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ABDULLAHI: A LOST OPPORTUNITY TO CLARIFY ALIEN TORT STATUTE JURISPRUDENCE FOR CORPORATIONS

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The Supreme Court recently denied certiorari from the Second Circuit’s Abdullahi v. Pfizer, Inc, an Alien Tort Statute (ATS) case concerning Pfizer’s nonconsensual medical testing of the antibiotic Trovan after a meningitis epidemic in Nigeria. The seminal Supreme Court ATS case of Sosa v. Alvarez-Machain, with its oft-quoted “vigilant doorkeeping” requirement, provided the basis for many of the arguments in Abdullahi. Yet the Second Circuit failed to act as a vigilant doorkeeper, extending ATS jurisdiction to situations that should not be considered to rise to the standard required by Sosa. This paper therefore advocates that the Supreme Court accept an ATS case and solidify two stricter standards for corporate or private actor liability in novel applications of the ATS: (1) Color of law—The state (a) actively and jointly participates with corporations in the specific conduct at issue, or (b) provides “significant state aid” to a private contractor; or (2) Purely Private Actors—The actions of a corporation or other purely private actor (a) could reasonably rise to the level of war, or (b) are outside of domestic boundaries, meaning (i) physical boundaries for all ATS cases, or (ii) domestic legal enforcement boundaries for suits based on well-established ATS causes of action. These standards come from Sosa and Lugar v. Edmonson Oil Co., and protect both foreign plaintiffs and corporations.
The Alien Tort Statute (ATS), after spending most of its life in obscurity, has relatively recently made a strong appearance in the foreign relations jurisprudence of the United States.

1 “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76-77 (codified, as amended, at 28 U.S.C. § 1350 (2000)).

2 “The ATS was passed by the First Congress in 1789… During the first 191 years of its existence, the ATS lay effectively dormant. In fact, during the nearly two centuries after the statute's promulgation, jurisdiction was maintained under the ATS in only two cases.” Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007).

Some commentators argue that the scope of the Alien Tort Statute should be expanded in relation to private actors like corporations, while some believe it should be restrained.\(^4\) The Supreme Court’s *Sosa v. Alvarez-Machain*,\(^5\) a seminal case on the subject,\(^6\) provides guidance—yet the

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Meets International Law: What’s the Sequel to Sosa v. Alvarez-Machain?, 12 TULSA J. COMP. & INT’L L. 77, 77 (2004-2005). This paper chooses the term “Alien Tort Statute” only because it is the term used by the Supreme Court in its only case on the subject to date. See infra note 5.


\(^6\) For some scholarly discussion of the impact of *Sosa*, see, e.g., Beth Stephens, *Sosa v. Alvarez-Machain – The Door is Still Ajar for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV.
case of *Abdullahi v. Pfizer, Inc.* is one recent example of how courts have shown continuing difficulty interpreting *Sosa*’s imperatives. In that case, Pfizer submitted a petition for writ of certiorari to the Supreme Court of the United States from the Second Circuit. While the Supreme Court denied certiorari in June 2010, the discussion of the Second Circuit in *Abdullahi* reveals some of the great uncertainties currently lingering concerning the scope and authority of the Alien Tort Statute as it pertains to private actors. This paper argues that the Supreme Court should have taken the opportunity it had in *Abdullahi* to clarify these uncertainties. Part I provides a brief history of ATS litigation most relevant on the distinction between state and private actors. Part II is a summary of the procedural history, facts, and

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

8 Petition for a Writ of Certiorari, Pfizer, Inc. v. Rabi Abdullahi, et al., 2009 WL 2173302 (No. 09-34) [hereinafter Petition for Certiorari].

9 562 F.3d 163.


arguments of Abdullahi. Part III presents possible state action and private actor liability standards for private liability under international norms. Part IV investigates the policy and practicality of these proposed standards, setting the standards against previous commentator suggestions. This paper concludes that both plaintiff and corporate interests can be served, and the imperatives of Sosa best followed, if corporations are held liable under the ATS for violations of international law in only four situations falling into two categories: (1) When the state (a) actively and jointly participates with corporations in the specific conduct at issue under the color of law standard as applied in Lugar v. Edmonson Oil Co., or (b) provides “significant state aid” to a private contractor; or (2) when the actions of a corporation or other purely private actor (a) could reasonably rise to the level of war, or (b) are outside of domestic boundaries, meaning (i) physical boundaries for all ATS cases, or (ii) domestic legal enforcement boundaries for suits based on well-established ATS causes of action. This standard would have cleared Pfizer of ATS liability in Abdullahi and taken standards directly from Sosa.

I

BRIEF HISTORY OF RELEVANT ATS LITIGATION

The Alien Tort Statute 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 first case to elaborate on the ATS following its 1789 enactment13

was *Filartiga v. Pena-Irala* in 1980.\(^{14}\) In that case, Dr. Joelito Filartiga, a Paraguayan citizen, was claimed by his family members who brought the action to have been kidnapped and tortured to death by Pena, then the Inspector General of Police in Asuncion, Paraguay\(^ {15}\) for his father’s opposition against the President of Paraguay.\(^ {16}\) The conduct at issue in the case was perpetrated by a foreigner upon a foreigner, in a foreign land.\(^ {17}\) The plaintiffs declined to continue with action in their own national courts, “believing that further resort to the courts of [their] own country would be futile.”\(^ {18}\) The court in *Filartiga* held in favor of the plaintiffs.\(^ {19}\) The Alien

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\(^{13}\) *See* supra note 1.

\(^{14}\) *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

\(^{15}\) *Id.* at 878. Joelito’s father, Joel, was a “longstanding opponent of the government of President Alfredo Stroessner,” who was then in power in Paraguay.” *Id.*

\(^{16}\) *Id.* at 879-880.

\(^{17}\) *Id.* at 878-879. Service of the summons and civil complaint was only feasible because Dolly Filartiga, Joel’s daughter and Joelito’s sister, had moved to Washington, D.C. and later heard that Pena had entered the U.S. and was living in New York on a visitor’s visa. *Id.*

\(^{18}\) After the murder of his son, Joel Filartiga had commenced a criminal proceeding against Pena and the police in Paraguay about four years before the U.S. Circuit Court case was decided. *Id.* at 878. Mr. Filartiga alleged that he immediately encountered opposition soon after filing the case. His lawyer was arrested and shackled to the wall at police headquarters, where Pena threatened him with death. *Id.* The lawyer had since been disbarred, allegedly without just cause. *Id.* The Paraguayan case centered around a member of Pena’s household confessing to having killed Joelito after finding him *in flagrante delicto* with his wife, yet this supposed confessor was also never convicted. *Id.* While these facts were outlined by the Circuit Court
Tort Statute, the court concluded, specifically provided for U.S. federal court jurisdiction where the cause of action was a violation of the law of nations. The court held that “an act of torture committed by a state official against one held in detention,” as occurred in the case, was a violation of the law of nations by virtue of its universal condemnation in both international agreements and the policy of nations. Yet Filartiga made no mention of possible private actor liability.

Soon, other cases began to appear that based their decisions on violations of the law of nations and their jurisdiction in the Alien Tort Statute. The case of Kadic v. Karadžić set in its recitation of the facts, the Court did not focus on them in its analysis. Despite the difficulties in the Paraguayan criminal trial, the defendant argued forum non conveniens, that a full and adequate remedy could have been found in a civil trial in Paraguayan courts. Id. at 879. Joel Filartiga was understandably unwilling to pursue this remedy out of skepticism. Id. The court never reached the question because it was not addressed in the court below. Id. at 889.

19 The court held that federal jurisdiction could be properly exercised and remanded the case for further proceedings. Id. at 889.

20 Id. at 886-888.

21 Id. at 880.

22 Most notable for purposes of this paper were Tel-Oren v. Libyan Arab Republic and In re Estate of Marcos. 726 F.2d 774 (D.C. Cir. 1984); 25 F.3d 1467 (9th Cir. 1994). Tel-Oren held, similarly to Kadic v. Karadžić, that non-official torture did not violate the law of nations. 726 F.2d at 791-795; see infra note 27. Estate of Marcos dealt with official, not private, action, but helped provide the basis for the Sosa Court’s “specific, universal, and obligatory” norm requirement for ATS jurisdiction. 25 F.3d at 1475; Sosa, 542 U.S. at 732.
forth a distinction between public and private actors under the law of nations. The plaintiffs in *Kadic* were Bosnians “suing the leader of the insurgent Bosnia-Serb forces in a United States District court in Manhattan.” On appeal to the Second Circuit, the court held “that Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor.” Genocide and war crimes, the court stated, were violations of the law of nations that could lead to both state and private actor liability, but “torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or state officials’”.

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25 *Kadic*, 70 F.3d at 236. The court looked to various sources in creating this standard, looking to *Tel-Oren* and multiple international agreements, as well as the Restatement (Third) of the Foreign Relations Law of the United States, which is still the most recent Restatement on the subject. *Id.* at 240-45; *Tel-Oren*, 726 F.2d 774; *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1986). The Restatement lists as state violations of international law “genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.” *Id.*

26 *Kadic*, 70 F.3d at 241-43.
The court held that state action “requires merely the semblance of official authority,” including “a person purporting to wield official power.” Clarifying the color of law test, the court stated that domestic jurisprudence under 42 U.S.C. § 1983 “is a relevant guide to whether a defendant has engaged in official action,” and that this standard particularly provides for liability “when [the defendant] acts together with state officials or with significant state aid.”

Many ATS cases followed in the nine years after Kadic, elaborating on or increasing the scope of ATS jurisdiction. Yet it was not until as recently as 2004, 24 years after Filartiga, an interesting question of state action was presented, as the plaintiffs were required to prove that Srpska, the entity that Karadžić controlled, was a state. Srpska was actually within the borders of Bosnia-Herzegovina. Because Srpska was alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments, the court held Karadžić’s control over it was state action.

Among the many corporate ATS cases during this period were Doe I. v. Unocal Corp., Presbyterian Church of Sudan v. Talisman Energy, Inc., and Flores v. Southern Peru Copper Corp; the former two cases highlighted the question of when state involvement turns corporate action into state action, while the last case involved a question of environmental damage from purely private action. In Unocal, Burmese citizens alleged that they had been subjected to forced labor, murder, rape, and torture, by their own military. Some of those forced into labor worked on a Unocal pipeline project in Burma.
that the Supreme Court finally validated ATS jurisdiction in the case of Sosa v. Alvarez-Machain.\textsuperscript{31} The US Drug Enforcement Agency (DEA) came to believe that the respondent, a Mexican physician, had “acted to prolong [a DEA] agent’s life in order to extend [his] interrogation and torture” at the hands of Mexican nationals.\textsuperscript{32} After the respondent did not come to the United States following his indictment, a group of DEA-hired Mexican nationals, including the petitioner, abducted the respondent from Mexico and brought him to the United States.\textsuperscript{33} The Sosa Court determined that the law of nations was comprised of two elements, the first being “the general norms governing the behavior or national states with each other,” and the second, “a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries.”\textsuperscript{34} Beyond these two elements, though, is “a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”\textsuperscript{35} It is in this sphere that Blackstone’s 18th century paradigms are found—

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question in the case was how much Unocal had to be involved in or aware of the forced nature of the work for the corporation to be liable under the ATS for state action. \textit{Id.} at 945-946.


\textsuperscript{32} \textit{Id.} at 697.

\textsuperscript{33} \textit{Id.} at 697-698.

\textsuperscript{34} \textit{Id.} at 714-715. The second element included the law merchant, which “emerged from the customary practices of international traders and admiralty.” \textit{Id.} at 715. While the language lends itself to the corporate ATS analysis, courts seem to have not picked this as a way to hold corporations liable under the ATS. This is likely because Sosa focuses on a third category as being the intended target of the ATS. \textit{See infra} note 37.

\textsuperscript{35} Sosa, 542 U.S. at 715.
“violation of safe conducts, infringement of the rights of ambassadors, and piracy.”36 The Court set up a new standard: “We think courts should require any claim based on the present-day law of nations to 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 we have recognized.”37 The Court continued: “An assault against an ambassador, for example, [i]f not adequately redressed could rise to an issue of war. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS.”38 The Court concluded that “a single illegal detention of less than a day . . . violates no norm of customary international law so well defined as to support the creation of a federal remedy.”39

The Court also advised “great caution in adapting the law of nations to private rights”40 and “an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”41 The Court’s holding allowed for specificity but flexibility, stating that “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class

36 Id.; see 4 WILLIAM BLACKSTONE, COMMENTARIES *68.
37 Sosa, 542 U.S. at 725.
38 Id. at 715.
39 Id. at 738.
40 Id. at 694.
41 Id. at 733. Unfortunately, and as will be seen later in this note, the standard that the “door is still ajar subject to vigilant doorkeeping,” while providing an easily conceptualized ideal, has not proven to be a very exact standard.
of international norms today.” Yet the Sosa Court does not focus on the use of the ATS against private actors. Mention is made early in the opinion that “[t]here is no record of congressional discussion [connected to the ATS] about private actions that might be subject to the jurisdictional provision.” A short discussion of private actor liability comes in Footnote 20, which cites to Kadic and simply states: “A related consideration 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 an individual.” The Court does not provide an answer to this question, however, and there the discussion of purely private actor liability ends.

42 Id. at 732-33.

43 Id. at 749.

44 Id. at 733, n. 20. The Court in the Sosa footnote compares Kadic to Judge Edwards’ concurrence in the older case of Tel-Oren v. Libyan Arab Republic, but the holding in Kadic encompasses Judge Edwards’ significant proposition as it relates to private actors, that torture by private actors alone does not violate international law. See supra note 26. For this reason Tel-Oren is not a focus of this paper. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-795 (C.A.D.C. 1984) (Edwards, J., concurring).

45 One commentator implies that Sosa, in connection with footnote 20 from that case, requires that “[t]he conduct alleged in a complaint may not constitute an international law violation for which a private party may be held liable unless the plaintiff adequately alleges that the defendant acted as a state actor.” Joel Slawotsky, Doing Business Around the World: Corporate Liability under the Alien Tort Claims Act, 2005 Mich. St. L. Rev. 1065, 1078 (2005). Slawotsky, while placing the quoted sentencing directly after a quote of footnote 20 from Sosa, does not state how footnote 20 from Sosa provides support for the statement. It does not seem that such an open-
due to this lack of substantive guidance on the issue of corporate liability under the ATS, courts have gone in different directions on the issue in the cases post-*Sosa*. For example, the Eleventh Circuit has held that “cruel, inhuman, degrading treatment or punishment” was not a violation of the law of nations sufficient to support an ATS claim against the corporation of Del Monte Fresh produce, while the Second Circuit has held that Barclay National Bank could be liable under the ATS and aiding and abetting liability for supporting the South African government in its previous system of apartheid.\(^{46}\) The Ninth Circuit has held in a case against AMVAC that knowledge that genocide will occur in the course of events does not meet the intent threshold for private actors or for state actors under the ATS.\(^{47}\) The Eastern District of Louisiana held for the Freeport Corporation, following *Kadic*’s dichotomy of state actor and private actor causes of action under the ATS and concluding after applying four different state action tests from § 1983 that Freeport was not a state actor and therefore not liable for “a violation of international human rights” outside of *Kadic*’s genocide and war crimes.\(^{48}\)

II

ended statement from *Sosa* could lead to such a conclusion, nor does the conclusion comport with the private actor liability possible under *Kadic*. *See supra* note 26.

\(^{46}\) *Aldana v. Fresh Del Monte Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Khulumani v. Barclay Nat’l Bank Ltd.*, 254 (2d Cir. 2007).

\(^{47}\) *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008).

\(^{48}\) *Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362 (E.D. La. 1997). The court stated that for state action to be present, an actor must “represent the state,” but that both private individuals and private entities like corporations can represent the state and be state actors. *Id.* at 376; *see supra* note 25.
A SUMMARY OF ABDULLAHI v. PFIZER

Abdullahi is another example of the confusion surrounding corporate ATS liability post-Sosa. Abdullahi was based on events that transpired in Nigeria in the spring of 1996. The facts as put forward by the Circuit Court and District Court in Abdullahi v. Pfizer, Inc., 2005 WL 1870811 (S.D.N.Y. 2005) include the following. An epidemic of bacterial meningitis had broken out in northern Nigeria. Pfizer took this opportunity to test its new antibiotic, Trovan, at the Infectious Disease Hospital (IDH) in Kano, Nigeria. Pfizer obtained the Nigerian government’s permission to test and also “claimed to have secured approval from an IDH ethics committee,” both prerequisites for testing. Three American doctors from Pfizer came to Nigeria to administer the drug trials and were soon joined in their

49 562 F.3d at 169. Specifically, the Pfizer doctors were sent in April of 1996. Id.

50 Id. at 169, 170.


52 For a full discussion of the events at issue, see 2005 WL 1870811 at *1, *2.

53 2005 WL 1870811 at *1.

54 Trovan is Pfizer’s brand name for the antibiotic trovaflozacin mesylate. Id. Pfizer was attempting to obtain FDA approval for the drug at the time. Id.

55 Id.

56 Id.

57 562 F.3d at 170. The court uses the word “claim” because of the plaintiffs’ contention that no such ethics committee approval was obtained, but that the approval letter was later backdated to give the appearance of prior approval. Id.

58 Id. at 169.
work by four Nigerian doctors\textsuperscript{59} in the IDH.\textsuperscript{60} The Nigerian government arranged for the IDH to be made available, requested that the FDA authorize export of Trovan and, according to the plaintiffs, otherwise facilitated the testing.\textsuperscript{61} These doctors then recruited two hundred infected

\textsuperscript{59} \textit{Id.} The four Nigerian doctors later prove problematic for the court. The district specifically states in its facts only that the doctors are Nigerian, not that they work for the Nigerian government. \textit{Id.} Yet later, in its discussion of state action, the court seems to assume that the doctors represent Nigeria when it lists their nationality as one of the reasons why this action can be attributable to Nigeria. \textit{Id.} at 188 The dissent points out that the court does not know whether these doctors are actually employed by the government of Nigeria, in which case they could be considered to represent it, or whether the doctors are simply Nigerian citizens, in which case they should not be considered to represent the country for purposes of official state action. \textit{Id.} at 210-211.

\textsuperscript{60} \textit{Id.} at 169.

\textsuperscript{61} The court states that Nigeria “facilitated the non-consensual testing in Nigeria’s IDH in Kano.” \textit{Id.} at 188. The court seems to mean by this statement the conduct it consequently describes, that the Nigerian government “was intimately involved and contributed, aided, assisted and facilitated Pfizer's efforts to conduct the Trovan test,’ acted in concert with Pfizer,’ and, according to a Nigerian physician involved in the Trovan experimentation, appeared to ‘back[ ]’ the testing.” \textit{Id.} The question of whether these facts are plead with enough specificity is challenged by the dissent. “Elsewhere in their complaints, Plaintiffs note in conclusory fashion that a Nigerian doctor did not publicly object to the Trovan study because it “seemed to have the backing of the Nigerian government.” Wesley Dissent at 210. “These bare allegations are plainly insufficient to survive a motion to dismiss for lack of state action.” \textit{Id.} at 211.
children, giving half Trovan and half Ceftriaxone, an FDA-approved antibiotic. The plaintiffs claimed that they were not informed of the possible side effects of Trovan or the experimental nature of the study, and that Pfizer purposefully gave the Ceftriaxone group a low dose so as to make Trovan appear more effective. Pfizer also allegedly failed to inform the test subjects that Medecins Sans Frontieres “was providing a conventional and effective treatment for bacterial meningitis, free of charge, at the same site.” The plaintiffs claimed that the Nigerian government later back-dated the IDH approval letter to give the appearance that the IDH had authorized the tests before they began, when it had only done so after. The tests allegedly

62 Id. at 169. Ceftriaxone is “an FDA-approved drug shown to be effective in treating meningitis.” 2005 WL 1870811 at *1.

63 “Appellants contend that Pfizer knew that Trovan had never previously been tested on children in the form being used and that animal tests showed that Trovan had life-threatening side effects, including joint disease, abnormal cartilage growth, liver damage, and a degenerative bone condition.” 562 F.3d at 169.

64 The lack of informed consent that flows from this allegation later proves to be an important point for the majority. See id. at 177 (“The prohibition on nonconsensual medical experimentation on human beings meets this standard because, among other reasons, it is specific, focused and accepted by nations around the world without significant exception.”).

65 Id.

66 Id. at 170.

67 Id. The plaintiffs do not contend, however, that Pfizer was in any way involved in the backdating of the letters by Nigeria.
caused the deaths of eleven children and “left many others blind, deaf, paralyzed, or brain-damaged.”

The Circuit Court majority used the Statute of the International Court of Justice’s Article 38 [hereinafter ICJ Statute] as its guide for authorities showing the existence of

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68 Of the eleven children who died, five had taken Trovan and six had been given the lower dose of Cefriaxone. Id. at 169.

69 The Circuit Court did not follow much of the logic of the District Court. The Abdullahi District Court also agreed with the plaintiffs that non-consensual medical experimentation violates the law of nations. 2005 WL 1870811 at *9. Yet the district court interpreted Sosa and the earlier case of Kadic v. Karadžic to mean 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 that although non-consensual medical experimentation was against the law of nations, it was not a “proper predicate for jurisdiction under the ATS.” Id. at *9, 14.

70 “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. “ Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.
customary international law.\textsuperscript{71} The court then examined four sources of international law\textsuperscript{72} that the plaintiff-appellants used as evidence of a norm forbidding non-consensual human experimentation: the Nuremberg Code,\textsuperscript{73} the World Medical Association’s Declaration of

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\textsuperscript{71} The ICJ Statute is, by its preamble, actually a guide for determining international law in general, not customary international law. The majority makes a mistake that may seem to be semantics, but could lead to even greater confusion, when it states that customary international law is clarified by the ICJ Statute sources, one of which is “international custom” itself. 562 F.3d at 175. To state that custom can be proved by many things, one being custom, seems an inherent logical fallacy. The court seems to mean that the law of nations, not customary international law, is discovered through the ICJ Statute sources. The conflation of the terms “law of nations” and its subset, “customary international law,” may seem to be of little consequence, yet for purposes of clarity, the two are not the same, and should not be treated as the same by future courts, especially when \textit{Sosa} specifically requires a review of the law of nations, not customary international law. \textit{See Sosa}, 542 U.S. at 715 (“It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.”).
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\textsuperscript{72} Although the majority states that it will examine these sources, it does not mention CIOMS again, and mentions the Declaration only as an opening into an argument that domestic laws support its holding. 562 F.3d at 175, 181.
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\textsuperscript{73} \textit{United States v. Brandt}, 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181 (1949).
\end{quote}
Helsinki [hereinafter Declaration],\textsuperscript{74} guidelines from the Council for International Organizations of Medical Services [hereinafter CIOMS Guidelines],\textsuperscript{75} and Article 7 of the International Covenant on Civil and Political Rights [hereinafter ICCPR].\textsuperscript{76} After criticizing the district court for laying too much emphasis on whether a source of law is binding and whether it authorizes a cause of action,\textsuperscript{77} the court stated that “the existence of a norm of customary international law is one determined, in part, by reference to the custom or practices of many States, and the broad acceptance of that norm by the international community.”\textsuperscript{78} Each of the cited sources of law was, per \textit{Sosa},\textsuperscript{79} examined for universality,\textsuperscript{80} specificity,\textsuperscript{81} and mutuality of concern.\textsuperscript{82}


\textsuperscript{75} Council for International Organizations of Medical Services [CIOMS], International Ethical Guidelines for Biomedical Research Involving Human Subjects (3rd ed.2002).


\textsuperscript{77} “[The district court] mistakenly assumed that the question of whether a particular customary international law norm is sufficiently specific, universal, and obligatory to permit the recognition of a cause of action under the ATS is resolved essentially by looking at two things: whether each source of law referencing the norm is binding and whether each source expressly authorizes a cause of action to enforce the norm.” \textit{Sosa}, 562 F.3d at 176.

\textsuperscript{78} \textit{Id.} This phrasing is slightly misleading. Prevalent state practices, also called general principles of law, are considered by the Restatement to be “secondary sources of international law.” \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES} §102 cmt. 1 (1987).
First to be examined was the Nuremberg Code. The Nuremberg Code encompassed the International Military Tribunal, which the court quoted as having “power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed’ among other offenses, war crimes and crime against humanity.” Among these offenses was the nonconsensual testing of human medical subjects, at least in war time. As proof of this the court quoted United States federal court cases, a government report, a scholarly article, and Commentary on the Geneva Conventions of

79 See Sosa, 542 U.S. at 731, 732.
80 562 F.3d at 177.
81 Id. at 184.
82 Id. at 185.
83 Id. at 177 (quoting London Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 3, 1945)).
84 Id. at 177, 178. The purpose of the Allied Control Council No. 10, which the court cites as authorizing the creation of the U.S. military tribunals, was “to establish a uniform legal basis in Germany for the prosecution of war criminals.” Allied Control Council No. 10, preamble, (Dec. 20, 1945), available at http://avalon.law.yale.edu/imt/imt10.asp (emphasis added).
86 562 F.3d at 179; “Nuremberg was based on enduring [legal] principles and not on temporary political expedients, and this fundamental point is apparent from the reaffirmation of the
August 1949. The court next analyzed the ICCPR. The ICCPR was cited by the court as having more than 160 state ratifications and as being viewed by the U.S. government as a source of binding legal obligation. As for the Declaration, the court acknowledged it was non-Nuernberg principles in Control Council Law No. 10, and their application and refinement in the 12 judgments rendered under that law during the 3-year period, 1947 to 1949.” Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 107, 107 (1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final_report.pdf. Yet the source does not show that these principles apply outside of wartime or to non-state actors.

562 F.3d at 179; M. Cheriff Bassiouni et al., An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation, 72 J.C.RIM. L. & CRIMINOLOGY 1597, 1640 & n. 220 (1981)


562 F.3d at 180. The court admits that some parties have made reservations or declarations to the ICCPR, but points out that none of have altered the prohibition of medical or scientific experimentation without the free consent of human subjects. Id.

Id. at 180, 181. The basis for this assertion on the part of the court is the passage of domestic laws prohibiting such testing, as well as FDA regulations. See 21 U.S.C. § 355(i) (1976); 21 C.F.R. §§ 50.20, 50.23-.25, 50.27, 312.20, 312.120 (2008); 45 C.F.R. §§ 46.111, 46.116-.117 (2008). Yet the fact that the U.S. has enacted similar laws or laws to the same effect as the ICCPR is not the same as a verification that the source of the binding legal obligation underlying
binding, but stated that it was important because it had “spurred States to regulate human experimentation.”91 The court completed its analysis on the universality of the norm by looking to state laws prohibiting the practice of nonconsensual medical testing92 as well as to the European Convention on Human Rights and Biomedicine, which states that an “intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.”93

As for Sosa’s mutual concern and “serious consequences in international affairs” requirements, the court stated that the success of the administration of drug trials in developing countries “promises to play a major role in reducing the cross-border spread of contagious diseases, which is a significant threat to international peace and stability.”94 A drug trial performed without informed consent, the court asserted, “poses threats to national security by impairing our relations with other countries.”95 And as for the question of whether there was those laws is the ICCPR, or that the U.S. believes such obligations should apply as international law.

91 562 F.3d at 181.

92 Id. The court states that at least eighty-four countries have an informed consent requirement for medical research on human subjects. The court especially focuses on United States law. Id.


94 562 F.3d at 186.

95 Id. at 187.
state action, the court found willful participation in joint activity,\textsuperscript{96} or acting “together with state officials or with significant state aid,”\textsuperscript{97} in the Nigerian government’s request for Trovan export, arrangement of the IDH, the presence of Nigerian doctors on the Pfizer team, and the back-dating of the FDA approval letter.\textsuperscript{98} The court ended its opinion with an analysis of forum non conveniens\textsuperscript{99} and choice of law\textsuperscript{100} issues pertaining to this case.

\textsuperscript{96} The court cites \textit{Gorman Bakos v. Cornell Coop. Extension of Schenectady County} on this point. \textit{Id.} at 188; 252 F.3d, 551-552 (2d Cir. 2001).

\textsuperscript{97} 562 F.3d at 188; Kadic, 70 F.3d at 245.

\textsuperscript{98} 562 F.3d at 188.

\textsuperscript{99} “In light of recent developments, in particular the initiation of proceedings by the federal government of Nigeria and the state of Kano against Pfizer and certain of its employees, [Pfizer does] not seek affirmance of the judgment on the basis of \textit{forum non conveniens}.” \textit{Id.} at 189. Despite this fact, the court took upon itself to “offer additional guidance to assist the parties and the district court” because of “the frequency with which this issue has arisen and remained unsettled in this case.” \textit{Id.} The court focuses on the second step in the three-step \textit{forum non conveniens} analysis from \textit{Iragorri v. United Techs. Corp}, the step requiring analysis of the adequacy of the alternative forum. \textit{Id}; Iragorri v. United Techs. Corp., 274 F.3d 65, 71-75 (2d Cir. 2001) (en banc). The court holds that the district court focused too much on the plaintiffs’ duty to show that Nigeria was not an adequate forum, and that the district court should have included “an analysis of whether Pfizer discharged its burden of persuading the court as to the adequacy and present availability of the Nigerian forum and improperly placed on plaintiffs the burden of proving that the alternative forum is inadequate.” 562 F.3d at 189.
The dissent immediately focused on the narrow class of cases in which courts have upheld jurisdiction—genocide and war crimes, free passage of a neutral ship in international waters, state-administered torture, violation of safe conducts, infringement of the rights of ambassadors, and piracy.101 The dissent also acknowledged that Sosa did not limit causes of action to this list, but at the same time subjected any expansion of the list to “vigilant doorkeeping.”102 The dissent split its discussion into the requirements of universal and legally obligatory adherence,103 mutuality,104 and state action.105 As for adherence, the dissent pointed

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100 The court determines that “[t]he district court correctly determined that Connecticut choice-of-law rules applied.” 562 F.3d at 190. This aspect of the case applies only to plaintiffs’ claims under the Connecticut Unfair Trade Practices Act and the Connecticut Products Liability Act, not the ATS, and therefore is outside of the scope of this paper. Id.

101 Id. at 192 (J.Wesley, dissenting) [hereinafter Wesley Dissent]. The dissent cites to Kadic, Amerada Hess Shipping Corp. v. Argentine Republic, Filartiga, and Sosa to support this assertion. Id; Kadic, 70 F.3d at 241-43 (upholding jurisdiction over genocide and war crimes); Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 426 (2d Cir.1987) (upholding jurisdiction over the free passage of neutral ship in international waters); Filartiga, 630 F.2d at 878 (upholding jurisdiction over state-administered torture); Sosa, 542 U.S. at 724 (upholding jurisdiction over violation of safe conducts, infringement of the rights of ambassadors, and piracy).

102 Id., (quoting Sosa, 542 U.S. at 729).

103 Wesley Dissent, supra note 100 at 193.

104 Id. at 207.

105 Id. at 209.
out that the majority largely ignored the distinction between norms that legally bind states and those that bind private actors.\textsuperscript{106} Citing \textit{Flores v. S. Peru Copper Corp.},\textsuperscript{107} the dissent claimed that certain sources within each ICJ Statute class have more influence than others, and that treaties ratified by “an overwhelming majority of States” have the greatest evidentiary weight.\textsuperscript{108} Identifying the ICCPR and the European Convention on Human Rights and Biomedicine as the two treaties relied on by the plaintiff-appellants,\textsuperscript{109} the dissent dismissed the former because it both (1) has little utility as it is not self-executing for the United States\textsuperscript{110} and (2) only applies to State entities.\textsuperscript{111} The court dismissed the latter because it is both “a regional agreement not

\textsuperscript{106} “The majority lists the norm at issue here as the prohibition of ‘medical experimentation on non-consenting human subjects,’ and proceeds to analyze that norm without regard to the alleged violator. . . . Such a broad, simplified definition ignores the clear admonitions of the Supreme Court-and conflicts with prior decisions of this Court-that a customary international law norm cannot be divorced from the identity of its violator. . . . To my mind, the majority should have asked whether customary international law prohibits \textit{private actors} from medical experimentation on non-consenting human subjects. That question must be answered in the negative.” \textit{Id.} at 194.

\textsuperscript{107} 414 F.3d 233 (2d Cir. 2003).

\textsuperscript{108} Wesley Dissent, supra note 100 at 195.

\textsuperscript{109} \textit{Id.} at 195-197.

\textsuperscript{110} \textit{Id.} at 195.

\textsuperscript{111} \textit{Id.} at 195-196. The dissent logically finds that the ICCPR only applies to state entities because it states so by its terms. \textit{Id.} at 195 (quoting ICCPR art. 2(1)). The dissent further states that “[b]ecause the ICCPR only creates obligations flowing from a state to persons within its
signed by the most influential states in the region”\textsuperscript{112} and was promulgated after the conduct at issue in the case.\textsuperscript{113} Next tackling the Declaration and the CIOMS Guidelines, the dissent brushed them aside\textsuperscript{114} as “mere general statement[s] of policy”\textsuperscript{115} put forward by private entities,\textsuperscript{116} unlike the declaration used as evidence of an international norm in \textit{Filartiga}, which territory, a non-state actor cannot be said to have violated it.” \textit{Id.}; see also United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002) (stating that the ICCPR governs the relationship between a State and individuals within the state).

\textsuperscript{112} \textit{Id.} at 196. Those states cited by the dissent as not having signed the Convention on Human Rights and Biomedicine are France, Germany, Italy, the Netherlands, Russia, and the United Kingdom. \textit{Id.} The dissent does not cite any authority, though, that contends that the influence of states party to a treaty should be a factor in determining the strength of that treaty as support for customary international law. \textit{Id.}

\textsuperscript{113} \textit{Id.} at 196-197.

\textsuperscript{114} \textit{Id.} at 197.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} The dissent rejects such privately-created document as well-meaning, aspirational, but private, declarations as sources of international law [that] runs counter to our observation in \textit{Yousef} that “no private person-or group of men and women such as comprise the body of international law scholars- \textit{creates} the law.” \textit{Id.} at 198 (quoting 327 F.3d at 102); see also Flores, 414 F.3d at 262 (stating that declarations of private organizations are not proper evidence of customary international law)
came from the United Nations.\textsuperscript{117} As further proof of its point, the dissent cited the Restatement (Third) of Foreign Relations Law of the United States § 404 and \textit{Kadic} as differentiating between “those violations that are actionable when committed by a state and a more limited category of violations” applying to private actors.\textsuperscript{118}

Substantive uniformity in state practice, the dissent stated, “is only a starting point for demonstrating international custom,” and without “express international accords” to accompany it, does not become customary international law.\textsuperscript{119} After next reciting the history of the Nuremberg Code,\textsuperscript{120} the dissent found that Code problematic because it was a United States military court decision that “does not fit neatly into any of the categories this Court has

\textsuperscript{117} “Though not binding,” a United Nations Declaration “‘creates an expectation of adherence’ because it ‘specifies with great precision the obligations of member nations.’” \textit{Id.} (quoting \textit{Filartiga}, 630 F.2d at 883).

\textsuperscript{118} \textit{Id.} at 203.

\textsuperscript{119} Wesley Dissent, supra note 100 at 198.

\textsuperscript{120} \textit{Id.} at 198-201. The dissent especially stresses that the “Medical Case” against German doctors for their nonconsensual testing of human subjects was an exclusively U.S.-run affair. \textit{Id.} at 200. This was so because the Control Council Law No. 10 “authorized each of the occupying Allies, within its own ‘Zone of Occupation,’ to arrest and prosecute ‘persons within such Zone suspected of having committed a crime,’ subject to a right of first refusal by the International Military Tribunal.” \textit{Id.} (quoting Allied Control Council Law No. 10 art. III, §§ 1, 3 (Dec. 20, 1945), \textit{in 1 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10}, XVIII (William S. Hein & Co., Inc. 1997) (1949), \textit{available at} http://www.loc.gov/rr/frd/Military_law/pdf/NT_war-criminals_Vol-I.pdf).
identified for sources of international law” from the ICJ Statute. First stating that it is important to distinguish between ATS jurisdiction and universal criminal jurisdiction, the dissent later conflated the two at the end of its universality analysis by examining whether non-consensual testing is a norm sufficiently similar to previous norms that have provided for universal criminal jurisdiction. The dissent also stressed that such jurisdiction is only appropriate for acts “which, ‘by their nature,’ are beyond state sovereignty,” such as acts on the high seas and in airspace.

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121 Wesley Dissent, supra note 100 at 201.

122 “Universal jurisdiction, not to be confused with universal acceptance of a norm for ATS purposes, ‘permits a State to prosecute an offender of any nationality for an offense committed outside of that State and without contacts to that State.’” Id. (quoting United States v. Yousef, 327 F.3d 56, 103 (2d Cir. 2003)).

123 Wesley Dissent, supra note 100 at 204-206. The dissent does not state why it delves into the universal criminal jurisdiction analysis. Yet the dissent certainly does so, stating that section 404 of the Restatement (Third) of Foreign Relations Law lists “only five specific acts for which universal criminal jurisdiction exists,” and later discussing universal jurisdiction prosecutions of piracy. Id. It seems that the court may be trying to show that if a norm makes for universal jurisdiction, it is a universally accepted norm, which would also make it an acceptable norm as a cause of action under the ATS. See id. at 204.

124 Wesley Dissent, supra note 100 at 205-206.
After conducting a short analysis of mutual concern and the “serious consequences in international affairs” requirements from Sosa, the dissent moved on to state action. The dissent asserted that for the private action under color of state law to be considered an international norm in this case, it must first constitute a norm actionable against states. As to whether the cooperation of state actors and private actors here was enough for state action, the dissent concluded that the letter to the FDA, the IDH accommodations, the alleged silencing of Nigerian physicians critical of the test, and the assignment of Nigerian physicians to the project are not enough. This is partly because the plaintiffs did not allege in the complaint that the hospital was owned by the government, or that the Nigerian doctors were government employees.

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125 The dissent’s discussion of mutuality follows some of the same lines as the previous discussion of universality. “[The ICCPR and the Convention on Human Rights and Biomedicine] fail to demonstrate mutuality for the same reason they fail to demonstrate universality—the ICCPR does not address acts by non-state actors and the other two were not in force at the time of the alleged misconduct.” Id. at 208.

126 Id. at 209.

127 Id. This assertion seems limited to the facts of this case; because the dissent has already established that private liability does not obtain for nonconsensual medical testing, the only way for Pfizer to be held liable is if there was state action.

128 “These bare allegations are plainly insufficient to survive a motion to dismiss for lack of state action.” Id. at 211. The dissent ignores the allegations of the backdating of the letter because the plaintiffs at one point state that the one who backdated the letter was just a “Nigerian physician.” Id. at 210.
employees.\textsuperscript{129} To reach its conclusion on state action, the court noted that “[t]he Supreme Court’s case law on state action is hardly a model of clarity”\textsuperscript{130} and cited a number of possible tests,\textsuperscript{131} including the “instructive” Beanal test requiring either joint cooperation, joint

\begin{itemize}
\item \textsuperscript{129} Id. at 210.
\item \textsuperscript{130} Id. at 211.
\item \textsuperscript{131} Id. Formulations of tests for state action cited by the court are often interconnected and include: (1) whether the State is responsible for specific conduct at issue, from Horvath v. Westport Library Ass’n, 362 F.3d 147, 154 (2d Cir. 2004); (2) whether “the relevant facts show pervasive entwinement to the point of largely overlapping identity between the State and the entity that the plaintiff contends is a state actor,” also from Horvath, 362 F.3d at 154, (3) whether the “source [of the activity] fairly can be said to be the state,” from Leshko v. Servis, 423 F.3d 337, 340 (3d Cir. 2005), (4) “whether the State was sufficiently involved to treat that decisive conduct as state action,” from NCAA v. Tarkanian, 488 U.S. 179, 192 (198), and the following tests [5]-[8]:

participation, influence, or playing of an integral part in the conduct as issue, and the *Tarkanian* test of “whether the State was sufficiently involved to treat that decisive conduct as state action.”132 Regardless of which test is best, stated the dissent, “[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.”133

In its petition for writ of certiorari to the Supreme Court,134 Pfizer followed much of the dissent’s arguments from the Court of Appeals.135 The petition highlighted some of the varying case law from other circuits,136 and argued that in some circuits the class of torts applicable to purely private actors is extremely limited outside of the narrow category of activities of war crimes, slave trade, piracy, and genocide.137 Closing the arguments of the petition was an

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Wesley Dissent, supra note 100 at 211.

132 Wesley Dissent, supra note 100 at 211-212; *see supra* note 130.

133 *Id.* at 212-213 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982)).


135 *Id.* at 7-10, 18-19, 24-25.

136 *Id.* at 14-19. “No other circuit has so permissively interpreted the degree of state action required to make out violations of international law cognizable under the ATS.” *Id.* at 14; *see supra* notes 45-47.

137 Petition for Certiorari, *supra* note 8, at 23-25; *Cisneros v. Aragon*, 485 F.3d 1226 (10th Cir. 2007) (holding that child rape by a purely private actor is not a violation of international law);
extended consideration of the practical consequences of allowing corporate liability under the Alien Tort Statute.\textsuperscript{138} Pfizer argued that such consequences include (1) discouraging corporate participation in international investment and development by fear of liability, litigation, and bad publicity, (2) impinging on the political branches in their domain over foreign relations concerns, and (3) excessively supplanting domestic redress in the foreign state where the tort occurred.\textsuperscript{139}

III

\textit{COLOR OF LAW AND PURELY PRIVATE ACTORS}

In their arguments, it often seems that the majority and the dissent at the Second Circuit in \textit{Abdullahi} are applying unclear standards in very different ways, exemplifying the need for a clearer focus and standard in ATS cases.\textsuperscript{140} That concrete limit can come through focusing on Abagninin, 545 F.3d at 741 (acknowledging that the traditional conception of crimes against humanity requires State policy); Aldana, 416 F.3d at 1247 (holding no private liability present for arbitrary detention and alleged crimes against humanity without “widespread or systematic attack”); Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007) (finding no violation of international law in international child abduction and kidnapping by private actor parent of her own child).

\textsuperscript{138} Petition for Certiorari, \textit{supra} note 8 at 25.

\textsuperscript{139} \textit{Id.} at 25-29.

\textsuperscript{140} One example of this confusion is the use of the ICJ statute by both the majority and the dissent in \textit{Abdullahi}. When the majority looks to sources per the ICJ statute, it never states in which of the ICJ Statute categories they are to be found, and consequently uses subsidiary sources as if they are no different from the others. For example, the court states that the Declaration is non-binding, but does not state why, nor does it state into which of the ICJ Statute
categories the Declaration fits. 562 F.3d at 181. In analyzing the Nuremberg Code, the majority cites the Code as prohibiting nonconsensual medical testing, but fails to recognize as secondary sources under the ICJ Statute the sources it uses to show that this applies outside of the context of state actors in times of war. Id. at 177-179; see supra notes 51-54. “[The Nuremberg Trial] established important precedents for the development of international law concerning the definition of certain crimes, particularly that of aggressive war, and concerning the criminal liability of individuals acting in the name of a state, under official orders, or as members of criminal conspiracies or organizations.” Quincy Wright, The Law of the Nuremberg Trial, 41 AM. J. INT’L L. 1, 38 (1947). As the dissent states, “the evidence [of the majority] does not compare with the sources put forward in the few cases where we have held a principle to be a norm of customary international law.” Id. at 201. Yet the dissent has trouble with the ICJ Statute as well in its discussion of the Nuremberg Code, eventually dismissing the Nuremberg Code as a typical domestic court decision and missing its great importance in international law. See, e.g., Legality of the Threat of Nuclear Weapons (United Nations) 1996 I.C.J. 226, 289 (July 8) (citing specifically to the United States Nuremberg Military Tribunal); Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 I.C.J. 14, 286-287 (June 27) (quoting a judgment of the International Military Tribunal); Steven Fogelson, The Nuremberg Legacy: An Unfulfilled Promise, 63 S. Cal. L. Rev. 833, 873 (1989-1990) (arguing that the Nuremberg Trials fall under (a) international conventions, and (c) general principles of law in the ICJ Statute hierarchy). The Code also differs from traditional domestic jurisprudence in that the tribunal was set up by international agreement. 562 F.3d at 200. While the domestic court need not necessarily follow the primary and secondary source distinctions
previous legal guidance about the color of law and private actor distinction. From this focus come the tests set forth in this part: state action only in the situations of (1) active and joint state participation in the specific conduct at issue, per Lugar, or (2) state hiring of private contractors; and private liability only (3) if the corporate or private actions could reasonably rise to the level of war, or (4) if the conduct at issue is outside of physical domestic boundaries, or outside of domestic legal boundaries only for well-established private actor ATS violations, currently genocide and war crimes. The following tests should apply to ATS claims to take into account both plaintiff and corporate interests and the precedent of Sosa, including its “vigilant doorkeeping” requirement.\textsuperscript{141}

\textit{Color of Law and State Actors}

One of the few quotes in \textit{Sosa} specifically reaching the distinction between private actors and state actors comes in footnote 20, which states: “A related consideration 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 an individual.”\textsuperscript{142} The Court approvingly\textsuperscript{143} cites \textit{Kadic v. Karadžic},\textsuperscript{144} an oft-cited\textsuperscript{145} Alien Tort Statute case, as an

\begin{footnotes}
\item[141] Sosa, 542 U.S. at 729.
\item[142] \textit{Id.} at 733.
\item[143] While the Court does not explicitly state that it supports all the holdings of \textit{Kadic}, it cites \textit{Kadic} as a legitimate example of the debate surrounding corporate ATS liability. \textit{Id.}
\item[144] Kadic, 70 F.3d at 239-241.
\end{footnotes}
example of a case that makes for private liability for genocide under the Statute.\textsuperscript{146} \textit{Kadic}, in turn, looks to the “color of law” jurisprudence of 42 U.S.C. § 1983 as “a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.”\textsuperscript{147} The “color of law” jurisprudence as used in \textit{Kadic} should be extended outside of the torture and summary execution contexts as a workable test for the public/private distinction beyond the groundbreaking yet somewhat vague cautions of \textit{Sosa}.

The court in \textit{Kadic} states that “[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.”\textsuperscript{148} While this language in and of itself does not necessarily show which “color of law” test \textit{Kadic} follows,\textsuperscript{149} \textit{Kadic} specifically cites only to the case of \textit{Lugar v. Edmonson Oil Co.}\textsuperscript{150} The

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\item \textsuperscript{145} \textit{Kadic} has been treated positively by many cases, including several recent ATS cases. Presbyterian Church Of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 254 (2d Cir. 2009); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263, 74 Fed.R.Serv.3d 410, 410 (11th Cir. 2009).
\item \textsuperscript{146} Sosa, 542 U.S. at 729.
\item \textsuperscript{147} \textit{Kadic}, 70 F.3d at 245. \textit{Kadic} examined the state action requirement closely because the defendants argued that the apparent state for which they were acting, Srpska, was not actually a “state” because it was located within the sovereignty of Bosnia-Herzegovina. \textit{Id.} at 239.
\item \textsuperscript{148} \textit{Kadic}, 70 F.3d at 245.
\item \textsuperscript{149} \textit{See supra} note 130.
\item \textsuperscript{150} \textit{Kadic}, 70 F.3d at 245; \textit{Lugar v. Edmonson Oil Co., Inc.}, 457 U.S. 922 (1982). \textit{Lugar}, the owner of a truck stop, owed money to Edmonson Oil. According to state law, the County
court in *Lugar* states: “[We] have consistently held that a private party’s joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a ‘state actor.’” The important distinction in *Lugar* was that state actors took active part in the execution of the law. The court in *Lugar* distinguished this from the holding in the related case of *Flagg Bros., Inc. v. Brooks*, in which no state action was found when the law allowed for wholly privately effected remedies without compelling that those remedies occur with the help of state actors. Additionally, the “significant state aid” aspect of the *Lugar* test should specifically cover private contractors in which the government is financing a private contractor to do its work, so that private contractors cannot avoid liability by default. This standard also

Sherriff executed a writ of attachment, which “effectively sequestered petitioner’s property, although it was left in his possession.” *Id.* at 924-925.

151 *Id.* at 941.

152 *Lugar*, 457 U.S. at 937, 938.

153 *Id.* at 926.


155 “[W]hether the mere institution by a private litigant of presumptively valid state judicial proceedings, without any prior or subsequent collusion or concerted action by that litigant with the state officials who then proceed with adjudicative, administrative, or executive enforcement of the proceedings, constitutes action under color of state law within contemplation of § 1983.” *Flagg Bros.*, 639 F.2d at 1061-1062 (footnote omitted).

156 This interpretation then covers the private military contractors that are criticized by so many because of their immunity from legal repercussions for the consequences of their actions abroad. *See, e.g.*, Laura Dickinson, *Filartiga’s Legacy in an Era of Military Privatization*, 37 Rutgers
comports with the statement from *Kadic* that state action includes the situation where “a person [is] purporting to wield official power.”157 This rubric of state action as active involvement by public officials in the specific conduct at issue or state hiring of private contractors provides a clear, workable basis that the Supreme Court should put forth as the state action test for *Abdullahi*. This is also very similar to the *Tarkanian* test of “whether the State was sufficiently involved to treat that decisive conduct as state action,” already mentioned by the dissent in *Abdullahi*.158 The problem is that not even the dissent in *Abdullahi* was able to identify this one test as the definitive test put forward by *Kadic*, further exemplifying judicial confusion on the issue.

The majority in the *Abdullahi* appeal also makes a few mistakes in its application of the state action test.159 Despite using a “joint activity” test taken from *Kadic*,160 the majority employs a much too inclusive version of the state action test to find that four Nigerian

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157 See supra note 27.

158 See supra note 130.

159 First, the majority misquotes *Kadic* and very generally states that “a private individual will be held liable under the ATS if he ‘acted in concert with’ the state, i.e., ‘under color of law.’” 562 F.3d at 188. Yet *Kadic* very specifically stated that torture and summary execution require color of law for liability, while genocide and war crimes do not. Kadic, 70 F.3d at 243, 245.

160 The court employed, among other tests, the “acts together with state official or with significant state aid” test as used in *Kadic* at 254. *Id.* at 188; Kadic, 70 F.3d at 256.
government acts make for liability under the test. The first action, the request to the FDA to authorize Trovan export to Nigeria, falls short on a few counts. First, the plaintiffs allege that in order for the FDA to authorize the export of Trovan, “Pfizer obtained the required letter of request from the Nigerian government.”\footnote{Wesley Dissent, supra note 100 at 210 (quoting plaintiffs’ allegations).} Because such a letter from the U.S. government was required for export authorization, any government desiring medical testing in its country would need to send such a letter. Under the majority’s standard, then, every medical test abroad requiring FDA approval would automatically entail state action, even though such state participation is routine and required. This goes too far under a guarded Sosa standard of vigilant doorkeeping.

Second, because the Nigerian government did not participate in the specific testing at issue, in the same way that the Sherriff in Lugar executed the attachment procedures, there should be no state action here. The arrangement of accommodations in Kano is not the equivalent of the execution of the testing at issue in the case as is required under the proposed Lugar standard. There is also no evidence in the cases that the IDH or the rest of the hospital was administered by the Nigerian government itself.\footnote{See supra note 97.} Such evidence could have supported an argument that the testing at very least gave the impression of government action, evidence of joint participation.\footnote{Such appearance of government could possibly at least meet the standard of Horvath v. Westport Library Ass’n, whether “the relevant facts show pervasive entwinement to the point of largely overlapping identity between the State and the entity that the plaintiff contends is a state actor.” Horvath v. Westport Library Ass’n, 362 F.3d 147, 154 (2d Cir. 2004).} The court also looks to the fact that Nigerian members of Pfizer’s team...
helped administer the test. Yet the court never states that these Nigerian members represent the government\textsuperscript{164}—surely a non-official citizen of the country, not working with or for to the government, cannot engage in state action under the “color of law” jurisprudence. Otherwise any American could represent the U.S. government for purposes of § 1983, destroying the distinction between state and non-state actors. As to the final point, that Nigerian officials may have back-dated the FDA approval letter, the dissent correctly ignores this point because, as it points out, the plaintiffs later “allege that the letter was in fact created by a ‘Nigerian physician whom Pfizer says was its principal investigator.’”\textsuperscript{165} Again, a Nigerian physician not shown to be connected to the government should not be considered a source of state action. In addition, such backdating does not show that the government was directly involved in the conduct at issue, the testing, as would be required under the proposed \textit{Lugar} standard.

\textit{Private Actors}

Even if Pfizer here did not act “under color of state law,” it could still be held liable as a private actor under \textit{Sosa}. Purely private actor liability under the ATS should only arise in two situations outlined in \textit{Sosa}, both of which encompass the already well-establish private liability violations of genocide and war crimes.\textsuperscript{166} The first is when a private actor’s actions “impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war.”\textsuperscript{167} The alternative phrasing, requiring that an action be “admitting of a judicial remedy

\textsuperscript{164} See \textit{supra} notes 54, 97.

\textsuperscript{165} 562 F.3d at 210.

\textsuperscript{166} See \textit{supra} note 25.

\textsuperscript{167} \textit{Sosa}, 542 U.S. at 715.
and at the same time threatening serious consequences in international affairs,”¹⁶⁸ should not be encouraged for use as a standard. The majority on appeal in Abdullahi uses the “serious consequences in international affairs” standard, and interprets “serious consequences” so broadly as to include a largely peaceful protest against a domestic government, a deadly yet peaceful and unintentional disease outbreak, or general animus, none of which could reasonably escalate into a war.¹⁶⁹ This highlights the problem with using a relative standard of “serious consequences.”

¹⁶⁸ Id.

¹⁶⁹ The majority in Abdullahi stretches in order to fit the situation into the lesser formulation of “threatening serious consequences in international affairs.” First, the court claims that such consequences may occur because of the “cross-border spread of contagious diseases.” 562 F.3d at 186. While the results of this outbreak were international, there is no indication by the court that this led to any feelings of animosity against Nigeria or the U.S. Id. The second example, of riots in South Korea from fear of mad-cow disease infected beef, is cited as being “anti-U.S.” Id. at 187 n. 19 (“Other examples of the link between the cross-border spread of contagious disease and international peace and stability come to mind, such as the outbreak of anti-U.S. riots in South Korea as a result of fear that imported American beef will spread mad cow disease to that country.”). Yet the N.Y. Times article cited for this proposition states that the protests (the article does not use the term “riots”) were actually against Korea’s own president for allowing the importation of such beef. Choe Sang-Hun, South Korea Lifts Ban on U.S. Beef, New York Times, June 26, 2008, http://www.nytimes.com/2008/06/26/world/asia/26korea.html (last accessed Mar. 3, 2010). Such protests would not have reasonably risen to the level of war. The court also states that such drug trials pose “threats to national security by impairing our relations with other countries.” As proof of this, the court cites the present case as having “the potential to
If the court had been required to show that the act could make for consequences that “could rise to an issue of war,” it would not have been able to fit this weak case into that rubric.

The second situation in which purely private actor liability should apply is when corporations or individuals are “situated outside domestic boundaries.”\(^{170}\) This would greatly decrease the number of situations in which private actors like corporations could be held liable for actions abroad under ATS jurisdiction. Here, the actions took place inside the domestic boundaries of Nigeria and under the legal system and jurisdiction of that state,\(^{171}\) and thus would not make for private liability under this standard. There could be an argument made that although Nigeria may regulate this behavior, it has failed to enforce that regulation in this case, and that this is the equivalent of not regulating. To take into account this convincing argument, while at the same time attempting “vigilant doorkeeping,” the standard for “outside domestic boundaries” should be bifurcated. In situations where the underlying violation of the law of nations is already well-established for private actors—genocide and war crimes as the law currently stands—“domestic boundaries” should include situations where the state is not enforcing its own law, in addition to situations that are outside of physical domestic boundaries and not covered by domestic laws. In situations where the underlying violation of the law of nations is not as well established or is novel for private actors, “domestic boundaries” should

\(^{170}\) Sosa, 542 U.S. at 715.

\(^{171}\) This is evidenced by the attempted Nigerian court trials in the related \textit{Zango} case. 562 F.3d at 170-171.
only mean physical domestic boundaries. This standard will protect against the worst unpunished human rights abuses abroad, while, in keeping with the “vigilant doorkeeping” standard, discouraging courts from attempting to create new violations of the law of nations with little support and out of sympathy with those not obtaining justice in their home country. Applying this standard to Abdullahi does not create liability for Pfizer, because nonconsensual medical testing is not one of the well-established norms, and the conduct at issue occurred within the boundaries of Nigeria.

IV

POLICY AND OTHER PROPOSED SOLUTIONS

Pfizer makes many policy arguments against ATS jurisdiction over corporations. First, Pfizer argues that such jurisdiction makes for “burdensome litigation, public relations problems, and crippling liability that will discourage [corporate] participation in international investment.”172 Yet a corporation performing the same conduct in the United States would face the first two issues. It does not seem fair that a corporation who wishes to avoid litigation or bad publicity can do so by simply moving its actions to another country. Bad acts should make for bad publicity. As for the third issue, it may be true that potential liability would discourage

172 Petition for Certiorari, supra note 8, at 25. The petition also cites to Awakening Monster: The Alien Tort Statute of 1789 for its calculations of monetary damages to trade and foreign direct investment that may come from ATS suits against corporations. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789.
foreign investment and have other negative impacts on the corporations. While some argue that these impacts are exaggerated, there could also be negative economic impacts of corporate exit on citizens of developing countries. Yet others argue that any such impacts from


174 Hugh King cites to two other articles and states: “Although courts have been reluctant to consider explicitly such policy-based arguments, many commentators have argued that the likelihood of damaging economic ramifications as a result of possible ATCA suits is exaggerated.” Hugh King, Corporate Accountability Under the Alien Tort Claims Act, 9 MELB. J. INT’L L. 472, 481 (2008).

corporate exit on those in developing countries are not negative because those corporations often exploit citizens of those countries.¹⁷⁶

Pfizer also argues that allowing ATS jurisdiction over corporations will lead the courts down a slippery slope in which “it is difficult to see any limiting principle.”¹⁷⁷ Yet that limiting principle can be found in the very specific suggestions of this paper—the *Lugar* standard and private contractor hiring in state action cases, and a standard that a private action be reasonably capable of rising to the level of war or be outside of domestic boundaries for less well-established ATS private actor causes of action and outside of legal or enforcement boundaries for the well-established ATS private actor causes of action. Corporate deep pockets, facts in a foreign land leading to burdensome discovery, and coercive settlements are also cited by Pfizer as corporate ATS difficulties.¹⁷⁸ It may be true that poor developing countries or their citizens may find corporate deep pockets especially attractive, although this would be true of any plaintiff looking to make money. The claimed difficulty of coercive settlements faces the same problem—there is no reason provided by Pfizer that the inflammatory allegations leading to such settlements should be more common to claims of international law violations than they are to domestic law. Also, if corporate ATS liability is limited in the ways set forth in this paper, not just any offense could be actionable, and only the most worthy offenses would even have the chance for success in litigation, discouraging plaintiffs or human rights lawyers from filing

¹⁷⁶ Carter, for one, does not believe that corporate exit would harm citizens of developing countries, because “these views ignore the real suffering of people forced to work in substandard—indeed, often life-threatening—conditions.” *Id.*

¹⁷⁷ Petition for Certiorari, *supra* note 8 at 25.

¹⁷⁸ *Id.* at 26.
meritless lawsuits. As for the burdensome discovery issue, such discovery affects public and private actors equally—there is no reason to give corporations special consideration on this point when states and individuals can be held liable under the ATS and face the same discovery obstacles.

And finally, Pfizer argues that ATS jurisdiction over corporations competes with the political branches of the U.S. government, as well as domestic regulation by other nations of corporate activity within their boundaries. This is true. But states may have incentives not to take action against such abuses, even when they harm that country’s own citizens, whether these incentives come in the form of corporate bribes, or in the fear of losing that corporation’s significant investment in the country. In many countries, the judiciary is weak, or does not

179 This argument is specifically cited by Sosa as a reason to limit the scope of the ATS. Sosa, 542 U.S. at 695. At the same time, this problem is not specific to corporate ATS suits, but applies in the public actor context as well.

180 Petition for Certiorari, supra note 8 at 28. John Bellinger also states: “But [corporate ATS liability] does give rise to diplomatic friction in U.S. relations with foreign governments. Governments often object to their officials and corporations being subject to U.S. jurisdiction for activities taking place in their countries and having nothing to do with the U.S.” Bellinger, supra note 4. Bellinger cites to the South African government’s own request that the Khulumani apartheid case be dismissed because it “punishes global investment in their country and interferes with South Africa’s own resolution of the legacy of apartheid.” Id.; see supra note 45.

181 One commentator argues: “[N]o TNC [transnational corporation] is likely to spend a large proportion of its revenues in payments to a situs government so that the TNC can abuse the government’s citizens in peace. The revenues provided by taxes, however, as well as
usually hear claims by individuals against corporations. There may also be no protection for plaintiffs who may feel retribution by security forces for bringing suit. Another problem is the “race to the bottom,” in which countries attempt to outdo each other by offering the lowest wages and standards in order to attract investment in their country, at the expense of their citizens. All of these factors tend to prove that the burdens on corporations can be lessened, and the other checks on corporations working abroad can be weak, so that some form of limited ATS liability is desirable. On the other side is the acknowledgment that corporations can, or

concessions and other fees paid by the TNCs are crucial to host governments. Many of these governments have sufficiently undemocratic structures that government officials can allow abuses of segments of their citizenry by the TNCs without facing significant internal criticism or instability.” Gregory G.A. Tzeutschler, Note, Corporate Violator: Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad, 30 COLUM. HUM. RTS. L. REV. 359, 382 (1999). Tzeutschler cites the Ok Tedi mine in Papua New Guinea, which was projected to “generate 3.3 percent of Papua New Guinea’s total merchandise export earnings.” Id. at 382, n. 114.

“In many of the countries where defendant TNCs [transnational corporations] operate, such as Burma, Indonesia, and Nigeria, the judiciary usually does not hear claims of ordinary citizens against corporations. . . . In some countries, the judiciary is firmly dependent on the other branches of government and there is no protection for plaintiffs.” Id. at 377 (1998-1999).

Id.

Id. at 382.
should, largely govern themselves.\textsuperscript{185} Many corporations do voluntarily check their own actions in the human rights arena.\textsuperscript{186} While the incentives to self-govern may be great, there should still be legal consequences to protect local citizens when those incentives do not prove strong enough.\textsuperscript{187} Finally, corporations should not be held to a different ATS standard than other private actors because \textit{Sosa} gives no indication that the two should be treated differently, but rather groups the two together as “private actors.”\textsuperscript{188}

Other commentators have broached these same policy considerations and have to come to various conclusions. Many commentators discuss implementing the ideas of accomplice or aiding and abetting liability to cover corporations who have worked with the government to


\textsuperscript{186} Many corporations have signed on to the Sullivan Global Principles and the UN Global Compact concerning human rights, corruption, labor, and the environment. Many corporations also investigate their own business practices. Slawotsky, \textit{supra note} 44, at 1109.

\textsuperscript{187} Joel Slawotsky points to the exercise of influence by corporate stakeholders such as CalPERS to “prompt and guide a corporation into sound corporate governance.” \textit{Id.} at 1108. Yet Slawotsky acknowledges that there is a great limitation to the efficacy of such checks in that they are not legally enforceable. \textit{Id.}

\textsuperscript{188} Sosa, 542 U.S. at 733, n. 20; \textit{see supra} note 43.
allegedly violate international law.\textsuperscript{189} The complicity approaches can provide for a more expansive view of ATS liability for corporations. Yet this paper focuses on “color of law” jurisprudence because \textit{Kadic} specifically stated that such should be the basis for state action findings. Also, a more expansive view of ATS liability for corporations is not in keeping with \textit{Sosa}’s “vigilant doorkeeping” requirement.\textsuperscript{190} Some commentators instead focus on the applicability of the state action doctrine in situations where corporations perform government


\textsuperscript{190} This view was followed in \textit{In re South African Apartheid Litigation}, a District Court case in which the judge concluded that it should not be assumed that the ATCA includes aiding and abetting liability. In re S. African Apartheid Litig., 346 F.Supp.2d 538, 550-551 (S.D.N.Y. 2004) (“This conclusion is strengthened by the policies behind \textit{Central Bank} and is in accord with the framework announced by \textit{Sosa}. To allow for expanded liability, without congressional mandate, in an area that is so ripe for non-meritorious and blunderbuss suits would be an abdication of this Court’s duty to engage in ‘vigilant doorkeeping.’”); \textit{see also} Slawotsky, \textit{supra} note 44, at 1082.
functions despite lack of actual government involvement.191 While finding its basis in domestic color of law jurisprudence, this idea seems too easily to create corporate liability under the ATS, especially because the idea of what should be a government function can vary by country, so that determining which standard of government function to use would be problematic for courts. It would also put the courts in a position of telling other countries what their functions are or should be.

A brief overview of some other views provides a glimpse into the many arguments surrounding the ATS. Some commentators discuss the push under the Bush Administration to amend the ATS to decrease the likelihood of corporate liability, with one commentator concluding that the ATS should have remained unchanged, as it did.192 Some other commentators emphasize that courts should not be making such foreign policy decisions, especially in relation to corporations, but should leave that work to the political branches.193 On the issue of the distinction between individuals and corporations as private actors, one commentator concludes that because the Torture Victims Protection Act applies to corporate actors, the ATS should as well.194 Some commentators focus on the need for private military

191 Nemeroff, supra note 188.
192 “Modifying the [Alien Tort Claims] Act might spare American corporations expensive lawsuits and help developing nations expand their economies. But ATCA amendments could also mean that enormous human sacrifices are made in exchange for long-term economic progress and short-term corporate profit.” Carter, supra note 174, at 652.
193 Ramsey, supra note 4, at 279-380.
194 “Given that it is reasonable to conclude that the TVPA, which addresses jus cogens norms of torture and extrajudicial killing, applies to corporations acting under color of state law, it would
CONCLUSION

If a corporation knows it is working in a country with laws that offer little protection for its own citizens, it can enter that country knowing it has an effective carte blanche as far as treatment of test subjects. But if a corporation enters a country knowing that at least the most egregious violations of international law will be punished, it will check its actions in some respects. At the same time, if the risk of such litigation can be kept relatively small, and the certainty of which types of action will lead to such litigation relatively constant, corporations can still attract the investment necessary to perform their work in those countries. Such can be the case if corporations know that they will only be held liable for violations of international law under ATS jurisdiction (1) if the state actively and jointly participates with them in the specific conduct at issue or (2) supports them as private contractors, or (3) if their actions could reasonably rise to the level of war, or (4) if they are outside of physical domestic boundaries, or outside of domestic legal boundaries for the well-established private actor ATS violations, currently genocide and war crimes. In effect, the ATS can act as a final safety net for those in developing countries who could easily be abused by corporations looking only to save money at the expense of those they manipulate. The ATS can also simultaneously encourage corporations

be anomalous to find that the ATS is limited to individual persons.” David D. Christensen, Note, Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute after Sosa v. Alvarez-Machain, 62 WASH. & LEE L. REV. 1219, 1238 (2005).

195 Laura Dickinson focuses her arguments on this point. See supra note 4.
to invest abroad\textsuperscript{196}—if the Supreme Court, despite having denied certiorari in \textit{Abdullahi v. Pfizer}, \textit{Inc.}, accepts another ATS case and adopts the standards described in this paper, standards that would have lead to a holding of no ATS liability for Pfizer in \textit{Abdullahi}. Not only would the standards protect both corporate and human rights interests, but the proposed standards follow the benchmark case of \textit{Sosa v. Alvarez-Machain}, the only Supreme Court ruling on the Alien Tort Statute to date, by taking language directly from \textit{Sosa} and limiting ATS liability in keeping with \textit{Sosa}’s “vigilant doorkeeping” requirement.

\textsuperscript{196} “Prudent ATCA rulings will allow for the balancing of business interests with the interests of the population the MNCs operate in.” Slawotsky, \textit{supra} note 44, at 1109.