THE EXPANDING ROLE OF THE ALIEN TORTS ACT

IN INTERNATIONAL HUMAN RIGHTS ENFORCEMENT

BY

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I.

Preface

“Globalization” is a concept so widely used today that it has almost become a cliché. For many years, it was viewed as a worthy goal, especially by businesses seeking to take advantage of emerging markets. The idea of the Earth as a “global village” has taken on mythic proportions in popular culture; it has been romanticized and – in the views of some – exaggerated for political and commercial gains. Despite dreams of universal utopia, and despite a clear convergence of interests on many fronts, globalization entails serious risks. As many have learned to their dismay, global opportunities often risk global liabilities – harsh results that are not always anticipated in the glow of entrepreneurial zeal.¹

Such risks are increasingly apparent in the expansion of liability under the Alien Tort Statute,² commonly known as the “Alien Tort Claims Act” or “ATS,” a centuries-old law that allows foreign persons to sue in United States courts for international law violations. Despite a strong attempt by the United States Supreme Court to limit the scope of the Act by encouraging lower courts to construe it narrowly,³ cases against United States corporations continue to proliferate,⁴ and the Act’s reach has been advocated to encompass ideas as broad as the injuries to farm workers by pesticides in foreign nations,⁵ to drug trials on foreign citizens,⁶ and even to

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¹ See Richard O. Faulk, Amageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution, 10 MSU-DCL J. INT’L L. 205, 228 (2001) (“Persons doing business in the global marketplace should consider these risks before prematurely endorsing uniform legal principles and dispute resolution procedures. Otherwise, what are now perceived as global opportunities may translate into global liabilities.”) (emphasis in original); see also Richard O. Faulk, Editorial, U.S. Class Action Suits Are Spawning Judicial Imperialism, WALL ST. J., International ed., August 31, 2000, at B11.


⁴ See Adam Liptak, Class Action Firms Extend Reach to Global Rights Cases, N.Y. TIMES, June 3, 2007.

the effects of human contributions to climate change through global warming.\textsuperscript{7} Policymakers find themselves increasingly occupied with ATS claims “arising from conduct that occurred in other countries and which has no significant connection to the United States – claims that may not be consistent with our own government’s policies for promoting human rights.”\textsuperscript{8}

This article examines the historical foundations of the ATS, the complexities of its recent interpretations. It then weighs the utility of the Act as a means for enforcing international human rights in the courts, and examines the risks posed by current trends to those who increasingly pursue international business opportunities. As will be seen, the boundaries of the ATS are inadequately defined, and there are dangerous opportunities for common law mischief and abuse. Precautions are obviously necessary, and the trend toward internationalism in United States jurisprudence suggests that even greater risks lie ahead.

II.

Evolution of ATS Liability

A. Origins

The ATS is a model of brevity. It provides: “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.”\textsuperscript{9} Although the law was enacted in 1789 as a part of the Judiciary Act, it was rarely invoked. Indeed, only one case was decided within its jurisdiction

\textsuperscript{6} \textit{Abdullahi v. Pfizer, Inc.}, ___ F.3d __, 2009 WL 214649 (2d Cir., Jan. 30, 2009) (discussed in detail \textit{infra})


within the first 170 years of its existence.\textsuperscript{10} Despite the mysteries surrounding its enactment,\textsuperscript{11} it appears that the ATS was passed to provide foreign officials with a federal forum to redress torts committed against them by U.S. citizens within U.S. borders. The framers of the Constitution were very concerned about whether foreign citizens, such as ambassadors, would have adequate protection in state courts.\textsuperscript{12} The U.S. was accountable to other nations for failing to provide these official persons with opportunities for redress, and the pre-Constitutional federation had its share of international complications for failing to do so.\textsuperscript{13} To resolve this problem, the framers vested the Supreme Court with original jurisdiction over “all Cases affecting Ambassadors, other public ministers and Consuls.”\textsuperscript{14} The initial Congress strengthened and implemented this provision in the Judiciary Act, which confirmed the Supreme Court’s jurisdiction over suits brought by diplomats,\textsuperscript{15} created alienage jurisdiction,\textsuperscript{16} and added the ATS.\textsuperscript{17}

\textsuperscript{10} See \textit{Sosa}, supra note 3, at 712; see also Curtis A. Bradley, \textit{The Alien Tort Statute and the War on Terrorism}, 42 \textit{Va. J. Int’l L.} 587, 588 (2002). After Sosa, two circuits confirmed that the “statute provided jurisdiction in just two cases in the first 191 years after its enactment.” \textit{See Abdullahi}, at 4; \textit{Taveras v. Taveras}, 477 F.3d 767, 771 (6\textsuperscript{th} Cir. 2007) – a long “dry spell” indeed.

\textsuperscript{11} Judge Friendly called the ATS a “legal Lohengrin” because “no one seems to know whence it came.” \textit{ITT v. Vencap, Ltd.}, 519 F.2d 1001, 1015 (2d Cir. 1975). For those who are not opera buffs, Lohengrin was the mysterious knight in Wagner’s opera of the same name who insisted on keeping his name and origin a secret.

\textsuperscript{12} See \textit{Sosa}, supra note 3, at 716.

\textsuperscript{13} See 1 Records of the Federal Convention of 1787, p. 25 (M. Farrand ed.1911) (speech of J. Randolph) (discussing how the inadequate vindication of the law of nations persisted through the time of the Constitutional Convention).

\textsuperscript{14} U.S. Const., Art. III, § 2.

\textsuperscript{15} See 1 Stat. 80, ch. 20, § 13.

\textsuperscript{16} \textit{Id.} at § 11.

B. The Emergence of International Human Rights Litigation.

Given the limited scope of the ATS, as evidenced by the early Republic’s historical concerns, the Act remained a generally unused and unproven tool until the 1980’s. In those years, human rights litigants sought new vehicles for redress, and creative counsel seized upon the ATS as a possible method to secure federal court jurisdiction over controversies involving claims under the “law of nations.” The first appellate recognition of this type of litigation came in 1980 when the Second Circuit decided Filartiga v. Pena-Irala.\(^\text{18}\) The court permitted Paraguayans living in the U.S. to sue a former Paraguayan government official for torture and murder of one of their family members in Paraguay.\(^\text{19}\) According to the Second Circuit, torture was a violation of the “law of nations” and the ATS permitted U.S. Courts to decide torture cases – even if the heinous act occurred outside of U.S. borders in a foreign nation. As a result of this decision, human rights litigation under the ATS became increasingly common – but the suits typically involved suits by foreign nationals against representatives of their own governments for injuries in their home nations.\(^\text{20}\)

In the 1990’s, however, the landscape changed. Suits proliferated against private persons and corporations, usually accused of “aiding and abetting” human rights violations in connection with activities done in connection with foreign governments.\(^\text{21}\) Some courts, notably the Second Circuit, extended the reach of ATS liability beyond governmental officials to include private

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\(^{18}\) 630 F.2d 876 (1980).

\(^{19}\) The former Paraguayan official was living in the U.S. at the time the suit was filed.

\(^{20}\) See Bellinger, supra note 8, at 3-4.

\(^{21}\) As of 2005, more than 100 such cases had been filed since Filartiga was decided. See generally, Julian G, Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT’L L. REV. 105, 107-110 (2005).
parties – persons who participated or “aided and abetted” such violations of “universal concern” as “slavery, genocide or war crimes.”

Although courts faced significant difficulties in determining exactly what comprised the “law of nations,” some courts nevertheless marched ahead to craft elaborate – but ultimately confusing – definitions of their own. As the controversy regarding the scope and utility of the ATS in human rights litigation grew, defendants raised a major threshold argument which, if successful, would preclude litigation of any claims without specific Congressional authorization. They argued that the ATS did not truly create a cause of action, but rather simply vested the federal courts with jurisdiction to decide claims when, and if, Congress specified them in legislation. If their arguments were correct, courts were powerless to entertain any suits until Congress specified the types of claims which could be litigated.

C. The Supreme Court’s Decision in Sosa v. Alvarez-Machain

In 2004, the United States Supreme Court addressed this thorny issue. In Sosa v. Alvarez-Machain, the Court agreed that the ATS was, in fact, a jurisdictional statute, and that it did not, in itself, create causes of action. Although this holding vindicated the precise position the defendants were asserting, the High Court refused to end the inquiry at that point. In a decision that plainly recognized the propriety of human rights litigation under the ATS, the Court held that district courts were empowered by the ATS to “recognize private causes of action for

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22 See Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

23 See e.g., Flores v. Southern Peru Copper Corp., 414 F.3d 233, 247-48 (2d. Cir. 2003) (in which the court “clarified” the term as “the body of law known as customary international law” which “is discerned from myriad decisions made in numerous and varied international and domestic arenas” and “does not stem from any single, definitive, readily-identifiable source.”).

certain torts under the laws of nations.”  Although there were very few such claims actionable at the time the ATS was enacted, Congress did not foreclose the judiciary from redressing other injuries caused by violations of international law, so long as the suit was based on a “norm of international character accepted by the civilized world and defined with a specificity comparable to the features” of the claims recognized at the time the statute originally became effective.  

The Sosa Court was careful to stress that this right to create “common law” causes of action was not an unlimited license for judicial adventures. “Judicial caution” and a “restrained conception of discretion” should inform a district court when considering whether to recognize new causes of action under the ATS.  Without providing any truly specific criteria or guidance, the Court suggested that the lower courts should be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs,” and that the “potential implications of the foreign relations of the United States” were also critical considerations. Writing for the majority, Justice Souter envisioned tight scrutiny of newly advanced claims, stating that the portal for expanded causes of action was “still ajar subject to vigilant door keeping.”  Unfortunately, as the Supreme Court surely must have foreseen, the degree to which doorkeepers are willing to keep a door “ajar” varies with their tolerance for intrusion. By delegating “door keeping” responsibility to a vast and diverse group of federal trial judges without meaningful guidance or standards, the Sosa Court set the stage for a mass of

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25 Id. at 724.

26 These included offenses against ambassadors, violation of a foreigner right of “safe conduct” through U.S. territory, and piracy. Id. at 720.

27 Id. at 725.

28 Id.

29 Id. at 727.

30 Id. at 729.
conflicting and confusing decisions that inevitably followed in its wake.

Clearly, despite Sosa’s carefully worded precautions and admonitions, the lower courts were not constrained to act consistently. Sosa’s decision to leave the door “ajar” has given rise to a host of other important legal issues, including:

- Does the ATS apply extraterritorially? Can a U.S. court properly apply federal common law under the ATS to conduct that occurred entirely within the borders of a foreign state?

- Even if such a cause of action may be recognized, should the plaintiffs be required to exhaust local remedies in the foreign state as a prerequisite to suing under the ATS?

- May corporations or other private parties be held liable under the ATS for aiding and abetting human rights abuses perpetrated by foreign governments?

- How does a court decide whether an international “norm” is sufficiently accepted and specific to justify suit under the ATS? What standards should be applied, which resources should be considered, and what relative weight should they be afforded?

- What circumstances justify dismissal of ATS claims because of “impingement” on Executive and Legislative prerogatives? When do the potential implications for United States foreign affairs justify judicial restraint? Should the Executive Branch be granted a participatory role in ATS cases under such circumstances, and if so, what degree of deference to its positions should be afforded?\(^{31}\)

To this day, federal district and appellate courts are struggling with these issues – issues which the Supreme Court necessarily foresaw – or should have foreseen – issues upon which the Court provided virtually no guidance or clarification. Instead, lower courts were left largely to their own ingenuity, with only vague warnings rumbling from the elevated bench above. Apparently, the High Court was content to trust in the “laboratories” of the common law, as restrained – to a greater or lesser degree – by the threat of a rare clap of thunder in the clouds.

\(^{31}\) See Bellinger, supra note 8, at 5.
III.

An Uncertain and Dangerous Landscape

A. The Door is Rushed

The “restraint” urged by the High Court in *Sosa* was not applied consistently in the lower courts – or by litigants. Indeed, the door left “ajar” in *Sosa* has been rushed, pushed and pried by scores of new claimants in a variety of attempts to redress human rights issues in federal courts.

Examples of creative and expansive post-*Sosa* attempts to invoke the ATS are legion, and brief descriptions of some of them will illustrate the situation. They include:

- claims against United Arab Emirate officials for their involvement in the abuse of underage camel jockeys;\(^{32}\)
- a suit against U.S. chemical manufacturers for damages caused by the defoliating Agent Orange during the Vietnam War;\(^ {33}\)
- an action against a Canadian company for alleged involvement in human rights abuses through its investments in Sudan;\(^ {34}\)
- claims against an American company for selling bulldozers ultimately used to destroy the homes of Palestinians;\(^ {35}\)
- a suit against a fruit company, for allegedly paying Colombian paramilitary groups to keep the company's banana plantations "free of labor opposition and social unrest;”\(^ {36}\)
- claims against a French financial institution for alleged payments to Saddam Hussein's regime in violation of the rules of the United Nations oil-for-food program;\(^ {37}\)

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\(^{33}\) *In re Agent Orange Prod. Liability Litig.*, 517 F.3d 76 (2d Cir. 2008).

\(^{34}\) *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2007 WL 4532798 (D.C.Cir., Nov. 29, 2007).

\(^{35}\) *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007).


• an action against an aircraft company for allegedly servicing flights used by the CIA for "extraordinary renditions" of suspected terrorists to other countries where interrogators commonly use torture and other unlawful techniques;\textsuperscript{38}

• Suit against an internet service provider for providing the Chinese government with internet records leading to the identification and alleged torture of a human rights activist;\textsuperscript{39}

• Claims filed against a mining company for allegedly paying Colombian paramilitaries who murdered labor activists;\textsuperscript{40}

• Action against a major retail store chain for failing to stop suppliers from committing labor abuses;\textsuperscript{41}

• Suit against a chocolate company for buying cocoa and providing services to cocoa farmers employing child labor;\textsuperscript{42}

• Claims against an oil company for participating in a Burmese gas pipeline construction project, whose contracted security forces allegedly engaged in forced labor, forced displacement, murder and rape.\textsuperscript{43}

The approach taken by some of the courts involved in these cases was hardly the “restrained” and “narrow” one recommended by \textit{Sosa}. For example, the district court in the Agent Orange controversy took a particularly expansive view of itself as a “quasi-international tribunal” with the power to dispense justice that superseded the “deficiencies of national constitutions and


\textsuperscript{39} Second Amended Complaint at 2, Xiaoning v. Yahoo! Inc., No. 07-CV-2151 (N.D. Cal. July 30, 2007).

\textsuperscript{40} Complaint ¶ 49, Doe v. Drummond Co., No. 06-CV-61527 (S.D. Fla. Oct. 10, 2006).


\textsuperscript{43} \textit{Doe I v. Unocal Corp.}, 395 F.3d 932 (9th Cir. 2002), \textit{reh'g en banc granted}, 395 F.3d 978 (9th Cir. 2003), \textit{and vacated and appeal dismissed following settlement}, 403 F. 3d 708 (9th Cir. 2005).
Whatever conclusions one draws from these disparate scenarios, the “laboratories” of the federal judiciary remain busy formulating and re-formulating federal “common law” under the ATS. Eventually, the Supreme Court will have another opportunity to review and clarify the controversy engendered by Sosa. The issues have, so far, escaped review, but another recent decision by the Second Circuit, discussed below, offers hope that the Supreme Court will finally provide definitive guidance.

The nature of that guidance, however, may be more expansive than restrictive. Over the past decade, the High Court has trended toward internationalism in its constitutional jurisprudence on a number of important issues, relying on foreign law and international “consensus” to inform its decisions. Although these were not ATS cases, the expansive perspectives of Sosa perhaps reflect this general trend. Given this view, there is reason to believe that the Supreme Court may expand the scope and facilitate the utility of the ATS by taking a more liberal and inclusive view of what the “law of nations” comprises. The degree to which the door swings wider will also depend upon the composition of the Court at the time the review takes place. Internationalism already holds a majority position on the Court, and that majority may increase with new appointments from the current administration.

B. Lessons from the Second Circuit Laboratory

The Second Circuit remains the most active federal appellate court in dealing with ATS

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45 See, e.g., Roper v. Simmons, 543 S. Ct. 551 (2005) (In determining constitutionality of executing minors, Court must look to the “evolving standards of decency that mark the progress of a maturing society” including international ones); Lawrence v. Texas, 539 U.S. 558 (2003) (In deciding homosexual rights, Court relied on ruling by the European Court of Human Rights); Washington v. Glucksberg, 521 U.S. 702 (1997) (In case regarding physician-assisted suicide, Court examined how other countries treated the issue). Admittedly, the trend is not entirely evident in certain other contexts, such as consular notification requirements, although the vote is closely divided. See Medellín v. Texas, 552 U.S. ___, 129 S.Ct. 360 (2008) (refusing to accede to international obligation by 5-4 vote).
issues. Two recent cases illustrate the “trends” in that Circuit toward expansive interpretations of the act – and may also foreshadow results from the Supreme Court. The first case, *Am. Isuzu Motors v. Ntsebeza*, involved an action by victims of apartheid in South Africa. It was filed against numerous corporations which allegedly “aided and abetted” human rights violations committed by the former South African regime. The case sought to impose liability under the ATS on companies which did business in South Africa while apartheid was in effect.

*Ntsebeza* attracted significant attention when the present South African government filed objections to the suit and urged its dismissal, arguing that the lawsuit threatened to harm South Africa by discouraging investment and by conflicting with the new regime’s policies of “reconciliation, reconstruction, reparation, and goodwill.” While the district court proceedings were still pending, the Supreme Court in *Sosa* cited the case as subject to possible dismissal because of “case-specific deference to the political branches.” Although the district court deferred to these concerns, the Second Circuit was not deterred. It reversed the lower court by holding that private parties who “aid and abet” foreign governments’ human rights abuses may be sued under the ATS. Although the federal government supported the defendants’ petition for certiorari to the Supreme Court, the High Court could not muster a quorum to review the case on the merits. As a result, the vexing problem of “aiding and abetting” remained in flux – and the tendency toward expansive application remained unchecked.

Earlier this year, a panel of the Second Circuit issued another sweeping decision, this

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46 504 F.3d 254 (2d Cir. 2007), aff’d per 28 U.S.C. §2109, 128 S.Ct. 2424 (2008). This was not an affirmance on the merits. §2109 provides for affirmance if the Court lacks a quorum and a majority of the qualified justices are of the opinion that the case cannot be heard and determined at the Court’s next term. Under those circumstances, the Court enters an order affirming the judgment and the order has the same effect as an affirmance by an equally divided court.

47 *Sosa*, 542 U.S. at 733, n. 21.

48 *Id.*
time addressing the question of how a court determines whether a defendant’s alleged conduct actually violates the “law of nations.” In *Abdullahi v. Pfizer, Inc.*, a group of Nigerian children and their guardians sued Pfizer for violating the ATS by conducting involuntary medical experimentation on the children with a new antibiotic in Nigeria. They claimed that the experiments were conducted without their knowledge and consent, and that, the drugs caused blindness, paralysis, brain damages, and in some instances, death. The plaintiffs were careful to allege that Pfizer was “working in partnership with the Nigerian government” in administering the drugs, and that Pfizer failed to disclose or explain the experimental nature of the study or the serious risks involved.

The district court granted Pfizer’s motion to dismiss, holding, among other things, that plaintiffs failed to identify a source of international law that provided “a proper predicate for jurisdiction under the ATS.” Apparentely heeding the *Sosa* Court’s admonitions about the narrow scope of ATS liability, the judge concluded that imposing liability for “failure to get any consent, informed or otherwise, before performing medical experiments on the subject children would expand customary international law far beyond that contemplated by the ATS.”

Thereafter, the plaintiffs appealed to the Second Circuit.

One suspects that plaintiffs were not optimistic about their chances on appeal. The Second Circuit previously rejected ATS claims for Agent Orange injuries, a suit for failing to provide consular notification and access to foreign nationals, and claims for pollution in a

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50 Id. at *3.

51 Id.

52 *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Company*, 517 F.3d 104, 119-23 (2d Cir. 2008).

53 *Mora v. people of the State of New York*, 524 F.3d 183 (2d Cir. 2008).
foreign state because the “norms” to be enforced were not sufficiently “universal” and “specific” to support ATS liability. Surprisingly, however, a divided panel reached an entirely different conclusion in *Abdullahi* – and reversed the district court’s dismissal. In doing so, the majority of the panel conducted a lengthy search and analysis of international sources – a search that yielded a pastiche’ of materials that United States courts “have long, albeit cautiously, recognized” as “sufficiently specific, universal, and obligatory” to meet the exacting standards of *Sosa*. Although the majority’s decision demonstrates significant research, and although it certainly offers redress for allegedly heinous misconduct, the pastiche’ of authorities upon which it relies raises serious questions about the level of proof necessary to establish a universal “norm.”

The majority of the panel faulted the district court for failing to conduct a more “fulsome and nuanced” inquiry – an inquiry derived to some degree from *Sosa*, but to a larger degree from the Second Circuit’s prior decision in *Flores*. The district court was apparently too rigid in its approach because it looked only at “whether each source referencing the norm is binding” and whether each source “expressly authorizes a cause of action to enforce the norm.” According to the panel majority, “[c]ourts are obligated to examine how the specificity of the norm compares with 18th century paradigms, whether the norm is accepted in the world community, and whether States universally abide by the norm out of a sense of mutual concern.” It was not necessary that the United States be a signatory to any international treaty or convention that prohibited nonconsensual experimentation; instead, “the existence of customary international law

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

55 *Abdullahi*, at *5.

56 Id. at *7.

57 Id.
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.”58 Citing its prior decision in Filartiga, the majority noted that even non-binding “declarations of international norms” may “provide evidence that a norm has developed the specificity, universality, and obligatory nature required for ATS jurisdiction.”59 The majority then concluded that the district court should have considered a “greater range of evidence” and “weighed differently the probative value” of the sources cited by the plaintiffs.60 In view of this error, and because the Second Circuit reviews ATS dismissals de novo,61 the panel majority proceeded to reconsider all the sources and independently determined that they were sufficient to support a claim under the ATS.

The problem with the Abdullahi majority’s decision is not necessarily its result or the types of sources it chose to consider, but rather the reasoning it employed to weigh the particular sources it identified in its analysis. To commence their inquiry, the majority consulted the Statute of the International Court of Justice (“ICJ Statute”), to which all members of the United Nations are parties. Article 38 of the Statute specifies the categories of authorities that provide “competent proof of the content of customary international law” to include:

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- International custom, as evidence of a general practice accepted by law;

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58 Id. at *8. (emphasis added) See Sosa, 542 U.S. at 7334 (“[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”).

59 Id.

60 Id. (“It was inappropriate for the district court to forego a more extensive examination of whether treaties, international agreements, or State practice have ripened the prohibition of nonconsensual medical experimentation on human subjects into a customary international law norm that is sufficiently (i) universal and obligatory, (ii) specific and definable, and (iii) of mutual concern, to permit courts to infer a cause of action under the ATS.”).

61 See Rweyemamu v. Cote, 520 F.3d 198, 201 (2d Cir. 2008).
• The general principles of law recognized by civilized nations;

• 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.  

As the court recognized in earlier opinions, the ICJ Statute provides a “limitless menu” of sources of a “soft and indeterminate character” to consider, and therefore presents a real threat of “creative interpretation.”  

There is a temptation – and a danger – for courts to become “roving commissions” when considering this wide array of authorities, and to avoid this risk, courts must proceed with “extraordinary care and restraint.”  

Under this framework, the plaintiffs relied upon four sources of international law to support their ATS claim regarding nonconsensual medical experimentation. These sources included:

• The Nuremberg Code, which categorically states that “[t]he voluntary consent of the human subject is absolutely essential” to experimental procedures;  

• The World Medical Association’s Declaration of Helsinki, which provides ethical guidance for physicians, and which states that human subjects should be volunteers and grant informed consent to participate in research;  

• Guidelines of the Council for International Organizations of Medical Services, which require “the voluntary informed consent” of the test subjects;  

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63 See Flores, 414 F.3d at 248.

64 Id. at 262 (“In undertaking the difficult task of determining the contours of customary international law, a court is not granted a roving commission to pick and choose among declarations of public and private international organizations that have articulated a view on the matter at hand.”).

65 Id. at 248.


• Article 7 of the International Covenant on Civil and Political Rights, which specifies that “no one shall be subjected without his free consent to medical or scientific experimentation.”

The district court – and the dissenting judge on appeal – had no problem concluding that nonconsensual experimentation violated the “law of nations,” but they had serious reservations about whether such a violation necessarily inferred the existence of a private cause of action under the ATS. Although the Nuremberg Code plainly renders such activities unlawful, further analysis is needed before a private right can be recognized. Under this test, the lower court found that, with the exception of the Nuremberg Code, all of the sources listed by plaintiffs contained “aspirational or vague language” lacking the specificity required for ATS jurisdiction. Other sources were not ratified or adopted by the United States, and none of the sources independently authorized a private cause of action. As a result, adopting the cautious approach of Sosa, the district judge and the dissent determined that the inference of an ATS cause of action was best deferred to Congress.

According to the lower court and the dissent, the issue was not resolved by a determination that the “law of nations” was violated. Instead, the issue was whether “customary international law” prohibits private actors from engaging in nonconsensual experimentation, as opposed to governmental officials only – and whether the law is sufficiently specific, universal

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70 “While federal courts have the authority to imply the existence of a private right of action for violations of jus cogens norms of international law, federal courts must consider whether there exist special factors counseling hesitation in the absence of affirmative actions by Congress.” 2005 WL 1870811, at *9.

71 Id. at *12-13.

72 Id. at *11-14. See Sosa, 542 U.S. at 732 n. 20 (Stating that courts deciding whether a principle is a “customary international law” must consider “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”).
and obligatory to justify a private cause of action against those persons. As Justice Breyer stated in his concurring opinion in Sosa, “[t]he norm must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.”\footnote{Sosa, 542 U.S. at 760 (Breyer, J., concurring).} In other words, not every violation of the “law of nations” justifies suit against private parties under the ATS – inferring a cause of action is only proper if the violation is inherently applicable not only to government officials, but also to private actors. Otherwise, the ATS cannot be properly invoked.

Surely, few would argue that nonconsensual medical experimentation is permissible under the “law of nations,” but just as surely, there are serious questions, about whether injuries sustained by persons who are the subjects of that experimentation are privately actionable under the ATS. These sources materials relied upon by the panel’s majority are all questionable in this regard. For example, the Nuremberg Code, perhaps the most important and compelling source relied upon by the majority, was developed by the United States military and announced by an American military court.\footnote{See United States v. Stanley, 483 U.S. 669, 687 (1987)(Brennan, J. dissenting).} It is not a treaty and did not immediately bind any state and, because it was part of a criminal verdict, it is more closely analogous to a judicial decision which is a “subsidiary, rather than primary source of customary international law.”\footnote{See ICJ Statute, art. 38.} As a pronouncement of criminal law principles, the Nuremberg Code is entirely silent regarding the civil liability of private actors under “customary international law,” and unless that gap can be filled from other sources, it is doubtful whether the Nuremberg Code, standing alone, is sufficient to impose ATS liability.

The remaining sources relied upon by the majority consisted of international treaties, multinational declarations of principles, and customs and practices of various nations. The
treaties, only one of which was ratified by the United States, are of questionable value under Sosa’s analysis. The first treaty, the International Covenant on Civil and Political Rights, was expressly devalued in Sosa, which described it as a “well-known international agreement that, despite its moral authority, has little utility under the standard set out in this opinion.” The Court’s remarks were based upon its observation that the “United States ratified it on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” Moreover, the treaty, by its terms, applies only to state entities and officials, not private persons, and further governs obligations flowing from a state to citizens within its territory. Extending the treaty’s obligations to private persons or corporations extends its reach far beyond its intended scope.

The second treaty, the Convention on Human Rights and Biomedicine, was promulgated by the Council of Europe, but is purely a regional agreement and it has not been ratified by the most influential states in the region. Since a treaty’s evidentiary value increases in relation to the influence the ratifying states have in international circles, it seems that the Convention’s value as a European norm may be suspect, not to mention its status as a “universal” principle.

76 Sosa, 542 U.S. at 734-735 (emphasis added).

77 Id.

78 See International Covenant on Civil and Political Rights, art. 2(1)(“Each State Party . . . undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” See also U.S. v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002)(“The plain language of the ICCPR indicates that its provisions govern the relationship of a state and the individuals within the state’s territory.”)

79 The Council of Europe is limited to European states. See Statute of the Council of Europe, art. 4, May 5, 1949, E.T.S. No. 1.

80 Although it has been signed by 34 states, only 22 states have actually ratified it. France, Germany, Italy, the Netherlands, Russia and the United Kingdom have yet to approve it.

Yet another problem with applying this treaty in Abdullahi is presented because the treaty was promulgated after Pfizer’s conduct took place. So far, other than the Abdullahi majority, no other court has defined applicable “customary international law” in an ex post facto manner.

Other non-treaty sources are more attenuated in their power. The majority relied on several “multinational declarations,” including the Helsinki Declaration, to support reversal of the district court’s dismissal, but in doing so, they appeared to give far greater weight to such materials than the Circuit’s precedents previously authorized. The Helsinki Declaration was adopted by the World Medical Association, a group comprised not of states, but of doctors and private organizations, and consists of aspirational statements that plainly do not have the force of law. Indeed, the court’s decision in Flores expressly held that “[s]uch declarations are almost invariably political statements – expressing the sensibilities and the asserted aspirations and demands of some countries or organizations – rather than statements of universally-recognized legal obligations . . . such declarations are not proper evidence of customary international law.”

While it is certainly true that some declarations, such as those issued by the United Nations, may evince a custom that “lays down rules binding on the States,” those governmental declarations are recognized because they create “an expectation of adherence” as they specify “with great precision the obligations of member nations.” No such expectations can arise from statements

82 Pfizer’s alleged misconduct to place in 1996, but the Convention was not opened for signature until April 4, 1997 and did not bind any state until Slovakia’s ratification on January 15, 1998.

83 See Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 118 (2d. Cir. 2008)(The United States did not ratify the 1925 Genea Protocol until 1975. Accordingly, the Protocol cannot be said to have constituted a “treaty of the United States during he period relevant to this appeal.”).

84 See The World Medical Association, “About the WMA,” http://www.wma.net/e/about/index.htm (“The World Medical Association is an international organization representing physicians . . . and has always been an independent confederation of free professional associations.”).

85 Flores, 414 F.3d at 262, quoting OPPENHEIM’S INTERNATIONAL LAW 1189 (9th ed. 1996).

86 Filartiga, 630 F.2d at 883.
issued non-governmental associations.\textsuperscript{87} Similarly, convergences of the laws of many nations to condemn a particular practice is not “significant or relevant for purposes of customary international law.”\textsuperscript{88} It is only when national prohibitions arise from “express international accords” that misconduct is deemed to violate customary international law.\textsuperscript{89} Accordingly, to qualify for ATS liability, convergence of state’s laws must arise from an international accord, not a mere “movement” toward condemning the type of action undertaken by the defendant.

\textit{Abdullahi} raises a host of other issues that cannot be addressed fully in the space provided here, but all of those concerns stem from the “slippery slope” created when \textit{Sosa} determined to leave the common law door “ajar” – instead of awaiting Congressional definitions of actionable torts. Among the issues discussed, but not fully resolved by \textit{Abdullahi’s} divided panel are:

- Does it matter if the type of misconduct involved in the case, \textit{e.g.}, nonconsensual experimentation, is fully capable of prosecution in the country where the acts occurred?
- Does it matter if the misconduct closely resembles acts for which only state actors traditionally have been held responsible, \textit{e.g.}, slavery or torture?
- What degree of state action or involvement is required to support a finding of “aiding and abetting”? Is facilitation sufficient? Is participation required, and if so, what level of participation by the state is needed?

To the extent \textit{Abdullahi} answers these questions, it does so ambiguously. For example, the “test” for aiding and abetting under other federal statutes, traditionally requires a showing of “pervasive entwinement to the point of largely overlapping identity between the State and the entity that the

\textsuperscript{87} \textit{Cf. U.S. v. Yousef}, 327 F.3d 56, 106 (2d Cir. 2003) (“[N]o private person or group of men and women such as comprise the body of international law scholars creates the law.”)

\textsuperscript{88} \textit{Flores}, 414 F.3d 249.

\textsuperscript{89} \textit{Filartiga}, 630 F.2d at 888.
plaintiff contends is a state actor.” In Abdullahi, the state allegedly provided “assistance” to Pfizer by procuring space and arranging for the assistance of local physicians – and apparently the majority believed those connections were sufficient to show “aiding and abetting,” at least at the pleading stage. Whether “assistance” of that kind is sufficient, even if proven, will ultimately support ATS liability remains uncertain.

IV.

Conclusions

The scope of liability under the ATS is obviously in flux, and presently it is waxing, rather than waning. Although the Supreme Court in Sosa counseled against its expansion, the lower courts have not consistently acted with vigilance to preserve its original purposes. The present uncertainties apparently resulted from Sosa’s trust in the lower judiciary’s common law prowess to determine the existence of new causes of action, to collect, marshal and reliably weigh international authorities and sources to assist in that decision, as well as their ability to contain the new causes of action within reasonable limits. Unfortunately, as the Second Circuit’s decisions reveal, allegations of heinous misconduct have great power – power that may motivate judicial creativity to reach decisions seemingly unsupported by the international sources upon which they profess to rely.

It is tempting to believe, and perhaps true, that our jurisprudence is infected with a kind of “creeping internationalism.” Perhaps some judges believe that global human rights concerns should be elevated to a position of primacy, and perhaps they are willing to emphasize legal “convergence” over formal subscriptions by participating states. Perhaps they are willing to honor declarations by non-governmental organizations as reliable evidence of customary international law. And perhaps they are ready to lower the “high bar” set by Sosa to make

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federal courts more accessible to ATS claimants. Given the present composition of the Supreme Court, as well as its anticipated future membership, it is certainly possible that the flexible views of the Abdullahi majority will be vindicated as not only the “law of nations,” but also the “law of the land.” If that occurs, those who would make the United States the “courthouse for the world” will surely find jurists willing to vindicate “universal” principles that are clearly defined only after a lawsuit is filed. If that occurs, those who seek global advantages in commerce will face undefined and unpredictable risks, and the world will be transformed into a vastly more dangerous place for commerce and trade.

There are political avenues available to avoid or limit these risks, although it may be difficult to travel them in the current political climate. They include;

- Legislation providing the Executive Branch with a formal role in ATS litigation;
- Legislation requiring exhaustion of local remedies in the nation where the tortuous conduct allegedly occurred as a prerequisite to filing an ATS claim;
- Legislation providing a clear statute of limitations for ATS cases; and
- Legislation defining the causes of action that can be litigated under the ATS.

Any one of these reforms would provide clarity and guidance that is sorely lacking in the current situation. Otherwise, we will be continually relegated to the “laboratories” of the common law to make increasingly ad hoc decisions on critical issues of international law and liability.

Although the common law’s “case by case” approach seems well-suited when courts address controversies microcosmic situations, the concept threatens disruption and confusion when, as in most ATS cases, the controversy itself represents the macrocosm. Creating such sweeping and unforeseeable liabilities is anathema to traditional common law jurisprudence,
which confines judicial lawmaking to “molecular motions,” not revolutionary declarations.\textsuperscript{91} Although difficult cases, such as \textit{Abdullahi}, surely inflame judicial creativity, as well as public sentiment, perhaps we should reconsider how we mind the doors to American justice.

\textsuperscript{91} See Southern Pacific Co. v. Jensen, 244 U.S. 205, 201 (1917) (per Holmes, J.) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions”). \textit{See also}, Benjamin Cardozo, The Nature of the Judicial Process 113 (1921) (stating that courts make law only within the “gaps” and “open spaces of the law”). Neither Holmes nor Cardozo can be cited to support deliberate, large-scale reversals of doctrine in the name of public policy.