RECENT DEVELOPMENTS

Abdullahi v. Pfizer: The Second Circuit Expands the Scope of Customary International Law Under the Alien Torts Statute

I. OVERVIEW

In response to the outbreak of a meningitis epidemic in northern Nigeria, American pharmaceutical corporation Pfizer sent three of its doctors to the area in April 1996 to test the experimental drug Trovafloxacin (or Trovan) on child patients suffering from meningitis at the Infectious Disease Hospital (IDH) in Kano.[1] Pfizer allegedly knew at the time that Trovan had never before been tested on children and, further, that animal testing had resulted in severe side effects such as "joint disease, abnormal cartilage growth, liver damage, and degenerative bone condition."[2] Nevertheless, with the help of Nigerian government officials, Pfizer's doctors enlisted two hundred children who had come to the IDH for treatment and divided them into two groups for the purpose of testing the experimental drug on them.[3] They treated one group with Trovan and the other with a well established, FDA approved antibiotic called Ceftriaxone.[4] The Pfizer doctors allegedly administered intentionally low doses of Ceftriaxone on the children in the second group in an attempt to inflate the comparative effectiveness of Trovan.[5]

Some two weeks later, the Pfizer doctors allegedly left Nigeria, ending the experiment without follow-up treatment.[6] Subsequently, five of the Trovan children and six of the low-dose Ceftriaxone children died, while many of the other test patients were left significantly debilitated.[7]

1. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169 (2d Cir. 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

Pfizer then allegedly doctored paperwork necessary for FDA approval with the help of Nigerian officials.[8] In 2002, parents of the deceased children sued Pfizer in the Southern District of New York under the Alien Torts Statute (ATS), alleging that Pfizer's experiments had violated international law because its doctors had failed to acquire informed consent from either the children or their parents.[9] The district court denied Pfizer's rule 12(b)(6) motion to dismiss because the Nigerian government's alleged involvement in the complaint made Pfizer a state actor and thus liable under international law, but dismissed the case on forum non conveniens grounds, despite the plaintiffs' allegations of corruption in the Nigerian court system.[10] On remand for further inquiry into forum non conveniens, the district court held that it did not have jurisdiction over the case because, although "non-consensual medical experimentation violates the law of nations," the plaintiffs had failed to identify any private right of action on which to base ATS jurisdiction.[11]

The United States Court of Appeals for the Second Circuit *held* that the prohibition in customary international law against nonconsensual human medical experimentation can be enforced through the ATS. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009).

II. BACKGROUND

The Alien Torts Statute, originally passed by Congress in 1789 as part of the Judiciary Act, 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."[12] The ATS sets out that a plaintiff must: (1) be an alien and (2) make a claim based in tort (3) for a violation of a U.S. treaty or the law of nations.[13] Lacking any drafting history or other record of

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8. *Id.* at 170.

9. *Id.* at 169-70. The ATS is sometimes called the Alien Tort Claims Act; however, ATS is more correct because it does not create a private right of action. *See* Abdullahi v. Pfizer, Inc., No. 01-CIV-8118 (WHP), 2005 WL 1870811, at *1 n.1 (S.D.N.Y. Aug. 9, 2005).

10. *Abdullahi*, at 170 (citing Abdullahi v. Pfizer, Inc., No. 01-CIV-8118, 2002 WL 31082956, at *5-6 (S.D.N.Y. Sept. 17, 2002)).

11. *Id.* at 171 (quoting Abdullahi v. Pfizer, Inc., No. 01-CIV-8118(WHP), 2005 WL 1870811, at *18 (S.D.N.Y. Aug. 9, 2005)).

12. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76-77 (codified as amended at 28 U.S.C. § 1350 (2006)).

13. Flores v. S. Peru Copper Corp., 414 F.3d 233, 242 (2d Cir. 2003). The term "law of nations" is interchangeable with "customary international law" for the purposes of the ATS. *Id.* at 247. Customary international law does not refer to rules found in a single treaty binding all states; rather, it refers to those norms that are nearly universally adhered to by states out of a belief that they are legally binding rules of international law in spite of the lack of any specific,

congressional discussion, the statute provides little guidance beyond these terse phrases as to its exact scope or intended application.[14] Nevertheless, historians have gleaned some insight into the cryptic phrases of the ATS by considering it in the context of the struggle between the federalists and the antifederalists to define the role of the federal government in foreign relations.[15] During the period of confederation, the Continental Congress could not punish infractions of the law of nations and was unable to strong-arm the states into providing an adequate forum for the vindication of violations of international law.[16] This deficiency created a serious risk of international catastrophe when injured foreign diplomats in the confederated states found themselves without redress.[17] In response, the First Congress passed the ATS, among other measures, to provide such a forum in the federal courts.[18]

Despite the illumination provided by this historical exegesis, a clear understanding of the scope of the ATS remained out of reach for most of its existence.[19] Perhaps due to this opacity, the ATS remained mostly dormant until the seminal case of *Filartiga v. Pena-Irala* almost two hundred years later.[20] In that case, Filartiga, a citizen of Paraguay, sued another Paraguayan, Peña-Irala, for violating an alleged norm of customary international law prohibiting the commission of torture under color of law, arguing for jurisdiction based on the ATS.[21] Plaintiff Dolly Filartiga claimed that the defendant, while working as the Inspector General of Police in Paraguay, kidnapped her brother and tortured him to death for his opposition to the government.[22] Examining the United

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universally binding international instrument. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Yousef, 327 F.3d 56, 91 n.24 (2d Cir. 2003).

14. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004).

15. *Id.*

16. *Id.* at 716.

17. *Id.* at 716-17.

18. *Id.* at 717.

19. *Id.* at 718-19.

20. Flores v. S. Peru Copper Corp., 414 F.3d 233, 243 (2d Cir. 2003); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

21. *Filartiga*, 630 F.2d at 878, 880. To determine the existence of a norm of customary international law, a court must examine the sources of international law in question, taking into account their relative weight, to determine whether a proposed norm is justified by widespread state practice and whether that practice is adhered to out of sense of legal obligation. *Flores*, 414 F.3d at 252; Abdullahi v. Pfizer, Inc., 562 F.3d 163, 194-95 (2d Cir. 2009) (Wesley, J., dissenting). Rules to which states pay lip service, but ignore in practice, usually cannot rise to the level of custom. *Flores*, 414 F.2d at 248. *But see Filartiga*, 630 F.3d at 884 n.15 (holding that failure of states to honor the prohibition on torture does not affect its binding status). Conversely, even if all or most states adhere to a given norm, but not out of any belief that it is legally binding, there is similarly no customary law. *Flores*, 414 F.3d at 248.

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

States Supreme Court's decision in *In re The Paquete Habana* and article 38(1) of the Statute of the International Court of Justice, the Second Circuit Court of Appeals determined that in order to rise to the level of customary international law, a norm must be "'a settled rule of international law' by 'the general assent of civilized nations.'"[23] It further concluded that the rule must be one of mutual, and not several, concern to states, meaning the rule concerns the relationship between states or between individuals and foreign states and is "'used by those states for their common good and/or in dealings *inter se*.'"[24]

In considering whether a given norm of customary international law exists, the Second Circuit determined that a court should examine the customs and usages of civilized nations and judicial decisions based on international law and the works of legal scholars, as long as such works concern what the law is rather than what individual authors believe it should be.[25] It also held that the court should determine whether the norm exists under modern customary international law, and not under the international law of the era when the ATS was first passed.[26] It further clarified that the ATS does not create, on its own, a separate private right of action in aliens.[27] Rather, it provides federal court jurisdiction over claims that already exist in the law of nations.[28] Thus it creates a more restrictive jurisdictional provision than the "arising under" standard applied in conferring conventional federal question jurisdiction.[29] Examining a variety of international conventions, including the U.N. Charter, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the

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23. *Id.* at 880-81 (quoting The Paquete Habana, 175 U.S. 677, 694 (1900) (citing Statute of the International Court of Justice, U.N. Charter annex art. 38(1))). The Statute of the International Court of Justice, setting out the relevant sources of international law, states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

24. *Filartiga*, 630 F.2d at 888 (quoting ITT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975)) (internal quotes omitted).

25. *Id.* at 880-81 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

26. *Id.* at 881.

27. *Id.* at 887.

28. *Id.*

29. *See id.*

Declaration on the Protection of All Persons from Being Subjected to Torture, the Second Circuit concluded that the right to be free from state torture had become a norm of customary international law.[30]

The next major case dealing with the ATS to confront the Second Circuit was *Kadic v. Karadzic*, a case brought by victims of genocide in the former Yugoslavia against Radovan Karadzic, president of the purported Bosnian-Serb state of Srpska.[31] The plaintiffs alleged that Karadzic had committed genocide, war crimes, and other violations of customary international law while commanding insurgent forces during the Bosnian civil war.[32] The defendant asserted that the claims could not apply to him because international law only creates obligations in states and individuals acting under color of state law.[33] He argued that he was not a state actor, despite simultaneously claiming to be the president of the unrecognized Srpska.[34] The Second Circuit rejected this defense, holding that certain crimes under international law create liability for both state and private actors.[35] The court examined the Restatement (Third) of Foreign Relations Law of the United States, comparing section 702, which lists the crimes for which states may be held liable, with section 404, which sets out a more restrictive list of crimes of universal concern, including piracy, genocide, and war crimes.[36] These crimes of

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30. *Id.* at 882-84 (discussing U.N. Charter arts. 55-56; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. Doc. A/10034 (1975); International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]).

31. Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).

32. *Id.*

33. *Id.* at 239.

34. *Id.* Srpska is a self-proclaimed republic within Bosnia-Herzegovina. *Id.* at 237.

35. *Id.* at 239.

36. *Id.* at 240; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 702 (1987). Section 702 states:

> "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."

Id. § 702. Section 404 states:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave

universal concern apply to all offenders regardless of territoriality, nationality, or state action.[37] The court consequently found that plaintiffs could state a cause of action under the ATS against private individuals, as well as state actors, for some specific violations of customary international law, including genocide and war crimes.[38]

In *Flores v. Southern Peru Copper Corp.*, the Second Circuit held that the claim of a group of Peruvian plaintiffs, who alleged that the Southern Peru Copper Corporation (SPCC) had violated their "right to life" and "right to health," or alternatively violated a rule against intranational pollution under customary international law, failed to state a claim on which relief could be granted and dismissed the action for lack of subject matter jurisdiction.[39] The SPCC's mining operations in Peru had emitted pollutants into the environment in and around Ilo, a port city in southern Peru, allegedly causing the residents to suffer from respiratory illnesses.[40] The Peruvian government had already required the SPCC to pay fines and restitution to locals for the environmental impact of its activities.[41] Nevertheless, the residents of Ilo sued the SPCC in U.S. district court under the ATS, claiming violations of their rights to life and health based in international law.[42] The Second Circuit found these claims to be too vague to constitute rights in customary international law actionable under the ATS.[43]

The Second Circuit went on the hold that although the plaintiffs' complaint could be construed as alleging a violation of a rule in customary international law prohibiting intranational pollution, the plaintiffs had failed to establish any norm of international law.[44] The court determined that the international conventions relied on by the plaintiffs—including the ICCPR, UDHR, and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—were aspirational only and did not create law binding on states.[45] It further concluded that

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> trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction . . . is present.

Id. § 404.

37. *See Kadic*, 70 F.3d at 240.
38. *Id.* at 236.
39. Flores v. S. Peru Copper Corp., 414 F.3d at 254-55 (2d Cir. 2003).
40. *Id.* at 237.
41. *Id.* at 238.
42. *Id.* at 236-37.
43. *Id.* at 254.
44. *Id.* at 255.
45. *Id.* at 257-59 (citing ICCPR, *supra* note 30, art. 12; International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360, 1966 U.N.T.S. 3 [hereinafter ICESCR]; UDHR, *supra* note 30, art. 25).

the United Nations General Assembly resolutions relied on by the plaintiffs were similarly nonbinding.[46] The court pointed out that in *Filartiga*, nonbinding sources of international law were only relevant to the extent they were justified by state practice.[47] The court also found documents submitted by the plaintiffs, which had been written by legal scholars, unconvincing because the documents constituted theoretical, policy-driven accounts of what the law should be rather than what it actually was.[48] The court concluded that the plaintiffs had not established any customary international law norms that could provide a right of action under the ATS.[49]

The Second Circuit's *Filartiga* line of cases, which created private rights of action for violations of customary international law, has been met with mixed reactions in the other circuits.[50] The United States Courts of Appeals for the Ninth and Eleventh Circuits adopted the Second Circuit's reasoning,[51] while Judge Bork of the United States Court of Appeals for the District of Columbia Circuit concluded in a concurring opinion in *Tel-Oren v. Libyan Arab Republic* that, contrary to *Filartiga*, customary international law is not a part of federal law.[52] The Second Circuit is satisfied that Congress intended to approve of the *Filartiga* approach when it adopted the Torture Victim Protection Act (TVPA), which created a cause of action for victims of state torture.[53] The Act applies to the same set of activities that the Second Circuit applied the ATS to in *Filartiga*, but is actionable by U.S. as well as foreign citizens.[54] Other circuits have held, however, that the TVPA merely created an independent cause of action based on conventional federal question jurisdiction and have chosen not to ratify the *Filartiga* approach.[55]

The Supreme Court finally ruled on the issue of private rights of action in federal court for violations of customary international law under the ATS in *Sosa v. Alvarez-Machain*.[56] The plaintiff in *Sosa* alleged

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46. *Flores*, 414 F.3d at 259-62.
47. *Id.* at 262.
48. *Id.* at 265.
49. *Id.* at 266.
50. *Id.* at 244-45.
51. *Id.* at 245 (citing Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)).
52. *Id.* at 245 (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 811 (D.C. Cir. 1984) (Bork, J., concurring)).
53. *Id.* at 246-47 (citing Torture Victim Prevention Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as 28 U.S.C. § 1350 note (2006))).
54. *Id.*
55. *Id.*
56. *See* Sosa v. Alvarez-Machaim, 542 U.S. 692, 697 (2004).

that bounty hunters, hired by DEA agents seeking revenge for the brutal torture and murder of one of their own by members of a Mexican drug cartel, captured him in Mexico and brought him back to the United States for trial.[57] He filed suit against Sosa, one of the Mexican bounty hunters, claiming the ATS vested jurisdiction based on a proposed norm of customary international law prohibiting arbitrary arrest and detention.[58] The Supreme Court held that Alvarez's brief detention did not violate a rule of customary international law that would support a remedy in federal court.[59] In doing so, it decided that the ATS could support a private rights of action for violations of customary international law without prior express congressional authorization, but only in a restricted set of circumstances.[60]

Justice Souter, writing for the majority, concluded that when Congress enacted the ATS there had been three violations of the law of nations that would have been recognized as creating private rights of action: piracy, offenses against diplomats, and "violation of safe conducts."[61] International law traditionally consisted of two distinct elements: rules "covering the general norms governing the behavior of national states" and rules "regulating the conduct of individuals situated outside domestic boundaries."[62] Bridging the gap between these arenas of public and private international law was a "narrow set of violations of the law of nations" involving individuals and states that was amenable to judicial remedy but at the same time included issues of serious international consequence.[63] It was these specific offenses over which the First Congress probably intended to create private rights of action under the ATS.[64] In order for a violation of modern customary international law to be actionable under the ATS today, it would need to be not only recognized generally by the states of the world as a binding norm, but also "defined with a specificity comparable to the features of the 18th-century paradigms."[65] The *Sosa* Court cautioned that courts should exercise restraint in defining new customary international law claims under the ATS because the creation of private rights of action in

57. *Id.* at 697-98.
58. *Id.* at 698-99.
59. *Id.* at 738.
60. *Id.* at 719-20.
61. *Id.* at 724. Safe conducts refers to the obligation of states to provide for the safety of "journeying aliens" bearing valid travel documents. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 208 (2d Cir. 2009) (Wesley, J., dissenting).
62. *Sosa*, 542 U.S. at 714-15.
63. *Id.* at 715.
64. *Id.*
65. *Id.* at 725.

federal law is generally a legislative function.[66] The Court nevertheless left open the possibility of recognizing new norms as actionable "subject to vigilant doorkeeping."[67] In addition to requiring a finding of specificity equivalent to the three original ATS causes of action, the Court stated that courts must also take into account the practical considerations involved in recognizing novel norms of customary international law.[68]

Upon examining the evidence that showed the existence of a customary international law norm against arbitrary arrest and detention, which was cited by Alvarez, the Court dismissed the UDHR and ICCPR, "despite their moral authority [as having] little utility," for purposes of determining ATS jurisdiction because those instruments are nonbinding on member states.[69] It also found that the norm advanced by the plaintiff would be so broad that it would provide jurisdiction in federal courts for any allegedly illegitimate arrest made globally.[70] Consequently, it held that such an aspirational standard could not establish a necessarily specific rule of customary international law as would be required by the ATS.[71]

III. THE COURT'S DECISION

In the noted case, the Second Circuit reversed the district court's dismissal for failure to State a claim and found the existence of a customary international law norm prohibiting nonconsensual medical experimentation that provides federal subject matter jurisdiction under the ATS.[72] Synthesizing its own *Filartiga* criteria and those set out by the Supreme Court in *Sosa*, the court determined that to establish ATS jurisdiction, it must determine whether a proposed norm of customary international law "(1) is a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) is defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) is of mutual concern to States."[73] Chief Judge Newman, writing for the majority, found that, in light of the relevant sources of international law and widespread state practice, states universally accept the norm against nonconsensual medical experimenta-

66. *Id.* at 725-28.
67. *Id.* at 729.
68. *Id.* at 732-33.
69. *Id.* at 734-35.
70. *Id.* at 736.
71. *Id.* at 738.
72. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009).
73. *Id.* at 174.

tion as binding international law, and further that the norm's content is as clear and unambiguous as those of the eighteenth century paradigms.[74] He also found that the norm was one of mutual concern to states based on the fact that states have taken action in prohibiting nonconsensual medical experimentation through express international accords.[75] Nonconsensual medical experimentation is furthermore of mutual concern to states, the court held, because it poses serious dangers to international peace and security.[76] According to the majority, the plaintiffs had sufficiently alleged state action, and thus Pfizer could be liable under international law.[77] Based on these determinations, the Second Circuit held that the norm was sufficient to support ATS jurisdiction.[78] In his dissent, Judge Wesley stated that, based on the facts alleged, Pfizer could not be considered a state actor, and further that the sources cited by the court were insufficient to establish a rule of customary international law.[79]

The majority relied on the ICJ Statute to set out the relevant sources of international law that could establish the existence of customary international law.[80] It noted the four sources identified by the plaintiffs: (1) the Nuremburg Code, (2) the World Medical Association's Declaration of Helsinki, (3) the Council for International Organizations of Medical Services (CIOMS) guidelines, and (4) article 7 of the ICCPR.[81] It concluded that the district court, in denying subject matter jurisdiction, had failed to accurately ascertain the content of customary international law or to correctly apply the *Sosa* standard.[82] The district court had, in Chief Justice Newman's opinion, incorrectly focused exclusively on whether the individual sources of international law examined were binding and whether they explicitly authorized private

74. *Id.* at 183-84.
75. *Id.* at 185.
76. *Id.*
77. *Id.* at 188-89.
78. *Id.* at 187.
79. *Id.* at 192-93 (Wesley, J., dissenting).
80. *Id.* at 175 (majority opinion).
81. *Id.* (citing ICCPR, *supra* note 30, art. 7; United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1, 181 (1949); World Med. Ass'n [WMA], *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, arts. 20, 22 (June 1964) (amended through October 2008) [hereinafter Helsinki Declaration], *available at* http://www.wma.net/en/30publications/10policies/b3/17c.pdf; COUNCIL FOR INT'L ORGS. OF MED. SERVS., INTERNATIONAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS guideline 4 (3d ed. 2002) [hereinafter CIOMS GUIDELINES]).
82. *Id.* at 176.

rights of action.[83] Thus, the court held, the district court had failed to come to grips with the fact that no single instrument is itself dispositive.[84] The majority came to this conclusion by determining that the district court had put too much weight on whether the United States had ratified the various sources proffered by the plaintiffs and failed to take into account that nonbinding conventions are relevant to the extent that they reflect state practice.[85]

Considering the universality requirement, the Second Circuit noted that the prohibition against nonconsensual medical experimentation had its roots in the Nuremburg trials.[86] During those proceedings, a U.S. military tribunal promulgated the Nuremburg Code, establishing the requirement of consent in medical experimentation, as part of a larger judgment against Nazi doctors who had conducted nonconsensual medical experiments on prisoners.[87] The majority pointed out that the "legal principles [applied] in judgments at Nuremburg occupy a position of special importance in the development of bedrock norms of international law."[88]

The court found that the ICCPR provided relevant evidence on the question of universal acceptance because, regarding this particular norm, it reflects state practice, including that of the United States.[89] Similarly, it found the World Medical Association's Declaration of Helsinki, which articulates the criteria for obtaining informed consent, relevant because it formed the basis of numerous domestic laws prohibiting nonconsensual medical experimentation in many countries, including U.S. Food and Drug Administration standards.[90] It was particularly telling that FDA approval of new drugs required informed consent regardless of whether the testing was conducted in the United States or abroad.[91] Finally, the court considered other sources of international law, including the European Union Clinical Trial Directive, the Convention on Human Rights and Biomedicine, and the Universal Declaration on Bioethics and

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83. *Id.*
84. *Id.*
85. *Id.* at 176-77.
86. *Id.* at 177.
87. *Id.* at 178 (citing George J. Annas, *The Nuremburg Code in U.S. Courts: Ethics versus Expediency*, *in* THE NAZI DOCTORS AND THE NUREMBURG CODE 201, 201 (George J. Annas & Michael A. Gordon eds., 1992)).
88. *Id.* at 179.
89. *Id.* at 180-81. Article 7 of the ICCPR states that "no one shall be subjected without his free consent to medical or scientific experimentation." ICCPR, *supra* note 30, art. 7.
90. *Abdullahi*, 562 F.3d at 181-82.
91. *Id.* at 182.

Human Rights.[92] It concluded that a norm prohibiting nonconsensual medical experimentation had reached such a level of universal acceptance among the international community that it was part of customary international law.[93]

The Second Circuit had no trouble in determining that a norm prohibiting medical experiments on persons without their consent was as specific and clear as the three original norms enumerated in *Sosa*.[94] Uncertainty at the margins of the rule was not problematic because the instant case involved allegations of "a complete failure . . . to inform appellants of the existence of the Trovan experiments."[95] The court went on to hold that the norm was of mutual concern to states because many had demonstrated as much through express international accords, and further because violations of the norm on the scale alleged constituted a threat to international peace and security.[96] States around the world had acted in concert through the ICCPR, the Convention on Human Rights and Biomedicine, and the EU Clinical Trials Directive to eliminate nonconsensual medical experimentation.[97] On the issue of international peace and security, the court pointed out that the noted case itself provided a pertinent example of the dangers posed by the conduct alleged.[98] Due to mistrust brought about by the Trovan tests, the population of Kano boycotted polio vaccination efforts for eleven months, contributing to a major outbreak of polio in the area that eventually spread throughout much of Africa and the Middle East.[99]

Finally, turning to the issue of state action, the majority concluded that the plaintiffs had pleaded facts sufficient to allege that Pfizer had acted in concert with the Nigerian government.[100] In order to achieve the status of state action, a "close nexus" must exist between the state and the action so that what appears as private conduct "'may be fairly treated as that of the State itself.'"[101] The court noted that the plaintiffs had alleged

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92. *Id.* at 183 (citing Convention on Human Rights and Biomedicine arts. 5, 15-16, Apr. 4, 1997, Europ. T.S. No. 164; U.N. Educ., Scientific and Cultural Org. [UNESCO] Res. 33/36, art. 6 (Oct. 19, 2005), *available at* http://unesdoc.unesco.org/images/0014/001428/142825e.pdf; Council Directive 2001/20/EC, art. 3(2)(d), 2001 O.J. (L 121) 34, 37).

93. *Id.* at 183-84.

94. *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

95. *Id.* at 184.

96. *Id.* at 185.

97. *Id.*

98. *Id.* at 186.

99. *Id.* at 186-87.

100. *Id.* at 188-89.

101. *Id.* at 188 (quoting Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001)).

that the Nigerian government was involved in every step of the Trovan test.[102] The Nigerian government allegedly aided Pfizer in getting FDA approval to conduct tests, provided facilities and staff to assist Pfizer in performing the experiments, and even helped to cover up the violations.[103] The court consequently concluded that the plaintiffs had adequately alleged the requisite close nexus.[104]

Judge Wesley, dissenting strenuously, argued that, rather than identifying a norm of customary international law, the majority had instead invented one out of thin air.[105] He disputed the majority's conclusion that Pfizer could qualify as a state actor under the facts alleged.[106] He found that the plaintiffs had only alleged that the Nigerian government had "acquiesced to or approved the Trovan program in general without knowing its disturbing details."[107] He consequently found the ICCPR to be irrelevant because it only applies to states, and is particularly insufficient in light of the Supreme court's statements regarding that convention in *Sosa*.[108]

He observed that the remainder of the conventions and declarations relied on by the majority were, for the most part, equally irrelevant because they either were aspirational political statement (many made by private organizations rather than states), merely regional in nature (and unratified by the most influential states of those regions), or post-dated the conduct in question.[109] He also found the Nuremburg Code unpersuasive because it was penned by a U.S. military tribunal and not by the International Military Tribunal at Nuremburg, which consequently qualified it only as a subsidiary source of international law under the Statute of the International Court of Justice.[110]

Because he was convinced that Pfizer was not a state actor, he found that even if a norm against nonconsensual medical experimentation existed, it would not apply to Pfizer unless it qualified as one of the norms of universal concern enumerated in the Restatement (Third) of Foreign Relations Law, which he determined it did not.[111] He further concluded that the issue was one of several, rather than mutual, concern

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102. *Id.*
103. *Id.*
104. *Id.* at 188-89.
105. *Id.* at 191 (Wesley, J., dissenting).
106. *Id.* at 194.
107. *Id.* at 212.
108. *Id.* at 195-96 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004)).
109. *Id.* at 196-98.
110. *Id.* at 201 (citing U.N. Charter annex art. 38(1)(d)).
111. *Id.* at 202-07 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 702 (1987)).

to the states because the issues involved were no different from products liability or medical malpractice claims, which are "quintessential subjects of domestic law."[112] In doing so, he noted that states had not exhibited an express desire to act in concert through the enactment of any specifically targeted convention against medical experimentation.[113]

Concluding, Judge Wesley stressed that the issue on appeal was not whether Pfizer's alleged actions were immoral, it was whether the plaintiffs had established a private right of action under customary international law that could support ATS jurisdiction.[114] He determined that they had not.[115]

IV. ANALYSIS

In the noted case, the Second Circuit's interpretation of jurisdiction under the ATS read customary international law expansively in several important ways. It depended substantially on aspirational, nonbinding sources of international law such as the ICCPR and UDHR, declarations by private, nonstate parties such as the Helsinki Declaration, and a judicial decision by a U.S. military tribunal, rather than on binding treaties, in finding a rule of customary international law.[116] First, it held that this norm of international law created a new private right of action in U.S. domestic courts.[117] Second, it held that Pfizer was a state actor because of the alleged aid provided to it by the Nigerian government,[118] even though Pfizer was not under the control of the Nigerian government or performing a function traditionally reserved to states. The classical, volantaristic paradigm of public international law posits that it is a system of rules made by states, for states, and applying only to states.[119] Yet recently the role of private actors in international affairs has increased drastically and, consequently, so has their presence in international law.[120]

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112. *Id.* at 208.
113. *Id.*
114. *Id.* at 213.
115. *Id.*
116. *Id.* at 177-85 (majority opinion).
117. *See id.* at 187.
118. *Id.* at 188-89.
119. *See* The Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).
120. Even Congress has felt compelled to address the increasing relevance of private individuals in international affairs:

> The Congress finds that fundamental political, economic, and technological changes have resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect

In the noted case, the Second Circuit broke new ground in the area of individual rights and obligations in customary international law, even in the face of the Supreme Court's instruction to engage in "vigilant doorkeeping."[121]

Even when supported by state practice, nonbinding conventions provide problematic evidence of customary international law because it is unclear whether states adhere out of any belief in a legal obligation.[122] The Second Circuit has previously held that when nonbinding sources, such as the ICCPR and UDHR, spell out a norm that is supported by state practice, those sources provide relevant evidence.[123] It has also held, contradictorily, that these sorts of aspirational conventions are functionally useless as sources of international law because they do not set out clear and discernable standards or evidence any intent to be bound.[124] The Supreme Court appeared to sound the death-knell for jurisdiction based on the ICCPR and its ilk in *Sosa* when it found that the Convention, "despite [its] moral authority, [has] little utility."[125] The Second Circuit nevertheless unearthed it in the noted case, over the protestations of Judge Wesley, holding that it was "potent authority for the universal acceptance of the prohibition on nonconsensual medical experimentation" in light of the other evidence, including state practice and the Nuremburg Code.[126]

The majority and dissent in the noted case also disagreed vigorously over the status of the other sources cited.[127] The majority considered the Nuremburg Code, for instance, a foundational document of international law because of its genesis during the Nuremburg Trials,[128] while Judge Wesley found it to be only a subsidiary source.[129] It is true that the sources do not constitute the kind of widespread formal action in the form of binding multilateral treaties that provides the most substantial

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> individual civil and economic rights and freedoms and which work together to use wisely the world's limited resources in an open and equitable international economic system.

22 U.S.C. § 2151(a) (2006).

121. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

122. *Compare* Flores v. S. Peru Copper Corp., 414 F.3d 233, 252 (2d Cir. 2003), *with Abdullahi*, 562 F.3d at 180, *and* Filartiga v. Pena-Irala, 630 F.3d 876, 883 (2d Cir. 1980).

123. *See Abdullahi*, 562 F.3d at 177; *Filartiga*, 630 F.2d at 883.

124. *Flores*, 414 F.3d at 252.

125. *Sosa*, 542 U.S. at 734.

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

127. *Compare id.* at 187-88 *with id.* at 191 (Wesley, J., dissenting).

128. *Id.* at 179 (majority opinion).

129. *Id.* at 201 (Wesley, J., dissenting).

evidence of customary international law.[130] The majority found them compelling, however, in light of all of the factors it considered.[131] It went so far as to rely on a source produced by private actors rather than states—the Helsinki Declaration.[132] As Judge Wesley pointed out, the Declaration of Helsinki was produced by the World Medical Association, "a group comprised not of member states, but of physicians and private national medical associations."[133] The Second Circuit has consistently held that private individuals cannot create international law sua sponte.[134] Yet the majority in the noted case found this source relevant because it had formed the basis of law subsequently enacted in various domestic arenas.[135] Under Second Circuit precedent, the universal acceptance in domestic law of a norm is relevant to customary international law only where states have expressed that it is of mutual concern.[136] The court found that they had done so regarding the norm in question.[137]

Reliance on a private source as a basis of international custom was only one of the ways that the Second Circuit increased the relevance of private actors in international law in the noted case. By holding that ATS jurisdiction existed over the norm in question, the court created a private right actionable against states and their instrumentalities in international law for violations of nonconsensual medical experimentation.[138] The Supreme Court in *Sosa* warned the lower courts to be extremely cautious in expanding beyond the three original private rights of international law because the law of nations primarily falls within the ambit of states and not individuals seeking redress in court.[139] Nevertheless, the world has changed significantly since 1789, and international law along with it, and the Second Circuit has consistently held that the ATS changes with them.[140]

As the Second Circuit pointed out in *Filartiga*, the U.N. Charter makes "a state's treatment of its own citizens" an issue of "international concern," and it is "clear that international law confers fundamental

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130. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 251 (2d Cir. 2003).
131. *See Abdullahi*, 562 F.3d at 183-84.
132. *See id.* at 181.
133. *Id.* at 197 (Wesley, J., dissenting).
134. *See Flores*, 414 F.3d at 250; United States v. Yousef, 327 F.3d 56, 102 (2d Cir. 2003).
135. *See Abdullahi*, 562 F.3d at 182.
136. *See Flores*, 414 F.3d at 249.
137. *See Abdullahi*, 562 F.3d at 188.
138. *See id.* at 187.
139. Sosa v. Alvarez-Machain, 542 U.S. 692, 720, 725 (2004).
140. *See Abdullahi*, 562 F.3d at 187-88; Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

rights upon all people vis-a-vis their own governments."[141] It does not place any real limit on the type or scope of domestic activity that international law can reach when the community of states decides that a given issue constitutes one of mutual concern.[142] In light of this approach, it is no wonder that the Second Circuit could find not only that a norm prohibiting nonconsensual medical experimentation existed in customary international law, but also that it is actionable by private individuals in U.S. federal court.[143] The court went so far as to call Judge Wesley "unselfconsciously reactionary and static" because of his failure to discover either the existence or actionability of the norm.[144]

The Second Circuit was no more hesitant in finding that Pfizer could be liable under international law than it was in finding that the plaintiffs had a private right of action.[145] Under the classical approach, international law no more created liability in individuals as private actors than it provided them with rights.[146] Although there is a limited set of offenses for which individuals can now be held personally liable under international law, recognized (at least some of the time) by the Second Circuit as those enumerated in § 404 of the Restatement (Third), individuals are still not generally liable in their private capacities.[147] Individuals can, however, be liable for violations not falling into the "universal concern" category when they act under color of state law.[148] In the noted case, the court did not go so far as to find that Pfizer was potentially liable as a private actor, but was content to hold that its actions fell within the jurisdiction of the court due to the alleged complicity of the Nigerian government.[149] In *Kadic*, the Second Circuit examined the jurisprudence associated with 42 U.S.C. § 1983 for purposes of determining when an individual is a state actor.[150] The *Kadic* court held

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141. *Filartiga*, 630 F.2d at 881, 885 (citing U.N. Charter arts. 55-56).

142. *See id.* at 888-89.

143. *See Abdullahi*, 562 F.3d at 187.

144. *Id.* at 188.

145. *Id.*

146. *See* United States v. Yousef, 327 F.3d 56, 103-04 (2d Cir. 2003).

147. Kadic v. Karadzic, 70 F.3d 232, 239-40 (2d Cir. 1995) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1982)); *see also Yousef*, 327 F.3d at 103 (refusing to find universality jurisdiction over acts of terrorism). Judge Wesley noted the Second Circuit's contradictory precedents regarding the issue of whether courts have the ability to find new offenses of universal concern. *Abdullahi*, 562 F.3d at 204 n.14 (Wesley, J., dissenting). *Compare Yousef*, 327 F.3d at 103-04 ("[C]rimes subject to universal jurisdiction cannot be expanded . . . by analogy."), *with* Bigio v. Coca-Cola, 239 F.3d 440, 448 (2d Cir. 2001) (implying that offenses could be incorporated into the § 404 list by analogy).

148. *Bigio*, 239 F.3d at 448.

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

150. *See Kadic*, 70 F.3d at 245. Section 1983 states:

that actions, "together with state officials or with significant state aid," sufficed to create state action.[151] The court in the noted case utilized the "close nexus" approach developed in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, a case interpreting § 1983 decided subsequently to *Kadic*, in finding that Pfizer was a state actor.[152]

As Judge Wesley pointed out, however, other courts have required more than mere state involvement in an activity in order to rise to the level of state action.[153] The Supreme Court has, for example, announced that the involvement of a state in private activity must be such that the "[s]tate is *responsible* for the specific conduct of which the plaintiff complains."[154] In *Beanal v. Freeport-McMoRan, Inc.*, the United States Federal Court for the Eastern District of Louisiana rejected claims of state action based on alleged involvement by the Indonesian military in the defendant's conduct because there was no showing that the military "played an integral part in the deprivation of human rights."[155] The Second Circuit has previously held that where the government is not actively controlling the activity, the private actor and the government must be so closely intertwined in the conduct that their identities are indistinguishable.[156] In the noted case, the alleged participation by the Nigerian government was not such that the state became one with Pfizer for the duration of the tests, although it may have provided some facilities and staff.[157] Certainly, in light of allegations that the Nigerian government provided paperwork necessary to get FDA approval for Pfizer's

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000). The Supreme Court has stated that a person can be a state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

151. 70 F.3d at 245.

152. *Abdullahi*, 562 F.3d at 188 (citing Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001)).

153. *Id.* at 211-12 (Wesley, J., dissenting).

154. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

155. 969 F. Supp. 362, 374-75, 379 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

156. Horvath v. Westport Library Ass'n, 362 F.3d 147, 154 (2d. Cir. 2004) (citing *Brentwood Acad.*, 531 U.S. at 303).

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

tests and subsequently helped Pfizer in attempting to hush the incident up, the plaintiffs adequately alleged "significant state aid."[158]

V. CONCLUSION

Neither the majority nor the dissent in the noted case questioned the illegality of nonconsensual medical experimentation.[159] The question, rather, is where and under what law such experimentation would be actionable. The plaintiffs can, and indeed did, sue Pfizer in Nigerian court for violations of its domestic laws. They fought tooth and nail to get into U.S. court, asserting strenuously in their collateral struggle to overcome Pfizer's forum non conveniens defense that Nigerian courts cannot provide the remedy they require.[160] The issue then presents itself: Assuming Pfizer is a state actor, is there a norm in customary international law actionable in U.S. federal court against Pfizer for engaging in nonconsensual medical experimentation under color of law? The vast majority of states have made nonconsensual medical experimentation domestically illegal, but that does not necessarily make it a rule of international law. Under classical international law principles, what a state did to its own citizens was its own concern; however, the Second Circuit is correct in pointing out that such a paradigm is no longer tenable (and in fact has not been since the end of the Second World War).[161] The presence of private individuals in international law will continue to grow. The limit, however, of the international community's ability or capacity to monitor states' behavior toward their citizens is currently unclear.

The issue is complicated by the related question of whether and when individuals should be held responsible for violations of international law. The Second Circuit skirted the issue in the noted case by holding that Pfizer was a state actor. Nonetheless, under its own analysis, Pfizer's activities created just as much of a threat to international peace and security, whether it acted with the help of Nigerian officials or not, which would seem to make its actions a possible candidate for the exclusive list of offenses of "universal concern" to all states.[162] The Second Circuit was far too prudent,

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158. *Id.* at 188 (majority opinion) (quoting Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) (internal quotes omitted)).

159. *See id.* at 213 (Wesley, J., dissenting).

160. *See* Abdullahi v. Pfizer, Inc., No. 01-CIV-8118, 2002 WL 31082956, at *6-12 (S.D.N.Y. Sept. 17, 2002); Abdullahi v. Pfizer, Inc., No. 01-CIV-8118(WHP), 2005 WL 1870811, at *15-18 (S.D.N.Y. Aug. 9, 2005).

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

162. *See Abdullahi*, 562 F.3d at 185-87.

however, to play so fast and loose with the boundaries of international law. Judge Wesley, in fact, was incensed at the very notion that Pfizer might be individually liable.[163] Nevertheless, the United States has an interest in the actions of Pfizer abroad simply because it is a U.S. corporation, whether it acts in its private capacity or as an instrumentality of another government. It is uncertain whether the Second Circuit would have been quite as keen to find a norm of customary international law actionable in U.S. courts were there no Americans involved.

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163. *See id.* at 194 (Wesley, J., dissenting).

* © 2010 Parker Patterson. J.D. candidate 2011, Tulane University Law School; B.A. 2007, Case Western Reserve University. The author would like to thank his parents, as well as Dave, Ally, Mandy, and Jackie for getting him this far.