Legal Backgrounder

WLF Washington Legal Foundation

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2009 Massachusetts Avenue, NW
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Vol. 20 No. 3 January 14, 2005

"ALIEN TORT STATUTE" SHAKEDOWN:
COURT MUST ARREST NEW ATTEMPT TO EXPAND MISCHIEVOUS U.S. LAW

by

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The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a 215-year old statute which has recently gained prominence after sitting virtually dormant for its first 200 years. The ATS, which was enacted by the First Congress as part of the Judiciary Act of 1789, provides in full 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 the nations or a treaty of the United States." At the time the ATS was enacted, there were only three recognized violations of the law of nations: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *See* 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769).

Over the past several years, however, various plaintiffs and activists groups have attempted to extend the ATS far beyond its roots in an effort to turn the U.S. courts into International Courts of Claims. Cases have been brought against U.S. corporations for a wide variety of claims, including environmental torts, expropriated property claims, and human rights violations committed by host governments based on dubious theories of vicarious liability. Although most courts have recognized the impropriety of these suits, and have dismissed the claims, this influx of cases has cost United States corporations significant, unnecessary costs in legal fees, discovery costs, and lost employee time.[1] A prime example of the misuse of the ATS to shake down a U.S. corporation operating abroad is *Abdullahi v. Pfizer*, No. 01 Civ. 8118, a case now pending in the Southern District of New York.

Background of Pfizer Case. In 1996, scientists at Pfizer learned of a bacterial meningitis epidemic besieging the Northern Nigeria town of Kano. At the time, Pfizer was in the process of testing a new antibiotic – Trovan – for treatment of bacterial meningitis. Trovan had not yet been approved by the FDA, but Pfizer had clinical data from numerous studies pointing to its safety and potential effectiveness. Given the dire situation present in Nigeria — with patients already dying or gravely ill — Pfizer offered to go to Nigeria and treat the critically ill patients using Trovan, as well as ceftriaxone, an FDA-approved Pfizer drug. Because Trovan had not been approved by the FDA, Pfizer sought and obtained a letter from the

[1] In the great majority of cases brought under the ATS, the only relationship the United States has to the case is that the parent or subsidiary of the purported wrongdoer is a U.S. company with deep pockets.

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Nigerian Government and the hospital where Pfizer would be treating the ill, Kano's Infectious Disease Hospital ("IDH"), asking the FDA to allow Pfizer to use Trovan to treat patients at IDH. The FDA granted the Nigerian Government's request and approved Pfizer's use of Trovan at IDH.

When the Pfizer doctors arrived in Kano, the Nigerian Government provided them with hospital facilities and the assistance of several Nigerian doctors and nurses. The Pfizer physicians singled out the children with symptoms of meningitis, and gave half of them Trovan and the other half ceftriaxone. While Pfizer intended to compare the results of the two antibiotic treatments, if children did not respond well to the Trovan, they were switched to ceftriaxone.

Most of the patients were children, and therefore, Pfizer had to obtain consent for treatment from the children's parents or legal guardians. Because most of the parents and legal guardians could not read or write, consent had to be obtained orally. Additionally, because the parents and legal guardians did not speak English, the Nigerian nurses — speaking with the patients in Hausa (the local Nigerian language) — had to obtain this oral consent for the Pfizer doctors. Because none of the Pfizer doctors spoke Hausa, they had to rely on the nurses' representations that the parents of the patients had consented to the treatment.

If left untreated, bacterial meningitis can be fatal. The Pfizer treatment proved, however, to be extremely successful. Indeed, Pfizer's success in lowering the mortality rate among those children inflicted was more successful than that of Doctors Without Borders, another group treating children with meningitis at IDH. Patients treated by Pfizer had a mortality rate of 6%,[2] while patients treated by Doctors Without Borders had a mortality rate of about 9.1%.

Despite Pfizer's success in treating the inflicted children, in August 2001, a group of parents whose children were treated with Trovan during the 1996 Kano epidemic filed suit in the Southern District of New York.[3] The Abdullahi plaintiffs attempted to use the ATS to establish jurisdiction, claiming that Pfizer violated international law by failing to inform the parents of the risks associated with Trovan, by failing to obtain the parents' informed consent before treating their children with Trovan, and by providing inadequate medical treatment.[4] They allege that Pfizer's actions constituted torts in violation of the following international laws: The International Covenant on Civil and Political Rights ("ICCPR"), the Universal Declaration of Human Rights, the Declaration of Helsinki, guidelines of the Council for International Organizations of Medical Sciences ("CIOMS"), and the Nuremberg Code.

Pfizer filed a motion to dismiss the case for failure to state a claim — on the grounds that the plaintiffs had not alleged a cognizable violation of international law — and, in the alternative, on the grounds of *forum non conveniens*. The District Court denied Pfizer's motion on the basis of failure to state a claim, but granted dismissal on the basis of *forum non conveniens*, finding that Nigeria was the preferred forum. *Abdullahi v. Pfizer, Inc.*, 2002 WL 31082956 (S.D.N.Y. 2002). On appeal, the Second Circuit remanded the case for reconsideration of whether dismissal on the basis of *forum non conveniens* was proper in light of the fact that the parallel action in the Nigerian court had been dismissed. Pfizer's motion to dismiss for *forum non conveniens* and, in line with recent decisions limiting the reach of the ATS, on failure to state a claim grounds, is currently pending in the District Court. As described below, the Abdullahi plaintiffs' claims are entirely lacking legal merit and should have been dismissed immediately by the District Court. Moreover, public policy concerns also dictate that cases like this should not be allowed to proceed in U.S courts.

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[2]The mortality rate among the children treated with Trovan and those treated with ceftriaxone was virtually the same.

[3]Five months before the Abdullahi plaintiffs filed this case, another group of plaintiffs filed an action against Pfizer in the Nigerian Federal High Court seeking damages arising out of the same humanitarian efforts by Pfizer.

[4]As support for their allegations that Pfizer's conduct in administering Trovan was tortious, the Abdullahi plaintiffs point to the fact that Trovan's use has been limited by the FDA. Due to rare instances of liver toxicity associated with the use of Trovan, Pfizer, in consultation with the FDA, limited Trovan's use to settings where patients are suffering from life threatening conditions. Notably, however, the Abdullahi plaintiffs do not make any allegations of liver damage.

The Abdullahi Plaintiffs' ATS Claims Against Pfizer Have No Legal Merit. Two decisions — one by the U.S. Court of Appeals for the Second Circuit, *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), and the other by the United States Supreme Court, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) — are dispositive of the Abdullahi plaintiffs' ATS claims against Pfizer.

In *Flores*, the Second Circuit held that customary international law only encompasses "those rules that States universally *abide by*, or accede to, out of a sense of *legal obligation* and *mutual concern*." 343 F.3d at 154 (emphases added). Further, the Second Circuit held that "in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint." *Id.*

Consistent with these views, the Second Circuit held that because the ICCPR — specifically relied upon by the Abdullahi plaintiffs as a pronouncement of international law — is not a self-executing treaty[5] and because none of its provisions — specifically the provision establishing all persons' "right to life" — are sufficiently definite, the ICCPR cannot give rise to a rule of customary international law. *Id.* at 163-64. Additionally, the *Flores* Court held that declarations of private organizations cannot establish customary international law because "[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." *Id.* at 169. Therefore, because the Declaration of Helsinki and the CIOMS Guidelines, cited by the Abdullahi plaintiffs, are declarations of private organizations, they also cannot establish customary international law. *Id.* at 168.

The Second Circuit also rejected the notion that conduct can constitute a violation of international law simply because it is "shockingly egregious." *Id.* at 159. The Second Circuit stated that regardless of how shocking or egregious conduct may be, this factor alone does not qualify as a violation of customary international law, and thus, cannot provide a basis for jurisdiction under the ATS. *Id.* To allow a rule of this sort would "displace the agreement of nations as the source of customary international law and substitute for it the consciences and sensibilities of individual judges." *Id.* Likewise, the Abdullahi plaintiffs' attempts to use allegations of "shocking" and "egregious" conduct to define their claims simply cannot give rise to any violation of *customary international law* that could sustain their ATS claims against Pfizer.

In *Sosa*, the Supreme Court further narrowed the very limited types of actions that can be brought under the ATS. The Court held that claims based on a violation of the law of nations must "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." *Sosa*, 124 S. Ct. at 2761. Given the fact that claims brought under the ATS will often impact foreign relations, the Court also noted that judicial caution must be exercised when evaluating such claims. Courts must be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 2763. Because attempts by the courts to craft remedies for new violations of international law "would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution." *Id.*

Further, the Supreme Court specifically held that two sources of purported international law cited by the Abdullahi plaintiffs do not give rise to an ATS claim. First, the Court stated that the Universal Declaration of Human Rights "does not of its own force impose obligations as a matter of international law." *Id.* at 2767 (quoting Eleanor Roosevelt as calling the Declaration "a statement of principles…setting up a common standard of achievement for all peoples and all nations" and "not a treaty or international agreement…impos[ing] legal obligations"). The Court likewise rejected attempts to use the ICCPR as a basis for establishing customary international law. The Court stated that although the ICCPR "does bind the United States as a matter of international law, the United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.*; *see also id.* at 2763 (noting that the Senate "expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the [ICCPR] declared that the substantive provisions of the document were not self-executing").

[5]A self-executing treaty is one that "either expressly or implicitly creates a private right of action to enforce rights described in the treaty." *See White v. Paulsen*, 997 F. Supp. 1380, 1385 (E.D.N.Y. 1998).

Finally, the Nuremberg Code — also used as support for the Abdullahi plaintiffs' ATS claims — although not specifically addressed in *Flores* or *Sosa*, is nonetheless equally insufficient to give rise to an ATS claim. The Nuremberg Code deals specifically with criminal conduct arising out of World War II, and, as other courts have held, cannot be considered a binding source of international law from which an ATS claim can arise. *See In re South African Apartheid Litig.*, 2004 WL 2722204, *8 (S.D.N.Y. Nov. 29, 2004) (noting that "besides dealing with criminal law and not civil matters, [the Nuremberg Code is] not a binding source[] of international law"); *cf. Heinrich ex rel. Heinrich v. Sweet*, 49 F. Supp 2d 27, 42 (D. Mass. 1999) (holding that the Nuremberg Code does not create a private right of action).[6]

Because the Abdullahi plaintiffs have not — and cannot — establish any violations of customary international law on the part of Pfizer in seeking to help critically ill children in Kano, the U.S. courts have no jurisdiction over this case, and the District Court should have long ago dismissed it.

Public Policy Also Dictates That the Abdullahi Plaintiffs' Claims Should Not Be Allowed to Proceed. Public policy reasons further dictate that these actions should not be heard in a U.S. court. Pfizer traveled to Kano to try to help critically ill children. The Nigerian Government supported Pfizer's efforts to treat the deadly disease ravaging its citizens. Many of the children saved would have likely died due to their illnesses without Pfizer's treatment. Thus, to allow claims like this to proceed could have devastating ramifications in future health crises. It would create a precedent that would induce drug companies' refusal to get involved in health crises, even where these companies may have drug treatments potentially available that could save lives or ease pain, for fear that their actions would be second-guessed later — even when requested to act by the U.S. or foreign governments. It would likewise set a poor policy precedent to punish medical companies from relying on foreign medical personnel to obtain consent in situations where these companies travel abroad, to non-English speaking countries, to provide these humanitarian efforts.

Moreover, the Nigerian courts — not U.S. courts — are clearly the proper forum for any grievances arising out of Pfizer's actions in Kano. All of the events in question took place in Nigeria. The witnesses, the Nigerian doctors and nurses who assisted Pfizer, as well as all of the plaintiffs, are all in Nigeria. Much of the testimony will be in Hausa because most, if not all, of the Abdullahi plaintiffs do not speak English. Moreover, a court in Nigeria has already rejected the very claims the Abdullahi plaintiffs now seek to pursue in this action. It would be entirely improper for a U.S. court to second guess the actions of the Nigerian court. This could lead to serious foreign policy conflicts between the United States and foreign governments. As the Supreme Court noted in *Sosa*, U.S. courts must consider the foreign relations consequences before finding that certain conduct should be actionable under the ATS. *Id.* at 2763. Further, in this case, the Nigerian Government requested the assistance of Pfizer and provided the Pfizer doctors with medical personnel who were instrumental in obtaining the consent at issue. A finding by a U.S. court that Pfizer's actions were improper would likely conflict with the determinations of the Nigerian Government, thus potentially causing further foreign policy ramifications. Thus, from a policy perspective, even if jurisdiction were proper, public policy dictates against this case being heard by a U.S court.

Conclusion. Claims such as those of the Abdullahi plaintiffs should be denied as a matter of law and as a matter of public policy. To accept such claims would not only threaten to allow U.S. courts to enter the province which should rightfully be occupied by the courts and governments of the nations where the objectionable conduct occurs, but it would also create unnecessary foreign policy challenges for the Executive Branch. Additionally, it would expose U.S. corporations to needless litigation costs and expenses. Courts should recognize and follow the Supreme Court's admonition in *Sosa* that the ATS was designed to apply to a very limited and specific universe of conduct. U.S. courts must resist the attempts to expand the scope of the ATS beyond this in order to avoid becoming the arbiters of all global disputes.

[6]Additionally, the events surrounding the Holocaust cannot be compared with Pfizer's actions in Kano. The conduct underlying the Nuremberg Code was medical experimentation performed by Nazi officials on healthy people. With the permission of the Nigerian Government and the consent of the FDA, Pfizer used Trovan, which had already been tested extensively, in an attempt to save the lives of critically ill children.

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