CASE NOTE

ABDULLAHI V. PFIZER: SECOND CIRCUIT FINDS A NONCONSENSUAL MEDICAL EXPERIMENTATION CLAIM ACTIONABLE UNDER ALIEN TORT STATUTE

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ABSTRACT

United States courts struggle to determine what international human rights violations and against what violators could be raised under the Alien Tort Statute by non-U.S. citizens. In 2009, the Second Circuit's majority in *Abdullahi v. Pfizer, Inc.* found that nonconsensual medical experimentation on humans violated a universally accepted norm of customary international law. The court found that the jurisdictional grounds under the Alien Tort Statute ("ATS") existed so that non-U.S. citizens could bring these claims to U.S. district courts. By integrating the principles outlined in *Sosa*, the court formulated clear criteria for determination of whether an alleged transgression of international law constitutes a norm of the law of nations and thus represents a triable issue under the ATS. The *Abdullahi* case also demonstrates a clear potential for international medical research to be exploitive in nature. If global medical research is to be safely accomplished, the international community will be forced to address the issue through application of international and comparative law. This case note provides in-depth analysis of the *Abdullahi* case and explores its implications on future ATS litigation.

INTRODUCTION

It is universally accepted that administering medical experiments on human subjects without their knowledge or consent is unethical and immoral. For most people, the subject of nonconsensual experimentation on humans brings up memory of the atrocious Nazi medical experiments conducted on concentration camp prisoners,[1] or of

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

the Tuskegee experiments on poor African-American men.[2] Despite agreement that such experimentation is unacceptable and is prohibited within the United States,[3] the role of domestic courts in adjudicating these and other violations of international law remains uncertain and highly controversial.[4] Specifically, United States courts have struggled to determine what international human rights violations could be raised by non-U.S. citizens or aliens and what violators could be sued under the Alien Tort Statute ("ATS").[5]

In January 2009, in *Abdullahi v. Pfizer, Inc.*, the Second Circuit's majority found that nonconsensual medical experimentation on humans violated a universally accepted norm of customary international law.[6] The *Abdullahi* suit was brought by Nigerian children and their guardians alleging that Pfizer conducted medical experimentations of a new drug on the children without their informed consent during a bacterial meningitis outbreak in Nigeria in 1996.[7] Plaintiffs asserted that, as a result of the new drug trials on two hundred children, eleven children died, and many others were left with permanent blindness, brain damage, loss of hearing, or paralysis.[8] The Second Circuit found that jurisdiction existed under the ATS, allowing the foreign plaintiffs' claims of nonconsensual medical testing to proceed.[9] Significantly, the *Abdullahi* court allowed private causes of action to be brought under the ATS as long as "the violations occurred as the result of concerted action" by the private individuals or organizations working together with the state government.[10]

This case comment provides in-depth analysis of the *Abdullahi* case and explores the implications of the *Abdullahi* decision for future cases brought to U.S. federal courts under the ATS. First, Part I surveys formation and significant developments of the ATS. Second, Part II provides the factual background and the procedural history of the case. Third, Part III examines the majority's holding and reasoning as well as discusses the dissenting opinion. Finally, Part IV addresses implications of the *Abdullahi* decision on the ATS jurisprudence and post-*Abdullahi* developments.

2. *U.S. Public Health Service Syphilis Study at Tuskegee*, CENTERS FOR DISEASE CONTROL AND PREVENTION, *available at* http://www.cdc.gov/tuskegee/index.html.

3. General Requirements for Informed Consent, 45 C.F.R. § 46.116 (2012); *see also* 21 C.F.R. § 50.20 (2012).

4. *See* Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455, 472-73 (2010).

5. *Id*. at 473; Alien Tort Statute, 28 U.S.C. § 1350 (2006).

6. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009) [hereinafter *Abdullahi*].

7. *Id*. at 169-70.

8. *Id*. at 169.

9. *Id*. at 187.

10. *Id*. at 188-89.

The Alien Tort Statute

The First Congress originally passed the ATS in 1789 allowing non-U.S. citizens to sue "for a tort only, committed in violation of the law of nations or treaty of the United States."[11] The statute grants federal jurisdiction for suits alleging (1) torts committed anywhere in the world (2) against a non-U.S. citizen who brings the action (3) in violation of the law of nations.[12] Some courts and legal scholars consider the ATS as having a "strictly jurisdictional nature" in the sense that the statutory provision grants jurisdiction to federal courts without a substantive power to create new causes of action.[13] At the time of enactment the ATS had a practical application for a limited set of actions that asserted violations of the law of nations.[14] Specifically, the ATS has been traditionally limited to claims for crimes against ambassadors, violations of the right to safe passage, and crimes of piracy.[15] Because of the scarce legislative history and conflicting historical interpretations of the ATS, non-American citizens randomly invoked the statute to seek redress for violations of international law in U.S. federal courts until 1980.[16]

While the ATS is a simple statute on its face, courts have struggled to identify the requirements that a non-U.S. citizen must satisfy in order to bring an ATS claim in a U.S. federal court. [17] Starting in 1980 with *Filartiga v. Pena-Irala,* a number of cases attempted to clarify and expand its statutory application to allow for new causes of action.[18] In *Filartiga*, after comprehensive examinations of numerous sources of customary international law condemning the acts of torture, the Second Circuit concluded that the right to be free from torture was proscribed by the law of nations.[19] Because torture committed by state officials or under the color of official authority violated universally accepted norms of international law, the torture claim by non-U.S. citizens could be brought under the ATS.[20] Implicit in this finding is the notion that "a state's treatment of its own citizens is a matter of international

11. 28 U.S.C. § 1350 (2006); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 n.10 (2004) (explaining that the statute has been modified slightly since its initial enactment in 1789) [hereinafter *Sosa*].

12. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) [hereinafter *Kadic*].

13. *Sosa*, *supra* note 11, at 713.

14. *Id*. at 720.

15. *Abdullahi*, *supra* note 6, at 173.

16. *Sosa*, *supra* note 11, at 712-13; *see Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980) [hereinafter *Filartiga*].

17. *See Sosa*, *supra* note 11, at 720-21.

18. *Id*. at 724-25; *Kadic*, *supra* note 12, at 241-44; *see Filartiga*, *supra* note 16, at 880.

19. *Filartiga*, *supra* note 16, at 884-85. In *Filartiga*, the relatives of a victim brought the ATS action against a Paraguayan Police General who kidnapped and tortured to death the 17-year old victim in retaliation for the family's political activities.

20. *Id*. at 880.

concern."[21] The *Filartiga* court found that there was an international consensus against the use of torture supported by numerous international treaties and accords.[22] The issue of whether torture is a norm of customary international law actionable under the ATS was resolved. The ATS question after *Filartiga* became: What does it take for a well recognized norm of international law to qualify as the "law of nations" in order for a U.S. federal court to exercise federal jurisdiction?[23]

Fifteen years after the *Filartiga* decision, the Second Circuit addressed another ATS issue of who could be held liable under the ATS.[24] The court in *Kadic v. Karadzic* held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[25] In *Kadic*, a group of victims of Bosnian war brought claims of crimes of genocide, war crimes, crimes against humanity, rape, forced prostitution, and forced pregnancy against the self proclaimed Bosnian-Serb leader.[26] The *Kadic* court emphasized that private persons might be found liable under the ATS for violations of international humanitarian law, genocide, and war crimes.[27] In addition, the court found the plaintiffs satisfied the state action requirement for other crimes by showing that the Bosnian-Serb leader acted under color of law because he acted in concert with the state officials of the former Yugoslavia.[28] Later, some courts also held that because the ATS contains no express exception for corporations, the statute grants jurisdiction over torture claims against corporate defendants.[29]

Finally, in 2004, the U.S. Supreme Court weighed in on the scope of the ATS. In the seminal opinion, *Sosa v. Alvarez-Machain*, Justice Souter outlined the framework for determining whether a claim properly asserts a violation of a norm of customary international law,

21. *Id*. at 881.

22. *Id*. at 882-84.

23. *Id*. at 880-81; *see also In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (concluding that the ATS creates a cause of action for violations of specific, universal and obligatory international human rights standards).

24. *Kadic*, *supra* note 12, at 239.

25. *Id*.; *see also Sinaltrainal v. Coca-Cola Co*., 578 F.3d 1252, 1263 (11th Cir. 2009) (finding that private parties, both individuals and corporations, may be liable for a violation of the law of nations under the ATS).

26. *Kadic*, *supra* note 12, at 237.

27. *Id*. at 239-40.

28. *Id*. at 245.

29. The language of the statute limits *who* may sue and for *what* violations, but it does not limit *who* may be sued. *See, e.g*., *Romero v. Drummond Co., Inc*., 552 F.3d 1303, 1315 (11th Cir. 2008); *Khulumani v. Barclay National Bank, Ltd*., 504 F.3d 254, 260 (2d Cir. 2007) (per curiam).

thus supporting a cause of action under the ATS.[30] In order for a violation of the law of nations to be actionable under the ATS, the norm prohibiting such violation must be "defined with a specificity comparable to the features of the 18th-century paradigms" such as transgression of the rights of ambassadors, piracy crimes, and violations of safe conducts or passports.[31] The Supreme Court explained that torts in violation of the customary international law could be defined by common law because nothing has precluded federal courts from "recognizing a claim under the law of nations as an element of common law."[32] Nevertheless, because the understanding of federal common law drastically changed in 1938 when the watershed opinion in *Erie R. Co. v. Tompkins* rejected the concept of federal "general" common law, the Supreme Court warned courts to exercise caution when finding actionable norms under the ATS.[33] Thus, the *Sosa* court called for judicial restraint in creating new private causes of actions under the ATS emphasizing potential encroachment on the decisionmaking region of Legislative and Executive branches.[34]

In a nutshell, the federal courts can allow new private causes of actions for international law violations to be brought under the ATS but only when these norms have been accepted by civilized nations and are shown to be analogous to the historic crimes against ambassadors, piracy, and violation of safe conducts.[35] The Court explained that the ATS affords jurisdiction to a very limited set of actions asserting violations of international legal norms that are (1) specific, (2) universal, and (3) well-recognized by most civilized nations that consider these norms obligatory.[36] While the Supreme Court admitted that federal courts do have a capacity to adjudicate enforceable international legal norms, it also called for "great caution" in applying the law of nations and creating new private causes of actions under the ATS.[37]

CASE SUMMARY

In 1996, Pfizer, Inc., one of the world's largest pharmaceutical companies, took advantage of a large outbreak of bacterial meningitis in Nigeria, using it as an opportunity to test an unapproved and

30. *Sosa*, *supra* note 11, at 720, 724-26.
31. *Id*. at 724-25.
32. *Id*.
33. *Id*. at 726; *see also Erie R. Co. v. Tompkins*, 304 U.S. 64, 68 (1938).
34. *See Sosa*, *supra* note 11, at 727.
35. *Id*. at 725.
36. *Id*. at 732.
37. *Id*. at 728-29.

potentially harmful medication.[38] In order to get the U.S. Food and Drug Administration's ("FDA") approval for the use of Trovafloxacin Mesylate ("Trovan") on children in the U.S., Pfizer conducted a medical research study for the new antibiotic on two hundred Nigerian children sick with meningitis.[39] Pfizer sent American doctors to conduct experiments together with Nigerian doctors at the Infectious Disease Hospital, a public hospital located in Kano, which is in the north of Nigeria.[40] The company's goal was to obtain the FDA's approval of Trovan through its comparison with another antibiotic Ceftriaxone.[41] Financial analysts predicted at that time that Trovan would bring the company a billion U.S. dollars in revenue if approved by the FDA.[42] While Ceftriaxone is a well-established and FDA-approved antibiotic for safe and effective treatment of bacterial meningitis in both adults and children, preliminary animal trials of Trovan revealed severe side effects, including degenerative joint disease, liver damage, and abnormal bone conditions.[43] Undeterred by these initial alarming findings, Pfizer proceeded with the experiments. The researchers divided the sick children in two groups: one group received the new drug Trovan, while the other group received Ceftriaxone.[44]

This experiment was conducted without the patients' consent or knowledge that they were experiment subjects. Plaintiffs claimed that both American and Nigerian doctors working for Pfizer intentionally failed to inform the children and their parents that the medical experiments were being conducted. The doctors also failed to advise Plaintiffs about the serious health risks involved in the drug studies. Possibly the most appalling allegation of all was that the doctors failed to inform Plaintiffs that a safe and effective alternative treatment for meningitis was available at the same hospital through the non-governmental organization "Doctors Without Borders."[45] In their lawsuit, Plaintiffs also alleged that Pfizer deliberately administered lower doses of Ceftriaxone to the second group in order to boost the effectiveness of Trovan in comparison to Ceftriaxone.[46] Moreover, the Pfizer doctors neglected to provide any follow-up medical care to the

38. *See* Petition for Writ of Certiorari at 3, *Pfizer, Inc. v. Abdullahi*, 130 S. Ct. 3541 (2010) (No. 09-34).

39. *Id*.

40. *Abdullahi*, *supra* note 6, at 169.

41. *Id*.

42. Joe Stephens, *Where Profit and Lives Hang in Balance*, WASHINGTON POST (Dec. 17, 2000), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070201255.html.

43. *Abdullahi*, *supra* note 6, at 169.

44. *Id*.

45. *Id*. at 170.

46. *Id*.

treated children after the conclusion of the medical experiments.[47] Plaintiffs alleged that, as a result of the Trovan medical trials, eleven children died and many others were left to suffer paralysis, brain damage, or permanent sight or hearing loss.[48] Following the medical experiments on the Nigerian children, the FDA never approved Trovan for use on children and eventually severely restricted use of Trovan even for adults.[49] Trovan was completely banned by the European Union in 1999.[50]

Following these events, the injured children and their families sought legal relief. In 2001, the injured Nigerian children and their guardians brought a tort action against Pfizer under the ATS asserting violations of customary international law (the *Abdullahi* action).[51] Meanwhile, another group of plaintiffs brought a suit against Pfizer in a federal court in Nigeria under the Nigerian law (the *Adamu* action).[52] However, the Nigerian lawsuit was voluntarily dismissed by the plaintiffs due to alleged corruption in the Nigerian legal system and the plaintiffs' inability to obtain legal redress in Nigeria.[53] The *Adamu* plaintiffs then brought a lawsuit in the U.S, which was then consolidated with the *Abdullahi* action.[54] The district court granted Pfizer's motions to dismiss for failure to state a claim under the ATS. The district court dismissed the claim on the grounds of *forum non conveniens* on the condition that Pfizer agreed to litigate the lawsuit in Nigeria.[55] Plaintiffs appealed the dismissals to the Second Circuit, which reversed and remanded on appeal for the reasons explained below.[56]

Majority's and Dissent's Opinions

In *Abdullahi*, the Second Circuit majority undertook a comprehensive analysis of subject matter jurisdiction under the ATS within the parameters outlined by the Supreme Court's opinion in *Sosa*. By integrating the principles identified by the Second Circuit in *Filartiga*, *Kadic*, and *Flores*[57] with those provided by *Sosa*, the court

47. *Id*. at 169-70.

48. *Id*. at 170.

49. *Company News; Suspension of Trovan Drug in Europe Is Urged*, N.Y. TIMES (June 12, 1999), *available at* http://www.nytimes.com/1999/06/12/business/company-news-suspension-of-trovan-drug-in-europe-is-urged.html.

50. *Abdullahi*, *supra* note 6, at 170.

51. *Id*.

52. *Id*. at 170-71.

53. *Id*.

54. *Id*. at 171.

55. *Id*.

56. *Id*. at 168-69.

57. *Flores v. S. Peru Copper Corp*., 414 F.3d 233, 247-48 (2d Cir. 2003) [hereinafter *Flores*].

formulated clear criteria for determination of whether an alleged transgression of international law constitutes a norm of the law of nations and thus represents a triable issue under the ATS.

The Second Circuit clarified that a norm of international law actionable under the ATS must be a norm that is (1) universally adhered to by States out of sense of legal obligation, (2) specific and definable, and (3) of "mutual" concern to States as opposed to "several" concern to individual States.[58]

Sources of International Law

The court started its analysis with the examination of various sources of international law.[59] In determining whether nonconsensual medical experimentation rises to the norm of international customary law, the Second Circuit referred to the four sources listed in Article 38 of the Statute of the International Court of Justice: (1) "international conventions" or treaties expressly accepted by States; (2) "international custom, as evidence of a general practice accepted as law"; (3) "the general principles of law recognized by civilized nations"; and (4) "judicial decisions and the teachings of the most highly qualified publicists of the various nations" as a secondary source of legal rules.[60] As evidence of customary international law prohibiting nonconsensual medical experimentations on human subjects, Plaintiffs cited the Nuremberg Code,[61] the World Medical Association's Declaration of Helsinki,[62] the Ethical Guidelines by the Council for International Organizations of Medical Services,[63] and article 7 of the International Covenant on Civil and Political Rights ("ICCPR").[64]

The court admitted that none of the international legal authorities, except the ICCPR, had been ratified by the U.S., and thus these authorities, taken individually, would not have binding legal power in U.S. federal courts. Nevertheless, the court also said that these non-obligatory international legal norms "may, with time and in conjunction with state practice, provide evidence that a norm has developed the specificity, universality, and obligatory nature required for ATS

58. *Abdullahi*, *supra* note 6, at 174.

59. *Id*. at 174-75.

60. *Id*. at 175 (citing Statute of International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1 U.N.T.S 993).

61. *Id*. (citing *Brandt*, *supra* note 1, at 181-82).

62. *Id*. (citing World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, arts. 20, 22 (June 1964) (amended through October 2008), *available at* http://www.wma.net/en/30publications/10policies/b3/17c.pdf).

63. *Id*. (citing Council for Int'l Orgs. of Med. Serv., *International Ethical Guidelines for Biomedical Research Involving Human Subjects*, guideline 4 (3d ed. 2002), [hereinafter *Council for Int'l Orgs. of Med. Serv*.], *available at* http://www.cioms.ch/publications /guidelines/guidelines_nov_2002).

64. *Id*. (citing International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]).

jurisdiction."[65] The court further clarified that the scope of inquiry must be not whether *each* source of international legal authority is binding by itself but rather whether "a greater range of evidence" has been considered and whether the probative value of *all* the sources taken as a whole amounts to sufficient evidence of the current state of customary international law.[66] Thus, even international agreements that are not self-executing or that have not been ratified by the United States can constitute evidence of the norm of customary international law broadly accepted by the international community.[67]

Principles of Universality

In order to properly bring a claim under the ATS, plaintiffs must assert a violation of a norm of customary international law that is universally accepted around the world as a binding legal obligation.[68] The court concluded that the prohibition of nonconsensual medical experimentations, originally identified at the Nuremberg war crimes trials, clearly represented such norm.[69] The court's strongest reasoning for finding the international agreement to prohibit nonconsensual experimentation came from the fact that at least eighty-four countries now require the informed consent from participants for purposes of medical experimentations.[70] Through the advancements of international conventions as well as development of domestic regulations, the informed consent norm "has become firmly embedded and has secured universal acceptance in the community of nations."[71]

Principles of Specificity

The court also stated that a norm of customary international law must be "sufficiently specific." To be "sufficiently specific," the norm must be analogous to the 18th-century paradigms of crimes against ambassadors, piracy, or infringement on the right of safe conduct.[72] According to the victims' allegations, Pfizer failed to inform any of the children or their guardians of the nature and risks of the medical experiments despite the fact that the company was well aware of the informed consent requirements. In other words, Pfizer doctors acted knowingly and purposefully when they nonetheless proceeded with

65. *Abdullahi*, *supra* note 6, 176 (citing *Filartiga*, *supra* note 16, at 883).
66. *Id*.
67. *Id*.
68. *Id*. at 177.
69. *Id*.; *see also* ICCPR, *supra* note 65, art. 7; *Brandt*, *supra* note 1, at 181-82; *Council for Int'l Orgs. of Med. Serv*., *supra* note 64, at guideline 4.
70. *Abdullahi*, *supra* note 6, at 181.
71. *Id*. at 183-84.
72. *Id*. at 184.

medical research.[73] The court found that the Nigerian victims alleged ample facts that Pfizer knowingly and purposefully conducted the medical experiments in a harmful manner.[74] Thus, the allegations against the Pfizer doctors, if proven true, would preclude any assumptions of simple negligence in failure to inform the participants of the nature and risks of the medical experiments.[75] The court concluded that prohibition of nonconsensual medical testing is "sufficiently specific" the same way the customary international law prohibits piracy.[76]

Principles of Mutual Concern

The court also required examination of a norm of customary international law from the perspective of the "mutual concern" to States. When nations act in concert with each other out of a sense of mutual concern, the nations make it their intention to prohibit certain conduct that they collectively find reprehensible. Unlike matters of "several concern" that involve issues in which individual States are only "separately and independently interested," matters of "mutual concern" encompass the objective of maintaining international peace and stability.[77] In other words, matters of "mutual concern" compel nations to cooperate with each other on eliminating mutually unwanted conduct through the means of international conventions and agreements in order to preserve international security and public health.[78]

By conducting involuntary medical experimentations, the court found that Pfizer threatened international efforts to prevent the spread of contagious diseases across the international borders by fostering mistrust and opposition not only to future drug trials but also to vital public health programs organized by pharmaceutical companies.[79] For example, after the reports about the Trovan medical trials resulting in alleged deaths of the children came out in Nigeria, the local population boycotted polio vaccination efforts in 2004, in part because of the Trovan drug experiments.[80] The resistance to polio vaccinations in Nigeria resulted in the spread of the disease across Africa and the

73. *Id*.; *but see Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 121-23 (2d Cir. 2008) (finding that because the plaintiffs did not allege that the chemical was sprayed with the purpose to injure human population, "they fail[ed] to make out a cognizable basis for their ATS claim.").

74. *Abdullahi*, *supra* note 6, at 184-85.

75. *Id*.

76. *Id*. at 184.

77. *Id*. at 185 (quoting *Flores*, *supra* note 58, at 249).

78. *Id*.

79. *Id*. at 186.

80. *See Poliomyelitis in Nigeria and West/Central Africa*, WORLD HEALTH ORG. (June 18, 2008), *available at* http://www.who.int/csr/don/2008_06_18/en/index.html.

Middle East.[81] In addition, the court found that nonconsensual medical trials conducted by American drug companies could contribute to growing anti-U.S. sentiments around the world, further threatening the already-volatile international security.[82]

The State Action Requirement

The court looked to the "color of law" jurisprudence of 42 U.S.C. § 1983 to determine whether a state action requirement was satisfied.[83] When a private individual acts together with state officials or with substantial state aid, the individual acts under "color of law."[84] The Second Circuit concluded that a private cause of action under the ATS could proceed as long as the private individual or organization "acted in concert with" the state actor under the color of law.[85] In *Abdullahi*, the court found sufficiently close relationship between Pfizer and the Nigerian governmental representatives who allegedly were involved in every stage of the drug trials.[86] Because the alleged illegal conduct took place with substantial help of Nigerian doctors in a public hospital provided to Pfizer by the local government specifically to conduct the medical trials, the court concluded that the illegal conduct was the "concerted action" between the American drug company and the Nigerian government.[87]

The Dissenting Opinion

Although Judge Wesley agreed with the framework the majority used to analyze claims under the ATS, he rejected the notion of private cause of actions brought under the ATS.[88] Judge Wesley maintained that the correct application of *Sosa* framework to *Abdullahi* facts would not result in the jurisdictional grant for nonconsensual medical experimentations claims against private actors.[89] He insisted that nonconsensual medial experimentation "more closely resembles the acts for which only state actors may be held responsible."[90] Judge Wesley reasoned that international law would only allow federal court jurisdiction over private actors under the ATS when the conduct in question is beyond the reach of any state, such as in crimes of piracy.

81. *Id*.

82. *Abdullahi*, *supra* note 6, at 187; *see also* Timothy S. Jost, *The Globalization of Health Law: The Case of Permissibility of Placebo-Based Research*, 26 AM. J.L. & MED. 175, 175 (2000).

83. *Abdullahi*, *supra* note 6, at 188.

84. *Kadic*, *supra* note 12, at 245.

85. *Id*.

86. *Abdullahi*, *supra* note 6, at 188.

87. *Id*. at 188-89.

88. *Id*. at 192-93 (Wesley, J., dissenting).

89. *Id*. at 209.

90. *Id*. at 206.

Because violations of medical experimentation fall under the jurisdiction of domestic courts, these crimes cannot be incorporated by analogy to crimes against ambassadors, piracy, and violation of safe conducts as to reach private, non-state actors under the ATS.[91] With respect to the sources of customary international laws accepted as evidence by the majority, Judge Wesley concluded that the evidence presented by plaintiffs was merely aspirational and insufficient to uphold ATS jurisdiction for the private right of action.[92]

Implications of *Abdullahi* Decision

It is undisputed that administering involuntarily medical experimentation on humans without their consent is unethical, morally reprehensible, and illegal. The controversy centers on whether such conduct is a recognized norm of international law actionable under the ATS. In reaching its conclusion that a nonconsensual medical experimentation constitutes a norm of customary international law actionable under the ATS, the *Abdullahi* majority carefully followed the *Sosa* framework to the extent *Sosa* provided guidance. The Supreme Court in *Sosa* affirmed that the ATS is purely jurisdictional. At the same time, it did not preclude federal courts from recognizing new norms of international law, even absent express statutory authority. Moreover, although the Supreme Court in *Sosa* provided some guideposts for determination of customary international law norms, the Court evaded laying out a clear and functional framework clarifying what causes of actions could be actionable under the ATS. The matter is further complicated by the fact that Congress has not clarified the scope and implications of the ATS.[93]

Although the *Abdullahi* opinion has been broadly criticized,[94] there are two reasons to believe that the Second Circuit decided the case in accordance with the framework outlined in *Sosa*. First, the Supreme Court has denied the Pfizer's petition for a writ of certiorari, thus rejecting an opportunity to overrule or correct the ATS framework set forth by the Second Circuit in *Abdullahi*.[95] The Supreme Court's denial could also mean that either the factual basis of the case was not adequate to warrant the Court's review of the ATS or that the issue was not sufficiently important to the Court. In any case, the denial of the

91. *Id*.

92. *Id*. at 194-95, 198.

93. *Flores*, *supra* note 58, at 246.

94. In re S. African Apartheid Litig., 633 F. Supp. 2d 117, 123 (S.D.N.Y. 2009); Dennis M. Coyne, *International Pharmaceutical Mistrials: Existing Law for the Protection of Foreign Human Subjects and Proposal for Reform*, 29 B.U. INT'L L.J. 427, 428 (2011).

95. Warren Richey, *Supreme Court Allows Drug Test Case Against Pfizer to Proceed*, CHRISTIAN SCIENCE MONITOR (June 29, 2010), http://www.csmonitor.com/USA/Justice /2010/0629/Supreme-Court-allows-drug-test-case-against-Pfizer-to-proceed.

writ of certiorari means that the *Abdullahi* decision stays as the mandatory authority for the ATS claims within the Second Circuit's jurisdiction.

Second, the fact that Congress has not acted in response to the *Abdullahi* decision by expressly prohibiting suits by victims of nonconsensual medical experimentations under the ATS might be a good sign. Following the court's decision in *Filartiga*, Congress passed the Torture Victim Protection Act in 1991 ("TVPA"), which specifically allowed individuals to bring civil actions suits against "any individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture."[96] Moreover, the House Report on the TVPA expressly referred to the *Filartiga* case with a comment approving the *Filartiga* court's reasoning.[97] In other words, by passing the TVPA, Congress authorized the cause of action for torture that has been recognized in *Filartiga* under the ATS.[98] It is reasonable to draw parallels with the *Filartiga* case and anticipate that Congress would be influenced by the *Abdullahi* decision holding that the involuntarily medical experimentation contravenes the universally accepted norms of customary international law.

It is important to note what issues the *Abdullahi* decision did not address. While the Second Circuit in *Abdullahi* focused on whether nonconsensual medical experimentation constituted a norm of customary international law, the court did not address another important matter: who could be sued as a violator under the ATS. Most recently, the U.S. Supreme Court granted the petition for certiorari in another Second Circuit's ATS case also brought by Nigerians. In *Kiobel v. Royal Dutch Petroleum Co.*, Nigerian plaintiffs brought claims against the multinational oil company alleging extrajudicial killing, torture, and crimes against humanity.[99] The plaintiffs claimed that the company collaborated with the Nigerian government to commit these violations of customary international law in response to the plaintiffs' legitimate protests against oil exploration and production destroying the local environment. The Second Circuit majority held that corporations, unlike States and individuals, could not be held liable for human rights violations. The court explained that although corporations are considered "persons" under U.S. domestic law, such liability under domestic law does not create a norm of customary international law actionable against corporations under the ATS. Faced with a high probability that the Supreme Court would affirm the

96. *Flores*, *supra* note 58, at 246-47 & n.21.

97. H.R. REP. NO. 102-367(I), at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85.

98. *Kadic*, *supra* note 12, at 241.

99. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 123 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct 17, 2011) (No. 10-1491).

Second Circuit's decision in favor of the corporate defendants resulting in future inability of non-U.S. citizen victims to bring ATS claims against corporations, the *Abdullahi* plaintiffs agreed to settle with Pfizer.[100]

CONCLUSION

The rapid globalization of medical research of new drugs and heated debates around ethics of international medical research have exposed the vulnerability of human research subjects in developing countries suffering from widespread poverty, lack of education, and corrupt authorities. The *Abdullahi* case demonstrates a clear potential for international medical research to be exploitive in nature. If global medical research is to be safely and ethically accomplished, the international community will be forced to address the issue through application of international and comparative law.[101] The *Abdullahi* decision sends a plain message of intolerance of nonconsensual medical testing to not only large multinational pharmaceutical companies but also the international community at large. While Congress has yet to pass any legislation codifying the *Abdullahi* approach and creating a statutory cause of action for nonconsensual medical testing under the ATS, the *Abdullahi* opinion could serve as a catalyst for congressional action. The growing ATS litigation will help further assimilation of international human rights law into the U.S. legal system and will likely lead to further developments of new norms of customary international law actionable under the ATS.

It is important to remember that the ATS is not just a monetary redress, but also an avenue to tell the story of injustice for victims and publicly name the perpetrators of abuse. Even though the ATS is a civil statute, its goal is nevertheless to bring those guilty for serious human right violations to answer for their actions. The ATS litigation also facilitates better understanding of the role of international legal norms within the U.S. legal system. The cases brought under the ATS also help create a record of human rights violations precipitating changes in the countries where violations took place. Most importantly, ATS litigation helps bring worldwide awareness to human rights causes or create political pressure necessary for changes to prevent future abuses.

100. *See* Sue Reisinger, *Pfizer Settles Lawsuits Over Drug Trials on Children in Nigeria*, CORPORATE COUNSEL (Feb. 23, 2011), http://www.law.com/jsp/cc/PubArticle CC.jsp?id=1202482854504 (discussing that while the settlement is confidential, Pfizer established the trust fund that would pay a maximum of $175,000 per child to those able to prove death or permanent disability due to the Trovan drug trial).

101. *See* Jost, *supra* note 83, at 175-76; James V. Lavery, *Putting International Research Ethics Guidelines to Work for the Benefit of Developing Countries*, 4 YALE J. HEALTH POL'Y L. & ETHICS 319, 320-22 (2004).

The *Filartiga* court emphasized that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[102] Whether through the *Abdullahi* court's application of the ATS, a Supreme Court's opinion, or a Congressional act, the American society has the responsibility to ensure that the medical researchers, both individuals and corporations, conducting nonconsensual harmful medical experiments on human beings abroad become the "enemies of all mankind."

102. *Filartiga*, *supra* note 16, at 890.