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Sosa Solved Nothing: Inconsistencies in the Application of the Alien Tort Statute

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Sosa Solved Nothing: Inconsistencies in the Application of the Alien Tort Statute

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Over the last five years, application of the Alien Tort Statute by U.S. courts has become inconsistent. The Second Circuit's recent decision in Abdullahi v. Pfizer *represents an unwarranted departure from the evolving standards used to govern application of the Alien Tort Statute. Disagreement over what sufficiently establishes international legal norms is partly to blame for the inconsistencies. Sources of international law, that only a few years ago were deemed insufficient to establish an international legal norm are, today, being used by federal courts to do just that. The precedent set by the U.S. Supreme Court's decision in Sosa v. Alvarez-Machain is also responsible. Sosa has left the lower courts with a standard for applying the Alien Tort Statute that is overly restrictive at best, and almost impossible to apply at worst. When taken together, disagreement over what constitutes international law, and the standard set by Sosa has created confusion among the lower courts. This leads to inconsistent jurisprudence that has unnecessarily complicated the practice of applying international law in our legal system.*

INTRODUCTION

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Despite its enactment as part of the Judiciary Act of 1789, the little-known Alien Tort Statute (ATS) has recently become a topic of increasingly heated discussion in the area of international law. The single-sentence statute allows foreigners to sue each other in U.S. federal courts for a violation of international law. The ATS is unique to the U.S. in that no other laws open a nation's court system to the world like it does. Concern over U.S. courts' ability to define international law, however, has made the ATS particularly controversial.

Difficult to decipher in its own right, international law involves a complex balancing act that requires sovereign nations to agree on what the world, collectively, views as law. With a growing need to understand issues and cooperate on an international level, the need to better understand and apply international law has also grown. The ATS adds an extra level of difficulty to applying international law in U.S. courts.

The standards used to apply the ATS have changed over time. In 2004, the Supreme Court developed its own standard for dealing with the ATS. A recent court, however, misapplied this standard, in part, because they misunderstood it. A closer look at this standard, however, will reveal that it is inappropriate for modern-day ATS cases.

This analysis will begin, in Part I, with a brief introduction to the application of international law in U.S. courts. Part II will trace the evolution of the legal standards used to evaluate the application of the Alien Tort Statute. Part III will show that the Second Circuit's recent application of sources of international law in *Abdullahi v. Pfizer, Inc*. is inconsistent with case precedent. Part IV will argue that these inconsistencies are the result of an inappropriate and overly restrictive precedent set by the Supreme Court in Sosa v. Alvarez-Machain. Finally, the Conclusion will discuss some of the implications of the *Sosa* precedent on the ATS.

Several areas of ATS jurisprudence will not be addressed in the discussion that follows. For instance, this thesis is predicated on the assumption that the ATS provides jurisdiction to U.S. courts. The recent debate over whether the ATS provides a private cause of action will not be directly addressed. This thesis will not discuss recent suggestions to amend the ATS.[1] Instead, it focuses specifically on the application of the ATS in a select number of cases, compares the application of the ATS in those cases to its application in a recent case, and argues that the current standard used by courts today is inappropriate.

[1] Carter, Kevin R. "Amending the Alien Tort Claims Act: Protecting Human Rights or Closing Off Corporate Accountability." *Case Western Reserve Journal of International Law* 38 (2007): 629-652.

I. INTERNATIONAL LAW AND U.S. COURTS

Contrary to popular belief, international law does *not* refer to a series of laws that apply specifically to countries. Instead, it includes two major sources of law: treaty law and customary international law. Treaty law refers to laws created when two or more countries enter into a treaty. Customary international law (CIL), on the other hand, refers to a much larger body of law. Generally speaking, CIL stems from the "general and consistent practice of states flowed [out of] a sense of legal obligation."[2] As we are about to see, both treaty law and CIL play an influential role with respect to the ATS.

A. The Alien Tort Statute

Enacted as part of the Judiciary Act of 1789, the Alien Tort Statute provides:

> [T]he 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.[3]

A "tort" generally refers to a wrongful act other than a breach of contract that one can seek some sort of remedy for, either in the form of damages or an injunction.[4] This statute established that individuals from other countries can sue in U. S. federal courts in a tort action for a violation of the "law of nations" or a treaty of the United States. Today, courts consider the law of nations and CIL to be synonymous. Thus, courts are allowed to hear a case under the

[2] 1 Restatement (Third) of Foreign Relations 102(2) (1987).
[3] 28 U. S. C. § 1350.
[4] Merriam-Webster Online Dictionary. 2009. <http://www.merriam-webster.com/dictionary/tort>

ATS if: (1) an alien sues (2) for a tort (3) committed in violation of CIL.[5] One difficulty in applying the ATS lies in determining what exactly constitutes CIL.

B. Sources of International Law

As previously mentioned, international law has different sources. As defined by Article 38 of the International Court of Justice, these sources include:

> a) international conventions, establishing rules expressly recognized by the contesting states;
> b) international custom, as evidence of a general practice accepted as law;
> c) the general principles of law recognized by civilized nations;
> d) judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[6]

According to the ICJ Statute, international customs (i.e. CIL) can be used to demonstrate an international law. CIL is defined by consistent and general practice of states accompanied by a sense of legal obligation. In other words, to show that CIL exists, one has to show that nations have consistently followed a custom over time. This can prove to be quite difficult, however, because any formal documentation of these customs is rare. Instead, one has to examine a state's actions (i.e. treaties they have ratified, laws they have passed, declarations they have signed, etc.) in order to determine what is CIL. These actions, thus, serve as sources of CIL.

The examination of these sources plays a vital role in any ATS case. In order for a court to determine whether a violation of CIL took place, it must first determine whether the act in question is governed by international law in the first place. Without proving that a particular CIL exists, it would be impossible to show that that law was ever violated. In order to make the determination that a CIL exists, court look to the sources of CIL (i.e. the actions of states).

[5] *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).
[6] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 ("ICJ Statute").

These sources essentially act as the *evidence* that a particular CIL exists. If a source fails to demonstrate that a particular CIL exists, a violation of that norm cannot have occurred, and the ATS claim is dismissed.

II. EVOLVING STANDARD OF THE ALIEN TORT STATUTE

Though the ATS officially became law in 1789, its first real application came in 1980. Since then, the courts have determined a number of guidelines – or standards – for applying the ATS to actual cases. Over time, these standards have changed. The following section looks at a number of important ATS cases in order to provide an overview of how ATS application standards have evolved. By understanding how the courts' reasoning regarding the ATS has developed over time, one can better understand how we arrived at the ATS standard we use today.

i. Filartiga v. Pena-Irala

For two hundred years after it was enacted, the ATS was rarely used and received little to no attention.[7] That changed, however in 1980 with the Second Circuit's ruling in *Filartiga v. Pena-Irala*.[8] The case involved a Paraguayan family suing a Paraguayan police officer for the kidnapping and murder of their son.[9] In 1976, Joel Filartiga's son was captured and tortured to death by Americo Pena-Irala, a Paraguayan police officer.[10] The kidnapping, torture and brutal murder of Filartiga's son all took place in Paraguay.[11] Filartiga attempted to sue Pena-Irala in Paraguay for the death of his son but was unsuccessful.[12] Pena-Irala then moved to the U.S.[13] A few years later, the Filartiga family discovered Pena-Irala living in Brooklyn.[14] The Filartigas

[7] Cisneros, Laura A. "Sosa v. Alvarez-Machain – Restricting Access to U.S. Courts Under the Federal Torts Claim Act and the Alien Tort Statute: Reversing the Trend." *Loyola Journal of Public Interest Law* 6 (2004): 90.
[8] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
[9] *Id.*
[10] *Id*. at 878.
[11] *Id.*
[12] *Id.* Pena-Irala successfully halted the lawsuit in Paraguay by arresting Filartiga's lawyer, threatening him with death, and eventually getting him disbarred without just cause.
[13] *Id.*
[14] *Id.* at 878-79.

sued Pena-Irala in federal court under the ATS, arguing that the torture of their son was a violation of the law of nations.[15] The district court dismissed for lack of subject matter jurisdiction.[16] On appeal, the Second Circuit reversed, holding that: (i) the ATS confers both subject matter jurisdiction and a cause of action; and (2) that torture violates the law of nations.[17]

Before they could reach this decision, the court had to take a number of important steps. First, the court addressed the matter of jurisdiction. The court held that Congress intentionally vested power in the federal courts to deal with external affairs through the Judiciary Act of 1789.[18] Looking to relevant history, the court found that the law of nations played an important role in the inception and adoption of the Constitution.[19] Consequently, the court reasoned that the interpretation of the law of nations was the responsibility of the judiciary. The court also pointed out that adjudicating tort claims outside of a court's territorial jurisdiction (in this case, Paraguay) was not uncommon.[20] The Court reasoned that even though the tort in this case arose outside of U.S. federal courts' territorial jurisdiction, Congress demonstrated through the Judiciary Act and, more specifically, the ATS that it had intended for federal courts to have power to deal with issues arising under international law. Therefore, the court held that it did have the jurisdiction to hear Filartiga's ATS claim.

Next the court addressed the question of whether the ATS created a private cause of action. Creating a cause of action simply means creating a right that allows individuals to sue (in

[15] *Id.* at 878.
[16] *Id.* at 880. (The district court interpreted "the law of nations" narrowly, and held that it did not include law that governs a state's treatment of its own citizens.)
[17] *Id.*
[18] *Id.* at 885.
[19] *Id.*
[20] *Id.*

this case, under the ATS).[21] The court held that the ATS does not grant rights to foreign citizens, but instead opens "the federal courts for adjudication of the rights already recognized by international law." [22] In other words, the court recognized that foreign citizens already have certain rights guaranteed to them under international law. Therefore, it is up to the courts to decide whether a right recognized by international law has been violated in an ATS case.[23]

Finally, the court created a framework for recognizing appropriate ATS claims. The court began by explaining that ATS allows federal courts to hear cases involving violations of a treaty of the United States or the "law of nations."[24] The court then explained that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[25] Here, the court recognized that the "law of nations" included legal norms that arose from the general practice of nations (today referred to as "customary international law" or CIL). The court then held that a CIL norm may be used in ATS cases if it is "clear and unambiguous,"[26] and if it "commands the general assent of civilized nations."[27]

The court also stated that a violation of CIL is actionable under the ATS if, and only if, "the nations of the world have demonstrated that the wrong is of *mutual*, and not merely several, concern, by mean of international accords…"[28] In other words, a violation must be one that concerns the international community, not just something that is outlawed in several countries.[29]

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[21] *Merriam-Webster Online*, s.v. "Cause of Action," http://www.merriam-webster.com/dictionary/cause %20 of% 20action (accessed April 30,2010).
[22] *Filartiga*, at 887.
[23] *Id.*
[24] 28 U.S.C. § 1350.
[25] See *United States v. Smith*, 18 U.S. (5 Wheat.) 153,160-61, 5 L. Ed. 57 (1820); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D.Pa.1963).
[26] *Filartiga*, 630 F.2d at 884.
[27] *Id.* at 881(citing *The Paquete Habana*, 175 U. S. 677 (1900))..
[28] *Id.* at 888, emphasis added
[29] *Id.*

Lastly, the court held that CIL "must [be] interpret[ed…] not as it was in 1789, but as it has evolved and exists among the nations of the world today."[30] This left the ATS room to grow and adapt to the corpus of CIL and the norms it would one day include.

Upon reviewing the Filartigas' claim in light of this new framework, the court held that the prohibition of torture was a "well-established, universally recognized norm[] of international law." [31] Consequently, the court ruled that the torture and death of Joel Filartiga's son was a violation of international law under the ATS.

The Second Circuit's ruling in *Filartiga* gave birth to the modern application of the ATS. With it came a new era of international human rights litigation. Using the standard created by the Second Circuit, litigants could now sue for human rights violations as long as they could show that the norm prohibiting a given activity was part of CIL. Following the *Filartiga* case, a number of famous cases involving murder, torture, genocide, slavery, and rape helped further establish the newfound prominence of the ATS.[32]

ii. Kadic v. Karadzic

In the years following *Filartiga*, the scope of the ATS continued to expand. In 1995, the Second Circuit once again played an influential role in shaping the ATS through its ruling in the case of *Kadic v. Karadzic*.[33] This time, the Second Circuit dealt with citizens from Bosnia-Herzegovina (Kadic) suing the de facto leader of the country's political regime (Karadzic) under

[30] *Id*. at 881.
[31] *Id.* at 888.
[32] *See, e.g.*, Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa*, 226 F.3d 88.
[33] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

the ATS.[34] Kadic alleged that Karadzic's act of violence – including rape, forced prostitution, forced impregnation, torture, and summary execution – violated CIL.[35]

The district court dismissed for lack of subject matter of jurisdiction, but once again the Second Circuit reversed.[36] Turning once again to "the works of jurists, writing professedly on public law; [] the general usage and practice of nations; or [the] judicial decisions recognizing and enforcing that law,"[37] the court held that some international norms applied to private actors and government officials.[38] Moreover, the court also held that individuals can be held liable for certain violations of international law when acting under state authority or acting in complicity with a state actor.[39] The Second Circuit's ruling in *Kadic*, thus, reaffirmed *Filartiga's* ruling that the ATS to applies to individuals – even state actors – if they were found to violate international legal norms.

iii. Flores v. Southern Peru Copper Corp.

Unlike the prior two cases which supported a broad application of the ATS, the 2003 case of *Flores v. Southern Peru Copper Corporation* demonstrates a more conservative take on the ATS. [40] In *Flores*, the Second Circuit dealt with several residents of Ilo, Peru (Flores) who complained that the sulfur dioxide produced by a nearby copper, mining, smelting and refining plant, owned by Southern Peru Copper Corporation (SPCC), had caused them or their descendants serious lung disease.[41] The plaintiffs in *Flores* brought suit against SPCC in U.S.

[34] *Id.* at 236-37.
[35] *Id.*
[36] *Id. at 245.*
[37] *Filartiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5Wheat.) 153, 160-61, 5 L. Ed. 57 (1820)).
[38] *Kadic*, at 239.
[39] *Id.* at 245.
[40] *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 236-37 (2d Cir. 2003).
[41] *Id.* at 236-37.

federal court under the ATS,[42] claiming that the pollution caused by the factory violated international legal norms that protected their "right to life," "right to health," and "right to sustainable development."[43] The plaintiffs also claimed that intranational pollution itself was a violation of international law.[44]

The district court dismissed Flores' claims because they had failed to prove the existence of the international legal norms they claimed were violated.[45] On appeal, the Second Circuit agreed. The court began by acknowledging the difficulties in determining CIL and urged courts to proceed with "extraordinary care and restraint."[46] Looking back to the framework set by *Filartiga*, the court held that the "right to life," "right to health," and "right to sustainable development" were not "clear and unambiguous" and were not of "mutual concern."[47] Instead, the court held that these "rights" were "vague and amorphous," and thus incapable of being clearly defined.[48] Moreover, the court found that the rights alleged by Flores were not followed out a sense of legal obligation and, thus, not appropriate sources of international law.[49]

In doing so, *Flores* introduced important restrictions on the application of the ATS. It required that CIL norms be followed out of a sense of *legal obligation* in order to be actionable under the ATS. *Flores* also reaffirmed the *Filartiga* framework, which required norms to be clear, unambiguous, and of mutual concern. By taking a more restrictive approach, *Flores* built

[42] *Flores* refers to the Alien Torts Statute (ATS) as the Alien Tort Claims Act (ATCS). They are synonymous.
[43] *Id*. at 237.
[44] *Id.*
[45] *Id.*
[46] *Id*. at 247-48.
[47] *Id.* at 252 (citing *Filartiga*, 630 F 2d.).
[48] *Id.* at 254.
[49] *Id. at 252* (explaining that "customs or practices based on social and moral norms, rather than international legal obligation, are not appropriate sources of customary international law because they do not evidence any intention on the part of States, much less the community of States, to be legally bound.")

legal obligation into the standard for evaluating ATS claims. This addition will prove to be particularly important when the ATS reaches the Supreme Court several years later.

iv. Sosa v. Alvarez-Machain

While the applicability of ATS underwent a series of expansions and contractions, the Supreme Court remained silent on the issue. In 2004, however, the Court heard the case of *Sosa v. Alvarez Machain*.[50] In doing so, the Court attempted to answer an increasing number of questions regarding the scope of the ATS by making its position clear. What followed was a new standard for applying the ATS.

In 1985, Enrique Camarena-Salazar (Camarena), an agent for the U.S. Drug Enforcement Agency (DEA) was abducted while on assignment in Mexico.[51] Camarena was then tortured over the course of a two-day interrogation before finally being murdered.[52] Based on eyewitness testimony, DEA agents came to suspect Dr. Humberto Alvarez-Machain (Alvarez), a Mexican citizen, was responsible for prolonging Camarena's life in order to draw out the torture and interrogation.[53]

In 1990, a federal grand jury indicted Alvarez for his role in the torture and murder of Camarena, and a warrant was issued for his arrest.[54] The DEA then requested that Alvarez be extradited to the U.S., but the request proved fruitless.[55] Instead, DEA agents sent a team of Mexican nationals, including Jose Francisco Sosa, to abduct Alvarez and bring him to the United

[50] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)
[51] *Id.* at 697.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 697-98.
[55] *Id.* at 698.

States to stand trial.[56] Alvarez later filed a suit against Sosa, the United States, and the DEA under the ATS, claiming that his arbitrary abduction and detention violated a CIL norm against abduction.[57]

The case eventually made its way to the U.S. Supreme Court.[58] After a careful review of the history behind the ATS and development of ATS case law since *Filartiga,* the Court rejected Sosa's argument that his abduction and detainment violated CIL.[59] In doing so, it created a new standard for assessing ATS claims.

The Court concluded that the ATS was enacted by Congress to apply to a limited category of claims.[60] More specifically, the Court explained that the ATS should recognize only CIL norms that demonstrate "definite content and acceptance among civilized nations [comparable to] the paradigms familiar when § 1350 was enacted."[61] The Court reasoned that doing so would ensure that the ATS would only be applied in ways that the First Congress might have intended.

To get a better understanding at the intent of the First Congress, the Court turned to Blackstone and his writings on the law of nations according to English criminal law. Blackstone emphasized three specific violations of the law of nations: violation of safe conduct, infringement of the rights of ambassadors, and piracy.[62] The Court reasoned that the First

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[56] *Id.*
[57] *Id.*(alleging that an arbitrary arrest violated the law of nations).
[58] The District court originally awarded Sosa $25,000 in damages under his ATS claim, and the judgment was later affirmed by a three-judge panel of the Ninth Circuit. 266 F.3d 1045 (2001). A divided en banc court came to the same conclusion. 331 F.3d, at 641. As for the ATS claim, the court relied upon what it called the "clear and universally recognized norm prohibiting arbitrary arrest and detention," *id*., at 620, to support the conclusion that Alvarez's arrest amounted to a tort in violation of international law.
[59] *Sosa*, 542 U.S. at 724-25.
[60] *See Sosa*, 542 U.S. at 712-25 (discussing the history of the ATS and the reasons for adopting it in 1789).
[61] *Sosa.* at 732. See, *e.g., United States* v. *Smith,* 18 U.S. 15 (illustrating the specificity with which the law of nations defined piracy).
[62] *See* 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)

Congress had the 18th century paradigms that prevented these offenses (hereinafter "piracy paradigms") in mind when enacting the ATS. Applying that intent to international law today, the Court concluded that the ATS applies only to claims based on CIL norms that are *as* specific, *as* universal, and *as* obligatory as the piracy paradigms of the 18th century.[63]

The Court explained that a limited interpretation of the ATS was necessary for several reasons. First, the Court acknowledged that our conception of common law has changed since 1789 when the ATS was enacted.[64] Consequently, the Court reasoned that judges should be particularly cautious when recognizing legal norms outside of what was understood to be part of the law of nations when the ATS was signed into law. Second, the Court concluded that, without express authority for the statute or a mandate from Congress, it was not the role of the judiciary to create new applications of the ATS.[65] Finally, the Court was hesitant to create new applications of the ATS because it might interfere with the Legislative and Executive Branches' duties to manage foreign affairs."[66] In the words of Justice Souter, these reasons prompted the Court to close the door opened by *Filartiga* but leave it "ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." [67]

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Sosa marked a significant transformation in the way the ATS can be applied. It attempted to establish a clear standard that could be used by lower courts in assessing ATS claims. This standard focused on three features of 18th century paradigms (the piracy

[63] Sosa, 542 U.S. at 732-35 (quoting Filartiga, 630 F.2d at 890 ("The torturer has become -- like the pirate and slave trader before him -- hostis humani generis, an enemy of all mankind.")); (quoting Tel-Oren, 726 F.2d at 781 (Edwards, J., concurring) (describing how section 1350 should reach only "a handful of heinous actions -- each of which violates definable, universal and obligatory norms")); (quoting Marcos, 25 F.3d at 1475 (cognizable "violations of international law must be of a norm that is specific, universal, and obligatory."))(emphasis added).
[64] *Sosa*, at 725. (explaining that common law is now considered to be something that is created as opposed to something that is discovered).
[65] *Sosa*, at 726-28.
[66] *Id*. at 727.
[67] *Id.* at 729.

paradigms): universality, specificity, and obligation. By requiring future ATS claims to be as specific, definable, universal, and obligatory as the piracy paradigms, the Court provided lower courts with a comparative tool to assess ATS cases.

In doing so, *Sosa* also incorporated many of the cases that came before it. For example, it upheld *Filartiga*'s requirement that CIL norms "command the general assent of nations" and be "clear and unambiguous."[68] It also upheld *Kadic*'s application of the ATS to individuals by recognizing piracy as a violation of international law.[69] Finally, the *Sosa* standard's specificity requirement addressed *Flores'* need for rules that are clearly defined.[70] Taken together, these cases gave birth to the tripartite test used by courts today. According to this test, the ATS applies to claims based on violation of a CIL norm that, when compared to *Sosa*'s piracy paradigms, is:

(1) Universal and legally obligatory, (*Filartiga, Flores, Sosa*)

(2) Specific and definable, and (*Flores, Sosa*)

(3) Of mutual concern.[71] (*Filartiga, Flores*)

While it represents a synthesis of over 20 years of case law, there is no question that *Sosa*'s "vigilant doorkeeping" provides a much narrower interpretation of the ATS. Its focus on the 18th century paradigms restricts modern cases to a handful of comparable violations, and overthrows *Filartiga*'s requirement of applying law "not as it was in 1789, but as it has evolved and exists among the nations of the world today."[72]

[68] *Supra* note 26, at 884; and note 27, at 881.
[69] *Supra* note 38, at 239.
[70] *Supra* note 48, at 254.
[71] *Sosa*, 542 U.S. at 732-35.
[72] *Supra* note 30, at 881.

As standing case precedent, *Sosa* continues to be the controlling opinion on the application of the ATS. Since 2004, the *Sosa* standard has been applied to a handful of cases. As the following chapters will go on to explain, the introduction of the *Sosa* standard has proved particularly difficult for lower courts to apply. Confusion over what *Sosa* actually requires of CIL norms has led to rulings that are inconsistent with both *Sosa* and its predecessors.

III. THE STANDARD APPLIED: *ABDULLAHI V. PFIZER, INC.*

One of the first opportunities to apply the Supreme Court's *Sosa* standard came with *Abdullahi v. Pfizer Inc*.[73] In 2009, the Second Circuit was asked to hear a case dealing with a major pharmaceutical company engaged in non-consensual medical experimentation (hereinafter "NCME"). The victims sued the pharmaceutical company under the ATS, alleging that the NCME violated international law. Turning to various sources of international law, the Second Circuit assessed the validity of the victims' claim by applying the newly-established *Sosa* standard. A careful analysis of both the facts and the sources used by the Second Circuit, however, will reveal that its ruling in *Abdullahi* is patently inconsistent with ATS jurisprudence.

A. Introduction to Abdullahi v. Pfizer

In 1996, Pfizer Incorporated set out to test its new antibiotic, Trovaloxacin Mesylate (nicknamed "Trovan"), on children who had contracted bacterial meningitis in Northern Nigeria as the result of a widespread epidemic.[74] In an attempt to gain approval by the U.S. Food and Drug Administration ("FDA"), Pfizer dispatched three of its American physicians to Kano, Nigeria where they recruited two hundred children that had contracted the disease.[75] In order to test the effectiveness of Trovan, Pfizer's physicians set up an experimental and a test group: half the children (the experimental group) were given Trovan while the other half (the control group) were given Ceftriaxone, an FDA-approved antibiotic.[76]

[73] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. N.Y. 2009).
[74] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. N.Y. 2009).
[75] *Id*.
[76] *Id*.

Trovan had never before been tested on children and animal testing had shown that the drug had potentially life-threatening side effects.[77] In addition, Pfizer physicians allegedly administered purposefully low doses of Ceftriaxone in order to exaggerate the effectiveness of Trovan by comparison.[78] Eleven children died as the result of these experiments, five of whom had taken Trovan and six of whom had received an insufficient dose of Ceftriaxone; several other children were left blind, deaf, paralyzed, or brain-damaged as a result of Pfizer's experiment.[79] To add insult to injury, Pfizer failed to get informed consent from either the children or their guardians and failed to explain the experimental nature of the study or its potentially dangerous side effects.[80]

In 2001, Rabi Abdullahi, joined by hundreds of other families who had suffered or lost children as a result of Pfizer's negligence, filed suit against Pfizer Inc. Abdullahi sued under the ATS, claiming that the experiments conducted by Pfizer violated an international legal norm prohibiting medical experimentation on non-consenting human subjects (hereinafter the "experimentation norm").[81]

The district court dismissed the case, arguing that Nigeria was an adequate alternative to U.S. courts for Abdullahi's claim.[82] Furthermore, the court concluded that Abdullahi had "failed to identify a source of international law that "provide[s] a proper predicate for jurisdiction under the ATS."[83]

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[77] *Id*. Animal testing ad shown that Trovan could lead to joint disease, abnormal cartilage growth, liver damage, and a degenerative bone condition.
[78] *Id*. Because this case is being reviewed on a motion to dismiss, certain unproven facts may have been procedurally construed in a light most favorable to the plaintiffs.
[79] *Id*.
[80] *Id*. at 169-70
[81] *Id*. at 170.
[82] *Id.* at 171.
[83] *See Abdullahi III*, 2005 U.S. Dist. LEXIS 16126, (2005).

On appeal, the Second Circuit decided to review the lower court decision from the beginning.[84] Bound by the precedent set by *Sosa*, the court determined whether there was a CIL experimentation norm that was sufficiently: (1) universal and obligatory; (2) specific and definable; and (3) of mutual concern.

Upon reviewing the sources of international law provided by Abdullahi, the court concluded that the experimentation norm was universally accepted by the nations of the world.[85] Next, the court determined that each of these sources clearly and specifically defined non-consensual medical experimentation, as required by *Sosa*.[86] Finally, the court held that the prohibition of non-consensual medical experimentation was an issue of mutual concern (something that concerns and involves the international community as a whole). On the premise that medical experimentation leads to drugs that help cure diseases affecting people around the world, the court reasoned that non-consensual experimentation impedes that process by creating fear and distrust towards pharmaceutical companies.[87] The resulting decrease in the use of drugs and the accompanying spread of infectious disease, according to the court, would pose a threat to international peace and security.[88] Consequently, the court held that the prohibition of non-consensual medical experimentation – in an attempt to prevent the spread of infectious disease – provided a sufficient and mutual cause for concern.[89] In sum, Second Circuit concluded that non-consensual medical experimentation is prohibited by CIL.[90]

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[84] *Abdullahi*, 562 F.3d at 172 (explaining that the Second Circuit agreed to hear the case *de novo*).
[85] *Id.* at 174.
[86] *Id.*
[87] *Id.* at 187.
[88] *Id.*
[89] *Id.* at 185-88.
[90] *Id.* at 187.

B. Inconsistent Application of Sources

The Second Circuit's ruling in *Abdullahi* represents a misapplication of several sources of international law. In an attempt to force those sources into the overly restrictive framework of *Sosa*, the court overlooked key problems with each source. To better understand the court's mistake, it is important to compare the sources used in *Abdullahi* to the sources used in *Filartiga*, *Flores*, and *Sosa*. By the comparing ways in which they were applied, it becomes obvious that the application of sources in *Abdullahi* is inconsistent with prior rulings.

i. Sources in Filartiga

In *Filartiga*, the court held that the CIL norm prohibiting torture was "clear and unambiguous,"[91] "command[ed] the general assent of civilized nations,"[92] and was "of mutual concern."[93] In order to reach this determination, the court looked at three sources of international law.

First, the court turned to two United Nations General Assembly Resolutions: the Universal Declaration of Human Rights (Universal Declaration) and the Declaration on the Protection of All Persons from Being Subjected to Torture (Declaration on Torture)[94]. The court

[91] *Filartiga*, 630 F.2d at 884.
[92] *Id.* at 881(citing *The Paquete Habana*, 175 U. S. 677 (1900)).
[93] *Id*. at 888.
[94] Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U. N. GAOR Supp. (No. 34) 91, U. N. Doc. A/1034 (1975).

11 Article 1
1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.
Article 2
Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.
Article 3

held that the U.N. Declarations were relevant because they expressly prohibit torture by any state, clearly define the act of torture, and explicitly outline what a victim of torture is entitled to.[95] In other words, the court was struck by the specificity of the declarations.[96]

Next, the Court turned to international accords and treaties. The court acknowledged that there were a number of international agreements that prohibited the use of torture.[97] With that, the court concluded that there was a clear consensus among the nations of the world that torture was prohibited.[98] The court also held that torture is of mutual concern because "the nations [of

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No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.
Article 4
Each state shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.
Article 5
The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.
Article 6
Each state shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.
Article 7
Each state shall ensure that all acts of torture as defined in Article I are offenses under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.
Article 8
Any person who alleges he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have the right to complain to, and to have his case impartially examined by, the competent authorities of the state concerned.
Article 9
Wherever there is reasonable ground to believe that an act of torture as defined in Article I has been committed, the competent authorities of the state concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint.
Article 10
If an investigation under Article 8 or Article 9 establishes that an act of torture as defined in Article I appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders in accordance with national law. If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings.
Article 11
Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law.
Article 12
Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceeding.

[95] *Id.* at 883.
[96] *Id.*
[97] *Id.*at 883-84.
[98] *Id.* at 884.

the world] have made it their business, both through international accords and unilateral action," to prohibit the exercise of torture.[99]

Finally, the court examined the general practice of states. Recall that international law can be evidenced by the general and consistent practice of states.[100] With this in mind, the court was particularly convinced that states generally prohibit torture based on statistics that torture was constitutionally banned in over fifty-five countries around the world, including the United States.[101]

After taking all of these sources of international law into account, the *Filartiga* court concluded that torture was clearly prohibited by international law. For the purposes of comparison, it is important to note that the court was ultimately convinced by specificity and breadth of sources that prohibited torture.

ii. Sources in Flores

In *Flores*, the court determined that the rights to life, health, and sustainable development were too broad, unclear, and amorphous to qualify as a CIL norm.[102] In order to come to this decision, the court examined the sources of international law cited by the petitioners.

To support his claim, Flores cited a number of international agreements to define the rights to life and health (i.e.: the International Covenant on Civil and Political Rights ("ICCPR"), the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and Rio Declaration on Environment and Development).[103] The court rejected each of these, holding that the language used to define Flores' alleged rights in many of

[99] *Id.* at 889.
[100] *Supra* note 2.
[101] *Filartiga*, at 884.
[102] *Flores*, 414 F.3d at 252-54.
[103] *Id.* at 254-55

these sources was "vague and amorphous."[104] The court concluded that the sources used by Flores outline "boundless," "indeterminate," and "virtuous goals" that "ultimately, failed to meet [*Filartiga*'s] requirement of clarity."[105] The court also pointed out that many of the rights asserted by Flores were not proportionally relevant to the sources that were cited.[106] In other words, the court found it problematic that the rights asserted by Flores were mentioned only once or twice in an entire document, as opposed to being the focus of the sources that were cited. Finally, the court concluded that the sources used by Flores were insufficient to support his claim because they failed to demonstrate any sort of legal obligation.[107]

The *Flores* Court was ultimately convinced by an absolute lack of clarity in defining the CIL norms alleged by the Flores. The Court also criticized the *nature* of the alleged norms, concluding that norm had to be more than just aspirational. Instead, it had to be clearly defined and followed because of a sense of legal obligation. Finally, the Court held that a norm had to be proportionally relevant to the source from which it comes. These limitations on the application of the ATS will be particularly important in assessing the content and nature of the norms alleged in *Abdullahi*.

[104] *Id.* at 254.
[105] *Id*. at 255.
[106] *Id.* at 258.
[107] *Supra* note 49, at 252 (explaining that "customs or practices based on social and moral norms, rather than international legal obligation, are not appropriate sources of customary international law because they do not evidence any intention on the part of States, much less the community of States, to be legally bound.").

iii. Sources in Sosa

In *Sosa*, the U.S. Supreme Court ruled that CIL did not prohibit arbitrary abduction and detention.[108] Once again, in order to reach its ruling, the Court examined the sources of international law presented by the petitioner.

Sosa argued that the CIL norm prohibiting arbitrary abduction and detention could be found in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR).[109] The Court, however, found both documents to be insufficient evidence of said norm. With respect to the Declaration, the Court held that it does not, by itself, impose obligations as a matter of international law on any of its signatories.[110] Regarding the ICCPR, the Court acknowledged that, while it does bind the United States as a matter of international law, it was ratified under the express understanding that it could not be enforced in federal courts.[111] In the end, the Court ruled that both the Declaration and the ICCPR, "despite their moral authority," were insufficient to support Sosa's argument.[112] With little else to support his claim, the Court concluded that Sosa's general prohibition of arbitrary abduction and detention was too broad to support the existence of specific, universal, and obligatory CIL norm.[113]

In what seems like a technicality, the *Sosa* Court rejected Sosa's arguments because he lacked the appropriate foundation for establishing a CIL norm actionable under the ATS. Of particular importance in this case is the Court's express rejection of the Declaration of Human Rights and the ICCPR as appropriate sources of international law. Though the Court specifically

[108] *Sosa*, 542 U.S. at 724-25.
[109] *Id.* at 734.
[110] *Id.*
[111] *Id.* at 735.
[112] *Id.* at 734.
[113] *Id*. at 736.

invalidated the ICCPR as an appropriate source, the very same accord will be used to justify the Second Circuit's ruling in *Abdullahi*.

iv. Sources in Abdullahi

In Abdullahi, the Second Circuit ruled that CIL *did* provide for an international norm against non-consensual medical experimentation. Like all the cases before it, the court reached its decision by looking to the sources of international law cited by the plaintiffs to see if such a norm actually existed. In *Abdullahi*, the plaintiffs specifically cited four sources of CIL: (1) the Nuremberg Code, (2) the International Covenant on Civil and Political Rights ("ICCPR"); (3) the World Medical Association's Declaration of Helsinki, and (4) the guidelines authored by the Council for International Organizations of Medical Services ("CIOMS").[114] The court held that these sources demonstrated that a CIL norm preventing non-consensual medical experimentation was sufficiently universal, specific, and of mutual concern under the *Sosa* standard.[115]

The court began its examination of sources by looking at the Nuremberg Code. The Code states, which states as its first principle that "[t]he voluntary consent of the human subject is absolutely essential." [116] The court acknowledged that Nuremberg had previously been interpreted as defining certain "universal and fundamental [human] rights" that later evolved into

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[114] *Abdullahi*, 562 F.3d at 175 (citing (1) *United States v. Brandt*, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181 (1949) [hereinafter Nuremberg Trials]; (2) World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, art. **[**23]** 20, 22, G.A. Res. (adopted 1964, amended 1975, 1983, 1989, 1996, and 2000), http://www.wma.net/e/policy/pdf/17c.pdf [hereinafter Declaration of Helsinki]; (3) Council for International Organizations of Medical Services [CIOMS], International Ethical Guidelines for Biomedical Research Involving Human Subjects, guideline 4 (3rd ed. 2002), *superseding id.* at guideline 1 (2nd ed. 1993); (4) International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].)

[115] *Id.* at 177.

[116] *Id.* at 179 (citing *United States v. Brandt*, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181, 181-82 (1949)).

universal and indisputable international legal norms.[117] Moreover, the court recognized that "[t]he medical trials at Nuremberg in 1947 deeply impressed *upon the world* that experimentation with unknowing human subjects is morally and legally unacceptable."[118] Finally, the court suggested that a number of international accords and domestic laws prohibiting non-consensual medical experimentation had been enacted because of Nuremberg.[119] Taking this together, the court held that Nuremberg expressed a norm that eventually evolved into a universally accepted CIL norm prohibiting non-consensual medical experimentation.

Next, the court looked to the ICCPR, which states that "no one shall be subjected without his free consent to medical or scientific experimentation involving risk, where such is not required by his state of physical or mental health."[120] The court held that the ICCPR was legally binding, and thus required its signatories to "undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[121] The court also acknowledged *Sosa*'s holding that the ICCPR could not, by itself, establish a CIL norm.[122] Nevertheless, the court held that the ICCPR reaffirmed the norm articulated by the Nuremberg Code.[123]

The court also looked to the World Medical Association's Declaration of Helsinki. The Declaration states that "[i]f at all possible, consistent with patient psychology, [a] doctor should

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[117] *Id*. (quoting *Siderman de Blake v. Republic of Arg*., 965 F.2d 699, 715 (9th Cir. 1992)(explaining that "[t]he universal and fundamental rights of human beings identified by Nuremberg--rights against genocide, enslavement, and other inhumane acts…--are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*," from which no derogation is permitted, irrespective of the consent or practice of a given State.)
[118] *Id.* (citing *United States v. Stanley*, 483 U.S. 669, 687 (1987) (Brennan, J., concurring in part and dissenting in part) (emphasis added)).
[119] *Id.*
[120] *Id.* at 180 (quoting the International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171).
[121] *Id.*
[122] *Sosa*, 542 U.S. at 735.
[123] *Abdullahi* , 562 F.3d at 180.

obtain the patient's freely given consent after the patient has been given a full explanation."[124] Although the Declaration of Helsinki was not legally binding, the court held that it, like the Nuremberg Code, inspired several individual countries to enact laws that prohibit non-consensual medical experimentation.[125] This, the court concluded, also reaffirmed (but did not itself establish) a CIL norm prohibiting non-consensual medical experimentation.[126]

Finally, the court looked at ethical guidelines authored by the Council for International Organizations of Medical Services ("CIOMS"), which require "the voluntary informed consent of [a] prospective subject"[127] Interestingly, although the CIOMS guidelines were cited by Abdullahi in support of an experimentation norm, the court never explicitly dealt with it in its opinion. The court never discussed whether the CIOMS guidelines were universal, specific, or of mutual concern. In short, the court avoided the CIOMS guidelines all together, and for good reason.

C. Problems with Abdullahi

Based on the sources of international law cited by Abdullahi, The Second Circuit held that the ATS recognizes a CIL norm prohibiting NCME. However, by comparing the sources of CIL used in *Abdullahi* to the sources used in *Filartiga*, *Flores*, and *Sosa*, it becomes abundantly clear that the Second Circuit's application of the *Sosa* standard was flawed.

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[124] *Id*. at 181 (quoting World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, art. 20, 22, G.A. Res. (adopted 1964, amended 1975, 1983, 1989, 1996, and 2000), http://www.wma.net/e/policy/pdf/17c.pdf [hereinafter Declaration of Helsinki]).
[125] *Id*.
[126] *Id*. at 181-83.
[127] *Id*. at 175 (quoting for International Organizations of Medical Services [CIOMS], International Ethical Guidelines for Biomedical Research Involving Human Subjects, guideline 4 (3rd ed. 2002), *superseding id.* at guideline 1 (2nd ed. 1993);

i. The Nuremburg Code

In its examination of the sources cited by Abdullahi, the court acknowledged that the Nuremburg Code was internationally revered, and recognized as instrumental in the area of medical rights. From this, the court concluded that Nuremberg asserts a universal CIL norm prohibiting non-consensual medical experimentation. The court also held that Nuremberg enjoys a well-established position in the general body of international law, but is *not* legally binding.

Based on what is presented in the court's opinion, we can conclude only two things about the Nuremburg Code: (1) it is well-respected; and (2) it is not legally binding. Immediately this poses a problem for the *Sosa* standard, which requires that a CIL norm be as specific, as universal, *and* as obligatory as the piracy paradigms. Its specificity remains unquestioned. Its universality, however, is only tenuously established by the fact that it is has "impressed upon the world" the idea that non-consensual medical experimentation is wrong.[128]

The fact that Nuremberg is not legally binding is also problematic. Without a way to bind other states, Nuremberg failed to meet the requirement established by *Flores* and reaffirmed in *Sosa* that a CIL norm be followed out of a sense of legal obligation. Whether Nuremberg was viewed as authoritative or influential by other states in the creation of domestic legislation that bans non-consensual medical experimentation – as the *Abdullahi* Court attempts to point out – is irrelevant. Whether Nuremberg later went on to establish unbreakable rules of international law (*jus cogens* norms) is also irrelevant – especially given that *jus cogens* norms do not explicitly prohibit non-consensual medical experimentation.

In sum, the Nuremberg Code fails to demonstrate that a norm prohibiting non-consensual medical experimentation is universal or obligatory in a way that satisfies *Sosa*. According to

[128] *Supra* note 118, at 179.

Sosa, then, the *Abdullahi* Court was mistaken when it concluded that Nuremberg establishes a norm actionable under the ATS.

ii. The ICCPR

The *Abdullahi* Court also looked at the ICCPR. The Court held that it was both universally accepted, noting that over 160 countries have ratified the ICCPR.[129] The Court also found that the ICCPR was legally binding, and therefore obligatory to the states that ratified it. Based on the ICCPR's wide-spread acceptance and well-established following, the Court concluded that norms espoused by the ICCPR (one of which prohibits NCME) are also universal and obligatory.

Despite the *Abdullahi* Court's findings, the ICCPR poses a number of problems for supporting a NCME norm. First, the ICCPR's alleged NCME norm represents a small part of a much larger document which focuses on a number of different issues.[130] The *Abdullahi* Court held that "the part" (the NCME norm) is universal and obligatory because "the whole" (the ICCPR) was universal and obligatory. This reasoning is not necessarily fatal to Abdullahi's claim under *Sosa*'s requirements. The ICCPR does, in fact, encompass a number of different norms that are considered to be part of CIL. It is, however, important to just how small the NCME part is relative to the ICCPR as a whole. Recall that *Flores* required a proposed norm to be proportionally relevant to source that establishes it.[131] Article 7 of ICCPR is the only article out of more than 50 that makes any reference to NCME.[132] Out of a possible 7,033 words, only 32 of them deal with NCME. So, while the support for an NCME norm does exists within the

[129] *Adbullahi*,562 F.3d at 180.
[130] See International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171("ICCPR").
[131] *Supra* note 106, at 258.
[132] See ICCPR.

ICCPR, the support itself is rather weak given a lack proportional relevance. Consequently, the ICCPR is not strong enough under *Sosa* to support an NCME norm by itself.

Second, the ICCPR was already invalidated by the Supreme Court as an appropriate source of CIL. Recall that, in *Sosa*, the Supreme Court held that the ICCPR was ratified under the express understanding that it could not be enforced in U.S. federal courts. [133] Consequently, the Court held that the ICCPR could not be used in U.S. Courts to establish the "relevant and applicable rule of international law." [134] The *Abdullahi* Court acknowledges the Supreme Court's ruling on the ICCPR and attempts to remedy the problem by finding that the ICCPR merely *reaffirms* the NCME norm established by the Nuremberg Code. As the previous section demonstrated, the Nuremberg Code fails to support its own NCME norm under the ATS, let alone an ICCPR norm. As result, the *Abdullahi* Court's point is moot.

Once again, the *Abdullahi* Court failed to abide by the standard created by *Sosa*. Rather than providing a norm that was so specific, so universal, and so obligatory that it could compare to the piracy paradigms, the ICCPR presented a norm that was only partially obligatory and only somewhat universal.

iii. The Declaration of Helsinki and the CIOMS Ethical Guidelines

Finally, the *Abdullahi* court looked at the Declaration of Helsinki and the CIOMS Ethical Guidelines. The Court found that both documents were recognized by a number of countries around the world even though neither were legally binding. Furthermore, the Court acknowledged that the Declaration of Helsinki, like the Nuremberg Code, helped spur domestic legislation prohibiting NCME in several countries. The Court concluded that the incorporation

[133] Supra note 111, at 735.
[134] *Id*.

of a NCME norm into domestic law was strong evidence that the norm itself was universal and obligatory.

Once again, when viewed in light of what is required by *Sosa*, the *Abdullahi* Court's analysis is fraught with problems. First, the Court ignores the CIOMS Guidelines almost entirely. Aside from finding that they are well-respected by countries around the world, the Court says nothing about the Guidelines' universality, specificity, or obligation. The Court probably sidestepped these issues because the Guidelines would have conflicted with *Flores* and *Sosa*. Recall that *Flores* rejected "vague," "amorphous," and aspirational declarations of principle as appropriate sources of CIL because they posed no legal obligations.[135] The CIOMS *Ethical* Guidelines clearly fall into this category, as the very title suggests, because they reflect what medical experts *should* do as opposed to what they *must* do as a matter of law. Given its lack of legal obligations and no other support from the *Abdullahi* Court, it is safe to conclude that the CIOMS Ethical Guidelines fail to meet what was required of it by *Sosa*.

With respect to the Declaration of Helsinki, the Court again runs into problems with the issue of legal obligation. As stated in *Flores* and reaffirmed by *Sosa*, it is not enough for a norm to be followed because moral, ethical, practical, or prudential concerns. Instead, to be actionable under the ATS, a CIL norm must be followed out of a sense of legal obligation.[136] Since the Declaration was not legally binding, it could not impose any sort of legal obligation. The lack of any real legal obligation is underscored by the text of the Declaration itself. Recall that the relevant portion of the Declaration states that: "[i]f at all possible, consistent with patient psychology, [a] doctor should obtain the patient's freely given consent after the patient has been

[135] *Supra* note 104, at 254.
[136] *Supra* note 49, at 252; and note 63, at 732-35.

given a full explanation."[137] The prefatory clause "if at all possible" suggests that states are not *obligated* to do so, but instead are *encouraged* to do so. As a result, the Declaration of Helsinki provides a clear lack of legal obligation that is patently inconsistent with the unquestionable piracy paradigms cited by *Sosa*.

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Ultimately, each source cited by the *Abdullahi* Court fails to meet the high bar set by *Sosa*. Though the Court might have thought it demonstrated that NCME was universal, specific, and obligatory under *Sosa*, the Courts reasoning is plagued by a number of problems. Paying specific attention to *Sosa*'s obligation prong, almost all of the sources cited by *Abdullahi* fail to demonstrate that states follow them out of a sense of legal obligation. Since none of the sources, with the exception of the ICCPR, were legally binding, it would be impossible to suggest that countries followed them out of a source of legal obligation. While it may be possible to argue that the sources together are evidence of a norm, *Sosa* requires more than that. Recall that *Sosa* requires sources to be *as* obligatory as norms in the 18th century; the piracy paradigms were each obligatory in their own right. Because Abdullahi's sources fail to demonstrate such a clear sense of legal obligation, the case should have failed *Sosa*'s stringent test.

[137] *Supra* note 123, at 181.

IV. SOURCE OF THE CONFUSION: A BAD STANDARD

The *Abdullahi* Court interpreted *Sosa* to require only that sources show that a CIL norm is sufficiently specific, universal, and obligatory in order for courts to recognize a right to sue under the ATS.[138] The Court goes on to assert that the legally binding nature of CIL sources is irrelevant.[139] A plain reading of *Sosa*, however, seems to require much more. Recall that *Sosa* explicitly mandates that the ATS does not recognize any CIL norms "with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[140] In other words, *Sosa* required that the ATS could *only* apply to norms so widely accepted and so necessary that there could be no question that they bound the nations of the world. *Sosa* affirmed this interpretation when it explained that ATS was meant to apply only "to a narrow class of international norms today."[141]

Viewed side by side, the *Abdullahi* and *Sosa* interpretations of the ATS are incompatible. Where the *Abdullahi* Court takes a more liberal approach to the application of the ATS, the *Sosa* Court requires a much more restraint. This divergence presents a problem: which application is correct? On one hand, there can be no question that, as standing case precedent, the standard provided by *Sosa* reigns supreme. On the other hand, one would be hard-pressed to argue that countries across the world permit non-consensual medical experimentation. As *Abdullahi* illustrated, there are a plethora of international agreements, accords, and domestic laws that prevent it. There is no question that a CIL norm prohibiting non-consensual medical

[138] Abdullahi, 187.
[139] *Id.*
[140] Supra note 61, at 732.
[141] Supra note 67, at 729.

experimentation already exists; we can all safely agree that it is something nations universally forbid. Unfortunately, the norm fails to meet the stringent standard set by *Sosa.*

What remains to be seen, however, is whether the standard itself is suitable for applying the ATS today. The *Sosa* Court grounded its opinion in the historical context of the ATS. The Court attempted to show that the safest and most appropriate way of applying the ATS was to do so in a way that was consistent with what was understood at the time of the ATS's enactment. The result was a standard that proved to be overly restrictive, and difficult to apply by lower courts, as seen in *Abdullahi*. In addition, this thesis will go on to demonstrate that the *Sosa* standard is unworkable and inappropriate given international law today.

The problems with *Sosa* are two-fold. First, the *Sosa* standard is based on a body of international law that no longer exists. Since the enactment of the ATS in 1789, international law has undergone an entire paradigm shift. As a result, the Supreme Court's attempt to tie modern-day application of the ATS to an incommensurable era of international law is inappropriate.

Second, the *Sosa* standard is far too strict to adapt to modern-day issues in international law. The *Sosa* Court interpreted the ATS's reference to the "law of nations" to only allow CIL norms similar to the piracy paradigms. The corpus of CIL, however, has grown dramatically since the ATS's enactment and continues to grow to this day. By limiting the ATS to only a handful of archaic violations, the *Sosa* standard precludes ATS application to a number of human rights violations (like non-consensual experimentation) that, otherwise, go unaddressed. In short, *Sosa* undoes much of its predecessors' work by implementing a standard that simply does not work in today's federal courts.

A. The Law of Nations and the Paradigm Shift

Although the controversy revolving around ATS is fairly recent, the concept of international law, or the "law of nations," is nothing new. Like our system of common law, the idea of the law of nations comes to us as part of our Anglo-American legal heritage. Since its adoption by the U.S. in the 18th century, the law of nations – commonly referred to today as CIL – has undergone a number of important changes. To fully understand these changes, it is important to look, first, at the historical context in which the law of nations is grounded. An explanation of the role it played in both 18th century England and post-colonial America will lend itself to understanding how the law of nations was viewed and what role it might have been expected to play. Next, an introduction to a landmark case that fundamentally changed how the law of nations was viewed will help illustrate the divide between its past and present applications. A proper understanding of these changes reveals that *Sosa*'s allusion to 18th century paradigms is inappropriate for dealing with the ATS today.

i. The Diachronic History of the Law of Nations

Dating as far back as the fifteenth century, the law of nations comes to us as part of the common law system we inherited from England. As the name suggests, the law of nations dealt with activities and relationships between nations, and thus applied generally to all nations. It applied to areas of maritime law, laws regulating merchant activity, and laws regulating the behavior of states (including, but not limited to, piracy and attacks on ambassadors). Since its inception, the law of nations was considered to be part of the "common law." In other words, England considered the law of nations to be part of its nation's own laws, not a separate body of law that existed elsewhere. As such, it could be applied in domestic cases, and applied to

individuals just like any other law did. This practice was eventually adopted by the United States, which incorporated the law of nations into its own federal common law.[142]

Another important feature of the law of nations was that it was viewed by political theorists at the time to be part of "natural" law. Hugo Grotius – widely considered to be the father of international law – described the law of nations as universal law binding on all mankind.[143] He believed that this law existed outside the influence of human beings, and was discoverable through rational thought.

Over time, this theory of natural law was replaced by what we today refer to as "positive law." In contrast to the natural law theory, positive law asserts that all laws – international and domestic – are man-made by legislatures, courts, or some other political body. Put differently, the positivist perspective views laws as made, not discovered. The Supreme Court recognizes this paradigm shift in *Sosa*, and identifies it as a reason for proceeding with caution when dealing with the ATS.[144] In doing so, the Court acknowledges the gap that now exists between how the law of nations was understood back in the 18th century and how it is viewed today.

The status of the law of nations has also dramatically changed since it was first introduced to the United States during the 18th century. Recall that since its inception, the law of nations was considered to be part of the federal common law. In a landmark opinion, the Supreme Court, in 1938, abolished federal common law, holding that it granted judges the unconstitutional power to make laws.[145] In doing so, the Court invalidated the body of law to which the law of nations traditionally belonged. While the current status of the law of nations

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[142] Stephens, Pamela J. "Sinning Sosa: Federal Common Law, The Alien Tort Statute, and Judicial Restraint." *Boston University International Law Journal* 25 (Spring 2007): 8.
[143] *See* Dumbauld, Hugo Grotius: The Father of International Law, 1 Journal of Public Law 117, 118, 120, 126 (1952).
[144] *Supra* note 64, at 725.
[145] *See Erie R. Co.* v. *Tompkins,* 304 U.S. 64, (1938).

(a.k.a. CIL) is the subject of several heated debates today[146], one fact remains very clear: the status of the law of nations within the U.S. legal system was forced to fundamentally change towards the end of the 1930's.

ii. Please Mind the Gap

Since it was introduced almost 300 years ago, the law of nations has changed dramatically, both in its nature and in its role. No longer do we view the law of nations as "natural law." Gone are the days of the law of nations as federal common law. These changes have created an obstacle – a gap, if you will – that prevents today's courts from viewing CIL through the same lens used by the Framers. Despite these changes, the Supreme Court's ruling in *Sosa* requires today's courts to engage in the dubious task of crossing that gap. According to *Sosa*, a proper examination of an ATS claim mandates that lower courts compare modern CIL norms to norms preset in the 18th century. Given the gap between the present day and the 1700s, this becomes incredibly difficult to do without the aid of a time machine.

By requiring lower courts to recognize only norms that are *as* specific, *as* universal, *and as* obligatory as the piracy paradigms, *Sosa* asks courts to place themselves in the position of their 18th century predecessors. As we have just seen, however, the philosophical, legal, and historical context of the 18th century with respect to the law of nations is fundamentally different from that

[146] *See i.e.* Brav, Ehren J."Recent Development: Opening the Courtroom Doors to Non- Citizens: Cautiously Affirming Filartiga for the Alien Tort Statute." *Harvard International Law Journal* 46 (Winter 2005) 265-78; Wilkins, Brinton M. "Splitting the Baby: An Analysis of the Supreme Court's Take On Customary International Law Under the Alien Tort Statute in Sosa v. Alvarez- Machain." *Brigham Young University Law Review* 2005 (2005): 1415-61.
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of today. Asking lower courts to cross the historical gap essentially forces them to act within a completely different legal paradigm.

Critics, however, might argue that this is nothing new. Indeed, looking back to the Framer's intent or the formation of our nation is something courts do quite frequently. The distinction in this case, however, is that the body of international law and the context within which it operates changed so drastically that comparing the two paradigms becomes difficult.

As a matter of practicality, then, the *Sosa* standard fails to deliver a workable set of principles for adjudicating future ATS cases. The *Sosa* standard, in theory, is not necessarily flawed. In fact, it reaffirms many of the principles espoused by *Filartiga* and *Flores*. The problem with *Sosa* is that it simply did not go far enough. The standard articulated by *Sosa* rests firmly on comparing the features (universality, specificity, and obligation) of modern-day CIL norms with those of 18th century norms. Aside from this comparison, the Court says nothing else that might help lower courts determine which norms are actionable under the ATS. Rather than forcing courts to jump back in time, the Supreme Court should have gone a step further by focusing its analysis on modern-day violations of CIL. Had it done so, the Court could have eliminated much of the guesswork currently burdening lower courts today. Put differently, had the Court provided a few examples of *current,* ATS-appropriate CIL paradigms, lower courts would simply have to compare the present to the present; this would have avoided the problems of comparing the present to the past.

Ultimately, *Sosa* was intended to fill in the holes left behind by cases like *Filartiga* and *Flores* – cases that focus on *modern* violation of international law. Instead, it created more problems than it solved. *Sosa* requires lower courts cross a major historical gap by comparing

the law of nations as it was applied in the 18th century to CIL as it is applied today. As we saw in *Abdullahi*, however, this type of time travel has proved particularly difficult.

B. What Remains?

With few modern-day examples to help guide them, courts today are left to rely on the "historical comparison" standard provided by *Sosa*.[147] As it is written, however, this standard is inappropriately strict. *Sosa* very clearly demands that norms actionable under the ATS be *as* specific, *as* universal, *and as* obligatory as the piracy paradigms. The Supreme Court itself held that a strict interpretation of the *Sosa* standard is necessary to ensure that the ATS only applies to a "narrow class of international norms." [148] The consequence of such a strict standard, however, is detrimental to our body of CIL today. In essence, the required narrow reading of *Sosa* forces courts to view our massive body of international law through the eyes of three, antiquated paradigms.

The *Sosa* standard is particularly inappropriate given the sheer size of modern-day CIL. What was once limited to pirates, ambassadors, and interactions between states now applies to a whole slew of entities including multinational corporations, state actors, and individuals. While a whole host of issues – like non-consensual medical experimentation – might have never occurred to the Framers, these issues are certainly relevant in CIL today. Given the significant change in both breadth and scope of CIL, it becomes almost impossible for many modern CIL norms to fit *Sosa*'s criteria. Put differently, the *Sosa* standard is simply too restrictive to adapt to the scope of CIL today.

[147] Kontorovich, Eugene. "Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute." *Notre Dame Law Review* 80 (2004): 112-61.
[148] *Supra* note 67, at 729.

The Supreme Court insisted that, based on Framers intent, the ATS was meant to apply to only a narrow class of international norms. However, the Court provides nothing to support the claim that the Framers understood law of nations to be limited *only* to what it encompassed during the 18th century. On the contrary, the law of nations was incorporated by the United States, in part, so that it could join a growing international community.[149] It stands to reason, then, that the Framers understood that the law of nations would eventually expand to include norms other than the piracy paradigms enumerated by Blackstone. Therefore, *Sosa*'s attempt to confine modern CIL to 18th century paradigms unfairly limits the ATS to a narrow vision of CIL that was intended to grow.

In the end, *Filartiga* got it right when it held that CIL should be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today."[150] *Sosa* inappropriately departs from this reasoning, requiring instead that courts look at CIL today through the eyes of the Framers in 1789. In contrast, *Sosa*'s predecessors, *Filartiga* and *Flores*, establish standards that are not bound by time. Instead, they look for universality, specificity, and legal obligations as they apply in a modern context. Rather than establishing standards like this that adapt to CIL as it exists today, *Sosa* leaves courts with a standard that is unnecessarily strict.

[149] Smith, Charles Anthony. "Credible Commitments and the Early American Supreme Court." *Law & Society Review* 42 (2008): 75-110.
[150] *Supra* note 27, at 881.

CONCLUSION

The *Sosa* opinion represents an unnecessary departure from the standard set by *Filartiga* and *Flores*. Rather than providing courts with a standard that adapts to the growth of CIL overtime, *Sosa* forces courts to compare modern cases with CIL as it was 300 years ago. While a historical analysis is not uncommon in the world of legal standards, *Sosa*'s historical test is inappropriate given the paradigm shifts that have occurred regarding CIL. No longer do we view it as natural law; gone are the days where we apply it as part of our federal common law. The *Sosa* Court explicitly acknowledged these changes and commented on how difficult they make modern application of the ATS. Despite that, the Court created a standard that tied ATS analysis to an era of CIL that no longer exists. In doing so, the Court created an ATS standard that is difficult to apply, and far too narrow to apply modern CIL.

The ATS was originally enacted to ensure that U.S. would play by the rules of the world.[151] Over time, however, the ATS evolved into a tool to punish human rights violations. By allowing victims like Filartiga and Abdullahi to sue for violations of international law, the ATS acted as a vehicle for justice that might not have been possible in other parts of the world. The precedent set by *Sosa*, however, essentially neutralizes the ATS's power to punish human rights violations. By limiting the number of violations it can cover, *Sosa* makes more complex human rights violations like NCME almost impossible to address under the ATS. In a world that is growing and globalizing more and more each day, we need an ATS standard that better adapts to today's CIL. Such a change is still a possibility. *Abdullahi v. Pfizer, Inc*. has been appealed to

[151] *Supra* note 149.

the Supreme Court and its petition for certiorari is still pending. Given the recent addition of Justice Sonia Sotomayor and the retirement of Justice John Paul Stevens, the new make-up of the Court might mean a new way of looking at the ATS. While a completely new standard seems unlikely, some desperately needed flexibility and clarification may still be possible for the Alien Tort Statute.

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