05-4863-cv(L),
05-6768-cv (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RABI ABDULLAHI, individually and
as the natural guardian and personal representative
of the estate of her daughter, LUBABATAU ABDULLAHI,
[List of Plaintiffs/Appellants continues on first page]
Plaintiffs/Appellants,
v.

PFIZER, INC.,
Defendant/Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE,
URGING AFFIRMANCE

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May 24, 2006

SALISU ABULLAHI, individually and as the natural guardian and personal representative of the estate of his son ABULLIAHI {MANUFI} SALISU; ALASAN ABDULLAHI, individually and as the natural guardian and personal representative of the estate of his daughter FIRDAUSI ABDULLAHI; ALI HASHIMU, individually and as the natural guardian and personal representative of the estate of his daughter SULEIMAN; MUHAMMADU INUWA, individually and as the natural guardian and personal representative of the estate of his son ABDULLAHI M. INUWA; MAGAJI ALH LADEN, individually and as the natural guardian and personal representative of the estate of his son KABIRU ISYAKU; ALHAJI MUSTAPHA, individually and as the natural representative and personal representative of the estate of his daughter ASMA'U MUSTAPHA; SULEIMAN UMAR, individually and as the natural guardian and personal representative of the estate of his son BUHARI SULEIMAN; SAINAB ABDU, a minor, by her mother and natural guardian, HAJA ABDULLAHI; HAJA ABDULLAHI, individually; FIRDAUSI ABDULLAHI, a minor, by her father and natural guardian ABDULLAHI MADAWAKI; ABDULLAHI MADAWAKI, individually; SANI ABDULLAHI, a minor, byhis father and natural guardian, SANI ABDULLAHI; ABDULLAHI ADO, a minor, by his mother and natural guardian, AISHA ADO; AISHA ADO, individually; ABDUMAJID ALI, a minor, by his father and natural guardian, ALHAJI YUSUF ALI; NURA MUHAMMED ALO, a minor, by his father and natural guardian, MUHAMMED ALI; MUHAMMED ALI, individually; UMAR BADAMASI, a minor, by his father natural guardian, MALAM BADAMASI ZUBAIRU; MALAM BADAMASI ZUBAIRU, individually; MUHAMMADU FATAHU DANLADI, a minor, by his father and natural guardian, ALHAJI DANLADI IBRAHAM; ALHAJI DANLADI IBRAHAM, individually; DALHA HAMZA, a minor, by his father and natural guardian, MALAM HAMZA GWAMMAJA, MALAM GWAMMAJA, individually; TASIU HARUNA, a minor, by his guardian MUKHTAR SALEH; MUKHTAR SALEH, individually; MUHYIDDEEN HAASAN, a minor, by his father and natural guardian, TIJJANI HASSAN; TIJJANI HASSAN, individually; KAWU ADAMU IBRAHIM, a minor, by his father and natural guardian, MALAM ABAMUS IBRAHAM ADAMU; ALHAJI IBRAHIM HARUNA, individually; MALLAM IDRIS, individually; YUSUF IDRUS, a minor, by his father and natural guardian, IDRAS UMAR; IDRAS UMAR, individually; HAFSAT ISA, a minor, by her father and natural guardian, ISA MUHAMMED ISA; ISA MUHAMMED ISA, individually; TAJU ISA, a minor, by her father and natural guardian, MALAM ISA USMAN; MALAM ISA USMAN, individually; HADIZA ISYAKU, a minor, by her father and natural guardian, ISYAKI SHUAIBU; ISYAKU SHUAIBU, individually; ZAHRA'U JAFARU, a minor, by her father and natural guardian, JAFRU BABA; JAFARU BABA, individually; ANAS MOHAMMED, a minor, by his father and natural guardian, MALAM MOHAMMED; MALAM MOHAMMED, individually; NAFISATU MUHAMMED, a minor, by her mother and natural guardian, YAHAWASU MUHAMMED; YAHAWASU MUHAMMED, individually; MUHSINU TIJJANI, a minor, by his father and natural guardian, TIJJANI HASSAN; ALHAJI YUSUF ALI; MARYAM IDRIS, a minor, by her father and natural

guardian, MALAM IDRIS; AJUDU ISMAILA ADAMU, individually and as parent and natural guardian of YAHAYA ISMAICA, minor; MALAM MOHAMMED, individually and as parent and natural guardian of BASHIR MOHAMMED, minor; MALAM USAB YA'U AMALE, individually and as parent and natural guardian of SUYUDI YUSALS YU'A, minor; MALASM HARUNA ADAMU, individually and as parent and natural guardian of MOHAMMED TASI'U HARUNA, minor; ZANGON KWAJALAWA, individually and as parent and natural guardian of NURUDDIM DAUDA, minor; MALAM DAHAURU YA'Y, individually and as parent and natural guardian of RABI DAHURU, minor, and as parent and natural guardian of ZAINAB MUSA DAHURU, minor; ZANGON MARIKITA, individually and as parent and natural guardian of ISMAILA MUSA, minor; ARHAJI MUHAMMAD SOJA, individually and as parent and natural guardian and personal representative of Estate of HAMAZA ACHAJI MUHAMMAD, minor, deceased; ACHAJI IBRAHIM DANKWALBA, individually and as parent and natural guardian and personal representative of Est. of ABDULLAHI IBRAHIM, minor; MALLAM LAWAN, individually and as parent and natural guardian and personal representative of Est. of AISHA LAWAN, minor, deceased; ALHAJI MUHAMMED TSOHON SOJO, individually and as parent and natural guardian and personal representative of Est. of UNNI ALHASI MUHAMMED, minor; ISMAILA ZUBAIRUI, individually and as parent and natural guardian and personal representative of Est. of MUSTAPHA ZUBAIRU, minor, deceased; ABUBAKER MUSA, individually and as parent and natural guardian of SA'ADATU MUSA, minor; MOHAMED ABDU, individually and as parent and natural guardian of HARUNA ABDU, minor; MALLAM HASSAN, individually and as parent and natural guardian and personal representative of Est. of SADIYA HASSAN, minor, deceased; MALLAM YAKUBU UMAR, individually and as parent and natural guardian of UMAR, minor; MALLAM SAMAILA, individually and as parent and natural guardian of ADAMU SAMALIA, minor; MUSA YAHAYA, individually and as parent and natural guardian of YUKHASA MUSA, minor; AUDU ISMAILIA ADAMU, individually and as parent and natural guardian of YASHAYA SAMAILA; MALLAM MUSA DAHIRO, individually and as parent, and MALAM MUSA ZANGO, individually and as parent and natural guardian of SAMAILA MUSA, minor; MALLAM ALHASSAN MAIHULA, individually and as a parent and natural guardian of NAJIB MAIHULA, minor; MALLAM ABDULLAH GAMA, individually and as parent and natural guardian of DANKUMA GAMA, minor; DAUDA NUHU, individually and as parent and natural guardian and personal representative of Est. of HAMISU NUHU, minor, deceased; MALLAM ABDULLAHI, individually and as parent and natural guardian and personal representative of Est. of NAJARATU ABDULLAHI, minor, deceased; MALLAM UMARU MOHAMMED, individually and as parent and natural guardian and personal representative of Est. of SULE MOHAMMED, minor, deceased; MALLAM NASIRU, individually and as parent and natural guardian and personal representative of Est. of YUSIF NASIRU, minor, deceased; YUSUF MUSA, individually and as parent and natural guardian and personal representative of Est. of NAFISATU MUSA, minor, deceased; MALLAM MURITALA, individually and as parent and natural guardian and personal representative of Est. of UMARU MURITALA,

minor, deceased; MALLAM TANKO, individually and as parent and natural guardian and personal representative of Est. of MEDINA TANKOL, minor, deceased; MALAM KABIRU MOHAMED, individually and as parent and natural guardian and personal representative of Est. of KABIRU MOHAMED, minor, deceased; MALLAM SULE ABUBAKAR, individually and as parent and natural guardian and personal representative of Est. of FATIMA ABUBAKER, minor, deceased; MALLAM IDRIS, individually and as parent and natural guardian and personal representative of Est. of BABA IDRIS, minor, deceased; MALLAM MOHAMED BASHIR, individually and as parent and natural guardian and personal representative of Est. of SANI BASHIR, minor, deceased; IBRAHIM, individually and as parent and natural guardian and personal representative of Est. of HASSAN IBRAHIM, minor, deceased; ALHAJI SHUAIBU, individually and as parent and natural guardian and personal representative of Est. of MASJBATU SHUAIBU, minor, deceased; MALLAM ABDULLAHI SALE, individually and as parent and natural guardian and personal representative of Est. of SHAMISIYA SALE, minor, deceased; MALLAM IBRAHIM AMYARAWA, individually and as parent and natural guardian and personal representative of Est. of YAHAYA IBRAHIM, minor, deceased; MALLAM ABDU ABUBAKER, individually and as parent and natural guardian and personal representative of Est. of NASITU ABUBAKER, minor, deceased; MALLAM YUSUF, individually and as parent and natural guardian and personal representative of Est. of HODIZA YUSUF, minor, deceased; MALLAM DAUDA YUSUF, individually and as parent and natural guardian and personal representative of Est. of ABUBAKER SHEU, minor, deceased; MALIAM MOHAMMED SHEU, individually and as parent and natural guardian and personal representative of Est. of MUSTAPHA YAKUBU, minor, deceased; ALHAJI UBA, individually and as parent and natural guardian and personal representative of Est. of MARYAM UBA, minor, deceased; MALLAM MOHAMADO JABBO, individually and as parent and natural guardian of AUWALU MOHAMADO; and MALLAM ABDULLAH ADAMU, individually and as parent and natural guardian and personal representative of Est. of ABDULLAH ADAMU, minor,

Plaintiffs/Appellants.

v.

PFIZER, INC.,

Defendant/Appellee.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation nor any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE, URGING AFFIRMANCE

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set forth more fully in the accompanying motion for leave to file this brief. WLF is a public interest law and policy center with supporters in all 50 states, including many in New York. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to opposing litigation designed to create private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of allegedly customary international law into the domestic law of the United States. *See, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003). WLF is concerned that an overly expansive interpretation of the ATS would threaten to undermine American foreign and domestic policy interests.

WLF addresses the following issue only: whether the complaint

adequately invokes the jurisdiction of the federal courts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. WLF addresses neither the choice-of-law issue nor whether the district court properly dismissed the complaint on the ground of *forum non conveniens*.

STATEMENT OF THE CASE

This case arises from claims by citizens of Nigeria that they were injured as a result of allegedly deficient medical care. The Plaintiffs were treated by a team of doctors sent by Defendant Pfizer Inc. to Nigeria in response to a severe outbreak of meningitis. They allege that Pfizer failed to inform them that they were to be treated with Trovan, which Plaintiffs describe as a "new, untested, and unproven" antibiotic, and that they would not have consented to treatment had they been aware of Trovan's unapproved status. They further allege that Pfizer's sole purpose in providing medical assistance was to collect data that would speed Food and Drug Administration (FDA) approval of Trovan for pediatric uses. They further allege that Pfizer conducted its medical treatment in conjunction with the Nigerian government.

One group of plaintiffs (the "*Abdullahi* Plaintiffs") filed suit in August 2001 in U.S. District Court for the Southern District of New York, alleging a cause of action against Pfizer under the Alien Tort Statute (ATS), 28 U.S.C.

§ 1350. They allege that Pfizer's conduct is actionable as a violation of customary international law. A second group of plaintiffs (the "*Adamu* Plaintiffs") filed suit in November 2002 in U.S. District Court for the District of Connecticut, raising similar claims. The second suit was transferred to the Southern District of New York as a related case. This appeal is a consolidated appeal from dismissal of both actions.

The district court dismissed the complaint of the *Abdullahi* Plaintiffs on August 9, 2005 for failure to state a claim under the ATS. The court held that to state a claim under the ATS, a plaintiff must allege violation of a "clear and unambiguous" rule of customary international law. Slip Op. 18 (quoting *Filartiga v. Pena-Irala,* 630 F.2d 876, 884 (2d Cir. 1980)). The court held that none of the documents cited by Plaintiffs – including the Nuremberg Code, the Declaration of Helsinki, guidelines authored by the CIOMS, article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), and the Universal Declaration of Human Rights – provided the requisite "clear and unambiguous" rule. *Id.* 19-23. The court said, "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.*[1]

On November 8, 2005, the district court dismissed the complaint of the *Adamu* Plaintiffs for lack of subject matter jurisdiction under the ATS, the Connecticut Unfair Trade Practices Act, and the Connecticut Products Liability Act. The Court incorporated by reference the discussion of the ATS contained in its August 9, 2005 order dismissing the claims of the *Abdullahi* Plaintiffs and concluded that "none of the sources of international law that Plaintiffs advance provide a proper predicate for jurisdiction under the ATS." Slip Op. 9. The court added that if it had had jurisdiction over the Plaintiffs' claims, it would have dismissed them under the doctrine of *forum non conveniens*. *Id.* 17-18.

SUMMARY OF ARGUMENT

WLF agrees with each of the arguments raised by Pfizer in its appellate brief. WLF writes separately to emphasize just how large a sea change in ATS jurisprudence was effected by the Supreme Court's decision in *Sosa*. Specifically, while accepting *Filartiga*'s ultimate conclusion (that the ATS provides federal court jurisdiction over claims of official torture in violation of customary

[1] The court went on to hold in the alternative that the Nigerian courts constituted an adequate alternative forum for Plaintiffs' claims and thus that the complaint should be dismissed under the doctrine of *forum non conveniens*. *Id.* 24-31.

international law), the Supreme Court rejected much of the theoretical underpinnings of the Second Circuit's pre-*Flores* ATS jurisprudence. *See Flores v. South Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003). Under the ATS standards established by *Sosa*, the district court's dismissal of Plaintiffs' ATS claims was fully justified.

Before *Sosa*, there existed three principal schools of thought regarding the scope of the ATS. One view, espoused by the Ninth Circuit, held that the ATS not only granted federal courts jurisdiction to hear claims by aliens sounding in tort and alleging violations of the law of nations, but also created a federal private right of action by aliens alleging injury as a result of such violations. This Court, in *Filartiga*, adopted a slightly different approach, but one that had few practical differences from the Ninth Circuit approach. *Filartiga* held not that the ATS itself created any new causes of action, but that it simply opened the federal courts for adjudication of rights "already recognized by international law." *Filartiga*, 630 F.2d at 887. *Filartiga* assumed that the federal common law automatically made actionable those rights clearly recognized by international law. *Id.* at 886-87.[2] The third school of thought (often associated with the D.C. Circuit) held that while the ATS opened the federal courts to

[2] The Court's later decision in *Flores* cut back somewhat on *Filartiga*.

actions based on a limited number of 18th-century international law violations, the ATS did not authorize the federal courts to recognize new private rights of actions based on evolving standards of customary international law; rather, any such recognition must be initiated by Congress.

The Supreme Court in *Sosa* did not fully endorse any of those three schools of thought, but the position it adopted was far closer to the D.C. Circuit approach than to the approaches espoused by *Filartiga* and the Ninth Circuit. *Sosa* flatly rejected the Ninth Circuit's view that the ATS created any causes of action, deeming that view "implausible." *Sosa*, 542 U.S. at 713. Moreover, it also rejected *Filartiga*'s position that because (in this Court's view) customary international law is fully incorporated into a federal common law, alleged violations of clearly established customary international law are actionable in federal court. Instead, while holding open the possibility that there might exist additional federal common law rights of action over which courts may exercise ATS jurisdiction (in addition to the three actions recognized in 1789), *Sosa* held that federal courts should exercise "great caution" in recognizing *any* such rights. *Id.* at 728. A principal reason for exercising caution was the Court's recognition that nearly a century ago, it had rejected the view that there exists *any* federal "general" common law. *Id.* at 726. *Sosa* explained that a decision to create a

federal cause of action is one better left to the judgment of Congress instead of the courts. *Id.* at 727.

While not confirming the existence of any additional federal common law causes of action under the ATS, *Sosa* established the following minimum pre-requisite: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was adopted" – *i.e.*, violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 732. Because the *Sosa* plaintiff could not meet even that minimum standard, the Court rejected his ATS claims without examining other factors relevant to the determination of whether to recognize a private right of action under federal common law.[3]

The Court nonetheless made clear that an allegation that the defendant has violated a clearly defined and universally accepted international law standard is

[3] The Court was unanimous in rejecting the plaintiff's claims. Three justices who concurred in the judgment would have adopted Judge Bork's view: that the Court should not recognize any federal common law rights of action beyond those recognized in the 18th century. *Id.* at 739-51 (Scalia, J., concurring in part and concurring in the judgment). The majority, while agreeing with the concurrence that "great caution" should be exercised in recognizing new common law rights, said that it was unwilling "to shut the door on the law of nations entirely." *Id.* at 728, 731.

not by itself sufficient to establish an actionable federal common law right under the ATS. Rather, the Court stated that the necessary "great caution" requires federal courts, before recognizing such a right, to consider, among other factors: whether the plaintiff has exhausted remedies in the courts of the country in which the injury occurred; and "the practical consequences" of such recognition.

WLF respectfully suggests that each of these factors counsels against recognition of the federal common law cause of action that Plaintiffs seek to establish based on Pfizer's alleged mistreatment of its patients. As Pfizer fully demonstrates, none of the alleged sources of international law upon which Plaintiffs rely supports ATS jurisdiction. Those sources do little more than establish aspirational goals regarding medical ethics; there is simply no evidence that any of those goals have been universally adopted by the world as binding norms. Moreover, Plaintiffs can point to no language in any of those sources that explicitly prohibits any of the conduct in which Pfizer is alleged to have engaged. Indeed, the sources upon which Plaintiffs rely focus almost exclusively on non-therapeutic, experimental research. They have limited relevance to the facts alleged here: a defendant accused of failing to obtain informed consent before providing treatment to patients admittedly suffering from serious diseases and thus in need of treatment. Not surprisingly, Plaintiffs can point to no cases

that have permitted ATS claims to proceed based on facts even remotely similar to those present here.

The parties disagree regarding whether Plaintiffs have adequately alleged state action, with both sides acknowledging that the courts have been less willing to recognize ATS jurisdiction when state action is absent. WLF respectfully submits that, regardless whether state action has been adequately pled, the complaint does not adequately invoke ATS jurisdiction for the additional reason that "the nations of the world have not demonstrated that [the alleged] wrong is of mutual, and not merely several, concern." *Flores,* 414 F.3d at 249 (citations omitted). A defendant alleged to have provided substandard medical treatment to 187 patients in a single country may have violated the municipal law of that country, but the nations of the world have never indicated that such isolated violations are a matter of "mutual concern" to the world community based on, for example, a concern that the violations are "capable of impairing international peace and security." *Id.*

The other *Sosa* factors also counsel against recognition of Plaintiffs' proposed federal common law private right of action. For example, as the district court found, the courts of Nigeria are an adequate forum for Plaintiffs' claims, and thus Plaintiffs' failure to exhaust remedies in the courts of Nigeria (where

the alleged misconduct took place) before filing suit in the United States should be deemed fatal to their ATS claims. *Sosa*, 542 U.S. at 733 n.21. Accordingly, Plaintiffs' inappropriate choice of a United States forum (without first exhausting remedies) mandates dismissal of Plaintiffs' ATS claims for lack of subject matter jurisdiction, without any need to consider whether the same set of circumstances warrants application of the *forum non conveniens* doctrine.

Consideration of "practical consequences" also counsels against recognition of Plaintiffs' proposed federal common law cause of action. First, all would agree that Africa – a continent regularly plagued by infectious disease epidemics – is greatly in need of increased medical assistance for which it lacks the resources to pay. A likely source of such *pro bono* aid is large pharmaceutical companies such as Pfizer. Recognizing ATS jurisdiction in suits such as this one, in which the adequacy of consent received from patients is being second-guessed despite the superior clinical results achieved, will likely discourage pharmaceutical companies from providing such aid in the future.

Perhaps more important are the "practical consequences" with respect to the practice of medicine within the United States. Plaintiffs' proposed cause of action would not limit ATS claims to those arising overseas. If the federal common law is deemed to recognize a cause of action for medical care alleged to

be inadequate under international law standards, then both aliens and U.S. citizens will be permitted to file such claims based on medical care provided in the United States. Aliens could invoke federal court jurisdiction under the ATS, while U.S. citizens could invoke general federal question jurisdiction, 28 U.S.C. § 1331. Before recognizing Plaintiffs' proposed cause of action, the Court should seriously consider whether it really wants to federalize medical malpractice law in this manner.

ARGUMENT

I. *Sosa* Represents a Major Departure from Previous Second Circuit Interpretations of the ATS

This Court's 1980 *Filartiga* decision revived interest in the ATS as a vehicle for enforcing international human rights law. The increased number of suits filed under the ATS led the Supreme Court to review and decide *Sosa* in 2004, to provide guidance to the lower courts regarding the meaning of that statute. Plaintiffs insist that in *Sosa*, "the Supreme Court endorsed this Circuit's approach" to interpreting the ATS. Appellants Br. 17. That claim is a major mischaracterization of *Sosa*, which adopted an interpretation of the ATS fundamentally at odds with *Filartiga*.

WLF believes that the district court's dismissal of Plaintiffs' claims should

be affirmed even under the *Filartiga* approach. WLF is submitting this brief, however, in order to emphasize just how much a sea change in ATS jurisprudence was effected by *Sosa*.

A. Before *Sosa*, Federal Appeals Courts Adopted Three Distinct Approaches to Claims Raised Under the ATS

Before *Sosa*, there existed three principal schools of thought regarding the scope of the ATS.[4] One view, espoused by the Ninth Circuit, held that the ATS not only granted federal courts jurisdiction to hear claims by aliens sounding in tort and alleging violations of the law of nations, but also created a federal private right of action by aliens alleging injury as a result of such violations. *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994) (ATS "creates a cause of action for violations of specific, universal and obligatory international human rights standards"), *cert. denied*, 513 U.S. 1126 (1995); *Doe v. Unocal Corp.,* 395 F.3d 932, 944 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003).

This Court, in *Filartiga*, adopted a slightly different approach, but one that had few practical differences from the Ninth Circuit approach. *Filartiga* held not

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[4] The ATS, 28 U.S.C. § 1350, enacted as part of the First Judiciary Act of 1789, 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.

that the ATS itself created any new causes of action, but that it simply opened the federal courts for adjudication of rights "already recognized by international law." *Filartiga*, 630 F.2d at 887. *Filartiga* assumed that the federal common law automatically made actionable those rights clearly recognized by international law. *Id.* at 886-87. The Court held that a violation of the law of nations, actionable under the ATS, arises "'when there has been a violation of those standards, rules, or customs (a) affecting the relationship between states or between individuals and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.'" *Id.* at 888 (quoting *IIT v. Vencap*, 519 F.2d 1001, 1015 (2d Cir. 1975)).[5]

In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), the District of Columbia Circuit explicitly rejected the *Filartiga* approach, albeit no single rationale for doing so garnered majority support. Judge Robert Bork's concurring opinion in *Tel-Oren* was later widely championed by those who disagreed with *Filartiga*; his opinion marked a third, distinct school of thought

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[5] The Court's later decision in *Flores* appears to have cut back somewhat on *Filartiga*. In rejecting the plaintiff's request that the Court recognize a right of action based on violation of customary international law relating to "intranational pollution," *Flores* imposed strict limits on the types of evidence acceptable for establishing that customary international law is both definite and universally adhered to by civilized nations, and thus actionable. *Flores,* 414 F.3d at 255-266.

regarding the scope of the ATS. *Tel-Oren*, 726 F.2d at 798-823 (Bork, J., concurring). *See, e.g.,* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815 (1997). Judge Bork wrote that while the ATS opened the federal courts to actions based on a limited number of 18th-century international law violations, the ATS did not authorize the federal courts to recognize new private rights of actions based on evolving standards of customary international law; rather, any such recognition must be initiated by Congress. *Tel-Oren*, 726 F.3d at 811, 813-14 (Bork, J., concurring). *See also, Al Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd and remanded on other grounds sub nom., Rasul v. Bush*, 542 U.S. 466 (2004).

B. *Sosa* Rejected *Filartiga*'s View That All Violations of Clearly Established Customary International Law Should Be Actionable Under the ATS

The Supreme Court in *Sosa* did not fully endorse any of those three schools of thought, but the position it adopted was far closer to the *Tel-Oren* approach than to the approaches espoused by *Filartiga* and the Ninth Circuit. *Sosa* flatly rejected the Ninth Circuit's view that the ATS created any causes of action, deeming that view "implausible." *Sosa*, 542 U.S. at 713.

Sosa also rejected *Filartiga*'s view that the ATS made actionable all vio-

lations of clearly established international law. *Sosa* held that when Congress adopted the ATS in 1789, it contemplated that the statute granted jurisdiction over only three very limited causes of action recognized by federal common law: suits alleging violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 715, 720, 724. The Court also recognized that "'United States courts apply international law as a part of our own *in appropriate circumstances*.'" *Id.* at 729-30 (emphasis added) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). Thus, for example, the federal courts have long consulted customary international law to provide a rule of decision "'in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . .; [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills.'" *Id.* at 715 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 67 (1769)). But *Sosa* recognized that such use of international law was a far cry from providing private rights of action for violations of international law by establishing such law as a part of the federal common law; and while *Sosa* held open the possibility that there may exist additional federal common law rights of action over which courts may exercise ATS jurisdiction, it held that federal courts should exercise "great caution" in recognizing any such rights. *Id.* at 728.

Sosa also rejected the view, associated with the D.C. Circuit, that it was *solely* up to Congress to recognize new causes of action for which the ATS provides jurisdiction. But while the Court said it was unwilling to "shut the door to the law of nations entirely," *id.* at 731, the Court's expressed caution in recognizing *any* new private rights of action under the ATS places *Sosa* far closer to the D.C. Circuit's view of the ATS than to *Filartiga*'s view. *See, e.g., id. at* 729 ("[T]he judicial power should be exercised on the understanding that the door is still ajar *subject to vigilant doorkeeping*, and thus open to a *narrow class* of international norms today.") (emphasis added).[6]

The Court articulated numerous reasons why federal courts should exercise "great caution" before recognizing such private rights of action. Among the reasons given: (1) the modern-day acceptance of Oliver Wendell Holmes's view that the common law does not have an independent, transcendental existence (the 18th-century view) but rather only comes into being when created by a judge; (2) the Supreme Court's rejection (in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938)), of the view that there exists any federal "general" common law; (3) a

[6] The only federal common law private cause of action under the ATS even arguably embraced by *Sosa* is one for violation of customary international law against official torture. *Id.* at 732 (quoting *Filartiga*'s observation that "for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.").

decision to create a private cause of action is one better left to legislative judgment; (4) creation of ATS causes of action can have significant collateral consequences on U.S. foreign relations, a subject normally left to the discretion of the elected branches of government; and (5) the federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 725-28.

While not confirming the existence of *any* additional federal common law causes of action under the ATS, *Sosa* established the following *minimum* pre-requisite: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was adopted" – *i.e.*, violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 732. Although that standard arguably is not significantly stricter than the one established by *Filartiga*, *Sosa* went on to articulate numerous other factors, not contemplated by *Filartiga*, that federal courts must take into account before recognizing federal common law rights of action under the ATS. The Court stated that the necessary "great caution" requires federal courts, before recognizing such a right, to consider, among other factors: whether the plaintiff has exhausted remedies in the courts of the country

in which the injury occurred; and "the practical consequences" of such recognition. *Id.* at 732-33 & n.21.[7] The Court thereby made clear that federal common law private rights of action based on alleged violations of customary international law are not nearly as broad as was suggested by *Filartiga* and the Second Circuit's other *pre-Flores* ATS decisions.

II. Plaintiffs Come Nowhere Close To Meeting *Sosa*'s Strict Standard for Establishing a Federal Common Law Right of Action

One searches Plaintiffs' brief in vain for any recognition of the important

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[7] *Sosa* articulated another factor that should inform the private-right-of-action decision in appropriate cases: whether "deference to the political branches" requires nonrecognition of a right of action. *Id.* at 733. When the political branches explicitly tell a court that recognition of an ATS right of action would undermine U.S. foreign policy interests, the case for nonrecognition of a right of action is overwhelming. *See, e.g., In Re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). But even here, where the political branches have not weighed in directly, this factor cuts somewhat in Pfizer's favor. Although Congress has created a private right of action for other violations of customary international law (such as official torture; *see* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 *note*), there is no indication from Congress that it intended to create the private right of action Plaintiffs propose. In the absence of any such evidence and in light of *Sosa*'s reminder that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," 542 U.S. at 727, the deference factor weighs against recognition of a private right of action.

In *Sosa* itself, the plaintiff was unable to meet even the first standard – establishing that the alleged conduct violated an international norm with clear content and universal acceptance among civilized nations – and thus the Court had no occasion to examine whether the other three factors would independently bar the plaintiff's ATS cause of action.

limiting principles set forth in *Sosa*. Plaintiffs fail to acknowledge *Sosa*'s admonition that courts should use "great caution" in adapting the law of nations to private rights. They phrase the issue presented as whether (based on the allegations set forth in the complaint) Pfizer has "violate[d] customary international law" and assert that the ATS "provides jurisdiction over claims brought by an alien alleging violations of international common law," Appellants Br. 1, 11 – totally ignoring *Sosa*'s admonition that the relevant focus is on the federal common law and whether, based on all the factors cited above, an alleged violation of international law fits within the "narrow class" of international norms, *id.* at 729, for which the federal common law is willing to recognize a private right of action.[8] They make no effort to explain why it would be appropriate for the courts essentially to federalize medical malpractice law, despite *Sosa*'s warning that "a decision to create a private right of action is one better left to legislative judgment *in the great majority of cases*." *Id.* at 727

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[8] Plaintiffs quote *Kadic* to the effect that there are only three prerequisites to an ATS cause of action: (1) the plaintiff must be an alien; (2) the cause of action must be for a tort; and (3) the tort must be committed in violation of the law of nations, or treaty of the United States. Appellants Br. 14 (citing *Kadic v. Karadzic,* 70 F.3d 232, 238 (2d Cir. 1999)). As explained above, *Kadic* has been superseded on the third point by *Sosa*, which mandates a focus on *all* the factors that go into recognition of a private right of action under federal common law, not simply on an examination of the law of nations.

(emphasis added).

Plaintiffs' failure to come to grips with *Sosa* has an obvious explanation: their complaint comes nowhere close to meeting *Sosa*'s strict standard for establishing a federal common law right of action. Perhaps most tellingly, Plaintiffs have been unable to point to a single federal court decision that recognizes an ATS cause of action that is even remotely similar to the medical misconduct cause of action they have pled.

A. The Federal Courts Lack ATS Jurisdiction Over Plaintiffs' Claims Because They Failed to Exhaust Remedies in the Courts of Nigeria

Sosa identified, as a factor relevant to creation of a federal common law private right of action under the ATS, whether the claimant has "exhausted any remedies available in the domestic legal system" – in this case, the legal system of Nigeria. *Id.* at 733 n.21. The Court noted that the European Commission, in an *amicus curiae* brief urging rejection of an ATS private right of action in that case, had asserted that such exhaustion is required by "basic principles of international law." *Id.* (citing I. Brownlie, *Principles of Public International Law* 472-81 (6th ed. 2003).

It is uncontested that none of the Plaintiffs have exhausted efforts to obtain relief in the courts of Nigeria. The *Abdullahi* Plaintiffs have sought *no* such

relief. The *Adamu* Plaintiffs in 2001 filed claims in the High Court in Kano, Nigeria, *Zango v. Pfizer International, Inc.,* Case No. FHC/K/CS/204/2001, but they later voluntarily dismissed their claims and filed a new suit in federal district court in Connecticut. The district court found that Nigeria is an "adequate alternative forum" in light of the *Zango* proceedings and thus dismissed both cases on *forum non conveniens* grounds.

The "adequate alternative forum" finding is fatal to Plaintiffs' ATS claims. There can be no justification for expanding federal court jurisdiction to encompass the novel private right of action proposed by Plaintiffs when they have failed to avail themselves of an opportunity to raise their claims initially in a more appropriate judicial forum that the district court determined to be "adequate." As the United Nations has confirmed, "That the exhaustion of local remedies is a well-established rule of customary international law is not disputed. It has been affirmed by the decisions of international and national courts, bilateral and multilateral treaties, State practice, codification attempts by governmental and non-governmental bodies and the writing of jurists." Second Report on Diplomatic Protection, U.N. General Assembly Doc. A/CN.4/514 (Feb. 28, 2001). Accordingly, the district court's judgment can be affirmed without any need to consider whether the same set of circumstances (the failure

to exhaust an adequate judicial remedy in the country in which the injury arose) warrants application of the *forum non conveniens* doctrine.

B. None of the Alleged Sources of International Law Upon Which Plaintiffs Rely Supports ATS Jurisdiction

Pfizer's brief more than adequately explains why none of the alleged sources of international law upon which Plaintiffs rely supports recognition of a federal common law right of action under the ATS in this case. Rather than repeating those arguments here, WLF wishes to highlight a few brief points.

First, Plaintiffs' reliance on the International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. (Dec. 19, 1996), as a basis for recognizing a private right of action is untenable following *Sosa.* The Court explained, "[T]he United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 735.

Plaintiffs respond that designation of a treaty as not self-executing merely precludes civil enforcement of the terms of the treaty under the ATS's "treaty" provision, and does not preclude enforcement under the ATS's "law of nations" provision. Appellants Br. 34-38. Plaintiffs complain:

> Indeed, the District Court's approach ensures that no claim under customary international law could ever lie – in direct contravention of

> *Sosa*'s explicit holding to the contrary. The District Court would not allow a claim in the absence of a self-executing treaty; however, were such a treaty to exist, there would be no need to resort to an international common law cause of action.

Id. at 36-37.

The fallacy in Plaintiffs' logic is that they ask the Court to ignore the direct command of Congress. When it ratified the ICCPR, the Senate explicitly directed that the provisions of the ICCPR were *not* to be enforceable by private parties in federal court proceedings: "[T]he Senate has expressly declined to give the federal courts the task of interpreting international human rights law, as when its ratification of the [ICCPR] declared that the substantive provisions of the document were not self-executing. 138 Cong. Rec. 8071 (1992)." *Sosa*, 542 U.S. at 728. This Court cannot create a private cause of action permitting enforcement of the terms of the ICCPR while at the same time remaining faithful to *Sosa*'s admonition that the federal courts "look for legislative guidance before exercising innovative authority over substantive law" and that even in the absence of such guidance, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id*. at 726-27.

Second, Plaintiffs' reliance on the Nuremberg Code and the proceedings of the Nuremberg Tribunal is unavailing because it fails to take into account the

context of those proceedings. As Pfizer cogently explains, Pfizer Br. 30-38, the Nuremberg Code is a statement of medical ethics issued as part of a decision by a military tribunal that heard charges against Nazi doctors accused of performing experiments on prisoners of war and concentration camp inmates during World War II. The defendants before that tribunal were charged with two specifically enumerated crimes: "war crimes" and "crimes against humanity." *Id*. at 31. Plaintiffs do not allege (nor could they) that Pfizer is guilty of either of those crimes. Documents issued in connection with a proceeding in which the defendants were convicted of "war crimes" and "crimes against humanity" cannot possibly provide justification for creating a private right of action to remedy a heretofore unrecognized medical misconduct tort.

Moreover, Plaintiffs' suggestion that Pfizer's activities in Nigeria were comparable to the life-threatening experiments by Nazi doctors on individuals not in need of medical treatment is outrageous. Pfizer is accused of failing to provide informed consent before providing treatment to patients admittedly suffering from serious diseases and thus in need of treatment, and in a country in desperately short supply of doctors and medicine. The Nuremberg Code arose in the context of *non-therapeutic* medical experiments. The medical profession has long distinguished between the level of consent required in therapeutic and non-

therapeutic settings, with considerably higher levels of consent imposed in the latter setting. *See, e.g.,* Margaret A. Somerville, *Therapeutic and Non-Therapeutic Medical Procedures – What Are the Distinctions?*, 2 HEALTH L. IN. CAN. 85 (1981); Clifton Perry, *Informed Consent in Research,* NATIONAL FORUM (Summer 1999) ("[W]hatever the accepted level of informational disclosure experienced by a physician in a therapeutic setting, the researcher owes more information to the research subject simply because there is no pretense, or at least a lessened one, regarding acting in the subject's best medical interest."). Yet, in arguing that Pfizer violated a specific, well-defined, and universally accepted international law standard, Plaintiffs make no effort to distinguish Pfizer's efforts to assist gravely ill children desperately in need of medical treatment from the grotesque, non-therapeutic experimentation at issue in the Nuremberg Tribunal. Nor does the medical profession reclassify the treatment of ill patients as non-therapeutic research simply because the treating physicians employs something other than the most widely accepted treatment. As the federal government's widely respected Belmont Report explains:

> When a clinician departs in a significant way from standard or accepted practice, the innovation does not, in and of itself, constitute research. The fact that a procedure is "experimental," in the sense of new, untested or different, does not automatically place it in the category of research.

U.S. Dep't of Health, Educ. & Welfare, Nat'l Comm'n for the Prot. Of Human Subjects of Biomedical & Behavioral Research, *Ethical Principles and Guidelines for the Protection of Human Subjects of Research* ["Belmont Report"] (1974), *available at* http://www.hhs.gov/ohrp/humansubjects/guidance/belmont.htm. Plaintiffs cannot begin to demonstrate the existence of a specific and universally accepted international law standard applicable to Pfizer's conduct when they have not even attempted to articulate a standard specifically applicable to therapeutic settings.

Third, regardless whether Plaintiffs have adequately alleged that Pfizer acted under color of state law, their ATS claim is deficient because "the nations of the world have not demonstrated that [the alleged] wrong is of mutual, and not merely several, concern." *Flores,* 414 F.3d at 249 (citations omitted). A defendant alleged to have provided substandard medical treatment to 187 patients in a single country may have violated the municipal law of that country, but the nations of the world have never indicated that such isolated violations are a matter of "mutual concern" to the world community based on, for example, a concern that the violations are "capable of impairing international peace and security." *Id.* Even if it were true that most nations would disapprove of Pfizer's alleged conduct, that would not render the conduct a violation of inter-

national law. As Judge Friendly observed, "We cannot subscribe to plaintiffs' view that the Eighth Commandment 'Thou shall not steal' is part of the law of nations." *IIT*, 519 F.2d at 1015. Because Plaintiffs cannot establish that Pfizer's alleged conduct violated standards "affecting the relationship between states or between an individual and a foreign state" and "used by those states for their common good and/or in dealing *inter se*," *Filartiga*, 630 F.2d at 888, Plaintiffs cannot establish a violation of customary international law.

C. The "Practical Consequences" of Plaintiffs' ATS Claims Also Counsel Against Recognition of Those Claims

Sosa directs federal courts, in deciding whether to recognize a federal common law private right of action under the ATS, to consider "the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33. Consideration of the "practical consequences" also counsels against recognition of Plaintiffs' proposed federal common law cause of action.

First, all would agree that Africa – a continent regularly plagued by infectious disease epidemics – is greatly in need of increased medical assistance for which it lacks the resources to pay. *See, e.g.,* John Zarocostas, "Drug Shortages Slow Aids Progress," *Washington Times* (Apr. 17, 2006); Press

Release, Doctors Without Borders, "Malaria Still Kills Needlessly in Africa: Effective Drugs Not Reaching Patients" (Apr. 21, 2006). A likely source of such *pro bono* aid is large pharmaceutical companies such as Pfizer. Recognizing ATS jurisdiction in suits such as this one, in which the adequacy of consent received from patients is being second-guessed despite the superior clinical results achieved, will likely discourage pharmaceutical companies from providing such aid in the future. WLF ventures to guess that given the chaotic situation that existed in Kano, Nigeria in 1996, enterprising attorneys would have little difficulty, when applying Western standards, in challenging the adequacy of informed consent received from the families of desperately ill African children by *any* of the English-speaking doctors providing treatment. WLF respectfully suggests that treating such deficiencies as violations of the law of nations will not serve humanity's interest in improved health care.

Perhaps more important are the "practical consequences" with respect to the practice of medicine within the United States. Plaintiffs' proposed cause of action would not limit ATS claims to those arising overseas. To the contrary, the entire premise of the modern conception of customary international law is that the rules protect individuals from human rights abuses committed by their own governments and countrymen in their own countries. *See, e.g., Restatement*

(Third) Foreign Relations Law of the United States § 102(2) (1987).

If the federal common law is deemed to recognize a cause of action for medical care alleged to be inadequate under international law standards, then both aliens and U.S. citizens will be permitted to file such claims based on medical care provided in the United States. Aliens could invoke federal court jurisdiction under the ATS, while U.S. citizens could invoke general federal question jurisdiction, 28 U.S.C. § 1331. An alleged violation of federal common law is, of course, a federal question over which the federal courts have jurisdiction without regard to the amount in controversy. A significant percentage of all medical malpractice and medical product liability claims include a failure-to-warn allegation. *See, e.g.,* Kenneth D. Krantz, *Tort Reform 1997-98: Profits v. People?,* 25 FLA.ST.U.L.REV. 161, 179 (1998). If federal courts recognize Plaintiffs' proposed federal common law private right of action, it would be a simple matter to add an ATS cause of action to all such failure-to-warn allegations. Before recognizing Plaintiffs' proposed cause of action, the Court should seriously consider whether it really wants to federalize medical malpractice law in this manner.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court affirm the decision of the district court.

Respectfully submitted,

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Counsel wish to thank Kristopher Moore, a student at Texas Tech University Law School, for his assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 9.0), the word count of the brief is 6,681, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2006, I deposited two copies of the *amicus curiae* brief of the Washington Legal Foundation in the U.S. Mail, First Class postage prepaid, addressed to the following:

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