IS THE U.S. GOVERNMENT VIOLATING THE SAFE CONDUCTS OF NONCITIZENS? HOW A TURN TO STRICT ORIGINALISM COULD REVITALIZE THE ALIEN TORT STATUTE

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INTRODUCTION

The United States's increasingly severe immigration enforcement apparatus has generated intense scrutiny and triggered a flood of federal litigation.[1] In particular, the crackdown on asylum seekers, refugees, and other noncitizens who fear returning to their home countries[2] has driven

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1 *See, e.g.*, Stuart Anderson, *All The President's Immigration Lawsuits*, FORBES (Nov. 5, 2019, 12:15 AM), https://www.forbes.com/sites/stuartanderson/2019/11/05/all-the-presidents-immigration-lawsuits/#f301d727d8eb [https://perma.cc/6FR5-QLTM]; *Court Battles: Immigrants' Rights*, ACLU, https://www.aclu.org/defending-our-rights/court-battles?topics=270 [https://perma.cc/Q9WN-74RY] (last updated June 2020); *Litigation*, INT'L REFUGEE ASSISTANCE PROJECT, https://refugeerights.org/litigation [https://perma.cc/2HP2-7KJ9]; Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL'Y INST. (July 2020), https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency [https://perma.cc/57PL-UNW6]; *Rodriguez Alvarado v. United States*, ASYLUM SEEKER ADVOC. PROJECT https://asylumadvocacy.org/ftca-litigation [https://perma.cc/G3CS-34TW].

2 *See, e.g.*, Caitlin Dickerson, *10 Years Old, Tearful and Confused After a Sudden Deportation*, N.Y. TIMES (May 20, 2020), https://www.nytimes.com/2020/05/20/us/coronavirus-migrant-children-unaccompanied-minors.html [https://perma.cc/3SF5-9SAT]; Raya Jalabi, *Adrift in Iraq: Deportees from U.S. Describe Fear and Isolation*, REUTERS (Sept. 24, 2019, 6:29

a renewed interest in the United States's sparingly-examined obligations under the international legal prohibition against refoulement,[3] as well as the availability of corresponding civil remedies for noncitizens in federal courts.[4] At the same time, the U.S. Supreme Court has substantially narrowed one of the key remedies accessible to foreign nationals who suffer violations of international law—the Alien Tort Statute (ATS)—and strongly signaled that even more restrictions are to come.[5] Following a trilogy of Supreme Court decisions, most recently in *Jesner v. Arab Bank*,[6]

AM), https://www.reuters.com/article/us-iraq-usa-deportations/adrift-in-iraq-deportees-from-u-s-describe-fear-and-isolation-idUSKBN1W916L [https://perma.cc/HN7P-W223]; Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, PROPUBLICA (Apr. 2, 2020, 6:30 PM), https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law [https://perma.cc/8HGQ-6BWQ].

3 Non-refoulement is a longstanding and universally recognized tenet of international law which protects against forcible return to a country where one's "life or freedom would be threatened on account of . . . race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6276, 189 U.N.T.S. 176 [hereinafter 1951 Convention]; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6259, 6278, 606 U.N.T.S. 267 (binding the United States to Article 33 of the 1951 Convention) [hereinafter 1967 Protocols]. Beyond the 1967 Protocols, to which the United States is a signatory, the prohibition against refoulement became binding U.S. law following the passage of the Refugee Act of 1980 and the ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107 (1980) (amending former 8 U.S.C. § 1253); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *entered into force* 26 June 1987, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en [https://perma.cc/3FEV-FZN9] [hereinafter 1984 CAT]; *see also* Report of the U.N. High Comm'r for Refugees, U.N. GAOR, 40th Sess., Supp. No. 12 ¶ 22, U.N. Doc. A/40/12 (1985), https://www.unhcr.org/en-us/excom/unhcrannual/3ae68c340/report-united-nations-high-commissioner-refugees.html [https://perma.cc/WR6N-3V47] [hereinafter 1985 UNHCR Report].

4 *See, e.g.*, Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110 (N.D. Cal. 2019); Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284 (S.D. Cal. 2018); Hamama v. Adducci, 261 F. Supp. 3d 820 (E.D. Mich. 2017), *vacated and remanded*, 912 F.3d 869 (6th Cir. 2018); *see also* Jaya Ramji-Nogales, *Non-Refoulement under the Trump Administration*, 23 AM. SOC'Y OF INT'L L.: INSIGHTS 11 (Dec. 3, 2019), https://www.asil.org/insights/volume/23/issue/11/non-refoulement-under-trump-administration [https://perma.cc/3E3L-X6DJ].

5 28 U.S.C. § 1350 (2020). The ATS is a jurisdictional law passed as part of the Judiciary Act of 1789 which states: "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

6 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

it remains an open question whether noncitizens can rely on the ATS for bringing human rights-based actions.

In *Jesner*, Justices Thomas, Alito, and Gorsuch each wrote separately to indicate their desire to restrict ATS liability to the three eighteenth-century international law offenses common at the time the ATS was passed: violations of safe conducts, infringements of the rights of ambassadors, and piracy.[7] The English jurist William Blackstone listed these three causes of action in his influential work, *Commentaries on the Laws of England*,[8] and the *Sosa v. Alvarez-Machain* Court subsequently identified them as informing the First Congress's understanding of the law of nations when enacting the ATS.[9]

Thus, it appears plausible that the next time the Supreme Court reviews an ATS-based case,[10] a majority of justices will agree that the only permissible causes of action under the ATS are the three violations mentioned above, otherwise known as the "Blackstone Violations."[11] Although some, including Justices Thomas, Alito, and Gorsuch, may see this outcome as foreclosing the availability of future remedies for noncitizens, limiting the ATS to the three Blackstone Violations would not necessarily spell the end of the statute. Even if the Supreme Court were to impose a strict originalism framework the next time it hears an

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7 *Id.* at 1397 (listing these three specific offenses); *id.* at 1408 (Thomas, J., concurring); *id.* at 1409–10 (Alito, J., concurring); *id.* at 1413–14 (Gorsuch, J., concurring); *see also* Nahl v. Jaoude, 354 F. Supp. 3d 489, 499 (S.D.N.Y. 2018) (citing *Jesner*, 138 S. Ct. at 1397), *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020).

8 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769) [hereinafter BLACKSTONE, COMMENTARIES].

9 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("[T]he First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.").

10 On July 2, 2020, the Supreme Court agreed to hear two consolidated ATS cases: Nestle USA, Inc. v. Doe I, John, et al. (No. 19-416) and Cargill, Inc. v. Doe I, John, et al. (No. 19-453). Order List: 591 U.S., July 2, 2020, https://www.supremecourt.gov/orders/courtorders/070220zor_apl1.pdf [https://perma.cc/4J62-S7DF] [hereinafter Pending ATS Cases]. The Court will hear oral argument in these cases on December 1, 2020. October 2020 Term Calendar for the Session Beginning November 30, 2020, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalDecember2020.pdf [https://perma.cc/4382-5QFJ].

11 *Jesner*, 138 S. Ct. at 1397.

ATS case,[12] and a majority of Justices agree that the only permissible causes of action under the ATS are the three Blackstone Violations, noncitizens may still maintain at least one viable cause of action: violations of safe conducts.

An examination of the United States's current immigration policies highlights both the justifications for preserving the standard the Supreme Court established in *Sosa v. Alvarez-Machain*,[13] as well as the modern-day viability of the first Blackstone Violation—the violation of safe conducts.[14] In addition, the international principle of non-refoulement offers a framework for exploring a potential cause of action that can be understood as viable under *either* the *Sosa* standard *or* as a safe-conducts violation. More specifically, the protections against refoulement embedded within U.S. and international law which prohibit the United States from forcibly returning foreign nationals to a country where they face a threat of persecution may be considered as a form of general implied safe conducts.

This Note will proceed in four parts. First, it will provide an overview of ATS jurisprudence as it relates to cognizable causes of action under the ATS, as well as the Trump Administration's refoulement violations. Second, it will explore the historical definitions and applications of safe-conducts violations. Third, it will analyze the international principle of non-refoulement as a potential cause of action under both the *Sosa* test and as a violation of safe conducts. And finally, it will contend that even if the Supreme Court should do away with the *Sosa* standard, noncitizens can and should allege violations of safe conducts as a modern-day cause of action under the ATS.

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12 *See* Pending ATS Cases, *supra* note 10; Amy Howe, *Justices Grant New Cases, Send Indiana Abortion Cases Back for a New Look*, SCOTUSBLOG (July 2, 2020, 12:48 PM), https://www.scotusblog.com/2020/07/justices-grant-new-cases-send-indiana-abortion-cases-back-for-a-new-look [https://perma.cc/4SB5-TPCE]; *see also infra* notes 52–53 and accompanying text (describing the three concurrences in *Jesner* as signaling the next step in the Court's ATS jurisprudence).

13 *Sosa*, 542 U.S. at 725, 729.

14 *See id.* at 724; *see also infra* Section II.B.

I. BACKGROUND

Rarely invoked during the first two centuries following its enactment, the U.S. Court of Appeals for the Second Circuit gave the ATS new life in *Filártiga v. Peña-Irala*.[15] Post-*Filártiga*, federal courts experienced a wave of human rights litigation under the ATS.[16] However, twenty-four years later, in *Sosa v. Alvarez-Machain*, the Supreme Court imposed a baseline limitation on the permissible causes of action that noncitizens could bring under the ATS.[17] Accepting that some common law causes of action warrant ATS recognition, the Court implemented a two-part test for federal courts to follow when addressing a novel claim. First, plaintiffs must allege a violation of international law that is "specific, universal, and obligatory," and has features comparable to "18th-century paradigms."[18] Second, federal courts must find that granting jurisdiction constitutes a "proper exercise of the judicial power."[19]

As ATS suits carried on undeterred following the decision in *Sosa*—especially against corporate defendants—the Supreme Court layered on two additional limitations to the permissible causes of action available to foreign plaintiffs. In *Kiobel v. Royal Dutch Petroleum Co.*, the Court added a geographic restriction to ATS claims by imposing a presumption against recognizing claims that arise in territory outside of the United States.[20] And in *Jesner*, the Court held that it would be categorically "inappropriate for courts to extend ATS liability to foreign corporations" without further congressional authorization.[21] The Court's decision in *Jesner* led many observers to believe that the ATS was no longer viable.[22]

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15 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

16 *See* Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1067–68 (2015); Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 811 (2008).

17 *Sosa*, 542 U.S. at 697.

18 *Id.* at 725, 732.

19 *Id.* at 731.

20 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." (citing Morrison v. National Australia Bank Ltd., 561 U.S. 247, 266–73 (2010))).

21 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

22 *See* Bastian Brunk, *The Supreme Court Deals the Death Blow to US Human Rights Litigation*, CONFLICTOFLAWS.NET (Apr. 25, 2018), http://conflictoflaws.net/2018/the-supreme-

Yet, despite these restrictions and the increasing pessimism surrounding the ATS's continued salience, litigators continue to file ATS actions.[23]

A. *Brief Overview of ATS Jurisprudence: From* Filártiga *to* Jesner

1. *Filártiga* (1980)

In *Filártiga,* the U.S. Court of Appeals for the Second Circuit held that the ATS granted the court jurisdiction to hear claims alleged by a Paraguayan national concerning his relative who was tortured to death by a Paraguayan police inspector in Paraguay.[24] In addition to finding a jurisdictional grant, the Second Circuit forever changed the trajectory of ATS jurisprudence by recognizing the possibility of new private rights of action based on violations of broadly accepted international norms.[25] Accordingly, upon remand, the District Court for the Eastern District of New York affirmed that international law provided the substantive principles for analyzing the plaintiff's tort claims.[26] As a result of this approach, federal courts began hearing tort cases for violations of international law brought by non-nationals against state actors, corporations, and individuals.[27] This new framework expanded the scope

court-deals-the-death-blow-to-us-human-rights-litigation [https://perma.cc/WUU9-855V]; Stephen P. Mulligan, *The Rise and Decline of the Alien Tort Statute*, CONG. RES. SERV. (June 6, 2018), https://fas.org/sgp/crs/misc/LSB10147.pdf [https://perma.cc/A4YP-L722] ("The High Court's narrowing of the available avenues to raise an ATS claim in *Sosa*, *Kiobel*, and *Jesner* has led commentators to debate whether the statute remains a viable mechanism to provide redress for human rights abuses in U.S. courts.").

23 *See, e.g.*, Pending ATS Cases, *supra* note 10; Al-Tamimi v. Adelson, 916 F.3d 1 (D.C. Cir. 2019); Al Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168 (S.D. Cal. 2019); Nahl v. Jaoude, 354 F. Supp. 3d 489 (S.D.N.Y. 2018), *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020).

24 Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

25 *Id.* at 888 ("[T]he narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.").

26 Filártiga v. Peña-Irala, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) ("The court concludes that it should determine the substantive principles to be applied by looking to international law, which, as the Court of Appeals stated, 'became a part of the common law *of the United States* upon the adoption of the Constitution.'" (quoting *Filártiga*, 630 F.2d at 886)).

27 *See* LUKE SOBOTA & DAVID WALLACH, *Alien Tort Statute*, in INTERNATIONAL ASPECTS OF U.S. LITIGATION: A PRACTITIONER'S DESKBOOK 305 n.19 (James E. Berger ed., 2017).

of the ATS and gave rise to a steady stream of litigation in U.S. district courts.[28]

2. *Sosa* (2004)

Sosa v. Alvarez-Machain was the first Supreme Court case to substantively address the ATS. The case involved an arbitrary detention claim alleged by a Mexican national against another Mexican national, which the Court ultimately found to be insufficient to constitute a violation of customary international law.[29] However, in rejecting the claim, the *Sosa* Court preserved a pathway for foreign nationals to bring ATS actions in federal court.[30]

In holding that the ATS is a purely jurisdictional statute—meaning that it does not by itself create any new causes of action—the Court clarified that the ATS was still intended to be operational upon its enactment, and thus new causes of action could be found in the federal common law.[31] To recognize such an action, the Supreme Court held that federal courts "should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[32] Notably, the majority opinion in *Sosa*, authored by Justice Souter, relied heavily on the writings of William Blackstone as evidence that the First Congress conceived of the three Blackstone Violations (i.e., violations of safe conducts, infringements of the rights of ambassadors, and piracy) when passing the ATS.[33]

After *Sosa*, federal courts began applying a two-part test to determine whether a violation of international law constituted a

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28 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

29 Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

30 *Id.* at 724–25.

31 *Id.* at 724; *see also id.* at 724–25 ("[N]o development in the two centuries from the enactment of § 1350 . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law . . . .").

32 *Id.* at 725.

33 *Id.* at 715–16; *id.* at 719–25; *id.* at 737.

cognizable claim under the ATS. First, there is "an initial, threshold question" as to "whether a plaintiff can demonstrate that the alleged violation is 'of a norm that is specific, universal, and obligatory.'"[34] Second, the court must decide "whether allowing th[e] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority . . . ."[35] Additionally, the *Sosa* Court indicated that the two prongs of the test should be understood as informing each other, meaning that district courts should be mindful of the future consequences of recognizing such a cause of action.[36]

The cautious test announced in *Sosa* has been described as a mode of "flexible originalism."[37] On the one hand, it limits federal courts' ability to recognize ATS claims by imposing eighteenth-century analogues. On the other hand, it leaves the door for recognizing new causes of action "ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[38] The advantage of the *Sosa* standard is that it provides federal courts with a functional test for filtering out frivolous allegations of international law violations, and at the same time, preserves the ability of federal courts to hear a limited class of actions consistent with the apparent intent of the First Congress. In *Kiobel* and *Jesner*, however, the Supreme Court began to shift toward a "strict originalism" in order to further close the door on novel ATS causes of action, particularly for corporate defendants.[39]

3. *Kiobel* (2013)

In *Kiobel*, Nigerian nationals living in the United States brought an action under the ATS against Dutch, British, and Nigerian corporations,

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34 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (quoting *Sosa*, 542 U.S. at 732).

35 *Id.* (citing *Sosa*, 542 U.S. at 732–33).

36 *Sosa*, 542 U.S. at 732–33 ("[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.").

37 Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 835 (2006) [hereinafter Lee, *Safe-Conduct Theory*].

38 *Sosa*, 542 U.S. at 729.

39 *Cf.* Lee, *Safe-Conduct Theory*, *supra* note 37, at 839. *See generally* Mulligan, *supra* note 22.

alleging that they aided and abetted the Nigerian government in committing extrajudicial killings, torture, and other human rights abuses in Nigeria.[40] The District Court for the Southern District of New York held some of the claims to be actionable under the ATS, including for torture and arbitrary detention, and dismissed several other claims, such as for forced exile and wanton destruction of property.[41] On interlocutory appeal, the Second Circuit dismissed the entire complaint because they found that corporate liability is not recognized under the law of nations.[42] The Supreme Court then granted certiorari. Rather than determining whether the plaintiffs had properly stated their ATS claims, the *Kiobel* Court instead decided "whether a claim may reach conduct occurring in the territory of a foreign sovereign."[43]

Ultimately, in order to evade the possibility of judicial interference leading to international discord, the Court concluded that "the presumption against extraterritoriality applies to claims under the ATS," and "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[44] In addition, although the defendants in *Kiobel* were foreign corporations, the holding regarding the presumption against extraterritoriality applied to all ATS defendants.[45]

The Court's holding in *Kiobel* represents a crossroads in the ATS jurisprudence. Justice Breyer's concurrence—which Justices Ginsburg, Sotomayor, and Kagan joined—contended that jurisdiction under the ATS should continue to be found where:

> (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

40 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113–14 (2013).

41 Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *aff'd in part*, r*ev'd in part*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

42 *Kiobel*, 621 F.3d at 149.

43 *Kiobel*, 569 U.S. at 115.

44 *Id.* at 124–25 (citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 266–73 (2010)).

45 *Id.* at 117.

> becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[46]

However, the *Kiobel* majority's emphasis on avoiding the optics of judicial interference in foreign-based ATS cases proved to be more salient. Moreover, considering the Court's caution when intermingling in foreign affairs—together with its budding preference for the three Blackstone Violations—the Court's decision in *Jesner* was a natural evolution.[47]

4. *Jesner* (2018)

In a 2018 plurality opinion authored by Justice Kennedy, the Supreme Court in *Jesner* concluded that because Congress is in a better position to determine whether imposing liability on foreign corporations would interfere with international relations, it would be "inappropriate for courts to extend ATS liability to foreign corporations" without first receiving further congressional authorization.[48] The defendant in *Jesner* was a Jordanian bank accused of supporting organizations responsible for terror attacks in Israel, the West Bank, and the Gaza Strip.[49] The claims were initially brought separately by several U.S. and foreign nationals under the ATS and the Anti-Terrorism Act.[50] The plaintiffs' claims were consolidated in the Eastern District of New York and subsequently

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46 *Id.* at 127 (Breyer, J., concurring). While Justice Breyer may not have been imagining the U.S. government or its officials as potential defendants when formulating this ATS framework, it would nevertheless apply in such a context.

47 *See id.* at 116 (majority opinion) ("Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns.").

48 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018). The *Jesner* holding specifically concerns foreign corporate defendants, but leaves open the possibility of ATS jurisdiction being appropriate for U.S. corporate defendants for violations committed within the U.S. The Supreme Court will consider the question of corporate liability for U.S. companies under the ATS in the fall of 2020. *See* Pending ATS Cases, *supra* note 10; Howe, *supra* note 12.

49 *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 149–50 (2d Cir. 2015), *aff'd sub nom., Jesner*, 138 S. Ct. 1386 (2018).

50 *Id.* at 147.

dismissed, and the dismissal was affirmed by the Second Circuit and eventually, the Supreme Court.[51]

Significantly, Justices Thomas, Alito, and Gorsuch each wrote individually in *Jesner* to indicate their "desire to overrule *Sosa* and limit ATS liability to the three international law violations common in 1789 when the ATS was passed—'violation of safe conducts, infringement of the rights of ambassadors, and piracy.'"[52] The *Jesner* Court went as far as acknowledging that a proper application of the Court's holding in *Sosa* might preclude district courts from recognizing *any* new ATS causes of action beyond the Blackstone Violations, however the Court decided it need not reach that question in the case.[53]

Like in *Kiobel*, the Court in *Jesner* was particularly concerned with the ramifications of hauling foreign corporations before U.S. courts and offending the sovereignty of other nations.[54] The *Jesner* Court reasoned that "[l]ike the presumption against extraterritoriality, judicial caution under *Sosa* guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches."[55] Yet, despite the Supreme Court's heightened ATS reticence, district courts continue to apply the *Sosa* standard to ATS claims brought against non-corporate defendants by reading *Jesner* as merely reaffirming the idea that "courts must exercise 'great caution' before recognizing new forms of liability under the ATS."[56]

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51 *Id.* at 159–60.

52 Nahl v. Jaoude, 354 F. Supp. 3d 489, 499 (S.D.N.Y. 2018) (quoting *Jesner*, 138 S. Ct. at 1397), *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020).

53 *Jesner*, 138 S. Ct. at 1403.

54 *Id.* at 1407 (citing *Sosa*, 542 U.S. 692, 733 (2004)) ("This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation.").

55 *Id.* (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2012)). The Court further explained that its decision "underscores the important separation-of-powers concerns that require the Judiciary to refrain from making [the] kinds of decisions under the ATS" which infringe on the ability of the political branches to conduct foreign policy. *Id.* at 1408 ("The political branches, moreover, surely are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.").

56 *Nahl*, 354 F. Supp. 3d at 499 (quoting *Jesner*, 138 S. Ct. at 1403), *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020).

5. Post-*Jesner* (2018–present)

Following the Supreme Court's decision in *Jesner*, a handful of ATS claims—including against domestic corporate defendants—have withstood initial scrutiny.[57] For example, in *Nahl v. Jaoude*, the District Court for the Southern District of New York granted plaintiffs leave to amend their complaint to plead a tort in violation of the law of nations based on allegations of money laundering and terrorist financing.[58] In *Al Otro Lado, Inc. v. McAleenan*, the United States District Court for the Southern District of California denied the government's motion to dismiss where plaintiffs used the ATS to allege that the United States violated the customary international legal principle of non-refoulement by forcibly returning noncitizens to countries where they face persecution.[59] Applying the *Sosa* test, the court found a "recognized duty of non-refoulement that qualifies as an international law norm under the law of nations," but stopped short of becoming the first court to recognize this cause of action under the ATS.[60]

Additionally, in *Doe v. Nestle, S.A.*, former child slaves forced to harvest cocoa in the Ivory Coast brought a putative class action against multinational companies under the ATS for aiding and abetting child

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57 *See, e.g.*, Estate of Alvarez v. Johns Hopkins Univ., 373 F. Supp. 3d 639, 640 (D. Md. 2019), *motion to certify appeal granted sub nom.* Estate of Giron Alvarez v. Johns Hopkins Univ., No. TDC-15-0950, 2019 WL 1779339 (D. Md. Apr. 23, 2019); Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168 (S.D. Cal. 2019); *Nahl*, 354 F. Supp. 3d, *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020); Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781 (E.D. Va. 2018); Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284 (S.D. Cal. 2018); *see also* Kelly Geddes, Comment: *Legal Fictions and Foreign Frictions: An Argument for A Functional Interpretation of* Jesner v. Arab Bank *for Transnational Corporations*, 86 U. CHI. L. REV. 2193, 2211–12 (2019).

58 *Nahl*, 354 F. Supp. 3d., *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020). On July 30, 2020, the U.S. Court of Appeals for the Second Circuit reversed and remanded back to the district court, holding that even if a terrorism financing violation was cognizable under the ATS, there is not a "civil remedy for those who suffered a purely financial injury, inflicted not by the terrorist acts that are the target of the Convention, but by the mismanagement of a corporation by corporate officers who engaged in criminal activities that resulted in crippling financial sanctions." Nahl v. Jaoude, 968 F.3d 173, 181 (2d Cir. 2020). Importantly, the Second Circuit took "no position" on whether the alleged cause of action met the first prong of the *Sosa* test, and instead reversed the district court on separate grounds described above. *Id.*

59 *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1222–26.

60 *Id.* at 1224–25.

slavery.[61] The district court initially dismissed the case for lack of subject matter jurisdiction, but the U.S. Court of Appeals for the Ninth Circuit reversed and vacated, and then reversed and remanded after the complaint was dismissed by the district court for a second time.[62] The Ninth Circuit explained that plaintiffs' specific and domestic allegations that defendants funded child slavery were sufficiently within the focus of the ATS to sustain a claim.[63] Two separate defendants then petitioned the Supreme Court to review the decision, and the Court granted certiorari on July 2, 2020, to address whether domestic corporations are liable under the ATS following *Jesner*.[64] Overall, the slow drip of cases which have withstood initial scrutiny under the *Sosa* standard in recent years demonstrates that the Court's post-*Jesner* ATS filter is working.[65]

B. *The U.S. Government's Non-Refoulement Violations*

The United Nations categorizes non-refoulement as a "universally recognized" tenet of international law which protects against "expulsion or compulsory return to any country where [one] may have reason to fear persecution or serious danger resulting from unsettled conditions or civil strife."[66] Non-refoulement is enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).[67] In the

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61 Doe v. Nestle, S.A., 929 F.3d 623 (9th Cir. 2019), *cert. granted sub nom.* Nestle USA, Inc. v. Doe I, No. 19-416, 2020 WL 3578678 (U.S. July 2, 2020), and *cert. granted sub nom.* Cargill, Inc. v. Doe I, No. 19-453, 2020 WL 3578679 (U.S. July 2, 2020).

62 *Doe*, 929 F.3d 623.

63 *Id. But see id.* at 627 (Bennett, J., dissenting) ("The panel majority, however, fails to apply *Jesner*'s controlling analysis and applies an incorrect theory of ATS corporate liability even as the Supreme Court suggests that we reach the opposite conclusion.").

64 Pending ATS Cases, *supra* note 10; Howe, *supra* note 12.

65 *Compare* Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781 (E.D. Va. 2018) (finding subject matter jurisdiction over plaintiffs' ATS claims post-*Jesner* because defendant was an American corporation), *with* Wildhaber v. EFV, No. 17-CV-62542-BLOOM/Valle, 2018 WL 3069264 (S.D. Fla. June 21, 2018) (dismissing plaintiffs' ATS claims post-*Jesner* because they were alleged against foreign corporations), *aff'd*, 745 F. App'x 141 (11th Cir. 2018), *cert. denied*, 140 S. Ct. 107 (2019).

66 1985 UNHCR Report, *supra* note 3, ¶ 22.

67 1951 Convention, *supra* note 3, art. 33 ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or

refugee and asylum context, non-refoulement does not guarantee formal recognition of refugee or asylum status, but rather prohibits countries from forcibly returning individuals to countries where they may face persecution or torture.[68]

The Trump Administration has consistently argued that it is adhering to its legal obligations related to non-refoulement.[69] However, the administration's policies and actions tell a different story.[70] Most notably, the Migrant Protection Protocols (MPP)[71]—often referred to as

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freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."); *see also* Innovation Law Lab v. Wolf, 951 F.3d 1073, 1089 (9th Cir. 2020) ("Article 33 is a general anti-refoulement provision, applicable whenever an alien might be returned to a country where his or her life or freedom might be threatened on account of a protected ground.").

68 1985 UNHCR Report, *supra* note 3, ¶ 22.

69 For example, per the Department of Homeland Security's internal guidance, U.S. officials overseeing the implementation of the Migrant Protection Protocols (MPP) at the southern border were instructed to "act consistent with the non-refoulement principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)." U.S. DEP'T. OF HOMELAND SEC., Policy Guidance for Implementation of the Migrant Protection Protocols, at 3 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/9XJQ-LU9V]. Similarly, in court, the government has argued that "MPP provides a procedure to ensure that no [noncitizen] will be removed to Mexico who is 'more likely than not' to face persecution or torture there, which satisfies all relevant non-refoulement obligations." Brief for Defendants-Appellants at *4, Innovation Law Lab v. McAleenan, No. 19-15716, (9th Cir. May 22, 2019) 2019 WL 2290420.

70 *See* Hamed Aleaziz, *US Border Officials Are Issuing Fake Court Notices To Keep Out Immigrants Who Have Won Asylum*, BUZZFEED (Dec. 10, 2019, 2:10 PM) https://www.buzzfeednews.com/article/hamedaleaziz/immigrants-asylum-turned-away-us-border [https://perma.cc/N6U4-NA24] ("Francisco, who requested his full name not be used due to his tenuous life in Mexico, is not alone. Koop said that in recent weeks at least three other individuals, all Venezuelan, have also been denied the opportunity to remain in the US after being granted asylum."); *Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse*, HUMAN RIGHTS WATCH (Feb. 5, 2020) https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and [https://perma.cc/H26T-X7PD] (identifying or investigating "138 cases of Salvadorans killed since 2013 after deportation from the US," as well as "more than 200 cases [with] a clear link between the killing or harm to the deportee upon return and the reasons they had fled El Salvador in the first place"); *This American Life: The Out Crowd*, CHICAGO PUBLIC RADIO (Nov. 15, 2019), https://www.thisamericanlife.org/688/the-out-crowd [https://perma.cc/5HBT-L2SX].

71 *See* Press Release, *Migrant Protection Protocols*, DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [https://perma.cc/BW42-2C55].

the "Remain in Mexico" policy[72]—as well as the "safe third country" agreements with Central American countries,[73] systematically send noncitizens to countries where they face persecution.[74] On an individual basis, the Trump Administration is also abruptly deporting noncitizens to dangerous countries either in error, or before they have a chance to fully present their fear-based claims.[75] In other words, the United States is returning foreign nationals to the hands of their persecutors despite binding legal prohibitions against refoulement.[76]

Consequently, several lawsuits have confronted the administration's policies through the frame of non-refoulement.[77] In *Innovation Law Lab v. Wolf*, for instance, the U.S. Court of Appeals for the Ninth Circuit held that plaintiffs were likely to succeed on their claim "that the MPP does not comply with the United States' anti-refoulement obligations . . . ."[78]

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72 *See Fact Sheet: Policies Affecting Asylum Seekers at the Border*, AM. IMMIGR. COUNCIL (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border [https://perma.cc/ZT7S-DNCP].

73 *See* Peniel Ibe, *The Dangers of Trump's "Safe Third Country" Agreements in Central America*, AM. FRIENDS SERV. COMMITTEE (Jan. 16, 2020) https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america [https://perma.cc/L7EA-AUKK].

74 *See* Brief for Local 1924 as Amici Curiae Supporting Plaintiffs-Appellees, Innovation Law Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) (No. 19-15716), 2019 WL 2894881; Ramji-Nogales, *supra* note 4; *This American Life*, *supra* note 70; *see also* Joel Rose & Laura Smitheran, *Fear, Confusion And Separation As Trump Administration Sends Migrants Back To Mexico*, NPR (July 1, 2019, 2:35 PM), https://www.npr.org/2019/07/01/736908483/fear-confusion-and-separation-as-trump-administration-sends-migrants-back-to-mex [https://perma.cc/X3F7-4SG2].

75 *See, e.g.*, Christina Appelbaum, *'I Don't Want to Die': Asylum Seekers, Once in Limbo, Face Deportation Under Trump*, N.Y. TIMES (Apr. 21, 2019), https://www.nytimes.com/2019/04/21/nyregion/asylum-seekers-deportation.html [https://perma.cc/EA2R-GDEC]; John Ferrannini, *Gay SF Man was Deported in Error, Federal Judge Rules*, BAY AREA REPORTER (Jan. 8, 2020), https://www.ebar.com/news/news/286527 [https://perma.cc/4JWB-3VL6]; Matt Katz, *ICE Detainee Who Sued His Jailers was Swiftly Deported. Now He's Missing.*, WNYC (May 28, 2020), https://www.wnyc.org/story/ice-detainee-sued-his-jailers-four-days-later-he-was-deported-now-hes-missing [https://perma.cc/CH2G-AWUF].

76 *See* 8 U.S.C. § 1231(b)(3)(A) (2020); 8 C.F.R. §§ 208.16–18 (2020).

77 *See* Innovation Law Lab v. Nielsen, 366 F. Supp. 3d 1110 (N.D. Cal. 2019); Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284 (S.D. Cal. 2018); Hamama v. Adducci, 261 F. Supp. 3d 820 (E.D. Mich. 2017), *vacated and remanded sub nom.* Hamama v. Homan, 912 F.3d. 869 (6th Cir. 2018).

78 Innovation Law Lab v. Wolf, 951 F.3d 1073, 1093 (9th Cir. 2020), *petition for cert. pending* (No. 19-1212).

Additionally, in a prior opinion granting a stay of the lower court's decision, Judge Watford's concurrence noted that "DHS's policy is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' non-refoulement obligations."[79]

As the legal challenges to the Trump Administration's immigration policies continue to work their way through the courts, this Note seeks to offer an alternative way of addressing both the issue of non-refoulement and other harms caused to noncitizens—violations of safe conducts under the ATS.

II. ANALYSIS

The historical right to safe conducts embodies a host nation's promise to keep foreign nationals safe and secure during the period they are subject to the will of that host nation.[80] While this right can be viewed as an adjacent predecessor to the legal prohibition against non-refoulement, the origins of the right to safe conducts reveal that its scope extends beyond the obligation to refrain from sending a noncitizen into harm's way. Accordingly, the customary principle of non-refoulement provides a useful point of departure for both analyzing the ongoing functionality of the *Sosa* test for new ATS causes of action post-*Jesner*, as well as for examining the contours of a modern-day claim for a violation of safe conducts.

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79 Innovation Law Lab v. McAleenan, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J., concurring).

80 There is also a more literal definition of a "safe conduct" which refers to a physical document like a passport. *See, e.g.*, 18 U.S.C. § 1545 (2020). This Note explores the historical concept of safe conducts which, as will be explained below, extends beyond this one definition. *See infra* notes 94–99 and accompanying text (distinguishing the narrow definition of safe conducts with the broader historical understanding of the term).

A. *Understanding Historical Notions of Violations of Safe Conducts*

1. How Did the First Congress Understand Safe Conducts?

Much has been written about the historical origins of the ATS.[81] In order to understand safe conducts—or a foreign national's right to safety in a host nation—as one of the three core violations underpinning the creation of the statute, it is worth briefly addressing the motivations of the First Congress in passing the law.

There are a few competing theories as to the primary goal driving the enactment of the ATS. Because William Blackstone stressed that violations of safe conducts could be viewed as just grounds for war,[82] one key factor was national security.[83] As a new and fledgling nation-state, the First Congress wanted to send a clear signal to the world that it valued the law of nations and would provide an accessible and concrete judicial remedy to any violations, including of safe conducts.[84] However, national

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81 *See, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) [hereinafter Bellia Jr. & Clark, *Law of Nations*]; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989) [hereinafter Burley, *Badge of Honor*]; William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Anthony D'Amato, Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Lee, *Safe-Conduct Theory*, *supra* note 37.

82 4 BLACKSTONE, COMMENTARIES, *supra* note 8, at 68–69 ("[S]uch offenses may, according to the writers upon the law of nations, be a just ground of a national war . . . .").

83 *See* Bellia Jr. & Clark, *Law of Nations*, *supra* note 81, at 449 ("In 1789, the United States was a weak nation seeking to avoid conflict with foreign nations."); D'Amato, *supra* note 81, at 65 ("[T]he Alien Tort Statute was an important part of a national security interest in 1789. Acutely recognizing that denials of justice could provide a major excuse for a European power to launch a full-scale attack on our nation, the Founding Fathers made sure that any such provocation could be nipped in the bud by the impartial processes of federal courts.").

84 *See* Bellia Jr. & Clark, *Law of Nations*, *supra* note 81, at 515 ("The ATS filled what would have been a significant gap in the first Judiciary Act . . . . For a new nation seeking to join the ranks of the European powers but lacking established structures and resources, the ATS provided the United States with a self-executing civil mechanism that did not require any affirmative federal executive action."); D'Amato, *supra* note 81, at 66 ("By providing for an impartial system of federal courts that had jurisdiction over such controversies, the new Government could shun political entanglements and no-win situations."); Lee, *Safe-Conduct Theory, supra* note 37, at 881

security was not the only concern. The Framers, inspired by a positive notion of what it meant to be a civilized nation, also felt a fundamental duty to comply with international law.[85] Professor Anne-Marie Burley argues that it was *this* underlying duty which ultimately reinforced the more immediate national security and diplomatic concerns.[86] Such a positive conception is perhaps aligned with contemporary understandings of compliance with international law,[87] but as will be explained below, it is also key to unlocking how safe conducts were understood at the time of the ATS's enactment.

According to Blackstone, who the First Congress relied on in conceptualizing the law of nations, safe conducts could be "expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war; or . . . [to] such as are in amity, league, or truce with us, who are here under a general implied safe-conduct."[88] Blackstone further explained that "during the continuance of any safe conduct, either express or implied, the foreigner is under the protection of the king and the law."[89] As the basis for the notion of express and implied safe conducts, Blackstone cited to the safe-passage protections derived from the Magna Carta that England afforded to foreign merchants within its territory.[90] Finally, Blackstone called for a criminal penalty for

("[S]uit in domestic court for tort remedies by an alien against the one who injured his person or property was mainly a political expedient premised on the host sovereign's hope that if the alien received a speedy and fair remedy, the other sovereign might not be informed of, or act upon, the safe-conduct breach, diminishing the risk that the offended sovereign would exercise its lawful right to make war.").

85 *See* Burley, *Badge of Honor*, *supra* note 81, at 482–87 ("[C]ompliance with the law of nations was a fundamental concomitant of nationhood. The United States could only take its place in the community of nations if it was prepared to play by the rules governing its fellow sovereigns. Further, the international community was limited to the company of 'civilized' nations. A fundamental attribute of this cherished status was recognizing and complying with an organized system of rights and duties.").

86 *Id.*

87 *Id.* at 487 ("Collective compliance by all nations would assure a world safe for trade and travel, rich in the exchange of goods and ideas, conducive to both national and human progress. Honor, as a shared concept motivating such compliance, was a check on the abuse of power. It was thus a pillar of a beneficial and lasting international order.").

88 4 BLACKSTONE, COMMENTARIES, *supra* note 8, at 68.

89 *Id.* at 69.

90 *Id.*; *see also English Translation of Magna Carta*, BRITISH LIBRARY, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/B297-9C3Z] ("All

transgressions, writing that "there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honor is more particularly engaged in supporting his own safe-conduct."[91]

Importantly, Blackstone's *Commentaries* include mention of both an express safe-conduct, which granted safe passage to foreign subjects whose country was at war with a host nation, as well as an implied safe-conduct, which guaranteed safe passage by virtue of either a bilateral treaty or a general understanding of peaceful reciprocity.[92] Professor Thomas H. Lee, an international law scholar and expert on the origins of the ATS, interprets this to mean that safe conducts could either be expressly granted to an individual, or implied—generally or specifically—for an entire class of foreign nationals.[93]

Emer de Vattel, an influential French thinker who, like Blackstone, informed the First Congress's thinking on the law of nations, held a more rigid view of safe conducts akin to Blackstone's notion of an "express"

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merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too."); Burley, *Badge of Honor*, *supra* note 81, at 482 ("Such reasoning may well have seemed particularly persuasive to the Framers, many of whom were northern merchants whose livelihoods depended substantially on foreign trade. The Alien Tort Statute would have sent a signal to resident and visiting aliens that they could conduct business as usual, protected by a familiar and authoritative body of law.").

91 4 BLACKSTONE, COMMENTARIES, *supra* note 8, at 69.

92 For an informative analysis of eighteenth-century conceptions of safe conducts, see Lee, *Safe-Conduct Theory*, *supra* note 37, at 871–79 ("To summarize, the American concept of the safe conduct at the time of the ATS's enactment likely encompassed both explicit safe conducts granted under the authority of the United States to individual aliens and implied safe conducts afforded to classes of aliens whether by virtue of a treaty or generally under the law of nations.").

93 *Id.* at 874–75. Lee cites to Article V of the 1783 Treaty of Paris as an example of a *specific implied safe conduct*: "that persons of any . . . description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested in their endeavors to obtain the restitution of such of their estates, rights and properties, as may have been confiscated." *Id.* A *general implied safe conduct*, on the other hand, is something even more broad. Lee argues that Blackstone combined the two categories—of general and specific implied safe conducts—when he defined the violation of an implied safe conduct as, "committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct." *Id.*

safe-conduct.[94] This definition is also reflected in Black's Law Dictionary.[95] However, there are several indications that the Framers held a broader conception of *what* safe conducts meant and *who* they protected. For instance, the Second Continental Congress of 1781, which some view as a precursor to the ATS,[96] mirrors Blackstone's language in including a mention of both express and implied safe conducts:

> *Resolved*, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:
>
> First. For the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war:
>
> Secondly. For the commission of acts of hostility against such as are in amity, league or truce with the United States, *or who are within the same, under a general implied safe conduct . . . .*[97]

Additionally, in his Camillus Letters, Alexander Hamilton refers to the "tacit[] promises [of] protection and security" whenever "a [g]overnment grants permission to foreigners to acquire property within its territories."[98] That is all to say, at the time of the ATS's enactment, the First Congress likely understood safe conducts as extending beyond a

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94 EMER DE VATTEL, LAW OF NATIONS bk. III, § 265 (Thomas Nugent trans., Liberty Fund, 2008) ("A safe-conduct is given to those who otherwise could not safely pass through the places where he who grants it is master,—as, for instance, to a person charged with some misdemeanor, or to an enemy.") [hereinafter VATTEL, LAW OF NATIONS].

95 *Safe Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a safe conduct as "1. A privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specified purpose. 2. A document conveying this privilege.—Sometimes written *safe-conduct*.—Also termed *safe passage*; *safeguard*; *passport*.").

96 *See* Bellia Jr. & Clark, *Law of Nations*, *supra* note 81, at 497; Bradley, *supra* note 81, at 631; Burley, *Badge of Honor*, *supra* note 81, at 476–77.

97 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136 (G. Hunt ed., 1912) (1781) (emphasis added) [hereinafter JOURNALS]. Although the Resolution begins with a reference to criminal punishment, it ends by suggesting the possibility of civil liability for violations. *Id.* at 1137 ("*Resolved*, That it be farther recommended to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.").

98 Alexander Hamilton, *The Defence No. XIX, [14 October 1795]*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-19-02-0056 [https://perma.cc/GZG3-NEBK] [hereinafter Hamilton, The Defence].

physical document guaranteeing safe passage for citizens of nations at war with the United States.[99]

2. Who Was Entitled to Safe Conducts?

As explained above, an express safe-conduct document could be granted to citizens of foreign belligerents during times of war.[100] In addition, specific implied safe-conducts applied to classes of foreign nationals through specific treaty provisions, such as Article V of the 1783 Treaty of Paris.[101] But who was entitled to a general implied safe conduct?

Under the law of nations during the founding period of the United States, a nation owed a duty of protection not only to foreign ambassadors, but also to all foreign nationals within its territory.[102] As Vattel explained, a sovereign was obliged to protect foreign nationals upon admission:

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99 *See* Lee, *Safe-Conduct Theory, supra* note 37, at 873 ("[I]t seems safe to say that a safe conduct signified a sovereign obligation on the part of the United States to prevent injury to the person or property of an alien within its territory and also abroad where it had a military presence. Where a safe conduct was implicated, the United States assumed correlative duties to punish the injurer under its criminal laws if harm occurred and to oblige the injurer to pay damages for the injury. The safe conduct might be expressly or impliedly granted and it could be granted in war or peace."). In the only modern federal case to substantively address the definition of safe conducts, the U.S. Court of Appeals for the Sixth Circuit took a similarly broad approach. *See* Taveras v. Taveraz, 477 F.3d 767, 773–74 (6th Cir. 2007) ("[T]he purpose of the doctrine of safe conducts under the law of nations is to protect the safety and security of the person and property of the journeying alien bearing the safe conduct privilege . . . .").

100 *See* VATTEL, LAW OF NATIONS, *supra* note 94, at bk. III, § 265–66.

101 *See* Definitive Treaty of Peace, U.S.-Gr. Brit., art. V, Sept. 3, 1783, 8 Stat. 80–83; *see also* Lee, *Safe-Conduct Theory, supra* note 37, at 874 ("The special features of this specific implied safe conduct include the one-year time limitation and the applicability to 'persons . . . of any description' rather than British subjects, which may have been a concession to extend coverage to American Loyalists.").

102 *See* Bellia Jr. & Clark, *Law of Nations*, *supra* note 81, at 472–75 ("[T]he nation or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend the state itself. And that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries; but also because nations ought mutually to respect each other, to abstain from all offence, from all abuse, from all injury, and, in a word, from every thing that may be of prejudice to others." (quoting VATTEL, LAW OF NATIONS, *supra* note 94, at bk. II, § 72)).

> [A]s soon as [a sovereign] admits [foreigners], he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him. Accordingly we see that every sovereign who has given an asylum to a foreigner, considers himself no less offended by an injury done to the latter, than he would be by an act of violence committed on his own subject.[103]

Although Vattel did not label this implicit measure of protection as a general "safe conduct," his description of protection afforded to foreign citizens overlaps with Blackstone's description of a general implied safe conduct granted to those who are "in amity, league, or truce with [the host nation],"[104] as well as with the language of the Second Continental Congress of 1781, which extended that protection to those "who are within the same."[105]

Similarly, while Professors Anthony J. Bellia Jr. and Bradford R. Clark understand these eighteenth-century legal safeguards as outside the scope of safe conducts, Professor Thomas H. Lee argues that such protections are precisely what Blackstone and the First Congress conceptualized as the general implied safe conducts guaranteed to foreign nationals not at war with the host sovereign.[106] It may seem unrealistic

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103 VATTEL, LAW OF NATIONS, *supra* note 94, at bk. II, § 104; *see also* Hamilton, *The Defence*, *supra* note 98 ("There is no parity between the case of the persons and goods of enemies found in our own country, and that of the persons and goods of enemies found elsewhere. In the former, there is a reliance upon our hospitality and justice, there is an express or implied safe conduct, the individuals and their property are in the custody of our faith, they have no power to resist our will—they can lawfully make no defence against our violence—they are deemed to owe a temporary allegiance, and for endeavoring resistance would be punished as criminals; a character inconsistent with that of [an] enemy. To make them a prey is therefore, to infringe every rule of generosity and equity—it is to add cowardice to treachery.").

104 4 BLACKSTONE, COMMENTARIES, *supra* note 8, at 68; *see also* 1 BLACKSTONE, COMMENTARIES, *supra* note 8, at 259–60 ("Great tenderness is shewn by our laws, not only to foreigners in distress . . . but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home whenever the king sees occasion.").

105 JOURNALS, *supra* note 97, at 1136.

106 *Compare* Bellia Jr. & Clark, *Law of Nations*, *supra* note 81, at 531 ("[T]he law of nations more broadly protected nations at peace with one another from any violence by citizens of the one directed against citizens of the other—not merely violence against citizens under the protection of a safe conduct . . . . This basic principle applied regardless of whether the nations had a formal treaty of amity or friendship or whether the transgressor's nation had granted the

today that a foundational international legal protection would extend to such a broad class of foreign nationals. However, given the intent of the First Congress,[107] it is plausible that the general implied safe conduct encapsulated the intentionally expansive definition described above.[108] International travel was less common in 1789, and the threat of war in response to perceived violations of international norms was apparently far higher.[109] Thus, it follows that the First Congress would have wanted to project any corresponding legal remedy for such violations as widely available to foreign visitors.

3. What Constituted a Violation of Safe Conducts?

There is a much clearer picture of the motivations for protecting against such safe-conduct violations (i.e., not sparking an international conflict) than there is of what a violation actually looks like.[110] On a

victim an express or implied safe conduct."), *with* Lee, *Safe-Conduct Theory*, *supra* note 37, at 874 ("Safe conducts could also be implied for a class of aliens—by contrast to the individual character of an express safe-conduct document—from specific treaty provisions or *generally from the law of nations*." (emphasis added)).

107 *See supra* notes 83–87 and accompanying text (describing the motivations of the First Congress); *see also* Burley, *Badge of Honor*, *supra* note 81, at 481 (explaining that one reason the Framers may have taken their duties under the law of nations seriously was "to assure foreign merchants that universal norms and standards of justice would apply even in the hinterland").

108 *See* Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1646 n.4 (2014) ("Professors Bellia and Clark have a narrower understanding of what constitutes a safe conduct violation that seemingly does not incorporate Blackstone's general implied safe conduct . . . . On Blackstone's view, however, which I believe was shared by the First Congress, all friendly and neutral aliens in the United States enjoyed a 'safe conduct,' that is, the promise of protection by the United States of their persons or property. This promise, however, was an implied one that did not require manifestation in a particular document like a wartime safe conduct. Even today a foreigner who is lawfully in the United States holds a passport, which is the modern equivalent of the late eighteenth-century safe conduct.") [hereinafter Lee, *Three Lives of the Alien Tort Statute*].

109 *Cf.* D'Amato, *supra* note 81, at 67 ("The military power of the United States today is such that insults and denials of justice to foreign nations will not jeopardize our existence.").

110 Blackstone wrote that "there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king," and called such violations a "just ground of a national war." 4 BLACKSTONE, COMMENTARIES, *supra* note 8, at 68–69. Likewise, Vattel wrote that "[h]e who promises security by a safe-conduct, promises to afford it wherever he has the command,—not only in his own territories, but likewise in every place where any of his troops may happen to be: and he is bound, not only to forbear violating

conceptual level, a safe-conduct violation can be understood as a "noncontract injury to an alien's person or property."[111] Meaning, a foreign national with either an express safe-conduct document or an implied safe conduct (specific or general), who consequently suffered a noncontract injury to their person or property, could allege "a tort . . . in violation of the law of nations or a treaty of the United States."[112] Put another way, "[t]he violation of a safe conduct meant nothing more or less than a tort (again, a noncontract injury to person or property) committed against a foreigner to whom a sovereign or its agent had promised safety."[113]

Professor Lee offers the most complete depiction of what a safe-conduct violation may have constituted in 1789, separated into three main categories: (1) a wartime injury to an enemy foreign national's person or property in contravention of either an express or implied safe-conduct; (2) an injury to a friendly or neutral foreign national's person or property in violation of a treaty; and (3) an injury to a friendly or neutral foreign national's person or property which violated "a unilateral commitment by a sovereign to protect the person or property of any alien with whose sovereign the host country was not at war"—otherwise known as a general implied safe conduct.[114] The first two categories are relatively specific, at least in scope.[115] The third category, however—the general implied safe conduct referenced by Blackstone and the First

that security either by himself or his people, but also to protect and defend the person to whom he has promised it, to punish any of his subjects who have offered him violence, and oblige them to make good the damage." VATTEL, LAW OF NATIONS, *supra* note 94, at bk. III, § 268.

111 Lee, *Safe-Conduct Theory, supra* note 37, at 837.

112 *Id.* at 838 ("[A]ny friendly or neutral alien within the United States could sue for a noncontract injury to person or property because he was entitled to a 'general implied safe conduct,' the breach of which constituted a 'violation of the law of nations.'").

113 Lee, *Three Lives of the Alien Tort Statute*, *supra* note 108, at 1653.

114 Lee, *Safe-Conduct Theory, supra* note 37, at 836–37. Lee also notes the extremely broad scope of general implied safe conducts, explaining that they "essentially convert[] any injury to [an alien's] person or property within a country into an international law violation by virtue of the fact that the victim was a friendly or neutral alien. In America of 1789, this would have covered every citizen or subject of a European state since the United States was not then at war."

115 Imagine the United States issuing an enemy foreign national a document granting them explicit permission to pass safely through U.S. territory, only for them to be attacked and injured by an angry mob of U.S. citizens.

Continental Congress—covers a far more wide-ranging category of noncitizens.[116]

B. *Understanding Violations of Safe Conducts in a Modern Context*

As previously mentioned, the *Sosa* Court held that the First Congress contemplated the three Blackstone Violations when it included the words "violation of the law of nations" in the text of the ATS in the Judiciary Act of 1789.[117] While infringements of the rights of ambassadors and piracy are fairly easy to conceptualize,[118] even in modern times, defining violations of safe conducts is more challenging.[119]

In *Taveras v. Taveraz*, a 2007 child custody case, the Sixth Circuit became the first twenty-first century federal court to directly analyze the elements of a safe-conduct violation.[120] In a somewhat confusing fashion, Mr. Taveras alleged that the United States had committed a violation of *his* safe conducts by granting a visa to his estranged wife and children, and then subsequently admitting *them* into the country. Addressing this claim, the Sixth Circuit clarified that the only safe-conduct document implicated in the case was the visitor's visa granted by the United States to Ms. Taveraz and her children.[121] The court then explained that a violation of safe conducts only occurs when a noncitizen suffers an injury to *their* person or property as a result of a host nation's safe conducts

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116 In this context, imagine a Mexican national visiting the United States and having their car vandalized. This is precisely why Lee argues that the *Sosa* Court's "flexible originalism" is a reasonable interpretation of the ATS. *See* Lee, *Safe-Conduct Theory, supra* note 37, at 839 ("[C]onstruing the statute to cover precisely the same historical violations today [] would be overinclusive, not underinclusive as the *Sosa* Court presumed.").

117 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813–14 (D.C. Cir. 1984) (Bork, J., concurring); Dodge, *supra* note 81, at 225–26.

118 *Cf.* Lee, *Safe-Conduct Theory, supra* note 37, at 860–61 (depicting infamous incidents involving attacks on ambassadors), 866–68 (providing background on piracy violations); Bellia Jr. & Clark, *Law of Nations*, *supra* note 81, at 467, 480–81 (same).

119 Lee argues that two examples of modern analogues to the eighteenth-century safe conduct are passports held by friendly and neutral aliens, as well as the customary law of war guarantees of safety to surrendering enemy soldiers. Lee, *Three Lives of the Alien Tort Statute*, *supra* note 108, at 1653.

120 Taveras v. Taveraz, 477 F.3d 767, 772–73 (6th Cir. 2007).

121 *Id.* at 769, 774.

infringement as to them.[122] In other words, Mr. Taveras could not allege a violation of safe conducts vis-à-vis the United States's admission of Ms. Taveraz and their children into the country.

Interestingly, the opinion implies that, if properly pleaded, a claim for the violation of safe conducts could be viable in a modern-day context.[123] Even though Mr. Taveras's argument was misplaced, the court tacitly accepted the proposition that a violation of safe conducts could occur if there were a sufficient nexus between the violation and the plaintiff's alleged tort.[124] What remains unsettled is whether a violation of a general implied safe conduct would be cognizable today, and if so, how widely accessible such a claim would be.

Professor Lee's "safe-conduct theory" of the ATS contends that the statute "was enacted to provide damages in federal court for aliens who suffered noncontract injury to person or property for which the United States would bear sovereign responsibility under the law of nations or a ratified treaty."[125] Lee writes that the "obvious translation" of the ATS to the present day is something analogous to 42 U.S.C. § 1983 litigation and tort liability under the Federal Tort Claims Act (FTCA).[126] Accordingly, Lee points out that, counterintuitively, understanding the violation of safe conducts through a lens of strict originalism would be overinclusive of modern-day causes of action, not underinclusive, as the Supreme Court has apparently presumed.[127]

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122 *Id.* at 773 (citing 4 BLACKSTONE, COMMENTARIES, *supra* note 8, at 68–69).

123 *Taveras*, 477 F.3d at 774.

124 *Id.*

125 Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1739 (2018); *see also* Lee, *Safe-Conduct Theory*, *supra* note 37.

126 Lee, *Safe-Conduct Theory*, *supra* note 37, at 900–01, 900 n.347. Although this Note does not cover ATS-related issues such as sovereign immunity or the political question doctrine—both of which have come up in modern-day ATS suits—it is worth pointing out that at least one district court has held that the Administrative Procedure Act provides the relevant waiver for sovereign immunity in ATS actions. Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1308 (S.D. Cal. 2018) ("In line with the APA's broad waiver of sovereign immunity for claims against the United States for nonmonetary relief, the Court finds that the APA's unqualified waiver of sovereign immunity supplies a waiver for the ATS claims asserted in this case." (citations omitted)).

127 Lee, *Safe-Conduct Theory*, *supra* note 37, at 905–06 ("The counterintuitive realization that a strictly originalist interpretation would be overinclusive today justifies flexible originalism, or moderate abstraction to a principle of greater vitality in the present day.").

C. *A Noncitizen's Allegation of the U.S. Government's Violation of the International Law Principle of Non-Refoulement Can Withstand Scrutiny Under the* Sosa *Standard*

Although the district court in *Al Otro Lado* declined to be the first federal court to recognize a cause of action for the violation of non-refoulement under the ATS, it suggested that doing so may ultimately be appropriate.[128] Indeed, a straightforward application of the *Sosa* test suggests that a non-refoulement violation is a cognizable cause of action under the ATS. First, because the principle of non-refoulement constitutes a specific, universal, and obligatory international norm, and second, because granting jurisdiction would be a proper exercise of judicial discretion.

1. Non-Refoulement Constitutes a "Specific, Universal, and Obligatory" International Norm

As a threshold matter, non-refoulement is a specific, universal, and obligatory norm, comparable to the eighteenth-century paradigms of safe conducts, the rights of ambassadors, and piracy.[129] The United Nations has repeatedly held up non-refoulement as a cornerstone of international law, and its widespread adoption in international and regional accords solidifies its status as the type of claim necessary for recognition under the ATS.[130]

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128 Al Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168, 1224–25 (S.D. Cal. 2019). The court essentially punted on the ATS issue, explaining that "[h]aving reviewed Defendants' present dismissal arguments, however, the Court cannot conclude that it lacks jurisdiction over the Individual Plaintiffs' ATS claims. Because the ATS is a jurisdictional statute, Defendants are not foreclosed from challenging the Plaintiffs' ATS claims at a later stage." *Id.*

129 Sosa v. Alvarez-Machain, 542 U.S. 692, 725, 732 (2004).

130 *See* Note on Non-Refoulement (Submitted by the High Commissioner), Human Rights Council, U.N. Doc EC/SCP/2 (Aug. 23, 1977), https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html [https://perma.cc/MR5G-9AR9]; 1985 UNHCR Report, *supra* note 3; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* 5–6 (Jan. 26, 2007), https://www.unhcr.org/4d9486929.pdf [https://perma.cc/XKP5-KDPR] [hereinafter 2007 UNHCR Advisory Opinion].

Non-refoulement has been codified in a variety of international and regional human rights treaties, including the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 2010 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), the 1984 Cartagena Declaration on Refugees, the 1969 Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa, and the 1969 American Convention on Human Rights.[131] As a result of its widespread acceptance, the United Nations and international legal scholars have argued that non-refoulement has achieved the status of *jus cogens*, or the level of peremptory norms which are non-derogable.[132] Thus, non-refoulement appears to be squarely within the class of international norms sufficient to meet the first prong of the *Sosa* test.

For comparison, the U.S. Court of Appeals for the Second Circuit concluded that the prohibition against arbitrary denationalization satisfied the first prong of the *Sosa* test due to the sheer number of international legal documents expressing such a prohibition, which reflected an international consensus as to its validity.[133] Similarly, in *Nahl*, the District Court for the Southern District of New York held that the Terrorism Financing Convention, to which 173 nations are a party, constituted a sufficiently universal norm to sustain an ATS claim.[134] The

131 *See* 2007 UNHCR Advisory Opinion, *supra* note 130; *see also* 1984 CAT, *supra* note 3; International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en [https://perma.cc/LU3C-VL5U] [hereinafter 2010 ICPPED].

132 2007 UNHCR Advisory Opinion, *supra* note 130, at 10 ("The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment . . . is non-derogable and applies in all circumstances . . . ."); *see also* Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT'L L. & POL'Y 533, 550 n.59 (1998).

133 *In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 252–53 (S.D.N.Y. 2009).

134 Nahl v. Jaoude, 354 F. Supp. 3d 489, 500 (S.D.N.Y. 2018) (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009), Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 277, 284 (E.D.N.Y. 2007)), *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020). Again, although the District Court decision in *Nahl* was reversed and remanded, the Court of Appeals specifically did not reach the

Nahl Court also affirmed that treaties should only serve as proof of a customary international legal norm if "an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles."[135]

In terms of the breadth of non-refoulement's overall acceptance and the applicable international legal instruments containing a related provision, 148 states (including the United States) are party to either the 1951 Convention or the 1967 Protocol, 83 states (including the United States) are signatories to the CAT, and 98 nations (not including the United States) are signatories to the ICPPED.[136] Beyond the international consensus as to the definition of non-refoulement, countries bound by the principle—including the United States—have recognized their corresponding obligations, and at least attempted to meet them.[137]

Non-refoulement also has a firm and historically-rooted footing within American immigration law.[138] The concept underlies the protections afforded to noncitizens in the United States who fear returning to their home country. Accordingly, immigration judges and the Board of Immigration Appeals routinely address issues of non-refoulement in the form of asylum, withholding of removal, and CAT

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district court's analysis about whether the alleged violation constituted a specific, universal, and obligatory international norm. *See supra* note 58.

135 *Nahl*, 354 F. Supp. 3d at 500 (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 137 (2d Cir. 2010)), *rev'd and remanded*, 968 F.3d 173 (2d Cir. 2020).

136 UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (April 2015), https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf [https://perma.cc/JE9V-4TPC]; 1984 CAT, *supra* note 3; 2010 ICPPED, *supra* note 131.

137 *See Asylum & The Rights of Refugees*, INT'L JUST. RESOURCE CTR., https://ijrcenter.org/refugee-law [https://perma.cc/Q4CA-BWDK]; Jonathan Bialosky, *Non-Refoulement in the ILC Articles on Expulsion of Aliens and Its Practical Value for U.S. Immigration Law*, 25 MICH. ST. INT'L. L. REV. 1, 13–15 (2017); Tilman Rodenhäuser, *The Principle of Non-refoulement in the Migration Context: 5 Key Points*, ICRC: HUMANITARIAN LAW & POLICY (Mar. 30, 2018), https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points [https://perma.cc/44DE-SBKS]; *see also* sources cited *supra* note 69. *But see* Ramji-Nogales, *supra* note 4.

138 *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) ("If one thing is clear from the legislative history of . . . the entire [Refugee Act of 1980], it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968." (citations omitted)).

claims.[139] Moreover, the protections of withholding of removal pursuant to 8 U.S.C. § 1231(b)(3)(A) and the CAT are nondiscretionary because of the United States' international legal obligations related to non-refoulement.[140]

Although there is some debate as to the extent of the United States's legal obligations as a party to the 1967 Protocol and the CAT, the existing U.S. case law on non-refoulement supports the notion that it is a well-established international legal norm with domestic force.[141] Cases addressing non-refoulement often relate to U.S. asylum law and individuals applying for withholding of removal and protection under the CAT.[142] Additionally, from the mid-1980s to the mid-1990s, a considerable amount of non-refoulement litigation was brought challenging the United States's interdiction at sea policy for Haitian refugees, culminating in *Sale v. Haitian Centers Council, Inc*.[143] In *Sale*, the Court held that the interdiction and forced repatriation of Haitian nationals in international waters was permissible because non-

139 *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (providing that an otherwise inadmissible alien who claims a fear of persecution must be referred for an interview by an asylum officer); 8 U.S.C. § 1231(b)(3)(A) (prohibiting the Attorney General from removing an alien to a country "if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."); 8 U.S.C. § 1158(a)(2)(A) (permitting the removal of aliens only to countries "in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection"); 1984 CAT, *supra* note 3 ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."); 8 C.F.R. §§ 208.16–18 (providing the implementing regulations for the treaty); *see also* Bialosky, *supra* note 137, at 13–15 (listing asylum claims, withholding of removal claims, and CAT claims, as the three primary embodiments of non-refoulement in U.S. immigration law).

140 *See* 8 C.F.R. §§ 208.16–208.18; Bialosky, *supra* note 137, at 13–15; *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 420 (1999) ("[W]ithholding is mandatory unless the Attorney General determines one of the exceptions applies . . . .").

141 *See generally* Barapind v. Reno, 72 F. Supp. 2d 1132, 1148–50 (E.D. Cal. 1999), *aff'd but criticized*, 225 F.3d 1100 (9th Cir. 2000); Rosati, *supra* note 132, at 553–75.

142 *See, e.g.*, Guzman Chavez v. Hott, 940 F.3d 867, 869–70 (4th Cir. 2019), *petition for cert. granted sub nom. Albence v. Guzman Chavez* (No. 19-897), 2020 WL 3146678 (intending to review the holding in this case related to detention, not whether withholding of removal is a mandatory obligation).

143 Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993).

refoulement only applies to refugees who are already within the United States.[144] However, the Court's reasoning engaged at length with the United States's non-refoulement obligations under international law.[145]

Thus, in light of its well-established standing in both U.S. and international law, the principle of non-refoulement meets the initial threshold requirement necessary for a federal court to grant jurisdiction in the ATS framework under the *Sosa* test. As for the second, and arguably more subjective prong of the *Sosa* standard, non-refoulement also appears to constitute a proper exercise of judicial discretion.

2. Recognizing Non-Refoulement as a Cognizable Cause of Action Under the ATS Qualifies as a "Proper Exercise of Judicial Discretion"

Many of the Supreme Court's concerns over the judicial branch's interference with American foreign policy would not apply in the context of a non-refoulement claim brought against the United States. Holding the United States government accountable for alleged violations of this concrete tenet of international law would neither limit the government's ability to conduct international relations nor infringe upon another nation's sovereignty.[146] Thus, permitting a non-refoulement claim to move forward against the United States under the ATS can reasonably be viewed as a "proper exercise of judicial discretion."[147]

Moreover, the practical consequences of making non-refoulement claims available to foreign national litigants are unlikely to be so drastic as to require the political branches to grant specific authority.[148] Because non-refoulement is a well-defined obligation arising from state actions in highly specific circumstances, a federal court exercising ATS jurisdiction would not be opening the door to a flood of similar causes of action. Furthermore, if a court were to accept the *jus cogens* status of non-

144 *Id.* at 186–88.

145 *Id.* at 179–83.

146 Ironically, the First Congress envisioned federal courts' exercise of ATS jurisdiction as a way to *avoid* diplomatic entanglements, not as a catalyst for initiating or exacerbating them. *See* sources cited *supra* note 84.

147 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1390–91 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004)).

148 *Id.*

refoulement as a customary legal norm on par with international prohibitions against torture and prolonged arbitrary detention, the propriety of judicial intervention—notwithstanding the inevitability of some diplomatic ripples—seems more likely.[149] Overall, based on the two-part test set out in *Sosa*, non-refoulement seems to be among "the modest number of international law violations" the Court envisioned as providing a common law cause of action under the ATS.[150]

D. *A Contemporary Allegation of a Safe-Conducts Violation Can Potentially Withstand Scrutiny Under the ATS*

If the First Congress's goal in passing the ATS was to minimize harm to noncitizens living under the jurisdiction of the United States,[151] few would argue that this goal is being achieved today.[152] Rather, the U.S. government's current immigration enforcement practices highlight the potential viability of the violation of safe conducts as a stand-alone cause of action under the ATS.[153] Although a federal district court might not be willing to recognize *all* injuries in tort committed by an actor with a U.S. sovereign nexus against a noncitizen as constituting a safe-conduct violation,[154] one can imagine a set of circumstances warranting recognition under the ATS, including but not limited to a scenario mirroring an alleged violation of non-refoulement.

For instance, could U.S. Immigrations and Customs Enforcement (ICE) detainees who are subjected to excessive force in a federal detention

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149 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. a (AM. LAW INST. 1987) (listing the prohibitions against torture and prolonged arbitrary detention as customary law of human rights, and affirming that "human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.").

150 *Sosa,* 542 U.S. at 724.

151 Lee, *Safe-Conduct Theory*, *supra* note 37, at 906.

152 *See* sources cited *supra* notes 1–2.

153 *See* Ramji-Nogales, *supra* note 4; *see also* sources cited *supra* notes 1–2, 70.

154 *See supra* note 116 and accompanying text.

center,[155] or aboard an ICE flight,[156] successfully allege a violation of their safe conducts? To answer that question, a court must first determine how far a contemporary application of the United States's promise of a noncitizen's safety extends. Based on the origins of the ATS,[157] a guarantee of safe conducts should be accessible to those with a specific and somewhat durable grant of entry into the country. Permitting such a cause of action, especially for individuals who have been legally admitted into the country—even if impermanently—would be consistent with the protections long afforded to certain classes of noncitizens.[158]

As the Supreme Court has acknowledged, "[t]hat those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, has long been recognized by the law of nations."[159] Though no noncitizen has any inherent right to enter or remain in the United States,[160] it is a well-established notion that individuals who have been granted entry or become long-term residents in the United States are subject to enhanced safeguards.[161] Similarly, someone with an even

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155 *See, e.g.*, Jama v. INS, 343 F. Supp. 2d 338 (D.N.J. 2004); Tom Dreisbach, *Video Shows Controversial Use Of Force Inside An ICE Detention Center*, NPR (Feb. 6, 2020, 7:45 AM), https://www.npr.org/2020/02/06/802939294/exclusive-video-shows-controversial-use-of-force-inside-an-ice-detention-center [https://perma.cc/458P-MLLZ]; Elly Lu, *Immigrant Detainees at Adelanto Say Officers Pepper-Sprayed Them For Peacefully Protesting*, LAIST (June 22, 2020, 2:08 PM), https://laist.com/2020/06/22/adelanto-detention-facility-immigrant-detainee-protest.php [https://perma.cc/A2T3-28G7].

156 *See, e.g.*, Complaint, Ibrahim v. Acosta, No. 1:17-cv-24574-DPG (S.D. Fla. Dec. 18, 2017), 2017 WL 6507829.

157 *See supra* Section II.A.

158 *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights . . . .").

159 Fong Yue Ting v. United States, 149 U.S. 698, 734 (1893) (Brewer, J., dissenting).

160 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

161 Kwong Hai Chew v. Colding, 344 U.S. 590, 601 (1953) ("While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process."); *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law . . . . It is well established that certain constitutional protections available to persons inside

less permanent implied safe conduct, such as a non-immigrant visa, deferred status, Special Immigrant Juvenile Status (SIJS), or Temporary Protected Status (TPS), may also have a basis for protection on similar grounds. In each of these cases, the United States has granted permission to a noncitizen to physically be in the country, and accordingly, some promise of safe conducts attaches.[162]

However, for noncitizens in the United States who have *not* been formally granted permission to enter or remain in the country—or who have had that permission revoked and may be subject to removal—the only applicable protection would be the general implied safe conducts discussed previously.[163] Even still, the mere fact that these foreign nationals, including asylum seekers and those with final orders of removal, are physically present and subject to the will of the United States, may itself impose an obligation on the government to respect the baseline guarantee of protection afforded by general implied safe conducts.[164] Meaning, if a member of this population suffers a noncontract injury at the hands of a state actor, they should be able to allege a violation of safe conducts.

Recognizing a federal cause of action any time any foreign national in the United States suffers an injury in tort is admittedly expansive, but as the historical texts show, this may be the actual intent behind the ATS.[165] Moreover, while immigration benefits can always be granted and withdrawn according to U.S. law, the protections associated with a general implied safe conduct remain constant—at least according to Blackstone.[166]

Assuming the existence of this contemporary application of general implied safe conducts, there is also the question of how to demarcate the boundaries of a noncontract injury in today's immigration enforcement

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the United States are unavailable to aliens outside of our geographic borders . . . . But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." (citations omitted)).

162 *See supra* notes 98–99 and accompanying text.

163 *See* discussion *supra* Sections II.A.1–2.

164 Assuming that they are not nationals of a country the United States is at war against.

165 *See* discussion *supra* Sections II.A.1–2; sources cited *supra* notes 108, 114 and accompanying text.

166 *See supra* note 104.

context. Beyond injuries in tort such as battery or intentional infliction of emotional distress, for instance, the less-litigated violation of the principle of non-refoulement may be classified in the same category. As stated previously, the U.S. government's obligations do not require that it grant legal status to those who fear persecution in their country of origin, but rather, prohibit it from forcibly repatriating such individuals to countries where they face persecution. Accordingly, a Salvadoran national who is deported and then murdered on account of her political opinion has likely suffered a noncontract injury resulting from her forced return.[167] Likewise, a Somali[168] or Iraqi[169] national who faces clear persecution in their respective home countries can allege a harm stemming from their removal.

Furthermore, viewing the mechanisms of withholding of removal and protection under the CAT as themselves reinforcing the underlying notion of general implied safe conducts, the forcible repatriation of individuals with valid persecution-based claims begins to look more like an injury to person or property in violation of international law. In other words, the United States' binding commitments under the customary international law of non-refoulement, while admittedly below the threshold of granting a *specific* implied safe-conduct analogous to a visa, are potentially sufficient as a form of general implied safe conducts.

In addition, understanding noncontract injuries suffered by foreign nationals at the hands of the United States, including for violations of non-refoulement, as simultaneously an injury in tort in violation of the law of nations as well as a safe-conducts violation, may provide additional grounds for foreign plaintiffs to seek civil remedies in federal courts under the ATS. At minimum, the allegation that the United States is violating the safe conducts of noncitizens could reframe the legal discussion surrounding the core protections afforded to all foreign nationals within the United States.[170]

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167 *See* HUMAN RIGHTS WATCH, *supra* note 70.

168 *See, e.g.*, Complaint, *supra* note 156.

169 *See, e.g.*, Jalabi, *supra* note 2.

170 *See* Al Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168, 1222–26 (S.D. Cal. 2019) (grappling with, but not rejecting, plaintiffs' novel ATS claims in the context of the Trump Administration's asylum policies).

III. PROPOSAL

In light of the *Jesner* Court's ATS skepticism and the current composition of the Court, the viability of this once-revived statute appears in doubt. Indeed, in *Jesner*, the Court acknowledged that it may be precluded from "ever recognizing any new causes of action under the ATS" beyond the three eighteenth-century international law offenses of violations of safe conducts, infringements of the rights of ambassadors, and piracy.[171] However, it would be a mistake to abandon the flexible originalism established by the *Sosa* Court. The *Sosa* standard represents a workable system that courts have successfully applied.[172] Moreover, reorienting the ATS around a theory of strict originalism may not have the Court's intended effect.[173]

A. Sosa *Should Remain Binding Law*

The two-part *Sosa* test for recognizing new causes of action under the ATS is functional, effective, and should remain intact. When the primary holdings of *Kiobel* and *Jesner* are layered on to the *Sosa* standard, the current interpretation of the ATS accounts for the key concerns expressed by the Supreme Court; namely, avoiding the optics of hauling foreign corporations before U.S. courts and interfering with the ability of the political branches to conduct foreign policy.[174] Especially in the context of holding the U.S. government accountable for human rights violations, this rationale for overturning *Sosa* does not apply. When corporate liability is taken out of the equation, the proverbial door for recognizing new common law causes of action under the ATS is still far enough ajar that few may still enter without triggering the Supreme Court's known wariness.

If anything, the Trump Administration's treatment of noncitizens has increased the risk of the U.S. government itself committing torts in

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171 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

172 *See* discussion *supra* Section II.C.

173 *See supra* note 116 and accompanying text.

174 *Jesner*, 138 S. Ct. at 1407. Even if the Supreme Court were to extend *Jesner* to U.S. corporate defendants, e.g., Pending ATS Cases, *supra* note 10, the *Sosa* test would still be workable.

violation of the law of nations.[175] Thus, the flexible originalism of the *Sosa* standard should remain undisturbed in order to preserve a limited set of available actions without forcing district courts to wade into the murky waters of applying the Blackstone Violations in a contemporary context. Additionally, without the ATS as a viable mechanism for noncitizens to bring causes of action in federal court, there may not be another pathway to a judicial forum. The *Sosa* Court recognized that "Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation."[176] Accordingly, as long as the ATS remains the law of the land in the United States, there should be available causes of action for foreign nationals based on the holdings in *Sosa*—even in the absence of specific Congressional authorization.[177]

B. *Even if the Court Overturns* Sosa*, Violations of Safe Conducts Are a Viable Cause of Action Under the ATS*

If the Supreme Court ultimately arrives at the point delineated by the three *Jesner* justices with respect to the available causes of action under the ATS, it will not be the demise of the statute. Designating the three Blackstone Violations as the only available causes of action would still permit noncitizens to allege violations of safe conducts. For example, as suggested above, a noncitizen could theoretically sustain a claim under the ATS for, among other things, alleging a violation of the principle of non-refoulement as a species of a safe-conducts violation. Additionally, under the theory of general implied safe conducts mentioned by Blackstone and the First Congress, and helpfully elucidated by Professor Thomas H. Lee, noncitizens who suffer *any* noncontract injury that has a

175 *See* sources cited *supra* note 1.

176 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

177 *Id.* at 714, 719–20 ("The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect . . . . It would have been passing strange for [the First Congress] to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action. There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.").

U.S. sovereign nexus may have a justiciable cause of action under the ATS.[178]

If Professor Lee is in fact correct that "[t]he right rule of translation . . . of the ATS is redress of torts against aliens committed under circumstances implicating U.S. sovereign responsibility," foreign nationals enduring the harsh reality of U.S. immigration enforcement may have yet another tool in their legal arsenal: general implied safe conducts.[179] One advantage of bringing such claims—beyond the symbolic preservation of the ATS under even a strict originalism framework—is that doing so provides an alternative means of seeking justice in federal court.[180] Therefore, moving forward, immigration advocacy organizations and noncitizen plaintiffs should take the safe conducts doctrine into account when searching for civil remedies to address the harms being caused to their persons or property.

CONCLUSION

Judge Friendly once described the Alien Tort Statute as "a kind of legal Lohengrin" because "although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."[181] Four decades after its revival, the ATS now risks returning to obscurity.[182] Yet, given the plight of immigrants, refugees, and asylum seekers currently searching for safe harbor, the 200-year-old statute may be coming into focus at just the right moment. While much of the ATS litigation in recent years has centered extensively on corporate liability,[183] there is now an opportunity to return the ATS to the foundation that drove its resurgence

178 *See* discussion *supra* Sections II.B, D. Again, it would be unrealistic for the Supreme Court to knowingly open the floodgates for such a broad category of torts when attempting to achieve the exact opposite result.

179 Lee, *Safe-Conduct Theory*, *supra* note 37, at 906.

180 *Id.* at 907 (explaining that the ATS could also be utilized "as a means to ensure that the government does not contract out potentially tortious activity that injures foreigners").

181 IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

182 Pending ATS Cases, *supra* note 10; *see also* discussion *supra* notes 52–53 and accompanying text (indicating that three Supreme Court Justices in *Jesner* signaled that they believe the ATS should be restricted).

183 *See* discussion *supra* Sections I.A.3–4.

in *Filártiga* and *Sosa*. By bringing ATS actions for tortious injuries committed by the U.S. government and its officials, including for non-refoulement violations, noncitizens can continue forging a path for new causes of action under either the existing *Sosa* framework or through a revitalized safe conducts doctrine.