Rabi Abdullahi v. Pfizer, Inc.

In the below case, the court discusses what constitutes a sufficiently specific and universal norm of international law to be cognizable under the ATS. The majority and dissent disagree over the extent to which such norms must be binding independent of the ATS jurisdictional grant, and over what sources (those of private global governance associations, or only those of intergovernmental organizations) are appropriate to use for international law (note that the dissent even rejects one of the Art. 38(d) sources, the work of international publicists, in the name of democracy).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
August Term, 2006
(Argued: July 12, 2007 Decided: January 30, 2009)
Docket Nos. 05-4863-cv (L), 05-6768-cv (CON)

BARRINGTON D. PARKER, *Circuit Judge*:
This consolidated appeal is from the judgments of the United States District Court for the Southern District of New York (Pauley, *J.*) dismissing two complaints for lack of subject matter jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and in the alternative, on the ground of *forum non conveniens*. Plaintiffs-Appellants Rabi Abdullahi and other Nigerian children and their guardians sued Defendant-Appellee Pfizer, Inc. under the ATS ("the *Abdullahi* action"). They alleged that Pfizer violated a customary international law norm prohibiting involuntary medical experimentation on humans when it tested an experimental antibiotic on children in Nigeria, including themselves, without their consent or knowledge. Plaintiffs-Appellants Ajudu Ismaila Adamu and others, also children and their guardians who were part of Pfizer's Nigerian drug experiment, brought a similar action against Pfizer, alleging violations of the ATS, the Connecticut Unfair Trade Practices Act ("CUTPA"), and the Connecticut Products Liability Act ("CPLA") ("the *Adamu* action"). Pfizer moved to dismiss both actions for lack of subject matter jurisdiction and on the basis of *forum non coveniens*. The district court granted the motions and both sets of plaintiffs have appealed.

* * *

As explained below, we conclude: (1) that the district court incorrectly determined that the prohibition in customary international law against nonconsensual human medical experimentation cannot be enforced through the ATS; (2) that changed circumstances in Nigeria since the filing of this appeal require re-examination of the appropriate forum, albeit on the basis of a legal analysis different from that employed by the district court; and (3) that the district court incorrectly applied Connecticut's choice of law rules in the *Adamu* action. Consequently, we reverse and remand the cases to the district court for further proceedings.

* * *

The central events at issue in these cases took place in 1996, during an epidemic of bacterial meningitis in northern Nigeria.[1] The appellants allege that at that time, Pfizer, the world's largest pharmaceutical corporation, sought to gain the approval of the U.S. Food and Drug Administration ("FDA") for the use on children of its new antibiotic, Trovafloxacin Mesylate, marketed as "Trovan." They contend that in April 1996, Pfizer, dispatched three of its American physicians to work with four Nigerian doctors to experiment with Trovan on children who were patients in Nigeria's Infectious Disease Hospital ("IDH") in Kano, Nigeria. Working in concert with Nigerian government officials, the team allegedly recruited two hundred sick children who sought treatment at

the IDH and gave half of the children Trovan and the other half Ceftriaxone, an FDA-approved antibiotic the safety and efficacy of which was well-established. 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. Pfizer purportedly gave the children who were in the Ceftriaxone control group a deliberately low dose in order to misrepresent the effectiveness of Trovan in relation to Ceftriaxone. After approximately two weeks, Pfizer allegedly concluded the experiment and left without administering follow-up care. According to the appellants, the tests caused the deaths of eleven children, five of whom had taken Trovan and six of whom had taken the lowered dose of Ceftriaxone, and left many others blind, deaf, paralyzed, or brain-damaged.

Appellants claim that Pfizer, working in partnership with the Nigerian government, failed to secure the informed consent of either the children or their guardians and specifically failed to disclose or explain the experimental nature of the study or the serious risks involved. Although the treatment protocol required the researchers to offer or read the subjects documents requesting and facilitating their informed consent, this was allegedly not done in either English or the subjects' native language of Hausa. The appellants also contend that Pfizer deviated from its treatment protocol by not alerting the children or their guardians to the side effects of Trovan or other risks of the experiment, not providing them with the option of choosing alternative treatment, and not informing them that the non-governmental organization Médecins Sans Frontières (Doctors Without Borders) was providing a conventional and effective treatment for bacterial meningitis, free of charge, at the same site.[1]

* * *

In 1998, the FDA approved Trovan for use on adult patients only. After reports of liver failure in patients who took Trovan, its use in America was eventually restricted to adult emergency care. In 1999, the European Union banned its use.

* * *

In November 2002, following the dismissal of the *Zango* lawsuit, a number of the *Zango* plaintiffs filed the *Adamu* action. They alleged that in planning the Trovan experiment in

[1] 2 The appellants further allege that Pfizer failed to follow its protocol in ways that might have mitigated the harm suffered by the children. They contend that Pfizer violated the protocol by administering Trovan orally even though oral absorption is difficult for sick children; conducting no testing prior to administering the drug to determine whether Nigeria's strain of meningitis might be responsive to Trovan; failing to determine that the children in the test had meningitis; and failing to either exclude from the experiment children with liver or joint problems or to test for such problems, even though Trovan was known to exacerbate them. Although Pfizer's protocol called for children receiving Trovan to be switched to Ceftriaxone if they did not respond well to Trovan, Pfizer allegedly did not conduct regular blood tests of the children or switch those who suffered from Trovan-related side effects to Ceftriaxone.

Connecticut and in conducting the tests in Nigeria without informed consent, Pfizer violated the CUTPA, the CPLA, and the ATS. Eventually, the *Adamu* action was transferred to the Southern District of New York and consolidated with the *Abdullahi* action. Pfizer then moved to dismiss both cases for failure to state a claim under the ATS and on the basis of *forum non conveniens*. It also moved to dismiss in *Adamu* on the ground that Connecticut choice of law principles require the application of Nigerian law, which bars suit under CUTPA and the CPLA.

The district court granted the motions. *See Abdullahi III*, 2005 WL 1870811; *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005). In *Abdullahi III*, Judge Pauley held that while "[p]laintiffs correctly state that non-consensual medical experimentation violates the law of nations and, therefore, the laws of the United States," they failed to identify a source of international law that "provide[s] a proper predicate for jurisdiction under the ATS." 2005 WL 1870811, at *9, 14. Noting that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," he concluded that "[a] cause of action for Pfizer's 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." *Id.* at *13-14 (internal quotation marks omitted).

With regard to the *forum non conveniens* analysis, the district court declined to accept plaintiffs' submissions concerning Pfizer's alleged bribery of Nigerian officials on the ground that they were not based on personal knowledge. *Id.* at *16-17. Finding that the plaintiffs had failed to submit specific evidence that the Nigerian judiciary would be biased against its own citizens in an action against Pfizer, the district court alternatively held that Nigeria was an adequate alternate forum. *Id.* at *16, 18.

* * *

Since then, a tectonic change has altered the relevant political landscape. In May 2007, the state of Kano brought criminal charges and civil claims against Pfizer, seeking over $2 billion in damages and restitution. Around the same time, the federal government of Nigeria sued Pfizer and several of its employees, seeking $7 billion in damages.[5] None of these cases seek compensation for the subjects of the tests, who are the appellants before this Court. Pfizer then notified this Court that in light of these recent developments, which it believed required further consideration by the district court, it would not seek affirmance on the basis of *forum non conveniens.*

* * *

The district court dismissed both actions based on its determination that it lacked subject matter jurisdiction because plaintiffs failed to state claims under the ATS. We review dismissal on this ground *de novo*.

* * *

A. The Prohibition of Nonconsensual Medical Experimentation on Humans

Appellants' ATS claims are premised on the existence of a norm of customary international law prohibiting medical experimentation on non-consenting human subjects. To determine whether this prohibition constitutes a universally accepted norm of

customary international law, we examine the current state of international law by consulting the sources identified by Article 38 of the Statute of the International Court of Justice ("ICJ Statute"), to which the United States and all members of the United Nations are parties.

* * *

The appellants ground their claims in four sources of international law that categorically forbid medical experimentation on non-consenting human subjects: (1) the Nuremberg Code, which states as its first principle that "[t]he voluntary consent of the human subject is absolutely essential"; (2) the World Medical Association's Declaration of Helsinki, which sets forth ethical principles to guide physicians world-wide and provides that human subjects should be volunteers and grant their informed consent to participate in research; (3) the guidelines authored by the Council for International Organizations of Medical Services ("CIOMS"), which require "the voluntary informed consent of [a] prospective subject"; and (4) Article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), which provides that "no one shall be subjected without his free consent to medical or scientific experimentation."

The district court found that "non-consensual medical experimentation violates the law of nations and, therefore, the laws of the United States" and cited the Nuremberg Code for support. *Abdullahi III*, 2005 WL 1870811, at *9. * * * [But] It found that with the exception of the Nuremberg Code, these sources contain only aspirational or vague language lacking the specificity required for jurisdiction. *Id.* at *12-13. It also determined that because the United States did not ratify or adopt any of these authorities except the ICCPR, and because even the ICCPR is not self-executing, none of them create binding international legal obligations that are enforceable in federal court. *Id.* at *11-13. Finally, the district court concluded that the plaintiffs failed to provide a proper predicate for ATS jurisdiction because none of the sources independently authorizes a private cause of action and the inference of such a cause of action is a matter best left to Congress. *Id*. at *13-14.[8]

The district court's approach misconstrued both the nature of customary international law and the scope of the inquiry required by *Sosa*. It 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. But *Sosa*, as we have seen, requires a more fulsome and nuanced inquiry. Courts 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. By eschewing this inquiry, the district court did not engage the fact that norms of customary international law are "discerned from myriad decisions made in numerous and varied international and domestic arenas" and "[do] not stem from any single, definitive, readily identifiable source." *Flores*, 414 F.3d at 247-48.

The district court also inappropriately narrowed its inquiry in two respects. First, it

focused its consideration on whether the norm identified by the plaintiffs is set forth in conventions to which the United States is a party, and if so, whether these treaties are self-executing or executed by federal legislation. While adoption of a self-executing treaty or the execution of treaty that is not self-executing may provide the best evidence of a particular country's custom or practice of recognizing a norm, *see Flores*, 414 F.3d at 257, 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.

* * *

Second, the district court's consideration of whether each source of law creates binding legal norms failed to credit the fact that even declarations of international norms that are not in and of themselves binding may, with time and in conjunction with state practice, provide evidence that a norm has developed the specificity, universality, and obligatory nature required for ATS jurisdiction.

` * * *

In sum, 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. *See Sosa*, 542 U.S. at 732-35. We now proceed with such an examination.

* * *

i. Universality * * *

[B]oth the legal principles articulated in the trials' authorizing documents and their application in judgments at Nuremberg occupy a position of special importance in the development of bedrock norms of international law. United States courts examining the Nuremberg judgments have recognized that "[t]he universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts . . .—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*," from which no derogation is permitted, irrespective of the consent or practice of a given State.

* * *

[The] status [of the prohibition on nonconsensual experimentation] as a norm that states conceive as legally binding–and therefore part of customary international law–is confirmed by Article 2 of the accord, which requires that "[e]ach State Party . . . undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." ICCPR art. 2(1). The international community's recognition in the ICCPR of its obligation to protect humans, regardless of the source of the action, is powerful evidence of the prohibition's place in customary international law.

* * *

Currently, the laws and regulations of at least eighty-four countries, including the United States, require the informed consent of human subjects in medical research. That this conduct has been the subject of domestic legislation is not, of course, in and of itself proof of a norm. *See Flores*, 414 F.3d 249. However, the incorporation of this norm into

the laws of this country and this host of others is a powerful indication of the international acceptance of this norm as a binding legal obligation, where, as here, states have shown that the norm is of mutual concern by including it in a variety of international accords.

The history of the norm in United States law demonstrates that it has been firmly embedded for more than 45 years and–except for our dissenting colleague–its validity has never been seriously questioned by any court. Congress mandated patient-subject consent in drug research in 1962. Bassiouni et al., *supra*, at 1624 (citing 21 U.S.C. § 355(i) (1976)). In response, the FDA promulgated its first regulations requiring the informed consent of human subjects. Tellingly, the sources on which our government relied in outlawing non-consensual human medical experimentation were the Nuremberg Code and the Declaration of Helsinki, which suggests the government conceived of these sources' articulation of the norm as a binding legal obligation.

* * *

Additional international law sources support the norm's status as customary international law. The European Union embraced the norm prohibiting nonconsensual medical experimentation through a 2001 Directive passed by the European Parliament and the Council of the European Union. The Directive accepted the informed consent principles of the 1996 version of the Declaration of Helsinki.

* * *

Since 1997, thirty-four member States of the Council of Europe have also signed the Convention on Human Rights and Biomedicine, a binding convention and a source of customary international law. * * * In 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Universal Declaration on Bioethics and Human Rights, which requires "the prior, free, express and informed consent of the person concerned" for research-oriented treatments.

* * *

[T]he norm prohibiting nonconsensual medical experimentation on human subjects has become firmly embedded and has secured universal acceptance in the community of nations. Unlike our dissenting colleague's customary international law analysis, which essentially rests on the mistaken assumption that ratified international treaties are the only valid sources of customary international law for ATS purposes, *see* Dissent at 19-20, we reach this conclusion as a result of our review of the multiplicity of sources–including international conventions, whether general or particular, and international custom as identified through international agreements, declarations and a consistent pattern of action by national law-making authorities–that our precedent requires us to examine for the purpose of determining the existence of a norm of customary international law. Our dissenting colleague's reasoning fails to engage the incompatibility of nonconsensual human testing with key sources of customary international law identified in Article 38 of the ICJ's statute, most importantly international custom, as evidence of a general practice accepted as law, as well as the general principles of law recognized by civilized nations.

* * *

ii. Specificity * * *

The appellants allege that Pfizer knowingly and purposefully conducted such experiments on a large scale. Whatever uncertainty may exist at the margin is irrelevant here because appellants allege a complete failure on the part of Pfizer and the Nigerian government to inform appellants of the existence of the Trovan experiments. These allegations, if true, implicate Pfizer and the Nigerian government in conduct that is at the core of any reasonable iteration of the prohibition against involuntary medical experimentation. While the prohibition in question applies to the testing of drugs without the consent of human subjects on the scale Pfizer allegedly conducted, we do not suggest that it would extend to instances of routine or isolated failures by medical professionals to obtain informed consent, such as those arising from simple negligence. The allegations in the complaints involve anything but a doctor's routine or erroneous failure to obtain such consent from his patient.

* * *

iii. Mutual concern * * *

Customary international law proscribes only transgressions that are of "mutual" concern to States—"those involving States' actions performed . . . towards or with regard to the other." *Flores*, 414 F.3d at 249 (differentiating matters of "mutual" concern from those of "several" concern, in which "States are separately and independently interested"). Conduct that States have prohibited through domestic legislation is also actionable under the ATS as a violation of customary international law when nations of the world have demonstrated "by means of express international accords" that the wrong is of mutual concern. *Filartiga*, 630 F.2d at 888. An important, but not exclusive, component of this test is a showing that the conduct in question is "capable of impairing international peace and security." *Flores*, 414 F.3d at 249. Appellants have made both of these showings.

* * *

The success of these efforts 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. The administration of drug trials without informed consent on the scale alleged in the complaints directly threatens these efforts because such conduct fosters distrust and resistance to international drug trials, cutting edge medical innovation, and critical international public health initiatives in which pharmaceutical companies play a key role. This case itself supplies an exceptionally good illustration of why this is so. The Associated Press reported that the Trovan trials in Kano apparently engendered such distrust in the local population that it was a factor contributing to an eleven month-long, local boycott of a polio vaccination campaign in 2004, which impeded international and national efforts to vaccinate the population against a polio outbreak with catastrophic results. According to the World Health Organization, polio originating in Nigeria triggered a major international outbreak of the disease between 2003 and 2006,

causing it to spread across west, central, and the Horn of Africa and the Middle East, and to re-infect twenty previously polio-free countries.

The administration of drug trials without informed consent poses threats to national security by impairing our relations with other countries. Seven of the world's twelve largest pharmaceutical manufacturers – a group that includes Pfizer – are American companies. * * *As this case illustrates, the failure to secure consent for human experimentation has the potential to generate substantial anti-American animus and hostility.

* * *

B. State Action [*In this section of the opinion, the court proceeds to impose a State Action requirement under the ATS, relying solely on Kadic, a case concerning the conflict in Bosnia which discussed certain violations of international law that required state action, such as torture and extrajudicial killing. As Kadic didn't require state action for war crimes, and thus did not impose a blanket state action requirement for all violations of international law, it is unclear why the court here holds that state action is necessary under the ATS.* (*In fact, Kadic explicitly stated, "*We do not agree that the law of nations, as understood in the modern era, confines its reach to state action." Kadic v. Karadzic, 70 F.3 232, 239.) *However, the majority may have done this analysis purely to respond to the dissent, which maintains that there is no violation for nonconsensual medical experimentation by private actors; according to the dissent, a violation only arguably exists where there is nonconsensual medical experimentation by state actors.*]

* * *

WE SLEY, *Circuit Judge*, dissenting: * * *

The majority lists the norm at issue here as the prohibition of "medical experimentation on non-consenting human subjects," Maj. Op. at 15, and proceeds to analyze that norm without regard to the alleged violator, *see id.* at 15-40. Put another way, the majority's analysis would be no different if Plaintiffs had sued the Nigerian government, instead of, or in addition to, Pfizer. 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. The majority's analysis omits this critical consideration. As a result, the majority opinion presents only half of the equation. To my mind, the majority should have asked whether customary international law prohibits *private actors* from medical experimentation on non-consenting human subjects. That question must be answered in the negative.

* * *

A second, more fundamental problem with the majority's reliance on the Convention is that it was promulgated *after* the conduct at issue here. I know of no authority for an international ex post facto definition of the law of nations by later signed treaties. * * * The Convention is without import to this inquiry. Two other post-1996 sources cited by

the majority, the 2005 UNESCO Universal Declaration on Bioethics and Human Rights and the 2001 European Parliament Clinical Trial Directive share equal evidentiary irrelevance for the same reason.

* * *

Plaintiffs and the majority cite several multinational declarations, including the World Medical Association's Declaration of Helsinki and the International Ethical Guidelines for Research Involving Human Subjects promulgated by the Council for International Organizations of Medical Sciences ("CIOMS Guidelines"), as additional evidence that the prohibition against non-consensual medical experimentation applies to non-state actors. In doing so, the majority somehow overlooks our decisions in *Flores* and *Yousef*.

In *Flores*, plaintiffs sought to demonstrate customary international law by reference to multinational declarations. In response, we noted that a declaration, "which may be made by a multinational body, or by one or more States, customarily is a 'mere general statement of policy [that] is unlikely to give rise to . . . obligation[s] in any strict sense.'" 414 F.3d at 262 (quoting *1 Oppenheim's International Law* 1189 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1996)) (alterations in original). "Such declarations are almost invariably political statements – expressing the sensibilities and the asserted aspirations and demands of some countries ororganizations – rather than statements of universally-recognized legal obligations." *Id.* As a result, we concluded that "such declarations *are not proper evidence of customary international law*." *Id.* (emphasis added).

In *Flores*, the declarations we rejected were put forth by international governmental bodies, the Organization of American States and the United Nations Conference on Environment and Development. *Id.* at 263. Here, the two declarations embraced by the majority were put forward by entirely private organizations – hardly evidence of the state of international law.

* * *

Treating these well-meaning, aspirational, but private, declarations as sources of international law runs counter to our observation in *Yousef* that "no private person – or group of men and women such as comprise the body of international law scholars – *creates* the law." 327 F.3d at 102. This is so for good reason. As we have seen in our ATS jurisprudence, international custom gives rise to legally enforceable obligations. To include the political statements of private organizations in the select and conscribed group of sources capable of creating international law would enfranchise non-democratic, unaccountable entities with governmental authority. As a result, these declarations are "not proper evidence of customary international law." *Flores*, 414 F.3d at 262.

* * *

The majority also points to the great number of states that, in their respective domestic laws, require informed consent in medical research. That many countries have prohibited private actors from conducting medical experiments or treatments without informed consent is certainly commendable and worthy of praise, but not "significant or relevant for purposes of customary international law." *See Flores*, 414 F.3d at 249. For it is only

when states prohibit domestic action as a result of "express international accords" that a wrong becomes a violation of customary international law.

* * *

My colleagues contend that the [Nuremberg] Code flowed naturally from the principles of law espoused in the London Charter. * * * However, the majority overlooks the fact that the Nuremberg Code dealt not with these general principles of law, but instead with the very specific issue of permissible medical experimentation. The ethical principles espoused in the Code had no forebears in either the London Charter or the judgment of the International Military Tribunal. They were developed exclusively in the Medical Case. * * *

[T]he Code was developed by the United States military and announced by an American military court. *See United States v. Stanley*, 483 U.S. 6 669, 687 (1987) (Brennan, J., dissenting). Certainly, the Code is not a treaty and did not immediately bind any state. Under the framework of the ICJ Statute – and, accordingly, this Court – because it was part of a criminal verdict, its closest analogue is a judicial decision, but judicial decisions are only "subsidiary," rather than primary, sources of customary international law.

* * *

Conscious of our obligation to measure the weight of the sources of international law in the aggregate, what is the sum of the sources that serve as the cornerstone of the majority's conclusion? The ICCPR, characterized by the Supreme Court as being of "little utility," *Sosa*, 542 U.S. at 734, which, in any event, does not apply to private actors; a pair of private organizations' declarations that our Circuit precedent tells us "are not proper evidence of customary international law," *Flores*, 414 F.3d at 262; one regional convention and two multi-national declarations that post-date the critical time period and are thus completely irrelevant; states' domestic laws untethered to any international agreement that we are told is not "significant or relevant for purposes of customary international law," *id.* at 249; and the Nuremberg Code, a document whose evidentiary value is unclear.

* * *

The fact that medical experimentation by private actors is not a subject of customary international law does not end the inquiry. If international law supports state liability but not private liability, a private actor may still be liable if he or she "acted under color of law." In that regard, we are told to employ our 42 U.S.C. § 1983 jurisprudence in the inquiry. *See Bigio*, 239 F.3d at 448; *Kadic*, 70 F.3d at 245. As an initial matter, this requires that the law of nations includes a norm actionable against states, which, in the instant case, is far from certain. But even assuming, for argument's sake, that international law prohibits states from conducting non-consensual medical tests, Plaintiffs have not demonstrated that Pfizer acted under the color of law.

* * *

As we recently stated, when confronted with a motion to dismiss, it "is not enough . . . for a plaintiff to plead state involvement in *some activity* of the institution alleged to have

inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with the *activity that caused the injury* giving rise to the action." *Sybalski v. Indep. Group Home Living Program, Inc.*, 546 F.3d 255, 257-58 (2d Cir. 9 2008) (internal quotations omitted).

Here, that activity was not, as the majority apparently concludes, conducting the Trovan trials in general, but rather administering the drug without informed consent. Although Plaintiffs allege that the Nigerian government requested the import of Trovan and arranged for Pfizer's accommodations and some medical staff in Kano, they do not allege that the government or any government employee played any role in either administering Trovan without consent or deciding to do so in the first instance.

* * *

Plaintiffs' allegations paint a vivid picture of the unspeakable pain and suffering of dozens of innocent children. The issue on this appeal, however, is not whether Pfizer's conduct was "wrong," or even whether it is legally actionable, but whether it falls within both the "narrow class" of international norms for which ATS jurisdiction exists, and the even smaller subset of those norms actionable against non-state actors. Our Court and the Supreme Court have made it pellucidly clear that ATS jurisdiction must be reserved only for acts that the nations of the world collectively determine interfere with their formal relations with one another – including those rare acts by private individuals that are so serious as to threaten the very fabric of peaceful international affairs. I cannot agree with my colleagues that Pfizer's alleged conduct poses the same threat or is so universally and internationally proscribed as to fit within that narrow class.

I respectfully dissent.