobel* by adopting legislation consistent with the responsibility to protect doctrine. Specifically, Congress should universally provide jurisdiction in U.S. courts for claims under the ATS when other States that are in a better position to adjudicate human rights claims are unwilling or unable to do so.

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of Iran, 947 F. Supp. 2d 48, 70 (D.D.C. 2013), reconsideration denied (July 12, 2013) ("Even though the respondents in Kiobel had American corporate affiliates and allegedly orchestrated and incited heinous actions against the Nigerian petitioners (including extrajudicial killing, torture, and crimes against humanity), the Supreme Court concluded that there was not a sufficient nexus to the territory *or interests of the United States* to confer ATS jurisdiction.") (emphasis added)

16. *Id*. at 1665.

II. THE BIRTH OF MODERN HUMAN RIGHTS AND THE RESPONSIBILITY TO PROTECT

The effective international protection of individuals that reaches into the borders of other countries is a relatively new phenomenon. In order to fully understand the significance of the dilemma addressed in this article, this section provides a brief history of its development. Specifically, it will trace how the erosion of sovereign rights paved the way for the emergence of the responsibility to protect.

A. The Erosion of Sovereign Rights in the Face of Mass Atrocity

The dilemma regarding when it is permissible for States to intervene in the affairs of others to protect human rights is a modern one and States across the world including the United States are still navigating its contours. In the early 20th century, a government's internal treatment of its own citizens was relatively insulated from the law of nations, with the exception of some notable humanitarian interventions in the 19th century.[17] Predominantly, however, sovereign rights provided a veil of immunity that protected even the most brutal governments from international scrutiny.[18] International law offered limited protection of individual rights, such as those of citizens of one country injured by another country (e.g. international law governed injury to the property rights of aliens, attacks on aliens on foreign soil, and the use of force against civilians and soldiers during wartime).[19]

Yet, over the course of history, sovereign rights have been gradually and cyclically eroding, with each grave breach of human rights that disturbs our modern sensibilities further enforcing our global interconnection and consequently instilling a growing belief in the duty to intervene in the affairs of other nations to protect individual human rights. After the atrocities of World War I, the international community increasingly recognized that a government's treatment of its own citizens could have implications globally and made efforts to influence the activity of governments vis-à-vis their citizens.[20] One step taken in hopes of forestalling future devastation was the creation of the League of Nations, whose aim was to curb the behavior of individual sovereign States to act in the interest of the collective security of a community of States.[21] Although the League of Nations lacked binding authority over sovereign States and its founding treaty did not explicitly mention human rights, it was the first major chink in the armor of sovereign rights that eventually allowed for the development of international human rights law.[22]

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17. STEVEN RATNER, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 4 (2009); *See also* Louis Henkin, *International Law: Politics, Values, and Functions*, 216 COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L. 12, 208 (1989). Concerning the 19th and 20th century inroads on sovereignty, *see* Jordan Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 Va. J. Int'l L. 977 (2011).

18. Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903, 913 (2007).

19. *Id*. at 4. *See also*, Paust, *supra* note 17.

20. RATNER, *supra* note 17, at 6 (2009); CYNTHIA SOOHOO, BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 19 (2008).

21. *Id*.

22. Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and*

The collective horrors and destruction of World War II ignited a desire for a deeper codification of international norms promoting the protection of human rights. Faced again with the distinct reality that those States who abused the rights of their citizens were likely to present security risks for their neighbors, States recognized that a firmer commitment to international human rights was essential to encouraging stability and peace.[23] In 1945, the Allied powers created the "United Nations," which initially included only those countries united against the Axis powers.[24] With the support of the United States, the United Nations adopted a Charter that served as the founding document for the organization and laid out a mandate to protect human rights. In the preamble of the U.N. Charter, member States pledged "to reaffirm faith in fundamental human rights" and "the dignity and worth of the human person."[25] Moreover, Article 55 of the U.N. Charter identified human rights as essential to the promotion of international peace and stability:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.[26]

The U.N. Charter committed its members "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[27]

Despite this bold language in the U.N. Charter its impact was limited by the inability of the U.N. General Assembly to adopt a list of protected human rights within the Charter[28] and the affirmation of the principle of non-intervention in Article 2.7,[29] which confirmed the protection of sovereign rights. Additionally, the conclusion by U.S. courts that the U.N. Charter was not self-executing further constrained its practical application in the U.S.[30]

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the Mandate System of the League of Nations, 34 N.Y.U. J. INT'L L. & POL. 513, 533 (2002).

23. SOOHOO, *supra* note 20, at 23.

24. Kathleen Renée Cronin-Furman, *60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect*, 25 AM. U. INT'L L. REV. 175, 179-80 (2009).

25. U.N. Charter preamble.

26. U.N. Charter art. 55. The United Nations Charter was incorporated into U.S. law via 59 Stat. 1033 (1945).

27. U.N. Charter art. 56.

28. The list of protected human rights was articulated three years later in the Universal Declaration of Human Rights, which is considered soft law and non-binding on member States.

29. Article 2.7 of the UN Charter prohibits intervention "in matters which are essentially within the jurisdiction of any State."

30. *See, e.g.*, Sei Fujii v. State, 217 P.2d 481 (Cal. Dist. Ct. App. 1950), *aff'd*, 38 Cal.2d 718, 242 P.2d 617 (1952); Camacho v. Rogers, 99 F. Supp. 155, 158 (S.D.N.Y. 1961); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 (7th Cir. 1985). *But see* Oyama v. California, 332 US 633, 672-73 (1948) (Murphy, J., concurring, joined by Rutledge, J.); *see also id*. at 649-50 (Black, J., concurring, joined by Douglas, J.).

B. The Emergence of the Responsibility to Protect

This slow march away from sovereign rights and toward human rights during the past century paved the way for the emergence of the responsibility to protect, which describes the increasing acceptance that States have a duty to protect their own citizens from human rights abuses and when they fail to do so, other States must intervene. This section traces the emergence of the responsibility to protect and describes the tools that States might use to fulfill this duty, highlighting in particular the possibility of judicial action under the legal theory of universal jurisdiction.

In the 1990s, the failure of the international community to intervene to stop the genocide in Rwanda and the controversial humanitarian interventions in Kosovo, Bosnia, and Somalia raised questions about when foreign intervention is appropriate and catalyzed the formal articulation of the responsibility to protect doctrine.[31] In 2000, the United Nations Secretary General Kofi Annan in his Millennium Report to the General Assembly urged member States to "unite in the pursuit of more effective policies, to stop organized mass murder and egregious violations of human rights."[32] In response to this call, the International Commission on Intervention and State Sovereignty (ICISS), an independent body established by the Canadian Government, published a report in 2001 that first outlined the responsibility to protect,[33] which it defined as "an idea that sovereign States have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, the responsibility must be borne by the broader community of states."[34] While the report mainly focused on military intervention, which it identified as the most controversial form of intervention, it also indicated that the responsibility to protect included "all forms of preventive measures, and coercive measures – sanctions and criminal prosecutions – falling short of military intervention."[35] The ICISS specifically listed universal jurisdiction as one of the tools in the "direct prevention toolbox," stating:

> [t]he Geneva Conventions and Additional Protocols (as well as the Convention against Torture) establish universal jurisdiction over crimes listed in them. This means that any state party can bring to trial any person accused of such crimes. Universal jurisdiction is in any case held to exist under customary international law for genocide and crimes against humanity, and a number of countries have enacted legislation to give their courts jurisdiction in such cases.[36]

Thus, from its inception, the responsibility to protect included judicial action as a tool that could be used to deter future atrocities.

The responsibility to protect next gained ground, when the High-Level Panel on Threats, Challenges, and Change established by Secretary General Kofi

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31. ICISS Report, *supra* note 1.

32. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, 47, U.N. Doc. A/54/2000 (April 3, 2000), *available at* www.un.org/millennium/sg/report/ch3.pdf.

33. Nanda, *supra* note 2, at 5. *See also* Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 63 (2012).

34. ICISS Report, *supra* note 1, at VIII.

35. *Id*. at 8.

36. *Id*. at 23-24.

Annan endorsed the principle, identifying it as an "emerging norm" in its report in 2004.[37] Still, the High-Level Panel noted that the responsibility to protect represented a "normative challenge to the United Nations" in that "the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene."[38]

In 2005, however, the U.N. General Assembly explicitly endorsed the responsibility to protect when it adopted the World Summit Outcome.[39] The World Summit Outcome document affirmed that the international community "has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[40] However, the World Summit Outcome document watered down the responsibility to protect mandate with respect to military intervention, indicating that the international community should be "*prepared* to take collective action. . .should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleaning, and crimes against humanity" as opposed to having an affirmative duty to do so.[41]

III. THE U.S. DOUBLE STANDARD OF HUMAN RIGHTS

As the responsibility to protect norm developed, States have been navigating the difficult question of when it is appropriate to intervene militarily, politically, and judicially in the domestic affairs of other States. The United States has demonstrated marked inconsistencies in its approach to human rights enforcement, at times pushing the boundaries of when it is acceptable to intervene in the affairs of others in the name of human rights and at others defending sovereign boundaries when their own interests are threatened.[42] As this section will further illuminate, the United States' human rights policy has been a combination of leadership and resistance.[43] On one hand, the United States has been instrumental in the development of international human rights law; on the other, it has resisted the implementation and enforcement of international human rights law within its own borders.[44] For instance, the

37. U.N. Secretary-General, *Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 ¶¶ 55, 203 (Dec. 2, 2004) [hereinafter High-Level Panel Report]. *See also* Nanda, *supra* note 2, at 7.

38. High-Level Panel Report, *supra* note 37, at ¶ 36.

39. World Summit Outcome, *supra* note 1.

40. *Id*. at ¶ 139.

41. *Id*. at ¶ 139. (emphasis added)

42. Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 365, 366 (1998) ("A recent example is President Clinton's support for an International Criminal Court on the condition that its jurisdiction be severely limited. A primary reason for this was the fear that U.S. troops and other U.S. government officials might be subject to the Tribunal's jurisdiction. For similar reasons the President has resisted signing the Land Mine Treaty.").

43. IGNATIEFF, *supra* note 3 ("Under some administrations, it has promoted human rights as if they were synonymous with American values, while under others, it has emphasized the superiority of American values over international standards. This combination of leadership and resistance is what defines American human rights behavior as exceptional…").

44. *See generally*, Koh, *supra* note 5; Johan D. van der Vyver, *American Exceptionalism: Human*

United States has been a central figure during the drafting and negotiation of numerous human rights treaties, but it ultimately failed to put many of those same treaties into force within its domestic law (e.g. the International Covenant on Economic, Social, and Cultural Rights, Convention on the Rights of the Child, the Rome Statute, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)).[45] When the United States has ratified international human rights treaties, it has done so with so many reservations, understandings, and declarations (RUDs) that the treaties lost a fair measure of force within domestic law (e.g. Genocide Convention, Torture Convention and the International Covenant on Civil and Political Rights).[46] Many scholars have thus lambasted the United States for its exceptionalist stance on human rights, claiming that the United States believes that human rights is good for other countries, but is wary of subjecting its own human rights records to external scrutiny.[47]

A. The United States' Role in the Development of Human Rights Law

American exceptionalism has been present since the birth of the modern day human rights regime. When the community of Allied Nations contemplated the development of the League of Nations, President Woodrow Wilson proclaimed that the United States "puts human rights above all other rights" and would fight to "make the world safe for democracy."[48] However, the United States ultimately refused to join the League of Nations and retreated into isolation.[49] Henry Cabot Lodge, one of the leading isolationist voices, explained, "We do not want a narrow alley of escape from the jurisdiction of the League. We want to prevent any jurisdiction whatsoever."[50] The United States also opposed the proposal to create a tribunal that would hold foreign officials responsible for violations of "the law and customs of war and the laws of humanity," a would-be precursor of the International Criminal Court.[51] Secretary of State Robert Lansing bluntly stated his rationale for the rejection of

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Rights, International Criminal Justice, and National Self-Righteousness, 50 EMORY L.J. 775, 776 (2001) ("For a foreign observer, the policies and practices of the United States in the arena of international relations are quite confusing. Its foreign policy fluctuates between the seemingly contradictory forces of engagement and isolationism.").

45. Goldsmith, *supra* note 42, at 366-68.

46. *Id.* at 367. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 344 (1995) ("By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing.") *But see* Jordan Paust, *Human Rights Through the ATS After Kiobel: Partial Extraterritoriality, Misconceptions, and Elusive and Problematic Judicially-Created Criteria*, 6 DUKE FORUM FOR LAW & SOCIAL CHANGE __ at note 151 (2014) (regarding the reach of Article 50 of the ICCPR).

47. Henkin, *supra* note 46, at 366 ("The problem is that the United States does not embrace the international human rights standards that it urges on others. The United States systematically declines to apply international human rights law to its domestic officials. All three branches of the federal government perpetuate this double standard"); Rubenfeld, *supra* note 3, at 1973 ("Since 1945, however, America has spoken out of both sides of its mouth on international law, championing internationalism in one breath, rejecting it in the next.").

48. SOOHOO, *supra* note 20, at 19.

49. *Id.* at 21.

50. *Id.* at 22.

51. *Id.* at 20.

the proposal: "The essence of sovereignty is the absence of responsibility."[52]

After World War II, the United States was a driving force in promoting the reemergence of human rights as a guidepost for future relations amongst nations.[53] Legal scholar Jed Rubenfeld characterized the United States' embrace of international law after World War II as "part of an ambition to Americanize as much of the world as it could, which meant both the export of American institutions, including constitutional law, and the strengthening of American global influence."[54] Indeed, President Franklin Roosevelt intrinsically linked American ideals of freedom and democracy to human rights in his Four Freedoms speech, proclaiming that "freedom means the supremacy of human rights everywhere."[55] Eleanor Roosevelt also played a central role in the development of modern human rights doctrine. As the chair of the United Nations Commission on Human Rights, she helped to draft the Universal Declaration of Human Rights (UDHR) and is credited with negotiating its unanimous adoption.[56] Still, even in the early days of human rights law, the United States led efforts to restrain its force as evinced by Eleanor Roosevelt's speech before the General Assembly emphasizing the non-binding nature of the UDHR just prior to its adoption:

> In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation.[57]

After all, the Truman administration had conditioned its support of the UDHR on its non-binding nature out of fear that African-Americans would evoke human rights to challenge the Jim Crow laws in the South.[58]

After the adoption of the UDHR, U.S. support for human rights law waned. In the early years of the Cold War, leaders in the executive branch saw little use for human rights and instead waged a covert anti-communist propaganda war against the Soviet Union.[59] The Eisenhower administration worried that supporting the enforcement of human rights law might lead to other countries, particularly the Soviet Union, "prying around in human rights conditions in the United States."[60] Despite these concerns, his administration still supported the drafting of both International Covenants on human rights. Under the Nixon

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52. *Id.* Secretary Lansing issued a formal dissent to the proposed development of an international criminal tribunal and indicated that he did not intend to allow human rights law to impinge on the sovereign rights of the United States.

53. SOOHOO, *supra* note 20.

54. Rubenfeld, *supra* note 3.

55. Franklin Roosevelt, President of the United States, Address of January 6, 1941, *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 672 (vol. 9) (Samuel Rosenman ed.).

56. John Carey, *The U.N. Human Rights Council: What Would Eleanor Roosevelt Say?*, 15 ILSA J. INT'L & COMP. L. 459, 459-60 (2009).

57. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 61 (1950).

58. PECK, *supra* note 5, at 17.

59. *Id.* at 18-26.

60. Dulles, *United States Policy Regarding Draft International Covenants on Human Rights: The 1953 Change*, (Feb. 19 1953) *in* 3 Foreign Relations of the United States 1555, (1952-1954) *available at* http://images.library.wisc.edu/FRUS/EFacs/1952-54v03/reference/frus.frus195254v03.i0014.pdf.

administration, the human rights agenda lost further ground as "realpolitik," the sense that the United States should pursue its national interest devoid of any moral or ideological concerns, dominated U.S. foreign policy.[61] In his confirmation hearing for Secretary of State before the Senate in 1973, Henry Kissinger explained the Nixon administration's hesitation to pursue human rights objectives abroad, stating that "the protection of human rights is a very sensitive aspect of domestic jurisdiction of . . . governments . . . If the infringement of human rights is not so offensive that we cannot live with it, we will seek to work out what we can with the country in order to increase our influence."[62] In practice, this approach meant that during this period the United States rarely condemned human rights violations and frequently provided U.S. aid to countries with terrible human rights records.[63] Congress became increasingly frustrated by the executive branch's support of human rights abusers and ultimately adopted measures that would restrict or deny foreign aid on the basis of a country's human rights record, which President Nixon subsequently ignored.[64]

During the later years of the Cold War, the executive branch re-embraced human rights as a counter-narrative to communism and accusations of American imperialism as well as a way to improve the United States' image after the scandal of the Vietnam War.[65] As Anthony Lake, the State Department's director of policy planning in the Carter administration, put it, "this human rights business" became the "centerpiece of [the U.S.] effort to restore American's post-Vietnam, post-Watergate image."[66] Indeed, President Carter announced that "[h]uman rights [was] the soul of American foreign policy" on the thirtieth anniversary of the signing of the UDHR.[67]

Similar to the Nixon administration, the Reagan administration first viewed human rights as an impediment to pursuing the United States' national interest, but then later narrowly redefined human rights as supporting the American values of liberty, democracy, and capitalism in order to accomplish his political agenda of fighting communism.[68] George H.W. Bush took a pragmatist approach to human rights protection. He supported human rights, but only when the political costs were low.[69]

Bill Clinton embraced human rights in a fashion similar to Carter. Before Bill Clinton took office, he announced that "U.S. foreign policy cannot be divorced from the moral principles most Americans share. We cannot disregard how other governments treat their own people."[70] Under his administration, the

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61. CLAIR APODACA, UNDERSTANDING U.S. HUMAN RIGHTS POLICY: A PARADOXICAL LEGACY 30-31 (2006).

62. *Id*. at 30.

63. *Id*. at 31-33.

64. *Id*. 33-44; *see also* Foreign Assistance Act § 32, Pub. L. No. 87-195.

65. PECK, *supra* note 5, at 45-46, 85-129.

66. IGNATIEFF, *supra* note 3.

67. Jimmy Carter, Universal Declaration of Human Rights Remarks at a White House Meeting Commemorating the 30th Anniversary of the Declaration's Signing (Dec. 6, 1978).

68. Apodaca, *supra* note 61, at 82.

69. *Id*.

70. *Id*. at 137.

United States, as part of the Security Council, voted in favor of creating the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[71] The U.S. government under the Clinton administration was instrumental in the negotiation of the Rome Statute, which created the International Criminal Court (ICC).[72] However, President Clinton declined to sign the Landmines Convention[73] and failed to intervene during the genocides in Rwanda,[74] one of the most gruesome instances of human rights violations of our time.[75]

B. The U.S. Nationalistic Responsibility to Protect

The move away from sovereign rights and toward the responsibility to protect in the early 2000s ushered in a new era of military intervention justified by the protection of human rights, during which the United States' pursuit of national interest goals through human rights protection became more overt and unilateral. Whereas before U.S. officials only considered the use of human rights as a tool to accomplish national interest behind closed doors, during the last two decades, the nationalistic protection of human rights has become explicit as dramatically illustrated by the rhetoric surrounding U.S. military interventions abroad.

Markedly, President George W. Bush, who was inaugurated into office the same year as the ICISS report on the responsibility to protect was published, evoked human rights as part of its justification for intervening in Iraq, an oil rich country of significant geopolitical interest to the United States.[76] In making the case for war in Iraq, President Bush characterized Saddam Hussein as a "dangerous man" who violated human rights and "used weapons of mass destruction against Iraq's neighbors and against Iraq's people."[77] Paradoxically,

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71. Jelena Pejic, *The United States and the International Criminal Court: One Loophole Too Many*, 78 U. DET. MERCY L. REV. 267, 270 (2001)

72. *See generally*, *id*.; *See also* Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 57 (2002) ("The United States was extensively involved in the drafting of the Rome Statute, and also in the preparation for and negotiations at the Rome Conference.").

73. Rubenfeld, *supra* note 3, at 1980.

74. *See generally*, PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES (1998); SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002).

75. "While Rwanda may be the best-known humanitarian tragedy of the second half of the twentieth century, Darfur may garner that dubious distinction for the first half of the twenty-first." Ralph Mamiya, *Taking Judicial Notice of Genocide? The Problematic Law and Policy of the Karemera Decision*, 25 WIS. INT'L L.J. 1, 18 (2007).

76. President George W. Bush, Speech to the World Affairs Council of Philadelphia: The Struggle for Democracy in Iraq (Dec. 12, 2005). *See also* Brian Knowlton, *Whatever the Weapons Result, He Says, Saddam was a Threat: Bush Defends Iraq Intelligence*, N.Y. TIMES, Jan. 28, 2004, *available at* http://www.nytimes.com/2004/01/28/news/28iht-prexy_ed3__1.html.

77. Bush, *supra* note 76. George Bush's Iraq war speech from the Cross Hall in the White House, Mar. 17, 2003, *available at* http://www.theguardian.com/world/2003/mar/18/usa.iraq.

See also Knowlton, *supra* note 76. Interestingly, this claim was based in part on reports that Saddam Hussein had used white phosphorus against the Kurds in 1991, the very same chemical agent that the United States used in the Battle of Fallujah in 2004. U.S. DEP. OF DEFENSE, POSSIBLE USE OF PHOSPHOROUS CHEMICAL WEAPONS BY IRAQ IN KURDISH AREAS ALONG THE IRAQI-TURKISH-IRANIAN

even though the United States formally recognized the killing that occurred in Darfur in the early 2000s as genocide, it failed to intervene to protect the residents of Darfur.[78]

Similar to the justification for war in Iraq, U.S. officials cited a confluence of human rights and national interest concerns in support for military intervention in Libya. As legal scholar Saira Mohamed articulated in her article *Taking Stock of the Responsibility to Protect*, though intervention in Libya was championed as a triumph for the responsibility to protect, it actually represents the endorsement of "a responsibility triggered only when state interests align with that duty."[79] As articulated plainly by President Obama in his first speech after the no fly zone was instituted, the United States is "naturally reluctant to use force to solve the world's many challenges. But when our interests and values are at stake, we have a responsibility to act."[80] He identified those interests as preventing the destabilization of the region, avoiding the flow of refugees from Libya to neighboring countries, deterring other repressive leaders from committing mass atrocities, and affirming the credibility of the U.N. Security Council.[81]

Leading up to the decision to launch military strikes against the Assad regime in Syria, President Obama also tied his decision to intervene to underlying national interests, stating that "if the Assad regime used chemical weapons on his own people, tha[n] that would change some of our calculations. And the reason has to do with not only international norms but also America's core self-interest."[82] Secretary of State John Kerry similarly evoked this nationalistic approach to human rights protection. On August 30, 2013, when he laid out that evidence that Assad used chemical weapons, he stated, "our concern with the cause of the defenseless people of Syria is about choices that will directly affect our role in the world and our interests in the world."[83]

BORDERS, *available at* http://www.gulflink.osd.mil/declassdocs/dia/19950901/950901_22431050_91r.html; *see also* Peter Popham, *U.S. intelligence classified white phosphorus as chemical weapon*, INDEPENDENT, Nov. 23 2005, *available at* http://www.independent.co.uk/news/world/americas/us-intelligence-classified-white-phosphorus-as-chemical-weapon-516523.html. *US Used White Phosphorous in Iraq*, BBC NEWS, Nov. 16, 2005, *available at* http://news.bbc.co.uk/2/hi/middle_east/4440664.stm; *see also* Captain James T. Cobb, First Lieutenant Christopher A. LaCour & Sergeant First Class William H. Hight, *The Fight for Fallujah*, FIELD ARTILLERY MAG. 26, *available at* http://www.globalsecurity.org/military/library/report/2005/2-2AARlow.pdf.

78. Although the United Nations report did not conclude that atrocities in Darfur were genocide, U.S. officials said that genocide had occurred there. *See* Glenn Kessler, *U.S. Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html.

79. Mohamed, *supra* note 33, at 333. ("The clear emphasis of the justification was on the United States— the capacity of the United States to intervene and the national interest of the United States in doing so.")

80. President Barack Obama, Remarks by the President in Address to Nation on Libya (Mar. 28, 2011), *available at* http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript.

81. *Id*.

82. President Barrack Obama Interview with Judy Woodruff and Gwen Ifill, PBS News Hour, August 28, 2013, *available at* http://www.pbs.org/newshour/bb/white_house/july-dec13/obama_08-28.html.

83. Secretary of State John Kerry, Remarks on Syria (August 30, 2013), *available at* http://www.washingtonpost.com/world/national-security/running-transcript-secretary-of-state-john-kerrys-remarks-on-syria-on-aug-30/2013/08/30/f3a63a1a-1193-11e3-85b6-

IV. THE NATIONALISTIC PROTECTION OF HUMAN RIGHTS IN THE JUDICIARY

Recently, the judiciary has intimated that it will follow the Executive Branch's lead and condition its protection of human rights on the presence of a national interest. In 2013, the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* issued an opinion restricting the ability of U.S. courts to adjudicate human rights claims arising from conduct that occurred abroad to instances where that conduct "touches and concerns" the United States.[84] The four justice concurring opinion in *Kiobel* further outlined specific criteria that would allow U.S. courts to adjudicate human rights claims that arose abroad, explicitly including the existence of a U.S. national interest as one ground for doing so.

A. Summary of the Holding in Kiobel

In *Kiobel*, the Petitioners, a group of Nigerians who now reside in the United States, brought suit against Dutch, British, and Nigerian oil companies.[85] They alleged that the companies had aided and abetted the Nigerian military in committing, *inter alia*, extrajudicial killings, torture, and arbitrary arrests in retaliation for their community's protest against oil exploration.[86] The suit was brought under the ATS, a statute that was enacted by the First Congress as part of the Judiciary Act of 1789 and grants federal jurisdiction over "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."[87]

The ATS was rarely used until 1979 when the Center for Constitutional Rights evoked it on behalf of the Filártiga family in a lawsuit against former Paraguayan official Americo Peña-Irala, who was responsible for the torture and murder of seventeen-year-old Joelito Filártiga.[88] The Second Circuit held that torture was a "clear and unambiguous" violation of the law of nations and that "international law confers fundamental rights upon all people vis-à-vis their own governments."[89] Since the Second Circuit's landmark decision in *Filártiga*, courts across the country adjudicated claims from the victims of human rights violations world-wide.[90]

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84. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

85. *Id*. at 1659.

86. *Id*. at 1662-63.

87. 28 U.S.C. § 1350. Ch. 20, §§ 12, 1 Stat. 73, 79 (1789); *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2nd Cir. 1980); *Kiobel*, 133 S.Ct. at 1663 ("Passed as part of the Judiciary Act of 1789, the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years.")

88. Complaint, *Filartiga*, 630 F.2d 876, *available at* http://ccrjustice.org/files/April%201979%20Filartiga%20v.%20Pena-Irala%20Complaint.pdf. *See* Paust, *supra* note 48, at Part III A (regarding four cases that addressed ATS claims in the 1790s).

89. *Filartiga*, 630 F.2d at 884-85.

90. *See, e.g.*, Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283 (11th Cir. 2009) (Guatemala); Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (China); Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009) (Somalia); Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011) (Iraq); El-Shifa Pharmaceutical Industries Co. v. U.S., 607 F.3d 836 (D.C. Cir. 2010) (Sudan); Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005) (Nigeria); Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) (Israel); Abecassis v. Wyatt, 704 F. Supp. 2d 623 (S.D. Tex. 2010) (Israel); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (D. Md. 2010) (Iraq); Ali Shafi v. Palestinian Authority, 642 F.3d 1088 (D.C. Cir. 2011) (West Bank); Belhas v. Ya'Alon, 515 F.3d 1279 (D.C. Cir. 2008) (Lebanon); Chavez v. Carranza, 413 F. Supp. 2d 891 (W.D.

Kiobel unhinged much of the precedent created in the wake of *Filártiga*. In line with other recent cases such as *Morrison v. National Australia Bank* and *Goodyear Dunlop Tires Operations, S.A. v. Brown* in which the Court has reined in the exterritorial application of U.S. laws, the Court in *Kiobel* declined to extend the ATS's reach outside of its own borders under the facts of the case.[91] It unanimously held that the petitioners had no cause of action under the ATS for violations of the law of nations where the alleged actions occurred within a sovereign other than the United States, lacked impact on U.S. interests, and involved a foreign defendant.[92] A majority of the Court applied the presumption against extraterritoriality, which is a canon of statutory interpretation that provides that when a statute does not include a clear indication that it was meant to apply overseas, it does not.[93] The five justice majority opinion authored by Chief Justice Roberts emphasized that the ruling reflected the "presumption that United States law governs domestically but does not rule the world."[94]

While this language indicates a hesitance to act as the world police, the Court's stated rationale for applying the presumption against extraterritoriality to this particular statute and its articulation of when the presumption may be overcome signals a willingness to do so when it is in this country's national interest and has low political costs. Specifically, the majority opinion, reiterating its opinion in *Sosa*, cautioned that "the potential foreign policy implications of recognizing causes under the ATS should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[95] Moreover, the five justices in the majority explained that the goal of applying the presumption against extraterritoriality in this case was to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[96] In essence, although *Kiobel* involved a foreign corporation,

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Tenn. 2005) (El Salvador); Chowdhury v. WorldTel Bangladesh Holding, Ltd., 588 F. Supp. 2d 375 (E.D.N.Y. 2008) (Bangladesh); Estate of Abtan v. Blackwater Lodge and Training Center, 611 F. Supp. 2d 1 (D.D.C. 2009) (Iraq); Estate of Manook v. Research Triangle Institute, Intern., 759 F. Supp. 2d 674 (E.D.N.C. 2010) (Iraq); Genocide Victims of Krajina v. L-3 Services, Inc., 804 F. Supp. 2d 814 (N.D. Ill. 2011) (Croatia); In re Chiquita Brands Intern., Inc., 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (Colombia); Lizarbe v. Rondon, 642 F. Supp. 2d 473 (D. Md. 2009) (Peru); M.C. v. Bianchi, 782 F. Supp. 2d 127 (E.D. Pa. 2011) (Moldova).; Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007) (Dominican Republic); Doe v. Nestle, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (Ivory Coast); El-Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007) (Macedonia and Afghanistan); Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, 807 F. Supp. 2d 689 (N.D. Ill. 2011) (Hungary); Jean v. Dorelien, 431 F.3d 776 (11 Cir. 2005) (Haiti); Tachiona v. U.S., 386 F.3d 205 (2d Cir. 2004) (Zimbabwe); Vietnam Ass'n for Victims of Agent Organ v. Dow Chemical Co., 517 F.3d 104 (2d Cir. 2008) (Vietnam).

91. Parrish, *supra* note 5, at 117-18 ("*Kiobel* is by no means unique. In a number of other contexts, U.S. courts have begun to display a nervousness about being a battleground for foreign disputes."). Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); Morrison v. National Australia Bank Ltd., 561 U.S. 127, 130 (2010).

92. *Kiobel*, 133 S. Ct. at 1669. ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.")

93. *Id*. at 1664. (citing Morrison v. National Australia Bank Ltd., 561 U.S. 127, 130 (2010)).

94. *Id*. (quoting Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454 (2007)).

95. *Id*. at 1665 (quoting *Sosa*, 542 U.S. at 727).

96. *Id*. at 1664.

not a foreign government or official, the judiciary characterized the adjudication of human rights claims under the ATS as a threat to US diplomacy and foreign relations.

Still, the majority of the Court left some wiggle room when it concluded that ATS claims could overcome the presumption against extraterritoriality if they "touch and concern the territory of the United States. . . with sufficient force."[97] The meaning and application of "touch and concern" is not entirely certain. As Justice Kennedy writes in his concurrence, "the Court [was] careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]."[98] Justice Alito characterized the majority's test as "leav[ing] much unanswered."[99] Justice Breyer's four-justice concurrence similarly lamented that the majority's standard "leaves for another day the determination of just when the presumption against extraterritoriality may be overcome."[100] Still, given that the Court applied the presumption against extraterritoriality in an effort to avoid unforeseen foreign policy consequences that the protection of human rights might occasion, claims where a national interest is present are likely to be among those that "touch and concern the territory of the United States. . . with sufficient force" to displace the presumption against extraterritoriality.

While a careful analysis of the majority opinion suggests that the presence of an unequivocal U.S. interest could be grounds for providing jurisdiction under the ATS to hear claims regarding human rights violations abroad, the four-justice concurrence by Justice Breyer states it outright. These four Justices expressly "interpret[ed] the statute as providing jurisdiction only where distinct American interests are at issue."[101] Justice Breyer specifically identified three factors that would support an application of the ATS extraterritorially:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) *the defendant's conduct substantially and adversely affects an important American national interest*, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[102]

In light of the ambiguity of the majority's "touch and concern" standard, U.S. courts interpreting *Kiobel* are likely to look to the four justice concurring opinion for further direction. At least one court, the D.C. District Court, has done so already. In *Mwani v. Laden*, the D.C. District Court, guided by the language in the four justice concurrence, concluded that the claim overcame the presumption against extraterritoriality because "[i]t [wa]s obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here."[103]

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97. *Id.* at 1669.
98. *Id.* (Kennedy, J., concurring).
99. *Id.* at 1669 (Alito, J., concurring).
100. *Id.* at 1673(Breyer J., concurring).
101. *Id.* at 1674 (Breyer, J., concurring).
102. *Id.* at 1671 (Breyer J., concurring) (emphasis added).
103. Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013).

B. Executive Intervention in ATS cases

The briefs submitted on behalf of the Executive branch in ATS cases over the last 34 years document a conversation between the executive and judicial branches of the United States government. While each individual administration's briefs reflect their broader human rights policy, a survey of these briefs also reveal a gradual, though inconsistent, shift toward understanding the ATS as impinging on foreign affairs. While courts in the United States initially rejected the requirement of a U.S. nexus for the protection of human rights advocated by Presidents Ronald Reagan, George H.W. Bush, and George W. Bush, the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* finally legitimized this approach to ATS litigation in 2013.

When the ATS first came to be used as a tool for the protection of human rights in *Filartiga*, the Carter administration filed submissions in support of plaintiffs seeking civil remedies for violations of fundamental human rights abroad.[104] In response to a request from the Second Circuit, the Department of State (DOS) under the Carter administration submitted a memorandum as amicus curiae arguing that the district court's dismissal of the case should be reversed because torture constituted a fundamental and universally accepted human right.[105] The DOS reasoned that if there is consensus in the international community that an individual right is guaranteed and a widely shared understanding of the scope of that right, then "there is little danger that judicial enforcement will impair our foreign policy efforts"[106] and "to the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[107] The DOS was careful to note that "it is likely that only a few rights have the degree of specificity and universality to permit private enforcement and that the protection of other asserted rights must be left to the political branches of government,"[108] a stance echoed by the Supreme Court in *Sosa* nearly 25 years later.[109] The DOS also emphasized that these were rights to which "all individuals are entitled, regardless of nationality."[110] The stance expressed in the memorandum as amicus curiae reflects the Carter administration's embrace of human rights in the post-Vietnam, post-Watergate era.

In direct contrast to approach of the Carter administration, the Reagan administration filed an amicus brief in *Trajano v. Marcos* urging the Ninth Circuit to affirm the dismissal by the federal district court of an ATS case against

104. Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773 (2008).

105. Memorandum for the United States as Amicus Curiae at 15-17, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

106. *Id.* at 22.

107. *Id.* at 22-23.

108. *Id.* at 6.

109. Sosa, 542 U.S. at 729 (2004) ("[O]ther considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.").

110. Memorandum for the United States as Amicus Curiae at 10, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

Ferdinand Marcos, the former dictator of the Philippines who was residing in the United States.[111] The brief argued that U.S. courts should only have jurisdiction when the concerned violations of the law of nations contravene rights and obligations that form part of the law of the United States and have some nexus to the United States, its citizens or its territory.[112] At the same time, it stated that relations between the Philippines and the United States would not be harmed if the suit went forward.[113] The Ninth Circuit in part relying on this statement from the executive branch reversed the district court's dismissal, but did not adopt (or even address) the standard for jurisdiction proposed by the Reagan administration.[114] This amicus brief can also be seen as an expression of the Reagan administration's policy toward human rights in that Reagan supported Marcos because he was an important ally of the United States in fighting communism during the Cold War.[115] In fact, when a coup was staged against Marcos, President Reagan offered him exile in the United States.[116]

In line with his pragmatist approach to human rights protection, the administration of George H.W. Bush Sr. did not file any submissions in ATS cases during its tenure.[117] During hearings on the Torture Victim Protection Act (TVPA), a statute which created a cause of action for torture and extrajudicial executions, officials from the administration of George H.W. Bush opposed the *Filártiga* line of cases and argued that a TVPA that provides exterritorial jurisdiction when there is no nexus to the United States would risk provoking retaliatory lawsuits against U.S. officials and create tensions with other countries that could hamper the executive branch's relations with foreign nations.[118] Still, when President George H.W. Bush signed the TVPA, he expressly supported an extraterritorial dimension to human rights litigation in domestic courts, stating that "[i]n this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere."[119]

When President Bill Clinton took office, the executive branch once again supported human rights litigation in U.S. courts. In Kadic v. Karadzic, the DOS and DOJ filed a joint Statement of Interest stating that the case did not raise any political questions and encouraging the Second Circuit to reverse the district court's dismissal of a case against the President of Republika Srpska, the leader

111. Brief for the United States as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (table disposition) (Nos. 86-2448, 86-15039).

112. *Id.* at 4-6, 9-13.

113. *Id.* at 32.

114. Marcos, 878 F.2d 1439 at 2.

115. Janet L. Sawin, *A Study of Peaceful Revolution: The Philippines, 1986*, FLETCHER F. WORLD AFF. 181, 185 (Winter 1993).

116. Erin M. Callan, *In Re Mr. and Mrs. Doe: Witnesses Before the Grand Jury and the Head of State Immunity Doctrine*, 22 N.Y.U. J. INT'L L. & POL. 117, 119 (1989)

117. Stephens, *supra* note 104, at 791.

118. *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Judiciary Comm.*, 101st Cong. 11-16 (1990) (statement of John O. McGinnis, Deputy Assistant Attorney General, Dep't of Justice) & 22-29 (1990) (statement of David P. Stewart, Assistant Legal Advisor, Dep't of State).

119. Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465, 466 (Mar. 12, 1992).

of a self-proclaimed Bosnian–Serb republic within Bosnia–Herzegovina, for brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution.[120] In Doe v. Unocal, in response to a request from the district court, the Clinton administration stated that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma."[121]

At the same time that President George W. Bush was pursuing military intervention abroad in the name of human rights, he was also ushering in a new era of hostile intervention by the executive branch in ATS cases, particularly in cases involving corporate defendants.[122] In these cases the Bush administration consistently argued that the ATS threatened important foreign policy interests.[123] In total, the Bush administration made submissions in ten ATS cases involving corporate defendants; however, in a dramatic departure from prior cases, the U.S. courts only deferred to the administration's foreign policy concerns in two cases, one of which involved a U.S. contractor.[124]

One illustration of this phenomenon was *Sosa v. Alvarez-Machain*. In that case, a Mexican national Humberto Alvarez-Machain, who was abducted from his house in Mexico by Jose Francisco Sosa and other Mexican nationals with the authorization of the U.S. Drug Enforcement Administration (DEA) so that he could stand trial in the United States for the torture and murder of a DEA agent, sued under the Federal Tort Claims Act (FTCA) and the ATS after his acquittal. When *Sosa* was pending before the Supreme Court, the Bush administration urged the Court "to correct the fundamentally mistaken understanding of" the *Filártiga* line of cases.[125] Bush era attorneys argued that the ATS was a strictly jurisdictional statute and did not create a private right of action in U.S. courts,

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120. Statement of Interest of the United States at 1-2, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

121. Statement of Interest of the United States, Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112), *reprinted as* Exhibit A, Nat'l Coal. Gov't, 176 F.R.D. at 361-62.

122. Stephens, *supra* note104, at 792.

123. *Id.*; *see, e.g.*, Brief for the United States as Amicus Curiae at 4, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628).

124. *Id.* at 773-74. ("Although the courts have emphasized that executive branch views are not binding, they rarely rejected them prior to the presidency of George W. Bush. This historically deferential approach took a dramatic turn during the Bush administration, when the executive branch informed the courts that a series of human rights cases against corporate defendants threatened U.S. foreign policy interests."). In *Corrie v. Caterpillar, Inc.*, the next of kin of Rachel Corrie, an American human rights defender who was killed by a bulldozer that the Israeli government used to demolish housing in Palestine, sued the American corporation that sold bulldozers to Israel. The Department of State and Department of Justice under the Bush administration intervened as amicus curiae supporting the district court's dismissal of the case. In contradiction to its stance in *Filartiga*, the United States argued that "[n]othing in the ATS or in its contemporary history suggests that Congress intended it to apply to conduct in foreign lands." Since the United States government had provided Israel with the funding it used to buy the bulldozers, it agreed with the district court, which concluded that a judgment against Caterpillar would impinge its discretion to sell military equipment to Israel and "other allied countries." Brief of the United States as Amicus Curiae, Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) (No. 05-36210).

125. Brief for the United States as Respondent Supporting Petitioner at 8, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339).

that existing ATS litigation raised separation of powers concerns since it could potentially interfere with the foreign policy matters exclusively entrusted to the political branches, and finally that the presumption against extraterritoriality precluded the adjudication of claims of human rights abuses that occurred abroad.[126]

The Court agreed with the executive branch that the ATS was only jurisdictional and did not provide a private right of action, but concluded that "at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law" and that Alvarez's claims were outside of this narrow set of claims.[127] The Court did not, however, entertain the arguments raised by executive branch regarding separation of powers concerns or the presumption against extraterritoriality in *Sosa*.[128] In direct opposition to the Bush administration's insistence that it correct the mistake of *Filártiga*, the Supreme Court expressly endorsed the "birth of the modern line of cases" after *Filártiga*.[129]

In *Kiobel*, the majority of the Court made an about-face when it issued an opinion that applied the presumption against extraterritoriality and thereby affirmed the approach to adjudication of human rights claims under the ATS advocated by the Bush administration in *Sosa*.[130] The Obama administration, acting as amicus curiae, discouraged the Supreme Court from creating a categorical rule for the exercise of jurisdiction under the ATS for human rights violations occurring in a foreign country, but stated that "allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filártiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights."[131]

V. WHY NATIONALISTIC PROTECTION OF HUMAN RIGHTS IS PROBLEMATIC

The Supreme Court's adoption of a nexus requirement, particularly one guided by the presence of a U.S. national interest, is problematic on multiple levels. First, the requirement is contrary to the very nature of human rights, which are universal and obligatory as the Supreme Court recognized in *Sosa*. This conception of human rights protection makes the United States fall short of its obligations under international human rights law. Second, by adopting a standard of selective jurisdiction based on national interest as opposed to universal jurisdiction, the United States legitimizes critics that it has co-opted human rights to accomplish broader foreign policy goals. Finally, if *Kiobel* is read as requiring an inspection by the judiciary into what human rights claims are in the United States' national interest, it is inconsistent with the political question

126. *Id*. at 6-9.

127. *Sosa*, 542 U.S. at 712.

128. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1669 (2013) ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").

129. *See Sosa*, 542 U.S. at 724-25, 731-32 ("The position we take today has been assumed by federal courts for 24 years, ever since the Second Circuit decided citing *Filartiga*….").

130. *Kiobel*, 133 S.Ct. at 1659.

131. Supplemental Brief for the United States as Amicus Curiae at 4-5, *Kiobel*, 133 S.Ct. at 1659 (No. 10-1491).

doctrine, which precludes the judiciary from making determinations about how claims may or may not align with U.S. national interest.

The Nationalistic Protection Undermines the Universality of Human Rights

The United States has adopted several human rights instruments, including the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), that all highlight the universal nature of human rights.[132] Specifically, the UDHR, the CAT, and the ICCPR all describe how human rights derive from the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[133] In sum, these documents describe human rights as innate to our very nature as human beings.

Previously, the United States considered the ATS to be one of the avenues that it used to satisfy its obligations under international human rights law. For instance, in its most recent report to the Human Rights Committee, a treaty body that monitors state parties' compliance with the ICCPR, the United States touted its adjudication of human rights cases via the ATS as one of the ways in which it fulfilled its human rights commitments, in particular its duty to protect individuals' right to be free from torture and other forms of cruel and unusual treatment or punishment.[134]

However, the jurisdictional test for ATS claims adopted by the Supreme Court in *Kiobel* may inhibit the United States from fully meeting its obligations to protect human rights as defined by international law. The nexus test in *Kiobel*, especially if interpreted as creating a national interest threshold for human rights protection, undermines the basic tenets of human rights doctrine by implicitly favoring the protection of certain people's rights over others. Moreover, conditioning human rights on national interest makes them dependent on what region of the world a person lives, a person's politics, or whether the interests of

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132. When this article refers to the universality of human rights, it is referring to the principle that all human beings by their very nature are born with certain rights. Please note, however, that there is a separate ongoing debate about whether human rights standards can be qualified by cultural differences. Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 3 (1997)

133. Universal Declaration of Human Rights, preamble. The International Covenant on Civil and Political Rights, preamble.

134. FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶ 185 (Dec. 30, 2011) ("In certain circumstances victims may also pursue civil remedies against foreign officials in U.S. courts. For instance, the Alien Tort Statute (ATS), codified at 28 U.S.C 1350, provides that U.S. federal district courts 'shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.' Since the decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the statute has been relied on by alien plaintiffs and interpreted by federal courts in various cases raising claims under customary international law, including torture. In 2004, the Supreme Court held that the ATS is 'in terms only jurisdictional' but that, in enacting the ATS in 1789, Congress intended to 'enable [] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.' In an amicus curiae brief filed in the Second Circuit in Filartiga, the United States described the ATS as one avenue through which 'an individual's fundamental human rights [can be] in certain situations directly enforceable in domestic courts.' In that case, the United States recognized that acts of torture can be actionable under the ATS.") (internal citations omitted).

their government align with those of the United States. In a word, it politicizes human rights protection, which by its very essence should not be subject to politics, and thereby legitimizes critiques that the United States uses human rights as a political tool without a deeper commitment to its underlying principles.

A judicially-imposed nationalistic threshold for the adjudication of human rights claims is also contrary to the Supreme Court's own articulation of the purpose of the ATS. In *Sosa v. Alvarez-Machain*, the Court held that the ATS was meant to enforce international norms that are "specific, universal, and obligatory."[135] To allow courts to pick and choose amongst claims of human rights abuses that they feel sufficiently "touch and concern" the United States, in particular if that determination is based on national interest, undermines that fundamental principle articulated in *Sosa*. Furthermore, nationalistic protection of human rights in the context of the ATS conflicts with the original intent of the very Act that created it. The Supreme Court has identified the ATS as one of several provisions in the Judiciary Act that reflect "a concern for uniformity in this country's dealings with foreign nations."[136] The nebulous standard adopted in *Kiobel* might occasion the disparate treatment of cases according to a country's connection with the United States, thus conflicting with the original purpose of the Act itself.

A. The Unraveling of American Universal Jurisdiction

Both the majority opinion and the four justice concurrence in *Kiobel* rejected the understanding of various U.S. courts and legal scholars prior to *Kiobel* that the ATS provided universal jurisdiction for conduct in violation of universally recognized human rights.[137] Typically, when a court exercises jurisdiction over a matter, the claim must have some connection to the territory, national interest, or a citizen of the State where the court sits, but universal jurisdiction is different.[138]

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135. "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *Sosa,* 542 U.S. at 732 (quoting In re Estate of Marcos Human Rights Litigation*,* 25 F.3d 1467, 1475 (9th Cir. 1994)).

136. *Id*. at 427 n. 25.

137. Restatement (Third) of Foreign Relations Law § 404 (1987). *See also, e.g.,* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995) (citing the provision that defines universal jurisdiction in the Third Restatement on Foreign Relations Law of the United States as support for jurisdiction in that case); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); and Xuncax v. Gramajo, 886 F. Supp. 162, 183 n.25, 185 (D. Mass. 1995). Julian Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AMER. J. INTL. L. 835, 837 (2014) (Despite its prominence in Sosa and subsequent academic support, both the Roberts majority and the Breyer concurring opinion rejected a universal jurisdiction reading of the ATS.") Jordan J. Paust, *Kiobel, Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 VA. J. INT'L L. DIG. 18, 20 (2012) ("As international law is the substantive law that is expressly incorporated, universal jurisdiction exists for ATS lawsuits and has provided the primary basis for the extraterritorial reach of the ATS in cases since the 1790s.") *But see*, Curtis Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 343 ("As an initial matter, it is not clear that the international law theory of universal jurisdiction even applies to civil liability. The Restatement (Third) of Foreign Relations Law asserts that it does, but it cites no support for that proposition.")

138. Ku, *supra* note 137, at 835 ("When a state seeks to exercise jurisdiction outside of its territory, international law generally requires a state to show some connection to its territory, nationality, or national security interests. These limitations flow from fundamental international legal principles of

With universal jurisdiction, "there is no link of territoriality or nationality between the State and the conduct of the offender, nor is the State seeking to protect its security or credit." [139] The legal theory behind universal jurisdiction is that some crimes are so "threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity."[140] Thus, a national court exercising universal jurisdiction does not act in its own name *uti singulus* (a special interest), but as an agent of the international community.[141]

The principle of universal jurisdiction was first applied to human rights violations during the trials of Nazi officials after World War II. These tribunals cited piracy as the first instance of the "Universality of Jurisdiction" and claimed that this doctrine should be extended to war crimes as well.[142] Other international and national courts, including U.S. federal courts, and legal scholars have also recognized piracy as the foundation of universal jurisdiction under international law.[143] Piracy is "crucial to the origins of universal jurisdiction,"[144] because it occurs on the high seas, outside of the jurisdiction of any one state, and so jurisdiction is awarded to any State who can apprehend a pirate.[145] "Before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a 'hostis humani generis' [enemy of the human race.]."[146] In the present era, universal jurisdiction has been expanded to include other violations of the law of nations that occur in countries where the State is unable and unwilling to prosecute them.[147] Like

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sovereign equality and noninterference in the domestic affairs of sovereign states.").

139. L. REYDAMS, UNIVERSAL JURISDICTION, INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES, 5 (2003). *See also* Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 619 (2013).

140. Michael Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-State Party States*, 35 NEW ENGLAND L. REV. 2, 363, 369 (2001).

141. Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 3, 596, 601 (2003).

142. 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35, 42 (1947) (Brit. Mil. Ct. Almelo). Cynthia Soohoo, Bringing Human Rights Home: A History of Human Rights in the United States 19 (2008).

143. Palestinian Centre for Human Rights, The Principle and Practice of Universal Jurisdiction (2010). *See also* United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) ("[Universal] jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes."); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 69 (Sept. 7) (Moore, J., dissenting) ("Piracy by law of nations, in its jurisdictional aspects, is sui generis."); Eichmann v. Attorney-General, 36 I.L.R. 277 (Isr. 1962).

144. PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 45 (2001), *available at*

http:// www.princeton.edu/~lapa/unive_jur.pdf.

145. *See* Convention on the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 450 U.N.T.S. 6465; *see also* United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, S. TREATY DOC. NO. 103-39 (1994), 1833 U.N.T.S. 3 ("On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship ... and arrest the persons and seize the property on board ... [and] may decide upon the penalties to be imposed."). *See also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 156 (1820) (noting that "pirates being *hostes humani generis*, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all.").

146. L. OPPENHEIM, INTERNATIONAL LAW, 609 (8th ed., 1955).

147. In the Restatement (Second) of Foreign Relations Law (1965), piracy was listed as the only

piracy, these international crimes would otherwise escape punishment because they occur in locations where the State has abdicated its responsibility to prosecute. Thus, it is the responsibility of the international community to step in and provide a jurisdiction of last resort, as explained by the Spanish Tribunal Supremo in a universal jurisdiction case against Guatemalan generals accused of genocide.[148]

The ATS shares the same historical origins and purpose as other universal jurisdiction provisions. Indeed, U.S. courts have consistently evoked the connection between piracy and human rights violations when finding jurisdiction in ATS cases.[149] For instance, in *Filartiga*, the Second Circuit explained that "for purposes of civil liability, the torturer has become—like the pirate . . . before him—hostis humani generis, an enemy of all mankind."[150] The Supreme Court underscored in *Sosa* that "when Congress passed the ATS, three principal offenses against the law of nations had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy."[151] The majority of the court concluded that other causes of action based upon present-day law of nations may be cognizable under the ATS if the claim both "rest[s] on a norm of international character accepted by the civilized world and [is] defined with a specificity comparable to the features of the [aforementioned] 18th-century paradigms [.]"[152]

Yet, the marriage of jurisdiction in ATS claims with the presence of a national interest by the four justice concurrence in *Kiobel* undermines the understanding of the ATS as a provision that provides universal jurisdiction and instead reflects the protective principle of jurisdiction under international law that provides jurisdiction over criminal offenses when they involve a threat to the sovereignty of the United States.[153] As defined by section 402 of the Third Restatement on Foreign Relations Law of the United States, courts can evoke the

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universally cognizable offense. The Restatement (Third) of Foreign Relations added several other universal crimes, such as war crimes and apartheid. RESTATEMENT (THIRD) OF FOREIGN RELATIONS Law § 404 (1987).

148. Guatemalan Genocide Case, STC 237/2005 (Spain, Tribunal Constitucional, September 26, 2005).

149. *See, e.g.,* Xuncax v. Gramajo, 886 F. Supp. 162, 183 n.25, 185 (D. Mass. 1995) (holding, on the basis of the piracy analogy in *Filartiga*, that torture is a "universal" crime and thus federal courts have "universal jurisdiction" in an ATS action brought by aliens and an American nun against former Guatemalan Minister of Defense alleging brutalities in Guatemala); Sosa, 542 U.S. at 762. (Breyer, J., concurring); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 204-8 (2d Cir. 2009).

150. *Filartiga*, 630 F.2d at 890.

151. Sosa, 542 U.S. at 724; *See also Kiobel*, 133 S.Ct. at 1666.

152. *Id*. at 725.

153. *See e.g.*, United States v. Bowman, 260 U.S. 94, 98 (1922) ("But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents. Some such offenses can only be committed within the territorial jurisdiction diction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.").

protective principle when jurisdiction is prescribed based upon "certain conduct of non-nationals outside a state's territory that is directed against the security of the state or against a limited class of state interests that threaten the integrity of governmental functions (such as counterfeiting)."[154]

Requiring that a human rights offense "touch and concern" the United States in order to receive relief in U.S. courts, particularly if that determination is driven by considerations of U.S. national interest, implies that when the United States exercises jurisdiction in ATS cases it is not acting for the benefit of all nations (in line with the principles of universal jurisdiction), but instead in its own narrow self-interest. This exposes the United States to criticism that it only uses human rights as a pretext to intervene in the internal affairs of others to serve its own political goals. Moreover, as explained above, the ICISS report identified universal jurisdiction as a tool in the responsibility to protect "toolbox" that could be used to deter future atrocities. Thus, interpreting the ATS in a way that precludes universal jurisdiction limits our capacity to meet our obligations under the responsibility to protect doctrine.

B. The Judicial Protection of Human Rights as a Political Question

Some scholars like Jack Goldsmith offer a pragmatist viewpoint, arguing that it is better for there to be selective enforcement of human rights by the United States than none at all.[155] While the wisdom of the political branches intervening to protect human rights only when the interests of the United States are at play is debatable, the political question doctrine precludes the judiciary from making such determinations.[156] The political question doctrine, which is rooted in concerns over the separation of powers, provides that some questions are best suited for the political branches to decide unencumbered by the oversight of the judicial branch.[157] As Justice Frankfurther famously underscored, "Court[s] ought not enter into the political thicket."[158] In *Marbury v. Madison*, Chief Justice John Marshall wrote: "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[159] The Supreme Court in *Baker v. Carr* listed the six factors that may trigger the doctrine:

Prominent on the surface of any case held to involve a political question is

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154. Restatement (Third) of Foreign Relations Law § 402 (1987).

155. *See, e.g.*, Goldsmith, *supra* note 42, at 373 ("A second possible response is that the United States should stop enforcing human rights norms against other countries. Such a course would alleviate any hypocrisy that inheres in the double standard. But it would harm the promotion of international human rights. A United States double standard is in this sense preferable to no enforcement at all.").

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

157. Renowned legal scholar Alexander Bickel put it this way, "it is quite plain that some questions are held to be political pursuant to a decision on principle that there ought to be discretion free of principled rules." ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 186 (1962).

158. Colegrove v. Green, 328 U.S. 549, 556 (1946).

159. Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 170 (1803).

found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[160]

Cases pertaining to foreign affairs often raise political questions.[161] As the Supreme Court has recognized, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative-'the political'-departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[162] While not every case involving a question of foreign affairs is inherently nonjusticiable, those cases "frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature" and "uniquely demand single-voiced statement of the Government's views."[163]

Requiring the judiciary to weigh questions of national interest is squarely within the realm of political questions that the doctrine was meant to preclude. In fact, Justice John Marshall explicitly addressed this question when he was a Congressman. In a speech to the House of Representatives, he explained his view that the judiciary is ill-equipped to make decisions involving, even in part, judgments about how our national interests align, because federal courts lack the necessary information to evaluate foreign relations, the political accountability to the public, and the power to enforce such decisions.[164] Additionally, allowing the judiciary to do so poses very real risks that the U.S. Government could end up speaking with two voices, which would trigger one of the six factors listed in *Baker*: "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[165] Similarly, the "touch and concern" standard is so vague and indefinite that judiciary could easily construe it in ways that impede the discretionary powers of the other two branches. Interestingly, it

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

161. United States v. Palmer, 3 Wheat. 610, 4 L. Ed. 471; Foster v. Neilson, 2 Pet. 253, 307, 309, 7 L. Ed. 415; Garcia v. Lee, 12 Pet. 511, 517, 520, 9 L. Ed. 1176; Williams v. Suffolk Ins. Co., 13 Pet. 415, 420, 10 L. Ed. 226; In re Cooper, 143 U. S. 472, 499, 12 Sup. Ct. 453, 36 L. Ed. 232.

162. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

163. *Baker*, 369 U.S. at 211. *See generally,* Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & POL. 425 (forthcoming 2014) (describing how many lower federal courts have erroneously dismissed cases as non-justiciable due to the political question doctrine); *see also* Louis Henkin, *Is There a Political Question Doctrine*?, 85 YALE L. J. 597 (1976).

164. John Marshall, Speech (March 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL 103 (Charles T. Cullen ed., 1984). According to legal scholars Walter Dellinger and Jefferson Powell, *Marbury v. Madison* reflected his viewpoint in that the Court determined the dispute to be judiciable because it "primarily involved the rights of an individual rather than the duties and interests of the nation." *See also* Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 367, 372-74 (1999).

165. Baker, 369 U.S. at 217.

appears that the Supreme Court's standard in *Kiobel* could undermine the very reason that it applied the presumption against extraterritoriality in the first place: to avoid "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[166]

VI. A CONGRESSIONAL SOLUTION TO *KIOBEL*'S PROBLEMATIC PRECEDENT

To rectify the problems created by *Kiobel*, Congress should pass legislation that both creates universal enforcement of human rights law and is in line with the responsibility to protect. As explained above, the responsibility to protect mandates that States only intervene when the government where the violation occurred is unwilling and unable to protect its citizen. Congress could adopt legislation creating a similar standard for the adjudication of human rights claims under the ATS.

Such a standard would be consistent with other courts that adjudicate human rights claims. The jurisdiction of the International Criminal Court (ICC), for example, is guided by the principle of complementarity, which permits the ICC to exercise jurisdiction only when the countries that would be better positioned to investigate or prosecute do not (or at least not genuinely).[167] As provided by the Rome Statute, the founding treaty of the ICC, the Court can assume jurisdiction in two instances.[168] First, the ICC will render a case admissible when there has been no investigation or prosecution by the State which would normally exercise jurisdiction over the crimes concerned.[169] However, the ICC allows the State to challenge the admissibility of a case on the grounds that it is currently investigating or prosecuting the case.[170] Second, the ICC will exercise jurisdiction when the State is investigating or prosecuting a case (or already has done so), but the ICC determines that the State is unwilling or unable to do so genuinely.[171]

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166. Kiobel, 133 S. Ct. at 1664 (quoting Sosa, 542 U.S. at 727).

167. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 497 (2003) (explaining that "under the principle of complementarity, the court must defer to national courts unless they are unable or unwilling to prosecute.").

168. Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 Crim. L. Forum 67 (2010) (explaining that the text of Article 17 requires a two-step test and that the first step – the so-called "proceedings requirement" – is an examination into whether a State is currently investigating or prosecuting the case or already has done so.)

169. *Id*. at 71 ("Where there has been no investigation or trial in relation to the case, then *none* of the these conditions for inadmissibility can be met, so the case remains admissible before the Court."). Rome Statute of the International Criminal Court, art. 17, 18, & 19, U.N. Doc. A/CONF. 183/9 (Jul. 17, 1998) [hereinafter Rome Statute]. *See also* Situation In The Republic Of Kenya (Decision Pursuant To Article 15 Of The Rome Statute On The Authorization Of An Investigation Into The Situation In The Republic Of Kenya), Case No. ICC-01-09-19, par. 52-54 (March 31, 2010).

170. Rome Statute at art. 19(2)(b).

171. *Id*. at art. 1 & 17. *See also* Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, para. 78 ("[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability.")

Alternatively, Congress could create an exhaustion requirement that would oblige any plaintiff bringing a claim under the ATS to first seek domestic remedies where the conduct occurred, similar to such requirements employed by several international tribunals.[172] For instance, the Inter-American Commission on Human Rights (IACHR), which hears cases against the United States, requires proof of the exhaustion of domestic remedies as a condition for the admissibility of a case. Under Article 31(1) of the IACHR Rules of Procedure, a petition is only admissible if domestic remedies have been pursued and exhausted. Article 31(2) however offers several exemptions to the requirement of exhaustion of domestic remedies that amount to a "futility" exception (i.e. a petitioner may show that pursuing domestic remedies would be futile). Specifically, a petitioner need not prove that he or she exhausted domestic remedies if: (1) domestic legislation does not afford due process of law for the protection of the rights allegedly violated, (2) there has been a denial of access to or prevention from exhausting the domestic remedies, or (3) there has been an unwarranted delay in rendering a final judgment under the domestic remedies.

There is precedent for adopting such a requirement in the United States. Another human rights statute that was recently adopted by Congress already includes an exhaustion requirement. The Torture Victim Protection Act of 1991, which incorporated the CAT into U.S. domestic law, explicitly includes an exhaustion requirement, which could be the basis for similar legislation concerning the ATS.[173] Moreover, the judiciary has indicated that it is amenable to such a requirement. In *Sosa*, the Supreme Court noted that the European Commission acting as amicus curiae argued "that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system" and that the Court would "certainly consider this requirement in an appropriate case."[174] The adoption of an exhaustion requirement would be another means to ensuring the universal protection of human rights under the ATS, which would be consistent with international law.

VII. CONCLUSION

The erosion of the sovereign rights and the development of the responsibility to protect has resulted in a dilemma concerning when foreign nations can legitimately intervene to protect the civilian populations of other countries that is unique to this century. Although critiques of the United States

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172. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35(1) (Nov. 4, 1950), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."); American Convention on Human Rights, art. 46(1)(a), 9 I.L.M. 673, 687 (Apr. 8, 1970) (requiring that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law).

173. Torture Victim Protection Act of 1991, § 2(b), 106 Stat. 73. ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.").

174. *Sosa*, 542 U.S. at 733, note 21. *See also* Brief for European Commission as Amicus Curiae 24, n. 54 (citing I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472–481 (6th ed.2003)).

have long centered on its inconsistent adherence to and enforcement of human rights law, never before has the United States so explicitly and publicly acknowledged its nationalistic protection of human rights. While the rhetoric of U.S. officials concerning military intervention is the most salient example of the national interest threshold for human rights enforcement, recently it has also seeped into the judiciary. While it still remains to be seen how the "touch and concern" test in *Kiobel* will be interpreted, if the four justice concurrence is any indication, the issue may turn on the United States' national interest in adjudicating the claim. This approach to human rights protection is inconsistent with the basic principles of human rights, the responsibility to protect, and the Supreme Court's articulation of the function of the ATS. It also raises concerns with respect to the political question doctrine, which precludes the judiciary from deciding questions that are best left to the discretion of the political branches such as determinations regarding this country's national interest. To cure these problems with *Kiobel*, Congress should adopt legislation that provides for jurisdiction under the ATS when States where the abuses occurred are unwilling and unable to adjudicate claims arising from them.