18-1304

In the United States Court of Appeals
for the Second Circuit

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, Amir Ahmed,
Plaintiffs - Appellants,

v.

BNP Paribas S.A., a French corporation, BNP Paribas North America, Inc., a Delaware corporation, Does 1-10, BNP Paribas S.A., New York Branch,
Defendants - Appellees.

On Appeal from the United States District Court
for the Southern District of New York
No. 16-cv-3228

BRIEF OF PLAINTIFFS-APPELLANTS

Tobias Barrington Wolff
Penn Law School
3501 Sansom Street
Philadelphia, PA 19104
(215) 898-7471

Kathryn Lee Boyd
Thomas B. Watson
McKool Smith, PC
1 California Plaza, Suite 2900
300 South Grand Avenue
Los Angeles, CA 90071
(213) 694-1200

Counsel for Plaintiffs-Appellants

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STATEMENT OF JURISDICTION

The District Court had original jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). There are more than one hundred members to this proposed class action, at least one plaintiff is diverse from the defendant, the class members reside throughout the United States, and the aggregate amount in controversy exceeds $5,000,000.

The judgment below following the March 30, 2018 Memorandum Opinion and Order of the District Court dismissing all of plaintiffs' claims is a "final decision" over which this Court has appellate jurisdiction. 28 U.S.C. § 1291. Plaintiffs filed a timely notice of appeal on April 27, 2018.

ISSUES PRESENTED

1. Did the District Court improperly apply the act of state doctrine to Plaintiffs' claims?

2. Did the District Court erroneously interpret New York statutes of limitations to bar the claims of adult Plaintiffs sounding in intentional tort?

STATEMENT OF THE CASE

Proceedings Below

The case below was heard before Judge Alison J. Nathan of the U.S. District Court for the Southern District of New York. Plaintiffs-Appellants appeal from the Memorandum Opinion and Order of Judge Nathan, *Kashef v. BNP Paribas*, 16-cv-3228 (AJN) 2018 WL 1627261 (S.D.N.Y., Mar. 30, 2018), issued without oral argument, which granted the Defendant-Appellee's motion to dismiss Plaintiffs' Second Amended Complaint on all claims.

Standard of Review

This Court reviews the motion to dismiss *de novo*, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011) (quotation and citation omitted).

Statement of Facts

This civil action arises out of a massive criminal conspiracy perpetrated by BNP Paribas and its New York and European affiliates (collectively BNPP), Defendant below and Appellee here, in concert with the Government of Sudan. The conspiracy had as its aim the circumvention of sanctions imposed against

Sudan by the United States that aimed to prevent atrocities the regime was committing against its own people.[1] The illegal agreement spanned at least ten years, from 1997 to 2007, and had effects extending years thereafter. It involved the transfer of billions of U.S. dollars through thousands of illicit transactions processed through BNPP's New York offices.

The U.S. Government and New York State prosecuted BNPP for its crimes, entered into plea agreements that required BNPP to pay billions of dollars in forfeiture and fines, and, under those plea agreements, convicted BNPP of both federal and New York felonies. JA-34-35, 37-38, 41-42, 110-22, 202-14, 359-65. As part of its federal plea agreement, BNPP executed a stipulated Statement of Facts in which it admitted to its illegal course of conduct. BNPP's admissions included the following:

> BNPP carried out transactions with Sanctioned Entities [in Sudan] and evaded the U.S. embargo through several means. One such method, which enabled BNPP to manage or finance billions of dollars' worth of U.S. dollar denominated letters of credit for

[1] The Executive Branch enacted sanctions against Sudan pursuant to its authority under the Constitution and the laws of the United States, including the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, SPA 22-73. The sanctions included two Executive Orders—Executive Order 13067, and Executive Order 13412, SPA-105-17—and implementing regulations issued by the Office of Foreign Assets Control (OFAC), 31 C.F.R. part 538 (Sudan Sanctions). SPA-118-23; *see also* SPA-151-56; JA-217-18. The Sudan Sanctions were issued August 2, 1999 and remained in effect until June 29, 2018. The emergency declared with respect to Sudan in Executive Order 13067 continues. 83 Fed. Reg. 30539 (June 28, 2018). Further, BNPP conspired to violate the Trading with the Enemy Act, 50 U.S.C. § 4303 *et seq.* JA-202-14.

> Sudanese entities, involved deliberately modifying and omitting references to Sudan in the payment messages accompanying these transactions to prevent the transactions from being blocked when they entered the United States. Another method . . . entailed moving illicit transactions through unaffiliated "satellite banks" in a way that enabled BNPP to disguise the involvement of Sanctioned Entities in U.S. dollar transactions. As a result of BNPP's conduct, the Government of Sudan and numerous banks connected to the Government of Sudan . . . were able to access the U.S. financial system and engage in billions of dollars' worth of U.S. dollar-based financial transactions, significantly undermining the U.S. embargo.

JA-222.

> BNPP's central role in providing Sudanese financial institutions access to the U.S. financial system, despite the Government of Sudan's role in supporting terrorism and committing human rights abuses, was recognized by BNPP employees. For example, in 2004, a manager at BNPP Geneva described in an email the political environment in Sudan as "dominated by the Darfur crisis" and called it a "humanitarian catastrophe." In April 2006, a senior BNPP Paris compliance officer stated in a memorandum that "[t]he growth of revenue from oil is unlikely to help end the conflict [in Darfur], and it is probable that Sudan will remain torn up by insurrections and resulting repressive measures for a long time." In March 2007, another senior BNPP Paris compliance officer reminded other high-level BNPP compliance and legal employees that certain Sudanese banks with which BNPP dealt "play a pivotal part in the support of the Sudanese government which . . . has hosted Osama Bin Laden and refuses the United Nations intervention in Darfur." A few months later, in May 2007, a BNPP Paris executive with responsibilities for compliance across all BNPP branches warned in a memorandum that: "In a context where the International Community puts pressure to bring an end to the dramatic situation in Darfur, no one would understand why BNP Paribas persists [in Sudan] which could be interpreted as supporting the leaders in place."

JA-223.

> In order to avoid having transactions identified and blocked by filters at banks in the United States, beginning at least as early as 2002 and continuing through 2007, BNPP agreed with Sanctioned Entities in Sudan not to mention their names in U.S. dollar transactions processed through the United States. For example, when conducting U.S. dollar business with BNPP, the Sanctioned Entities frequently instructed BNPP not to mention the names of the Sanctioned Entities in wire transfer messages, which BNPP then agreed to do. In many instances, the instructions specifically referenced the U.S. embargo. For example: "due to the US embargo on Sudan, please [debit our U.S. dollar account] without mentioning our name in your payment order" and "transfer the sum of USD 900,000 . . . without mentioning our name – repeat without mentioning our name under swift confirmation to US." Such payment messages frequently bore stamps from BNPP employees stating: "ATTENTION: US EMBARGO." At times, BNPP front office employees directed BNPP back office employees processing transactions with Sudanese Sanctioned Entities to omit any reference to Sudan: "! Payment in $ to [French Bank 1] without mentioning Sudan to N.Y. !!!" Indeed, until 2004, BNPP's internally published policy for processing US. dollar payments involving Sudan stated: "Do not list in any case the name of Sudanese entities on messages transmitted to American banks or to foreign banks installed in the U.S."

JA-224-25.

> BNPP's compliance personnel were also aware of BNPP's use of satellite banks to process transactions with Sanctioned Entities. For example, a 2005 compliance report described the scheme as follows:
>
> > The main activity of certain BNPP customers is to domicile cash flows in [U.S. dollars] on our books on behalf of Sudanese banks. These arrangements were put in place in the context of the U.S. embargo against Sudan. . . . The accounts of these banks were therefore opened with the aim of "facilitating transfers of funds in [U.S. dollars] for Sudanese banks."

JA-226-27. BNPP employed these and other devices to circumvent U.S. sanctions and to place billions of illicit U.S. dollars in the hands of the government of Sudan.

Because this case is on appeal from the granting of a motion to dismiss, Plaintiffs' allegations of fact are entitled to a presumption of truth. But the facts described above need no presumption. BNPP has admitted that they are "true and correct" and would have been proven "beyond a reasonable doubt" had the matter gone to trial. JA-216. Thus, through its crimes, BNPP provided money and financing on a massive scale that Sudan otherwise would not have possessed. The regime used those resources to engage in a genocidal campaign that it otherwise could not have perpetrated. *See, e.g.*, JA-88-89.

The victims of BNPP's scheme were the people of Sudan who were targeted by the regime in a campaign to eliminate occupants of oil-rich land and ethnically cleanse Black Africans, including Muslims in Darfur and Christians in southern Sudan. Plaintiffs are refugees from the atrocities committed against them in their former home, including the area of Sudan that became the new nation of South Sudan in 2011. Some were children at the time they were harmed. All now reside lawfully in the United States. Most are U.S. citizens; the rest are lawful permanent residents or waiting to become eligible for permanent resident status. All have suffered grievous injury from the atrocities perpetrated by Sudan, including mass rape, torture, deliberate infection with HIV, and being forced to watch family

members raped and killed. JA-43-64. The scheme perpetrated by BNPP provided the financing with which these atrocities were committed. As a result of BNPP's criminal conspiracy with Sudan, the regime had substantial resources available that it would not otherwise have had, resources with which it acquired military hardware and funded militias used in committing atrocities against the Plaintiffs. JA-73-74.

Liability turns on whether BNPP's participation in this criminal conspiracy with a perpetrator of mass atrocities was a substantial contributing factor to the injuries of the individuals who were the victims of those atrocities. Plaintiffs allege, and propose to prove at trial, that the commission of atrocities against them was one of the foreseeable ends of the criminal conspiracy: that BNPP entered into its conspiracy to commit financial crimes and help Sudan circumvent U.S. sanctions knowing that Sudan was committing atrocities, knowing that the purpose of the sanctions was to prevent Sudan from acquiring funds with which to carry out those atrocities, and knowing that Sudan's purpose in using the U.S. financial market for its illicit oil sales was to acquire billions of U.S. dollars to purchase weapons, materiel and militia forces as tools of slaughter. JA-74-86, 99-110.

Proof of liability in this case will involve a demonstration that the illicit U.S. dollars Defendant put in the hands of Sudan were substantial factors in permitting the regime to commit its atrocities. BNPP admits that, "[d]ue to its role in

financing Sudan's export of oil, BNPP Geneva took on a central role in Sudan's foreign commerce market. By 2006, letters of credit managed by BNPP Geneva represented approximately a quarter of all exports and a fifth of all imports for Sudan. Over 90% of these letters of credit were denominated in U.S. dollars. In addition, the deposits of Sudanese Government Bank 1 at BNPP Geneva represented about 50% of Sudan's foreign currency assets during this time period." JA-86-96, 222-23. Plaintiffs will prove that the dollars BNPP made available to Sudan were used to fund the regime's atrocities and formed an indispensable component of those atrocities.

This direct path between BNPP's supply of illicit funds to Sudan and the atrocities the regime committed with those funds places this case in a category different from other recent cases involving financial institutions and human rights violations. There is no intermediate causal step between BNPP's financial crimes and Sudan's use of illegal proceeds to commit atrocities. In other cases, plaintiffs have alleged that financial institutions have provided funds to state sponsors of terror, which in turn have given those funds to other terrorist organizations, which in turn have committed terrorist acts. Some courts have held that this extra step in the causal chain—from financial institution to state sponsor of terror to actual perpetrator of atrocities—prevents plaintiffs from holding the financial institution accountable. *See, e.g.*, *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85 (D.D.C.

2017) (rejecting claim against BNPP based on funds illegally supplied by BNPP to Sudan, which Sudan then provided to al Qaeda, which al Qaeda then used to commit terrorist bombing), *appeal docketed*, No. 17-7037 (Feb. 28, 2017).

Here, BNPP entered into an illegal conspiracy directly with a perpetrator of mass violations of human rights, knowing that the regime would, and did, use the illegal proceeds of the conspiracy to commit atrocities. Indeed, BNPP admits that it committed its crimes "despite the Government of Sudan's role in … committing human rights abuses…." JA-221-23. There is no extra step in the chain. The causal relationship is proximate.

Plaintiffs are twenty-one survivors of these unspeakable atrocities, some of them children. They seek to represent a class of refugees from Sudan who now reside in the United States and suffered grievous injuries at the hands of Sudan during and after BNPP's conspiracy. They have been maimed by military hardware acquired with the fruits of BNPP's conspiracy, raped and tortured by militias funded with the money that BNPP made available to Sudan, and seen family members killed by weapons purchased with currency that the United States tried to keep from the regime but that BNPP provided.

Plaintiffs have asserted common-law claims under the laws of the State of New York, the place where BNPP processed its criminal transactions and executed

a substantial portion of the conspiracy.[2] They allege that BNPP's conspiracy to provide illicit funds to Sudan also constituted a conspiracy to facilitate and aid and abet the atrocities that Sudan committed with those illicit funds. They further allege that BNPP's criminal conduct constituted negligence *per se*, was outrageous conduct causing severe emotional distress, and caused the negligent infliction of emotional distress.[3]

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[2] Defendants argued below that either the law of Sudan or Switzerland should govern Plaintiffs' claims. Because of its ruling on the act of state doctrine, the District Court did not decide the choice of law issue. Plaintiffs can prevail under the substantive liability standards of any of these legal systems, but it is clear that New York law applies. *See Licci v. Lebanese Canadian Bank*, 739 F.3d 45, 51 (2d Cir. 2013) (emphasizing New York's "'overriding interest in regulating' the conduct of banks operating 'within its borders'" (quoting *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 225 (1993).

[3] Plaintiffs also asserted claims for commercial bad faith and unjust enrichment under New York law. The District Court found that plaintiffs had not stated a cause of action under either of those doctrines. SPA-15-19. Plaintiffs do not pursue any further arguments on those two claims.

SUMMARY OF ARGUMENT

1. The Act of State Doctrine Poses No Obstacle to Plaintiffs' Claims.

The act of state doctrine fails at the threshold in this case because no official act of a foreign sovereign must be declared invalid or nonbinding for Plaintiffs to prevail on their common-law claims. In *W.S. Kirkpatrick v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990), a unanimous Supreme Court emphasized the limited scope of the act of state doctrine. "In every case in which we have held the act of state doctrine applicable," the Court explained, "the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *Id*. at 405. Where that threshold requirement is not met, the act of state doctrine is categorically inapplicable. This is so even when the "facts necessary to establish" a plaintiff's claim will also show that a foreign sovereign or its agents have committed acts that are illegal in their own territory. *Id*. at 406.

No official action by a foreign sovereign must be declared invalid to adjudicate any of Plaintiffs' claims. There is no state decree of parentage for the children produced by mass rape that the Court will be asked to set aside in order to decide a question of custody. There is no probate of an estate following the mass murder of ethnic minorities that the District Court will be asked to reopen in order to adjudicate a debt. No element of this case requires the court to rule on "the

effect of official action by a foreign sovereign." *Id*. *W.S. Kirkpatrick* squarely rejected the "position that the act of state doctrine bars any factual findings that may cast doubt upon the validity of foreign sovereign acts," *W.S. Kirkpatrick* at 406. *Id.*, and that is all that this case presents. The act of state doctrine is therefore inapplicable.

Even if it were necessary to conduct an act of state analysis, the doctrine does not shield BNPP. As the Supreme Court explained in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." The atrocities inflicted on Plaintiffs by the Government of Sudan—mass rape, genocide, torture—are violations of *jus cogens* norms so well established in the Law of Nations that there can be no reasonable dispute about their illegality, and they have been condemned in the strongest terms by both the Executive and Congress. Neither is there any dispute about the illegality of BNPP's actions: BNPP pled guilty to a years-long criminal conspiracy to violate U.S. sanctions.

2. Plaintiffs' Claims Are Timely.

The District Court incorrectly held that claims of the adult Plaintiffs sounding in intentional tort are time-barred. That holding depends on a reading of New York C.P.L.R. § 213-b that is unfaithful to the expansive purpose of that

provision. Plaintiffs are the proximate and foreseeable victims of the conspiracy to violate U.S. sanctions to which BNPP pled guilty and are thus within the class of plaintiffs for which the seven-year limitations period of § 213-b was designed. Even under New York C.P.L.R. § 215, the provision the District Court found to be controlling, Plaintiffs' claims fall within a tolling rule authorizing suit within one year of the termination of a criminal proceeding out of which their claims arise. *See* N.Y. C.P.L.R. § 215(8)(a). Under either provision, all of Plaintiffs' claims are timely.

ARGUMENT

I. The Act of State Doctrine Is Categorically Inapplicable Because Plaintiffs' Claims Do Not Require the Court to Declare Invalid Any Official Act by a Foreign Sovereign.

The Supreme Court has identified a strict, categorical limitation on the act of state doctrine that BNPP cannot satisfy. Only when the adjudication of a plaintiff's claims would "require[] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory" is the doctrine potentially implicated. *W.S. Kirkpatrick*, 493 U.S. at 405. This limitation bars application of the doctrine even when "the facts necessary to establish [plaintiff's] claim will also establish that [a sovereign act] was unlawful." *Id*. at 406. "The act of state doctrine is not some vague doctrine of abstention" that aims to spare foreign sovereigns from embarrassing findings of fact "but a '*principle of decision*'" that is applicable "only [ ] when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Id*. (emphasis in original). *W.S. Kirkpatrick* insists on a distinction between disputes in which the official act of a foreign sovereign is the thing to be adjudicated, where the act of state doctrine might apply, and disputes where such acts merely form a part of the factual predicate of a claim involving private wrongful conduct, where the doctrine is categorically inapplicable.

The claims in this case require the adjudication of private wrongful conduct: the admitted criminal actions of BNPP when it conspired to transfer billions of dollars to the Government of Sudan in violation of U.S. sanctions, and the allegation that BNPP thereby conspired and aided and abetted in the commission of the atrocities that Sudan used those funds to carry out. There is no official, sovereign act by Sudan to which the court must either give or deny effect—no judgment, no arrest warrant, no decree, no title to land, no declaration of parental rights or administration of a contested estate. In the process of adjudicating these claims, the court will have to make its own findings about the harms that Plaintiffs suffered as a result of the atrocities committed against them by Sudan. But no official act by the Government of Sudan will serve as a rule of decision for any aspect of this case. The claims here focus exclusively on the wrongful conduct of a private actor, BNPP, and the harm caused by BNPP's crimes.

This distinction between making factual findings of wrongful conduct by a foreign sovereign and the need to give or deny effect to an official act is reflected throughout the Supreme Court's cases. It was the District Court's failure to recognize this distinction that led to its error.

In many cases where the defendant invokes the act of state doctrine, the act of a sovereign is the subject of the lawsuit. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), it was the detention of plaintiff Underhill by defendant Hernandez,

which plaintiff claimed was unlawful and defendant claimed was a legal exercise of his sovereign authority as part of a revolutionary force in Venezuela. In order to find for the plaintiff, the U.S. court would have been required to bind Hernandez to a ruling that his official act was without force—to declare invalid the formal act of a government official and refuse to recognize its operative legal effect. In *Banco Nacional de Cuba v. Sabbatino*, the dispute involved Cuba's expropriation by official decree of a shipment of sugar owned by a business controlled by American stakeholders. The heart of that dispute was "the question of Cuba's title to the sugar, on which rested petitioner's claim of conversion." 376 U.S. at 406. Once again, a ruling in favor of the stakeholders would have required the court to invalidate the expropriation—to make a ruling in which the operative effect of Cuba's official act of granting title to the sugar was denied in the U.S. proceeding. The same was true in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918), both expropriation cases, where ruling for the plaintiffs "would have required declaring that the government's prior seizure of the [contested] property" and the legal title thereby granted were both "legally ineffective." *W.S. Kirkpatrick*, 493 U.S. at 405 (discussing *Oetjen* and *Ricaud*). The same has been true in cases involving artwork stolen by the Nazi government where a plaintiff requests an order recognizing ownership in a disputed work of art that would necessarily deny effect to the title

granted by the foreign sovereign's prior seizure. *See, e.g.*, *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140 (2d Cir. 2012); *see also*, *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l. B.V.*, 809 F.3d 737, 743-44 (2d Cir. 2016) (barring district court from questioning the validity of an assignment of property rights effectuated by a decree of the Russian Federation).

In cases where this element is lacking, the act of state doctrine plays no role, even if the court would have to make findings and draw conclusions concerning the illegality of a foreign sovereign's actions. This is the holding of *W.S. Kirkpatrick*. The dispute there centered on allegations of bribery and corruption by Nigerian government officials in their dealings with contractors. Plaintiff Environmental Tectonics Corp. (ETC), a private contracting business, was a bidder on a major construction project in Lagos, Nigeria. The project was awarded to a competing bidder, W.S. Kirkpatrick, and ETC subsequently learned that W.S. Kirkpatrick had paid illegal bribes to Nigerian officials to secure the government contract—acts that harmed ETC and would make the contract invalid under Nigerian law. U.S. authorities prosecuted W.S. Kirkpatrick under the Foreign Corrupt Practices Act and the company pled guilty. ETC then brought federal and state civil racketeering claims against W.S. Kirkpatrick, arguing that the company had entered into an illegal conspiracy with Nigerian officials and deprived ETC of

lucrative business prospects. W.S. Kirkpatrick invoked the act of state doctrine, but the Court unanimously rejected the defense.

To rule for the plaintiffs on their civil conspiracy claim, U.S. courts were required to find that Nigerian officials had committed the illegal act of receiving a bribe and had thereby entered into an illegal government contract. But the lawsuit did not ask the court to invalidate or otherwise deny effect to the government contract, which was not the subject of the lawsuit, nor did it ask the court to refuse operative effect to any other official act by the Government of Nigeria. The lawsuit asked only for a finding that W.S. Kirkpatrick, a private defendant, had violated U.S. and New Jersey law when it facilitated, aided and abetted, and conspired in the illegal acts of the Nigerian officials. In such a case, the Court concluded, the act of state doctrine is not implicated.

> Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires.

W.S. Kirkpatrick, 493 U.S. at 406.

The defendant in *W.S. Kirkpatrick* attempted to draw a distinction between its prior criminal prosecution under the Foreign Corrupt Practices Act, which only required evidence of the defendant's own actions and did not entail a finding of

illegal behavior on the part of Nigerian officials, and the civil claims in the case at bar, where it would be necessary for the court to find that Nigerian officials had illegally received bribes in order to establish defendant's liability. The defendant made the argument a cornerstone of its brief to the Court:

> [T]he government charge and offer of proof in the criminal case carefully avoided any statement as to whether any Nigerian government official received the bribe, let alone whether such a bribe caused the Nigerian government to award the military contract to Kirkpatrick or whether the Nigerian government as a practice requires such payments in connection with its contract awards. . . . In this civil case, ETC's claim depends upon proving that the bribe was actually received by one or more officials, that the bribe caused the Nigerian government to issue the contract and that ETC would have obtained the contract without such a payment.

Br. for Pet'rs, *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 1989 WL 1127461, at *25 (Aug. 24, 1989). The Supreme Court rejected the argument:

> Petitioners point out . . . that the facts necessary to establish respondent's claim will also establish that the contract was unlawful. Specifically, they 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.

W.S. Kirkpatrick, 493 U.S. at 406.

The District Court in this case relied on the same flawed argument that the defendant in *W.S. Kirkpatrick* attempted. "In order for the Court to impose liability on the Defendants for conspiring with or aiding and abetting the Government of Sudan in circumventing U.S. sanctions and carrying out the torts alleged," the

court below said, it "must necessarily conclude that the Government of Sudan's actions amounted to tortious conduct including battery, assault, false arrest and imprisonment, wrongful taking, and wrongful death." SPA-7. This is precisely the reasoning that *W.S. Kirkpatrick* rejected. It is true that the court would have to "conclude that the Government of Sudan's actions amounted to tortious conduct" for Plaintiffs to prevail, just as the plaintiffs in *W.S. Kirkpatrick* had to "prove that petitioner Kirkpatrick made, and Nigerian officials received, payments that violate Nigerian law" in order to establish liability. *W.S. Kirkpatrick*, 493 U.S. at 406. The act of state doctrine poses no barrier to adjudication merely because the trial court will have to make "factual findings that may cast doubt upon the validity of foreign sovereign acts." *Id*.

The District Court's error is even more conspicuous in its dismissal of Plaintiffs' claims for negligence *per se*, outrageous conduct causing emotional distress, and negligent infliction of emotional distress. The court justified its application of the act of state doctrine to those claims by saying, "To sustain any of these causes of action, the Plaintiffs must prove that they suffered a cognizable injury. The injuries Plaintiffs allege they suffered in connection with these causes of action are injuries inflicted by the Government of Sudan. The Court cannot rule on these claims without 'sit[ting] in judgment on the acts of the government of another, done within its own territory.'" SPA-8-9 (citations omitted). One of the

Supreme Court's purposes in *W.S. Kirkpatrick* was to put to rest this misapplication of the doctrine. Acknowledging that the "Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years," the Court made clear that its earlier statements about "sitting in judgment" on the acts of a foreign sovereign had no application where a plaintiff "was not trying to undo or disregard the governmental action, but only to obtain damages from private parties who had procured it," even if the court would be required to issue factual findings showing that agents of a foreign sovereign engaged in illegal conduct and thereby "cast doubt upon the validity of foreign sovereign acts." The act of state doctrine applies when the operative or binding effect of those official acts is itself the subject of the lawsuit. "When that question is not in the case, neither is the act of state doctrine." *W.S. Kirkpatrick*, 493 U.S. at 404-07.

This is what the Court meant in *W.S. Kirkpatrick* when it emphasized that the act of state doctrine is a "*principle of decision*" rather than "some vague doctrine of abstention," *id*. at 406 (emphasis in original), a passage the District Court quoted but misapplied. The "principle of decision" refers to the prospect that a U.S. court might have to "declare invalid the official act of a foreign sovereign," *id*. at 405, not merely the prospect of a trial court making factual findings indicating illegal conduct by that sovereign. Hence in *W.S. Kirkpatrick*, the Court

explained: "Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires." *Id*. at 406.

Commentators have long compared the act of state doctrine to full faith and credit in U.S. judgments law to capture this distinction. *See* U.S. Const. Art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."). In one early scholarly treatment, Professor Katzenbach described the act of state doctrine as "international full faith and credit" and explained: "The strongest case, of course, is presented by the executed judgment or decree—the exercise of territorial power-in-fact by a foreign official." Nicholas DeBelleville Katzenbach, *Conflicts an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087, 1094, 1131 (1956). Professor Dellapenna urged that the act of state doctrine "should be viewed as a rule that requires U.S. courts to enforce foreign decisions much like the full faith and credit clause applies to judgments in different states." Statement of Professor Joseph W. Dellapenna *in* American Society of International Law Proceedings, *Public Acts of State, the Foreign Sovereign Immunities Act, and the Judiciary*, 83 Am. Soc'y Int'l L. Proc. 483, 494 (1989). And Professor Mooney has explained: "Taken at face value, the Act of State

Doctrine would seem to invest foreign acts of state with virtual conclusivity, a stature similar to that given local acts of state, and be thus tantamount to an international full faith and credit rule." Eugene F. Mooney, *Foreign Seizures*: *Sabbatino and the Act of State Doctrine* 166 (1967).

The analogy to full faith and credit aims to capture the same distinction that governed the result in *W.S. Kirkpatrick*. Full faith and credit attaches to judgments and other "public acts" and "records" and applies only when a decree binds the party against whom it is invoked in a subsequent proceeding. Full faith and credit does not preclude the courts of one state from coming to conclusions different from those reached by sister states unless a specific judgment, public act or record binds the parties and dictates that result. Just so, *W.S. Kirkpatrick* emphasized that the act of state doctrine applies only when "the outcome of [a] case turns upon [ ] the effect of official action by a foreign sovereign" and the court must "undo or disregard the governmental action." *W.S. Kirkpatrick*, 493 U.S. at 406, 407. Where the court will merely have to make a finding that a foreign sovereign or its agents committed illegal acts—where no judgment, public act or record, or similar official act is before the court for decision—then "there is . . . no occasion to apply the rule of decision that the act of state doctrine requires" and the doctrine plays no role. *Id.* at 406.

As the party invoking the act of state doctrine, BNPP bears the burden of proof. *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 694 (1976). And BNPP fails that burden at the threshold. It can identify no official act by the Government of Sudan that a court would have to "undo or disregard" as a necessary step in deciding Plaintiffs' claims. *W.S. Kirkpatrick* completely disposes of the act of state doctrine in this case. This Court should reverse the ruling of the District Court on that basis alone.

II. The Atrocities Committed by the Government of Sudan Violate Universally Recognized Norms, Have Already Been Condemned as Illegal by the United States Government, and Cannot Support BNPP's Invocation of the Act of State Doctrine.

For the reasons set forth above, there is no need for this Court to perform an analysis under the act of state doctrine. That doctrine is inapplicable to this dispute. But if this Court does perform an act of state analysis, it must still reverse the decision of the District Court. Mass rape, torture and genocide are not acts of state entitled to respect and deference in the community of nations but violations of universally recognized principles that are fundamental and overriding. The Executive and Legislative Branches of the U.S. Government have condemned the atrocities perpetrated by the Government of Sudan, and the Executive has invoked the assistance of the federal courts in prosecuting BNPP for its criminal conspiracy to circumvent the U.S. sanctions that sought to prevent those harms. BNPP can find no sanctuary in the act of state doctrine, even if that doctrine is found to be

relevant here. If this Court reaches the issue, it should repudiate this attempt to invoke the act of state doctrine to shield facilitation of the most extreme human rights atrocities.

A. The Atrocities Committed by the Government of Sudan are Violations of *Jus Cogens* Norms and Cannot Support BNPP's Invocation of the Act of State Doctrine.

The atrocities committed by the Government of Sudan are entitled to no deference under the act of state doctrine. As *jus cogens* norms, the injunction against these atrocities is universal and non-derogable. A U.S. court pronouncing on the illegality of such atrocities will produce no legitimate conflict with the internal laws or policies of other nations. As Judge Sofaer put it when rejecting an act of state defense in a case involving accusations of deliberate mass slaughter of innocent civilians, "[t]he issue [in such a case] is not whether such acts are valid, but whether they occurred." *Sharon v. Time, Inc.*, 599 F. Supp. 538, 546 (S.D.N.Y. 1984).

In *Sabbatino*, 376 U.S. at 427-28, the Supreme Court explained that the act of state doctrine is a creation of federal common law "compelled by neither international law nor the Constitution," that seeks to "reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." The doctrine poses questions about the judicial role: what types of claim are appropriate for judicial resolution, and when

might a direct clash with the sovereign act of another nation counsel against judicial intervention?

When the acts of a foreign sovereign violate norms of international law, the status of the violated norm bears heavily on whether the act of state doctrine presents any obstacle. "[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Id.* at 428. As the Court later made clear in *W.S. Kirkpatrick*, these considerations are "a consequence of domestic separation of powers" and aim to identify the limited circumstances in which the "obligation" that U.S. courts ordinarily have "to decide cases and controversies properly presented to them" must give way to constraints on the judicial role. *W.S. Kirkpatrick*, 493 U.S. at 404, 409.

In many of the cases in which the Supreme Court has found the act of state doctrine to prevent recovery, the claimed violation has involved the expropriation of property or assets, often where a foreign national was the aggrieved owner. *Sabbatino* was an expropriation case involving Cuba's seizure of foreign-owned sugar-producing businesses; *Oetjen* arose out of the seizure by Mexican forces of

leather hides owned by Mexican citizens which were then sold and assigned to a series of American businesses; and *Ricaud* involved a similar expropriation by Mexican forces directly from an American citizen. *See Sabbatino*, 376 U.S. at 401-07; *Oetjen*, 246 U.S. at 299-302; *Ricaud*, 246 U.S. at 305-07. The *Sabbatino* Court emphasized that the application of the act of state doctrine to these cases rested on the contested status of expropriation claims under international law: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." Hence, even if there was an "international standard in this area" by which the illegality of the seizures could be measured, the contested status of the norm indicated that "the matter [was] not meet for adjudication by domestic tribunals." *Sabbatino*, 376 U.S. at 428 & n.26. When combined with the fact that each of these cases would require a U.S. tribunal to nullify and declare invalid a foreign sovereign's official act of expropriation (*see* Part I, *supra*), the lack of consensus on the underlying substantive norms led the Court to conclude that judicial intervention was improper.

The atrocities that the Government of Sudan has committed against its own people pose no such dilemma. Opinion within the community of nations is in no way "divided as [to] the limitations on a state's power" to torture innocent civilians, perpetrate mass rape, and engage in a program of ethnic cleansing. These

are *jus cogens* norms on which the international community has spoken with resounding clarity:

- On genocide: *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility Judgment, 2006 I.C.J. 6, 32 (Dec. 2005) (noting that it "is assuredly the case with regard to the prohibition of genocide" that it is one of the "peremptory norms of general international law *(jus cogens)*").

- On torture: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 2012 I.C.J. 422, 457 (July 2012) (commenting that "the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*").

- On mass rape as a tool of terror and war: *Prosecutor v. Bosco Ntaganda*, No. ICC-01-/04-02/06, Trial Chamber, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9, at 28 (Jan. 4, 2017) (observing that "rape can constitute an underlying act of torture or of genocide and that the prohibitions of torture and genocide are indisputably *jus cogens* norms" and further that a "majority of the Chamber accepts[] that the prohibition on rape itself has similarly attained *jus cogens* status under international law" (footnote omitted)).

As this Court has put it, such a "*jus cogens* norm, also known as a 'peremptory norm' of international law, 'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 n.4 (2d Cir. 2010) (quoting *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714 (9th Cir.1992)).

Courts in the United States have spoken with one voice on the *jus cogens* status of atrocities like those committed by the Government of Sudan. The Fourth Circuit has identified "torture, genocide, indiscriminate executions and prolonged arbitrary imprisonment" as peremptory norms from which no State may derogate. *Yousuf v. Samantar*, 699 F.3d 763, 775-77 (4th Cir. 2012). The Ninth Circuit has long held that acts of torture and extrajudicial killing perpetrated against civilians "by members of military or paramilitary forces" constitute "violations . . . of a *jus cogens* norm of international law." *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996); *see also In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) ("[T]he prohibition against official torture carries with it the force of a *jus cogens* norm, which enjoys the highest status within international law." (quotations, citation, and alterations omitted); *Siderman de Blake*, 965 F.2d at 717 (same). District courts around the country have come to the same conclusion. *See, e.g.*, *Warfaa v. Ali*, 33 F. Supp. 3d 653, 662 (E.D. Va. 2014) (torture and extrajudicial killing are violations of *jus cogens* norms), *aff'd on other grounds*, 811 F.3d 653 (4th Cir. 2016); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1252 (S.D. Fla. 1997) ("The ban on extrajudicial killing [ ] rises to the level of *jus cogens*, a norm of international law so fundamental that it is binding on all members of the world community." (footnote omitted)); *Hirsh v. State of Israel*, 962 F. Supp. 377, 381 (S.D.N.Y. 1997) ("A foreign state violates *jus cogens* when

it participates in such blatant violations of fundamental human rights as 'genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination.'" (citation omitted)).

The act of state doctrine is at its nadir in cases involving violations of peremptory *jus cogens* norms. The *Sabbatino* Court emphasized the need to respect the sovereign prerogatives of foreign nations where there is "disagreement as to relevant international law standards." *Sabbatino*, 376 U.S. at 430. There can be no legitimate disagreement among nations about the prohibitions against mass rape, torture and genocide. *Sabbatino* also emphasized the countervailing policy considerations that might arise in expropriation cases because of differences "between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system." *Id*. Different economic or cultural systems might value particular norms of international law relating to property rights more or less highly. But there are no legitimate countervailing economic or social considerations when government agents commit acts of torture, mass rape and genocide.

Courts must not equivocate on the peremptory and non-derogable status of such *jus cogens* norms, as BNPP invites when it invokes the act of state doctrine to shield itself from liability for the harms caused by its conspiracy with Sudan.

Equivocation on the substantive content of these norms would undermine the consensus upon which their enforcement depends—a proposition reflected in the statement this Court made about the proposed invocation of the act of state doctrine in a case involving allegations of "brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian–Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war." *Kadic v. Karadžić*, 70 F.3d 232, 236-37 (2d Cir. 1995). Defendant Radovan Karadžić failed to assert the act of state doctrine before the district court in that case, so this Court found the issue waived when he attempted to raise the argument on appeal. But the Court went out of its way to disapprove the idea that human rights atrocities could ever support an invocation of the doctrine, framing its analysis in terms of the Alien Tort Statute on which the plaintiffs in that case had based their chief claims:

> As to the act of state doctrine, . . . the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state. Finally, as noted, we think it would be a rare case in which the act of state doctrine precluded suit under [the ATS]. *Banco Nacional* was careful to recognize the doctrine "in the absence of . . . unambiguous agreement regarding controlling legal principles" such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien's property—in which world opinion was sharply divided.

Id. at 250 (citations omitted).

On the strength of these principles, courts have held that the act of state doctrine can never apply to violations of *jus cogens* norms. One court grounded that holding in the principle of non-derogation, finding that "*jus cogens* norms, which are afforded the highest status under international law, are exempt from the act of state doctrine because they constitute norms from which no derogation is permitted" and that allegations of "[s]tate torture violate[d] such a *jus cogens* norm." *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1242 (S.D. Fla. 2012) (quotation and citation omitted). Other courts have found that the act of state doctrine may never apply to violations of *jus cogens* norms because no reasonable disagreement is possible about the illegality of such actions. One such case alleged that Banque Paribas had "aided and abetted and conspired with the Vichy and Nazi regimes to plunder private property" of Jewish victims and survivors of the Holocaust in France. The court held that the act of state doctrine was "not implicated" because of "the widely-recognized principle of international law, at that time, proscribing the deprivation of property based on race." *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130 (E.D.N.Y. 2000). Another statement to the same effect appears in a ruling by Judge Sofaer in a libel case involving accusations that the Prime Minister of Israel had "condoned the massacre of unarmed noncombatant civilians." *Sharon*, 599 F. Supp. at 546. Judge Sofaer explained that

the act of state doctrine could not apply because there was no question that "such actions, if they occurred, would be illegal and abhorrent." *Id.*

All these analytical approaches draw on a common principle: questions concerning the validity of official actions taken by a foreign sovereign can only arise when the community of nations recognizes the possibility of disagreement about the application of international law to those acts. Where the underlying conduct is so abhorrent that it violates *jus cogens* norms that the international community has recognized as peremptory and non-derogable, there is no legitimate basis for disagreement. As this Court suggested in *Karadžić*, it would be the "rare case" in which the act of state doctrine could limit the ability of U.S. courts to pronounce on the illegality of torture, mass rape and genocide. 70 F.3d at 250. Whatever circumstances might permit a case to be dismissed on the theory that U.S. courts cannot "sit in judgment" of such atrocities, *Underhill*, 168 U.S. at 252 , a lawsuit that seeks to hold a bank accountable for the proximate consequences of its admitted financial crimes is not that case.

B. The Political Branches of the U.S. Government Have Condemned Sudan's Atrocities and There is No Danger of Inter-Branch Tension in this Case.

The political branches of the U.S. Government have left no doubt about their judgment that Sudan committed widespread atrocities against its own people. Executive Orders by two U.S. Presidents, a concurrent resolution of the House and

Senate, and sworn testimony by a U.S. Secretary of State all condemned the Government of Sudan as perpetrators of grave human rights abuses during the period of time relevant to this case. Insofar as the act of state doctrine aims to prevent "the possibility of conflict between the Judicial and Executive Branches" or avoid judicial pronouncements that may "increase any affront" a foreign sovereign might feel, those concerns are not implicated here. *Sabbatino*, 376 U.S. at 432, 433.

President Clinton invoked the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, and National Emergencies Act, 50 U.S.C. § 1601 *et seq.* to impose sanctions against Sudan:

> I, WILLIAM J. CLINTON, President of the United States of America, find that the policies and actions of the Government of Sudan, including continued support for international terrorism; ongoing efforts to destabilize neighboring governments; **and the prevalence of human rights violations, including slavery and the denial of religious freedom**, constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and hereby declare a national emergency to deal with that threat.

Executive Order 13067, 62 C.F.R. § 214, at 1 (Nov. 5, 1997) (emphasis added); SPA-106. Nine years later, Sudan's campaign of violence had intensified and President George W. Bush issued a second order to reaffirm U.S. condemnation of the atrocities and strengthen efforts to prevent harm.

> I, GEORGE W. BUSH, President of the United States of America, find that, due to the continuation of the threat to the national security and foreign policy of the United States created by **certain policies**

> **and actions of the Government of Sudan that violate human rights, in particular with respect to the conflict in Darfur**, where the Government of Sudan exercises administrative and legal authority and pervasive practical influence, and due to the threat to the national security and foreign policy of the United States posed by the pervasive role played by the Government of Sudan in the petroleum and petrochemical industries in Sudan, it is in the interests of the United States to take additional steps with respect to the national emergency declared in Executive Order 13067 of November 3, 1997.

Executive Order 13412, 71 C.F.R. § 200, at 1 (Oct. 17, 2006) (emphasis added); SPA-115.

This second presidential condemnation was the culmination of public findings by both political branches of the continuing atrocities being visited by Sudan on its own people. In sworn testimony before the Senate Foreign Relations Committee, Secretary of State Colin Powell stated the conclusion of the U.S. Government that Sudan had committed a "consistent and widespread" pattern of atrocities that included mass rapes, extrajudicial killing, and wanton destruction of whole communities. Secretary Powell emphasized that these atrocities were the product of "a coordinated effort, not just random violence" and that "genocide has been committed" by Sudan in the Darfur region. Secretary Colin L. Powell Testimony Before Senate Foreign Relations Cmte (Sept. 9, 2004), https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm. Shortly thereafter, the House and Senate unanimously adopted a concurrent resolution in which they "declare[d] that the atrocities unfolding in Darfur, Sudan, are genocide," "urge[d]

the Administration to call the atrocities [a] genocide,'" and declared the Government of Sudan to be in violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The concurrent resolution called on the United Nations and the U.N. Secretary General to label the atrocities in Darfur as genocide and take action. H.R. Con. Res. 467, 108th Cong. (2004) (enacted). The United Nations thereafter issued a report declaring the Government of Sudan "responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law." Rep. of the Int'l Comm'n of Inquiry on Darfur to the U.N. Secretary General, at 3 U.N. Doc. S/2005/60 (Jan. 25, 2005).

When BNPP's criminal conspiracy to fund the Government of Sudan with U.S. dollars eventually came to light, the U.S. Government invoked the assistance of the federal judiciary. On July 9, 2014, the U.S. Attorney for the Southern District of New York charged BNPP with criminal conspiracy to violate U.S. sanctions. Nineteen days later, BNPP pled guilty. As part of the plea agreement, the U.S. Government required BNPP to pay massive penalties, admit to the stipulated statement of facts referenced *supra*, and agree to ongoing monitoring and compliance procedures to ensure that it did not reoffend. The district court entered a judgment of conviction on May 1, 2015.

This is not an expropriation case in which the Executive Branch seeks to resolve a property dispute and fears that any "stamp of approval . . . by a judicial tribunal" on claimed violations of international law would "increase any affront" to the foreign sovereign with which it is negotiating. *See Sabbatino*, 376 U.S. at 432. This is a case in which a financial institution is attempting to avoid civil liability for the consequences of its admitted criminal conduct by invoking, as a shield, acts of mass rape, torture and ethnic cleansing that the Executive and Congress have condemned. The concerns over separation of powers that are discussed in earlier cases are not present here. This is particularly true for those Plaintiffs who suffered atrocities in the southern region of Sudan where sovereignty transferred to a newly recognized nation in 2011. *Cf. Republic of the Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986) (in case where defendant former head of state was no longer in power, "the danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government").

Separation-of-powers concerns are at low ebb in this case and indicate no need for judicial abstention.

C. The District Court's Analysis Directly Contradicts *Sabbatino* and *W.S. Kirkpatrick*.

The District Court misapplied the act of state doctrine when it rejected these clear reasons for finding the doctrine inapplicable. The court effectively treated act

of state as an absolute bar on all common-law and statutory causes of action except those directly grounded in international law. That holding contradicts the multiple cases in which the Supreme Court has analyzed act of state factors in response to common-law and statutory claims.

Much of the District Court's analysis on act of state relates to the threshold question of whether the doctrine is implicated at all, which Plaintiffs address in Part I, *supra*. *See* SPA-6-9. The entirety of the court's analysis of the *Sabbatino* factors and their application to this dispute is contained in the following paragraph:

> Plaintiffs also argue that the act of state doctrine is inapplicable to their claims because they allege "[h]uman rights abuses like genocide, ethnic cleansing, mass rape, torture, killing, and taking of property" that "do not qualify as public acts of state" and were "condemned" by the United States "during the time of BNPP's conspiracy." However, the Second Amended Complaint does not bring causes of action arising under international law for human rights abuses. Instead, it brings only common law claims under the laws of New York. As a result, the Plaintiffs do not ask the Court to determine whether the Government of Sudan violated international law; they only ask the Court to find that the Government of Sudan's actions amounted to battery, assault, wrongful takings, and other common law claims. This is what the act of state doctrine prohibits the Court from doing.

Id. at 8 (citations omitted). Clear precedent forecloses this analysis. The plaintiffs in *Sabbatino* did not "bring causes of action arising under international law," they asserted a common-law claim for conversion under the laws of New York. *See Sabbatino*, 376 U.S. at 406 ("Petitioner then instituted this action in the Federal District Court for the Southern District of New York. Alleging conversion of the

bills of lading it sought to recover the proceeds thereof . . . ."). The plaintiffs in *W.S. Kirkpatrick* did not "bring causes of action arising under international law," they asserted claims under federal RICO and the New Jersey Anti-Racketeering Act. *See W.S. Kirkpatrick*, 493 U.S. at 402; *see also, e.g.*, *Oetjen*, 246 U.S. at 299 (plaintiffs brought "suits in replevin"); *Underhill v. Hernandez*, 65 F. 577, 578 (2d Cir. 1895) (plaintiffs brought suit "for false imprisonment and assault and battery"), *aff'd*, 168 U.S. 250 (1897). In each case, the Court took the cause of action on its own terms, whether grounded in state or federal law, and asked whether the act of state doctrine posed any barrier to recovery.

The act of state doctrine defines the limited circumstances in which a court may be prevented from performing the judicial function. Where a plaintiff's claims would require the court to invalidate the official act of a foreign sovereign, the court must determine whether "the degree of codification or consensus concerning" the status of those acts under international law will allow it to "focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Sabbatino*, 376 U.S. at 428. The doctrine neither defines the elements of any cause of action nor restricts the permissible sources of substantive law that may animate any claim. *See W.S. Kirkpatrick*, 493 U.S. at 405-408; *Sabbatino*, 376 U.S. at 428-36.

The District Court's approach would effectively transform the act of state doctrine into a categorical bar on common-law and statutory causes of action. Parties would be prevented from making any arguments about norms of international law and separation of powers under the act of state doctrine, unless claimants were asserting "causes of action arising under international law." SPA-8. The *Sabbatino* Court expressly foreclosed this result, emphasizing that it was not "laying down or reaffirming an inflexible and all-encompassing rule" in response to the common-law claim before it, but rather was deciding "only that the (Judicial Branch) will not examine the validity of a taking of property within its own territory by a foreign sovereign government" because of the contested international law status of expropriation claims. *Sabbatino*, 376 U.S. at 428.

In *W.S. Kirkpatrick*, the Supreme Court warned against precipitous expansion of the act of state doctrine. "It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked," the Court explained; "it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine . . . into new and uncharted fields." 493 U.S. at 409. The Court below failed to heed this warning.

The District Court misapplied *W.S. Kirkpatrick* when it found the act of state doctrine applicable to this case at all, and it directly contradicted *Sabbatino* when it shielded BNPP's financial crimes from any civil liability under common-law causes of action. This Court should reverse the ruling below and instruct the District Court that the act of state doctrine poses no obstacle to Plaintiffs' claims.

III. New York's Statutes of Limitations for Crime Victims Apply to Appellants' Claims Sounding in Intentional Tort

The District Court properly found that the statute of limitations on all of Plaintiffs' claims was tolled as a result of BNPP's fraudulent concealment of its illegal activity, that all of Plaintiffs' claims sounding in negligence are timely, and that all claims brought by the minor Plaintiffs are timely. SPA 10-11, 13-15. But the District Court erred in holding that the claims of adult Plaintiffs sounding in intentional tort are time barred. Those claims are governed by C.P.L.R. § 213-b, New York's statute of limitations for crime victims. Section 213-b was specifically enacted to provide victims of a crime for which a defendant has been convicted a period of seven years in which to seek damages for any injury "resulting therefrom." The intentional tort claims of the adult Plaintiffs are timely under that provision.

Even under the statute of limitations that the District Court found controlling, C.P.L.R. § 215, these claims are still timely. Section 215(8)(a) gives claimants "at least one year from the termination of [a] criminal action" "against

the same defendant" to file suit "with respect to the event or occurrence from which a claim governed by this section arises," even if any otherwise-applicable limitations provisions have expired. The federal criminal action against BNPP terminated on May 1, 2015, the date BNPP was sentenced and the district court entered its judgment of conviction. Plaintiffs filed their action on April 29, 2016, less than one year from that date. Thus, under either provision, the claims of the adult Plaintiffs were timely filed.

A. Plaintiffs' Claims Sounding in Intentional Tort Are Timely Under C.P.L.R. § 213-b.

The District Court erred when it denied Plaintiffs the seven-year limitations period of New York C.P.L.R. § 213-b based on its incorrect finding that they are not crime victims for purposes of that statute. Plaintiffs alleged in their complaint and argued below that they are the victims of BNPP's criminal conspiracy with the Government of Sudan to violate U.S. sanctions, having suffered exactly the harms those sanctions were designed to prevent. The financial crimes that BNPP committed in furtherance of its conspiracy have a close causal nexus with Sudan's aim in that conspiracy: the use of illicit funds to commit atrocities against Plaintiffs. The conduct for which BNPP pled guilty is the same conduct that forms the basis of Plaintiffs' claims. BNPP was "convicted of a crime which is the subject of [Plaintiffs'] action" and Plaintiffs are suing for "injury or loss resulting therefrom." Plaintiffs are therefore "crime victims" within the meaning of § 213-b

and their intentional tort claims are timely under its seven-year limitations period, measured from the tolling date of June 2014 set by the District Court.[4]

The courts of New York have repeatedly emphasized that § 213-b "was intended to be expansive" and that "a broad interpretation of [the] statute is warranted in order to conform to the legislative intent" that "all crime victims receive compensation for injuries suffered as a result of the crime." *Elkin v. Cassarino*, 248 A.D.2d 35, 38-39 (N.Y. App. Div. 2d Dep't 1998); *id*. at 39 (quoting Robert Abrams, Mem. to the Governor, Bill Jacket, L. 1992 ch. 618, at 23). Section 213-b applies to BNPP's federal criminal conviction, since it "does not expressly or impliedly mandate that the 'crime' in question be a conviction in a New York State Court, or one defined by the laws of the State of New York." *Id*. at 38. And, as the Second Department has emphasized, because § 213-b "does not specifically define 'crime,' does not limit the crimes to which it is applicable, and does not limit the term 'crime victim,'" *id.*, courts should apply the provision generously to accomplish its goal of holding criminals responsible for the injuries caused by their crimes.

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[4] The opinion below incorrectly states that "Plaintiffs do not specifically argue that they were victims of BNPP's crimes." SPA-13. Plaintiffs specifically alleged and argued exactly that. JA-133 ("Plaintiffs and the Class were victims of BNPP's crimes," including violations of the sanctions), JA-439-41 ("Plaintiffs are victims of BNPP's crimes"); *see also* JA-35, 140, 141, 144.

Decisions by federal and state courts interpreting § 213-b confirm the broad sweep of the provision. In *Hemmerdinger Corp. v. Ruocco*, 976 F. Supp. 2d 401 (E.D.N.Y. 2013), a federal district court rejected an attempt to read a "direct injury" requirement into § 213-b and held that the provision applies whenever a plaintiff's claim arises out of the events underlying a defendant's criminal conviction. *Hemmerdinger* involved a conspiracy to defraud a developer in which several defendants were criminally convicted and pled guilty. The scheme involved invoices that were fraudulently inflated by hundreds of thousands of dollars. The developer later sued the defendants for damages, invoking § 213-b, and one defendant argued that the plaintiff "did not allege a direct injury resulting from the crime for which [he] was convicted" because the plaintiff's damages resulted from payment of the fraudulent invoices whereas this defendant "was convicted based on his transmission of a single facsimile" some time after the plaintiff received the invoices and made payment. *Id*. at 410. The district court rejected such formalism. Even if the defendant's bad act did not itself inflict injury on the plaintiff, the plaintiff's injuries "arose out of the same event and occurrence as formed the basis of the defendant's Federal criminal conviction." *Id.* (quoting *Elkin*, 248 A.D.2d at 36-37). Section 213-b therefore applied and the plaintiff's claims were timely.

In *Elkin v. Cassarino*, *supra*, the Second Department repudiated a similar attempt to impose a "direct injury" requirement on § 213-b. Another statutory

provision, New York Executive Law § 621, imposes a more restrictive definition for "crime victim" when defining the circumstances in which the State of New York will use public funds to compensate people injured by crimes. In that setting, New York requires that a "victim" suffer "personal physical injury as a *direct result* of a crime." N.Y. Exec. Law § 621(5) (emphasis added). Section 213-b contains no such requirement, and the Second Department thoroughly rejected the suggestion that any limitation from Executive Law § 621(5) should be imported into § 213-b. "The two statutes serve two totally different purposes"—the one defining when the State itself will assume the burden of compensating victims, the other defining when the perpetrators of criminal conduct can be held accountable for the injuries they cause—and "it follows that the terms 'crime' and 'crime victim' were not intended to be restricted [in § 213-b] as they are in the Executive Law." *Elkin*, 248 A.D.2d at 38.

A New York court employed similar reasoning to find that insurance companies qualify as "crime victims" under § 213-b when they are obligated to pay an insured for the loss it suffers as the result of a third party's criminal conduct. In *National Union Fire Ins. v. Erazo*, 187 Misc. 2d 194 (N.Y. Sup. Ct. 2001), the plaintiff was an insurance company obligated to cover a hospital's losses after an employee stole $100,000. The defendant was prosecuted, pled guilty to grand larceny, and agreed to make full restitution to the insurance company for

the amount it had covered, but he only paid half the money. The insurance company sued to recover the other half and invoked § 213-b to establish that its claim was timely. The court concluded that the insurance company was "a 'crime victim' within the meaning of C.P.L.R. 213-b," *id*. at 197-98, notwithstanding the fact that the hospital, not the insurer, was the direct victim of the defendant's crime. Pointing to legislative history indicating that "[a]ny questions that may arise regarding the nature and extent of damages recoverable [under § 213-b] ought to be answered in the broadest fashion," the court found it "entirely consistent with the ameliorative purposes of C.P.L.R. 213-b and the Penal Law's understanding of the term 'crime victim' to interpret that term . . . . as including insurance companies." *Id.* at 199-200.

Cases that raise questions about the scope of a criminal conviction have produced similar results. A New York court recently applied § 213-b to the wrongful death claim of a pedestrian killed by a motorist, even though the motorist was only convicted of leaving the scene of an accident. *See Rosado v. Estime*, No. 509494/2017, 2018 N.Y. Misc. LEXIS 1499 (N.Y. Sup. Ct. Apr. 30, 2018). The pedestrian's injuries were caused by the accident itself, not the act of leaving the scene, but the court found that formal distinction to be irrelevant. It was enough that "the plaintiff's action for personal injuries and wrongful death does arise from the same event or occurrence as the criminal conviction." *Id*. at *3-*5. Another

New York court has applied § 213-b to a case in which a criminal defendant was convicted of attempt to commit assault, even though the plaintiff's injuries in that case arose out of a completed assault, not an attempt. Section 213-b "is designed to provide a meaningful remedy to the victim and the statute should, therefore, be read expansively," the court found, and "compensation may be sought" for a conviction of attempted assault "where . . . the factual predicate is the same for both the [underlying] crime charged and the conviction," even if the assault itself did not produce a conviction. *Cavanaugh v. Watanabe*, 10 Misc. 3d 1043, 1044-1045 (N.Y. Sup. Ct. 2005).

A common theme runs through all these cases. When a plaintiff asserts claims that arise out of the same set of events that produced a defendant's criminal conviction, § 213-b provides a seven-year statute of limitations notwithstanding any nominal differences that may exist between the crime charged and the elements of the plaintiff's cause of action. What matters is the presence of a causal nexus between the events underlying the criminal conviction and the events underlying the plaintiff's claims, not labels and formal categories.

Cases in which courts have found § 213-b inapplicable, in contrast, have typically suffered from some threshold infirmity. They are cases in which the defendant "was not convicted of any crime as a result of the [events] that gave rise to" the action for damages, *Vasquez v. Wood*, 18 A.D.3d 645, 646 (N.Y. App. Div.

2d Dep't 2005); or where the defendants in the civil action were not parties to any criminal action at all, *see, e.g.*, *Williams v. Congregation Yetev Lev*, No. 01-cv-2030 (GBD), 2004 WL 2924490, at *5-*6 (S.D.N.Y. Dec. 16, 2004); or where a criminal conviction was overturned on appeal, *see, e.g.*, *In re Shapiro*, 180 B.R. 37, 42 (Bankr. Ct. E.D.N.Y. 1995); or they are cases where the conduct for which a defendant has been criminally convicted was entirely distinct from the conduct that forms the basis of the civil suit and there is not "any causal connection" between the conviction and the damages action. *Boice v. Burnett*, 245 A.D.2d 980, 981-982 (N.Y. App. Div. 3d Dep't 1997).

The Plaintiffs' claims in this case suffer from no such infirmity. BNPP pled guilty to a years-long conspiracy to violate U.S. sanctions and transfer massive sums to the Government of Sudan, money that it knew the regime was using to commit atrocities. JA-88-93; 109-22. As Plaintiffs allege in detail, BNPP acted "as a de facto central bank for the Government of Sudan." JA-84. This was not mere money laundering. The illicit U.S. dollars that BNPP provided to Sudan created military resources that would otherwise not have existed and that were used to commit atrocities against the Plaintiffs. JA-88. Plaintiffs Majuc and Jane Doe were victims of the violence caused by weapons that Sudan bought with the illicit funds BNPP provided, such as Antonov aircraft and attack helicopters; Kashef, Abdalla, Mosabal, Hamad, Abbo Abakar, Omar, Jane Doe, Hassan, Khalifa, and Ahmed

suffered torture and had family members killed or raped by militias funded with these resources; and Kashef, Jane Doe, Lual, Jane Roe, Lukudu, Adam, Judy Doe, Ulau, Marjan, and Khalifa survived torture and detention in the regime's "ghost houses." JA-46-53; 55-64.

Plaintiffs' claims rely on well-established New York causation principles. The atrocities committed against these Plaintiffs were a "normal or foreseeable consequence" of BNPP's conspiracy to circumvent U.S. sanctions, *Hain v. Jamison*, 28 N.Y.3d 524, 530 (2016) , and the illicit funds that BNPP provided were a "substantial factor" in causing harm to Plaintiffs. *Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 907-08 (2008). Indeed, BNPP's own admissions establish the causal nexus between their crimes and the Plaintiffs' injuries. *See, e.g.*, JA-271 (GOS's human rights abuses and "pervasive role" in oil industry are threat to U.S. foreign policy, which U.S. addressed by prohibiting provision of financial services to GOS); *id*. at JA-275-76 (BNPP Geneva played a "central role in Sudan's foreign commerce market" due to its role in financing Sudan's export of oil); *id*. at JA-276 (BNPP compliance officers recognized BNPP's "central role in providing Sudanese financial institutions access to the U.S. financial system").

Plaintiffs' intentional tort claims arise "out of the same event or occurrence as formed the basis of the defendant's Federal criminal conviction."

Hemmerdinger, 976 F. Supp. 2d at 410, (quoting *Elkin*, 248 A.D.3d at 36-37). They thus fall within the ambit of § 213-b's seven-year limitations period.

B. The District Court Relied on Arguments that New York Courts Have Rejected When It Found C.P.L.R. § 213-b Inapplicable.

In reaching a different conclusion, the District Court placed great weight on the Third Department's use of the term "direct injury" in one sentence of its opinion interpreting § 213-b in *Boice v. Burnett*, 245 A.D.2d 980, 981 (N.Y. App. Div. 3d Dept. 1997). *See* SPA-11-12. The District Court misapplied *Boice*, as the subsequent treatment of the case by other New York courts makes clear.

Boice involved acts of fraud committed by Burnett, an employee of Unisys Corporation, who submitted fake expense vouchers to Unisys for reimbursement and then committed tax fraud by failing to report the money as income and claiming the fake expenses as business deductions. Burnett was prosecuted by the State of New York for the tax fraud and pled guilty. Some time later, several plaintiffs who were employees of an entity that did business with Unisys sued Burnett for defamation. They had been named in some of the false expense vouchers, and they argued that the defendant had "damaged their professional reputations by publishing false statements indicating that they had engaged in illegal or unethical conduct." *Id*. at 981.

The Third Department found § 213-b inapplicable in *Boice* because "the misrepresentations made by defendant on his tax return do not form the basis of

plaintiffs' defamation action" and there was no "causal connection between the crime and the injuries for which plaintiffs [sought] compensation." *Id*. at 981-982. The Third Department was describing this factual infirmity when it used the term "direct injury." The plaintiffs' injuries "resulted not from the false statements contained in defendant's tax return," the court explained, "but from his entirely separate and distinct act of completing the false vouchers." *Id*. at 982. *Boice* rested on the conclusion that the conduct for which the defendant was criminally convicted—misrepresenting his income and deductions to the State of New York—had no causal relationship to the injury to reputation that the plaintiffs complained of. The fact that Burnett lied to the taxing authorities in New York formed no step in the causal chain of plaintiffs' claims.

New York courts that discuss *Boice* frequently describe the case as resting on this lack of any causal connection. *See, e.g.*, *Respass v. Dean*, 7 A.D.3d 503 (N.Y. 2d Dep't App. Div. 2004) (citing *Boice* as a "no causal connection" case); *Cavanaugh*, 10 Misc. 3d at 1044 ("Research discloses that the benefit of C.P.L.R. 213-b has been denied only in those cases where there was no causal connection between the crime for which defendant was convicted and the damages sought." (citing *Boice*)); *Rosado v. Estime*, 2018 N.Y. Misc. LEXIS 1499, at *5 (adopting this limited reading of *Boice*); *Coggins v. County of Nassau*, 988 F. Supp. 2d 231,

250 (E.D.N.Y. 2013) (adopting the limited reading of *Boice* contained in *Cavanaugh*).

In finding the contrary, the District Court relied on the definition of "victim" in New York Executive Law § 621(5) as justification for limiting the scope of § 213-b. SPA-13. *Boice* made no reference to the Executive Law, and for good reason: § 621(5) is the provision that the Second Department explicitly rejected in *Elkin v. Cassarino* as having any relevance to the question. *See* Section A, *supra*; *Elkin*, 248 A.D.2d at 38. ("The two statutes serve two totally different purposes" and so "it follows that the terms 'crime' and 'crime victim' were not intended to be restricted [in § 213-b] as they are in the Executive Law."); *see also Roitman v. United Artists Theater Group, LLC*, No. 008444/08, 2009 N.Y. Misc. LEXIS 4121, at *5-*6 (N.Y. Sup. Ct. Jan. 14, 2009) (holding that "the terms 'crime' and 'crime victims' [in § 213-b] were not intended to be restricted by reference to other statues [sic] such as the Executive Law or as here, the Penal Law"). The District Court's reliance on the Executive Law reveals how seriously it misread *Boice*.

The District Court also relied on the text of the federal conspiracy statute, 18 U.S.C. § 371, in attempting to bolster its conclusion that Plaintiffs are not "crime victims," writing: "As that provision makes clear, an individual who commits an offense under this section commits 'an offense against *the United States*,'" SPA-12, and so "the victim of the crime to which BNPP pled guilty was

the United States—not the individual Plaintiffs." *Id*. This is nonsensical. 18 U.S.C. § 371 is the general federal conspiracy statute. The text quoted by the District Court is the statutory basis for nearly every criminal conspiracy charged in the federal courts, which of course often resulted in harm to individual victims. That language in § 371 reflects the foundational principle that crimes are public offenses against the sovereign. Federal reporters contain thousands of criminal conspiracies prosecuted under 18 U.S.C. § 371 as "an offense against the United States" in which the individual victims of the conspiracy are obvious. *See, e.g.*, *United States v. Babilonia*, 687 Fed. Appx. 63, 66 (2d Cir. 2017) (describing federal prosecution under 18 U.S.C. § 371 for conspiracy to commit interstate stalking as part of a murder plot).

Finally, the District Court made a reference to statements by an Assistant U.S. Attorney at BNPP's sentencing hearing that purport to describe who counts as a "victim" of BNPP's criminal conduct. SPA-12. BNPP urged those statements on the Court below, even though courts ordinarily may not look outside the pleadings on a motion to dismiss to determine the sufficiency of the allegations. *See Mandarino v. Mandarino*, 180 Fed. Appx. 258, 261 (2d Cir. 2006) ("fact-specific" issues should not be resolved on a motion to dismiss). That prohibition is particularly apt here. The statements in question were taken out of context, misinterpreted by the court, and raise factual issues not properly resolved at the

pleading stage. Read in their entirety, the AUSA's remarks relate to rules and regulations governing direct compensation from the federal government and whether certain persons in the courtroom that day—unrelated to this case—qualified as "victims" under that standard. *See* JA-387-88. This is exactly the fallacy that the Second Department rejected when it refused to use New York Executive Law § 621(5) as a basis for limiting the scope of § 213-b. *See Elkin*, 248 A.D.2d at 38. This Court should do the same.

C. Plaintiffs' Claims Sounding in Intentional Tort Are Timely Under New York C.P.L.R. § 215.

Even under the limitations provision that the District Court found controlling, the claims of the adult Plaintiffs were timely filed. New York C.P.L.R. § 215 contains a tolling rule that applies to claims that are the subject of a criminal proceeding.

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

C.P.L.R. § 215(8)(a). This tolling provision applies with respect to "any criminal action, whether commenced in a court of any state or in any federal court." *Dynamic Chems., Inc. v. Ackerman Mech. Servs., Inc.*, 58 A.D.3d 153, 156-157

(N.Y. App. Div. 4th Dep't 2008). And the "termination of [a] criminal action" under this provision is measured from the date on which the defendant was sentenced. *See id*. ("[T]he operative date . . . is the date on which [the criminal defendant] was sentenced . . . ."); N.Y. C.P.L. § 1.20(16)(c) ("A criminal action . . . terminates with the imposition of sentence or some other final disposition in a criminal court of the last accusatory instrument filed in the case.").

BNPP was sentenced and judgment of conviction entered on May 1, 2015. This civil action was filed on April 29, 2016. BNPP is the "same defendant" that federal authorities prosecuted in that action, and BNPP's criminal conspiracy with the Government of Sudan to violate U.S. sanctions was based on the same "event or occurrence from which" the claims in this action arise. Plaintiffs' intentional tort claims fall squarely within the tolling provision of § 215 and are timely even if "the time in which to commence such action has already expired." C.P.L.R. § 215(8)(a).

Section 215(8)(a) contains no reference to terms like "victim" or "crime victim." Its tolling provision is available in any case in which "a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by this section arises." *Id.* The Third Department has relied on this statutory text to give § 215(8)(a) an expansive scope. In *Clemens III v. Nealon*, 202 A.D.2d 747 (N.Y. App. Div. 3d Dep't 1994),

defendant pled guilty to criminal mischief for conduct "which resulted in damage to two boats." *Id*. at 747. Six plaintiffs who had been aboard the boats then sued the defendant for personal injuries. Defendant argued that § 215(8)(a) should be available only to "the victims of the crime charged in the criminal proceeding, which in this instance were the owners of the two damaged boats and not plaintiffs, who sustained personal injury." *Id*. at 748-750. The appellate court rejected the argument, declining to read any requirement that a plaintiff be the direct victim of the crime charged in order to benefit from the tolling provision of § 215(8)(a). Finding that "the words and meaning of the subject statute are plain, clear and unambiguous," the court held that "the statute is satisfied when (1) a criminal action has been commenced, (2) against the same defendants, and (3) concerning the same event or transaction from which the civil action arose." *Id*. at 749.

Plaintiffs are entitled to the one-year tolling provision contained in the statute that the District Court found to be controlling. § 215(8)(a). Under that provision, Plaintiffs' claims were timely filed.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the ruling of the District Court dismissing Plaintiffs' claims under the act of state doctrine, reverse the ruling of the District Court that the claims of the adult Plaintiffs sounding in intentional tort are not timely, and remand for further proceedings.

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Respectfully submitted,

s/ *Kathryn Lee Boyd*
Kathryn Lee Boyd
Thomas B. Watson
McKool Smith, PC
Suite 2900
1 California Plaza
300 South Grand Avenue
Los Angeles, CA 90071
(213) 694-1200

Tobias Barrington Wolff
Penn Law School
3501 Sansom Street
Philadelphia, PA 19104
215-898-7471

Counsel for Plaintiffs-Appellants

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s/ *Kathryn Lee Boyd*
Kathryn Lee Boyd
Thomas B. Watson
McKool Smith, PC
Suite 2900
1 California Plaza
300 South Grand Avenue
Los Angeles, CA 90071
(213) 694-1200

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2018, the above Brief was electronically filed and served via the Court's CM/ECF System on:

Carmine D. Boccuzzi, Jr.
Avram E. Luft
Cleary Gottlieb Steen & Hamilton LLP
1 Liberty Plaza
New York, NY 10006
(212) 225-2000

Jonathan I. Blackman
Cleary Gottlieb Steen & Hamilton LLP
City Place House
55 Basinghall Street
London, EC2V 5EH
England
+44-2076142200

Counsel for Defendants-Appellees

s/ *Kathryn Lee Boyd*
Kathryn Lee Boyd
Thomas B. Watson
McKool Smith, PC
Suite 2900
1 California Plaza
300 South Grand Avenue
Los Angeles, CA 90071
(213) 694-1200

Tobias Barrington Wolff
Penn Law School
3501 Sansom Street
Philadelphia, PA 19104
215-898-7471

Counsel for Plaintiffs-Appellants