

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 07-cv-01924-DME-KMT

KENNETH L. SMITH,

Plaintiff,

v.

HONS. MICHAEL L. BENDER,
NATHAN B. COATS,
GREGORY J. HOBBS, JR.,
REBECCA LOVE KOURLIS,
ALEX J. MARTINEZ,
MARY J. MULLARKEY, and
NANCY E. RICE, in their individual capacities only,
HON. JOHN W. SUTHERS, and
FRIEDRICK C. HAINES, in their individual capacities only,
JOHN DOES 1-99, and
THE UNITED STATES OF AMERICA,

Defendants.

**DEFENDANT UNITED STATES OF AMERICA’S REPLY TO
PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT
UNITED STATES OF AMERICA’S MOTION TO DISMISS**

Defendant United States of America (United States) hereby replies to Plaintiff’s Response in Opposition to Defendant United States of America’s Motion to Dismiss (Doc. 13) (Response):

I. THE ICCPR IS NOT BINDING ON THE FEDERAL COURTS

The gravamen of Plaintiff’s argument is that the International Covenant on Civil and Political Rights (ICCPR) is the law that provides him the relief he seeks from the United States. *See* Response, at 2-16; Complaint, at 15-16. In order for the Court to agree with Plaintiff’s

argument, the Court would have to contradict the binding precedent of not only the Tenth Circuit, which is that “it is clear that the ICCPR is not binding on the federal courts,” *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), but also the United States Supreme Court. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).¹ Plaintiff asserts that this Court is obligated to abide by the ICCPR and that the Tenth Circuit’s holding is merely non-binding dicta. *See* Response, at 2-16, 17. But this argument is unavailing in light of the Supreme Court’s holding, acknowledged by Plaintiff (*see* Response, at 17), that “the United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” *Sosa*, 542 U.S. at 735.

In any event, Plaintiff’s argument that the Tenth Circuit’s holding in *Hain* is dicta should be rejected because the Court in *Hain* ruled on the applicability of the ICCPR as an alternate holding based upon due consideration of legal authorities. Alternate holdings, especially those relying on legal analysis, are not dicta. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.”); *United States v. Rohde*, 159 F.3d 1298, 1302 (10th Cir. 1998) (holding that the court’s thorough analysis of alternate grounds for the outcome of the case resulted in that analysis being considered a holding, not dicta). Plaintiff bases his attempt to characterize the

¹ The ruling in *Sosa* negates Plaintiff’s argument in Plaintiff’s Reply in Support of Motion for Declaratory Relief Under 28 U.S.C. § 2201(a) (Doc. 21), that *Roper v. Simmons*, 543 U.S. 551 (2005) overruled *Hain*. *Roper* does not discuss *Hain* or *Sosa*, and merely alludes to the ICCPR as one argument against the juvenile death penalty. *See id.*, at 567, 576. As to the ICCPR’s non-binding status, *Roper* is silent as that issue was not considered in *Roper*. *See id.* Thus, the rulings of *Hain* and *Sosa* that the ICCPR does not apply remain. *See* above.

Tenth Circuit’s ruling as dicta only on his assumptions about what questions should have been before the Circuit. *See* Response, at 17. But it is apparent from the text and analysis in *Hain* that the Court reached its holding that the ICCPR is not binding only after due consideration of legal authorities. *See Hain*, 287 F.3d at 1243. The issue of whether the ICCPR is binding law is therefore not an issue of first impression in the Tenth Circuit, as asserted by Plaintiff. *See* Response, at 2.²

Assuming *arguendo* that the Tenth Circuit’s ruling was dicta, it is nevertheless a correct statement of the law, and therefore should be followed by this Court. The Tenth Circuit based its ruling on an analysis of precedent from the Fifth and Sixth Circuits, the Congressional Record, and the Restatement of Foreign Relations, all of which support the Court’s conclusion. *See Hain*, 287 F.3d at 1243 (citing *Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir. 2001)); *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); 138 Cong. Rec. S4784; Restatement (Third) of Foreign Relations Law § 111 (1987)); *see also Sosa*, 542 U.S. at 735. Specifically, the Tenth Circuit noted that in ratifying the ICCPR, the United States Senate maintained various reservations in its ratification, including that the provisions of the ICCPR were “not self-executing.” *See Hain*, 287 F.3d at 1243 (quoting 138 Cong. Rec. S4784); *Sosa* 542 U.S. at 735 (holding the same). As

² Moreover, Plaintiff’s reference to “[c]ounsel’s assertion that this Court does not possess subject-matter jurisdiction” (*see* Response, at 3) and all other references to “counsel” in Plaintiff’s filings are misplaced. First, for the reasons stated above in the analysis of the *Hain* and *Sosa* decisions, it is the United States Supreme Court, and the Courts of the Tenth Circuit, Fifth Circuit, Sixth Circuit, and Congress, who hold the position that the ICCPR does not apply, not counsel. And, the United States’ filings in this matter and positions in those filings are those of the United States, not merely of counsel. *See* Colo. RPC. 1.2.

such, the Court in *Hain* found that the ICCPR is not binding on the federal courts because a “non-self- executing’ agreement will not be given effect as law in the absence of necessary authority.” *Id.* (citing *Buell* 274 F.3d at 372 and quoting Restatement (Third) of Foreign Relations Law § 111 (1987)). At the time of the Court’s ruling in *Hain*, Congress had not enacted implementing legislation for the ICCPR. *See id.* Plaintiff does not assert that any implementing legislation has since been enacted. *See* Response. In fact, Plaintiff’s Motion for Declaratory Relief (Doc. 12) acknowledges that there has been no implementing legislation to date. *See* Motion for Declaratory Relief, at 5-13.

Moreover, the Supreme Court’s holding in *Sosa*, two years after *Hain*, confirms that the *Hain* ruling is correct. *See Sosa*, 542 U.S. at 735. In *Sosa*, petitioner Alvarez-Machain, a Mexican national, argued that his alleged abduction by Sosa was an “arbitrary arrest” in violation of the ICCPR, among other international laws including the Universal Declaration of Human Rights (UDHR). *See id.* at 698, 735. The Court found that the ICCPR and UDHR, “despite their moral authority,” had little authority domestically and that neither could “establish the relevant and applicable rule of international law” that would allow a finding for Alvarez-Machain. *Id.* at 734-35.

In short, based on the rulings in *Hain* and *Sosa*, the United States is not subject to liability based on Plaintiff’s claims against state actors who allegedly deprived him of his rights, and thus the United States’ Motion to Dismiss should be granted. “[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.” *Lewis v. Casey*, 518 U.S. 343, 349 (1996). Until Congress

adopts legislation to implement the ICCPR, it can provide no relief to Plaintiff.

II. NEITHER THE ICCPR NOR *JUS COGENS* WOULD PROVIDE THE RELIEF PLAINTIFF SEEKS

A. Dissatisfaction with outcome of lawsuits is not equivalent to denial of access to the courts

Plaintiff's recent history of lawsuits on the topic of his denial of admission to the Colorado Bar negates his claim that he was denied access to the courts. *See* Complaint, at 1-3. As noted by the Colorado Supreme Court in one of Plaintiff's recent cases, *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005), as to which the Court may take judicial notice pursuant to Federal Rule of Evidence 201(b)(2),³ rather than comply with the procedures of the bar to assess Plaintiff's fitness to practice law, "[Plaintiff] filed a series of lawsuits, first in federal district court and then in Denver District Court. In those actions, he challenged the denial of his application for admission under 42 U.S.C. section 1983, as a violation of his First, Fourth and Fourteenth Amendment rights." *Smith*, 121 P.3d at 891; *see also* State Defendants' Motion to Dismiss, at 2-3. Thus, because Plaintiff has demonstrated that he has had ample access to the courts, his legal assertion that he has been denied access is unavailing. *See* Defendant United States of America's Motion to Dismiss, at 11-12. Accordingly, even if the ICCPR were applicable, it cannot provide the relief Plaintiff seeks because the public record shows that there has been no denial of Plaintiff's access to court. *See Smith*, 121 P.3d at 891. And dissatisfaction with legal rulings is not a denial of access to the courts. *See Harrington v. Wilson*, 2006 WL

³ The United States is not asking the Court to take judicial notice of the facts as found in *Smith*, but of the existence of public records, as referenced in *Smith*, of Plaintiff's filings.

2724094, at *16 (D.Colo. 2006) (holding, in a case alleging denial of access to the courts based on alleged disabilities, that “despite all of the plaintiff’s verbiage and attempted artful pleading, he has not adequately alleged that there has been any impediment to his access to the courts . . . Instead, he is simply dissatisfied with rulings issued by the trial and appellate courts” and denying plaintiff’s motion seeking, *inter alia*, declaratory judgment and injunctive relief as to plaintiff’s right of access to Colorado state courts) (citation omitted) (attached). Instead, Plaintiff must show some actual “interference” with his ability to access the courts. *See, e.g., Lewis*, 518 U.S. at 349, 351 (holding that to successfully claim denial of access to the courts, an inmate must show that some physical circumstances “hindered his efforts to pursue a legal claim”). In the present case, Plaintiff cannot show that his efforts to pursue his claims have been hindered, only that the outcome of his claims have been unsatisfactory.

B. Norms of *jus cogens* do not address right of access to courts

Plaintiff argues in the alternative that if the ICCPR does not apply, norms of *jus cogens* require this Court to find that the United States should pay damages or grant Plaintiff access to the courts so he can again file suit about his being denied admission to the Colorado Bar. *See* Response, at 13-15; Complaint, at 15. As Plaintiff acknowledges in his Response, principles that rise to the level of *jus cogens* norms are typically those regarding egregious acts, such as the prohibition against torture (found to be a *jus cogens* norm) and against the death penalty (not found to be a *jus cogens* norm). *See* Response, at 14; *see also* Defendant’s Motion to Dismiss, at 10-11; *Sosa*, 542 U.S. at 737-38 (customary international law did not prohibit arrest and detention). Plaintiff also concedes that whether *jus cogens* norms are established is typically up

to the presiding judge. *See* Response, at 14. And Plaintiff offers no argument for why the alleged denial of bringing a lawsuit about his denial of admission to one of 50 state bars of the United States warrants a finding that a *jus cogens* norm has been violated.

III. THERE HAS BEEN NO WAIVER OF SOVEREIGN IMMUNITY

Because there has been no implementing legislation for the provisions of the ICCPR or any other express waiver by Congress, sovereign immunity has not been waived. *See* Motion to Dismiss, at 6-8. Moreover, the Supreme Court has cautioned against affording individuals private rights of action under international law. *See Sosa*, 542 U.S. at 727 (urging “judicial caution” and finding “a high bar to new private causes of action for violating international law”).

CONCLUSION

For the reasons stated above, Defendant United States of America requests that its Motion to Dismiss be granted.

DATED this 29th day of January, 2008.

Respectfully Submitted,

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s/ Marc A. Bonora

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on January 29, 2008, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail address:

Christine K. Wilkinson
christine.wilkinson@state.co.us, steve.morrow@state.co.us

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant(s) in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

Kenneth L. Smith
23636 Genesee Village Road
Golden, CO 80401

s/ Marc A. Bonora
For the United States Attorney's Office