UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTESAR OSMAN KASHEF, *et al.*,

Plaintiffs,

v.

BNP PARIBAS S.A., BNP PARIBAS S.A. NEW YORK BRANCH, and BNP PARIBAS US WHOLESALE HOLDINGS, CORP. (f/k/a BNP PARIBAS NORTH AMERICA, INC.),

Defendants.

No. 1:16-cv-03228-AJN

DECLARATION OF PROF. DR. RAMON O. MABILLARD,
PROFESSOR AT THE FACULTY OF LAW OF THE UNIVERSITY OF FREIBURG

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Pursuant to 28 U.S.C. § 1746, I, Prof. Dr. Ramon O. Mabillard, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

INTRODUCTION

1. I have been instructed by the plaintiffs in this case to advise the court on the availability and adequacy of Switzerland as a forum and the public and private interest concerns related to convenience of litigation in Switzerland. Specifically, I was asked (1) whether the Swiss courts would have jurisdiction in this case, (2) what substantive law would govern the dispute, and (3) whether Switzerland would be a more convenient forum in a case involving as many as 15,000 American plaintiffs bringing claims against French and American defendants, based on the factors under consideration by this Court.

2. I have based the following opinions on consideration of the case materials set forth below in detail (see para. 21 below), including the Declaration of Isabelle Romy, and my knowledge and experience as a judge on the Court of Appeal of the Canton Basel-Stadt, a cantonal supreme and federal appellate court, as a law professor and Chair of Civil Procedure and Private International Law at the University of Freiburg, and as a partner at the law firm of BURKHARDT LTD in Basel, Switzerland (see para. 15 *et seq*. below).

3. I understand that the Court will consider whether a presently available and adequate alternative forum exists in Switzerland. I understand that the Court will also consider whether a balance of private and public interest factors weighs heavily in favor of the alternative forum in Switzerland. I have been asked to address the following private interest factors, as they relate to Switzerland: the relative ease of access to sources of proof; the availability of compulsory process for the attendance of unwilling witnesses; the cost of obtaining the attendance of willing witnesses; and all other practical problems that make trial of a case

expeditious and inexpensive for the parties (see para. 63 *et seq*. below). I have also been asked to address the following public interest factors, as they relate to Switzerland: administrative difficulties relating to court congestion; having local disputes settled locally; and avoiding problems associated with the application of foreign law (see para. 48 *et seq*. below).

4. As I explain below, I conclude that Switzerland is not a presently available forum for this case because a Swiss court would exercise its discretion to decline jurisdiction. The defendants' consent to Swiss jurisdiction is the sole possible basis for jurisdiction, because the acts of complicity of the defendants occurred at their seats in France and the United States, while the resulting injuries occurred in Sudan (see para. 24 *et seq*. below). However, the defendants' consent is insufficient to alone establish the international jurisdiction. Under Art. 6 in connection with Art. 5, para. 3 of the Private International Law Act of 18 December 1987 ("PILA"),[1] the defendants' consent to Swiss jurisdiction may be disregarded by the court if, cumulatively, neither party has its domicile or habitual residence or an establishment in the relevant canton (*i.e*., Swiss member state) *and* if Swiss law is not applicable (see para. 26 *et seq*. below).

5. Both conditions are met in this case. First, it is undisputed that neither plaintiffs nor defendants ever had their domicile or habitual residence or an establishment in a Swiss canton. Second, Swiss law would not apply to this case under the conflict of law provisions of the PILA. Pursuant to Art. 133, para. 2 PILA,[2] Sudanese substantive law would govern this case because none of the defendants had habitual residence in the same state as the plaintiffs at the time of the acts of complicity and because, as this Court held in its February 16, 2021 Opinion,[3]

[1] Ex. 1 at 2.
[2] *Ibid*. at 5.
[3] *Kashef v. BNP Paribas, S.A.*, No. 16-cv-3228 (AJN), 2021 WL 603290 (S.D.N.Y. Feb. 16, 2021).

it was foreseeable that the acts of complicity of the French and U.S. BNPP defendants would result in harmful effects in Sudan (see para. 38 *et seq*. below).

6. Because none of the parties has its domicile, habitual residence or an establishment in a Swiss canton and the case will be governed by Sudanese law, the Swiss court is free to decline jurisdiction, regardless of the defendants' consent based on Art. 6 in connection with Art. 5, para. 3 PILA[4] (see para. 44 below).

7. It is my opinion, as a judge and practitioner, that a Swiss court would decline jurisdiction due to the Herculean task a Swiss judge would face in coordinating and adjudicating the claims of 15,000 American plaintiffs against several foreign (non-Swiss) defendants under Sudanese law, without the efficiency of U.S. class action or complex litigation case-management mechanisms, which are not available in Switzerland (see para. 45 *et seq*. below).

8. If these claims were voluntarily joined, as Professor Romy proposes,[5] the task of obtaining evidence would fall entirely on the Swiss judge because, in Switzerland, the collection of evidence is an exclusively judicial function, at all stages of the proceedings. The Swiss judge – on the parties' initiative – makes requests for the production of documents and examines witnesses. Therefore, the Swiss trial judge who is tasked with conducting the evidence hearings would need to obtain voluminous evidence and testimony from the United States and other foreign locales under the time-consuming and unwieldy mechanisms of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970[6] ("Hague Convention", see para. 85 *et seq*. below). No single judge could manage this burden. Joinder would therefore be severed, most likely at the outset, so that multiple judges would adjudicate

[4] Ex. 1 at 2.
[5] Romy Decl. para. 25.
[6] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970, https://www.hcch.net/en/instruments/conventions/full-text/?cid=82.

thousands of rulings on an individual basis. These rulings could each spawn individual appeals. All of this would impose congestion in the Swiss courts and create the risk of inconsistent rulings, confusion, and delay for the parties to determine jurisdiction alone.

9. It is highly implausible that any Swiss judge faced with a flood of claims from Americans suing French and American defendants, governed by Sudanese law, would voluntarily assume this undertaking rather than simply decline jurisdiction as he or she would have total discretion to do. It is even more doubtful that a Swiss judge would volunteer to take jurisdiction when an alternative forum is available in the United States, where courts have already adjudicated pretrial and appellate issues that would need to be re-litigated in Switzerland, resulting in an estimated ten years of further proceedings (see para. 61 *et seq*. below).

10. What is more, transferring this case to Switzerland would impose substantial financial burdens and risks on the U.S. plaintiffs. In the best-case scenario, where they would successfully apply for legal aid – a process that would itself require each plaintiff to hire a Swiss lawyer for pretrial summary court proceedings – the plaintiffs would still be responsible for their own expenses (*e.g*., travel costs), as well as the defendants' party costs if they did not prevail. And regardless of the outcome, the plaintiffs would be obligated to reimburse the legal aid to the canton, which would have a cause of action against them with a ten-year statute of limitations. In the worst-case scenario, if the plaintiffs were denied legal aid, they would face the prospect of paying the costs of the court, their own lawyers' fees and litigation expenses, as well as the opposing party costs, with the risk of joint and several liability and a requirement to post security of costs in advance. Their lawyers would not be able to advance their costs or act on a contingency fee basis. Depending on the amount of damages claimed, the estimated court and opposing party costs for the 19 named plaintiffs alone could rise together to more than

CHF 631,400 with the risk of joint and several liability for the plaintiffs (see para. 63 *et seq*. below).

11. From the perspective of the private convenience of the parties, and given the limited financial means of the Sudanese-American former refugee plaintiffs and class members, I conclude that Switzerland is not a more convenient forum (see para. 63 *et seq*. below):

a. At the outset, the plaintiffs would need to hire Swiss counsel to prepare complex pretrial legal aid applications, requiring a plausible showing of merits and lack of means, and any needed appeals;

b. Even if legal aid is granted, it would only cover court costs and the fees of court-appointed counsel (who would likely not be specialists in complex international litigation); the U.S. plaintiffs would still be (i) responsible for their own costs (*e.g.*, pay translators to be able to communicate with Swiss counsel, travel to Switzerland), (ii) liable for opposing costs, and (iii) liable to reimburse the Swiss canton for the legal aid;

c. If legal aid is denied, the 19 named U.S. plaintiffs alone would face the risk of paying court and opposing party costs exceeding CHF 631,400, with the prospect of joint and several liability and the need to post security in advance;

d. Plaintiffs' Swiss counsel would be barred from advancing these costs and must be paid a reasonable fee, since contingency fees are forbidden; and

e. Plaintiffs and their willing witnesses in the United States – potentially more than 15,000 people – would either have to pay their own travel costs to testify in Switzerland or would be forced to request that the Swiss judge or judges hold thousands of evidentiary proceedings in the United States under the Hague Evidence Convention.

12. From the perspective of Swiss and American public interests, I also conclude that Switzerland is not a more convenient forum (see para. 48 *et seq*. below):

a. Switzerland lacks the class action and complex litigation case-management mechanisms available in the United States: the Swiss docket would be flooded with as many as 15,000 claims brought by U.S. plaintiffs against French and U.S. defendants, requiring individualized hearings on legal aid, briefing and arguments on jurisdiction, evidentiary hearings, trials, and appeals;

b. If the U.S. plaintiffs' claims are voluntarily joined, as proposed by Professor Romy, this Herculean task would fall upon one Swiss judge, who would almost certainly order the claims severed and reassigned to multiple judges;

c. Multiple severed proceedings would create risks of inconsistent rulings, compounded by potential pretrial appeals, with no procedural mechanism to harmonize rulings on common issues;

d. The Swiss courts would be forced to resort to thousands of Hague Evidence Convention proceedings in order to obtain evidence in the United States from plaintiffs and willing witnesses lacking the financial means to travel to Switzerland, and to obtain compulsory process over unwilling witnesses, including BNPP's former U.S. employees;

e. Obtaining testimony from the United States via remote video-link – if at all possible from a Swiss perspective – would require the participation of diplomatic or consular officials, or U.S. court-appointed commissioners, adding a drain on U.S. public resources;

f. It is immaterial that a Swiss court would be more familiar with how Swiss banking or secrecy laws would apply to BNPP Suisse, because – as I am informed – no discovery request has been directed at BNPP Suisse;

g. From the Swiss legal system's perspective this is not a local dispute, it is an international case involving entirely foreign parties and the application of the foreign law of Sudan (which appears to be based on Sharia);

h. A Swiss court likely has less interest in how the Sharia law of Sudan is applied than a New York court would have interest in how Swiss law is applied;

i. Even if the Swiss court only faced the claims of the 19 named plaintiffs, this would still entail the burden of dozens of Hague Convention requests to the United States, 19 individualized legal aid hearings, and the complications of ascertaining and applying Sudanese Sharia law; and

j. The result will be an estimated decade of further delay, in addition to the nearly six years the case has been pending in the United States.

13. In summary, I conclude that transferring this case to Switzerland, based on a reasonable assessment, would result in a Swiss court rejecting jurisdiction, rendering Switzerland an unavailable and inadequate alternative forum. If, against all odds, the case did proceed in

Switzerland, it would be overwhelmingly inconvenient for the American plaintiffs and would impose undue financial hardship. It also would impose a tremendous administrative burden on the Swiss courts, resulting in congestion, delay, and expense of taxpayer funds on a dispute entirely between foreign parties (see para. 98 below).

14. For the Court's convenience, I have attached as Appendix D a table cross-referencing my conclusions and analysis including the public and private factors being considered by the Court.

QUALIFICATIONS AND BASIS FOR EXPERT OPINION

I. Professional Qualifications and Areas of Expertise

15. I received my law degrees from the University of Basel in 1996 (lic. iur.),[7] from the University of Freiburg i.Ue. in 2004 (Dr. iur.)[8] and 2015 (venia legendi),[9] and from Columbia Law School, New York, in 2004 (LL.M.). I have been a member of the Swiss bar since 1999. In 2007, I was elected civil law notary of the canton Basel-City by the cantonal government.

16. In 2016, I was elected judge of the Court of Appeal of the Canton Basel-City and have been sitting as a judge on the bench of this cantonal supreme and federal appellate court, since then. In 2017, I was elected as a member of the Notary Exam Commission of the Canton Freiburg i.Ue.

17. Since 2008, I have held the position of professor at the Faculty of Law of the University of Freiburg i.Ue., Switzerland where I am responsible for the chair of Civil

[7] Lic. iur. ("licentiatum iuris") is a law degree awarded by the European faculties of law corresponding approximately to the Juris Doctor awarded by the U.S.-American law schools.
[8] Dr. iur. ("doctor iuris") is a law degree awarded by the European faculties of law corresponding approximately to the Doctor of Juridical Science (*i.e.*, the Juridicae Scientiae Doctor or "JSD") awarded by the U.S.-American law schools.
[9] The venia legendi may be translated as lecture qualification and corresponds to an academic degree qualifying its holder as a full professor.

Procedure, Debt Enforcement and Bankruptcy Law, as well as Private International Law. I have been teaching civil procedure, bankruptcy law, and private international law at the University of Freiburg i.Ue. since 2007. I have also been a lecturer for commercial and company law at the Swiss Distance University from 2007 through 2015.

18. I have worked as a practicing lawyer since 2001. From 2001 until 2010, I was, with some of this time spent in academia and further education, an associate at the Swiss law firm VISCHER AG, where I specialized in corporate restructuring and litigation. Since 2011, I have been founding partner and part-time counsel to the Basel law firm BURCKHARDT LTD, a law firm specialized in corporate advice and litigation, including debt enforcement and bankruptcy.

19. I am the author or co-author of various commentaries, articles, and reviews in the areas of civil procedure, insolvency law, private international law, and commercial law, and have served as an expert witness or consultant in various matters concerning civil procedure, insolvency law, and private international law in arbitrations and litigation at home and abroad. Details of my qualifications, publications, and experience, including my publications for the last ten years, are set out in my Curriculum Vitae, attached as Appendix A.

20. I am fluent in German, French, and English.

II. Materials Considered

21. The documents that have been provided to me by plaintiffs' Counsel in connection with my instructions are listed in Appendix B. In particular, I have reviewed the Third Amended Complaint (ECF 241) ("TAC") and exhibits (ECF 241-1 - 241-15); the Court's opinions dated March 3, 2020 (*Kashef v. BNP Paribas S.A.*, 442 F. Supp. 3d 809 (S.D.N.Y. 2020)) and February 16, 2021 (*Kashef v. BNP Paribas, S.A.*, No. 16-cv-3228 (AJN), 2021 WL 603290 (S.D.N.Y. Feb. 16, 2021)); the Memorandum of Law in Support of Defendants BNP

Paribas S.A. and BNP Paribas US Wholesale Holdings, Corp.'s Motion to Dismiss for *Forum Non Conveniens* (ECF 262); the Declaration of Prof. Isabelle Romy ("Romy Declaration") (ECF 264) and its exhibits (ECF 264-1 - 264-9); the Declaration of Mr. Tayeb Hassabo ("Hassabo Declaration") (ECF 67); the Declaration of Mr. Nagi Idris ("Idris Declaration") (ECF 82); the Reply Declaration of Mr. Tayeb Hassabo ("Hassabo Reply") (ECF 86); as well as other publicly available sources cited below.

22. While preparing this declaration, I have carefully considered a number of Swiss case reports, statutes, and scholarly texts, and have performed such investigations as I have deemed necessary to ensure the accuracy of this declaration. The sources that I rely upon and consider relevant are cited in the text of this declaration and, where they are not easily accessible to the English-speaking public, appended to this declaration as Appendix C.

23. The abbreviation SCD (Supreme Court Decision; in German "BGE" [Bundesgerichtsentscheid]; in French "ATF" [Arrêt du Tribunal Fédéral]) refers to judgments of the Swiss Federal Supreme Court; these judgments are to be found either on the official website of the tribunal (www.bger.ch) or on the specific website of the University of Bern (www.servat.unibe.ch). All references and citations made in this report will be in English, if available.

OPINIONS

I. Unavailability of a Swiss Forum

A. Swiss courts will decline jurisdiction rather than assume the burden of thousands of claims by foreign plaintiffs against foreign defendants, governed by foreign law.

24. As I explain in detail below, the Swiss court would be authorized to decline jurisdiction in this international litigation, in accordance with Art. 6 in connection with Art. 5,

para. 3 of the PILA,[10] because the sole basis for jurisdiction would be the defendants' implied consent, and because (a) none of the parties have their domicile or habitual residence or an establishment in a Swiss canton and (b) Sudanese law, not Swiss law, would apply to the case. In these circumstances, the Swiss court will most likely not accept jurisdiction.

25. The jurisdiction of a Swiss court in an international dispute is determined with regard to the United States under the PILA and with regard to Europe/France under the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 ("Lugano Convention").[11] Under Art. 129, para. 1 PILA,[12] Art. 2, para. 1 and Art. 5, para. 3 Lugano Convention,[13] a Swiss court has jurisdiction over a tort claim if: (1) the defendant is domiciled in Switzerland, (2) the defendant's tortious act or omission occurred in Switzerland ("locus of the tort"), or (3) the tortious act had its effect in Switzerland ("locus of the effect").[14]

26. If none of these criteria are met, the Swiss court may still have jurisdiction if the parties agree through a contractual choice of forum clause (which is not relevant in the present case) or if the defendant impliedly consents to jurisdiction by appearance in the court without objecting to jurisdiction (which might be relevant in the present case). However, a Swiss court even with the defendant's implied consent to jurisdiction is authorized to decline jurisdiction if

[10] Ex. 1 at 2.
[11] Ex. 2.
[12] Ex. 1 at 4.
[13] Ex. 2 at 2-3.
[14] Art. 129, para. 1 PILA provides: "The Swiss courts at the domicile or, in the absence of a domicile, at the habitual residence of the defendant have jurisdiction to hear actions in tort. Moreover, the Swiss courts at the place where the act or the result occurred and, for actions pertaining to the operation of an establishment in Switzerland, the courts at the place of the establishment have jurisdiction".
Art. 2, para. 1 Lugano Convention provides: "Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State". Art. 5, para. 3 Lugano Convention provides: "A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued . . . in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur". Switzerland and France are both parties to the Lugano Convention.

(a) none of the parties have their domicile or habitual residence or an establishment in the relevant canton and (b) Swiss law is not applicable to the dispute, whereas both conditions need to be met[15] (Art. 6 in connection with Art. 5, para. 3 PILA).

27. In all cases, it is a procedural prerequisite ("*Prozessvoraussetzung*") that the Swiss court must first establish that it has international jurisdiction at the outset of the case.[16] To do so in this case, the Swiss court must determine (1) the domicile of the parties, (2) the location where the defendants' alleged acts of tortious complicity occurred, (3) the location where the effect occurred and the foreseeability of that effect, and (4) the applicable substantive law.

28. Here, none of the parties are domiciled in Switzerland. The defendants are French and U.S. banks: BNP Paribas SA (France) ("BNPP-France"), BNP Paribas SA - New York branch ("BNPP-NY"), and the U.S. subsidiary formerly known as BNP Paribas North America ("BNPP-North America"). The plaintiffs are 19 U.S. residents, acting individually and as representatives of a class of 15,000 Sudanese-Americans residing in the United States, in a civil suit for complicity in genocide and other human rights violations committed by the Sudanese government in Sudan. I understand that this case will proceed in this Court either as a class action or, if a class is not certified, as individual lawsuits, in which as many as 15,000 American plaintiffs residing in the United States would file individual claims, related to this case, which would be litigated under U.S. case-management procedures for complex litigation.

1. As to the foreign French and U.S. defendants, Switzerland is neither the locus of the tort nor the locus of the effect.

29. The term "locus of tort" is interpreted similarly both under the PILA and the Lugano Convention, as the Swiss Federal Supreme Court takes into account the case law

[15] Ex. 3, SCD, May 27, 1993, BGE 119 II 167, cons. 3a.
[16] The court normally bases its jurisdictional ruling, at the preliminary stage of the case, on the factual allegations in the complaint. The merits of the case would be decided later on, after the taking of evidence.

rendered by the European Court of Justice ("ECJ").[17] The same is true for the term "locus of effect".

30. Under Swiss law, each court within whose jurisdiction an element of a tortious act was committed has separate jurisdiction.[18] A single court could only exercise jurisdiction over all collaborating tortfeasors if they committed their acts in the same jurisdiction.[19]

31. In the present case, the accused parties are the defendants BNPP-France, BNPP-New York, and BNPP-North America. Plaintiffs allege, and BNPP-France has admitted in its U.S. plea agreement, that BNPP-France:

> conspired with banks and other entities located in or controlled by . . . Sudan [and other sanctioned countries], other financial institutions located in countries not subject to U.S. sanctions, and others . . . [to] move at least $8,833,600,000 through the U.S. financial system on behalf of Sanctioned Entities in violation of U.S. sanctions laws . . . .[20]

32. According to BNPP's guilty plea agreement, BNPP-France supervised this scheme and participated directly in the money flow through the New York branch. "General Management in Paris" gave its "full support" to these sanctioned transactions.[21] Compliance officers in BNPP-France and BNPP-North America reviewed the sanctioned transactions.[22] BNPP Suisse compliance officers "express[ed], to the highest level of the bank" concerns about the "transactions executed with and for Sudanese customers".[23] A "senior BNPP Paris executive dismissed the concerns of the compliance officials and requested that no minutes of the meeting be taken".[24] Based on these allegations and admissions, BNPP-France's Directors managed the sanctions-evasion scheme from Paris. BNPP-New York and North America implemented their

[17] See *e.g.*, Ex. 4, SCD, Dec. 22, 2004, BGE 131 III 153, cons. 6.2.
[18] *Ibid*.
[19] Ex. 5, SCD, March 13, 2007, BGE 133 III 282, cons. 5.4-5.5.
[20] *United States v. BNP Paribas SA*, Stipulated Statement of Facts, para. 14 (ECF 241-3).
[21] *Ibid*. para. 32.
[22] *Ibid.* para. 31.
[23] *Ibid*. para. 33.
[24] *Ibid.*

aspects of it, dollar clearing and compliance monitoring, in New York. Hence, Paris and New York are the respective loci of the tort as to these defendants.

33. The locus of the effect is always the place where the first, direct infringement occurred.[25] For example, if an infringement of a legal right at one place (*e.g.*, the violation of a persons' physical integrity) causes further pecuniary damage at another place (*e.g.*, surgery costs), the latter place is irrelevant.[26] Sudan is therefore the locus of the effect in this matter.

34. Because Switzerland was neither the domicile, the locus of the tort, nor the locus of the effect of these specific defendants, the Swiss courts do not have jurisdiction under Art. 129 PILA,[27] Art. 2, para. 1 Lugano Convention or Art. 5, para. 3 Lugano Convention.[28]

2. Swiss law forbids imputing jurisdiction over BNPP Suisse, which is not a defendant, to the French and U.S. BNPP defendants.

35. Paragraph 30 of the Romy Declaration appears to conclude that the Swiss courts would have jurisdiction over the French and U.S. defendants by virtue of the Swiss courts having jurisdiction over BNPP Suisse. This is impermissible under Swiss law and was expressly rejected by the European Court of Justice, whose jurisprudence, as already explained, is taken into account by the Swiss courts.

36. In *Melzer v. MF Global UK Ltd*, the European Court of Justice addressed the issue of establishing territorial jurisdiction over a tort involving the cross-border participation of several persons, from several states, producing harmful effects in another state – the same circumstances present in this case. The ECJ held that a court in one state cannot establish jurisdiction over foreign defendants merely because an accomplice or joint participant, who is

[25] Ex. 6, SCD, Nov. 2, 1998, BGE 125 III 103, cons. 2b/aa.
[26] Ex. 7, ECJ, June 10, 2004, *Kronhofer v. Maier*, C-168/02, cons. 19.
[27] Ex. 1 at 4.
[28] Ex. 2 at 2-3.

not being sued in that court, is within the territorial jurisdiction of that court: "*[It is prohibited to] the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised*".[29]

37. Accordingly, Swiss jurisdiction over BNPP Suisse, under the "locus of the tort" doctrine, cannot be imputed to, and does not extend to, the defendants in this case, BNPP-France, BNPP-New York, and BNPP-North America.

3. Under Swiss conflicts of laws, Swiss courts would apply Sudanese, not Swiss law, and on that basis would exercise their discretion to decline jurisdiction.

38. According to Art. 6 PILA,[30] in matters involving an economic interest, the court before which the defendant proceeds on the merits without reservation has jurisdiction, unless such court declines jurisdiction to the extent permitted by Art. 5, para. 3 PILA.[31] The chosen court may not decline jurisdiction: (a) if a party is domiciled or has its habitual residence or an establishment in the canton of the chosen court, or (b) if, pursuant to the PILA, Swiss law is applicable to the dispute.

39. On this point, Professor Romy is partially correct when she states in paragraph 31 of her Declaration that the "Swiss court may not decline its jurisdiction *if Swiss law applies* to the matter in dispute" (emphasis added). Yet, Professor Romy never examines whether Swiss

[29] Ex. 8, ECJ, May 16, 2013, *Melzer v. MF Global UK Ltd*, C-228/11, cons. 41.
[30] Ex. 1 at 2.
[31] *Ibid*.

law would in fact apply and fails to cite the conflict-of-law provisions of the PILA. Swiss law would *not* apply, as is evident under Art. 140 and Art. 133, para. 2 PILA.[32]

40. Under the PILA, where two or more persons have taken part in a tortious act, the applicable law is "determined separately for each one of them" (Art. 140 PILA). Thus, the court would make separate conflict-of-law determinations for the French and the U.S. BNPP defendants.

41. Art. 133, para. 2 PILA provides:

> If the tortfeasor and the injured party do not have their habitual residence in the same state, these claims are governed by the law of the state in which the tort was committed. However, if the result occurred in another state, the law of that state applies if the tortfeasor should have foreseen that the result would occur there.

42. Under this provision, Sudanese law will apply to all claims in this case because (a) the parties did not habitually reside in the same state at the time of the tort and (b) as this Court held in its February 16, 2021 opinion,[33] it was foreseeable to the BNPP defendants that their tortious cooperation would result in the occurrence of atrocities in Sudan.[34] In a case where the "locus of effect" of a tortious act was in Liechtenstein, the Swiss Federal Supreme Court affirmed the lower-level court's holding that the laws of Liechtenstein applied to the case.[35]

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[32] I understand that this Court determined that Swiss substantive law is applicable under the conflict-of-laws principles of New York, which differ from Swiss choice-of-law rules. My opinion here does not in any way reflect on the Court's conclusions as to the application of New York's conflict-of-laws rules. Because New York and Switzerland apply different choice-of-law rules in circumstances such as these, a New York court would apply Swiss law and a Swiss court would apply Sudanese law to the very same case.

[33] *Kashef*, 2021 WL 603290, at *8 states "…it is not just the mere *number* of links in the chain that determines whether it is reasonable to hold BNPP responsible, but also whether each subsequent link was the natural and foreseeable result of the former. The facts alleged in plaintiffs' Second Amended Complaint, assuming they are true, demonstrate that BNPP knew or at least should have known that the Sudanese government was committing horrific abuses…".

[34] Art. 132 PILA, according to which the parties at any time after the damaging event may agree to apply "*the law of the [Swiss] forum*", does not come into play here, because, as I am informed, the plaintiffs objected to Swiss substantive law being applied to the case and the parties do not have an agreement as to choice of law.

[35] Ex. 6, 125 III 103 at cons. 3b in fine.

43. Moreover, Professor Romy fails to examine whether the parties ever had their domicile or habitual residence or an establishment in a Swiss canton. This is not the case, as the defendants are domiciled, resident, and established in France and the United States respectively.[36]

44. Because (a) none of the parties have their domicile or habitual residence or an establishment in a Swiss canton and (b) Sudanese law would govern this case, the Swiss court would be authorized to decline jurisdiction. In a case where both parties were domiciled and/or resident in France and, at the same time, French law was applicable according to the PILA, the Swiss Federal Supreme Court affirmed the lower-level court's discretionary decision to decline jurisdiction.[37]

45. I conclude, as a judge and practitioner, that the Swiss court will decline jurisdiction because it would be a Herculean task to coordinate and adjudicate the claims of 15,000 U.S. plaintiffs against French and U.S. defendants, under Sudanese law, without the efficiencies of the U.S. class action or U.S. complex litigation case-management mechanisms (which are unavailable in Switzerland), and requiring thousands of Hague Evidence Convention requests directed at the United States (see paras. 48 *et seq*.).

46. Even if the Swiss court only faced the claims of the 19 named plaintiffs, this would still entail burdening the Swiss judge with dozens of Hague Convention requests to the United States, 19 individualized legal aid hearings, and the complications of ascertaining and applying Sudanese Sharia law. It is doubtful that a Swiss court would voluntarily accept this undertaking when there is already an available forum in the United States that has, for years,

[36] BNPP Suisse, which is not a defendant to the case, is not an establishment (*i.e.*, a local branch) of one of the defendants within the meaning of Art. 21 para. 4 PILA, but rather a separate corporate entity.
[37] Ex. 3, 119 II 167 at cons. 3.

adjudicated pretrial and appellate issues that would needlessly be relitigated in Switzerland. Indeed, a Swiss judge would be well aware that accepting jurisdiction over the claims of these 19 plaintiffs would open the door to thousands of other Sudanese-American plaintiffs.

47. In my opinion, the BNPP defendants cannot establish that the Swiss courts will accept jurisdiction. Therefore, Switzerland is not an available and adequate forum for this case.

II. Public Interest Factors

A. Adjudicating multiple claims by U.S. plaintiffs through pretrial proceedings, trial, and appeal would impose congestion and administrative burden on Swiss courts that lack class action or complex litigation case-management mechanisms.

48. If a Swiss court were to voluntarily agree to jurisdiction, it would be assuming a significant administrative burden. Unlike federal courts in the United States, Swiss courts do not have class action or complex litigation case-management mechanisms that would permit the efficient adjudication of an estimated 15,000 individual claims. There is no precedent or model in Swiss law for this procedural situation.

49. Currently, the only mechanism that comes somewhat close to a class action in Swiss law is limited to privacy violations: a provision that permits a Swiss public interest organization incorporated to protect the interests of a group of individuals to bring claims for the injunctive or declaratory relief of privacy violations (Art. 89, para. 1 of the Civil Procedure Code of 19 December 2008 ("CPC")).[38]

50. There is no mechanism for the collective assertion of mass damages (so-called "Massenschäden"). Such a mechanism may be adopted in the future but does not exist today. The Swiss Federal Council's Dispatch of 10 December 2021 to the Swiss Parliament regarding the Changes to the Civil Procedure Code (Group Action) includes a proposal to expand the

[38] Ex. 9 at 4.

existing mechanism for privacy violations to all violations and to provide for damages and, at the same time, to introduce a new group action specifically for the collective assertion of mass damages.[39] However, this provides no relief in the near term. The proposal remains to be debated in the Swiss Parliament, which is a process that usually takes up to several years.

51. Professor Romy's opinion in paragraph 25 points to the possibility of voluntary joinder of claims under Art. 71 CPC,[40] under which connected claims can be joined in one trial. But there are no representative plaintiffs or claims under Swiss law, so a single judge would need to adjudicate all 15,000 individual claims separately, making individual determinations on legal aid, jurisdiction, individual Hague Convention procedures to collect evidence from the United States, individual evidence hearings, trial, and appeals.

52. The congestion and administrative burden this would place on a Swiss court would be Herculean and would produce a substantial delay and drain on judicial resources. The drivers of this burden would be:

a. the need to conduct 15,000 legal aid hearings for U.S. plaintiffs lacking the financial resources to hire attorneys and pay court costs (see para. 63 *et seq.* below);

b. the need for coordination of the 15,000 independent claims by the court for which there is no procedural precedent;

c. the presumably multi-party and lengthy answers, replies, and rebuttals regarding the 15,000 independent claims at the preliminary jurisdictional phase and the trial phase;

d. the need for the judge to conduct 15,000 individualized evidence proceedings, which could be streamlined only to a small degree, including obtaining evidence from the United States, France, and other countries, in an international setup governed by the Hague Convention, which, traditionally, is a lengthy and rather complicated process (see para. 84 *et seq.* below);

[39] *See* Ex. 10.
[40] Ex. 9 at 3.

e. the potential need for parties' briefs and argumentation on the result of the 15,000 evidence proceedings;

f. the need for 15,000 final decisions which, usually, are not rendered by a single judge but by the chamber of judges instead and, therefore, require additional coordinating efforts amongst the judges; and

g. possible jurisdictional and merits appeals for thousands of individual claims, with potentially inconsistent decisions.

53. Therefore, the voluntary joinder mechanism proposed by Professor Romy as an efficient means of adjudicating these claims in Switzerland would be highly inconvenient and unmanageable.

54. A voluntary joinder would almost certainly be severed at the outset, so that a single judge is not burdened with thousands of individualized hearings on legal aid and, subsequently, jurisdiction, which would each be appealable. Swiss courts at all times have the power to order the separation of a voluntary joinder to simplify the proceedings (Art. 125 lit. b CPC). Thus, there is no guarantee that claims combined by a voluntary joinder would ultimately be dealt with by the same judge. Given the administrative burdens described above, it is highly likely that claims voluntarily joined by the plaintiffs would be broken up into separate cases.

55. Whether filed separately or severed by the first instance judge, the Swiss courts would be flooded with thousands of complaints by American plaintiffs against French and U.S. defendants. This would produce further congestion in the courts and raise the risk of inconsistent rulings at all stages of the proceedings: legal aid eligibility hearings, preliminary determinations of jurisdiction, evidentiary hearings, trial, and appeal. Once the jointly filed claims are severed, there is no mechanism to harmonize rulings so that they are consistent across separate but factually related cases. In addition, if a decision by one judge is appealed, other proceedings

before different judges (but involving related facts) would not be stayed pending the appeal. This would further compound the problem of congestion, redundant rulings, and inconsistent rulings.

56. Even if the only claimants were the 19 plaintiffs who are acting as representatives of the class in the United States, the Swiss courts would still face numerous burdens: 19 individualized legal aid hearings and potential appeals, preliminary jurisdictional proceedings, and the daunting task of judicial evidence collection necessitating international requests to the United States or other jurisdictions under the Hague Evidence Convention.

57. Finally, the fact that there have already been proceedings in the United States would not alleviate or streamline this congestion and administrative burden. The Swiss civil court would not give any *res judicata* effect to BNPP's guilty plea to violating U.S. sanctions because Swiss civil courts are not bound by the verdict of Swiss criminal courts, much less foreign criminal courts. In addition, the Swiss court would not give *res judicata* effect to the US Court of Appeals' ruling regarding the New York limitations period, because this would be regarded as a ruling on the procedural law of the *lex fori* in the United States.

B. Adjudicating claims under Sudanese law would present further administrative difficulties.

58. As discussed above in the jurisdictional analysis, Swiss conflicts of laws would lead to Swiss courts applying Sudanese law. Thus, the two scenarios being compared by this Court are, on one hand, a U.S. judge applying Swiss law, with the advantages of published Swiss decisions and secondary sources, available online, or, on the other hand, a Swiss judge (almost certainly multiple judges) applying Sudanese law. I am currently unaware of any case in which the law of Sudan was applied to claims brought in Swiss courts. I have reviewed the BNPP defendants' expert report on Sudanese law[41] as well as the rebuttal reports of Sudanese law

[41] Hassabo Decl. passim; Hassabo Reply passim.

experts filed in the U.S. proceedings,[42] and in my opinion there are multiple complicating factors for Swiss courts to identify, research, interpret, and apply the law of Sudan which draws upon Sharia law. This too would add complications, delays, and burdens on Swiss courts.

C. The trial of American plaintiffs' personal injury claims, under Sudanese law, against French and U.S. defendants is an international matter, not a local dispute.

59. As discussed above, from a Swiss law perspective Switzerland is neither the locus of the tort nor the locus of the effect under private international law principles. This dispute is international in nature, involving entirely foreign (non-Swiss) parties, foreign law, and substantially foreign conduct and injuries. Even a claim against BNPP Suisse – which is not at issue here – would be an international dispute, not a local one, because of the U.S. citizenship and residency of the plaintiffs and the occurrence of the injuries in Sudan.

60. In my opinion, Switzerland has no particular interest in how the Sharia law of Sudan is applied to French and American defendants. No doubt, Switzerland has less interest in the application of Sudanese Sharia law than New York has in the application of Swiss law.

D. Adjudicating this case in Switzerland would produce a delay of approximately ten years of additional litigation given the administrative burden and inefficiencies.

61. If this case is transferred to the Swiss courts after nearly six years of litigation in the United States, I estimate that Swiss pretrial preparation and trial proceedings would easily take up to an additional decade before the court of first instance alone. Determining legal aid at a pretrial stage and, afterwards, jurisdiction at a preliminary stage could each add years given the number of individual matters as discussed above. This would of course be a drain on court resources as well as on the parties' resources. The duration before the court of first instance might even be longer if, during the proceedings, appellate remedies were to be lodged against

[42] Idris Decl. passim.

partial and/or procedural decisions. What is more, appellate remedies could be lodged against the final decisions of the court of first instance. The Romy Declaration ignores these factors at paragraphs 21-22, where it is simply states that "proceedings may take from several months to years".

62. I conclude that transferring this case, after nearly six years of litigation in the United States, would likely impose a further decade of undue administrative burdens, congestion, and delay on Swiss courts.

III. Private Interests of the Parties

A. Transferring this case would impose substantial financial and evidentiary burdens on the U.S. plaintiffs and witnesses in the United States.

63. Litigating this case in Switzerland would likely be prohibitively expensive for the U.S. plaintiffs. In the best-case scenario, where they would successfully apply for legal aid, the plaintiffs would still be responsible for their own expenses (*e.g.*, travel costs to Switzerland, per diems, accommodation) and, if they do not prevail, for the party costs of each defendant with the prospect of joint and several liability. Moreover, even in this best-case scenario, it would require the plaintiffs to repay the legal aid to the canton once they are in a position to do so and would likely prevent them from being represented by lawyers with expertise and qualifications to handle a complex case such as this.

1. Even if the U.S. plaintiffs qualify for legal aid, they would still face substantial out-of-pocket expenses and civil liability to the Swiss canton.

64. Under Art. 117 and 118 CPC,[43] a plaintiff "is entitled to legal aid if . . . he or she does not have sufficient financial resources . . . and his or her case does not seem devoid of any chance of success". The plaintiffs must apply to the court for legal aid (Art. 119, para. 3 CPC).

[43] Ex. 9 at 8-9.

The application requires disclosure of the plaintiffs' "financial circumstances including income and assets" (Art. 119, para. 2 CPC). In addition, the plaintiff must "state his or her position on the merits of the case and the evidence he or she intends to produce" (*ibid.*). Given the complexity of the application for this case, the plaintiffs would likely need to hire a Swiss attorney to prepare and present their applications in pretrial summary court proceedings, with a risk of having to pay connected (and future) costs and fees should the application be denied.

65. If the plaintiffs are granted legal aid, they would be exempt from the obligation to pay court costs and to pay advances and security (Art. 118, para. 1 lit. a and b CPC). The court would also appoint a Swiss lawyer at the canton's expense to represent them (Art. 118, para. 1 lit. c CPC), however, they would not be guaranteed a lawyer of their choice with adequate expertise in complex, international litigation.[44] It would be a daunting task for legal aid-appointed lawyers to coordinate and manage thousands of individual personal injury claims for foreign clients, under Sudanese law, especially since the language of the proceedings would not be English but French, German, or Italian instead depending on the canton where the proceedings would take place (Art. 129 CPC) and, hence, translation will be needed.

66. In addition, given the complexity of the legal aid application and the need for translation, preparing 15,000 legal aid applications and conducting the legal aid proceedings would itself be time-consuming, and could require a couple of years alone. If the legal aid decisions are appealed, this could require an additional couple of months to a couple of years. This would, of course, add additional delay to the years of proceedings that have already taken place in the United States.

[44] *See* Ex. 11, SCD, July 4, 2017, 4A_106/2017, cons. 3.2.1.

67. Even if granted, legal aid would still leave the plaintiffs exposed to substantial financial risks. They would be required to bear their own expenses within the meaning of Art. 95, para. 3 lit. a CPC,[45] including the costs of travel and lodging for themselves.

68. The plaintiffs would also be required to pay the party costs including legal fees of each defendant within the meaning of Art. 95, para. 3 CPC,[46] if they do not prevail. Legal aid does not cover opposing party costs (Art. 118, para. 3 CPC). If several plaintiffs are participating in the proceedings, the court determines each plaintiff's share of the costs. It may hold them jointly and severally liable (Art. 106, para. 3 CPC).[47]

69. What is more, the plaintiffs would be obligated to reimburse the legal aid to the canton once they are in a position to do so, regardless of the outcome of the case (Art. 123, para. 1 CPC). The canton would have a cause of action against the U.S. plaintiffs (Art. 123, para. 2 CPC).

70. If the application for legal aid is denied, the plaintiffs have a right to appeal (Art. 121 CPC), again with a risk of having to pay connected costs and fees should the appeal be denied.

71. There is a real risk of the application for legal aid being denied, even for a plaintiff who can prove their lack of financial resources, because of the serious doubts that a Swiss court would have jurisdiction, as explained above. If the court decides that jurisdiction will not be accepted, even a meritorious case will be deemed devoid of any chance of success[48] and the application denied (Art. 119, para. 3 CPC). Accordingly, the U.S. plaintiffs would incur the

[45] Ex. 9 at 5.
[46] *Ibid.*
[47] Ex. 12, SCD, Dec. 14, 2021, 4A_487/2021, cons. 6.5.
[48] Ex. 13, Decision of the Zurich Court of Appeal, June 18, 2014, VO140073-O/U, cons. 2.4.

costs and burden of preparing the legal aid application (including potential appeal costs), with doubtful prospects of success.

2. If the U.S. plaintiffs are denied legal aid, their litigation costs would be prohibitively expensive.

72. If the Swiss court rejects the application for legal aid, the 19 named plaintiffs alone will face the prospect of advancing and (in the event of loss) ultimately paying amounts that could exceed CHF 631,400 in estimated court and opposing party costs, in addition to their own party costs, and the risk of joint and several liability, as explained below. Moreover, the plaintiffs' Swiss attorneys would be prohibited from acting on a contingency fee basis and from advancing these costs. As I am informed, it is rather doubtful that an average American resident (with median household income of $67,521)[49] could afford these financial risks, much less genocide victims who entered as refugees.

a. Nineteen plaintiffs would face the financial risk of paying more than CHF 631,400 in court and opposing party costs; adding 15,000 would increase the risk to as much as CHF 75.5 million in such costs.

73. In Switzerland the losing party, on top of the costs of its own legal representation, bears the procedural costs of the court and the opposing parties (Art. 95 in connection with Art. 106, para. 1 CPC). It is the cantons which set the tariffs for these costs (Art. 96 CPC). In the Canton of Geneva for example, the Règlement fixant le tarif des frais en matière civile of 22 December 2010 ("RTFMC")[50] provides for a tariff system with flat rates of compensation based on the value of the claim both for court costs and for party costs. With a voluntary joinder the values of the different independent claims are cumulative, as long as they are not mutually exclusive (Art. 93 para. 1 CPC). If several plaintiffs are participating in the

[49] U.S. Census, Income and Poverty in the United States: 2020, 14 September 2021, p. 1, https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf.
[50] Ex. 14.

proceedings, the court determines each plaintiff's share of the costs. It may hold them jointly and severally liable (Art. 106, para. 3 CPC).

74. To estimate costs, I will first assume that an individual victim demands CHF 1 million in compensatory damages, as I am informed this reflects sums awarded in comparable individual human rights cases in the United States. For the present case, this means that even the 19 named plaintiffs alone, whose claims could be cumulatively valued at CHF 19 million, would be required to pay approximately CHF 100,000-240,000 under the (ordinary) flat rates of compensation for court costs (Art. 17 and 13 RTFMC). These (ordinary) rates of compensation can still be increased until up to twice the maximum amount by the court (Art. 6 RTFMC), *i.e.*, approximately CHF 480,000, whereas in complex cases such as the present one such increase is to be expected. Court costs would be capped at that amount, even if additional plaintiffs were joined in the action.

75. Regarding opposing party costs, with claims cumulatively valued at approximately CHF 19 million, the 19 named plaintiffs alone would be required to pay approximately CHF 106,400 plus 0.5% of the value above CHF 10 million under the (ordinary) flat rates of compensation for party costs (Art. 85 RTFMC), *i.e.*, approximately CHF 151,400. These (ordinary) rates of compensation can still be increased by the court.

76. Accordingly, if only the 19 plaintiffs proceeded jointly, without joining any additional plaintiffs, they would face more than CHF 631,400 in combined court and opposing party costs, with the prospect of joint and several liability.

77. If all 15,000 plaintiffs were joined in one case, with individual claims of CHF 1 million each, their potential court costs (CHF 480,000) and opposing costs (CHF 75,056,400) would total approximately CHF 75.5 million.

78. Another method to estimate the costs for all 15,000 plaintiffs would be to use the value of comparable class action settlements in human rights cases, which I am informed could be approximately CHF 150 million. If 15,000 plaintiffs were to seek CHF 150 million in cumulative compensatory damages, the court costs would be capped at CHF 480,000 and the opposing party costs would be approximately CHF 806,400 for a total of CHF 1,286,400 in costs, with the prospect of joint and several liability.

b. Requirement to post a security for costs in advance.

79. In practice, all Swiss civil courts demand that plaintiffs make an advance payment up to the amount of the expected court costs (Art. 98 CPC) before being allowed to pursue their claims. Moreover, at the request of the defendant, the plaintiff must provide security for party costs if he or she has no domicile or seat in Switzerland (Art. 99, para. 1 lit. a CPC). This means that the U.S.-domiciled plaintiffs, in addition to advancing the court costs, can be forced to advance the above-mentioned party costs, as allocated by the court, potentially with joint and several liability for the other plaintiffs' party costs (Art. 106 para. 3 CPC)[51] before being allowed to pursue their claims in Switzerland.

c. Litigation costs cannot be advanced by counsel for plaintiffs.

80. Unlike in the United States, in Switzerland it is prohibited for lawyers to advance relevant costs of their clients and act so to speak as litigation financiers participating in a successful outcome of the case.[52]

[51] *See* Ex. 12, 4A_487/2021 at cons. 6.5.
[52] Ex. 15, SCD, Dec. 10, 2004, BGE 131 I 223, cons. 4.5.2.

d. The U.S. plaintiffs' Swiss lawyers must be paid a reasonable fee and cannot act on a contingency basis.

81. Swiss law prohibits contingency fee arrangements under Art. 12 lit. e of the Lawyers Act of 23 June 2000 ("LA").[53] According to Art. 12 lit. e LA,[54] lawyers may not enter into an agreement with the client prior to the end of a legal dispute to share the profits of the case as a substitute for the lawyer's fee. In addition, they may not undertake to waive the lawyer's fee in the event of an unfavorable conclusion of the proceedings. This means that the so-called "pactum de quota litis", *i.e.*, an agreement by which the entire lawyer's fee consists of a share in the possible litigation profit, is impermissible. Similarly, the so-called "pactum de palmario", *i.e.*, an agreement by which a lawyer's fee owed in any case is increased by a bonus in the event of a successful outcome of the case, is permissible only within certain (narrow) limits. First, the lawyer must be paid a fee sufficient to cover his own costs and earn a reasonable profit regardless of the outcome of the case, *i.e.*, the fee that is not contingent on success may not be minor. Second, the performance-related bonus must not be so high in relation to the non-contingent fee that the lawyer's independence is impaired. The limit is clearly exceeded if the performance-related bonus is higher than the non-contingent fee. Third, the "pactum de palmario" may only be concluded at the beginning of the client relationship or after the end of the legal dispute, but not during the ongoing client relationship.[55]

82. In summary, a plaintiff domiciled in the United States would face a potential risk of advancing and ultimately bearing substantial out-of-pocket expenses, with joint and several liability, in addition to the plaintiff's own costs. Moreover, unlike in the United States, plaintiffs'

[53] Only lawyers admitted to practice in Switzerland are allowed to act as professional representatives for parties in Swiss civil proceedings (Art. 68 para. 2 lit. a CPC).
[54] Ex. 16 at 2.
[55] Ex. 17, SCD, June 13, 2017, BGE 143 III 600, cons. 2.7.5.

counsel would be prohibited from advancing their client's costs and prohibited from acting on a contingency fee basis.

83. I conclude that, as a practical matter, it is highly unlikely that a plaintiff from the United States, of average means, could afford the financial risk of pursuing this case in Switzerland, even if he or she received legal aid. In this respect, a Swiss court would be more than inconvenient for the U.S. plaintiffs, it would *de facto* be unavailable.

B. Switzerland is not a more convenient forum for the parties or the courts to obtain evidence.

84. In addition to the difficulties discussed above, Switzerland is not a more convenient forum for obtaining evidence for several reasons set forth below.

1. Limited access to sources of proof.

85. Under Swiss law, the obtaining of evidence is exclusively a judicial function. Unlike in the United States, it is the judge's task to examine the witnesses, experts, and parties upon the parties' request (Art. 152 para. 1 in connection with Art. 171, 185, 191 CPC). Swiss law prohibits a party counsel from conducting its own witness hearings. For example, if counsel for plaintiffs were to bypass the official judicial channel and travel to Sudan or even to the United States to conduct depositions or witness hearings themselves, such doings might (a) constitute a disciplinary offence by Swiss counsel within the meaning of Art. 12 lit. a LA and (b) result in the exclusion of such testimony from the proceedings as the Swiss judge might consider it tainted (Art. 157 CPC). The latter is also true for evidence obtained by a party through their foreign, non-Swiss counsel's or expert consultant's investigations. Transferring this case would therefore jeopardize whether evidence developed in the U.S. proceedings could be admitted in future Swiss proceedings.

2. Transferring the case to Switzerland would necessitate numerous Hague Evidence Convention requests to obtain evidence from the United States or other foreign jurisdictions.

86. Because parties cannot conduct U.S.-style pretrial fact discovery, the Swiss judge, unlike the U.S. judge, would be forced to bear the administrative burden of obtaining voluminous testimony and documentary evidence from American plaintiffs and witnesses, including banking institutions and the U.S. government.

87. The Swiss judge would need to resort to the unwieldy mechanism of the Hague Evidence Convention to obtain evidence in the United States. The testimony of each American plaintiff – as many as 15,000 of them – would most likely need to be taken in the United States through the Hague Evidence Convention, because it is unlikely that these Americans, who entered as refugees, could afford the out-of-pocket costs of travel and accommodation to Switzerland, which legal aid would not cover and their counsel could not advance. If even a few thousand of the class members filed claims in Switzerland, the Swiss judge would be flooded with evidentiary proceedings under the Hague Convention.

88. The same would be true *mutatis mutandis* for voluntary witnesses in the United States presenting evidence in support of plaintiffs' claims.

89. The Court would also need to resort to the Hague Convention to secure the testimony of unwilling witnesses outside of Switzerland, including former BNPP employees in New York and France. This would potentially add a significant number of Hague Convention proceedings to the already sizable number required for plaintiffs and willing witnesses.

90. In total, this would represent a sizable number of Hague Convention proceedings in the United States – potentially more than 15,000 – which could create great delay and present administrative burdens in Switzerland and in the United States. It needs to be noted that Swiss

civil procedural law at present does not provide for the hearing of witnesses via video. The current Corona-regulations allowing for such tool exceptionally are expected to come to an end soon and the ongoing revision of Swiss civil procedural law introducing this tool potentially permanently is still ongoing. Even if Swiss civil procedural law were to permit the hearing of witnesses via video, the United States would only permit the direct taking of evidence by video-link on a voluntary basis under Chapter II of the Hague Convention (*i.e.*, where the taking of evidence is conducted by foreign diplomatic officers, consular agents or commissioners on its territory). Such arrangements must be agreed upon privately and do not involve the U.S. Central Authority.[56] In this case, a substantial number of Swiss diplomatic or consular officers would be needed to conduct the depositions, or the U.S. courts would need to appoint commissioners. In effect, this would return a portion of the burden of evidence-taking back to the United States and the U.S. courts.

91. Aside from the inconvenience of such a large number of Hague Convention proceedings, the need for the American plaintiffs and willing (and unwilling) witnesses to testify by means of a legal assistance procedure would mean that the Swiss proceedings would lack the benefits of in-person testimony, including the greater ability to assess the credibility of witnesses and the psychological or emotional state of victims.

92. In summary, the U.S. plaintiffs would be forced to choose between bearing the costs of traveling to Switzerland to give in-person testimony (a cost their lawyers could not advance) or using the cumbersome mechanisms for testimony under the Hague Evidence Convention, which would deprive them of the opportunity to present live testimony to the court

[56] Hague Conference's Synopsis of Responses to the Country Profile Questionnaire on the Taking of Evidence by Video-link of July 2018, p. 13, https://assets.hcch.net/docs/1dfce8db-44c1-459e-b6b2-025954328dc0.pdf.

to prove their claims and damages. Simply put, for the vast majority of witnesses, Switzerland would be enormously inconvenient.

3. The Swiss judge would have difficulties in obtaining evidence from Sudan and plaintiffs' counsel could not do so privately.

93. Because collecting evidence from non-parties is a judicial function, the Swiss judge would upon request of a party be tasked with collecting party-specified evidence as to the acts of genocide and crimes against humanity committed in Sudan. This would, again, be only possible by means of international legal assistance. As discussed above, evidence obtained by the U.S. plaintiffs through independent human-rights investigations might be deemed tainted and inadmissible. It is questionable how a Swiss judge would obtain any evidence from Sudan, which is not a party to the Hague Evidence Convention. Given that a coup d'état recently occurred, the prospect of success for a letter rogatory being accorded by a Sudanese court seems doubtful.

4. Because the defendants are not Swiss entities, a Swiss judge would be no better equipped to determine if any secrecy or privacy statutes would apply with respect to evidence.

94. Professor Romy's analysis of Swiss banking and privacy statutes is limited to evidence requests directed to BNPP Suisse.[57] Professor Romy does not assert that the Swiss Federal Act on Banks and Savings Banks of 8 November 1934 ("Swiss Banking Act") or the Swiss Federal Data Protection Act of 19 June 1992 ("DPA") is binding on the defendants in this case: BNPP-France, BNPP-NY, and BNPP-North America.

95. Professor Romy asserts that a Swiss court would be able to obtain documentary evidence from BNPP Suisse that would otherwise be protected under Swiss law. This point is immaterial, however, because, as I am informed, the plaintiffs are not seeking any documents from BNPP Suisse.

[57] Romy Decl. para. 51.

96. Regarding the French and U.S. BNPP defendants, the Swiss Federal Supreme Court has held that foreign "[b]anking institutions that are not included in the list of banks and securities dealers licensed by FINMA, in particular branches of Swiss banks abroad, are not subject to the Swiss Banking Act either directly or by way of analogous application".[58] None of the defendants are registered in the list of banks and securities dealers licensed by the Swiss Financial Market Supervisory Authority ("FINMA").[59] Nor are the defendants agents of BNPP Suisse to whom Swiss bank secrecy laws would extend.[60]

97. On balance, there does not appear to be any greater convenience in having a Swiss court obtain evidence, and numerous disadvantages for the American plaintiffs, for U.S.-based witnesses, and for the Swiss courts.

CONCLUSION

98. In conclusion, transferring this case to Switzerland would most likely result in a Swiss court rejecting jurisdiction, rendering Switzerland an unavailable forum. If, against all odds, the case did proceed in Switzerland, it would impose administrative burden and congestion on the Swiss courts, would subject the American plaintiffs to financial hardship, and would not be significantly more convenient for the parties, witnesses, or the courts.

[58] Ex. 18, SCD, Oct. 10, 2018, 6B_1314/2016 and 6B_1318/2016 (published in BGE 145 IV 114), cons. 3.2. The Swiss Federal Supreme Court has explicitly held that the Swiss Banking Act does not apply to foreign branches, subsidiaries, and affiliates of Swiss banks. *See also* Ex. 19, SCD, Feb. 16, 2017, BGE 143 II 202, cons. 8.6.1, where the Court held that a French affiliate of a Swiss bank, which did not operate through a branch office in Switzerland, was not covered by the Swiss Banking Act and could not be liable under Art. 47 of the Act.

[59] FINMA, Authorised banks and securities firms, 17 January 2022, https://www.finma.ch/en/~/media/finma/dokumente/bewilligungstraeger/pdf/beh.pdf?la=en.

[60] Ex. 18, 6B_1314/2016 and 6B_1318/2016, cons. 3.2, 3.3.4, observing that a bank coordinating a service for clients with a third party constitutes a "legally and economically independent transaction" which does not give rise to an agency relationship for purposes of extending the Swiss Banking Act protections to third parties outside of Switzerland.

Fribourg/Basel, 4 February 2022

Ramon O. Mabillard