

The Tenth Circuit's Misconstruction of Statutory Rape in International Law Under the Alien Tort Claims Act of 1789 [*Cisneros v. Aragon*, 485 F.3d 1226 (10th Cir. 2007)]

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I. INTRODUCTION

Alexandre Robert, a fifteen-year-old French student, spent July 2007 in Dubai.¹ On Bastille Day, Robert left a beach club to meet his father for dinner.² Unable to find a cab, he ran into an acquaintance who offered him a ride.³ He was unaware that two Emirati convicts were also in the acquaintance's car.⁴ Instead of taking him to meet his father, they took him outside the city to an isolated plot of desert where they sodomized him one-by-one at knifepoint before dropping him off in front of a luxury hotel.⁵

Robert attempted to sue but received little cooperation from the authorities.⁶ Instead, they discouraged him from pressing charges, accused him of homosexual conduct, and did not inform him that one of the perpetrators was HIV positive, thus seriously risking his health.⁷ Only after Robert's family launched a public campaign drawing significant attention to the situation did the Dubai government finally punish the perpetrators.⁸

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1. Vivienne Walt, *Outrage over Dubai Rape Case*, TIME, Nov. 5, 2007, available at <http://www.time.com/time/world/article/0,8599,1680682,00.html>. Robert was living in Dubai with his father who is a hotel manager. *Id.*

2. *Id.*

3. Thanassis Cambanis, *In Rape Case, a French Youth Takes on Dubai*, N.Y. TIMES, Nov. 1, 2007, available at http://www.nytimes.com/2007/11/01/world/middleeast/01dubai.html?_r=1&oref=slogin. Press reports do not clarify who this acquaintance was or how Robert knew him. *See id.*

4. *See id.*

5. *Id.*

6. *Id.*

7. Roula Khalaf & Simeon Kerr, *World News: Dubai Hit by Rape Trial Row*, FIN. TIMES ASIA, Nov. 7, 2007, http://search.ft.com/ftArticle?queryText=%22Sheikh+Mohammed%22&page=8&id=071107000170&ct=0&nclck_check=1. Robert's mother reported that Dubai authorities even threatened to charge her son with homosexual conduct, a crime in Dubai. *Id.*

8. *Id.* (noting Robert's mother launched a website titled BoycottDubai.com); Thanassis Cambanis, *Two Emirati Men Sentenced in Youth's Rape Case*, INT'L HERALD TRIB., Dec. 12, 2007, <http://www.iht.com/articles/2007/12/12/news/dubai.php>. Because Dubai is heralded as the poster child of the Middle East, a rich oil-based city taking great strides to be attractive to both foreign in-

Robert's situation turned a global spotlight to Dubai and the United Arab Emirates (UAE) and highlighted two global concerns: (1) the inadequate treatment and court bias toward foreigners and (2) the need for the global community to address the proliferation of sexual offenses against minors.⁹

First, global concern regarding the treatment and remedies available to foreigners in developing countries has existed for centuries.¹⁰ By the late eighteenth century, several European nations feared their citizens would not receive fair treatment in the state courts of the newly formed United States of America.¹¹ Congress responded by passing the Judiciary Act of 1789, which included a provision known as the Alien Tort Claims Act (ATCA) that provided foreigners a remedy in federal court.¹² Similarly, Sheikh Mohammed bin Rashid Al Maktoum, Dubai's ruler and UAE prime minister, called for the UAE to modernize their judicial system and urged the "highest standards of transparency and accountability."¹³

Second, the global community is concerned about the propagation of sexual violence against minors.¹⁴ In 2006, the United Nations (UN) delivered a report on the violence against children.¹⁵ The report noted that in 2002 approximately 223 million children, roughly the equivalent of 77% of the United States population, were the victims of sexual abuse worldwide and almost 2 million children were forced into prostitution.¹⁶

vestors and tourists, a public hit to its reputation as a Middle East safe haven for Westerners is potentially devastating. See Cambanis, *supra*; Susan Spano, *Dubai a Posh Oasis in the Persian Gulf*, L.A. TIMES, Jan. 27, 2008, available at <http://www.latimes.com/la-tr-dubai27jan27.0,805460.story>.

9. See Cambanis, *supra* note 3 (noting a perceived bias in United Arab Emirates's (UAE) courts against foreigners); The Secretary-General, *Report of the Independent Expert for the United Nations Study on Violence Against Children*, ¶ 28, delivered to the General Assembly, U.N. Doc. A/61/299 (Aug. 29, 2006) (report by Paulo Sérgio Pinheiro). See generally Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1497 (2003) (discussing the view "that [modern] American courts are hostile to foreign parties"); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996) (discussing the differences in winning percentage between foreign and domestic litigants). Senator Joseph Biden recognized the global issue of violence against women on October 31, 2007, when he introduced the International Violence Against Women Act. S. 2279, 110th Cong. § 1 (2007).

10. See Cambanis, *supra* note 3; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 481-82 (1989) (arguing Congress enacted the Alien Tort Claims Act (ATCA) to ensure domestic stability and to increase investment from foreign merchants); Genç Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT'L ECON. L. 193, 224 (2005) (noting the accepted theory that Congress passed the ATCA to avoid international conflict).

11. See Burley, *supra* note 10, at 481-82; Trnavci, *supra* note 10, at 224-25.

12. See Alien Tort Claims Act, Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (2000)); Trnavci, *supra* note 10, at 224-25.

13. Khalaf & Kerr, *supra* note 7.

14. See *Study on Violence Against Children*, *supra* note 9, ¶ 28.

15. See *id.* ¶ 1.

16. *Id.*; see UNITED STATES CENSUS BUREAU, UNITED STATES POPULATION ESTIMATES, http://factfinder.census.gov/servlet/GCTTable?-ds_name=PEP_2006_EST&-mt_name=PEP_2006_EST_GCTT1_US9&-format=US-9&-tree_id=806&-geo_id=&-CONTEXT=gct (reporting that in 2002, the same year as the study, the United States population was estimated at 288

In 2007, these two concerns merged in the United States Court of Appeals for the Tenth Circuit case, *Cisneros v. Aragon*.¹⁷ In a case of first impression for all federal appellate courts, Carmen Cisneros, a statutory rape victim and alien, sued the alleged perpetrator in a civil action under the ATCA claiming that statutory rape violated the law of nations.¹⁸ The Tenth Circuit had an opportunity to show the global community's condemnation of sexual violence against minors and possibly create a forum to provide justice for other victims of sexual assault like Robert.¹⁹ Instead, the Tenth Circuit denied Cisneros's claim and seemingly closed the ATCA to victims of sexual violence.²⁰ In so doing, the Tenth Circuit failed to recognize the prohibition of sexual violence against minors as a general principle of international law and further confused the ATCA's jurisdictional requirements.²¹

II. CASE DESCRIPTION

In the fall of 1986, fifteen-year-old illegal alien Carmen Cisneros met nineteen-year-old Michael Aragon, and a sexual relationship quickly ensued.²² According to Cisneros, the sexual acts occurred in a variety of places surrounding Cheyenne, Wyoming, including on top of a hill near Vedauwoo,²³ in a parked car near railroad tracks at Lake Owen,²⁴ and at Aragon's parents' house.²⁵ While Aragon remembered picking up Cisneros from elementary school—eighth grade—and taking her over to his parents' house to have sex, he denied that any sexual act

million). While global sexual violence affects both women and men of all ages, the problem disproportionately affects women. See *Study on Violence Against Children*, *supra* note 9, ¶¶ 28, 30; see WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 157-59 (Etienne G. Krug et al. eds., 2002) (listing factors that increase women's vulnerability to sexual violence).

17. 485 F.3d 1226, 1227-28 (10th Cir. 2007).

18. *Id.* *Cisneros* is the United States Court of Appeals for the Tenth Circuit's third opinion addressing the ATCA and its first published opinion considering the scope and role of international law under the ATCA. See *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004) (applying a ten-year statute of limitations to ATCA claims); *Kyler v. Montezuma County*, No. 99-1052, 2000 WL 93996, *2 (10th Cir. Jan. 28, 2000) (dismissing claim because plaintiff was not an alien). It is unclear why *Cisneros* does not apply the *Van Tu* statute of limitations to Cisneros's claim. See *Van Tu*, 364 F.3d at 1199. Currently, there are no published opinions regarding an isolated incident of sexual violence or rape of a minor under the ATCA.

19. See *Cisneros*, 485 F.3d at 1227-28.

20. *Id.* at 1228. For a discussion of statutory rape as sexual violence, see *infra* notes 287-289 and accompanying text.

21. See *infra* Part V.

22. Appellant's Opening Brief at 3, *Cisneros*, 485 F.3d 1226 (No. 06-8029), 2006 WL 2415723; Brief of Appellee at 4 n.2, *Cisneros*, 485 F.3d 1226 (No. 06-8029), 2006 WL 4917006.

23. Vedauwoo is a popular camping and rock-climbing destination in southeastern Wyoming and is located in Medicine Bow National Forest. See USDA Forest Service, Medicine Bow and Routt National Forests, Thunder Basin National Grassland, <http://www.fs.fed.us/r2/mbr/recreation/camping/laramie/vedauwoo.shtml> (last visited Apr. 5, 2008).

24. Lake Owen Campground is a camping destination in southeastern Wyoming located in Medicine Bow National Forest. See USDA Forest Service, Medicine Bow and Routt National Forests, Thunder Basin National Grassland, <http://www.fs.fed.us/r2/mbr/recreation/camping/laramie/lakeowen.shtml> (last visited Apr. 5, 2008).

25. Brief of Appellee, *supra* note 22, at 5.

occurred on federal land at either Vedauwoo or Lake Owen.²⁶ Cisneros then became pregnant with Aragon's child.²⁷ The pregnancy turned the illicit sexual relationship into a tumultuous marriage that eventually resulted in a divorce.²⁸

Nearly twenty years later, in 2005, Cisneros sued Aragon. She alleged that as a minor she could neither appreciate nor resist Aragon's sexual advances, and that his offenses violated the law of nations under the ATCA.²⁹ Cisneros also pursued several state law claims under federal supplemental jurisdiction.³⁰

A. District Court Proceedings

Cisneros filed suit on May 19, 2005, in the United States District Court for the District of Wyoming.³¹ She alleged subject-matter jurisdiction pursuant to 18 U.S.C. § 2255, which allows civil recovery for a victim of sexual abuse, and under the ATCA.³² The district court, however, dismissed both of her jurisdictional arguments.³³ It rejected her § 2255 claim because she failed to present adequate evidence that the alleged sexual acts occurred on federal land.³⁴ It also discharged her ATCA claim for lack of subject-matter jurisdiction, concluding that the sexual abuse of a minor, specifically statutory rape, does not violate the

26. Appellant's Opening Brief, *supra* note 22, at 3; Brief of Appellee, *supra* note 22, at 5-6. Cisneros alleged subject-matter jurisdiction under both the ATCA and 18 U.S.C. § 2255 (2000). *Cisneros*, 485 F.3d at 1228. Title 18 U.S.C. § 2255(a) states:

Any minor, who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 2255(a) (2000). Cisneros alleged that Aragon violated §§ 2243(a) and 2242(2). *Cisneros*, 485 F.3d at 1228. Section 2243(a) provides:

Whoever . . . knowingly engages in a sexual act with another person who—(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2243(a) (2000). Section 2242(2) provides: "Whoever . . . engages in a sexual act with another person if that other person is—(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." § 2242(2). Both § 2243 and § 2242 require the offense to occur on the "special maritime and territorial jurisdiction of the United States." §§ 2242, 2243. Because Cisneros was unable to show the alleged offenses occurred on federal land, she was unable to allege an offense under either section and thus failed to obtain subject-matter jurisdiction under § 2255. *Cisneros*, 485 F.3d at 1228.

27. Appellant's Opening Brief, *supra* note 22, at 3.

28. *See id.*

29. *Cisneros*, 485 F.3d at 1227-28; *see* Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). The ATCA states in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

30. *Cisneros*, 485 F.3d at 1233.

31. Brief of Appellee, *supra* note 22, at 1-2.

32. *Id.*

33. *Id.* at 2-3.

34. *Id.*

law of nations.³⁵ Finally, it dismissed her supplemental state law claims due to her lack of a valid federal claim.³⁶

B. *The Tenth Circuit Court of Appeals*

The Tenth Circuit affirmed the district court's dismissal of both claims for lack of subject-matter jurisdiction.³⁷ First, it ruled that sexual abuse of a minor does not violate the law of nations, and, as a result, it upheld the dismissal of Cisneros's ATCA claim on jurisdictional grounds.³⁸ Second, it upheld the dismissal of Cisneros's § 2255 claim due to inadequate evidence that the offense occurred on federal land.³⁹ Finally, it affirmed the district court's dismissal of the state law claims due to a lack of supplemental jurisdiction.⁴⁰

III. BACKGROUND

A. *Brief History of the Alien Tort Claims Act*

The ATCA provides federal courts with "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."⁴¹ Under the ATCA, federal courts obtain subject-matter jurisdiction when an alien sues for a tort, and that tort violates the "law of nations" or a United States' treaty.⁴² Standard federal procedural regulations, such as personal jurisdiction requirements, still apply.⁴³

The ATCA is nearly as old as the Constitution.⁴⁴ The first United

35. *Id.*

36. *Cisneros v. Aragon*, 485 F.3d 1226, 1233 (10th Cir. 2007). Federal courts do not have supplemental jurisdiction to hear state law claims unless a party brings a valid federal claim. *Id.*

37. *Id.*

38. *Id.* at 1230-31.

39. *Id.* at 1232.

40. *Id.* at 1233. This Comment focuses solely on the court's dismissal of Cisneros's ATCA claim.

41. 28 U.S.C. § 1350 (2000). For a more thorough explanation of the history and scope of the ATCA, see generally GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003); *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY* (Ralph G. Steinhardt and Anthony D'Amato eds., 1999); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); 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); and Trnavci, *supra* note 10.

42. *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004).

43. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (noting the requirement for personal jurisdiction); see also Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 473 (2007) (noting that some procedural requirements for the ATCA remain unsettled including the statute of limitations); Trnavci, *supra* note 10, at 258-62 (noting the plaintiff's case in chief must survive several obstacles including obtaining personal jurisdiction, defeating a forum non conveniens motion, and not arguing a non-justiciable political question).

44. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 13 (Wythe Holt & L.H.

States Congress enacted the ATCA as part of the Judiciary Act of 1789.⁴⁵ Because Congress failed to illuminate what specific causes of action existed under the ATCA,⁴⁶ twentieth century federal courts struggled with identifying the legislative intent behind the ATCA.⁴⁷ Scholars now believe, however, that Congress enacted the ATCA to “avoid conflicts with other nations over mistreatment of non-U.S. citizens.”⁴⁸ The drafters’ goal was to increase the United States’ international presence as well as to improve national security by providing a forum to ensure the fair treatment of non-United States citizens.⁴⁹ Concerned with the failure of state courts to provide adequate remedies for the mistreatment of diplomats and bias toward foreigners, Congress passed the ATCA to show the world that the United States would provide foreigners with fair treatment.⁵⁰

The ATCA, however, essentially remained dormant for nearly 200 years until Judge Irving Kaufman authored the *Filartiga v. Pena-Irala*⁵¹ opinion in 1980.⁵² In *Filartiga*, the United States Court of Appeals for the Second Circuit held that torture “violates universally accepted norms of the international law of human rights” and that the alleged torturer was subject to federal subject-matter jurisdiction under the ATCA.⁵³ *Filartiga* was a landmark decision because the court viewed the ATCA as not only providing jurisdiction to hear a claim, but also providing a substantive cause of action.⁵⁴ The court interpreted the

LaRue eds., 1990) (noting that the Continental Congress, operating under the Articles of Confederation, directed that the U.S. Constitution take effect on March 4, 1789); Maeva Marcus, *Introduction to ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789* 4 (Maeva Marcus ed. 1992) (noting that Congress passed the Judiciary Act on September 24, 1789).

45. Dodge, *supra* note 41, at 222.

46. See Trnavci, *supra* note 10, at 226 (noting that “there is no record of congressional discussion about private actions that might be subject to the jurisdictional provision”).

47. See, e.g., *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.”).

48. Trnavci, *supra* note 10, at 224 (citing Burley, *supra* note 10, at 465).

49. *Id.* (quoting Burley, *supra* note 10, at 465) (noting that the argument hinges on the theory that the drafters desired to boost the national security and international legitimacy of the newly-formed nation by establishing a foundation in diplomatic relations).

50. See Dodge, *supra* note 41, at 234-37. Congress’s concern is epitomized by the Marbois incident when a French citizen assaulted a French ambassador in 1784. See *id.* at 229-30. With no federal courts to act, a tenuous situation resulted, in which the federal government persuaded Pennsylvania courts to prosecute the French citizen while it handled the incident diplomatically with the French government. *Id.* The Supreme Court of Pennsylvania found the French citizen guilty, but no civil remedy existed for the French diplomat. *Id.* at 230; see also Casto, *supra* note 41, at 499-500.

51. 630 F.2d 876 (2d Cir. 1980).

52. *Id.* at 887. Before the twentieth century, there were only two cases in which a plaintiff alleged subject-matter jurisdiction under the ATCA. See *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).

53. *Filartiga*, 630 F.2d at 878. *Filartiga* sued Americo Norberto Pena-Irala for the wrongful death of his son. *Id.* Pena-Irala was the Inspector General of Paraguay’s police department. *Id.* *Filartiga* alleged that Pena-Irala was responsible for the kidnapping and torturing of his son, a political activist in Paraguay. *Id.* For a more thorough discussion regarding *Filartiga*’s factual background, see Steve Kuan, *Alien Tort Claims Act—Classifying Peacetime Rape as an International Human Rights Violation*, 22 HOUS. J. INT’L L. 451, 468-71 (2000).

54. *Filartiga*, 630 F.2d at 887.

ATCA to provide aliens a right to sue if their claims stemmed from a violation of the law of nations itself.⁵⁵

Filartiga resulted in a massive increase of human rights litigation in federal courts under the ATCA.⁵⁶ It also spawned debate in the legal community over whether the ATCA was simply a jurisdictional statute creating no new causes of action absent additional legislative action, often referred to as the “revisionist” position, or whether the statute itself authorizes private action without auxiliary legislation.⁵⁷ *Tel-Oren v. Libyan Arab Republic*⁵⁸ epitomized the debate in 1984 in which Judges Bork and Edwards wrote strong, separate concurring opinions representing opposing positions.⁵⁹

The Supreme Court finally addressed the scope of the ATCA in *Sosa v. Alvarez-Machain*.⁶⁰ In *Sosa*, Justice Souter, writing for the majority, held that although the ATCA is a jurisdictional statute that fails to create any new causes of action, the ATCA’s “jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.”⁶¹ Justice Souter’s approach rejected the revisionist position and paralleled the Restatement (Third) of Foreign Relations, which states that courts possess the right to address cases that arise under international law absent a congressional or executive act.⁶²

55. *Id.* (construing the ATCA not as “granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law”). Judge Kaufman also noted that there is judicial history of incorporating international law into federal common law without a precise congressional mandate to do so. *Id.* at 886.

56. *See, e.g.*, Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104 (2d. Cir. 2008); Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007); Doe v. Exxon Mobil Corp., 393 F.Supp.2d 20 (D.D.C. 2005). The amount of ATCA litigation continues to rise as aliens sue corporations for human rights abuses committed in foreign countries. *See, e.g.*, Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007).

57. *Compare* Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT’L L. 513 (2002) (adopting the minority or revisionist position), *with* Dodge, *supra* note 41 (adopting the majority position).

58. 726 F.2d 774 (D.C. Cir. 1984) (per curiam). In *Tel-Oren*, the survivors, mostly Israeli, of an armed attack on a civilian bus sued the Libyan Arab Republic and a variety of Palestinian organizations. *Id.* at 775. The court dismissed the claim for lack of subject-matter jurisdiction. *Id.*

59. *Id.* Judge Bork firmly stood on the originalist platform stating, “[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.” *Id.* at 801 (Bork, J., concurring). In contrast, Judge Edwards followed the *Filartiga* approach and argued that requiring additional legislative action to grant a cause of action was at odds with the statute’s historical underpinnings and construction, as well as the traditional role of international law in American jurisprudence. *Id.* at 776-79, 782, 789 (Edwards, J., concurring).

60. 542 U.S. 692 (2004).

61. *Id.* at 724. The *Sosa* Court listed prudential concerns for federal courts to consider in adopting a new common law cause of action under the ATCA. *Id.* at 725-28. The Supreme Court provided the following five considerations: (1) common law changes since 1789 “counsel[] restraint in judicially applying internationally generated norms;” (2) due to the Erie doctrine, courts should be careful in recognizing new common law causes of action without legislative guidance; (3) the legislature is usually in a better position than the courts to recognize private rights of action; (4) courts should consider collateral consequences of adopting a new cause of action; and (5) there is no congressional mandate to seek out new causes of action. *Id.*

62. *Compare id.* at 724 (allowing federal common law claims under the ATCA), *with* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111(2) cmt. c (1987) (stating the judiciary may

Since *Sosa*, some circuit courts follow a two-step procedure in ATCA cases.⁶³ First, these courts determine if the ATCA provides subject-matter jurisdiction.⁶⁴ Second, they decide whether to recognize “a common-law cause of action to provide a remedy for the alleged violation of international law.”⁶⁵ To address this two-step process, this Comment will examine the ATCA in terms of subject-matter jurisdiction, the sources of law that comprise international law, and then address the judicial framework utilized to determine international law rules frequently referred to as international law norms.

B. Examining the Law of Nations Under the ATCA

The “law of nations” is essentially an old term of art that embodies the dynamic and ever-changing “global body of law.”⁶⁶ It is derived independently from multi-national treaties and conventions,⁶⁷ customary principles of law,⁶⁸ or general principles of law.⁶⁹ International court

address international law absent an executive or a legislative act).

63. *Accord* *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1004-06 (2007) (articulating the distinction between the court’s procedure in determining jurisdiction and the decision to allow a common law claim on the merits).

64. *Accord id.*

65. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 266 (2007) (Katzmann, J., concurring); *accord* *Bridgestone Corp.*, 492 F. Supp. 2d at 1004-06. This two-step process results from *Sosa*’s approach, which instructed circuit courts to be cautious with the federal common law, noting that, among other things, courts lack a legislative mandate to seek out new causes of actions and should be cautious to ensure that the norms they authorize do not interfere with international relations. *See Sosa*, 542 U.S. at 725-29.

66. *Trnavci*, *supra* note 10, at 263. This Comment uses the phrases law of nations and international law interchangeably.

67. Global treaties and conventions function three ways in international law. First, the treaty binds the states and thus creates international law obligations on all states that ratified the treaty. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 cmt. f (1987). Second, the treaty may reflect customary international law or codify customary international law because a number of states’ practices are consistent with the convention’s tenants. *See* *North Sea Continental Shelf*, (F.R.G. v. Den., F.R.G. v. Neth.) 1969 I.C.J. 3, ¶¶ 37, 48 (Feb. 20); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 102 cmt. i (1987). Third, if the court is unwilling to accept the convention as either binding or codifying existing customary international law the treaty is often argued as having created customary international law when states behavior is consistent with the treaty. *See* *Continental Shelf*, 1969 I.C.J. 3, ¶¶ 29-31. In *Continental Shelf*, the ICJ rejected this argument because Germany’s action did not reveal the required *opinio juris*. *Id.* ¶ 37.

68. Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987). State practice is determined by a variety of actions including diplomatic statements, statements of policy, and perhaps most importantly, international convention and treaty ratification. *Id.* § 102 cmt. b. The state’s action must resonate out of a sense of legal obligation referred to internationally as *opinio juris*. *Id.* at cmt c. The Second Circuit sometimes considers the law of nations to be only customary international law. *Khulumani*, 504 F.3d at 267 (Katzmann, J. concurring). There is no explicit reason to limit the law of nations to customary law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 102 (1987); Statute of the International Court of Justice art. 38(1), 59 Stat. 1055, 1060 June 26, 1945.

69. General principles of law are legal principles common to all major legal systems. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 102 (1987); Statute of the International Court of Justice, *supra* note 68, art. 38(1)(c). General principles of law are the most helpful when a traditionally domestic issue is first confronted internationally, and there is a general lack of international custom or treaties on the new subject. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 102 cmt. l (1987).

decisions and the writings of respected international jurists provide additional authority for determining a global legal norm.⁷⁰

1. The ATCA and Subject-Matter Jurisdiction

The United States Courts of Appeal for the Second and Ninth Circuits represent the current split over what plaintiffs must show to gain subject-matter jurisdiction over the claim.⁷¹ The circuit split results from the Second Circuit's *Filartiga* opinion, which demanded a "more searching preliminary review of the merits" before the court may exercise subject-matter jurisdiction.⁷² The Ninth Circuit, however, rejected the more searching standard and indicated that courts have subject-matter jurisdiction when the claim is not insubstantial or frivolous.⁷³

Filartiga's "more searching" review is inconsistent with the Supreme Court's reasoning in *Sosa*.⁷⁴ In *Sosa*, the Supreme Court reasoned that ATCA claims are private claims that fall "under federal common law for violations of . . . international law norm[s]." ⁷⁵ Thereby the ATCA incorporates violations of the law of nations into the federal common law.⁷⁶ The standard of review for subject-matter jurisdiction under the ATCA, therefore, should be the same standard employed in other federal common law claims—whether the claims are frivolous or meritless.⁷⁷ The result is that as long as the claimant alleges a colorable and reasonable violation of the law of nations, the claimant should survive a motion to dismiss for lack of subject-matter jurisdiction.⁷⁸ The United States Court of Appeals for the Seventh Circuit followed the

70. See Statute of the International Court of Justice, *supra* note 68, art. 38(1).

71. *Compare Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1200-01 (9th Cir. 2007) (stating that the "district court had subject matter jurisdiction under the ATCA so long as plaintiffs alleged a non-frivolous claim by an alien for a tort in violation of international law"), with *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (1980) (stating that before a court assumes jurisdiction in an ATCA case the court must engage in a "more searching preliminary review of the merits").

72. *Filartiga*, 630 F.2d at 887-88; see also *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (stating a plaintiff must state more than a colorable claim in order for the court to have jurisdiction); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 87-90 (1981) (contending that *Filartiga* requires a universal, obligatory, and definable standard). *Filartiga* rejected the notion that a colorable claim provides the courts with subject-matter jurisdiction under the ATCA, preferring instead to require a more exhaustive review of the plaintiff's allegations before deciding whether to assume jurisdiction. See *Filartiga*, 630 F.2d at 887-88. Therefore, under the Second Circuit's framework, if a court decides the alleged violation does not violate the law of nations it may dismiss the claim for lack of subject-matter jurisdiction. See *Kadic*, 70 F.3d at 238. Under the *Filartiga* framework, the court makes no articulable distinction between the standards that govern subject-matter jurisdiction and the standards that govern whether the private right of action exists. See *id.*

73. See *Sarei*, 487 F.3d at 1200-01; *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1004-06 (S.D. Ind. 2007) (noting that plaintiff need only "allege an arguable violation of the law of nations" to establish subject-matter jurisdiction).

74. See *Sarei*, 487 F.3d at 1200-01.

75. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

76. *Id.* at 724.

77. See *Sarei*, 487 F.3d at 1200-01. For example, 28 U.S.C. § 1331 (2000) authorizes federal courts to utilize federal common law. *Sarei*, 487 F.3d at 1200-01 n.5.

78. See *id.* at 1200-01; *Bridgestone Corp.*, 492 F. Supp. 2d at 1004-06.

Ninth Circuit's standard because it reflected Congress's intent that federal courts hear the cases "that could affect the young nation's foreign relations."⁷⁹ Finally, it is unclear whether the Second Circuit will continue with its "more searching" review as its more recent *Khulumani v. Barclay National Bank Ltd.*⁸⁰ per curiam opinion fails to articulate any standard of review and contains concurring opinions arguing for the opposing standards.⁸¹

2. Determining and Interpreting the Proper Sources of International Law Under the ATCA

After obtaining subject-matter jurisdiction over the claim, courts establish the sources of law for determining whether the alleged act violated the law of nations.⁸² In *The Paquete Habana*,⁸³ United States military forces captured two small fishing smacks⁸⁴ manned by crews of three and six Cubans, respectively, in 1898 during the Spanish American War.⁸⁵ The military sold the smacks as "prize[s] of war," and the owners sued alleging that the taking of a civilian coastal fishing boat during wartime violated settled rules of international law.⁸⁶ In authoring the opinion, Justice Gray famously stated:

[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁸⁷

The court completed a survey of the wartime doctrine prohibiting

79. *Bridgestone Corp.*, 492 F. Supp. 2d at 1004-06 (citing *Sosa*, 542 U.S. at 716-17). Such an interpretation is also consistent with the Supreme Court's subject-matter jurisdiction requirements. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (noting "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to hear the case").

80. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

81. The actual per curiam opinion fails to articulate any jurisdictional standard. See *id.* at 258-64. However, Judge Katzmman and Judge Korman presented opposing views on the jurisdictional standard appropriate under the ATCA. Compare *id.* at 266 (Katzmann, J., concurring) (rejecting the "more searching" standard in favor of a more lenient standard that recognizes subject-matter jurisdiction if the plaintiff alleges the defendant violated the law of nations, and the determination as to whether to recognize a ATCA claim hinges on whether "whether a cause of action exists"), with *id.* at 309-10 (Korman, J., concurring) (arguing for the "more searching" standard of *Filartiga*). In *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008), the Second Circuit dismissed on subject matter jurisdiction but failed to mention *Filartiga's* "more searching" standard. *Id.* at 123.

82. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 131 (E.D.N.Y. 2005).

83. 175 U.S. 677 (1900).

84. A "smack" is a small boat used primarily for fishing. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1701 (3d ed. 1996).

85. *The Paquete Habana*, 175 U.S. at 678-79.

86. *Id.*

87. *Id.* at 700 (citing *Hilton v. Guyot*, 159 U. S. 113, 163-64, 214-15 (1895)).

the taking of an enemy fishing boat and concluded that although the doctrine started as a principle of comity, its near universal acceptance transformed the doctrine from comity to international law.⁸⁸ Eighty years later, the Second Circuit, in *Filartiga*, relied on *The Paquete Habana* as a foundation for its historic holding.⁸⁹

The Paquete Habana established two important principles of American jurisprudence of international law.⁹⁰ First, it provided the basic framework for defining the law of nations by considering international legal customs as well as the works of jurists.⁹¹ The *Filartiga* opinion ushered in a modern era by noting that Article 38(1) of the International Court of Justice (ICJ) “confirms the propriety” of Justice Gray’s approach.⁹² Article 38(1) of the ICJ provides that in determining the applicable international law, courts look to: (1) international conventions and treaties; (2) international customs as evidenced by the practice of nations; (3) general principles of law; and (4) the writings of jurists and scholars and other judicial decisions.⁹³ The Restatement (Third) of Foreign Relations explicitly confirms the ICJ’s approach.⁹⁴ There is a growing consensus that *The Paquete Habana*’s framework, modernized by ICJ’s article 38, is the correct approach for determining international law.⁹⁵

Second, Justice Gray recognized that international law is evolutive.⁹⁶ In confirming *The Paquete Habana*, the *Sosa* Court concluded that in 1789 Congress viewed the ATCA as enabling the courts to address a “modest number of international law violations” articulated by

88. *Id.* at 686, 694.

89. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

90. *Id.* at 880-81.

91. *Id.* (citing *The Paquete Habana*, 175 U.S. at 700).

92. *Id.* at 881, 881 n.8; see Statute of the International Court of Justice, *supra* note 68, art. 38(1). Article 38(1) of the ICJ is part of the United Nations Charter which the United States signed and ratified. U.N. Charter art. 93. Article 38 of the ICJ provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, 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) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, *supra* note 68, art. 38(1).

93. Statute of the International Court of Justice, *supra* note 68, art. 38(1). For definitions of the various sources of international law see *supra* notes 67-69.

94. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 n.1 (1987).

95. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 304-05 (S.D.N.Y. 2003).

96. *The Paquete Habana*, 175 U.S. 677, 694 (1900) (“But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.”).

Blackstone such as piracy and offenses against ambassadors.⁹⁷ *Sosa* did not limit the ATCA to the offenses that Blackstone posited in 1789, and stated that courts may address modern claims based on “present-day law of nations” as long as the present day norm is as widely accepted today as Blackstone’s offenses were in 1789.⁹⁸

Sosa confirmed Congress’s interpretation of the ATCA.⁹⁹ In 1991, Congress enacted the Torture Victim Protection Act (TVPA) to provide a specific judicial remedy for torture victims, ostensibly endorsing the *Filartiga* holding.¹⁰⁰ Congress, like the Supreme Court, specifically viewed the ATCA as a dynamic statute capable of enforcing future and currently unknown international norms.¹⁰¹

3. Judicial Framework Utilized to Determine International Law Violations

Circuit courts are currently engaging in a confusing grammatical exercise in attempting to provide the standards that determine international law rules.¹⁰² Much of the confusion stems from *Sosa*.¹⁰³ The *Sosa* Court required any international rule to be as specifically-defined and as widely-accepted in the modern global community as the three eighteenth century rules that Blackstone articulated (*Sosa*’s eighteenth-century paradigm).¹⁰⁴ The Court then confused the issue by noting that the standard it articulated paralleled other circuit courts’ standards for determining a rule of international law, including the Ninth Circuit’s standard that required the rule to be “specific, universal and obligatory.”¹⁰⁵

97. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (noting Congress probably had in mind the three violations articulated by Blackstone: right of safe passages, piracy, and intrusion on the rights of ambassadors).

98. *Id.* at 724-25.

99. H.R. REP. NO. 102-367, pt. 2, at 4 (1991), as reprinted in 1992 U.S.C.C.A.N. 84, 86.

100. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2000)); cf. Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 764-65 (2004) (noting the Torture Victim Protection Act (TVPA) rejected Judge Bork’s opinion in *Tel-Oren* that argued for a very narrow interpretation of the ATCA, allowing only claims recognized in 1789).

101. H.R. REP. NO. 102-367, pt. 2, at 4 (stating the “[ATCA] should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law”).

102. See Abadie, *supra* note 100, at 763-68 (2004) (discussing the variety of standards).

103. *Sosa*, 542 U.S. at 732 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)). The Supreme Court also noted that its standard was consistent with other circuit courts’ standards including the District of Columbia Circuit’s standard of “heinous actions—each of which violates definable, universal and obligatory norms.” *Id.* (citing *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

104. *Sosa*, 542 U.S. at 724-25 (noting Congress probably had in mind the three violations articulated by Blackstone: right of safe passages, piracy, and intrusion on the rights of ambassadors).

105. *Id.* at 725, 732 (citing *In re Estate of Marcos Human Rights Litig.*, 25 F.3d at 1475); *Tel-Oren*, 726 F.2d at 781 (Edwards, J. concurring)). The revisionists who formerly argued that the ATCA was a jurisdictional statute only, now use *Sosa*’s inclusion of the other district standards to contend that *Sosa* mandated a higher standard than what was traditionally required. See Curtis A.

Sosa's eighteenth-century paradigm is consistent with both the Restatement (Third) of Foreign Relations' and the ICJ's description of customary international law.¹⁰⁶ The Restatement defines international norms as widely-accepted and consistently-practiced, but not necessarily "universal."¹⁰⁷ The ICJ noted that a customary norm does not require universal state practice.¹⁰⁸ Still other courts, while not denying and even sometimes confirming *Sosa's* approach, determine international law norms by asking whether the legal norm is "specific, universal and obligatory."¹⁰⁹ For example, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,¹¹⁰ a Second Circuit district court stated it was utilizing the law, as articulated by Article 38 of the ICJ, only to later posit the standard as a norm that is "specific, universal and obligatory."¹¹¹ The opinion is unclear as to what standard the court used or whether it considered the standards fungible.¹¹²

While this ostensibly appears to be a grammatical exercise, there are differences between *Sosa's* eighteenth-century paradigm and other paradigms requiring the norm to be universal.¹¹³ The most significant difference is that customary international legal norms have no "universal" requirement.¹¹⁴ International and other nations' domestic tribunals deciding issues of international law follow the approach outlined in Article 38 of the ICJ.¹¹⁵ It is possible, therefore, for federal courts to reach different conclusions regarding the same international legal norm if they apply a "universal" standard requirement, because this requirement is not a mandatory aspect of customary international law.¹¹⁶ The differing approaches for determining the required norm are most problematic

Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 897 (2007). The majority contends, in opposition, that the differing standards are problematic because of the possibilities of inconsistencies. See Abadie, *supra* note 100, at 763-67; Ralph G. Steinhardt, *Laying One Bankrupt Critique To Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2265-66 (2004) (stating that *Sosa* rejected some of the more restrictive standards).

106. Compare *Sosa*, 542 U.S. at 732 (providing the eighteenth century paradigm), with RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1987) (defining customary international law as widely accepted and generally and consistently practiced).

107. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1987). The Restatement's definition is consistent with the ICJ's view of customary international law as well. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at ¶ 186 (June 27) ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.").

108. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 186 (June 27).

109. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201-02 (9th Cir. 2007).

110. 244 F. Supp. 2d 289, 304-05 (S.D.N.Y. 2003).

111. *Id.* at 304-05, 306 n. 18.

112. See generally *id.*

113. See Abadie, *supra* note 100, at 766.

114. See *id.*

115. See *id.*

116. See *id.* In fact, international courts and United States courts have differed on whether the principle of sustainable development is customary international law. *Id.* (comparing *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7 (Sept. 25) (separate opinion of Vice-President Weeramantry) with *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1160-61 (C.D. Cal 2002)).

when courts address new claims based on emerging customary international norms because it is less likely that emerging norms will be universal, although the norm may be widely accepted.¹¹⁷

To summarize, the usual international approach to determine customary international law through Article 38 of the ICJ focuses on state behavior that is consistently practiced and widely accepted but not necessarily universal.¹¹⁸ *Sosa* seemingly endorsed the international approach but posited an additional requirement that the offense be as specifically-defined and accepted as the eighteenth-century offenses Blackstone articulated.¹¹⁹ Many circuit courts, however, still require the norm to be “universal, specific and obligatory.”¹²⁰ Only time will tell whether the different standards will result in different conclusions about the same alleged norm or whether the standards will fade into an irrelevant semantic oblivion.

4. Mutual and Several Concern

Not only are courts unable to universally define the standard to determine the rule that criminalizes the offense, but the Second Circuit, in particular, postulated an additional requirement.¹²¹ It requires an international norm to be a norm of *mutual* as opposed to *several* concern.¹²² A *mutual* concern occurs when the violation interferes with the “rules or customs [1] affecting the relationship between states or between an individual and a foreign state and [2] used by those states for their common good and/or in dealings *inter se*.”¹²³ A *several* concern exists when the state possesses a separate and independent interest in the offense.¹²⁴ Courts using the *mutual/several* dichotomy frequently contend that crimes like theft are not international law offenses because states possess an independent interest in the crime.¹²⁵

It is difficult to discern whether an international law norm must be of *mutual* concern under the ATCA.¹²⁶ The Second Circuit emphasizes the *mutual/several* dichotomy, while other circuits have rarely addressed

117. *See id.*

118. *See* Statute of the International Court of Justice, *supra* note 68, art. 38(1). For definitions of the various sources of international law see *supra* notes 67-69 and RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1987).

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

120. *See, e.g., In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994).

121. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 884, 887-88 (2d Cir. 1980).

122. *Id.*

123. *Id.* at 888 (citations omitted).

124. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003).

125. *See id.*

126. *Compare Filartiga*, 630 F.2d at 888 (positing the *mutual/several* dichotomy), with *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007) (failing to mention the *mutual/several* paradigm). The *mutual/several* dichotomy is not mentioned in *Sosa* either. *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (failing to mention the *mutual/several* dichotomy).

it.¹²⁷ Ironically, the case that launched the dichotomy, *Filartiga*, is internally inconsistent.¹²⁸ While Judge Kaufman considered only *mutual* concerns as judicable international law norms, he subsequently referenced domestic constitutions, noted their ban on torture in criminal proceedings, and ultimately held that it is the “universal renunciation” of torture that grants torture its status as a violation of the law of nations.¹²⁹ The opinion is inconsistent because Judge Kaufman cited domestic constitutions banning torture in criminal proceedings, a *several* concern, as part of his basis for the conclusion that torture is a *mutual* concern and a violation of international law.¹³⁰ More importantly, the *Filartiga* court held that torture violates international law because of its “universal renunciation,” not because of its characterization as *mutual* or *several*.¹³¹ If renunciation was Judge Kaufman’s predominant concern, then the fact that a vast collection of states independently and *severally* renounced a certain behavior should have been persuasive and determinative as to whether the behavior violates the law of nations, regardless of whether the concern is *mutual*.¹³²

The problem with the *mutual/several* dichotomy is that it may disregard the role of domestic statutes in international law.¹³³ Both the Restatement (Third) of Foreign Affairs and Article 38 of the ICJ recognize domestic law as determinative of a general principle of law, which is an independent source of law that may individually define a violation of international law.¹³⁴ The result is that under the *mutual/several* dichotomy, domestic regulations rarely play any role in determining international legal norms because domestic statutes largely exist to govern *several* concerns.¹³⁵

127. Compare *Filartiga*, 630 F.2d at 888, *Flores*, 414 F.3d at 249, and *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254, 273 n.7 (2d Cir. 2007) (Katzmann, J., concurring), with *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005), *Enahoro v. Abubakar*, 408 F.3d 877, 883, 884 (7th Cir. 2005), *Chavez v. Carranza*, 413 F. Supp. 2d 891, 898-99 (W.D. Tenn. 2005), *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 U.S. Dist. LEXIS 59374, at *7-8 (N.D. Cal. Aug. 14, 2007), *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1009 (S.D. Ind. 2007), and *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201-02 (9th Cir. 2007).

128. See *infra* notes 129-132.

129. *Filartiga*, 630 F.2d at 883-84, 888.

130. See *id.* The domestic law concerned torture in domestic criminal proceedings, which, like auto theft, is likely a *several* concern because it addresses how a state conducts its own criminal procedure. See *id.* at 884. Many aspects of domestic criminal procedure, however, specifically those procedures banning torture, may be of *mutual* concern due to the international condemnation of the activity because the domestic criminal procedure may reflect international norms. See *Khulumani*, 504 F.3d at 273 n.7 (Katzmann, J., concurring) (citing *Flores*, 414 F.3d at 249 (noting that United Nations (U.N.) conventions requiring states to criminalize aiding and abetting revealed that aiding and abetting had become international law)). Judge Kaufman does note that the domestic torture ban in criminal proceedings is consistent with international law. See *Filartiga*, 630 F.2d at 884.

131. *Filartiga*, 630 F.2d at 883-84, 888.

132. *Contra id.*

133. See Statute of the International Court of Justice, *supra* note 68, art. 38(1) (establishing general principles of law as a source of international law).

134. See *id.*, *supra* note 68, art. 38(1); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 (1987).

135. Cf. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (citing *Filartiga*, 630

5. *Jus Cogens*

The term *jus cogens* translates into higher or compelling law.¹³⁶ *Jus cogens* norms are legal trump cards that possess peremptory status in the international community, and as a result, supersede and invalidate other international agreements that are inconsistent with the principle.¹³⁷ *Jus cogens* norms may go as far as invalidating not only conflicting international agreements but also conflicting domestic statutes.¹³⁸ *Jus cogens* also prescribes obligations on states to prosecute violators of these norms.¹³⁹ Like other principles of customary international law, *jus cogens* norms are dynamic and changing.¹⁴⁰

Prior to the *Sosa* decision, at least one court used *jus cogens* for determining a violation of the law of nations.¹⁴¹ The *Sosa* Court, however, failed to mention *jus cogens* and relied solely on its eighteenth-century paradigm instead.¹⁴² The consensus is that violations of *jus cogens* norms are at a minimum actionable under the ATCA, but *jus cogens* norms are not the standard for determining whether a claim is actionable under the ATCA.¹⁴³

F.2d at 888) (rejecting domestic law as indicative of customary international law).

136. M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768, 801 (1990) ("The very words '*jus cogens*' mean 'the compelling law' and, as such, a *jus cogens* principle holds the highest position in the hierarchy of all other norms, rules, and principles. It is because of that standing that *jus cogens* principles have come to be known as 'peremptory norms.'"). Some scholars consider the individual act of rape to be a violation of *jus cogens*. See, e.g., David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law As a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 226 (2005). This commentary uses the phrase peremptory norms and *jus cogens* interchangeably.

137. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 cmt. k (1987); see Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

138. Mitchell, *supra* note 136, at 228-29. In *Filartiga*, Judge Kaufman noted the relationship between international and domestic law. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) ("Matters of domestic jurisdiction are not those which are unregulated by international law, but those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their 'nature.' All are susceptible of international legal regulation and may become the subjects of new rules of customary law of treaty obligations." (citations omitted)).

139. Mitchell, *supra* note 136, at 229-31. Some *jus cogens* norms violations may result in universal jurisdiction. *Id.* at 230. Universal jurisdiction provides that any nation or state may prosecute the violator without concern for nationality or territory constrictions. *Id.* at 230-31.

140. *Id.* at 231. The Restatement (Third) of Foreign Relations, however, provides a list of *jus cogens* norms including: "(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, [and] (f) systematic racial discrimination." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702, 702 cmt. n (1987).

141. See *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000).

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

143. See *Alvarez-Machain v. U.S.*, 331 F.3d 604, 613 (9th Cir. 2003); see, e.g., Virginia Monken Gomez, Note, *The Sosa Standard: What Does it Mean for Future ATS Litigation?*, 33 PEPP. L. REV. 469, 481 (2006) ("As peremptory and universally accepted international legal norms, *jus cogens* are simply an example of the types of . . . claims which the *Sosa* Court would at a minimum hold to constitute actionable [ATCA] violations.").

IV. COURT'S DECISION

Cisneros v. Aragon presented the first opportunity for any federal court to address whether statutory rape violated the law of nations through the ATCA.¹⁴⁴ After addressing the parties' arguments, the Tenth Circuit held that statutory rape did not violate international law.¹⁴⁵ In dicta, it opined several threshold requirements for actionable claims under the ATCA.¹⁴⁶

Cisneros argued that the district court erroneously dismissed her claim for lack of subject-matter jurisdiction.¹⁴⁷ She contended that Aragon violated 18 U.S.C. § 2243(a),¹⁴⁸ the federal statutory rape statute, and 18 U.S.C. § 2242(2)(a)-(b),¹⁴⁹ the federal statute criminalizing sexual relations with an individual incapable of appreciating the nature of the sex act or physically unable to refuse to participate in the act.¹⁵⁰ Cisneros argued Aragon violated international law because §§ 2243 and 2242(2)(a)-(b) embody an international norm prohibiting sexual violence against minors.¹⁵¹ Aragon responded that the alleged violations of the federal statutes did not violate international law because statutory rape is not a *mutual* concern.¹⁵² He maintained that the United States statutes are not indicative of international norms because they only note the *several*, independent concerns of the United States, and thus the court may not consider the statutes in determining whether a norm prohibiting sexual violence against minors exists.¹⁵³ The Court agreed with Aragon and affirmed the district court's dismissal of Cisneros's claim for lack of subject-matter jurisdiction over the claim.¹⁵⁴ The Tenth Circuit read Cisneros's contention as basing jurisdiction solely on the United States federal statutes, and thus held that "jurisdiction under [the ATCA] cannot be based solely on a violation of our criminal code."¹⁵⁵ The court noted that United States statutes may codify international norms, but held that, without additional evidence showing congruence between international norms and the federal statutes, the statute alone is not indicative of international law.¹⁵⁶

144. See *supra* note 18.

145. *Cisneros v. Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007).

146. See *infra* notes 168-170.

147. Appellant's Opening Brief, *supra* note 22, at 5-14.

148. 18 U.S.C. § 2243(a) (2000) (making it a criminal act to engage in a sexual act with a minor under the age of sixteen).

149. 18 U.S.C. § 2242(2)(a)-(b) (2000).

150. Appellant's Opening Brief, *supra* note 22, at 7-8.

151. Appellant's Opening Brief, *supra* note 22, at 9 (stating "the very statute alleged by Appellant's complaint is a 'law of nation[s] norm' providing this Court with enough to find jurisdiction under the [ATCA]").

152. Brief of Appellee, *supra* note 22, at 12-13 (citations omitted).

153. *Id.*

154. *Cisneros v. Aragon*, 485 F.3d 1226, 1228 (10th Cir. 2007).

155. *Id.* at 1230.

156. *Id.* It is unclear why the court considered Cisneros's contention that §§ 2243(a) and 2242(2) embodied an international norm as an isolated argument from Cisneros's contention that the sections

Cisneros further argued that the UN Convention on the Rights of the Child¹⁵⁷ reflected an international norm condemning sexual abuse against children.¹⁵⁸ She also cited an INTERPOL webpage¹⁵⁹ providing a list of countries' various child sexual abuse laws as evidence of the international norm prohibiting sexual abuse against minors.¹⁶⁰ The INTERPOL webpage shows that statutory rape laws exist in a measurable number of countries; however, it does not establish that INTERPOL member countries agree upon a common age of consent.¹⁶¹ Cisneros addressed this inconsistency by presenting a confusing argument contending that because she did not need to allege a violation of *jus cogens*, some incongruence regarding the age of consent is allowable.¹⁶² In sum, she asserted that the United States' statutory rape laws, combined with the Convention on the Rights of the Child, reveal that sexual abuse violates international norms.¹⁶³

Aragon argued that the lack of international consensus regarding a common age of consent shows there is no international norm proscribing sexual violence against a minor and statutory rape.¹⁶⁴ Aragon next maintained that because the Convention on the Rights of the Child was not a self-executing treaty, it did not "create obligations enforceable in the federal courts."¹⁶⁵ Aragon concluded by arguing that the alleged acts did not violate international norms because they were not specific, universal, or obligatory.¹⁶⁶ The court ruled that the Convention on the Rights of the Child and the INTERPOL webpage were neither congruent nor specific enough to reflect international legal norms, and in particular, the Convention on the Rights of the Child did not embody an international norm because it was not self-executing and was merely comprised of "aspirational goals stated in imprecise language."¹⁶⁷

were consistent with the United Nations Convention on the Rights of the Child and the Interpol Website. *See id.* In her brief, Cisneros's ultimate contention was that the federal statutes combined with the relevant international material reveal an international norm proscribing statutory rape. Appellant's Opening Brief, *supra* note 22, at 13-14.

157. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

158. Appellant's Opening Brief, *supra* note 22, at 8-9.

159. Legislation of INTERPOL Member States on Sexual Offences Against Children, <http://www.interpol.int/public/children/sexualabuse/nationallaws/default.asp> (last visited Apr. 5, 2008).

160. Appellant's Opening Brief, *supra* note 22, at 8.

161. Legislation of INTERPOL Member States, *supra* note 159.

162. Appellant's Opening Brief, *supra* note 22, at 14 ("It is that simple: sexual abuse or improper advantage taken of a minor (and in this case, an alien minor) is prohibited. The District Court's view is also simply not supported in requiring everyone (*jus cogens*) to agree such acts are prohibited."). The court did not address this argument. *See Cisneros v. Aragon*, 485 F.3d 1226 (10th Cir. 2007).

163. Appellant's Opening Brief, *supra* note 22, at 13-14.

164. Brief of Appellee, *supra* note 22, at 14-15.

165. *Id.* at 16 n.10 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-35 (2004)).

166. *Id.* at 14. While Aragon used the common language of specific, universal, and obligatory, he cited no authority for such a statement. *Id.*

167. *Cisneros*, 485 F.3d at 1230-31. In rejecting Cisneros's contention, the court stated in full: "This language hardly describes sexual misconduct 'with a specificity comparable to the features of the 18th-century paradigms [that the Supreme Court has] recognized.' The two articles are simply

In dicta, the Tenth Circuit seemingly posited a requirement that the international norms be *mutual* and not *several* to be actionable under the ATCA.¹⁶⁸ Furthermore, relying on *Sosa's* dicta, the court stated that ATCA claims are only legitimate if they are of a political nature and “substantially impact international affairs.”¹⁶⁹ The court ultimately rejected Cisneros’s claim because Aragon’s misconduct failed to cause serious repercussions in global affairs.¹⁷⁰

V. COMMENTARY

A. *The Tenth Circuit Dismissed Cisneros’s Complaint on Inappropriate Grounds*

The Supreme Court might as well have been speaking of *Cisneros* when it stated, “[o]n the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous.”¹⁷¹ The Tenth Circuit required Cisneros to plead more than a “colorable” offense of the law of nations and apparently utilized a higher jurisdictional standard requiring a “more searching preliminary review of the merits.”¹⁷² In doing so, the court blurred the lines between the standards for subject-matter jurisdiction and the standards for the adequacy of the claim on the merits.¹⁷³ The court’s dismissal for lack of

aspirational goals stated in imprecise language.” *Id.* at 1231 (internal citation omitted).

168. *See id.* at 1231. The Tenth Circuit noted that auto theft does not violate international law, but provided no authority for such a statement. *Id.* Such a statement is consistent with other courts that use theft as an example of a *several* concern when explaining the difference between *mutual* and *several* concerns. *See Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (providing an example of theft).

169. *Cisneros*, 485 F.3d at 1231 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)).

170. *Id.*

171. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). In *Arbaugh*, the Supreme Court considered whether the classification of Title VII of the Civil Rights Act of 1964’s “statutory limitation of covered employers to those with 15 or more employees” was a condition precedent for courts to obtain subject-matter jurisdiction over the claim, or whether the issue is for courts to decide on the merits. *Id.* at 510. Title VII claims arise under federal jurisdiction through 28 U.S.C. § 1331. *See id.* at 513. The court noted a plaintiff gains subject-matter jurisdiction through § 1331 when they plead a colorable claim arising under federal law. *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 681-85 (1946)). The Supreme Court defines colorable in the negative as not “immaterial and made solely for the purpose of obtaining jurisdiction or [not] wholly insubstantial and frivolous.” *See id.* at 513 n.10 (citations omitted).

172. *Cisneros*, 485 F.3d at 1228; *see Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). Under the *Filartiga* framework, a court will dismiss a case for lack of subject-matter jurisdiction if the plaintiff insufficiently alleges a violation of the law of nations. *See Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (“[I]t is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).”). *Kadic* does not define an adequate pleading. *See id.* The court, however, seems to equate “adequate” with “successful on the merits.” *See id.* A claim is adequate if the court holds the alleged violation of the law of nations is an actual violation of the law of nations. *See id.* Under *Kadic's* framework, a plaintiff’s allegation is always subject to dismissal for lack of subject-matter jurisdiction, as opposed to dismissal on the merits, if the court views the allegation as not violating the law of nations. *See id.*

173. *Cf. Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1004-06 (S.D. Ind. 2007) (discussing the

subject-matter jurisdiction contradicts long-standing traditions of law, the Supreme Court's interpretation of the ATCA in *Sosa*, Congress's intent, other federal courts, and previous Supreme Court precedent.

The ATCA provides the basis for both the cause of action and subject-matter jurisdiction in the same statute.¹⁷⁴ The ATCA is therefore similar to 28 U.S.C. § 1331, the federal question jurisdiction statute, because a court must first invoke jurisdiction before it can address the merits.¹⁷⁵ To do otherwise would confuse long-standing traditions of law because it is inappropriate for a court to consider the merits of the case only to declare that it lacks jurisdiction to address the plaintiff's claims.¹⁷⁶

The Tenth Circuit confused these long-standing traditions by dismissing on jurisdictional grounds after it addressed every argument Cisneros presented on the merits.¹⁷⁷ Such confusion contradicts both Supreme Court and Tenth Circuit precedent recognizing the general rule that a plaintiff's failure to state a claim warrants a dismissal on the merits, and dismissal on jurisdictional grounds is only appropriate for frivolous claims.¹⁷⁸

By conflating these standards, the Tenth Circuit's analysis in *Cisneros* is also inconsistent with *Sosa*.¹⁷⁹ After dismissing the claim, the *Sosa* Court remanded the case back to the district court, which subsequently entered a verdict for the defendant instead of dismissing the claims for lack of subject-matter jurisdiction.¹⁸⁰ Furthermore, requiring plaintiffs to meet the high standards normally reserved to prove the case

distinction between the standards that govern subject-matter jurisdiction and the standards applying to a claim on the merits).

174. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201 n.5 (9th Cir. 2007).

175. *See id.* (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

176. *See id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)) (noting *Sosa* stated that because the suit arises under federal common law, federal jurisdiction may also be determined under 28 U.S.C. § 1331); *Bell*, 327 U.S. at 682 ("For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."). In *Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005), the court considered an ATCA claim that involved a Vienna Convention Treaty to which the United States was a party. *Id.* at 369-71. The court decided jurisdiction based on the ATCA, then later withdrew the opinion and decided the case under 28 U.S.C. § 1331 because it permits federal subject-matter jurisdiction in cases involving the United States Constitution as well as treaties. *See Jogi v. Voges*, 480 F.3d 822, 824 (7th Cir. 2007) (withdrawing *Jogi*, 425 F.3d 367). The two *Jogi* decisions demonstrate how a case involving international law may be brought under either the ATCA or § 1331, depending essentially on whether Congress has ratified a treaty.

177. *Compare Bell*, 327 U.S. at 681-82 (holding that in federal common law claims, unless the claim is frivolous, the court should dismiss "on the merits, and not for . . . want of jurisdiction"), with *Cisneros*, 485 F.3d at 1230-31 (considering the merits but dismissing for lack of subject-matter jurisdiction).

178. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Bell*, 327 U.S. at 682; *Davoll v. Webb*, 194 F.3d 1116, 1128-29 (10th Cir. 1999); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 965 (10th Cir. 1996) (noting that dismissal on subject-matter jurisdiction grounds is only appropriate if the claim is frivolous).

179. *Roe v. Bridgestone Corp.*, 492 F.Supp.2d 988, 1006 (S.D. Ind. 2007) (citing *Sosa*, 542 U.S. at 738).

180. *Id.* (citing *Sosa*, 542 U.S. at 738).

on its merits as a jurisdictional requirement is inconsistent with Congress's intent.¹⁸¹ Congress was concerned that state courts were ill-equipped to handle international law issues, and, by denying jurisdiction, the "more marginal and creative cases might be pursued, at least for a time, in state courts after dismissal in the federal courts for lack of jurisdiction."¹⁸² Such a result directly contradicts Congress's objective in drafting the ATCA.¹⁸³

Finally, *Cisneros* also contradicts other circuit court decisions. Courts addressing the issue overwhelmingly agree that a more appropriate standard for determining subject-matter jurisdiction under the ATCA is whether the plaintiff presents an arguable or non-frivolous violation of international law.¹⁸⁴ The Ninth Circuit reasoned that because ATCA claims are common law claims, the standard to determine subject-matter jurisdiction should be the same as other statutes that authorize federal common law claims—whether the claims are frivolous.¹⁸⁵ The Tenth Circuit's failure to follow its sister courts' opinions and appropriately dismiss *Cisneros*'s claim eliminates the precedential value of the opinion.¹⁸⁶

The Supreme Court held that if a federal court confuses the subject-matter jurisdiction/claim-for-relief dichotomy and dismisses on inappropriate grounds, the opinion stands with "no precedential effect."¹⁸⁷ Because the Tenth Circuit inappropriately dismissed *Cisneros*'s claim for lack of subject-matter jurisdiction, as opposed to on the merits, the opinion lacks any precedential value regarding whether the ATCA pro-

181. *Id.*

182. *Id.*

183. *Id.*

184. *Compare id.* (holding that an arguable claim on the merits is all that is required for subject-matter jurisdiction), *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1244, 1247 (11th Cir. 2005) (dismissing for failure to state a claim), *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201 (9th Cir. 2007) (requiring a non-frivolous claim), *and Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165-68 (5th Cir.1999) (dismissing an ATCA claim on the merits as opposed to on subject-matter jurisdiction grounds), *with Enahoro v. Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005) (approving the higher standard to determine jurisdictional grounds). After *Enahoro* was decided, however, the Seventh Circuit, in a now withdrawn opinion, determined that *Sosa* did require dismissal of the claim on merit grounds. *See Jogi v. Voges*, 425 F.3d 367, 373 (7th Cir. 2005), *withdrawn*, 480 F.3d 822 (7th Cir. 2007).

185. *See supra* notes 74, 77, 184. In a concurring opinion, Judge Katzmman noted that *Sosa*'s requirement that the courts consider the prudential and policy concerns of adopting a new common law private right of action under the ATCA is an analysis that is reserved for discussing the merits of the action and not a jurisdictional question. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 266 (2d Cir. 2007) (Katzmann, J., concurring). According to Judge Katzmman, when courts address claims under the ATCA the jurisdictional threshold for courts is satisfied when a plaintiff meets the three elemental requirements of the ATCA: (1) a plaintiff sues, (2) for a tort, and (3) plaintiff alleges a violation of the law of nations. *Id.* at 267 (Katzmann, J., concurring); *see also id.* at 309 (Korman, J., concurring) ("Judge Katzmman argues that subject matter jurisdiction under the ATCA is established simply by virtue of an allegation that the defendant's conduct violated a norm of international law and that the decision to provide a remedy for the alleged violation simply relates to the issue of 'whether a cause of action exists.'").

186. *See infra* notes 187-189 and accompanying text.

187. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (citations omitted).

vides federal courts with subject-matter jurisdiction in suits involving the sexual abuse of a minor, specifically statutory rape.¹⁸⁸ *Cisneros*, consequently, should fade into obscurity because of the court's failure to distinguish between dismissing a claim for lack of subject-matter jurisdiction and dismissing a claim on the merits.¹⁸⁹

B. The Tenth Circuit Misplaced the Emphasis on the International Impact and Political Nature of the Offense

The Tenth Circuit held that *Cisneros*'s claim failed because Aragon's alleged acts did not threaten serious consequences in international affairs.¹⁹⁰ The court relied heavily on *Sosa*'s dicta, which noted that in 1789, the drafters believed international law only addressed situations that "overlapped with the norms of state relationships."¹⁹¹ *Cisneros*'s requirement that the offense impact the international world is misplaced because it: (1) is inconsistent with *Sosa*'s holding, (2) misconstrues the role of the *mutual* and *several* concern, and (3) will foreclose nearly all ATCA claims.¹⁹²

1. *Cisneros*'s Inconsistency with *Sosa*

The *Cisneros* court relied on dicta from *Sosa* in holding that a claim brought under the ATCA must "substantially impact international affairs."¹⁹³ The Tenth Circuit relied on the Supreme Court's discussion of how the drafters likely understood international law in 1789.¹⁹⁴ *Sosa* attempted to distinguish between types of international activity that the drafters would have perceived as delegated to the legislature and types that are judicially actionable.¹⁹⁵ By relying on *Sosa*'s dicta, the court

188. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citing *Steel Co.* 523 U.S. at 91) ("We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit.").

189. See *Steel Co.*, 523 U.S. at 91 (citations omitted). Even if other federal courts recognize *Cisneros*'s lack of precedential value regarding subject-matter jurisdiction and the ATCA, the opinion is still problematic because it is the only opinion addressing sexual violence of a minor as a violation of international law and thus contains significant persuasive value.

190. *Cisneros v. Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007).

191. *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)).

192. See *infra* sections V.B.1-3.

193. *Cisneros*, 485 F.3d at 1231 (citing *Sosa*, 542 U.S. at 715).

194. *Sosa*, 542 U.S. at 714-15.

195. *Id.* *Sosa* posits that Blackstone provided three spheres of international law. *Id.* The first sphere governed the states' behavior toward one another and was predominantly legislative and executive in nature. *Id.* The second judicial sphere concerned regulations of individuals outside of domestic boundaries such as maritime and commercial issues regarding shipwrecks. *Id.* The third issue, the one that the *Cisneros* court cites, concerns judicial issues arising between individuals that brings about consequences in the international community such as piracy and infringement upon the rights of ambassadors. *Id.* at 715. Considering that other aspects of the Judiciary Act of 1789 provided for resolution of the issues in the second sphere, the Supreme Court's conclusion that the drafters only had in mind third-sphere issues in drafting the ATCA is logical. See *The Paquete Habana*, 175 U.S. 677, 680 (1900) (using a maritime jurisdictional statute under the same Judiciary Act of 1789 instead

froze international law by requiring ATCA cases to conform to the drafters' understanding of international law in the eighteenth-century.¹⁹⁶

It is inappropriate to read *Sosa's* holding as requiring a static interpretation of international law as the drafters perceived it in 1789.¹⁹⁷ In fact, *Sosa's* opinion is consistent with a long line of American precedent recognizing international law as fluid and evolutive.¹⁹⁸ Furthermore, the Tenth Circuit appears to be alone in its emphasis on the type of international violation.¹⁹⁹ For example, a Seventh Circuit district court recognized international law's fluidity when it acknowledged child labor as a violation of international norms and as an actionable claim under the ATCA.²⁰⁰ Inherently non-political in nature, child labor at a rubber factory does not "substantially impact international affairs," but it is recognized as an international offense.²⁰¹

The Tenth Circuit confused *Sosa's* holding that the violation of international law needs to be as widely-condemned and as specifically-defined as the offenses Blackstone cited in the eighteenth-century, with the notion that the international violation needs to be the same *type* as Blackstone cited.²⁰² The Tenth Circuit's holding that the offense must "substantially impact international affairs" demonstrates it utilized an eighteenth-century approach to international law and misconstrued not only *Sosa* but also century-old precedent recognizing the dynamic nature of international law.²⁰³

2. Confusing Issues of Mutual and Several Concern

In a separate but related contention, the Tenth Circuit used automobile theft as an example of why statutory rape and sexual violence against a minor does not violate international law.²⁰⁴ As the court

of the ATCA).

196. See *Cisneros*, 485 F.3d at 1231 (citing *Sosa*, 542 U.S. at 715).

197. See *Sosa*, 542 U.S. at 725.

198. See *id.* (holding that new international law norms be as well-pronounced as the three historical paradigms Blackstone proclaimed); *The Paquete Habana*, 175 U.S. at 694 (showing that the principle of commandeering private fishing vessels during war changed from a principle of comity to a legal norm); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.").

199. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201-02 (9th Cir. 2007) (citing only *Sosa's* holding in determining law of nations requirements); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005) ("causes of action under [ATCA] are not static"); *Enahoro v. Abubakar*, 408 F.3d 877, 883-84 (7th Cir. 2005) (citing only *Sosa's* holding in determining law of nations requirements); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 U.S. Dist. LEXIS 59374, at *8 (N.D. Cal. Aug. 13, 2007) (same); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1009 (S.D. Ind. 2007) (same); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 898-99 (W.D. Tenn. 2005) (same).

200. *Bridgestone Corp.*, 492 F. Supp. 2d at 1022.

201. See *id.*

202. See *Sosa*, 542 U.S. at 714-15, 725; *Cisneros v. Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007).

203. See *Cisneros*, 485 F.3d at 1231; *supra* notes 198-199.

204. *Cisneros*, 485 F.3d at 1231. The Tenth Circuit's unsupported conclusion that automobile theft is not a violation of the law of nations is markedly similar to other court statements when they provide examples of *several* concerns. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir.

stated, a norm is not enforceable under the ATCA “simply because the norm is enshrined in the domestic law of all civilized societies.”²⁰⁵ While the opinion is unclear, the Tenth Circuit apparently concluded that statutory rape is an issue of *several* concern.²⁰⁶ In a similar fashion, the Second Circuit traditionally limits international norms to issues that are only of *mutual* concern: concerns that affect state relationships or concerns that states are willing to address *inter se*, or among themselves, for the common good.²⁰⁷

However, when states enter into “a binding agreement to enforce a mode of liability in their domestic law, that decision reflects a matter of mutual, not several, concern and is thus properly considered a subject of customary international law.”²⁰⁸ The UN Convention on the Rights of the Child is precisely that: an international agreement designed to enforce liability through the domestic laws of its signatories.²⁰⁹ Furthermore, *Filartiga*, the opinion that spawned the *mutual/several* dichotomy, specifically cautioned that courts must not dictate to the world which of humanity’s concerns are *mutual* and which are *several*.²¹⁰ Judge Kaufman noted that a state’s actions determine what is a *mutual* concern, and that there are no intrinsically *several* or purely domestic concerns.²¹¹ As *Filartiga* noted, all *several* concerns are susceptible to regulation by emerging norms of international law, and thus what was once a *several* concern may transform into a *mutual* one.²¹²

The Tenth Circuit, in dismissing Cisneros’s claim, failed to recognize that, at a minimum, the Convention on the Rights of the Child reveals statutory rape and sexual violence against minors to be a *mutual* and not a *several* concern.²¹³ Auto theft may not violate international

2003) (providing an example of theft). Because the Tenth Circuit’s conclusion is unsupported, it is safe to assume their argument is consistent with much of the Second Circuit’s argument that only *mutual* concerns, and not *several* concerns, are international law violations. *See id.*

205. *Cisneros*, 485 F.3d at 1231 (noting that auto theft is not a violation of the law of nations). The court appears to assume that all societies criminalize auto theft. *See id.*

206. *See id.*

207. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (citing *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)). There appears to be a difference between the Tenth Circuit’s requirement between a *mutual* concern and a concern that substantially impacts international affairs. *See Flores*, 414 F.3d at 249. A question of *mutual* concern does not ask about the extent of the impact on international affairs but is more focused on whether the concern is addressed by nations through their interactions with other nations. *See id.*; *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 273 n.7 (2d Cir. 2007) (Katzmann, J., concurring).

208. *Khulumani*, 504 F.3d at 273 n.7 (citing *Flores*, 414 F.3d at 249) (noting that UN conventions requiring states to criminalize aiding and abetting revealed that aiding and abetting had become international law).

209. Convention on the Rights of the Child, *supra* note 157, art. 34.

210. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (“We have no quarrel with this formulation [mutual/several concern dichotomy] so long as it be understood that the courts are not to prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good.” (citations omitted)).

211. *Id.*

212. *Id.*

213. *See Cisneros v. Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007); *Khulumani*, 504 F.3d at 273 n.7 (Katzmann, J., concurring).

law, but there is no UN Convention on the Rights of Motorists.²¹⁴ In contrast, the international community does believe that protecting minors from sexual abuse is a *mutual* international legal concern as evidenced by the Convention on the Rights of the Child.²¹⁵ By not recognizing that the Convention on the Rights of the Child demonstrates sexual violence of a minor to be a *mutual* concern, the Tenth Circuit confused the mutual/several dichotomy and misconstrued statutory rape as purely domestic.²¹⁶

3. Requiring the ATCA Claims to Interfere with State Relationships Forecloses Future ACTA Claims

The Tenth Circuit seemingly endorsed the view that most ATCA claims are only actionable if they involve some form of state action by noting *Kadic v. Karadzic's*²¹⁷ distinction between state actions and non-state actions.²¹⁸ *Cisneros* apparently stands for the proposition that for a claim to be actionable under the ATCA it must involve official state action.²¹⁹ Such an approach to international law is problematic because it will “defeat the action in its cradle” and limit “the range within which the [ATCA] was intended to operate.”²²⁰

Requiring state action smothers the ATCA claims summarily by making the claim subject to a number of affirmative defenses including act of state,²²¹ sovereign immunity,²²² comity,²²³ and the political ques-

214. This Comment does not contend that automobile theft does not violate customary international law or general principles of law and subsequently violate international law.

215. Convention on the Rights of the Child, *supra* note 157, art. 34. Other treaties, while not explicitly addressing the rights of minors, do, however, reveal an international concern regarding the protection of minors. *See, e.g.*, International Covenant on Civil and Political Rights arts. 9(1), 17(1)-(2), 24(1), Dec. 19, 1966, 999 U.N.T.S. 171.

216. *See Cisneros*, 485 F.3d at 1231; Convention on the Rights of the Child, *supra* note 157, art. 34.

217. 70 F.3d 232, 243 (2d Cir. 1995) (“However, torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law.”). *Kadic's* “state action” requirement was specific to situations of torture. *Id.* The Tenth Circuit’s utilization of *Kadic* to stand for the proposition that all ATCA claims require “state action” is a gross and unwarranted stretch of the Second Circuit’s holding. *See id.* *Kadic's* status in international law was likely supplanted by the *Kunarac* opinion of the International Criminal Tribunal for the Former Yugoslavia (ITCY), which opined that “the presence of a state official . . . is not necessary for the offence to be regarded as torture under international humanitarian law.” *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 496 (Feb. 22, 2001).

218. *Cisneros*, 485 F.3d at 1231 (citing *Kadic*, 70 F.3d at 243).

219. *Id.*

220. Scarborough, *supra* note 43, at 471-72.

221. *Id.* (citing *Kadic*, 70 F.3d at 250) (act of state doctrine was an unavailable defense because the defendant failed to raise it at the district court level)).

222. *Id.* (citing *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (dismissing the ATCA suit on foreign sovereign immunity grounds)). Under the act of state defense “courts generally refrain from judging the acts of a foreign state within its territory.” *Kadic*, 70 F.3d at 250.

223. *Id.* (citing *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24-25 (D.D.C. 2005) (refusing to assume the ATCA provides jurisdiction over whether the alleged genocide transpired in Indonesia because it “would be an impermissible intrusion in Indonesia’s internal affairs”).

tion doctrine.²²⁴ These defenses are in addition to other obstacles that usually arise in ATCA litigation, such as forum non-conveniens.²²⁵ Requiring state action will almost inevitably lead to the foreclosure of all ATCA causes of action.²²⁶

Since *Sosa*, nearly all circuit courts simply require the action to be consistent with *Sosa's* holding and provide no additional requirements for the claim.²²⁷ Therefore, besides vastly restricting actionable claims under the ATCA, *Cisneros's* state action requirements also contradict other circuits' interpretations of international law norms.²²⁸

C. *Sexual Violence Against Minors As a Violation of International Law*

Statutory rape statutes date back to 4000 B.C. as part of Hammurabi's Code of Laws.²²⁹ By 1275 A.D., English law had incorporated several aspects of Hammurabi's statutory rape laws.²³⁰ In England, the original age of consent was ten years, and the purpose of the law, according to Blackstone, "was not to create a new offense but to declare that a girl under the age of ten was incapable of judgment and discretion and thus unable to give legal consent."²³¹ American courts later adopted parts of the English laws as common law.²³² As the international community in the late twentieth and early twenty-first centuries began to specifically address issues of sexual violence, international tribunals and the conventions governing them relied on the same notion of consent that Blackstone articulated over 200 years ago.²³³

224. *Id.* at 470-71 (citing *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) (suit dismissed due to political question doctrine)).

225. *Id.* at 471 n.79 (noting that defenses such as forum non conveniens and the requirement that plaintiffs exhaust local remedies usually arise in ATCA claims).

226. *See id.* at 471-72.

227. *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201-02 (9th Cir. 2007) (citing only *Sosa's* holding in determining the law of nations requirement); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005) (same); *Enahoro v. Abubakar*, 408 F.3d 877, 883-84 (7th Cir. 2005) (same); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 U.S. Dist. LEXIS 59374, at *8 (N.D. Cal. Aug. 14, 2007) (same); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 898-99 (W.D. Tenn. 2005) (same). In 2007, the Second Circuit liberalized *Kadic's* requirement for state action in situations of torture by allowing a plaintiff's claim that a corporation aided and abetted torturous actions in South Africa to proceed. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007). It is noteworthy that, at its time, *Kadic* was a groundbreaking opinion because it held that there are several crimes, such as genocide and war crimes, which result in individual liability regardless of state action. *Kadic v. Karadzic*, 70 F.3d 232, 241-43 (2d Cir. 1995).

228. *See supra* note 227.

229. Rita Eidson, Comment, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 762 (1980).

230. *See id.*

231. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 212 (9th ed. 1783)).

232. Eidson, *supra* note 229, at 762 (citing *Nider v. Commonwealth*, 131 S.W. 1024, 1026 (1910)).

233. *See Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-T, Judgment, ¶ 457 (Feb. 22, 2001). (stating that a violation of sexual rights occurs "wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant"); Eidson, *supra* note 229, at 762 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 212 (9th ed. 1783)); Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM.

This Comment utilizes international law, as articulated in Article 38 of the ICJ, to argue that statutory rape is a violation of general principles of law and customary international law and thus should be an actionable claim under the ATCA.²³⁴ It also follows the *Sosa* paradigm, requiring the international legal norm to be as accepted and as definite in content as the historical paradigms the drafters were familiar with in the eighteenth-century.²³⁵ Alternatively, bearing in mind that the *Sosa* Court aligned itself with other circuit opinions, this commentary also recognizes the need to show the offense to be specifically-defined and universally-condemned, while revealing that the states must feel a legal obligation—*opinio juris*—to avoid breaching the norm.²³⁶

1. Defining the Offense—The Specificity Requirement: Searching for an International Definition of Statutory Rape

The Tenth Circuit dismissed, with little discussion, Cisneros's contention that Article 34 of the Convention on the Rights of the Child reflected international norms.²³⁷ The court viewed the Convention on the Rights of the Child as aspirational language that failed to specifically define any legal offense or remedy.²³⁸ After examining an INTERPOL webpage the court refused to utilize other sources to determine whether statutory rape violated any international norms.²³⁹ According to the court, statutory rape lacks a specific definition in international law.²⁴⁰ To the contrary, international law specifically defines rape as sexual penetration of an individual without that individual's consent.²⁴¹ The international definition of rape establishes that rape occurs when a victim is unable to consent "due to age-related incapacities;" therefore, statutory rape is not an independent international offense, but rather is intrinsically connected to the broader definition of rape.²⁴²

Older international conventions protecting women from rape per-

HUM. RTS. L. REV. 625, 675 (2001) (noting the ICTY indicated that issues of sexual violence hinge on the perspective of the victim, whether the individual consented to the sexual activity).

234. This interpretation is consistent with United States case law as well as international law. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citations omitted); Statute of the International Court of Justice, *supra* note 68, art. 38(1).

235. *Sosa*, 542 U.S. at 732.

236. See *id.* 732. *Opinio juris* is a requirement to show a violation of customary international law. See *supra* note 67.

237. *Cisneros v. Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007); see Convention on the Rights of the Child, *supra* note 157, art. 34.

238. *Cisneros*, 485 F.3d at 1231.

239. *Id.*

240. *Id.*

241. See Preparatory Comm'n for the Int'l Crim. Ct., *Finalized Draft Text of the Elements of Crimes*, arts. 7(1)(g)-1, 8(2)(b)(xxii)-1, n.16, 30 n.51 U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crimes*]; *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 440, 457 (Feb. 22, 2001); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 185-86 (Dec. 10, 1998); see also Eidson, *supra* note 229, at 762 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 212 (9th ed. 1783); Boon, *supra* note 233, at 675.

242. See *infra* notes 250-252 and accompanying text.

ceived them as objects of international law.²⁴³ For example, while the Fourth Geneva Convention prohibited rape and forced prostitution under Article 27, the statute's focus was preserving the honor and status of the victim as opposed to preventing the trauma that necessarily accompanies such a violation.²⁴⁴ The end of the twentieth century signaled a change in doctrine as four-year multinational negotiations culminated in the establishment of the International Criminal Court (ICC).²⁴⁵ The statute that defines the international crimes and that governs the ICC's jurisdiction is frequently referred to as the Rome Statute.²⁴⁶ The Rome Statute's objective was to provide a tribunal to prosecute the most heinous criminal activities, and its jurisdictional reach is specifically limited to genocide, wars of aggression, crimes against humanity, and war crimes.²⁴⁷

The Rome Statute represented a shift in defining sexual offenses in international law.²⁴⁸ Though the Rome Statute does not define rape, the Elements of Crimes, a supplementary text, provides a definition.²⁴⁹ The Elements of Crimes defines the offense of rape as:

The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.²⁵⁰

The Elements of Crimes's footnotes to the rape sections further indicate that a "person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."²⁵¹ These recent

243. See, e.g., Mitchell, *supra* note 136, at 239.

244. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S 287 (noting "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"); see Boon, *supra* note 233, at 627. Jurists criticized the Geneva Convention for considering crimes of rape as crimes against honor because by mischaracterizing the offense the statutes provided little utility in prosecuting perpetrators. See, e.g., Mitchell, *supra* note 136, at 239.

245. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Ct., *Rome Statute of the International Criminal Court* art. 1, U.N. Doc. A/Conf.183/9 (July 17, 1998), reprinted in 37 I.L.M 999 (1998) [hereinafter Rome Statute].

246. *Id.* art. 1.

247. Rome Statute, *supra* note 245, arts. 1, 5.

248. Boon, *supra* note 233, at 627, 630.

249. *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1, 8(2)(b)(xxii)-1; Rome Statute, *supra* note 245, art. 9. Article 9 of the Rome Statute provides that the Elements of Crimes document is to assist the court in determining the definitions of the crimes that fall within its jurisdiction. Rome Statute, *supra* note 245, art. 9.

250. *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1, 8(2)(b)(xxii)-1. The rape definitions are present under both the crimes against humanity and war crimes sections, respectively. See *id.* The definitions of rape are the same in both sections. *Id.*

251. *Id.* arts. 7(1)(g)-1 n.16, 8(2)(b)(xxii)-1 n.51.

international codifications of rape reflect the common law doctrine as articulated by Blackstone.²⁵² International tribunals have further clarified this definition of rape.²⁵³

In *Prosecutor v. Furundzija*,²⁵⁴ the International Criminal Tribunal for the former Yugoslavia (ICTY) defined rape as the penetration of a sexual organ under the threat of force or duress.²⁵⁵ The court, however, noted that the prohibition against rape “embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”²⁵⁶

In *Prosecutor v. Kunarac*²⁵⁷ the ICTY stated:

The matters identified in the *Furundzija* definition—force, threat of force or coercion—are certainly the relevant considerations in many legal systems but the full range of provisions referred to in that judgement suggest that the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy.²⁵⁸

According to *Kunarac*, sexual violence occurs whenever “the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.”²⁵⁹ What is particularly important about *Kunarac*

252. Compare *id.* arts. 7(1)(g)-1, 8(2)(b)(xxii)-1 (defining statutory rape as a form of rape), with Eidson, *supra* note 229, at 762 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 212 (9th ed. 1783)) (noting that the purpose of statutory rape “was not to create a new offense” but rather to state that minors under a certain age are unable to consent).

253. There are currently five highly-cited international tribunal cases that define rape. The ICTY authored three: *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998); *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment (Nov. 16, 1998); and *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001). The International Criminal Tribunal for Rwanda (ICTR) authored two opinions on the subject: *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); and *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence (Apr. 28, 2005). While none of the opinions directly contradicts one another, they do not agree on a single definition of rape. For example, *Kunarac* focused on the victim’s lack of consent while other cases, predominantly *Akayesu*, focused on the perpetrator’s use of force or coercion. Compare *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 457 (stating rape occurs when “the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant”), with *Akayesu*, Case No. ICTR-96-4-T ¶ 598 (defining rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”). *Muhimana*, the most recent of the opinions, consolidated the differing definitions. *Muhimana*, Case No. ICTR-95-1B-T ¶¶ 535-51. *Muhimana* noted that coercion and consent are not incompatible concepts, and, in the context of international war crimes, the use of force or coercion vitiates the need for the plaintiff to show a lack of consent. *Id.* ¶ 546. *Muhimana* ultimately noted that the definitions are compatible. *Id.* ¶ 550. This Comment focuses on *Kunarac* because its consent definition is more applicable to domestic situations because force is not necessarily required to show a victim’s lack of consent. See *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶¶ 129-30 (June 12, 2002). The definition proposed by this Comment, however, is factor-based and the use of force may make a showing of a lack of consent less relevant. See *infra* notes 267-268 and accompanying text.

254. Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

255. *Id.* ¶ 185.

256. *Id.* ¶ 186. Another ICTY case viewed rape not in terms of a mechanical definition of body parts and types of penetration but rather as a “physical invasion of a sexual nature, committed on a person under circumstances that are coercive.” *Delalic*, Case No. IT-96-21-T, Judgment, ¶ 479 (adopting definition from *Akayesu*, Case No. ICTR-96-4-T ¶ 597-98).

257. Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001).

258. *Id.* ¶ 440 (emphasis added).

259. *Id.* ¶ 457.

and *Furundzija* is that in both cases the ITCY courts completed extensive surveys of municipal law before drawing their respective definitions of rape.²⁶⁰

The ICTY defines rape as a violation of general principles of law and thus an international offense.²⁶¹ The ICTY viewed the specific definition of rape as emanating from municipal statutes, but noted rape violates not only general principles of law but customary international law as well because rape defies the “essence of the whole corpus of international humanitarian law” by stripping the victim’s human dignity.²⁶² In ATCA cases, courts have considered international tribunals’ rulings as important reflections of international law because the “opinions typically engage in nuanced and exhaustive surveys of international legal sources” and thereby are “persuasive evidence of . . . international law norms.”²⁶³ Circuit courts frequently turn to the Rome Statute and international criminal tribunals to define international criminal viola-

260. See *id.* ¶¶ 440-56; *Furundzija*, Case No. IT-95-17/1-T, ¶ 180; Mitchell, *supra* note 136, at 247-49 (discussing *Furundzija*’s municipal law survey).

261. See Statute of the International Court of Justice, *supra* note 68, art. 38(1); *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 440 (stating the common denominator in rape cases across municipal legal systems is a violation of sexual autonomy). In *Furundzija*, the ICTY established two requirements needed to formulate rape as a violation of a general principle of law: (1) the survey of national legal systems must be broad and include common and civil law systems, and (2) the definition needs to be articulate and specific. *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 177-78. After completing a survey of national laws, the ICTY subsequently noted “most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.” *Id.* ¶ 181. While the court noted national statutes viewed forced oral penetration as either sexual assault or rape, it held that forced oral penetration was rape because oral penetration, like vaginal penetration, violates both the sexual autonomy and security of the victim and thus violates customary international law. *Id.* ¶¶ 182-85. It noted that a defendant who may only be charged with sexual assault in his or her domestic jurisdiction may subsequently be charged with rape internationally because of the violation of customary international norms. *Id.* ¶ 184. In *Kunarac*, the ICTY posited the following definition of rape after extensively surveying domestic laws common to major legal systems:

[T]he *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 460. The *Kunarac* court specifically noted consent is based on context, and a court may consider whether the victim could resist the act when the individual consented. *Id.* ¶¶ 458, 460.

262. *Furundzija*, Case No. IT-95-17/1-T, ¶ 183.

263. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 338 (S.D.N.Y. 2005). The Restatement (Third) of Foreign Relations confirms the role of international tribunals as promulgators of customary international law by stating: “[T]o the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 103 cmt. b (1987). United States courts deciding ATCA cases also afford great weight to these international tribunals in determining whether an alleged act violates the law of nations. See, e.g., *Presbyterian Church of Sudan*, 226 F.R.D. 456, 478 n.21 (S.D.N.Y. 2005) (listing ATCA cases utilizing ICTY and ICTR decisions). To date, apparently only one United States ATCA case distinctly disagreed with either the ICTY’s or the ICTR’s construction of international law. See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 549-50 (S.D.N.Y. 2004). The Second Circuit, however, recently vacated and remanded *In re South African Apartheid Litigation*. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260-64 (2d Cir. 2007).

tions.²⁶⁴ The Tenth Circuit's failure to follow this model resulted in an inaccurate reflection of rape's status in international law.

The Rome Statute, *Kunarac*, and *Furundzija* exemplify the shift in viewing women and rape in international law. Under this new twenty-first century paradigm, women are no longer objects of international law, and rape is no longer a question of whether the perpetrator demonstrated the requisite force.²⁶⁵ Instead, the illegality of rape focuses on the victim—an autonomous being—and whether the victim consented.²⁶⁶ Under this new framework, rape is the penetration of a sexual nature of an individual without the individual's consent and includes statutory rape—an individual's inability to consent due to "age-related incapacity."²⁶⁷ A variety of circumstances, including the victim's duress, the perpetrator's force, coercion, power, and even the victim's age, are all factors in determining whether the victim consented.²⁶⁸

3. Global Condemnation of Rape—The Universal Requirement—and Subsequent State Remedial Measures—The *Opinio Juris* Requirement

The international community's definition of rape is specific enough to support an ATCA claim.²⁶⁹ This definition, however, resulted from international conventions and tribunals authorized to address rape in situations of war crimes and crimes against humanity.²⁷⁰ Rape in those situations blatantly violates international norms because it violates *jus*

264. See, e.g., *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257, 275-76 (E.D.N.Y. 2007); *Presbyterian Church of Sudan*, 226 F.R.D. at 477-79 (noting the Rome Statute codified the definitions of international crimes); *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 63, 89-98 (E.D.N.Y. 2005).

265. See Boon, *supra* note 233, at 630.

266. See *id.*

267. See *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1, 8(2)(b)(xxii)-1; *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶¶ 440, 457; *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 185-86; see also Eidson, *supra* note 229, at 762 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 212 (9th ed. 1783)); Boon, *supra* note 233, at 627. Under this framework, statutory rape and rape are not separate offenses because both crimes focus on the lack of consent of the victim with statutory rape specifically recognizing the "age-related incapacity" of victim. *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1 n.16, 8(2)(b)(xxii)-1) n.51.

268. See *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1, 8(2)(b)(xxii)-1; *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶¶ 440, 458; *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 185-86.

269. See *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1 n.16, 8(2)(b)(xxii)-1 n.51; *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶¶ 440, 457; *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 185-86.

270. See Rome Statute, *supra* note 245, art. 1; *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1 n.16, 8(2)(b)(xxii)-1 n.51; *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶¶ 440, 457; *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 185-86. The fact that the ICTY in *Kunarac* and *Furundzija* considered rape in the context of war crimes and genocide is irrelevant for definition purposes. The defendants in both cases were prosecuted for violating a canon of international law prohibiting rape in times of war. See *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶ 436; *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 165-173. While international law clearly prohibited rape in times of war, at the time of the tribunals decided opinions there was no clear international definition of rape. *Furundzija*, Case No. IT-95-17/1-T, ¶ 175. To solidify a definition of rape, the ICTY turned to general principles of law to find a definition specific and articulate enough to justify criminal prosecution. See *id.* ¶ 177. The ICTY's definition of rape therefore speaks to the other two requirements under the ATCA, universal condemnation and *opinio juris*, as well as provides an articulate and specific definition. See *id.* ¶¶ 185-86.

cogens norms.²⁷¹

Rape holds a unique status in international law. While the act of rape is included as an example of nearly every *jus cogens* norms violation, its independent international status is largely unknown despite numerous jurists who contend the prohibition of rape is a *jus cogens* norm.²⁷² To address this unique status, this Comment argues that rape—specifically statutory rape—is a violation of customary international law first in the context of *jus cogens* violations as articulated by the Rome Statute,²⁷³ and, subsequently more broadly, in terms of non-binding global conventions and declarations.²⁷⁴ Finally, this Comment establishes statutory rape as a violation of general principles of law.²⁷⁵

The global community condemns rape.²⁷⁶ Global conventions, such as the Rome Statute, created specific laws providing a description of rape, including statutory rape, and have authorized criminal courts to try sexual predators—assuming the court has jurisdiction.²⁷⁷ The Rome Statute, as well as the *Kunarac* and *Furundzija* decisions, embody customary international law for several reasons.²⁷⁸ First, the Rome Statute, which has 139 signatories, is widely accepted across a variety of major legal systems.²⁷⁹ Second, the largest objection to the Rome Statute, as voiced by the United States, stems not from the statute's codification of international crimes, but rather from the power given to prosecutors to try offenders based on assertions of extraterritorial jurisdiction.²⁸⁰

271. See *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995) (holding that sexual acts committed during torture, genocide, and war crimes are actionable under the ATCA); Mitchell, *supra* note 136, at 226; see also Zachary S. Kahn, Note, *How Far Is the 'Door Ajar' ? Whether Rape As Torture Is Actionable Under the Alien Tort Statute After Sosa*, 12 CARDOZO J.L. & GENDER 685, 708 (2006).

272. See, e.g., Mitchell, *supra* note 136, at 225. James R. McHenry III, Note, *The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, 35 VAND. J. TRANSNAT'L L. 1269, 1309 (2002).

273. See *infra* notes 277-284 and accompanying text.

274. See *infra* notes 285-301 and accompanying text.

275. See *infra* notes 302-306 and accompanying text.

276. See *infra* notes 277-308 and accompanying text.

277. See Rome Statute, *supra* note 245, art.1; *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1 n.16, 8(2)(b)(xxii)-1 n.51; *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, ¶¶ 440, 457; *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 185-86; *M.C. v. Bulgaria*, 2003-XIII Eur. Ct. H.R. 1, ¶¶ 179-85. In *M.C. v. Bulgaria*, the European Court of Human Rights criticized Bulgaria's prosecution for failing to appreciate the effects of rape upon a minor and failing to take sufficient steps to ensure the minor's protection. *Bulgaria*, 2003-XII Eur. Ct. H.R. 1, ¶¶ 179-85.

278. This Comment, while accepting that the customary status of the Rome Statute is still contested, contends that the rape definition supplied by the Elements of Crimes, and buttressed by the ICTY and ICTR, solidifies the status of rape as a violation of customary international law. See *supra* notes 245-277 and *infra* note 279 and accompanying text.

279. See Multilateral Treaties Deposited with the Secretary-General, Rome Statute of the International Criminal Court, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (last visited Apr. 11, 2008). Signatories and/or ratifiers include countries from all major legal systems including the United States, France, Germany, Iran, Russia, Zimbabwe, Morocco, United Arab Emirates, Brazil, Argentina, and Japan. *Id.* It is irrelevant that the Rome Statute is a recent document, because passage of time is not determinative as to whether a document embodies or creates customary international law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102 n.2 (1987).

280. See Marc Grossman, Under Sec'y for Political Affairs, U.S. Dep't of State, Remarks to the

Third, in *Furundzija*, the ICTY afforded great weight to the Rome Statute by stating, “[T]he Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.”²⁸¹ Finally, as noted earlier, with the exception of one overturned opinion, apparently every federal circuit court adopts the international tribunals’ proclamations of international law.²⁸² The Rome Statute facially reflects the ICTY’s position that rape violates general principles of law and certain customary international norms.²⁸³ These contentions demonstrate the universal condemnation of statutory rape and *opinio juris* because of the Rome Statute’s wide support and because states largely acquiesce to the definitions of international offenses as articulated by the Rome Statute and the ICTY.²⁸⁴

Universal renunciation of statutory rape is also evidenced by a growing number of non-binding resolutions designed to protect victims of sexual abuse.²⁸⁵ While these conventions fail to require state action, they show that sexual abuse is an international problem of *mutual* concern and reveal customary international law and *opinio juris* by articulating states’ legal obligation to prevent rape and prosecute perpetrators.²⁸⁶ The UN Declaration on the Elimination of Violence against Women (DEVAW) avers that states need to “[e]xercise due diligence to prevent, investigate and . . . punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”²⁸⁷ The DEWAV specifically defined violence to include “sexual abuse of female children” as well as rape.²⁸⁸ The UN’s declaration, therefore, condemned statutory rape as well as other forms of violence

Center for Strategic and International Studies: American Foreign Policy and the International Criminal Court, May 6, 2002, *available at* <http://www.state.gov/p/us/rm/9949.htm>. The United States’s concern stems from the ICC’s “unchecked power” to conduct political prosecutions. *Id.* A federal district court found this objection irrelevant in determining whether the substance of the rules contained within the Rome Statute represented customary international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 339-40 (S.D.N.Y. 2005) (“The objections raised by the United States centered on the *procedures* contained in the final draft of the Rome Statute, not the *substance* of the international legal rules contained therein.”).

281. *Furundzija*, Case No. IT-95-17/1-T, ¶ 227.

282. *See supra* note 263 and accompanying text.

283. *See supra* note 261 and accompanying text; *Furundzija*, Case No. IT-95-17/1-T, ¶ 227.

284. *See supra* note 261 and accompanying text; *Furundzija*, Case No. IT-95-17/1-T, ¶ 227.

285. *See, e.g.*, Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. Doc. A/RES/48/104. (Feb. 23, 1994). For a complete discussion on the international resolutions regarding the prevention of sexual violence in international humanitarian law, see INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME II: PRACTICE PART 2 §§ 1555-1753 (Jean-Marie Henckaerts & Louise Doswald-Beck eds. 2005).

286. *Opinio juris* occurs when states act out of a legal obligation. *See supra* note 68. The non-binding resolutions show that states collectively are concerned with sexual violence against minors revealing the concern to be a *mutual* concern and not a *several* one and demonstrating *opinio juris*. *See Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 273 n.7 (2d Cir. 2007) (Katzmann, J., concurring) (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (noting that aiding and abetting had become international law because UN conventions required states to criminalize such conduct).

287. Declaration on the Elimination of Violence Against Women, *supra* note 285, art. 4(c).

288. *Id.* art. (2)(a), (b).

against women such as domestic abuse.²⁸⁹ Ultimately, the DEVAW, passed to ensure the “integrity and dignity” of women, stated that “sexual abuse of female children” and rape is incompatible with “those rights and principles [that] are enshrined in international instruments, including the Universal Declaration of Human Rights [and] the International Covenant on Civil and Political Rights.”²⁹⁰ At a minimum, the DEVAW established international legal mechanisms as an “appropriate forum for discussion on, and elimination of, gender-based violence.”²⁹¹

Despite the DEVAW’s status as a non-binding resolution, it reflects that statutory rape violates customary international law because: (1) it is collaborated and enhanced by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and (2) because a significant number of individual states altered penal codes, increased funding, or changed internal procedure to ensure rape offenders are prosecuted thereby revealing the *opinio juris* of the global community.²⁹² First, while CEDAW does not mention rape, a state’s failure to prosecute perpetrators constitutes a violation of the CEDAW according to the oversight committee responsible for implementation of the treaty.²⁹³ Violence against women, including statutory rape, is therefore

289. *See id.*

290. *Id.* pmbl. The ICTY noted that rape implicitly violated “all of the relevant international treaties” regarding human rights. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 170 (Dec. 10, 1998) (citing International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171).

291. Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right To State Protection From Domestic Violence*, 20 N.Y. INT’L L. REV. 57, 117 (2007).

292. *See infra* notes 293, 295.

293. Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13. At the time of publishing, 185 States had ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). *See* Multilateral Treaties Deposited with the Secretary-General, CEDAW, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp> (last visited Apr. 11, 2008). The United States is the only party to sign the Convention but not ratify it. *Id.* The CEDAW is governed by the Committee on the Elimination of Discrimination against Women (Committee) that is responsible for reporting the progress made by the CEDAW as well as making recommendations on means to further its goal of eliminating discrimination against women. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *supra*, pt. V. While CEDAW’s text does not mention rape or violence against women, the Committee articulated that violence against women violates the CEDAW. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/Gen/1/Rev. 6, 244 (May 12, 2003), Committee on the Elimination of Discrimination against Women, General Recommendations, No. 19. General Comment No. 6 (11th Session, 1992). The Committee stated:

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

Id. Furthermore, as of April 13, 2008, ninety-five states ratified the Optional Protocol that accompanies the CEDAW. *See* Multilateral Treaties Deposited With The Secretary-General, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp> (last visited Apr. 11, 2008); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 15, 1999, 38 I.L.M. 763, 2131 U.N.T.S. 83. The Optional Protocol gives the Committee authority to enforce CEDAW’s principles. *See id.* In the *A.T. v. Hungary* communica-

inextricably connected to discrimination against women under CEDAW.²⁹⁴

Second, since the UN passed DEVAW the global community has continued to pressure individual states to ratify new laws and alter existing laws to protect women from abuse.²⁹⁵ While substantial work remains, a significant number of states took steps to improve the prosecution of rape offenders, a clear demonstration of *opinio juris*.²⁹⁶ Because CEDAW and DEVAW are widely supported, rape is a violation of customary international law.²⁹⁷

Related to CEDAW, the UN Convention on the Rights of the Child asserts that states need to take protective steps to prevent “[t]he inducement or coercion of a child to engage in any unlawful sexual activity.”²⁹⁸ The United States, along with other nation states and the European Union, passed statutes authorizing the prosecution of their citizens who travel abroad and engage in child prostitution.²⁹⁹ The statutes, enacted to combat child prostitution, are a direct result of the UN

tion, the Committee ruled that Hungary’s failure to protect a woman from rape and domestic violence violated the CEDAW. See U.N. Gen. Assembly, *Report of the Committee on the Elimination of Discrimination Against Women*, 27, Annex III, *delivered to the General Assembly*, U.N. Doc. A/60/38, (Mar. 18, 2006).

294. See *supra* text accompanying note 293.

295. In 2001 and 2003, the General Assembly requested that the Secretary-General prepare a report to provide information on the legal and policy measures implemented by UN member states to reduce violence against women. See G.A. Res. 57/181, ¶ 14, U.N. Doc. A/RES/57/181 (Feb. 4, 2003); G.A. Res. 55/68, ¶ 11, U.N. Doc. A/RES/55/68 (Jan. 31, 2001). As of 2004, forty-seven countries voluntarily reported to the UN that they altered penal codes or changed enforcement mechanisms to reduce violence against women. See The Secretary-General, *Report of the Secretary-General on Violence Against Women*, ¶¶ 5-34, *delivered to the General Assembly*, U.N. Doc. A/59/281 (Aug. 20, 2004); The Secretary-General, *Report of the Secretary-General on the Elimination of All Forms of Violence Against Women, Including Crimes Identified in the Outcome Document of the Twenty-Third Special Session of the General Assembly Entitled “Women 2000: Gender Equality, Development and Peace for the Twenty-First Century,”* ¶¶ 2-27, *delivered to the General Assembly*, U.N. Doc. A/57/171 (July 2, 2002). One year after the General Assembly passed DEVAW, the United States enacted the Violence against Women Act. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified and scattered in titles 18, 28, and 42 of the United States Code). The same year as the United States passed the Violence Against Women Act, the rest of the Western Hemisphere, with a few exceptions, essentially codified the DEVAW while adding enforcement mechanisms with the passage of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 *available at* <http://www.oas.org/cim/english/convention%20violence%20against%20women.htm>. The European Court of Human Rights ruled that Articles 8 and 3 of the European Convention on Human Rights proscribe obligations on member states to protect violations of an individual’s private rights, including protections from rape. See *M.C. v. Bulgaria*, 2003-XIII Eur. Ct. H.R. 1, ¶¶ 149-53 (Dec. 4, 2003).

296. See *supra* text accompanying note 295.

297. See *supra* text accompanying notes 293, 295.

298. Convention on the Rights of the Child, *supra* note 157, art. 34. The Convention on the Rights of the Child is a particularly strong resolution because all but two of the world’s nations have ratified it—the United States and Somalia. See Multilateral Treaties Deposited with the Secretary-General, Convention on the Rights of the Child, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp>.

299. See 18 U.S.C. § 2423(b) (2000) (criminalizing the act of child prostitution even if occurring outside the country); Karene Jullien, *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 DENV. J. INT’L L. & POL’Y 579, 590-600 (2003) (noting that the European Union’s member nations, the United States, Australia, Brazil, Thailand, and Sri Lanka all ratified statutes to prevent child prostitution).

Convention on the Rights of the Child.³⁰⁰ The world-wide effort to prevent child prostitution shows the global community's concerns with the sexual exploitation of children and reveals the UN Convention on the Rights of the Child as reflecting the states' obligation to protect minors from sexual exploitation.³⁰¹

The UN Convention on the Rights of the Child garners even more support because "every state in the world outlaws rape."³⁰² International tribunals considered this universal renunciation significant.³⁰³ This renunciation reflects an underlying legal and moral obligation "to penalize serious violations of sexual autonomy"³⁰⁴ and establishes rape as a violation of general principles of law because there exists "a general norm of international law derived from municipal law regarding the illegality of rape."³⁰⁵ The ICTY specifically opined that this general principle of law may be considered a customary international norm because it is consistent with the canon of established international norms that center on protecting the victim from violations of sexual autonomy.³⁰⁶

Rape is an indefensible and abhorrent act. Patricia Sellers, legal adviser for gender-related crimes for the office of the Prosecutor for both the ICTY and the International Criminal Tribunal for Rwanda, wisely argued that the prohibition of rape itself is a *jus cogens* norm and asked whether anyone could "fathom two states entering into an agreement to rape persons in a third state, without the condemnation of the international community of States."³⁰⁷ The answer to this question alone reveals statutory rape as a universally-condemned international violation of customary international law and general principles of law, because like other acts of sexual violence, statutory rape infringes upon the victim's dignity and sexual autonomy.³⁰⁸

D. Returning to Cisneros and Possible Outcomes

While it is clear that rape is a sexual act without consent, when plaintiffs plead they are unable to consent solely because of age, the international community is largely silent and domestic municipal laws

300. Jullien, *supra* note 299, at 589-90.

301. *See id.*

302. Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287, 302 (2002).

303. *See* Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 440, 457 (Feb. 22, 2001) (using domestic law as an impetus for the court's declaration of the international elements of rape as well as the international condemnation of rape); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ¶ 180 (Dec. 10, 1998) (same).

304. Mitchell, *supra* note 136, at 248.

305. Sellers, *supra* note 302, at 302; *see* Furundzija, Case No. IT-95-17/1-T, ¶ 180; Statute of the Court of International Justice, *supra* note 68, art. 38(1).

306. *See supra* text accompanying notes 254-262.

307. Sellers, *supra* note 302, at 303.

308. *See supra* text accompanying note 261; Sellers, *supra* note 302, at 303.

provide very little uniformity.³⁰⁹ The municipal laws of the global community, while universally outlawing rape, are inconsistent on what is an appropriate age of consent.³¹⁰ Cisneros's initial pleading essentially asserted strict liability, arguing that Aragon violated the law of nations because as a nineteen-year-old he slept with a fifteen-year-old.³¹¹ While the Tenth Circuit inappropriately dismissed the claim on jurisdictional grounds, the court's holding that the statutory rape of a fifteen-year-old, without any other forms of coercion or duress, does not violate the law of nations, is respectable.³¹²

Internationally, age alone may indicate a lack of consent, and a perpetrator who sexually violates a young child would violate international law because the definition of consent stems from the victim's ability to voluntarily participate.³¹³ In ATCA cases involving sexual violence against minors, courts need to determine the consent issue on a case-by-case basis utilizing a variety of factors including the victim's age, the amount of coercion or duress, and the discrepancies of power inherent in the situation.³¹⁴

While courts consider age in determining consent, it is unlikely that Cisneros's age was dispositive in establishing a violation of an international norm because the age of fifteen is not a universal age of consent.³¹⁵ Cisneros also alleged she was physically incapable of resisting the act.³¹⁶ Because the facts are incomplete in both the opinion and in the briefs, it is impossible to draw a conclusion as to whether Cisneros alleged the type of psychological deceit or coercion necessary to violate any norm of international law.³¹⁷ The Tenth Circuit should have drawn a similar conclusion and remanded the case to the district court for more discovery before summarily dismissing her claim for lacking the specificity required.

309. *Elements of Crimes*, *supra* note 241, arts. 7(1)(g)-1 n.16, 8(2)(b)(xxii)-1 n.51.

310. The INTERPOL member states webpage available *infra* was used to compile the following list of countries and their respective ages of consent: Germany, 14; Russia, 16; and Japan, 13. See Strafgesetzbuch [StGB] [Penal Code] [Germany] Nov. 13, 1998, § 176, available at <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGermany.pdf>; Ugolovnyi Kodeks RF [UK] [Criminal Code] art. 134 (Russ.), available at <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaRussia.pdf>; Keih [Penal Code] [Japan], art. 177, available at <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaJapan.pdf>. For an additional list of age of consent statutes see INTERPOL's Legislation of INTERPOL Member States on Sexual Offences Against Children, <http://www.interpol.int/public/children/sexualabuse/nationallaws/default.asp> (last visited Apr. 11, 2008).

311. *Cisneros v. Aragon*, 485 F.3d 1226, 1230 (10th Cir. 2007).

312. See *id.* at 1231.

313. See *supra* Part V.C.1. A brief survey of national laws shows that many national statutes place the age of consent at fourteen, and, at its lowest, twelve. See INTERPOL's Legislation of INTERPOL Member States on Sexual Offences Against Children, <http://www.interpol.int/public/children/sexualabuse/nationallaws/default.asp> (last visited Apr. 11, 2008).

314. See *supra* Part V.C.1.

315. See sources cited *supra* note 310. It is likely a perpetrator would violate the law of nations if the victim was under twelve. See *supra* text accompanying note 313.

316. *Cisneros*, 485 F.3d at 1230.

317. See *id.* at 1228; Appellant's Opening Brief, *supra* note 22, at 3, 4.

VI. CONCLUSION

In *Cisneros v. Aragon*, the Tenth Circuit inappropriately concluded that sexual abuse of a minor does not violate international law. The court's shortsighted decision to dismiss the claim on jurisdictional grounds, as opposed to on the merits, should reduce the precedential value of the decision. *Cisneros* is still problematic, however, because it is the only federal opinion addressing the sole issue of sexual abuse of a minor as a violation of international law.

Sexual abuse of minors is a global problem. The United Nations recognized that over 220 million children were the victims of sexual abuse in 2002.³¹⁸ The Tenth Circuit passed on a unique opportunity to give individual acts of rape an international face in American courts and likely foreclosed future claims alleging similar violations. The ICTY recognized that "[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person."³¹⁹ The Tenth Circuit should have recognized as much.

318. *Study on Violence Against Children*, *supra* note 9, ¶ 28.

319. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶ 186 (Dec. 10, 1998).