ABDULLAHI v. PFIZER & THE ALIEN TORT STATUTE: KICKING OPEN A DOOR LEFT SLIGHTLY AJAR BY *SOSA v. ALVAREZ-MACHAIN*

I. INTRODUCTION

In 1996, northern Nigeria was plagued by a bacterial meningitis epidemic.[1] One of the main treatment sites was the Infectious Disease Hospital (IDH) in Kano, Nigeria.[2] There, Médecins Sans Frontières (Doctors Without Borders) had been providing patients with "a conventional and effective treatment . . . free of charge."[3] Around the same time, pharmaceutical giant Pfizer was seeking the Food & Drug Administration's (FDA) approval for Trovafloxacin Mesylate (commonly known as "Trovan"), a new antibiotic designed to fight bacterial meningitis in children.[4] In order to obtain the clinical data required by the FDA, Pfizer put together a research protocol and allegedly received permission from the Nigerian government to conduct trials in Kano.[5] The company sent three of its American doctors into the region to work with four Nigerian doctors.[6] "[T]he team allegedly recruited two hundred sick children who sought treatment at the IDH" for the Trovan trial.[7] Of the two hundred, approximately half were given an oral form of Trovan and half were given an FDA-approved drug called Ceftriaxone.[8] The Pfizer team concluded the trial after two weeks and "left without administering follow-up care."[9] Eventually, Trovan was approved only for use in "adult emergency care" in the United States and was banned entirely in the European Union.[10]

Following the Trovan experiment, two sets of Nigerian plaintiffs (the *Abdullahi* plaintiffs and the *Adamu* plaintiffs)[11] filed actions in the Southern

1. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009), *cert. denied mem.*, 130 S. Ct. 3541 (2010).
2. *Id.*
3. *Id.* at 169-70.
4. *Id.* at 169.
5. *Id.* at 170.
6. *Abdullahi*, 562 F.3d at 169.
7. *Id.*
8. *Id.* at 169, 170 n.2.
9. *Id.* at 169.
10. *Id.* at 170.
11. The procedural history surrounding this preliminary litigation will be discussed more fully in Part III, *infra*.

District of New York, claiming, inter alia, violations of a customary international law norm against non-consensual medical experimentation.[12] According to the plaintiffs, the trial failed to meet any minimum human research standard.[13] Among other things, the plaintiffs alleged that Trovan had never been tested in oral form on children, that animal tests had shown life-threatening side effects, that the children in the Ceftriaxone "control group" were purposely given a low dosage to overvalue the effectiveness of Trovan, that the team failed to secure the informed consent of the children and their parents, and that no follow-up care was administered.[14] In their complaint, the plaintiffs alleged that five children's deaths were caused by Trovan, six children died from the inadequate dose of Ceftriaxone, and numerous others were left with permanent side effects such as paralysis, brain damage, and blindness.[15] The District Court dismissed both complaints in 2002, citing a lack of subject matter jurisdiction under the Alien Tort Statute (ATS).[16] The plaintiffs made a consolidated appeal—*Abdullahi v. Pfizer*—to the Second Circuit Court of Appeals.[17]

In January of 2009, the Second Circuit handed down its long-awaited decision on the case, holding that Pfizer's Trovan clinical trials violated a universally accepted norm of customary international law and thus afforded the plaintiffs subject matter jurisdiction under the ATS.[18] In a 2-1 decision, the court looked at a variety of international declarations to find that non-consensual clinical research falls under the "law of nations."[19] The court

12. *Abdullahi*, 562 F.3d at 168.

13. *Id.* at 169-70 (arguing that minimum research standards were not met when Pfizer failed to secure informed consent or follow basic treatment protocols).

14. *Id.*

15. *Id.* at 169.

16. *Id.* at 168, 170 (The actions were also dismissed on the alternative grounds of *forum non conveniens*. Although not the focus of this Note, the *forum non conveniens* aspect is important in that it helped to keep the *Abdullahi* litigation alive long enough to see the Supreme Court decide the landmark ATS case, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). The preliminary *Abdullahi* litigation, including the *forum non conveniens* aspect, will be discussed fully in Part III, *infra*.). *See also* 28 U.S.C. § 1350 (2006). The statute is officially titled "Alien's action for tort," but it is commonly referred to as the "Alien Tort Statute" or "Alien Tort Claims Act." In light of a sharp curtailing of ATS causes of action, for the purposes of this Note, "Alien Tort Statute" will be used.

17. *Abdullahi*, 562 F.3d at 168, 171. For clarity, this Note will periodically use "the 2009 decision" to refer to this case and distinguish it from any of the previous actions of the same title.

18. *Id.* at 187.

19. *Id.* at 166-68, 175-87.

also held that the plaintiffs had alleged facts adequate to show that Pfizer was a state actor, working in concert with the Nigerian government.[20]

This Note will examine the Second Circuit's application of the ATS to *Abdullahi v. Pfizer*, focusing both on how the Court defined the "law of nations" and how it performed the state action analysis to reach its ultimate decision that jurisdiction was appropriate under the ATS. First, Part II briefly introduces the ATS's "law of nations" component as well as the state action consideration. Then, it discusses the background of the ATS, focusing on its application by the Second Circuit and the Supreme Court's landmark decision in *Sosa v. Alvarez-Machain*. Next, Part III examines the preliminary litigation leading up to the 2009 decision. Part IV examines the 2009 *Abdullahi* decision, specifically (1) the sources relied upon by the court to prove that nonconsensual clinical research is the "law of nations" and (2) the majority's and dissent's characterization of Pfizer's relationship with the Nigerian government. Part V looks at the law of nations and the state action component in greater detail in order to provide an overall critique of the 2009 *Abdullahi* decision. Ultimately, this Note will demonstrate that the *Abdullahi* majority disregarded *Sosa* by its overly broad interpretation and application of the ATS and that future restraint must be exercised to prevent an ill-advised and problematic expansion of the ATS.

II. SUBSTANCE AND HISTORY OF THE ALIEN TORT STATUTE

A. Substance of the Alien Tort Statute

The Alien Tort Statute (ATS)[21] states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[22] The necessary elements can be broken down as: (1) an alien must bring the suit; (2) there must be a cognizable tort cause of action; and (3) the alleged action must violate either: (a) the "law of nations";[23] or (b) a treaty of the United States.[24] In virtually any facially non-frivolous ATS action, the first two elements will be satisfied. Because it can be determined plainly whether

20. *Id.* at 188-89. The court did not address the issue of whether corporate liability exists under the ATS, instead viewing Pfizer as an "individual." As such, this Note will examine only the private versus state actor distinction and disregard the admittedly important corporate versus individual liability component. For a brief discussion of the Second Circuit's current view of corporate liability under the ATS, *see infra* note 328.

21. 28 U.S.C. § 1350 (2006).

22. *Id.*

23. "Law of nations" and "customary international law" are synonymous terms. Flores v. Southern Peru Copper Corp., 414 F.3d 233, 237 (2d Cir. 2003). They will be used interchangeably in this Note.

24. *Id.* at 242.

an action violates a treaty of the United States, the existence of ATS jurisdiction almost inevitably turns on whether the action violates the law of nations. Plaintiffs generally advance a variety of international accords and instruments to prove the state of the law of nations and demonstrate that the tort alleged violates a customary norm of international law.[25]

Inherent in the law of nations analysis is a state action consideration; whether one is violating the law of nations will depend on whether that person or entity is a private or state actor.[26] Many sources of international law explicitly apply to states only[27] and, as a general rule, the list of law of nations violations for which a private actor can be held liable is much narrower.[28]

In examining ATS jurisprudence as a whole, and particularly the Second Circuit's decision in *Abdullahi v. Pfizer*, it is important to keep in mind the uncertain and debatable nature of the law of nations, as well as the indivorcible state action question.

B. History of the Alien Tort Statute

The history of the ATS reveals judicial uncertainty as to its intended scope and application, particularly with respect to the aforementioned law of nations inquiry.[29] A part of the Judiciary Act of 1789,[30] the ATS had—until 1980—been mentioned in just four judicial opinions[31] and provided jurisdiction in only two.[32]

25. *See, e.g.*, Part II.B *infra* (discussing the facts of a number of Second Circuit ATS cases, as well as the Supreme Court's *Sosa* opinion. In each, the plaintiffs offer several purported sources of international law to bolster their claims.).

26. *See, e.g.*, *Abdullahi*, 562 F.3d at 194 (Wesley, J., dissenting) (stating that "a customary international law norm cannot be divorced from the identity of its violator."); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (observing in note 20 that "[A] related consideration [to whether a norm can support a cause of action] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.").

27. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6546 (Dec. 16, 1966) (which applies only to State parties).

28. *See infra* Part V.B (discussing the differences between a state party's and a private party's liability with respect to violations of customary norms of international law).

29. *See infra* Part II.B.1 (discussing past Second Circuit cases dealing with the ATS).

30. The Judiciary Act of 1789, ch.20, § 9(b), 1 Stat. 73, 77 (1789) (current version at 28 U.S.C. § 1350).

31. Lucien J. Dhooge, *Lohengrin Revealed: The Implications of* Sosa v. Alvarez-Machain *for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT'L & COMP. L. REV. 393, 400 (2006).

32. *See* Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007) (discussing the two pre-1980 cases in which the ATS had provided jurisdiction).

The ATS's scarcity of precedent, coupled with its relative lack of legislative history[33] has caused courts confusion as to the intended scope of the statute.[34] In particular, there has been controversy as to whether it is purely jurisdictional in nature and as to what constitutes the "law of nations."[35] The two questions are tightly entwined; on its face, a dynamic view of the "law of nations" language seems to provide for new causes of action and give the statute substantive authority.[36] A static view would appear to make the statute purely jurisdictional in nature,[37] confining it to violations of the law of nations that existed in 1789.[38] Underlying this debate is a difficult paradox—in order for federal jurisdiction to even exist under the ATS, the complainant must sufficiently plead "a violation of the law of nations."[39] The Second Circuit[40] has wrestled with this dilemma in

33. Dhooge, *supra* note 31, at 397-98. The Act's scant legislative history will be evident in Part II.B.2 *infra*, in the context of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

34. Dhooge, *supra* note 31, at 398. *See also* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 245, 249 (2004) (noting that courts have interpreted the scope of the statute so broadly that the door is open for countless claims that "[a]lthough potentially meritless . . . are not 'frivolous' . . . .").

35. *See infra* Part II.B.1-3 (discussing the Second Circuit and Supreme Court ATS jurisprudence and highlighting the debate about whether the statute provides for new causes of action).

36. Sosa v. Alvarez-Machain, 542 U.S. 692, 712-24 (2004) (examining the history of the ATS and acknowledging the lower courts' confusion as to whether the statute was intended to create new causes of action).

37. *Id.* at 714.

38. The *Sosa* court noted that, when the First Congress drafted the original version of the ATS, it had in mind three primary violations of the law of nations: "violation of safe conducts, infringement on the rights of ambassadors, and piracy." *Id.* at 724 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 68 (1769)). These are collectively referred to as "the 18th century paradigms." *Id.* at 725.

39. Filartiga v. Pena-Irala, 630 F.2d 876, 887-88 (2d Cir. 1980) (stating a "violation of the law of nations" must be alleged "at the jurisdictional threshold" so courts have "accordingly, engaged in a more searching preliminary review of the merits . . . .").

40. The issue of the intended scope of the ATS has been addressed by many Circuits. *Compare* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (D.C. Cir. 1984) (holding that the ATS does not create a cause of action, merely a basis for subject matter jurisdiction) *with In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (holding that a cause of action is created by the ATS and that "nothing more than a *violation* of the law of nations is required to invoke [the ATS]" (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 779)). For the purposes of this Note, only the Second Circuit's opinions will be discussed in order to maintain the context of *Abdullahi*.

several cases[41] and, in 2004, the Supreme Court undertook to provide some clarification.[42]

1. The Second Circuit's Interpretation of the Alien Tort Statute

The ATS first began to enjoy judicial prevalence in 1980 when it provided jurisdiction in *Filartiga v. Pena-Irala*.[43] In that case, citizens of Paraguay brought an action against another Paraguayan, Americo Norberto Pena-Irala (Pena), for torturing and killing their son.[44] Pena was in the United States on a visitor's visa at the time.[45] In Paraguay, Pena had been the Inspector General of Police in the plaintiff's region.[46] The court found that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights . . . [t]hus . . . [the ATS] provides federal jurisdiction."[47] Aside from the reemergence of the ATS, *Filartiga* marked the beginning of the Second Circuit's effort to define the "law of nations"[48] and effectively initiated the creation of new causes of action under the ATS.[49] Particularly, the court noted that "only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords," is conduct violative of the law of nations and actionable under the statute.[50] To illustrate this notion, the court cited Judge Friendly: "the mere fact that every nation's municipal law may prohibit theft does not incorporate 'the Eighth Commandment, 'Thou Shalt not steal' . . . [into] the law of nations.'"[51] It is valuable to keep this distinction in mind while examining the remainder of the ATS cases discussed in this Note, particularly the 2009 *Abdullahi* decision. It can be tempting to erroneously assume that an action decried by most nations must be violative of the "law of nations."

Fifteen years later, the Second Circuit decided *Kadic v. Karadžić* and further shaped both its definition of the law of nations and breadth of

41. *See, e.g.*, Flores v. Southern Peru Copper Corp., 414 F.3d 233, 247-50 (2d Cir. 2003); Kadic v. Karadžić, 70 F.3d 232, 238 (2d Cir. 1995); *Filartiga*, 630 F.2d at 887-88 (2d Cir. 1980).

42. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004). *Sosa* was the first, and so far only, Supreme Court case to analyze the ATS.

43. *Filartiga*, 630 F.2d at 878.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

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

49. *Id.*

50. *Id.* at 888.

51. *Id.* (citing ITT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975)).

potential causes of action.[52] There, the plaintiffs were from Bosnia-Herzegovina and brought suit against the self-proclaimed leader of the unrecognized Bosnian-Serb Republic, known as "Srpska."[53] The "president" of this region, Karadžić, allegedly commanded his forces to perpetrate a number of atrocities on Croat and Muslim citizens of Bosnia-Herzegovina.[54] It was a bit murky whether Karadžić was a private or state actor[55] but the court stated "[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action."[56] Specifically, it found that private actors may be sued under the ATS in cases where the alleged tort violates normal standards of "universal concern" that would intuitively extend to private party conduct.[57] The court provided such examples as slavery, genocide, and war crimes.[58] The *Kadic* holding introduced the need to analyze the "state action" component of the law of nations when dealing with suits against apparently private actors. The court noted that a private actor would be liable under the ATS if he or she were the leader of an unrecognized state, acted under the color of authority, or acted in concert with a foreign state.[59] The state action consideration will be more fully discussed in Part V(B), *infra*.

In 2003, the Court provided a more detailed, albeit somewhat ambiguous, definition of the law of nations in *Flores v. Southern Peru Copper Corp*.[60] Peruvian residents brought suit under the ATS against an American mining company, claiming that some of the mining operation's pollution had caused severe—and in some cases, fatal—lung disease.[61] The court ultimately held that no source of international law supported the norm of customary international law put forth by the plaintiffs and that "right to life" and "right to health" were too indefinite to be regarded as binding international law.[62] In a lengthy and detailed discussion of the law of nations and sources of international law, the court stated that, for the

52. Kadic v. Karadžić, 70 F.3d 232, 239-44 (2d Cir. 1995).

53. *Id.* at 236-37.

54. *Id.*

55. *Id.* at 239. For example, Karadžić argued that he was not a state actor, but maintained that he was the President of the Republic of Srpska. *Id.* The court notes that the plaintiffs were also rather inconsistent "in pleading defendant's role as President of Srpska." *Id.*

56. *Id.*

57. *Kadic*, 70 F.3d at 240 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987)).

58. *Id.* at 240 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987)).

59. *Id.* at 244-45.

60. Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003).

61. *Id.* at 236-37.

62. *Id.* at 254-55, 266.

purposes of the ATS, the law of nations "refers to the body of law known as customary international law" and can be "discerned from myriad decisions made in numerous and varied international and domestic arenas."[63] It consists of "those clear and unambiguous rules by which States universally abide, or to which they accede, out of a sense of legal obligation and mutual concern."[64] Importantly, the Court also noted that the law of nations "does not stem from any single, definitive, readily-identifiable source."[65]

2. *Sosa v. Alvarez-Machain*: The Supreme Court's Interpretation of the ATS

One year after the Second Circuit decided *Flores*, the Supreme Court addressed the jurisdictional and substantive paradox of the ATS in a landmark decision.[66] In *Sosa v. Alvarez-Machain*, the plaintiff, Alvarez, was a Mexican citizen indicted for the murder of a United States agent in Mexico.[67] A United States agency approved a plan to hire Mexican nationals to kidnap Alvarez and bring him to Texas where an outstanding warrant for his arrest would be executed.[68] Pursuant to the plan, Sosa took Alvarez from his home in Mexico, "held him overnight in a motel," and then brought him to the United States on a private plane.[69] Alvarez was arrested and brought suit against Sosa under the ATS, claiming the statute authorizes the creation of new causes of action and that Alvarez violated a purported customary international norm against arbitrary detention.[70]

In an exhaustive opinion that examined the history of the ATS and the future of its jurisdictional grants, the Court found that:

> [T]he ATS is a jurisdictional statute creating *no new causes of action*. This does not mean . . .that the ATS was stillborn because any claim for relief required a further statute expressly authorizing adoption of causes of action. Rather, the reasonable inference from history and practice is that the ATS was intended to have practical effect the moment it became law, on the understanding that *the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time*: offenses against ambassadors, violation of safe conducts, and piracy.[71] (emphasis added).

63. *Id.* at 247-48.
64. *Id.* at 252.
65. *Flores*, 414 F.3d at 247-48.
66. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
67. *Id.* at 697.
68. *Id.* at 697-98.
69. *Id.* at 698.
70. *Id.* at 698-99.
71. *Sosa*, 542 U.S. at 694.

Rejecting Alvarez's contention that the ATS—in addition to granting jurisdiction—was intended as authority to create new causes of action, the Court pointed to the placement of the statute within § 9 of the Judiciary Act.[72] That section deals exclusively with federal jurisdiction and the Court notes that it is improbable that "the distinction between jurisdiction and cause of action [would] have been elided by the drafters of the Act."[73] The Court was cognizant that its ruling would raise a question about "the interaction between the ATS at the time of its enactment and the ambient law of the era."[74] It reconciled that question by noting the opinion of several *Amici* professors: "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time."[75]

Relying upon this premise and the idea that "nothing Congress has done is a reason for us to shut the door to the law of nations entirely,"[76] the Court announced that federal judges have a limited power to recognize "a narrow class of international norms," to be "judicially enforceable."[77] In the case of the specific norm championed by Alvarez, the Court stated:

> Whatever may be said for the broad principle [plaintiff] advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise.[78]

The prevailing standard for judicial enforceability would be that "any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[79] Explicitly emphasizing the need for restraint, the Court advised that this "judicial power should be exercised on the understanding that the door is

72. *Id.* at 713.

73. *Id.*

74. *Id.* at 714.

75. *Id.* See *supra* note 38 for the three specific violations of the law of nations recognized by English common law. For a thorough description of the Court's historical analysis of the ATS, see *Sosa*, 542 U.S. at 714-24.

76. *Sosa*, 542 U.S. at 731. The Court also noted that it "would welcome any congressional guidance" and acknowledged "that at any time (explicitly, or implicitly by treaties or statutes that occupy the field)" Congress may shut the door. *Id.*

77. *Id.* at 729.

78. *Id.* at 738.

79. *Id.* at 725. The Court's emphasis on 18th century paradigms reflects its belief that the United States received the law of nations as it existed upon its independence. Dhooge, *supra* note 31, at 421 (citing *Sosa*, 542 U.S. at 714 and Ware v. Hylton, 3 U.S. 199, 281 (1796)).

still ajar subject to vigilant doorkeeping."[80] Among the reasons cited for the necessity of this "vigilant doorkeeping," was the Court's concern about maintaining separation of powers.[81] "[T]he potential implications for the foreign relations of the United States of recognizing [new private causes of action] should make courts particularly wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs."[82] Moreover, "[the judiciary has] no congressional mandate to seek out and define new and debatable violations of the law of nations . . . modern indications of [Congress] . . . have not affirmatively encouraged greater judicial creativity."[83]

In a compelling concurrence, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) argued that no discretionary power "to create causes of action for the enforcement of international-law-based norms" should be reserved by the federal judiciary.[84] Much of his argument turned on his interpretation of the *Erie Railroad Co. v. Tompkins* holding that there is no federal general common law. [85] In particular, he notes that "federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[86] To create federal common law "out of 'international norms,' and then construct[ ] a cause of a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts."[87] Perhaps the best summarization of the concurrence's argument is its characterization by the majority: "Justice Scalia [believes it best] to close the door to further independent judicial recognition of actionable international norms,"[88] and Justice Scalia's own statement: "I would subtract [from the Court's opinion the] reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms."[89]

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

81. *Id.* at 727-28.

82. *Id.* at 727.

83. *Id.* at 728.

84. *Id.* at 739 (Scalia, J., concurring).

85. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938). Justice Scalia's full analysis of *Erie* as support for his position may be found at Sosa v. Alvarez-Machain, 542 U.S. 692, 739-49 (2004) (Scalia, J., concurring).

86. *Sosa*, 542 U.S. at 741 (Scalia, J., concurring) (citing Milwaukee v. Illinois, 451 U.S. 304, 312 (1981)).

87. *Id.* at 743.

88. *Sosa*, 542 U.S. at 729 (majority opinion).

89. *Sosa*, 542 U.S. at 739 (Scalia, J., concurring).

3. The Second Circuit's Post-*Sosa* Opinions

Following *Sosa*, there has been no shortage of cases filed under the ATS; apparently the relatively strict approach adopted by the Supreme Court has not scared off plaintiffs. Rather, it seems they have latched on to the limited judicial discretion still accorded to the courts. For its part, the Second Circuit was fairly conservative about granting ATS jurisdiction, at least until the 2009 *Abdullahi* decision.

Following *Sosa*, the Second Circuit has addressed the ATS on several occasions.[90] The first came in 2007 with *Khulumani v. Barclay National Bank, Ltd.*[91] The plaintiffs sued "approximately fifty corporate defendants and hundreds of 'corporate Does,'" alleging that they had collaborated with the South African government to maintain apartheid.[92] The Court held that the ATS conferred jurisdiction on these multinational corporations "because they aided and abetted violations of customary international law."[93] The "law of nations" question was not addressed by the Court as it "decline[d] to determine whether plaintiffs have adequately pled a violation of international law sufficient to avail themselves of [ATS] jurisdiction."[94]

One year later, the Court denied ATS jurisdiction in *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*[95] There, the plaintiffs brought suit under the ATS, alleging the defendants violated a customary international norm against the wartime use of Agent Orange.[96] The court ruled that the sources of law on which the plaintiffs relied did not satisfy the *Sosa* standard.[97] The sources advanced by the plaintiffs included the 1925 Geneva Protocol (which was not ratified until after the cause of action accrued), the Nuremberg Code (which denounced the intentional use of chemicals to kill humans, not their use to kill plants and cut off food supplies), and a number of advisory opinions and letters that were not on point.[98] Specifically, the court noted that the proffered materials did not

90. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009); Mora v. New York, 524 F.3d 183 (2d Cir. 2008); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008); Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007).

91. *See Khulumani*, 504 F.3d at 258.

92. *Id.*

93. *Abdullahi*, 562 F.3d at 174 (citing *Khulumani,* 504 F.3d at 260).

94. *Khulumani*, 504 F.3d at 260-61.

95. *Vietnam Ass'n*, 517 F.3d 104, 123 (2d Cir. 2008).

96. *Id.* at 113. Agent Orange was used during the Vietnam War to kill off brush and uncover potential enemy hiding places. *Id.* at 120.

97. *Id.* at 119.

98. *See id.* at 118-23.

define a universal and sufficiently specific international norm against the manufacture and wartime use of Agent Orange.[99]

The same year, the Second Circuit decided *Mora v. People of the State of New York*.[100] The plaintiff argued that Article 36(1)(b)(3) of the Vienna Convention on Consular Relations sufficiently defined an international norm against detaining an alien without informing him of the requirement of consular notice and access.[101] As in *Vietnam Association*, the Court denied ATS jurisdiction on the basis that the plaintiff's source of international law was not sufficiently universal and, thus, did not meet the *Sosa* standard.[102]

One of the Court's most recent occasions to formally determine ATS jurisdiction came, of course, with the 2009 decision of *Abdullahi v Pfizer*.[103] The manner in which the court ultimately determined that nonconsensual medical research falls within the law of nations will be examined in greater detail in Part IV below.

III. PRELIMINARY *ABDULLAHI* LITIGATION

The 2009 *Abdullahi* decision was the product of several prior actions in the Southern District of New York and the Second Circuit. To fully appreciate the context of *Abdullahi*, it is necessary to examine this preliminary litigation. As such, this section will discuss three preliminary suits commonly known as *Abdullahi I, II*, and *III*,[104] a Nigerian action styled *Zango v. Pfizer*,[105] and *Adamu v. Pfizer*,[106] an action that was later consolidated into the 2009 *Abdullahi* case.

A. Abdullahi I

Abdullahi I was filed in August 2001 and represented the first time that the Abdullahi plaintiffs attempted to sue Pfizer for the 1996 Trovan study.[107] The plaintiffs brought suit pursuant to the ATS in the Southern District of New York, broadly alleging Pfizer had administered the drug knowing of its dangerous side effects, inadequately informed patients of the risk, failed to

99. *Id.* at 123.

100. Mora v. New York, 524 F.3d 183 (2d Cir. 2008).

101. *Id.* at 186, 208.

102. *Id.* at 208-09.

103. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 166 (2d Cir. 2009).

104. Abdullahi v. Pfizer, Inc. *(Abdullahi I)*, No. 01 CIV. 8118, 2002 WL 31082956, at *1 (S.D.N.Y. Sept. 17, 2002); Abdullahi v. Pfizer, Inc. *(Abdullahi II)*, 77 F. App'x 48 (2d Cir. 2003); Abdullahi v. Pfizer, Inc. *(Abdullahi III)*, No. 01 CIV. 8118 (WHP), 2005 WL 1870811, at *1 (S.D.N.Y. Aug. 9, 2005).

105. Zango v. Pfizer, No. FHC/K/CS/204/2001 (Nigeria) (as cited in *Abdullahi II*, 77 F. App'x 48, 52 (2d Cir. 2003)).

106. Adamu v. Pfizer, Inc., 399 F.Supp.2d 495 (S.D.N.Y. 2005).

107. *Abdullahi I*, 2002 WL 31082956, at *3.

obtain informed consent, and neglected to follow up with the patients following Trovan administration.[108] Pfizer moved to dismiss for failure to state a claim or, alternatively, for forum non conveniens.[109] To decide the 12(b)(6) motion, the court examined whether a violation of the law of nations had been pleaded adequately and whether Pfizer was a state—rather than private—actor.[110]

As to the law of nations inquiry, the court stated that it *would* have jurisdiction under the ATS "so long as plaintiffs [could] allege an international law violation as evidenced by principles of those agreements and regulations [that they had offered to prove a violation of the law of nations]."[111] However, it recognized that whether the law of nations had been violated turned on whether Pfizer was a state or private actor.[112] Finding that the category of actionable claims was narrower for a private actor, the court held that *if* Pfizer were a private actor, there would not be a cause of action.[113] However, it determined the plaintiffs had pleaded sufficient facts that Pfizer acted in a state capacity such that the 12(b)(6) motion could not be granted.[114]

The forum non conveniens motion was afforded much more analysis in *Abdullahi I*[115] and proved to be the basis for much of the subsequent litigation.[116] The plaintiffs claimed that they could not bring suit in Kano's Federal High Court (FHC) given its corruption and susceptibility to political influence.[117] Pfizer argued that the FHC did provide an adequate forum because Pfizer was subject to service in Kano, Nigerian law recognizes "negligence, medical malpractice, and personal injury claims," and—perhaps most salient—Pfizer was, at that time, already defending an unrelated case in Kano's FHC.[118] Recognizing that it "has a duty to exercise restraint when assessing the sufficiency of other nations' courts,"[119] and that the public and private interest factors articulated in *Gulf Oil Corp. v. Gilbert*

108. *Id.*
109. *Id.* at *1.
110. *Id.* at *3-6.
111. *Id.* at *4.
112. *Abdullahi I*, 2002 WL 31082956, at *4-5.
113. *Id.* at *4-5.
114. *See id.* at *1, *6.
115. *See id.* at *6-12.
116. *See infra* this Part's discussion of *Zango v. Pfizer, Inc.*, *Abdullahi II*, *Abdullahi III*, and *Adamu v. Pfizer, Inc.*
117. *Abdullahi I*, 2002 WL 31082956, at *8.
118. *Id.* at *6-7.
119. *Id.* at *9.

favored suit in Nigeria,[120] the court granted Pfizer's motion to dismiss for forum non conveniens.[121]

B. Zango v. Pfizer

Zango v. Pfizer did not involve the same plaintiffs as the *Abdullahi* cases, but it ended up playing a significant role in the litigation leading up to the 2009 decision.[122] The *Zango* plaintiffs were subjects in the Trovan trial, but initially filed their suit in Nigeria, rather than the United States.[123] The suit was fraught with administrative delays and the plaintiffs eventually discontinued the action in 2002.[124] The *Abdullahi* plaintiffs sought to use *Zango* as evidence of Nigeria's inadequacy as a forum, and the case was central to *Abdullahi II* and *Abdullahi III*.[125]

C. Abdullahi II

In *Abdullahi II*, the plaintiffs appealed to the Second Circuit from the *Abdullahi I* order to dismiss on the grounds of forum non conveniens.[126] Specifically, the plaintiffs requested that the court take judicial notice of "both the *fact* of the [*Zango*] dismissal and the reasons for it."[127] Pfizer objected to the motion, alleging that the plaintiffs' account of the *Zango*

120. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), set out a number of private and public interest factors to be carefully weighed by courts when deciding the issue of *forum non conveniens*. *Id.* at 508-09. The public interest factors include administrative difficulties, unfairness of imposing jury duty on citizens with few ties to or understanding of the litigation, avoidance of conflicts of law, and the favorability of deciding issues locally. *Id.* The private factors include availability of and access to witnesses and evidence and the availability of process. *Id.* at 508. Here, the court determined that none of the public interest factors "strongly support[ed] either forum over the other." *Abdullahi I*, 2002 WL 31082956, at *11. As to the private factors, the court found that "most of the documents and witnesses located in the United States [were] within Pfizer's control" and could be brought easily to the Nigerian forum. *Id.* at *12. However, the plaintiff's medical records, the testing site, and other "evidence of numerous elements essential to plaintiffs' claim" were located in Nigeria. *Id.* at *11. Thus, the factors weighed in favor of Nigerian disposition. *Id.* at *12.

121. *Abdullahi I*, 2002 WL 31082956, at *12.

122. *See infra* this Part's discussion of *Abdullahi II*, *Abdullahi III*, and *Adamu v. Pfizer. Inc.*

123. *See* Abdullahi v. Pfizer, Inc. (*Abdullahi II*), 77 F. App'x 48, 51-52 (2d Cir. 2003).

124. *Id.* at 52 (noting that the Notice of Discontinuance filed by the *Zango* plaintiffs "blame[d] an indefinite adjournment and the fact that the judge hearing the case declined jurisdiction 'for personal reasons'").

125. *See infra* this Part's discussion of *Abdullahi II* and *Abdullahi III*.

126. *Abdullahi II*, 77 F. App'x. at 50. Pfizer also filed a cross appeal regarding the District Court's denial of its 12(b)(6) motion. *Id.* This issue was not reached by the Second Circuit because it remanded the proceedings to the District Court with respect to the *forum non conveniens* issue. *Id.* at 53.

127. *Id.* at 52.

proceedings was "disingenuous."[128] Further, Pfizer requested that the court take judicial notice of the entire *Zango* record, apparently arguing that a holistic view of the proceedings would demonstrate that Nigeria was an adequate forum.[129] The court refused to adopt either party's account of the *Zango* proceedings, noting that it could not "take judicial notice of factual propositions that are subject to reasonable dispute."[130] Instead, the court remanded the case to the District Court for additional fact-finding as to what caused the *Zango* dismissal and whether that impacted the adequate forum analysis.[131]

It is interesting to note that, at the end of its opinion, the Second Circuit presciently suggested that *Flores*—which had just been decided—might, at some point, have an impact on the *Abdullahi* litigation.[132] The court observed that Pfizer had not addressed in *Abdullahi I* the issue of whether its conduct violated the law of nations and that both parties had "glossed over the issue on appeal."[133] A footnote to this portion of the opinion indicates that when the District Court (in *Abdullahi I*) questioned Pfizer about the law of nations issue in oral argument, Pfizer merely maintained that it was unrelated to its motions and that it "would only pursue such an argument if the District Court found that the plaintiffs had adequately pleaded state action."[134] This small observation by the Second Circuit proved to be a remarkable foreshadowing of the 2009 decision.[135]

D. Abdullahi III

Abdullahi III was the product of the Second Circuit's remand in *Abdullahi II*.[136] The District Court was charged with examining the *Zango* record in order to make a final determination as to the validity of the forum non conveniens dismissal originally ordered in *Abdullahi I*.[137] Additionally, Pfizer moved to dismiss the action for a lack of ATS subject matter jurisdiction.[138] After examining the *Zango* record in its entirety, the court determined that

128. *Id.*

129. *Id.*

130. *Id.* at 52-53 (citing WEINSTEIN'S FEDERAL EVIDENCE § 201.13[1][b] (Hon. Joseph M. McLaughlin ed., 1997)).

131. *Abdullahi II*, 77 F. App'x. at 53.

132. *Id.*

133. *Id.*

134. *Id.* at 53 n.4.

135. *See infra* Part IV (discussing the majority and dissenting opinions of the 2009 decision, specifically how they differ in their analyses of the state action component).

136. Abdullahi v. Pfizer, Inc. *(Abdullahi III)*, No. 01-CIV.8118 (WHP), 2005 WL 1870811, at *1 (S.D.N.Y. Aug. 9, 2005).

137. *Id.* at *3.

138. *Id.* at *1.

some of the delay was attributable to the *Zango* counsel[139] and that the Nigerian judiciary was not demonstrably biased against its own citizens.[140] The dismissal on grounds of forum non conveniens stood.[141]

Perhaps more interesting than the forum non conveniens analysis was the court's discussion of Pfizer's revised motion to dismiss for failure to state a claim. Pfizer moved for 12(b)(6) dismissal "in light of 'recent Supreme Court and Second Circuit decisions that sharply curtail claims under the [ATS].'"[142] In fact, *Sosa* had been decided by the Supreme Court between *Abdullahi II* and *III*.[143] The District Court noted that, in light of its decision to dismiss for forum non conveniens, it did not need to reach the ATS jurisdictional issue.[144] However, "for the sake of judicial economy," it undertook to perform the analysis.[145]

The court first observed that "[p]rior to *Sosa*, a number of courts . . . had held that the ATS created a cause of action."[146] Keeping in mind a more or less firm holding from the Supreme Court that the ATS does not create new causes of action,[147] the District Court took pains to distinguish between a mere violation of the law of nations and the existence of a private cause of action. Although it acknowledged that "[p]laintiffs correctly state[d] that non-consensual medical experimentation violates the law of nations,"[148] the District Court importantly noted that "the law of nations does not itself create a right of action because it does not require any particular reaction to violations of law, and therefore whether and how the United States reacts to such violations are domestic questions."[149] The critical question, then, was

139. *Id.* at *17.

140. *Id.* at *16 (noting that, in 2001, Pfizer had actually lost a case brought in a Nigerian Federal High Court by Nigerian plaintiffs).

141. *Abdullahi III*, 2005 WL 1870811, at *18.

142. *Id.* at *6 (quoting Pfizer's Memorandum in Support of its Motion to Dismiss at 1 (Oct. 1, 2004)).

143. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004); Abdullahi v. Pfizer, Inc. (*Abdullahi II*), 77 F. App'x 48, 50 (2d Cir. 2003); *Abdullahi III*, 2005 WL 1870811 at 1* (S.D.N.Y. 2005) (*Sosa* was decided about nine months after the Oct. 8, 2003, *Abdullahi II* decision, but over one year before the Aug. 9, 2005, *Abdullahi III* decision).

144. *Abdullahi III*, 2005 WL 1870811, at *6.

145. *Id.*

146. *See id.* at *7 (citing a number of cases which held that the ATS created a private right of action and comparing a number of cases which held that the ATS provides nothing more than subject matter jurisdiction).

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

148. *Abdullahi III*, 2005 WL 1870811, at *9.

149. *Id.* (citing *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). It is interesting to note that the District Court stated that Pfizer's alleged violations of the law of nations included *both* non-consensual medical experimentation *and* failure to treat the subjects after Trovan administration. The court then apparently dispenses with the failure to treat aspect altogether by announcing that the non-consensual

whether the court could infer a private right of action for Pfizer's alleged violations of international law.[150]

Emphasizing *Sosa*'s call for judicial restraint,[151] the court examined the sources of international law proffered by the plaintiffs and found that they could not support ATS jurisdiction.[152] With respect to all five sources, the court determined that they did not give rise to a private cause of action.[153] Additionally the court noted, inter alia, the following shortcomings: some sources were authored by non-governmental bodies,[154] some sources had broad or aspirational language that lacked the requisite specificity to grant ATS jurisdiction,[155] and some sources to which the United States was party were not self-executing.[156] The court also made a broad observation that reflects the inherent difficulty of adopting any purported sources of international law as a basis for ATS jurisdiction:

> Besides the obvious difficulty of enforcing a principle that is so purposefully general in order that the greatest number of countries can agree while still disagreeing on the particulars of how to implement the goal, there is also the great problem that international agreements often set patently unattainable goals that cannot reasonably be considered legal obligations of those countries that hope to one day fulfill those aspirations.[157]

Ultimately, the court found that "[a] cause of action for Pfizer's 'failure to get any consent, informed or otherwise, before performing medical experiments on the subject children' would expand customary international

experimentation was violative of the law of nations and proceeding with a correspondingly specific analysis of the private right of action question. The failure to treat issue does not appear again in the opinion.

150. *Id.* at *10.

151. *See id.* at *9-14.

152. *See id.* at *11-14. After analyzing *Sosa*'s application to the case, the court found "that none of the sources of international law on which Plaintiffs advance provide a proper predicate for jurisdiction under the ATS." *Id.* at *14.

153. *Abdullahi III*, 2005 WL 1870811, at *10-13. "Plaintiffs allege that their claims under the ATS are supported by international law as set forth in the Nuremberg Code, the Declaration of Helsinki, guidelines authored by the CIOMS, article 7 of the ICCPR and the Universal Declaration of Human Rights." *Id.* at *11.

154. *See id.* at *12 (The court notes that both the World Medical Association's Declaration of Helsinki and the Council for International Organizations of Medical Services (CIOMS) Guidelines are the products of non-governmental bodies.).

155. *See id.* at *12-13 (The court observed that the Declaration of Helsinki was "general" and "asserted aspirations," the CIOMS Guidelines contained "broad, aspirational language," the International Covenant on Civil and Political Rights (ICCPR) employed "vague language," and the Universal Declaration of Human Rights was "merely aspirational.").

156. *See id.* at *11-13 (The court states that the ICCPR is not self-executing and, in a similar vein, points out that the United States has not even ratified or adopted the Nuremberg Code.).

157. *Id.* at *14 (citation omitted).

law far beyond that contemplated by the ATS,"[158] and that "none of the sources of international law on which Plaintiffs advance provide a proper predicate for jurisdiction under the ATS."[159]

E. Adamu v. Pfizer

Adamu was the final step in the litigation leading up to the 2009 decision. In late 2002, after the *Zango* suit had been dismissed, a portion of the *Zango* plaintiffs filed the *Adamu* action[160] in the District of Connecticut.[161] They alleged substantially the same causes of action as the *Abdullahi* plaintiffs and relied on many of the same purported sources of customary international law.[162] The case was eventually transferred to the Southern District of New York.[163] As it had in the *Abdullahi* cases, Pfizer moved to dismiss for failure to state a claim, forum non conveniens, and lack of subject matter jurisdiction.[164] Judge Pauley, who had decided the previous *Abdullahi* District Court cases, granted all of Pfizer's motions.[165] He characterized the central issue as follows: "because Pfizer is not alleged to have violated any treaty, to state a claim under the ATS, Plaintiffs must demonstrate violation of a 'clear and unambiguous' rule of customary international law."[166] Not surprisingly, the *Abdullahi III* "analysis of the various sources of international law" was incorporated into the *Adamu* action.[167] The *Adamu* plaintiffs joined the *Abdullahi* plaintiffs in a consolidated appeal that resulted in the 2009 decision.[168]

IV. THE SECOND CIRCUIT'S 2009 DECISION OF *ABDULLAHI v. PFIZER*

At the heart of *Abdullahi* is the issue of whether there is a norm of customary international law that prohibits non-consensual medical experimentation.[169] The Second Circuit determined this question in the

158. *Abdullahi III*, 2005 WL 1870811, at *14.

159. *Id.* Interestingly, the court did not examine whether Pfizer was a state or private actor. It rested its conclusion solely on the inadequacy of the proffered sources of international law.

160. Adbullahi v. Pfizer, Inc., 562 F.3d 163, 171 (2d Cir. 2009).

161. Adamu v. Pfizer, Inc., 399 F.Supp.2d 495, 498 (S.D.N.Y. 2005).

162. *See id.* at 497.

163. *Id.* at 495, 498.

164. *See id.* at 497-500.

165. *Id.*

166. *Adamu*, 399 F.Supp.2d at 501 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980)).

167. *Id.*

168. Abdullahi v. Pfizer, 562 F.3d 163, 168 (2d Cir. 2009), *cert. denied mem.*, 130 S. Ct. 3541 (2010).

169. *Id.* at 174-75.

affirmative[170] and the basis for that decision will be discussed in this Part. The Court examined a number of purported sources of international law on which the plaintiffs based their complaint, as well as some additional instruments it considered to be authoritative.[171] Those sources will be examined in detail at the end of this Part, but first, a discussion of the general arguments advanced by the *Abdullahi* majority and dissent will help to provide some context.

A. The Majority Opinion

The majority reversed the District Court's finding in *Abdullahi III* that the "prohibition in customary international law against nonconsensual human medical experimentation cannot be enforced through the ATS."[172] It found that "[t]he district court's approach misconstrued both the nature of customary international law and the scope of the inquiry required by *Sosa*."[173] That is, the District Court erroneously resolved the question of whether a norm of customary international law is sufficiently specific, universal, and obligatory by looking only at whether each source of law stating the norm is binding and whether each source explicitly authorizes a cause of action to enforce the norm.[174] In focusing only on whether a source was binding, not giving adequate weight to the collective value of non-binding conventions, and looking only at sources to which the United States is a party, the District Court (in the majority's estimation) did not make a sufficiently extensive "examination of whether treaties, international agreements, or State practice have ripened the prohibition of nonconsensual medical experimentation on human subjects into a customary international law norm . . . [sufficient under *Sosa*] . . . to permit courts to infer a cause of action under the ATS."[175] Specifically, "the district court should have considered a greater range of evidence and weighed differently the probative value of the sources."[176]

The Second Circuit majority held that the plaintiffs "pled facts sufficient to state a cause of action under the ATS for a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent . . . ATS jurisdiction exists over plaintiffs'

170. *Id.* at 175 (citing Abdullahi v. Pfizer *(Abdullahi III)*, No. 01CIV.8118 (WHP), 2005 WL 1870811, at *9 (S.D.N.Y. Aug. 9, 2005)).

171. *See id.* at 174-88.

172. *Id.* at 169.

173. *Id.* at 176.

174. *Abdullahi*, 562 F.3d at 177.

175. *Id.*

176. *Id.*

claims."[177] Underlying its analysis was an inquiry as to whether this alleged norm is: "(1) . . . a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) . . . defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) . . . of mutual concern to States."[178]

With respect to the universality factor, the court noted that "[t]he prohibition on nonconsensual medical experimentation . . . is specific, focused and accepted by nations around the world without significant exception."[179] Finding the norm had the requisite specificity, the court stated "[w]e have little trouble concluding that [the norm] . . . is every bit as concrete—indeed even more so—than the norm prohibiting piracy . . . or the interference with the right of safe conducts and the rights of ambassadors . . . ."[180] As to the third factor (mutual concern), the court pointed to the facts that "'the nations [of the world] have made it their business, both through international accords and unilateral action' to demonstrate their intention to eliminate conduct [of this type]"[181] and that the "administration of drug trials without informed consent also poses threats to national security by impairing our relations with other countries."[182] To support this notion, the court noted,

> Seven of the world's twelve largest pharmaceutical manufacturers – a group that includes Pfizer – are American companies. Consequently, American companies are likely to be sponsors of medical experiments on human subjects abroad . . . the failure to secure consent for human experimentation has the potential to generate substantial anti-American animus and hostility.[183]

The majority dedicated a scant three paragraphs to the question of state action.[184] Citing *Kadic*, it noted that a private individual can be subject to

177. *Id.* at 187.

178. *Id.* at 174. This standard follows the standard articulated by the Supreme Court in *Sosa*. Sosa v. Alvarez-Machain, 542 U.S. 692, 725-28 (2004).

179. *Abdullahi*, 562 F.3d at 177.

180. *Id.* at 184.

181. *Id.* at 185 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980)).

182. *Id.* at 187.

183. *Id.* (citing *Global 500*, FORTUNE, July 21, 2008, http://money.cnn.com/magazines/fortune/global500/2008/industries/21/index.html). Since the Second Circuit issued its opinion, the Global 500 list has changed slightly, such that only six of the top twelve pharmaceutical manufacturers are American (Johnson & Johnson, Pfizer, Abbott, Merck, Eli Lilly, and Bristol-Myers-Squibb). *Global 500*, FORTUNE, February 21, 2010, http://money.cnn.com/magazines/fortune/global500/2010/full_list/. Either way, the court's logic is arguably flawed; the fact that fifty percent (or fifty-eight percent, according to the 2008 list) of large pharmaceutical companies are American does not have any bearing on those companies' propensities toward overseas clinical trials.

184. *See Abdullahi*, 562 F.3d at 188-89.

ATS liability where he "'act[s] in concert with' the state, i.e., 'under color of law.'"[185] Moreover, "[u]nder §1983, State action may be found when 'there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[186] The court found that there was such a nexus between Nigeria and Pfizer's conduct; in particular, it pointed to the appellants' allegations that "the Nigerian government was involved in all stages of the Kano test," "the Nigerian government provided a letter of request to the FDA to authorize the export of Trovan, arranged for Pfizer's accommodations in Kano, and facilitated the nonconsensual testing . . . ."[187] The majority goes on to state:

> The unlawful conduct is alleged to have occurred in a Nigerian facility . . . Nigerian officials are alleged to have conspired to cover up the violations by silencing Nigerian physicians critical of the test and by back-dating an 'approval letter' that the FDA . . . required to be provided prior to conducting the medical experiment . . . [and] that the Nigerian government 'was intimately involved and contributed, aided, assisted and facilitated Pfizer's efforts to conduct the Trovan test.'[188]

These alleged facts were merely listed, rather than discussed, and the majority found that "[a]t the pleading stage, these contentions meet the state action test because they adequately allege that the violations occurred as the result of concerted action between Pfizer and the Nigerian government."[189] While the list of instances of "concerted action" may appear to be extensive, the dissenting opinion reveals that a number of the allegations were inappropriately included and considered.[190]

B. The Dissenting Opinion

In his dissent, Judge Wesley stated "I agree with the methodology used by the majority to determine whether a norm falls within the jurisdictional grant of the ATS, but I do not agree with their conclusion that a norm against non-consensual medical experimentation . . . is (1) universal and obligatory or (2) a matter of mutual concern."[191] In particular, he took issue with the majority's undertaking "to define a 'firmly established' norm of international law, heretofore unrecognized by any American court or treaty obligation, on the basis of materials inadequate for the task."[192] In

185. *Id.* at 188 (quoting Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995)).
186. *Id.* (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).
187. *Id.* at 188.
188. *Id.*
189. *Abdullahi*, 562 F.3d at 188-89.
190. *See infra* Part IV.B.
191. *Abdullahi*, 562 F.3d at 192 (Wesley, J., dissenting).
192. *Id.* at 191.

assessing the "universal and obligatory" factor, Judge Wesley examined the eight sources of customary international law relied upon by the majority and concluded that "[t]aken together, this evidence falls short of charting the existence of a universal and obligatory international norm . . . ."[193] With respect to the "mutual concern" factor, he noted that nonconsensual medical experimentation does not "threaten serious consequences in international affairs in the same manner or to the same extent as the historical paradigms listed by the Supreme Court or their modern counterparts identified by this Court."[194]

Perhaps the most fundamental difference between Judge Wesley's opinion and the majority's is Judge Wesley's assertion that "a customary international law norm cannot be divorced from . . . its violator."[195] That is, the fact that the majority glossed over the state action issue and did not meaningfully consider the distinct possibility that Pfizer was a private actor resulted in an incomplete and inadequate analysis.[196] There is an appreciable difference between a customary international norm against nonconsensual medical experimentation by private actors and a norm against such conduct by state actors.[197] Many potential international law sources are directed only at states. Thus, they carry no evidentiary value when a plaintiff alleges a violation of a norm of customary international law by a private actor.[198]

Judge Wesley dedicated a substantial portion of his opinion to the state action consideration, noting that both *Sosa* and *Flores* had "made clear that the identity of the defendant is a critical component of whether a principle is a norm of customary international law."[199] In determining whether Pfizer should be considered a state actor, Judge Wesley focused on the procedural context of the *Abdullahi* litigation.[200] In the original *Abdullahi* and *Adamu* complaints, which "total[ed] 628 paragraphs" the plaintiffs made just four allegations concerning the involvement of the Nigerian government in the Trovan testing:

> (1) in order for the FDA to authorize the export of Trovan, 'Pfizer obtained the required letter of request from the Nigerian government'; (2) the government 'arrang[ed] for Pfizer's accommodation in Kano'; (3) the government acted 'to silence Nigerian physicians critical of [Pfizer's] test';

193. *Id.* at 192-93.
194. *Id.* at 209.
195. *Id.* at 194.
196. *Abdullahi*, 562 F.3d. at 194 (Wesley, J., dissenting).
197. *Id.*
198. It is important to keep this distinction in mind as the *Abdullahi* sources are examined in Part IV(C), *infra*.
199. *Abdullahi*, 562 F.3d at 209-10 (Wesley, J., dissenting).
200. *Id.* at 210.

> and (4) the government 'assign[ed] Nigerian physicians to assist in the project.'[201]

The plaintiffs attempted to "bolster their complaints" by alleging for the first time in their appellate brief further ways in which the Nigerian government played a role in the Trovan trials.[202] Although the majority adopted these additional complaints into its list of actions probative of Pfizer's status as a state actor, the dissent points out that appellate review "is limited to the facts as asserted within the four corners of the complaint."[203] Noting that "in most cases, a finding of state action 'must be premised upon the fact that the State is *responsible*' for that specific conduct"[204] and that "[d]etermining state action . . . 'requires tracing the activity to its source to see if that source fairly can be said to be the state,'"[205] Judge Wesley concluded that the plaintiff's "bare allegations [were] plainly insufficient to survive a motion to dismiss for lack of state action."[206] Of particular importance was the fact that the "activity was not, as the majority apparently concludes, conducting the Trovan trials in general, but rather administering the drug without informed consent."[207] This is a significant nuance, in that it renders irrelevant many of the items that the majority considered in deciding that Pfizer was a state actor.

Judge Wesley went on to say that the "plaintiffs' complaints are more noteworthy for what they do not allege than what they do."[208] Among other things, "[t]hey have not suggested that Pfizer was exercising any delegated state authority . . . that Pfizer conspired with government officials to deprive the subjects of their rights, . . . that the Nigerian government exercised any coercive power over Pfizer, . . . [or that] any Nigerian government officials even knew about the non-consensual tests . . . ."[209] Judge Wesley

201. *Id.*

202. *Id.*

203. *Id.* at 210-11 (citing McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007)). *See also* Recent Case, *Second Circuit Looks Beyond Complaint to Find State Action Requirement Satisfied* – Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009), 123 HARV. L. REV. 768, 774-75 (2010) [hereinafter *Second Circuit Looks Beyond*] (noting "[t]he majority's reliance on these new allegations, however, was procedurally barred . . . . Courts may not rely on new facts in appellate briefs," and arguing that "[a]llowing plaintiffs to supplement their complaints with additional facts after a district court has correctly rejected their claim will make it much easier for an ATS plaintiff to survive the pleadings stage through clever use of the appeals process.").

204. *Abdullahi*, 562 F.3d at 211 (Wesley, J., dissenting) (citing Horvath v. Westport Library Ass'n, 362 F.3d 147, 154 (2d Cir. 2004)).

205. *Id.* at 211 (citing Leshko v. Servis, 423 F.3d 337, 340 (3d Cir. 2005)).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Abdullahi*, 562 F.3d at 211 (Wesley, J., dissenting).

concluded that "[a]t most, Plaintiffs' complaints alleged that the Nigerian government acquiesced to or approved the Trovan program in general without knowing its disturbing details."[210]

In his conclusion, Judge Wesley noted that, while Pfizer's alleged conduct was reproachable, "[t]he issue on this appeal . . . is not whether Pfizer's alleged conduct was 'wrong,' . . . but whether it falls within . . . the 'narrow class' of international norms for which ATS jurisdiction exists . . . ."[211] Echoing the admonition of the *Sosa* court, he stated:

> [It is] pellucidly clear that ATS jurisdiction must be reserved only for acts that the nations of the world collectively determine interfere with their formal relations with one another—including those rare acts by private individuals that are so serious as to threaten the very fabric of peaceful international affairs. I cannot agree with my colleagues that Pfizer's alleged conduct poses the same threat or is so universally and internationally proscribed as to fit within that narrow class.[212]

C. *Sources Put Forth by the* Abdullahi *Plaintiffs as Evidence of a Customary International Norm Against Non-Consensual Medical Research*

Having taken a broad look at the majority and dissenting opinions, it is appropriate to turn to a more detailed examination of the sources of law analyzed by the *Abdullahi* court.

Nuremberg Code

The first principle of the Nuremberg Code (Code)[213] states that "voluntary consent of the human subject is absolutely essential."[214] The Code was promulgated in 1947 as a part of the International Military Tribunal's (IMT) final judgment against a number of doctors found guilty (in The Medical Case) of war crimes and crimes against humanity for performing non-consensual medical testing during World War II.[215] The *Abdullahi* majority noted that the IMT's constitution was the London

210. *Id.* at 212.

211. *Id.* at 213.

212. *Id.*

213. *The Medical Case*, *in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1, 181 (1949).

214. *Id.* at 181.

215. Sharon Perley et al., *The Nuremberg Code: An International* Overview, *in* THE NAZI DOCTORS AND THE NUREMBERG CODE 149, 150-55 (George J. Annas & Michael A. Grodin eds., 1992). "The tribunal emphasized that '[i]n every single instance appearing in the record, subjects were used who did not consent to the experiments; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers.'" Abdullahi v. Pfizer, 562 F.3d 163, 178 (2d Cir. 2009) (citing *The Medical Case*, *supra* note 213, at 183).

Charter[216] and emphasized that Control Council Law No. 10, which authorized the creation of U.S. military tribunals, was enacted by the Allied Control Council, an entity through which members of the London Agreement exerted control over Germany.[217] The majority stated this in order to demonstrate that the Code flowed directly from the principles of law advanced in the London Charter.[218] The court's argument basically went as follows: the London Agreement gave rise to the London Charter which provided a constitution for the IMT.[219] Meanwhile, the Allied Control Council was the principal authority through which the London Agreement parties exerted control over Germany post-WWII.[220] The Council enacted Control Council Law No. 10 which authorized the military tribunal that issued the opinion that gave birth to the Nuremberg Code.[221] Therefore, the Code is naturally a product of the London Charter, which defined broad categories of Crimes Against Humanity and Crimes Against Nature.[222]

In his dissent, Judge Wesley argued that the majority's view of the Code was flawed because the Code did not deal with the broad and general principles of law addressed in the London Charter, but rather with the specific issue of consensual experimentation and research.[223] Specifically, "[t]he ethical principles espoused in the Code had no forebears in either the London Charter or the judgment of the [IMT]. They were developed exclusively in the Medical Case."[224] While the dissent is cognizant that the Code was "groundbreaking," Judge Wesley points out that its history gives rise to an inherent difficulty in measuring the Code's probative value.[225] Because it is not a treaty and was developed by the United States military and announced in a military court, it does not fit any of the International

216. *Abdullahi*, 562 F.3d at 177. The London Charter was annexed to the London Agreement, a 1945 agreement between the United States, Soviet Union, United Kingdom, and France to, "in the interests of all the United Nations," establish the IMT. *See* Agreement Between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics Respecting the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter].

217. *Abdullahi*, 562 F.3d at 178. *See also* TELFORD TAYLOR, CHIEF OF COUNSEL FOR WAR CRIMES, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 6-10, 250 (1949).

218. *Abdullahi*, 562 F.3d at 178-81.

219. *Id.* at 177-78. *See also* London Charter, *supra* note 216.

220. *Abdullahi*, 562 F.3d at 178.

221. *Id.* at 178. *See also* TAYLOR, *supra* note 217.

222. *Abdullahi*, 562 F.3d at 177-79. *See also* London Charter, *supra* note 216.

223. *Abdullahi*, 562 F.3d at 200-01 (Wesley, J., dissenting).

224. *Id.* at 201.

225. *Id.*

Court of Justice Statute (ICJS) categories of international law sources.[226] Indeed, its closest ICJS analogue is a judicial decision, which is regarded as a subsidiary, rather than primary, source.[227] Thus, Judge Wesley concluded the Code has some "evidentiary value in [the] inquiry," but cannot establish a customary norm prohibiting non-consensual medical testing.[228]

WMA Declaration of Helsinki[229]

The original Declaration of Helsinki, adopted by the World Medical Association in 1964,[230] announces several ethical guidelines for physicians world-wide and specifically provides detailed recommendations with respect to informed consent in medical trials.[231] The majority conceded that the Declaration is non-binding, but claimed that "it has spurred States to regulate human experimentation, often by incorporating its informed consent requirement into domestic laws or regulations."[232] That this requirement has been the subject of domestic legislation in at least eighty-four countries "is not, of course, in and of itself proof of a norm."[233] However, the majority noted

> the incorporation of this norm into the laws of this country and . . . others is a powerful indication of the international acceptance of this norm as a binding legal obligation, where, as here, states have shown that the norm is of mutual concern by including it in a variety of international accords.[234]

Additionally, it observed that "[t]ellingly, the sources on which our government relied in outlawing non-consensual human medical experimentation were the Nuremberg Code and the Declaration of Helsinki,

226. *Id.* *See infra* Part V.A for a more detailed discussion of Article 38 of the International Court of Justice Statute and the categories of international law sources.

227. *Abdullahi*, 562 F.3d at 201 (Wesley, J., dissenting). *See infra* Part V.A for a more detailed discussion of Article 38 of the International Court of Justice Statute and the categories of international law sources.

228. *Abdullahi*, 562 F.3d at 201 (Wesley, J., dissenting). Note that a broad view of the Code's context also calls into question its utility in determining the norm at issue in this case. Both the majority and dissent agree that the Code stemmed from the prosecution of war crimes. Nazi doctors were performing forced experimentation upon prisoners; it is reasonable to gather that the military tribunal did not have in mind cases such as *Abdullahi* when it published the Code.

229. World Med. Ass'n (WMA), *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, DoH/Oct2008 (adopted 1964, amended 1975, 1983, 1989, 1996, and 2000), *available at* http://www.wma.net/en/30publications/10policies/b3/17c.pdf.

230. *Id.*

231. *Id.* at arts. 20, 22.

232. *Abdullahi*, 562 F.3d at 181 (majority opinion).

233. *Id.* (citing Flores v. Southern Peru Copper Corp., 414 F.3d 233, 249 (2d Cir. 2003)).

234. *Id.*

which suggests the government conceived of these sources' articulation of the norm as a binding legal obligation."[235]

In his dissenting opinion however, Judge Wesley pointed to holdings in both *United States v. Yousef* and *Flores* to argue that the Declaration of Helsinki should not be given great weight.[236] *Yousef* held that "no private person or—group of men and women such as comprise the body of international law scholars—*creates* the law."[237] However "well-meaning" a private aspirational declaration may be, it does not and cannot rise to requisite level to create international law.[238] *Flores*, as described in *Abdullahi*, held that including a private organization's political statement in the "select and conscribed group of sources capable of creating international law" would have the undesirable effect of instilling governmental authority in non-democratic and unaccountable groups.[239] Here, the WMA is an international group of independent physicians and private medical groups.[240]

CIOMS Guidelines[241]

In 2002, the Council for International Organizations of Medical Services (CIOMS), in collaboration with the World Health Organization (WHO), prepared a resource entitled "International Ethical Guidelines for Biomedical

235. *Id.* at 182 (citing M. Cheriff Bassiouni, Thomas G. Baffes & John T. Evrard, *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J. CRIM. L. & CRIMINOLOGY 1597, 1625-26 and 21 C.F.R. § 310.102(h) (1981)). This does not seem to be a particularly compelling argument as the majority conceded that the Declaration of Helsinki was a non-binding instrument. *Id.* The logic is circular, essentially reasoning that if the United States adopts a provision of a non-binding instrument, that provision must be a norm of customary international law. Since it is a norm of customary international law, the source in which it may be found is probative of the fact that it is a binding norm of customary international law.

236. *Abdullahi*, 562 F.3d at 197-98 (Wesley, J., dissenting). Here, the WMA is an international group of independent physicians and private medical groups. *Members*, WORLD MED. ASS'N, http://www.wma.net/en/60about/10members/index.html (last visited Feb. 16, 2011).

237. United States v. Yousef, 327 F.3d 56, 102 (2d Cir. 2003).

238. *Abdullahi*, 562 F.3d at 198 (Wesley, J., dissenting) (citing *Yousef*, 327 F.3d at 102)).

239. *Abdullahi*, 562 F.3d at 198 (Wesely, J., dissenting). *Flores* also echoed the sentiments of *Yousef*, stating that "[multinational] declarations are almost invariably political statements – expressing the sensibilities and the asserted aspirations and demands of some countries or organizations – rather than statements of universally-recognized legal obligations . . . . [S]uch declarations are not proper evidence of customary international law." *Id.* at 197 (citing Flores v. Southern Peru Copper Corp., 414 F.3d 233, 262 (2d Cir. 2003)).

240. *Abdullahi,* 562 F.3d at 197 (Wesley, J., dissenting). *See also Members*, *supra* note 236.

241. COUNCIL FOR INT'L ORGS. OF MED. SCIS. & WORLD HEALTH ORG., 3 INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS (2002).

Research Involving Human Subjects" (CIOMS Guidelines).[242] It provides that "the investigator must obtain the voluntary informed consent of the prospective subject . . . ."[243] The *Abdullahi* plaintiffs relied on the CIOMS Guidelines as one of four sources of international law purportedly showing a customary international norm against nonconsensual medical research.[244] However, the majority never examined these guidelines in its opinion[245] and the dissent only mentioned them in conjunction with its discussion of the Declaration of Helsinki, dismissing them as "put forward by [an] entirely private [organization]—hardly evidence of the state of international law."[246] The paucity of analysis with respect to the CIOMS guidelines is probably well-founded; the mere fact that they are "guidelines" reflects their lack of probative value.

ICCPR

The International Covenant on Civil and Political Rights (ICCPR) states that "no one shall be subjected without his free consent to medical or scientific experimentation."[247]

In his dissent, Judge Wesley claimed that the ICCPR "is not appropriate evidence of customary international law . . . ."[248] Specifically, he pointed out that the *Sosa* court held that, while the ICCPR has "moral authority," it has minimal utility under the universal/specific/mutual concern standard because it was ratified by the United States "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."[249] The *Sosa* court noted that it would be impossible for the plaintiff to say that the ICCPR establishes "the relevant and applicable rule of law" and that, in fact, the plaintiff attempted instead to use it to merely show that the norm for which he advocated (a prohibition against arbitrary detention) had become binding customary international law elsewhere.[250]

The majority, however, argued that "the ICCPR, when viewed as a reaffirmation of the norm as articulated in the Nuremberg Code, is potent authority for the universal acceptance of the prohibition on nonconsensual

242. *Id.* at Background.
243. *Id.* at Guideline 4.
244. *Abdullahi*, 562 F.3d at 175.
245. *See id.* at 163-88.
246. *Abdullahi*, 562 F.3d at 197 (Wesely, J., dissenting).
247. International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
248. *Abdullahi*, 562 F.3d at 195 (Wesley, J., dissenting).
249. *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004)).
250. Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004).

medical experimentation."[251] The majority also claimed that Congress's legislative prohibition of nonconsensual medical testing, as well as the FDA's efforts, "demonstrates that the United States government views the norm as the source of a binding legal obligation even though the United States has not ratified the ICCPR in full."[252] It rested this notion on its reading of *Khulumani*, where the court held that treaties that have not been ratified may still demonstrate a customary international law norm for ATS purposes, as long as the treaty has been widely ratified and it is obvious that the United States has not declined to subscribe to the treaty on any grounds pertaining to the norm at issue.[253]

Given the facts of *Abdullahi*, perhaps the most salient consideration with respect to this source was put forth in the dissent by Judge Wesley—the ICCPR explicitly applies to "[e]ach State Party"[254] and governs "the relationship between a State and the individuals within the State's territory."[255] Thus, "the ICCPR only creates obligations flowing from a state to persons within its territory"[256] and cannot be violated by a purely private actor.[257] If it is determined that Pfizer was not working in concert with the Nigerian government (as Judge Wesley urged), Pfizer is a private actor and the ICCPR would have no effect in this case.[258]

251. *Abdullahi*, 562 F.3d at 180.

252. *Id.* at 180-81.

253. *Id.* at 181 n.11 (citing Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 276 n.9 (2d Cir. 2007)). This seems to be a questionable notion in that it rejects the original ATS drafters' perceived intent and concerns. The ATS was intended only to confer jurisdiction in a limited number of instances, and only those firmly embedded in the common law. *Sosa*, 542 U.S. at 722-23 (noting that the First Congress likely only had in mind three specific examples of violations of the law of nations). To allow a treaty not ratified by the United States to function as evidence of a customary norm would seem to make the United States subject to the decisions of other nations, rather than its own law.

254. ICCPR, *supra* note 247, at art. 2(1).

255. *Abdullahi*, F.3d at 195 (Wesley, J., dissenting) (citing United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002)).

256. *Id.* at 195-96.

257. *Id.* at 196.

258. *Id.* That the ICCPR would not even apply to Pfizer if it is found to be a private actor highlights the crucial impact of the majority's and dissent's disagreement on the state action component.

D. Additional Sources Relied Upon by the Abdullahi *Majority*

Convention on Human Rights and Biomedicine

The Convention on Human Rights and Biomedicine (Convention)[259] states that an "intervention in the health field may only be carried out after the person concerned has given free and informed consent . . . ."[260] As the majority noted, it is "a binding convention and a source of customary international law" and "[s]ince 1997, thirty-four member States of the Council of Europe have also signed [it]."[261] Judge Wesley, however, pointed out that the Convention is a "regional agreement not signed by the most influential states in the region" and that, while signed by thirty-four members, it has been ratified by just twenty-two.[262] "[A] treaty's evidentiary value increases along with the influence . . . of the states that have ratified it."[263] France, Germany, the United Kingdom, the Netherlands, Russia, and Italy—some of the most influential member states—all have declined to ratify the convention.[264] Thus, in Judge Wesley's estimation, the Convention does not carry a great deal of probative value.[265] Moreover, Pfizer's alleged conduct took place in 1996, one year before the Convention was opened for signatures.[266] To consider it in determining the state of international law in this case would be to create authority for an "international ex post facto definition of the law of nations."[267]

UNESCO Universal Declaration of Bioethics & Human Rights of 2005

The United Nations Educational, Scientific and Cultural Organization (UNESCO) drafted and adopted its Universal Declaration of Bioethics &

259. Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, *opened for signature* Apr. 4, 1997, E.T.S. No. 164, *available at* http://conventions.coe.int/Treaty/en/Treaties/html/164.htm.

260. *Id.* at ch. II, art. 5.

261. *Abdullahi*, 562 F.3d at 183 (citing *Chart of Signatures and Ratifications*, COUNCIL OF EUROPE, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=164&CM=&DF=&CL=ENG (last visited Feb. 26, 2011)).

262. *Abdullahi*, 562 F.3d at 196 (Wesley, J., dissenting). It should be noted that the Convention has now been ratified by twenty-seven members. *See Chart of Signatures and Ratifications*, *supra* note 261.

263. *Abdullahi*, 562 F.3d at 196 (Wesley, J., dissenting) (citing Flores v. Southern Peru Copper Corp., 414 F.3d 233, 257 (2d Cir. 2003)).

264. *Id.* (citing *Chart of Signatures and Ratifications*, *supra* note 261).

265. *See id.*

266. *Id.* at 196-97.

267. *Id.* at 197.

Human Rights in October of 2005 (UNESCO Declaration).[268] It announces the need for "the prior, free and informed consent of" any subject in a clinical trial.[269] The majority in *Abdullahi* did not undertake to analyze thoroughly the UNESCO Declaration, but rather mentioned it to demonstrate the "norm prohibiting nonconsensual medical experimentation on human subjects has become firmly embedded and has secured universal acceptance in the community of nations."[270]

In the dissent, Judge Wesley simply pointed to the same flaw he did for the Convention—that the instrument was drafted and promulgated well after the *Abdullahi* action arose.[271] It is worthwhile to further note that the UNESCO Declaration is directed at "Member *States*."[272] Once again, the importance of thoroughly and accurately performing the state action analysis is evident; the UNESCO Declaration could not be used to impute liability to Pfizer as a private actor.

European Parliament Clinical Trial Directive of 2001

In 2001, the European Parliament and Council of the European Union passed the Clinical Trial Directive of 2001 (2001 Directive),[273] which accepted and incorporated the informed consent principles of the Declaration of Helsinki.[274] The 2001 Directive mandated informed consent in all clinical trials[275] and required all member States to implement its regulations by 2004.[276] The *Abduallahi* majority relied upon the 2001 Directive as an "[a]dditional international law [source] support[ing] the norm's status as customary international law."[277] Once again, a dissenting Judge Wesley noted that the tortious conduct alleged in *Abdullahi* took place in 1996, five years before the adoption of the 2001 Directive.[278] The action was first filed in the United States in 2001[279], three years before the deadline for the Directive's enactment by member states.[280] Although the

268. Universal Declaration on Bioethics and Human Rights, E.S.C. Res. 36, 33d Sess., U.N. Doc. SHS/EST/BIO/06/1 (Oct. 19, 2005).

269. *Id.* at art. 6.

270. Abdullahi v. Pfizer, 562 F.3d 163, 183-84 (2d Cir. 2009).

271. *Id.* at 196-97 (Wesley, J., dissenting).

272. Universal Declaration on Bioethics and Human Rights, *supra* note 268.

273. Council Directive 2001/20, pmbl. (2), 2001 O.J. (L 121) 37 (EC) [hereinafter 2001 Directive].

274. *Id.*

275. *See id.* at arts. 2(j), 3, 4.

276. *Id.* at art. 22(*l*).

277. Abdullahi v. Pfizer, 562 F.3d 163, 183 (2d Cir. 2009).

278. *Id.* at 197 (Wesley, J., dissenting).

279. *Id.* at 170.

280. 2001 Directive, *supra* note 273, at art. 22(*l*).

2001 Directive may evidence the state of law in the European Union, it is not necessarily indicative of the state of law in the rest of the world.[281] While it might provide a modicum of probative value, it cannot be afforded a great deal of weight given the regional specificity of its adoption.

The United States' Domestic Informed Consent Regulations

The United States has codified a domestic informed consent regulation stating that "no investigator may involve a human being as a subject in research. . . .unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative."[282] The FDA requires this informed consent for any American research used to support new drug approval applications, regardless of whether the research is conducted domestically or abroad.[283] The majority noted that the fact that the government, via regulations, uses "domestic law to coerce compliance with the norm" is evidentiary of the importance it attributes to the norm.[284] The dissent argued that state practice is "not 'significant or relevant for purposes of customary international law'"[285] unless the state is prohibiting domestic action as a result of "express international accords."[286]

E. Balancing the Cited Sources of Customary International Law

As the *Flores* court noted, with variety of potential sources suggested by the International Court of Justice Statute, there is a risk of "creative interpretation."[287] The majority and dissenting opinions in *Abdullahi* exemplify the potential for interpretive license. While both agreed that customary international law "does not stem from any single, definitive, readily identifiable source," they arrived at differing conclusions after examining the same instruments.[288]

In order to minimize this risk, the Second Circuit historically has "in [its] cases, methodically assessed the weight and relative influence of not only

281. Only twenty-seven countries are members of the European Union. *See The Member Countries of the European Union*, EUROPA, http://europa.eu/about-eu/member-countries/index_en.htm (last visited Feb. 25, 2011). Although many of these nations enjoy great influence, they represent just a fraction of the rest of the world's nations.

282. 21 C.F.R. § 50.20 (2010).

283. *See generally* 21 C.F.R. §§ 50.1-50.56 (Part 50, as a whole, provides the regulations for the protection of human subjects.).

284. Abdullahi v. Pfizer, 562 F.3d 163, 182 (2d Cir. 2009).

285. *Id.* at 198 (citing Flores v. Southern Peru Copper Corp., 414 F.3d 233, 249 (2d Cir. 2003)).

286. Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980).

287. *See Flores*, 414 F.3d at 248-51.

288. *Abdullahi*, 562 F.3d at 176, 202 (citing *Flores*, 414 F.3d at 248).

each class of sources listed in the [International Court of Justice] Statute, but many individual sources within each class."[289] The broad differences in the analytical approaches taken by the majority and dissent become evident when considering this "methodical assessment" of probative value. Here, the majority wove together the salient aspects of eight different purported sources of international law to find the existence of a norm against non-consensual medical research.[290] The dissent took a stricter approach, reasoning that the "great weight of ATS jurisdiction must rest upon a foundation [that is] sturdy enough to support it."[291]

V. CRITIQUING THE *ABDULLAHI* COURT'S ANALYSIS OF WHETHER PFIZER'S ALLEGED NON-CONSENUSAL MEDICAL RESEARCH FALLS WITHIN THE "LAW OF NATIONS"

At this point, it is valuable to analyze more fully the "law of nations" component of the ATS, as well as its attendant state action inquiry. With a broader understanding of these elements, one can see some of the more troubling implications of the *Abdullahi* court's interpretation of the ATS.

A. The "Law of Nations"

Although *Sosa* articulated a broad standard for determining a customary international norm (that it be sufficiently specific, universal, and obligatory),[292] there is still much question as to where a court should look in order to find the "law of nations." As the Restatement (Third) of Foreign Relations Law notes, "[c]ustomary international law has developed slowly and unevenly . . . [N]ational courts required to determine questions of international law must do so by imprecise methods out of uncertain materials . . . ."[293] Moreover, the utility of any source depends heavily on the facts pled in an individual complaint.[294] As a result, when thinking broadly about the "law of nations" it is perhaps more important to identify

289. *Id.* at 194 (Wesley, J., dissenting). These classes of sources will be discussed in greater detail. *See infra* Part V.A. They are only mentioned now to illustrate the difference in the majority's and minority's approaches to balancing the weight of the evidence.

290. *Abdullahi*, 562 F.3d at 175-88 (majority opinion).

291. *Id.* at 202 (Wesley, J., dissenting).

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

293. RESTATEMENT (THIRD) OF FOREIGN RELATIONS: INTRODUCTORY NOTE (1987).

294. ATS plaintiffs have, for example, relied upon treaties that were not ratified at the time the cause of action arose and provisions of international accords that were not directly on point. For example, in *Vietnam Ass'n,* the plaintiff attempted to rely on a Protocol that had not been ratified until after the cause of action accrued and on an advisory opinion that the court characterized as "not on point." *See* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 119-24 (2d Cir. 2008).

the *kinds* of authorities that provide "competent proof of . . . customary international law"[295] than any specific, individual authority.

When undertaking to determine the law of nations, courts have frequently looked to Article 38 of the International Court of Justice Statutes (ICJS).[296] Article 38 declares four sources that should be applied when deciding questions "in accordance with international law."[297] The sources are:

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. 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.[298]

Section 103 of the Restatement (Third) of Foreign Relations Law similarly provides that "[i]n determining whether a rule has become international law, substantial weight is accorded to:

a. judgments and opinions of international judicial and arbitral tribunals;

b. judgments and opinions of national judicial tribunals;

c. the writings of scholars;

d. pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states."[299]

The general classes of international law sources articulated in the ICJS and Restatement assist in weighing the probative value of individual sources put forth by plaintiffs as evidentiary of a norm of customary international law. Once a court can determine whether a source fits into one of these categories, it is in a position to determine whether the source might be evidentiary of the state of international law and, if so, to what extent.

While using the ICJS and Restatement to categorize sources is a good starting point, it certainly will not be determinative of a source's applicability.

295. Flores v. Southern Peru Copper Corp., 414 F.3d 233, 251 (2d Cir. 2003).

296. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJS]. For example, the Second Circuit has cited Article 38 in *Flores* (*Flores*, 414 F.3d at 250-51) and *Yousef* (United States v. Yousef, 327 F.3d 56, 100-01 (2d Cir. 2003)).

297. ICJS, *supra* note 296.

298. *Id.*

299. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 (1987).

A good example of this can be found in the 2009 decision, where the plaintiffs relied upon—and the majority accepted—the Nuremberg Code as a source of international law evidencing a norm of customary international law prohibiting nonconsensual medical testing.[300] As the dissent noted, however, the Code does not fit technically into any of the ICJS categories.[301] It does intuitively seem, though, that it might carry some weight in specific factual situations—such as if a plaintiff alleged forcible experimentation by a regime during wartime.

Section 102 of the Restatement (Third) of Foreign Relations Law is also instructive when thinking broadly about the law of nations.[302] In pertinent part, it provides that "[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world."[303] It also states that, under certain circumstances, "[i]nternational agreements . . . *may* lead to the creation of customary international law" and that "[g]eneral principles common to the major legal systems . . . *may* be invoked as supplementary rules of international law where appropriate" (emphasis added).[304]

It is valuable to note that while the Restatement provides solid guidelines for proving international norms of customary law, it is not as persuasive as the ICJS because it, in itself, does not constitute a statement of universally recognized principles of international law: "at most . . ., the Restatement iterates the existing U.S. view of the law of nations . . . ."[305] This highlights yet again how difficult it is to categorize a source of international law, determine its weight relative to other related sources, and ultimately determine that it, either alone or in combination with other materials, demonstrates a norm of customary international law.

The expansiveness of the law of nations inquiry can be somewhat daunting, but it is important to remember that *Sosa* emphasized a need for judicial restraint and left the door to new causes of action "still ajar" and "subject to vigilant doorkeeping."[306] Indeed, this view represents the *liberal* end of the spectrum, as Justice Scalia (joined by Chief Justice Rehnquist and

300. *See* Abdullahi v. Pfizer, 562 F.3d 163, 179-84 (2d Cir. 2009).
301. *Abdullahi*, 562 F.3d at 198-202 (Wesley, J., dissenting).
302. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).
303. *Id.*
304. *Id.*
305. Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991).
306. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

Justice Thomas) argued that the door to new causes of action should be shut altogether.[307]

Taken together, this would tend to support a more conservative view of the law of nations as a whole and a healthy skepticism of the evidentiary value of the ATS plaintiffs' proffered "sources" of international law. In *Abdullahi*, the majority seemed to take an overly expansive view of the law of nations, picking and choosing relevant bits of a number of sources and declaring that they, collectively, demonstrate a customary international norm against nonconsensual medical research.[308] The dissent, on the other hand, conducted an analysis closer to that of the District Court in *Abdullahi III*, disfavoring instruments to which the United States is not party and aspirational declarations of non-governmental bodies.[309] While it is arguable that the dissent dispensed with sources that *may* have been probative in combination with a number of others, it does not appear that Judge Wesley threw out anything that plainly and convincingly evidenced the customary norm of international law at issue.[310] The majority, however, included instruments that clearly should not carry any evidentiary value; among other things, it accepted at least two sources that post-dated the initiation of the *Abdullahi* litigation.[311]

Looking only at the law of nations inquiry and disregarding the important, intertwined issue of whether Pfizer is a state or private actor, the *Abdullahi* decision seems to clearly represent an expansion of the ATS that was not contemplated by the First Congress and exceeds the limited judicial discretion to determine private causes of action from the law of nations that *Sosa* so cautiously granted.[312]

C. The State Action Consideration

The state action component is a major consideration when determining whether cases involving private actor defendants can be brought appropriately under the ATS; without demonstrable government involvement or a delegation of authority to a private actor by a government, the ATS will not extend jurisdiction to a case brought against a private actor[313] (such as a corporation like Pfizer). Although the majority did not afford it much

307. *Id*. at 739, 744-50 (Scalia, J., concurring). "Federal common law is a new door [and] [t]he question is not whether that door will be left ajar, but whether this court will open it." *See id*. at 746.

308. *See supra* Part IV.A.

309. *See supra* Part IV.C (focusing on the paragraphs discussing the dissenting opinion).

310. *See supra* Part IV.C (focusing on the paragraphs discussing the dissenting opinion).

311. *See supra* Part IV.C (focusing on the paragraphs discussing the majority opinion).

312. *See supra* Part II.B.2 (discussing the perceived intent of the ATS drafters within the *Sosa* opinion).

313. *See supra* Part II.B.1 (discussing *Kadic* and the state action component).

analysis, a good deal of the *Abdullahi* decision necessarily rests upon the issue of whether Pfizer is or is not a state actor. The "norm against nonconsensual medical testing" cannot be found as easily for private actors as for state actors.[314]

Section 404 of the Restatement (Third) of Foreign Relations Law states the following violations of international law for which private parties may be held liable: "[acts] such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ."[315] On the other hand, the § 702 of the Restatement provides that

> [a] state violates international law if, as a matter of state policy, it practices, encourages, or condones (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, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.[316]

Kadic noted that although the categories of private and state actor violations may overlap, they are not coterminous.[317] Clearly, the list of violations for which a state actor may be held liable is much longer than the corresponding list for private actors. A court may not draw from the state actor list to find liability against a private actor.[318]

In looking at these lists, it is clear that performing nonconsensual medical research does not fall within the classes of actions for which private actors can be held liable. As to the state actions list, it is possible that one could argue that nonconsensual medical research either falls under "torture or *other, cruel, inhuman, or degrading treatment* or punishment" or "a consistent pattern of gross violations of internationally recognized human rights."[319] With respect to the former, it is not particularly clear that Pfizer's actions fit neatly within this category. Although it is reproachable to fail to obtain informed consent, it is questionable whether Pfizer's Trovan trial constituted "cruel, inhuman, or degrading treatment."[320] The latter category

314. *See infra* notes 315-18.

315. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (noting that jurisdiction does not apply to state actors only).

316. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

317. *See* Kadic v. Karadžić, 70 F.3d 232, 240 (2d Cir. 1995).

318. *See id.*

319. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) (emphasis added).

320. This certainly does not suggest that nonconsensual medical research itself does not fall into this category. It is unclear in *this particular case* that Pfizer was acting to torture or degrade the Trovan subjects; its research protocol was undoubtedly lacking, but arguably it does not rise to the level of atrocity contemplated in the Restatement. Trovan was administered to individuals who were indeed suffering from the disease the drug was designed

requires the showing of "a consistent pattern of gross violations . . ."—something that may not be satisfied by the one-time Trovan trial—and a demonstration of the state of "internationally recognized human rights."[321] This effectively circles back to the law of nations inquiry and requires an analysis of relevant sources of international law.

Plainly, the Restatement § 404 (adopted by the Second Circuit in *Kadic*) does not contemplate a cause of action against Pfizer as a *private* actor for violating a customary international norm against nonconsensual medical research.[322] Therefore, it was critical that the majority found Pfizer was a state actor.

As discussed in Part IV(B), *supra*, the *Abdullahi* majority's analysis of the state action component was slipshod at best. It included unsubstantiated facts that were not within the scope of appellate review and was largely devoid of meaningful analysis.[323] The negligible portion of the opinion dedicated to Pfizer's status looked like a mere formality[324] and suggested that perhaps the court, desiring to bring Pfizer to justice, had glossed over the private actor possibility.

The *Sosa* Court did not have occasion to examine the state action component of the law of nations.[325] This is not because it is an unimportant part of ATS analysis; rather, the *Sosa* case plainly involved state action[326] so the Court did not reach that element. However, the hesitancy of the *Sosa* Court to expand the ATS too greatly[327] seems to suggest that the Supreme Court would counsel against a liberal analysis of the state action component in order to keep ATS liability firmly constrained. Disregarding or manipulating the state action component will have the undesirable effect of "lower[ing] the bar"[328] for ATS plaintiffs and the disastrous effect of effectively merging the separate lists of actions for which private and state

to treat; it was not administered gratuitously to healthy individuals. *See* Abdullahi v. Pfizer, 562 F.3d 163, 169-70 (2d Cir. 2009).

321. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

322. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (noting that nonconsensual medical research is not included in the list of punishable actions attributable to private actors).

323. *See supra* Part IV.A-B. *See also* Abdullahi v. Pfizer, 562 F.3d 163, 188-89 (2d Cir. 2009).

324. *See supra* Part IV.A-B. *See also Abdullahi*, 562 F.3d at 188-89.

325. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727-28 (2004) (noting the discussion concerns private rights of action, not state action).

326. *Id.* at 697-99 (noting that Sosa acted on behalf of the Drug Enforcement Administration).

327. *Id.* at 727-28.

328. Recent Case, *Second Circuit Looks Beyond*, *supra* note 203, at 772 (discussing how "procedural evasion of the state action requirement lowers the bar for ATS claim survival . . . .").

actors may be held liable. This ostensibly defies the primary holding of *Sosa*—that the ATS does *not* create new causes of action.[329]

VI. CONCLUSION

The ATS has a long, inconsistent, and controversial history—particularly with respect to the law of nations element and related state action inquiry. Although a great deal of ambiguity remains, *Sosa* has provided some guidance as to the breadth of the statute, how the law of nations may be determined, and the requirements for a customary norm of international law to provide a private cause of action. In particular, *Sosa* emphasized a need for judicial restraint and left the door to new causes of action "only slightly ajar" and "subject to vigilant doorkeeping."

With respect to the law of nations, the *Abdullahi* decision seems to clearly represent an expansion of the ATS that was not contemplated by the First Congress and exceeds the limited judicial discretion to determine private causes of action from the law of nations that the *Sosa* court so cautiously granted. The majority cobbled together various provisions of purported sources of international law (some of which were plainly inapplicable) to find that there exists a customary international norm against nonconsensual medical research for which the plaintiffs had a private right of action.

This finding was even more skewed by the fact that the majority glossed over the state action component, failing to entertain the very plausible notion that Pfizer is a private, rather than state actor.[330] Indeed, some of the sources relied upon apply explicitly and exclusively to state actors. Such inadequate consideration of the state action component can lead to disastrous expansion of ATS jurisdiction.[331] In particular, it opens the door

329. *Id.* (citing *Sosa*, 542 U.S. at 727).

330. One year after *Abdullahi* was decided, the Second Circuit held that ATS jurisdiction does not extend to claims against corporations, finding that "although customary international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has *never* extended the scope of liability to a corporation." Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2010). The court cautioned, however, "nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation . . . ." *Id.* at 122. Thus, while suits in the Second Circuit can no longer proceed against private pharmaceutical companies like Pfizer, plaintiffs may sue individually those within the company who allegedly assist or engage in behavior violative of the law of nations. Although this resolves *Abdullahi*'s unanswered question of whether corporate liability is possible under the ATS, it does nothing to curb courts' willingness to "find" state action based on a thin factual record. The danger still exists that courts will name corporate directors or researchers as "state actors" as a basis for individual liability.

331. For example, in its summation of the case, the Harvard Law Review staff noted "evasion of the state action requirement endangers the executive's power to conduct foreign

to ATS litigation over *private* violations of international customary norms that ought only be enforceable (for ATS purposes) against state actors. This is especially true with respect to nonconsensual medical research—absent appreciable state involvement, the ATS should not be a jurisdictional basis for foreign claims against private pharmaceutical companies or their employees.

Overall, the *Abdullahi* majority disregarded *Sosa* and applied the ATS over-broadly, more or less kicking down the door that the *Sosa* court cautioned was barely ajar. Without curtailing this brand of liberal ATS interpretation, federal courts could be faced with problematic effects of an ill-advised, unintended expansion of the ATS.

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affairs . . . . [Courts] risk blaming the foreign government even when the foreign government had little role at all." Recent Case, *Second Circuit Looks Beyond*, *supra* note 203 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 727-28 (2004)).

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