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Kashef v. BNP Paribas S.A.

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**In the
United States Court of Appeals
For the Second Circuit**

August Term 2018

No. 18-1304

ENTESAR OSMAN KASHEF, ALFADEL MOSABAL, ABUBAKAR ABAKAR, SIAMA
ABDELNABI HAMAD, ABBO AHMED ABAKAR, HAWA MOHAMED OMAR, JANE DOE,
NYANRIAK TINGLOTH, REVEREND ANDERIA LUAL, NICOLAS HAKIM LUKUDU,
TURJUMAN RAMADAN ADAM, JOHNMARK MAJUC, JOSEPH JOK, HALIMA SAMUEL
KHALIFA, AMBROSE MARTIN ULAU, SANDI (SUNDAY) GEORGARI MARJAN, SHAFIKA
G. HASSAN, JANE ROE, JUDY DOE, SARA NOURELDIRZ ABDALLA, and AMIR AHMED,

Plaintiffs-Appellants,

v.

BNP PARIBAS S.A., a French corporation, BNP PARIBAS NORTH AMERICA, INC., a
Delaware corporation, DOES 1–10, and BNP PARIBAS S.A., NEW YORK BRANCH,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York
No. 16-cv-3228, Alison J. Nathan, District Judge, Presiding.
(Argued December 12, 2018; Decided May 22, 2019)

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1 Before: SACK, PARKER, and CHIN, *Circuit Judges*.
2

3 Defendants were convicted of federal and state felonies arising from their
4 evasion of U.S. sanctions on Sudan. As Defendants admitted in pleading guilty,
5 they had knowledge of the genocide and ethnic cleansing being perpetrated by
6 the Sudanese regime and the consequences of providing the regime access to
7 additional financial resources, which could be used to escalate the commission of
8 atrocities. Nevertheless, Defendants illegally transacted with sanctioned entities
9 and actively attempted to evade U.S. detection, thus providing the regime access
10 to U.S. financial markets. Plaintiffs, victims of the Sudanese regime's atrocities,
11 sued Defendants under New York tort law, alleging that Defendants conspired
12 with and aided and abetted the Sudanese regime in its commission of
13 widespread atrocities. The United States District Court for the Southern District
14 of New York (Nathan, *J.*) dismissed Plaintiffs' claims under Federal Rule of Civil
15 Procedure 12(b)(6), reasoning that they were barred by the act of state doctrine
16 and, in the alternative, were untimely. We **VACATE** and **REMAND**.

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23 TOBIAS BARRINGTON WOLFF, University of Pennsylvania Law
24 School, Philadelphia, PA (Kathryn Lee Boyd & Thomas B.
25 Watson, McKool Smith, PC, Los Angeles, CA, *on the brief*), for
Plaintiffs-Appellants.

26 CARMINE D. BOCCUZZI, JR. (Jonathan I. Blackman & Avram E.
27 Luft, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New
28 York, NY, for *Defendants-Appellees*.
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1 BARRINGTON D. PARKER, *Circuit Judge*:

2 Defendant BNP Paribas S.A., a French corporation, is the parent company
3 of various BNP Paribas subsidiaries across the world, including the other named
4 Defendants in this action (collectively “BNPP”). BNPP is a global leader in
5 banking and financial services, operating in 73 countries, including in the United
6 States. BNPP’s annual revenue exceeds 40 billion euros and its total assets
7 amount to approximately 1.9 trillion euros, making it one of the five largest
8 banks in the world.¹

9 Following a guilty plea, BNPP was convicted of federal and state felonies
10 for evading U.S. sanctions on Sudan. Plaintiffs, who are alleged victims of the
11 Sudanese regime’s atrocities, sued BNPP in the United States District Court for
12 the Southern District of New York, bringing various tort claims under New York
13 law. They allege that BNPP conspired with and aided and abetted the Sudanese
14 regime in its commission of widespread atrocities, including murder, mass rape,
15 torture, and deliberate infection with HIV, among others. They also allege claims
16 of negligence per se, intentional infliction of emotional distress, and negligent
17 infliction of emotional distress.

¹ The information on BNPP’s structure, operations, and finances are publicly known and available through BNPP’s website and its various filings with regulatory agencies.

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1 The District Court (Nathan, J.) dismissed Plaintiffs’ claims under Federal
 2 Rule of Civil Procedure 12(b)(6), reasoning that they were barred by the act of
 3 state doctrine and, for the Plaintiffs who were adults at the time of injury (the
 4 “Adult Plaintiffs”), otherwise untimely. Because we conclude that the District
 5 Court misapplied the act of state doctrine and erroneously determined that the
 6 Adult Plaintiffs’ claims were untimely, we vacate and remand for further
 7 proceedings.

8 BACKGROUND

9 The atrocities taking place in Sudan are widely known and have been
 10 condemned by both the United States and the international community as
 11 genocide. *See, e.g.*, H.R. Con. Res. 467, 108th Cong. (2004) (enacted); S. Con. Res.
 12 133, 108th Cong. (2004) (enacted). In 1997 and 2006, pursuant to the International
 13 Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. § 1701 *et seq.*, the U.S.
 14 Government imposed sanctions on Sudan aimed at halting the genocide. *See*
 15 Exec. Order No. 13,412 § 1, 71 Fed. Reg. 61,369 (Oct. 17, 2006); Exec. Order No.
 16 13,067 § 1, 62 Fed. Reg. 59,989 (Nov. 5, 1997); *see generally* 31 C.F.R. pt. 538.
 17 Nevertheless, as BNPP itself admitted, from 2002 to 2007, it “conspired with
 18 numerous Sudanese banks and entities as well as financial institutions outside of

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1 Sudan to violate the U.S. embargo by providing Sudanese banks and entities
2 access to the U.S. financial system.” Stipulated Statement of Facts ¶ 17, *United*
3 *States v. BNP Paribas, S.A.*, No. 14-cr-00460-LGS (S.D.N.Y. 2015), ECF No. 13 Ex. 2.

4 In 2015, the Federal Government and New York State secured convictions
5 of BNPP for federal and state felonies. BNPP pled guilty to conspiracy to commit
6 an offense against the United States in violation of 18 U.S.C. § 371, by conspiring
7 to violate the IEEPA and the Trading with the Enemy Act, 50 U.S.C. § 4303 *et seq.*
8 BNPP also pled guilty to New York state crimes of falsifying business records in
9 the first degree, in violation of Penal Law § 175.10, and conspiracy in the fifth
10 degree, in violation of Penal Law § 105.05. BNPP was required to pay almost
11 nine billion dollars in forfeitures and fines, the largest financial penalty ever
12 imposed in a criminal case.²

13 BNPP admitted, in a Stipulated Statement of Facts (the “SSOF”), that the
14 allegations in the federal and state criminal informations were true, as were
15 additional facts set forth in the SSOF, and that had the matter gone to trial, the
16 Federal Government and New York State would have proven them beyond a
17 reasonable doubt. BNPP conceded that it “continued to process transactions
18 involving Sudanese Sanctioned Entities—despite being well aware that its

² Press Release, Dep’t of Justice, *BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act* (May 1, 2015).

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1 conduct violated U.S. law —because the business was profitable” and BNPP “did
2 not want to risk its longstanding relationship with Sudanese clients.” SSOF ¶ 24;
3 *see also id.* ¶¶ 59–73 (outlining the evidence of BNPP’s knowledge of its illegal
4 conduct).

5 BNPP admitted that it employed many sophisticated methods to violate
6 U.S. law. First, it “carried out transactions with Sanctioned Entities and evaded
7 the U.S. embargo” against Sudan by “deliberately modifying and omitting
8 references to Sudan in the payment messages accompanying these transactions.”
9 *Id.* ¶ 18. Second, in cooperation with Sudanese entities, it utilized complicated
10 payment structures with no legitimate business purpose to mask transaction
11 information that could trigger scrutiny. *Id.* ¶ 16. Third, it moved “illicit
12 transactions through unaffiliated satellite banks” to “disguise the involvement of
13 Sanctioned Entities in U.S. dollar transactions,” *id.* ¶¶ 18, 23–26, and went as far
14 as coordinating with satellite banks to institute waiting periods between transfers
15 so that “U.S. authorities would be unable to link the payments to the involved
16 Sanctioned Entit[ies],” *id.* ¶ 24.

17 BNPP also conceded that it had knowledge of the atrocities being
18 committed in Sudan and of the consequences of providing Sudan access to U.S.

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1 financial markets. Specifically, BNPP admitted that its “central role in providing
2 Sudanese financial institutions access to the U.S. financial system, despite the
3 Government of Sudan’s role in supporting terrorism and committing human
4 rights abuses, was recognized by BNPP employees.” *Id.* ¶ 20. For example, in
5 2004, a manager at BNPP described the political environment in Sudan as
6 “dominated by the Darfur crisis” and called it a “humanitarian catastrophe.” *Id.*
7 In April 2006, a senior BNPP compliance officer stated in a memorandum that
8 “the growth of revenue from oil is unlikely to help end the conflict” and that “it
9 is probable that Sudan will remain torn up by insurrections and resulting
10 repressive measures for a long time.” *Id.* In 2007, a BNPP compliance officer told
11 other high-level compliance and legal personnel that the Sudanese entities with
12 which BNPP dealt “play a pivotal part in the support of the Sudanese
13 government which . . . has hosted Osama Bin Laden and refuses United Nations
14 intervention in Darfur.” *Id.* A few months later, a BNPP executive warned in a
15 memorandum that “in a context where the International Community puts
16 pressure to bring an end to the dramatic situation in Darfur, no one would
17 understand why BNP Paribas persists in Sudan which could be interpreted as
18 supporting the leaders in place.” *Id.* The SSOF makes clear that despite BNPP’s

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1 understanding of the likely consequences of its involvement with Sudan, it
2 persisted in illegal conduct on a wide scale because its “business [with Sudan]
3 was profitable.” *Id.* ¶ 37.

4 Plaintiffs, who now reside lawfully in the United States, sued BNPP in the
5 Southern District of New York on behalf of a putative class of victims of the
6 genocide in Sudan. They allege, and we must accept as true, that BNPP
7 circumvented U.S. sanctions and provided Sudan with financial resources
8 knowing that Sudan was committing atrocities, knowing that the purpose of the
9 sanctions was to prevent Sudan from acquiring funds with which to carry out
10 those atrocities, and knowing that Sudan’s likely purpose in using the U.S.
11 financial markets for illegal oil sales was to acquire billions of U.S. dollars to
12 purchase the weapons and materials used by militia forces.

13 Specifically, Plaintiffs allege that they were the victims of atrocities
14 including mass rape, torture, deliberate infection with HIV, and being forced to
15 watch the murder and rape of their family members. Second Amended
16 Complaint ¶¶ 22–52, *Kashef v. BNP Paribas SA*, 316 F. Supp. 3d 770 (S.D.N.Y.
17 2018) (No. 16-cv-03228-AJN), ECF No. 49. One plaintiff alleges that militia forces
18 invaded her home, brutally beat her family, and murdered her father in front of

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1 her children. *Id.* ¶ 37. She and her children found themselves in camps where
2 they were detained separately, starved, tortured, subjected to chemical weapons,
3 beaten, and raped. *Id.* Two of her children died in the camps, and the plaintiff
4 was forced to search for them among dead bodies being held in refrigerators on
5 site. *Id.* Her teenage son, she alleges, had been locked alive in a freezer for three
6 days. *Id.*

7 Another plaintiff alleges that she was kidnapped from her home,
8 blindfolded, and locked in a room without food, light, or water. *Id.* ¶ 41. She
9 was raped and tortured for days, causing infection with HIV and the miscarriage
10 of an existing pregnancy. *Id.* Her husband was arrested, tortured, and
11 eventually murdered. *Id.* All the Plaintiffs allege similar injuries at the hands of
12 militia forces, which were armed and dispatched using the money and resources
13 made available as a consequence of BNPP's violation of U.S. sanctions on Sudan.

14 In the Second Amended Complaint (the "SAC"), Plaintiffs asserted twenty
15 claims arising under New York tort law.³ Claims 1, 2, 15, and 16 were primary
16 liability claims that BNPP was negligent per se and inflicted emotional distress
17 on Plaintiffs. Claims 3 through 14, 19, and 20 were secondary liability claims that

³ The District Court dismissed Claim 17, for commercial bad faith, and Claim 18, for unjust enrichment, for failure to state a claim. Plaintiffs do not challenge the dismissal of these claims on appeal.

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1 BNPP conspired with or aided and abetted Sudan in its commission of battery,
2 battery in performance of public duty, assault, false arrest and imprisonment,
3 conversion through wrongful taking, conversion through wrongful detention,
4 and wrongful death.

5 BNPP moved to dismiss the claims. The District Court dismissed Claims 1
6 through 16, 19, and 20 under the act of state doctrine. *Kashef*, 316 F. Supp. 3d at
7 779. The Court reasoned that determining BNPP's wrongdoing under New York
8 tort law would require it to either find an underlying tort committed by the
9 Sudanese regime (for secondary liability claims) or inquire into the harm to
10 Plaintiffs caused by the regime (for primary liability claims). *Id.* at 777–78. The
11 District Court concluded that it was prohibited from so doing by the act of state
12 doctrine, which forbids U.S. courts from questioning the validity of official acts of
13 foreign sovereigns. *Id.* As applied to only the Adult Plaintiffs,⁴ the District Court
14 alternatively dismissed Claims 3 through 10 and 15 as untimely under New
15 York's one-year statute of limitations for intentional torts. *Id.* at 782. The District
16 Court declined to apply New York C.P.L.R. § 213-b, under which the Adult
17 Plaintiffs' claims would be timely. *Id.* at 780–81.

⁴ Plaintiffs Sara Noureldirz Abdalla and Amir Ahmed were minors when they were injured. The remaining Plaintiffs were over the age of 18 at the time of their alleged injuries.

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1 Plaintiffs appeal, arguing that the District Court erred in its application of
2 the act of state doctrine and in its conclusion that the Adult Plaintiffs' claims are
3 time-barred. We agree and we vacate the judgment.

4 STANDARD OF REVIEW

5 We review *de novo* a district court's grant of a motion to dismiss brought
6 under Rule 12(b)(6), accepting all factual allegations in the complaint as true and
7 drawing all reasonable inferences in the plaintiff's favor. *Nicosia v. Amazon.com,*
8 *Inc.*, 834 F.3d 220, 230 (2d Cir. 2016). "To survive a motion to dismiss, a
9 complaint must contain sufficient factual matter, accepted as true, to state a claim
10 to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
11 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

12 DISCUSSION

13 *Act of State Doctrine*

14 The act of state doctrine bars U.S. courts from declaring invalid, and thus
15 ineffective as a rule of decision, the official act of a foreign sovereign. *W.S.*
16 *Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). "Whether
17 to invoke the act of state doctrine is ultimately and always a judicial question."
18 *Republic of Philippines v. Marcos*, 806 F.2d 344, 358 (2d Cir. 1986). The doctrine has

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1 been applied where, for instance, parties sought to challenge the validity of
2 formalized, official expropriation decrees of foreign sovereigns. *See, e.g., Banco*
3 *Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Similarly, the doctrine has been
4 applied where parties challenged the official orders of a sovereign's highest
5 commander. *See Underhill v. Hernandez*, 168 U.S. 250 (1897).

6 The Supreme Court has made clear that the act of state doctrine has
7 important boundaries. It is not a categorical rule of abstention that prohibits
8 courts from deciding cases or controversies whenever issues of foreign relations
9 arise. *Kirkpatrick*, 493 U.S. at 409 ("The act of state doctrine does not establish an
10 exception for cases and controversies that may embarrass foreign
11 governments."). The doctrine should not, the Supreme Court instructs, be
12 casually expanded "into new and uncharted fields." *Id.*

13 In dismissing Plaintiffs' claims, the District Court reasoned that "claims
14 against private entities may be barred when the causal chain between a
15 defendant's alleged conduct and plaintiff's injury cannot be determined without
16 an inquiry into the motives of the foreign government." *Kashef*, 316 F. Supp. 3d
17 at 776. In so concluding, the District Court painted with too broad a brush and

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1 misapplied the doctrine in the exact way the Supreme Court warned against in
2 *Kirkpatrick*.

3 I

4 The Supreme Court has determined that when the validity of a foreign
5 state's action is not the question being litigated, and the inquiry is simply
6 whether the conduct in question occurred, the act of state doctrine is not
7 implicated. *Kirkpatrick*, 493 U.S. at 405. In other words, the doctrine applies only
8 when "the relief sought or the defense [raised] would have *required* a court in the
9 United States to declare invalid the official act of a foreign sovereign performed
10 within its own territory." *Id.* at 405 (emphasis added). Adjudicating the claims
11 in this action involves no such requirement.

12 In *Kirkpatrick*, U.S. defendants had secured a contract with the Nigerian
13 government by promising to pay a bribe. *Id.* at 402. Following an investigation,
14 defendants pled guilty to violations of the Foreign Corrupt Practices Act. *Id.* The
15 plaintiff, an unsuccessful bidder for the Nigerian government contract, then sued
16 the defendants under federal and state racketeering and unfair competition
17 statutes. *Id.* To prevail, the plaintiff had to prove that Nigerian officials received
18 an unlawful bribe. *Id.* at 406.

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1 The Supreme Court held that the act of state doctrine did not bar the
2 claims because, in considering them, the district court was not required to rule on
3 the legality of the contract itself. *Id.* at 406. It was only required to determine
4 whether Nigerian officials had received bribes, an inquiry that did not trigger the
5 act of state doctrine even if it “would impugn or question the nobility of a foreign
1 nation’s motivations.” *Id.* at 408.⁵ In fashioning the contours of the doctrine,
2 Justice Scalia, writing for the Court, drew from *Sharon v. Time, Inc.*, 599 F. Supp.
3 538 (S.D.N.Y. 1984), for the proposition that the act of state doctrine is not
4 implicated when the litigated issue “is not whether the alleged acts are valid, but
5 whether they occurred.” *Kirkpatrick*, 493 U.S. at 406 (quoting *Time*, 599 F. Supp. at
6 546). In *Time*, Ariel Sharon, then-Minister of Defense of Israel, sued *Time*
7 Magazine for defamation following *Time*’s coverage of a report on Sharon’s
8 alleged participation in the murder of innocent Palestinians. 599 F. Supp. at 542.
9 To adjudicate the claim, the district court had to determine whether claims that
10 Sharon was complicit in murder were false, which would implicate the actions of

⁵ Moreover, the Supreme Court explained that even though a finding that Nigerian officials had received bribes supported a finding that the contract was invalid, the act of state doctrine was still not implicated because the parties never formally disputed the legality of the contract itself. See *Kirkpatrick*, 493 U.S. at 406 (“Specifically, [petitioners] note that in order to prevail respondent must prove that petitioner *Kirkpatrick* made, and Nigerian officials received, payments that violate Nigerian law, which would, they assert, support a finding that the contract is invalid under Nigerian law. Assuming that to be true, it still does not suffice [to trigger the act of state doctrine].”).

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1 Israel and Lebanon. *Id.* at 553. The district court determined that the act of state
2 doctrine did not apply, reasoning that

3 No one is suggesting that these acts—by which Time claims Sharon
4 condoned the massacre of unarmed noncombatant civilians—have
5 validity in the sense that they cannot be attacked. All agree—Israel,
6 the United States, and the world community—that such actions, if
7 they occurred, would be illegal and abhorrent. The issue in this
8 litigation is not whether such acts are valid, but whether they
9 occurred.

10 *Id.* at 546.

11 The reasoning of *Kirkpatrick* is directly applicable to this case. By BNPP’s
12 own concession, the acts of Sudan to which BNPP asks us to defer are the
13 atrocities committed against innocent civilians. Oral Arg. R. at 23:14–40 (“The
14 alleged official acts are . . . running their militias that inflicted violence on these
15 plaintiffs . . . other acts of sexual violence, mass rape, and . . . genocide.”). No
16 one here—the parties, the U.S. government, Sudan (in its own Constitution), or
17 the international community—contends that genocide, mass rape, and ethnic
18 cleansing are “valid.”⁶ Instead, the issue is simply whether the atrocities

⁶

See, e.g., H.R. Con. Res. 467, 108th Cong. (2004) (enacted) (declaring Sudan’s genocide); S. Con. Res. 133, 108th Cong. (2004) (enacted) (same); Exec. Order No. 13,412 (sanctioning Sudan for its violations of human rights); THE INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN (2005); CONSTITUTION OF THE REPUBLIC OF SUDAN (1998); *see also Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1210 (9th Cir. 2007) (discussing how violations of *jus cogens* norms cannot constitute rules of decision entitled to act-of-state deference); *Warfaa v. Ali*, 33 F. Supp. 3d 653, 661–62 (E.D. Va. 2014) (same), *aff’d*, 811 F.3d 653 (4th Cir. 2016); *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1242 (S.D. Fla. 2012) (same).

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1 occurred. This inquiry into occurrence rather than validity is precisely what the
2 Supreme Court in *Kirkpatrick* held was not precluded by the act of state doctrine.

3 To be sure, to prevail on their secondary liability claims against BNPP, the
4 plaintiffs will need to establish primary torts committed by the Sudanese regime.
5 Proof of these primary tort claims, as the SAC suggests, will be based on the
6 widespread and widely known genocide perpetrated in Sudan. The act of state
7 doctrine cannot shield this genocide from scrutiny by the courts of the United
8 States because, as we will discuss in depth below, both Sudan's own laws and a
9 universal international consensus prohibit us from deeming genocide an "official
10 act" of Sudan, or for that matter, of any state, that could supply or support a rule
11 of decision for our courts.

12 II

13 *Kirkpatrick* makes clear that the act of state doctrine only applies if
14 adjudicating the claims in question would require a court to declare invalid a
15 sovereign's "official act." *Kirkpatrick*, 493 U.S. at 405. To qualify as "official," an
16 act must be imbued with some level of formality, such as authorization by the
17 foreign sovereign through an official "statute, decree, order, or resolution."
18 *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976). A level

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1 of formality has featured in every Supreme Court case in which the act of state
2 doctrine has been applied. For example, in *Banco Nacional de Cuba v. Sabbatino*,
3 the Supreme Court applied the doctrine to an official and formalized government
4 expropriation decree. 376 U.S. at 406; *see also Oetjen v. Central Leather Co.*, 246 U.S.
5 297 (1918) (applying the act of state doctrine to an official government
6 expropriation decree); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918) (same).
7 Similarly, in *Underhill v. Hernandez*, the Supreme Court applied the act of state
8 doctrine to an official order by the highest military commander of a U.S.-
9 recognized government not to issue a passport. 168 U.S. at 254. Cases in our
10 Circuit have also required this formality to trigger act-of-state deference.
11 *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 147 (2d Cir. 2012) (applying the
12 act of state doctrine to an official government expropriation decree); *Fed. Treasury*
13 *Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) (same),
14 *cert. denied*, 137 S. Ct. 160 (2016).

15 BNPP makes absolutely no showing that the atrocities committed against
16 the Plaintiffs were the officially sanctioned policies of Sudan. They point to no
17 statute, decree, order, resolution, or comparable evidence of sovereign
18 authorization for any of the actions in question. On the contrary, the atrocities

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1 alleged to have occurred unquestionably violated Sudanese law. *See, e.g.,* THE
2 INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN pts. 1–2;
3 CONSTITUTION OF THE REPUBLIC OF SUDAN pts. 1–2. In *Filartiga v. Pena-Irala*, we
4 made clear that “we doubt whether action by a state official in violation of [its]
5 Constitution and laws . . . and wholly unratified by [its] government, could
6 properly be characterized as an act of state.” 630 F.2d 876, 889 (2d Cir. 1980).
7 Similarly, in *Kadic v. Karadzic*, we noted that “the appellee has not had the
8 temerity to assert in this Court that the acts [of torture] he allegedly committed
9 are the officially approved policy of a state.” 70 F.3d 232, 250 (2d Cir. 1995).
10 Given our precedent, acts that flagrantly violate a foreign state’s own laws
11 cannot, at the same time, constitute official acts entitled to deference.

12 Considering the lack of evidence introduced by BNPP that genocide is the
13 official policy of Sudan, and the countervailing evidence that genocide blatantly
14 violates Sudan’s own laws, we conclude that there is simply no “official act” that
15 a court would be required to “declare invalid” in order to adjudicate Plaintiffs’
16 claims. *Kirkpatrick*, 493 U.S. at 405.

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III

1

2 There is an equally steep hurdle that BNPP fails to overcome. We are

3 prohibited from deeming valid, for purposes of act-of-state deference, atrocities

4 such as genocide, mass rape, and ethnic cleansing, which violate *jus cogens*

5 norms. “A *jus cogens* norm, also known as a peremptory norm of international

6 law, is a norm accepted and recognized by the international community of states

7 as a whole as a norm from which no derogation is permitted and which can be

8 modified only by a subsequent norm of general international law having the

9 same character.” *Carpenter v. Republic of Chile*, 610 F.3d 776, 780 n.4 (2d Cir. 2010).

10 “*Jus cogens* embraces customary laws considered binding on all nations, and is

11 derived from values taken to be fundamental by the international community,

12 rather than from the fortuitous or self-interested choices of nations.” *Siderman de*

13 *Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992). Accordingly, we

14 have previously explained that these norms may not be violated, “irrespective of

15 the consent or practice of a given State.” *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 179

16 (2d Cir. 2009). “Because *jus cogens* norms do not depend solely on the consent of

17 states for their binding force, they enjoy the highest status within international

18 law.” *Siderman*, 965 F.2d at 715.

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1 There is no doubt that *jus cogens* norms were violated by the atrocities
2 occurring in Sudan. *See, e.g., Abdullahi*, 562 F.3d at 179; *Pena-Irala*, 630 F.2d at 884;
3 *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir.
4 1988); *Siderman*, 965 F.2d at 714; *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130
5 (E.D.N.Y. 2000); *Hirsh v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997), *aff'd*,
6 133 F.3d 907 (2d Cir. 1997). All of Plaintiffs' claims are premised on these blatant
7 violations of *jus cogens* norms. A dismissal of the claims based on the act of state
8 doctrine would require, as a predicate, that the violations in question be
9 "deemed valid" by courts of this country, *see Kirkpatrick*, 493 U.S. at 409,
10 regardless of the universal (and uncontroversial) understanding that genocide is
11 unlawful. Because our precedent prohibits us from deeming valid violations of
12 non-derogable *jus cogens* norms, "irrespective of the consent or practice of a given
13 State," *Abdullahi*, 562 F.3d at 179, we conclude that the atrocities to which BNPP
14 asks us to defer can never be the basis of a rule of decision capable of triggering
15 the act of state doctrine.⁷

⁷ This conclusion is consistent with those of other courts that have directly considered the question. *See, e.g., Siderman*, 965 F.2d at 714 (determining that torture violates *jus cogens* norm); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011), *vacated on other grounds sub nom. Rio Tinto PLC v. Sarei*, 569 U.S. 945 (2013); *Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012); *Warfaa v. Ali*, 33 F. Supp. at 661–62; *Garcia v. Chapman*, 911 F. Supp. 2d at 1242; *cf. Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).

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1 *Timeliness*

2 In addition to dismissing Plaintiffs' claims under the act of state doctrine,
3 the District Court alternatively dismissed the intentional tort claims of the Adult
4 Plaintiffs as untimely under New York C.P.L.R. § 215. Plaintiffs argue that their
5 claims are timely under § 215(8)(a) or § 213-b. We hold that Plaintiffs' claims are
6 timely under § 215(8)(a).

7 New York C.P.L.R. § 215(8)(a) provides:

8 Whenever it is shown that a criminal action against the same
9 defendant has been commenced with respect to the event or
10 occurrence from which a claim governed by this section arises, the
11 plaintiff shall have at least one year from the termination of the
12 criminal action as defined in section 1.20 of the criminal procedure
13 law in which to commence the civil action notwithstanding that the
14 time in which to commence such action has already expired or has
15 less than a year remaining.

16
17 In *Clemens v. Nealon*, a New York appellate court explicitly rejected the
18 theory that "the tolling provisions of CPLR 215(8) are exclusively for the benefit
19 of the victims of the crime charged in the criminal proceeding." 608 N.Y.S.2d
20 370, 371 (App. Div. 1994). Instead, § 215(8)(a) is satisfied so long as "(1) a
21 criminal action has been commenced, (2) against the same defendants, and (3)
22 concerning the same event or transaction from which the civil action arose." *Id.*
23 The "termination of the criminal action" is measured from the date on which the

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1 defendant was sentenced. *Dynamic Chemicals, Inc. v. Ackerman Mech. Servs., Inc.*,
2 867 N.Y.S.2d 820, 822 (App. Div. 2008).

3 Plaintiffs did not raise the § 215(8)(a) argument before the District Court.
4 However, we have “discretion to consider waived arguments” and should
5 exercise this discretion “where the argument presents a question of law and there
6 is no need for additional fact-finding.” *Bogle-Assegai v. Connecticut*, 470 F.3d 498,
7 504 (2d Cir. 2006). In this case, the issue is a simple question of law—whether
8 § 215(8)(a) applies. The factual predicate for the question has been fully briefed
9 by both parties and there has been no contention that additional fact-finding is
10 required or that any of the relevant facts are in dispute. We therefore exercise
11 our discretion to consider the argument.

12 BNPP is the same defendant that federal authorities prosecuted in a
13 criminal action, satisfying the first and second prongs of § 215(8)(a).
14 Additionally, the Plaintiffs’ causes of action arise out of the same occurrence as
15 the criminal prosecution: BNPP’s conspiracy with Sudan to violate U.S.
16 sanctions. Indeed, the Plaintiffs’ theory is that BNPP was illegally funding
17 Sudan’s commission of atrocities by avoiding U.S. sanctions put in place to
18 protect the Plaintiffs and the purported class, knowing that the funds would be

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1 used by Sudan to continue the perpetration of atrocities. SAC ¶¶ 1-15. The third
2 prong is thus satisfied and § 215(8)(a) applies. Because BNPP's judgment of
3 conviction was entered on May 1, 2015 and the Plaintiffs' civil action was filed on
4 April 29, 2016, the Adult Plaintiffs' claims are timely under § 215(8)(a).

5 **CONCLUSION**

6 For the reasons set forth, we **VACATE** the judgment of the District Court
7 and **REMAND** for further proceedings consistent with this opinion.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

23

A handwritten signature in blue ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal of the United States Court of Appeals, Second Circuit. The seal contains the text "UNITED STATES COURT OF APPEALS, SECOND CIRCUIT" and two stars.