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Jonathan Drimmer and Laura Ardito on

Abdullahi v. Pfizer, Inc.**2009 U.S. App. LEXIS 1768 (2d Cir. Jan. 30, 2009)**

2009 Emerging Issues 3493

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In an important decision under the Alien Tort Claims Act (“ATCA”), [28 U.S.C. 1350](#), on January 30, 2009, the U.S. Court of Appeals for the Second Circuit reinstated a consolidated case filed by the parents and guardians of Nigerian children against Pfizer, Inc. (“Pfizer”). *Abdullahi v. Pfizer, Inc.*, Nos. 05-4863, 05-6768, [2009 U.S. App. LEXIS 1768](#) (2d Cir. Jan. 30, 2009). The case is based on allegations that Pfizer tested an experimental drug on the children without their knowledge or consent. The U.S. District Court for the Southern District of New York had dismissed the case for lack of subject matter jurisdiction under the ATCA and, alternatively, on *forum non conveniens* grounds. *Abdullahi v. Pfizer, Inc.*, 01 Civ. 8118 (WHP), [2005 U.S. Dist. LEXIS 16126](#) (S.D.N.Y. 2005). In reversing that decision, the Second Circuit employed an analysis that, similar to other courts, indicates an increasing comfort in allowing ATCA cases to proceed in the United States where serious violations of international law may be at issue. For multi-national companies, this means that the likelihood of prevailing on equitable and even technical legal defenses may decrease as the gravity of an alleged violation increases.

The Abdullahi Litigation. The ATCA allows foreign litigants to file civil actions in U.S. federal courts where premised on “violations of the law of nations,” wherever they may be committed. [28 U.S.C. 1350](#). On the books since the nation’s first Judiciary Act in 1789, the ATCA largely remained dormant for 200 years. In 1980, when Paraguayan citizens relied on the Act in bringing suit in New York against a Paraguayan police official for acts of torture and murder in Paraguay, the Act was resuscitated. Since then, scores of ATCA claims have been filed, leading to damage awards that have regularly topped \$10 million and occasionally more than \$100 million. Yet, even defendants who prevail in these cases face the heavy costs of substantial litigation expenses and negative publicity.

For multi-national corporations, to date, the Act has been invoked by plaintiffs more than 120 times in cases brought in the U.S., most of which have been filed since 2000. That trend has also spawned “second generation” human rights cases against corporations, which have not relied on the ATCA but on securities laws, traditional common law torts, unfair competition and advertising laws, and other theories. See, e.g., *Kasky v. Nike*, [45 P.3d 243](#) (Cal. 2002); *Sheet Metal Workers #218 Pension Fund v. Hills*, 1:07-CV-01957-PLF, Complaint, Oct. 31, 2007 (D.D.C.).

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The actions leading to the complaint in the instant case began in 1996, when a meningitis outbreak hit Nigeria. The Complaint alleges that during the outbreak, Pfizer worked with Nigerian doctors and government officials to administer an experimental drug, “Trovan,” on children. The drug had never been tested on children but had caused life-threatening side effects in animals. The Complaint alleges that Pfizer administered the drug without obtaining consent, disclosing the experimental nature of the drug, or alerting recipients to the fact that an organization in the same location was administering an anti-meningitis drug already known to be safe. After receiving the drug, several of the children died and others were paralyzed.

In 2001, the plaintiffs sued Pfizer under the ATCA, alleging that the medical experiments violated international law. The district court granted Pfizer’s motion to dismiss on *forum non conveniens* grounds, finding, despite the plaintiffs’ claims of corruption, that the Nigerian courts were an adequate alternative forum. However, it denied the motion for failure to state a cause of action. *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118 (WHP), [2002 U.S. Dist. LEXIS 17436](#) (S.D.N.Y. 2002). The plaintiffs appealed to the Second Circuit, in a case consolidated with a similar action. In 2003, the Second Circuit remanded for further consideration of the *forum non conveniens* grounds. *Abdullahi v. Pfizer, Inc.*, 77 F. App’x 48, 53 (2d Cir. 2003) (summary order).

Shortly afterwards, in 2004, the U.S. Supreme Court decided *Sosa v. Alvarez-Machain*, [542 U.S. 692](#) (2004), which limited ATCA claims to a narrow set of harms that “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” at the time the ATCA was enacted, namely “offenses against ambassadors, violations of the right to safe passage, and individual actions arising out of piracy.” The district court again dismissed the case on *forum non conveniens* grounds, and further agreed with Pfizer that, following *Sosa*, the plaintiffs failed to state a claim because nonconsensual medical experimentation did not violate a customary international law norm.

The Second Circuit Decision. On appeal, a divided Second Circuit panel reversed. It held that nonconsensual medical experimentation on humans is (1) universal and obligatory, (2) specific, and (3) of mutual concern among nations, and thus establishes subject matter jurisdiction under the ATCA as a violation of a customary international law norm. *Abdullahi*, 2009 U.S. App. LEXIS at *20.

With regard to universality, the majority chastised the district court and dissent for relying only on ratified international treaties to which the U.S. is a party as evidence that “States

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universally abide by, or accede to” the prohibition against this practice “out of a sense of legal obligation.” Instead, the majority reasoned that international law norms are also discerned through international custom “as identified through international agreements, declarations and a consistent pattern of action by national law-making authorities” *Id.* at *49. The court emphasized the Nuremberg Code – a set of ten principles derived from the Nuremberg trials of Nazi war criminals after the Second World War – as a source that established universal acceptance of the prohibition against nonconsensual medical experimentation, and noted that its principles were reaffirmed by international agreements, such as the Universal Declaration of Human Rights, as well as domestic laws.

With regard to specificity, the Second Circuit found that the same international law sources “all uniformly and unmistakably prohibit medical experiments on human beings without their consent,” and thus provide “concrete content for the norm.” *Abdullahi*, 2009 U.S. App. LEXIS at *50. With regard to mutuality, the appeals court reasoned that, by signing international accords, States have demonstrated that this conduct is of mutual concern. It said that an important component of the mutuality test “is a showing that the conduct in question is ‘capable of impairing international peace and security.’” Nonconsensual medical experimentation on the scale alleged against Pfizer fulfills this requirement, the court stated, because it “fosters distrust and resistance” to important international drug trials, thus increasing the likelihood that contagious diseases will spread across borders. The court reasoned that it also threatens national security by impairing U.S. relations with other countries. *Id.* at *55-59.

The Second Circuit also held that the state action requirement for ATCA jurisdiction existed; under the Act, most recognized harms must be committed by a state actor, or otherwise under color of state law. Here, the plaintiffs alleged that Pfizer acted in conjunction with Nigerian government officials in administering the drug, which was sufficient. *Id.* at *62.

Further, although Pfizer did not seek affirmance of the district court’s dismissal on the alternative grounds of *forum non conveniens*, the appeals court nonetheless elected to discuss that ruling.¹ Under *forum non conveniens*, courts may decline jurisdiction when

1. Between the appeal and the Second Circuit’s decision in the case at bar, the Nigerian state of Kano brought criminal and civil charges against Pfizer. Nigeria’s federal government also sued Pfizer and individual employees for \$7 billion in damages. Apparently believing it could no longer receive a fair trial in Nigeria, Pfizer noted that it would not seek affirmance of the district court’s dismissal of the appeal on the basis of *forum non conveniens*.

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for the convenience of the parties and the court, and in the interests of justice, the case should be tried in another forum. The appeals court noted that in this case, the district court failed to analyze whether Pfizer met its burden of persuasion as to the Nigerian forum's adequacy and availability, and erroneously placed the burden on the appellants to prove that the Nigerian forum was inadequate. *Abdullahi*, 2009 U.S. App. LEXIS at *67.

In dissent, Judge Richard C. Wesley did not discuss *forum non conveniens*, but opined that the sources on which the majority relied were not binding on the U.S. and were otherwise not universally-recognized legal obligations. *Id.* at *123-25. He also disputed the majority's finding of state action. *Id.* at *106.

What Does It Mean? In following the methodology set forth in *Sosa* for discerning international law violations that confer jurisdiction under the ATCA, the Second Circuit provided some helpful doctrinal clarifications. Most important, with regard to the universality prong of the analysis, the court outlined an analysis that other courts might follow in identifying proper sources of customary international law norms. Specifically, if international conventions do not directly address the norm in question, courts may look to international custom, generally weighed in the following order: "international agreements, declarations and a consistent pattern of action by national law-making authorities." *Id.* at *49.

Also worthy of note is the court's discussion of the specificity element. The appeals court spent little time focusing on how nonconsensual medical experimentation is "defined with a specificity comparable to the features of the 18th-century paradigms." Instead, the court noted that a "concrete" norm existed against nonconsensual medical experimentation, and that while there may be some disagreements about certain aspects of informed consent, those marginal uncertainties are irrelevant because Pfizer's alleged conduct "is at the core of any reasonable iteration" of the norm. In essence, then, the decision holds that the question is not whether the contours of a norm are specifically defined, but whether the concrete norm clearly exists and the conduct at issue falls within it.

With regard to the third factor, mutuality, the court's analysis emphasized the importance of the prohibition against nonconsensual medical experimentation for maintaining "international peace and security." While the dissent argued that it is "not enough that a wrong could create international ramifications" to implicate mutuality, the majority's analysis indicates that courts may look to whether violations do just that.

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Finally, on a larger level, the Second Circuit's remand to the district court based on *forum non conveniens*, along with the rest of its analysis, perhaps signals an increasing comfort among federal courts in hearing ATCA cases where the underlying conduct involves allegations of serious misconduct by multi-national companies. As more ATCA cases are filed and heard in U.S. courts, with greater frequency courts appear to be ignoring potential equitable bars, such as *forum non conveniens* and technical legal arguments – such as whether norms are specifically defined – and permitting cases to proceed if the underlying facts suggest a grave breach of international law.

Indeed, that very principle was articulated just a month before *Abdullahi* by the U.S. Court of Appeals for the Ninth Circuit sitting *en banc* in *Sarei v. Rio Tinto*, [550 F.3d 882](#) (9th Cir. 2008), in the context of the exhaustion doctrine. In that case, a plurality of judges expressly held that whether an exhaustion analysis should be applied at all depends largely on the nexus of the case to the U.S. and the gravity of the underlying allegations.

For multi-national companies, this means that the chances of obtaining an early dismissal of an overseas human rights lawsuit may work on a sliding scale. The more the facts suggest an alleged violation that lies at the fringe of the law of nations, the greater the likelihood that multi-national companies may prevail on *forum non conveniens*, exhaustion, and other such defenses. However, the more serious the alleged violation, the more likely it appears that a U.S. federal court will hear the claim regardless of the potential merit of those defenses. If that indeed is the case, multi-national companies certainly should take heed.

For more information on the *forum non conveniens* doctrine in the ATCA context, see Finity E. Jernigan, “Forum Non Conveniens: Whose Convenience and Justice,” [86 Tex. L. Rev. 879](#) (2008); Mathew R. Skolnik, “The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of its Former Self After Wiwa,” 16 *Emory Int'l L.J.* 187 (2002). For Alien Tort Claims Act corporate compliance, see Jonathan Drimmer, “At Home and Abroad,” *Corporate Counsel*, April 1, 2009; Jonathan Drimmer, “Don't Be Dubbed A Human Rights Abuser,” *Legal Times*, Oct. 30, 2007; Jonathan Drimmer, “Corporate Exposure Under The Alien Tort Claims Act,” *Corporate Counselor*, June 5, 2007. For a general discussion of the ATCA, see Russell Donaldson, “Construction and Application of the Alien Tort Statute,” [116 ALR 387](#).

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