

26-0341

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ENTESAR OSMAN KASHEF et al.,

Plaintiffs-Appellees,

v.

BNP PARIBAS, *a French corporation,*

Defendant-Appellant.

*On Appeal from the United States District Court for the Southern
District of New York, the Honorable Alvin K. Hellerstein*

Civil Action No. 16-3228

**BRIEF OF THE CENTRE OF APPLIED LEGAL STUDIES, THE
INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN
AFRICA, PAN AFRICAN LAWYERS UNION, AND THE
FOUNDATION FOR HUMAN RIGHTS AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLEES**

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Proc. 26.1, there is no parent corporation for any of *amici* nor any publicly held corporation that owns 10% or more of any *amici*'s stock.

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INTERESTS OF AMICI CURIAE¹

The Centre of Applied Legal Studies (“CALS”)

CALS is a research center and law clinic based at the School of Law, University of the Witwatersrand in South Africa. Founded in 1978, CALS deployed public interest litigation and research to expose and confront the injustices of apartheid. After 1994, CALS contributed to the drafting of the South African Constitution and the development the country’s human rights jurisprudence. CALS works through five intersecting programs (Business & Human Rights; Civil & Political Justice; Environmental Justice; Gender Justice and Home, Land & Rural Democracy), and regularly submits amicus curiae briefs to national, regional and international courts and tribunals.

The Institute for Human Rights and Development in Africa (“IHRDA”)

IHRDA is a Pan-African non-governmental organization registered in the Gambia, which works to promote awareness and respect of human rights, rule of law, democratic governance and sustainable development in Africa and to improve the effectiveness of the African human rights system and institutions. IHRDA uses legal advocacy and strategic human rights litigation, capacity building and human rights research

¹ All parties have consented to the filing of this amicus. No counsel for a party has authored this brief in whole or in part, and no party, party’s counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

and information sharing as tools to contribute to achieving these ideals. As one of the leading legal advocacy organizations in Africa, IHRDA has litigated issues related to corporate accountability for human rights violations and state obligations relating to corporate human rights violations at the African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, African Committee of Experts on the Rights and Welfare of the Child and the Economic Community of West African States (ECOWAS) Community Court of Justice, representing vulnerable individuals and communities, including women, children persons with disabilities and persons affected by conflict.

Pan African Lawyers Union (“PALU”)

The Pan African Lawyers Union (PALU) is the premier continental association of lawyers and law societies in Africa, bringing together the continent's legal profession to advance justice, human rights, the rule of law, and good governance. Established in 2002 and headquartered in Arusha, Tanzania, PALU works with lawyers, civil society organizations, regional institutions, and governments to strengthen legal systems and promote access to justice across Africa. Through strategic litigation, legal advocacy, research, and capacity building, PALU contributes to the protection and advancement of human and peoples' rights and supports the progressive development of African jurisprudence.

The Foundation for Human Rights

The Foundation for Human Rights is a South African non-profit established in 1995, and works to advance human rights and social justice in South Africa. A core component of this work has been the pursuit of accountability for apartheid-era gross human rights violations, in the form of legal accountability (criminal trials, re-opened inquests and litigation to recognize rights violations) and reparations for victims and their families.

INTRODUCTION

BNP Paribas, S.A. (“BNPP”) argues that the jury verdict against it must be thrown out not only because Plaintiffs’ claims fail under Swiss law, but because Plaintiffs’ claims are not viable under the laws of any nation. BNPP Br. at 1. In BNPP’s hands, neither Swiss law nor—absurdly—the laws of any nation would hold a financial institution liable no matter what role it played in the commission of genocide.

The district court found that Swiss law governed here, and then the jury found that BNPP was liable under Swiss law. This *amicus* brief will not disagree with either of these conclusions. Rather, this brief will establish that BNPP’s position, if this Court embraced it, would place Swiss law far outside the normal principles of laws on the African continent—where the genocide at issue took place—and, indeed, accepted international law that binds all nations.

First, as this brief will explain, there is a substantial history of transnational corporations, including financial institutions, enabling, abetting, and profiting from conflicts and human rights abuses on the African continent. Partly in response to this history, African law has developed far-reaching legal standards for corporate liability, particularly insofar as gross human rights violations and international crimes are concerned.

Second, this brief will contrast the exceedingly narrow interpretation of the Swiss Code advanced by BNPP with the broader

jurisprudential developments on corporate accountability, including for international crimes, in Africa and globally. There are three fundamental flaws with BNPP's argument. First, BNPP pretends that the meaning of Swiss law on the issue of when liability attaches for aiding and abetting behavior is based on the actions of its executive branch, when the legal question of what Swiss law provides is a judicial question. Second, BNPP's own logic on accomplice liability is unsound: it would extend Sudan's sovereign immunity to private corporations and produce anomalous results turning on the happenstance of who a court deems the primary tortfeasor, with especially troubling implications for genocide. And third, BNPP's theory would place Switzerland outside of the principles that govern these questions in the vast majority of nations, including African nations.

Finally, this brief shows that BNPP's *forum non conveniens* argument fails to account for—or even acknowledge—the interests of members of the African diaspora in having their claims heard in the country in which they live.

BACKGROUND

I. The Extraordinary Facts of This Case Demand Accountability.

BNPP enabled and facilitated the financial transactions of the Government of Sudan while Sudan was embroiled in the African continent's longest-running civil war—the Second Sudanese Civil War

(1983-2005), during which an estimated two million people were killed and roughly four million people were displaced.² This is the period in which BNPP enabled the financial transactions of the Government of Sudan, which was committing genocide against its people. Towards the end of the war (2003-2005), the Government of Sudan committed a genocide in Sudan's Darfur region, murdering some 300,000 Darfuris.³

BNPP asserts that the risk of aiding and abetting the Government of Sudan's atrocities was unforeseeable, even at the height of genocide in 2003-2005. But it is difficult to imagine a tragedy more foreseeable. As early as 1994, the European Union ("EU") imposed sanctions on Sudan "in response to civil war abuses."⁴ Soon after, in 1997, the United States adopted an arms embargo to address "the prevalence of human rights

² See Samuel Momodu, *Second Sudanese Civil War (1983-2005)*, BlackPast (December 23, 2018), <https://blackpast.org/global-african-history/second-sudanese-civil-war-1983-2005/>; South Sudan, The 2005 Comprehensive Peace Agreement, *Encyclopaedia Britannica* (August 22, 2026), <https://www.britannica.com/place/South-Sudan/The-2005-Comprehensive-Peace-Agreement>; Peace Accords Matrix, *Sudan Comprehensive Peace Agreement*, University of Notre Dame (January 9, 2005), <https://peaceaccords.nd.edu/accord/sudan-comprehensive-peace-agreement>.

³ United States Holocaust Memorial Museum, *Darfur*, Holocaust Encyclopedia (last visited August 28, 2026), <https://encyclopedia.ushmm.org/content/en/article/Darfur>.

⁴ Human Rights Watch, *Human Rights Benchmarks for Sudan: Eight Ways to Measure Progress* (May 3, 2017), <https://www.hrw.org/news/2017/05/03/human-rights-benchmarks-sudan>; Council Decision 94/165/CFSP, art. 1, 1994 O.J. (L 75) 1 (imposing an embargo on arms, munitions and military equipment on Sudan, effective 16 March 1994).

violations, including slavery and the denial of freedom of religion” in Sudan.⁵ By 2004 the President of the United States,⁶ a unanimous United States Congress,⁷ United States Secretary of State Colin L. Powell,⁸ as well as many civil society organizations declared that what was happening in Darfur was a genocide. In July 2004, the Security Council adopted Resolution 1556 under Chapter VII of the UN Charter in response to violations of human rights and international humanitarian law in Sudan.⁹ In August 2004, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions documented widespread extrajudicial, summary, or arbitrary killings across Sudan.¹⁰ In September 2004, the Security Council adopted Resolution 1564, which

⁵ Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 5, 1997).

⁶ On September 21, 2004, in an address before the United Nations General Assembly, President George W. Bush affirmed the Secretary of State’s finding and stated, “[a]t this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide.” President George W. Bush, Remarks to the U.N. General Assembly (Sept. 21, 2004).

⁷ On July 23, 2004, Congress declared, “the atrocities unfolding in Darfur, Sudan, are genocide.” H.R. 3127, 109th Cong. (2006) (enacted) (“Darfur Peace and Accountability Act of 2006”).

⁸ On September 9, 2004, Secretary of State Colin L. Powell stated before the Committee on Foreign Relations of the Senate, “genocide has occurred and may still be occurring in Darfur,” and “the Government of Sudan and the Janjaweed bear responsibility.” Pub. L. 109-344 § 3(2), Oct. 13, 2006, 120 Stat. 1869.

⁹ S.C. Res. 1556 (July 30, 2004).

¹⁰ Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in August 2004), *Rep. on Civil and Political Rights, Including the Questions of Disappearances and Summary Execution*, U.N. Doc. E/CN.4/2005/7/Add.2 (Aug. 6, 2004).

“[e]xpress[ed] grave concern at the lack of progress with regard to security.”¹¹ In January 2005, the UN International Commission of Inquiry on Darfur to the United Nations Secretary-General concluded that “the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law” (including indiscriminate attacks, killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur).¹² Further, the International Criminal Court (“ICC”) determined that there were reasonable grounds to believe that from 2003 onwards the Government of Sudan, including its President, were responsible for committing genocide, crimes against humanity, and war crimes in Darfur. In fact, this was the first time in history that a sitting head of state was charged with genocide by an international tribunal.¹³

¹¹ S.C. Res. 1564, ¶ 7 (Sept. 18, 2004) (“Expressing grave concern at the lack of progress with regard to security and the protection of civilians, disarmament of the Janjaweed militias and identification and bringing to justice of the Janjaweed leaders responsible for human rights and international humanitarian law violations in Darfur.”).

¹² Int’l Comm’n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, U.N. Doc. S/2005/60, at 3 (Feb. 1, 2005).

¹³ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest (July 12, 2010), https://www.icc-cpi.int/sites/default/files/courtrecords/cr2010_04825.pdf.

This record bears on the foreseeability of the consequences of providing substantial financial services to the Government of Sudan. By the time of the conduct at issue, allegations of widespread, systematic violations by Sudanese authorities and associated forces were well-documented. Against that backdrop, a major international financial institution operating in Sudan should have (and here, did) appreciate the risk that sustaining the Government's access to international markets and foreign currency would sustain these abuses.

Rather than address the conflict in which BNPP played an integral role, BNPP's brief spends considerable time complaining about conflicting sanctions regimes that were in place at the time, a characterization that fundamentally misrepresents the record. Whatever technical differences existed among those regimes, every one of them recognized the same essential facts: that the Government of Sudan was responsible for serious human rights violations, and that maintaining a relationship with the Government risked contributing to those violations.

BNPP acknowledges this, noting, "[t]hese sanctions were aimed at preventing human-rights abuses in Sudan, but used different approaches to achieve that goal." BNPP Br. at 8. BNPP then attempts to differentiate general and targeted sanctions to argue that BNPP's behavior complied with targeted sanctions. This argument is a red herring and fundamentally misrepresents the nature of sanctions. Targeted sanctions were developed specifically to reduce the collateral harm that broad,

general sanctions can inflict on a total population.¹⁴ General sanctions often punish an entire population without meaningfully constraining the officials actually responsible for the underlying wrongdoing. Targeted sanctions are designed to solve that problem by directing asset freezes, travel bans, and similar measures at the specific individuals and entities responsible for abuses, while sparing the broader population the harm of an indiscriminate embargo. They exist to strengthen the international community's human rights response, not to weaken it.

BNPP's argument inverts that purpose. It asks this Court to read the existence of a targeted sanctions list as a ceiling, that is, to treat the fact that a particular transaction escaped specific designation as license to facilitate it regardless of the Government of Sudan's broader, well-documented atrocities. Reading a mechanism created to sharpen the world's response to human rights abuses as instead lowering the standard of conduct expected of a bank doing business with a regime committing genocide is absurd.

Additionally, BNPP's related assumption—that because it did not violate the “targeted sanctions” of Switzerland, the EU, and the UN, its conduct must therefore have been legal, does not follow. Whether conduct results in a targeted sanctions designation often turns on diplomatic

¹⁴ Uri Friedman, *Smart Sanctions: A Short History*, Foreign Policy (Apr. 23, 2012 2:33 AM), <https://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/>.

priorities, intelligence-sharing constraints, and political considerations, not on whether the underlying conduct is lawful. The absence of a targeted designation therefore says nothing about the legality of BNPP's conduct.

Viewed in this context, the present case does not raise an unprecedented question arising in isolation. It forms part of a much broader and longstanding legal problem: how legal systems respond when commercial actors are alleged to have caused, contributed to, facilitated, or benefited from serious human rights abuses committed by others. African law and practice have confronted that problem with particular urgency, and it is to that experience that this brief now turns.

II. Core Principles of African Law Support Liability.

A. There Is a Long History of Corporations Committing Serious Abuses of Human Rights on the African Continent.

BNPP enabled and facilitated the financial transactions of the Government of Sudan in the context of increased global recognition of the role that corporations play in human rights abuses, especially on the African continent. Transnational corporations now have economic power that surpasses that of many nation-states.¹⁵ In 2002 the UN-appointed

¹⁵ Christopher Byrnes et al., *'We All Stand Before History': Corporate Impunity as a Colonial Legacy—The Case of the Niger Delta*, Harvard Human Rights J. (April 9, 2019), <https://journals.law.harvard.edu/hrj/2019/04/we-all-stand-before-history/>.

Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo published a list of over 125 corporations and individuals that “[b]y contributing to the revenues of the elite networks, directly or indirectly, . . . contribute[d] to the ongoing conflict and human rights abuses.”¹⁶ The Panel recommended “[b]arring selected companies and individuals from accessing banking facilities and other financial institutions and from receiving funding or establishing a partnership or other commercial relations with international financial institutions.”¹⁷

In another example, in Nigeria, the Ogoni people were victims of egregious and unremedied human rights and environmental abuse allegedly perpetrated primarily by Royal Dutch Shell (“Shell”) and its subsidiaries, with the assistance of the Nigerian government and its state-owned oil enterprise.¹⁸ The execution of the “Ogoni Nine” environmental activists by Nigeria in 1995 led to increased public awareness and efforts to ensure greater corporate accountability for

¹⁶ Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Final Rep., ¶ 175, U.N. Doc. S/2002/1146 (2002).

¹⁷ *Id.* ¶ 176.

¹⁸ Press Release, Amnesty Int’l, Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine as Writ Served in Dutch Court (June 29, 2017), <https://www.amnesty.org/en/latest/press-release/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/>.

human rights violations, including in the US.¹⁹ The Ogoni Nine were arrested and publicly hanged in 1995 after protesting oil drilling by Shell. This is widely believed to be the result of a conspiracy between the government and Shell.²⁰

B. International and African Law Support Holding Corporations Accountable for Aiding and Abetting Crimes.

BNPP claims that the district court has sought to “impose liability for claims that would not be viable under the laws of *any* nation.” BNPP Br. at 1 (emphasis added). This is plainly incorrect. “Legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood.” *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 53 (D.C. Cir. 2011). A 2005 study found that in “fifteen of the sixteen [states surveyed] . . . it would be possible to bring civil legal claims—ordinary common law torts or civil law delicts—against business entities associated with [international humanitarian law] or [international criminal law] breaches.”²¹

Holding corporations such as BNPP accountable for crimes is particularly important here. This is not an ordinary case: it involves widespread and systematic human rights abuses, committed over an

¹⁹ *Id.*

²⁰ Byrnes, *supra* note 15.

²¹ Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict* 22 (2006), https://www.fafo.no/media/com_netsukii/536.pdf.

extended period and through a chain and conduct touching multiple different jurisdictions. The *amici* submit that due weight must be given to all the rights and legal interests at stake, starting with those of the countless victims—which BNPP elides—and extending to those that will be impacted by the narrow construction of corporate accountability for transnational human rights violations (including genocide) for which BNPP contends. This includes the interest of the international community. The International Court of Justice (“ICJ”), to which Switzerland is a party and accepts jurisdiction, has repeatedly found that insofar as international crimes are concerned—and, in particular, the crime of genocide—all states have a “common interest to ensure the prevention, suppression and punishment” of such crimes.²² This includes “a common interest in compliance with these obligations by the State in whose territory the alleged offender is present,” as these are “obligations *erga omnes*” (i.e. obligations owed to all states).²³

Considering the role played by corporations on the continent, African states and regional human rights bodies have adopted far-reaching legal standards for corporate liability—particularly insofar as

²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures Order, I.C.J. Rep. 2024, ¶ 33 (Jan. 26); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Preliminary Objections, Judgment, I.C.J. Rep. 2022, ¶ 107 (July 22); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, I.C.J. Rep. 2012, ¶ 68 (July 20).

²³ *Id.*

gross human rights violations and international crimes are concerned.²⁴ The African Charter on Human and Peoples' Rights ("African Charter") is Africa's main regional human rights treaty. The legislative history of the African Charter confirms that certain threats largely come from outside of the continent, either in the form of international corporations, neo-colonial influence, or non-African states.

The subsequent jurisprudence of the African human rights system has rightly affirmed and entrenched corporate accountability as a fundamental pillar of African States' duty to protect the human rights enshrined in the African Charter. This includes obligations on States to regulate corporate conduct, and to prevent and remedy human rights abuses committed by corporations.²⁵

The African Commission on Human and Peoples' Rights ("ACHPR") is the body created by the African Charter to interpret and oversee it. It came into being when the African Charter entered into force in 1986. ACHPR has repeatedly found that states are responsible for ensuring that corporations within their jurisdiction do not violate human rights.

²⁴ In the 1973 *African Declaration on Cooperation, Development, and Economic Independence*, African States committed to "take adequate steps to put an end to practices of foreign transnational companies that are contrary to Africa's interests." Org. of Afr. Unity, *African Declaration on Cooperation, Development, and Economic Independence*, 12 Int'l Legal Materials 996 (1973).

²⁵ Afr. Comm'n H.P.R., *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (2015), <https://achpr.au.int/sites/default/files/files/2021-09/generalcommentno3english.pdf>.

In its 2001 landmark ruling in *SERAC*, ACHPR—established in the 1980s to monitor compliance with the African Charter on Human and People’s Rights—held Nigeria accountable for environmental and human rights abuses cause by Shell.²⁶ *SERAC* is significant because, although the communication was brought against Nigeria rather than the corporations themselves, ACHPR expressly recognized that corporate conduct may interfere with rights protected by the African Charter.²⁷ It held that States have a positive duty to protect individuals and communities against harmful acts committed by private companies. *SERAC* therefore established an important foundation for the subsequent development of corporate accountability within the African human rights system.²⁸

The *Kilwa* case, which expanded *SERAC*, is particularly instructive because ACHPR did not confine its analysis to conduct in which a corporation directly perpetrates the underlying violation.²⁹ It held that an extractive company breaches its responsibilities not only when it directly commits human and peoples' rights violations, but also when it

²⁶ Soc. & Econ. Rts. Action Ctr. / Nigeria, Commc’n 155/96 (Afr. Comm’n H.P.R. 2001) (“*SERAC*”).

²⁷ *Id.* ¶¶ 57-58.

²⁸ *Id.*

²⁹ Inst. for Hum. Rts. & Dev. in Afr. v. Dem. Rep. Congo, Commc’n 393/10 (Afr. Comm’n H.P.R. 2016) (“*Kilwa*”) (unofficial translation).

participates in or supports violations committed by others.³⁰ The distinction reflects an understanding that corporate accountability may arise not only where a company is the immediate actor inflicting harm, but also where its own conduct facilitates or supports violations perpetrated by others.³¹ This directly undermines the suggestion that legal concern with corporate assistance to another actor's human rights abuses represents an unprecedented or anomalous form of responsibility. Within the African human rights system, the legal significance of corporate participation in or support for abuses committed by others has been expressly recognized.

In *Minority Rights Group*, ACHPR emphasized that “governments have a duty to protect their citizens, not only by adopting appropriate legislation and effectively enforcing it, but also by protecting them from harmful activities that may be perpetrated by private actors. The African Court on Human and Peoples' Rights (“African Court”) is the judicial body that sits alongside the African Commission. The African Court has emphasized that this duty requires a positive obligation on the part of the State to act whenever the rights of the people under its protection are

³⁰ *Id.* ¶¶ 100-102.

³¹ *Id.*

threatened; and this must be done in accordance with human rights instruments.”³²

Trafigura represents a further development in this jurisprudence.³³ The African Court did not confine its analysis to the State’s obligation to regulate private conduct. It expressly recognized that responsibility for respecting human rights is also incumbent upon companies, “notably, multinational companies,” and linked that responsibility to prevention, continuing human rights due diligence, and remediation.³⁴ Equally significant, the Court addressed corporate activities capable of producing a “direct and reasonably foreseeable impact” on the right to life beyond the territorial State.³⁵ These principles are relevant here at a level of general legal development rather than as governing law. They demonstrate that African human rights jurisprudence increasingly addresses both the responsibility associated with corporate contribution to human rights harm and the legal significance of the foreseeable consequences of transnational corporate activity. The fact that corporate conduct occurs in one State while its alleged human consequences

³² *Minority Rts. Grp. v. Dem. Rep. Congo*, Commc’n 588/15 (Afr. Comm’n H.P.R. 2023) (unofficial translation).

³³ *Ligue ivoirienne des droits de l’homme v. Republic of Côte d’Ivoire*, Judgment (Merits and Reparations), Application No. 041/2016 (Afr. Ct. H.P.R. Sept. 5, 2023) (“*Trafigura*”).

³⁴ *Id.* ¶ 142.

³⁵ *Id.* ¶ 135.

materialize in another is therefore not, in the African human rights system, a reason to treat those consequences as legally invisible.

The African Court has also affirmed that the African Charter requires state parties to take positive steps to protect human life from corporations operating in their territory or subject to their jurisdiction.³⁶ *Trafigura*” is instructive.³⁷ In August 2006, a tanker chartered by the commodities trading firm Trafigura, offloaded toxic petroleum-refining waste at various sites in Côte d’Ivoire. The waste released toxic fumes that killed at least seventeen people and caused illnesses in hundreds of thousands of others. February 2007, Trafigura settled with the Ivorian government, but, critically, the settlement included a clause under which the state renounced any future claims or lawsuits against Trafigura, effectively closing off further domestic legal accountability for the company. The African Court held that a state’s duty under the African Charter to protect the rights to life, health, and a satisfactory environment extends to preventing private corporations from causing that harm in the first place, corporate conduct isn’t outside the African Charter’s reach just because a company, not the state, does the polluting or dumping. The Court further held that a government cannot use a private settlement with the corporate wrongdoer to extinguish victims’

³⁶ *Id.* ¶ 131.

³⁷ *Id.* ¶ 135.

own rights to a remedy, meaning that a state and a corporation cannot contract around human rights protections.

Outside of the African Court, corporate accountability was a principle of the South African Truth and Reconciliation Commission (“TRC”) following the fall of apartheid. The TRC recognized that “[b]usinesses that were involved [in helping to design and implement apartheid policies] must be held responsible and accountable for the suffering that resulted” and faulted private business for “fail[ing] in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule.”³⁸

The direction of African legal development is also reflected in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the “Malabo Protocol”). Although the relevant criminal jurisdiction provisions are not yet in force, their adoption by African States is significant evidence of the continent’s considered approach to corporate involvement in international crimes. The Malabo Protocol expressly provides corporate criminal liability,³⁹

³⁸ Truth & Reconciliation Comm’n of S. Afr., *Final Report*, vol. 4, ch. 2, ¶¶ 23, 161 (1998), <https://www.justice.gov.za/trc/report/>.

³⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice & Human Rights, art. 46C, June 27, 2014, https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (Corporate Criminal Liability).

recognizes aiding and abetting as a mode of responsibility,⁴⁰ and provides for reparations to victims, including restitution, compensation and rehabilitation.⁴¹ These provisions are particularly relevant to BNPP's sweeping suggestion that responsibility for corporate assistance to grave abuses represents a form of liability foreign to national or international legal systems.⁴² African States have expressly contemplated precisely the opposite.

This approach is further reflected in ACHPR's State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to extractive industries. ACHPR calls upon States Parties to adopt or reform legislation recognizing the obligations of extractive industries to respect Charter rights throughout their operations, including by "[b]earing civil and criminal responsibility and paying compensation for human and peoples' rights violations and/or abuses arising from their extractive industrial activities or from activities of those operating on their behalf or for assisting or abetting such violations by state or non-state actors including private security companies."⁴³ The significance of this standard extends beyond direct corporate

⁴⁰ *Id.* art. 28N(ii) (Modes of Responsibility).

⁴¹ *Id.* art. 45(2) (Compensation and Reparation to Victims).

⁴² *Id.* art. 28N(ii) (Modes of Responsibility).

⁴³ ACHPR/Res.367(LX), Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector, art. 2 (May 22, 2017).

perpetration: ACHPR expressly contemplates legal responsibility where corporate actors assist or abet violations committed by others.

ACHPR's Working Group on Extractive Industries, Environment and Human Rights has similarly recognized that, although States remain the primary obligation-bearers under the African Charter, corporations, particularly multinational corporations, have obligations towards rights-holders.⁴⁴ Drawing upon Article 27 of the African Charter, the Working Group has identified a duty of due care requiring transnational corporations not only to refrain from deliberate violations, but also continuously to ensure that their operations comply with applicable human rights, labor and environmental standards so as to avoid harm, including in conflict situations.⁴⁵ It has further emphasized that the substantial power exercised by multinational corporations entails a correspondingly heightened responsibility of due diligence and care.⁴⁶

Taken together, these developments do not establish the elements of Plaintiffs' claims under Swiss law, and *amici* do not invoke them for that purpose. They establish a narrower but important proposition: corporate accountability for causing, contributing to, participating in, or

⁴⁴ Afr. Comm'n H.P.R., *State Reporting Guidelines and Principles on Articles 21 And 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment*, ¶ 56 (Oct. 30, 2018).

⁴⁵ *Id.*

⁴⁶ *Id.* ¶ 57.

supporting serious human rights abuses is firmly embedded in contemporary African legal thought and practice. From *SERAC's* recognition of the duty to protect against harmful private conduct, through *Kilwa's* express concern with corporate participation in or support for violations, to *Trafigura's* recognition of responsibilities incumbent upon multinational companies themselves, African jurisprudence has progressively confronted the legal consequences of corporate involvement in human rights harm.

These developments are particularly significant where the underlying violations rank among the gravest crimes recognized by international law. The African experience therefore provides no support for characterizing liability arising from a corporation's own knowing contribution to such abuses as inherently novel or legally anomalous. The distinct question of whether the requirements of Articles 41 and 50 of the Swiss Code of Obligations are satisfied in this case remains one of Swiss law. But it should be approached without the mistaken premise that holding a corporate actor accountable for its own contribution to abuses perpetrated by another actor is a form of responsibility unknown to contemporary legal systems.

Finally, it should be noted that the alternative to the principles of African law just discussed would be (as BNPP seeks), a system providing no accountability for crimes giving rise to genocide, and this would undermine the rule of law. BNPP's approach asks victims of crimes to

accept no remedy while institutions that furnished money, equipment, technology or other indispensable services retain the benefits of the impugned conduct. Corporate accountability is not collective punishment for doing business in a difficult market. Properly framed, it is individualized responsibility based on evidence of a corporation's own conduct, knowledge and contribution, with causation and damages assessed under the law governing the claim.

III. BNPP's Position About Swiss Law is Incorrect.

A. The Executive Branch in Switzerland Does Not Dictate Swiss Law on Aiding and Abetting Liability.

BNPP makes much of the idea that Swiss law would permit it to engage in conduct amounting to aiding and abetting crimes against human rights and it relies heavily on statements from the executive branch of Switzerland. However, it does not follow that when the government of the day in that foreign state provides an interpretation of its law to the Court, that view must trump all others. For one, the executive is not the state; in terms of the doctrine of the separation of powers, it is the judicial branch that is the custodian of the law. In this respect BNPP is incorrect in asserting that the district court “held that Switzerland was wrongly interpreting its own law.” If that were true, Switzerland would not need courts. This is court of law, not a court of sovereigns. Second, while a foreign government is “ordinarily entitled” to due consideration being given to its view of its own law, this court “is not

bound to accord conclusive effect to the foreign government's statements.” *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 585 U.S. 33, 36, 46 (2018).

B. This Court Should Reject BNPP’s Proposal that It Interpret Swiss Law as Conflicting with African Law.

BNPP’s narrow interpretation of the Swiss Code places it at odds with broader developments in corporate accountability for human rights abuses, including in Africa where the abuses happened. BNPP argues that the district Court “erred in holding that BNPP could be held jointly-and-severally liable as an accomplice to the Government of Sudan, even though Sudan could not be held liable as a principal.” BNPP Br. at 3. This argument suffers three fatal flaws.

First, international and domestic courts have consistently held “accessorial” liability is not contingent on the liability of the “principle” offender, whether that liability is criminal or civil. Under international criminal law, liability for aiding and abetting is established “in terms of the accused’s relationship to the *crime*, not the physical actor”.⁴⁷ The International Criminal Tribunal for the former Yugoslavia—established by the UN Security Council in 1993— has found that the principal offenders need not even have even been identified, let alone tried or

⁴⁷ Prosecutor v. Taylor, SCSL-03-01-A, Appeal Judgement, ¶ 366 (Special Ct. for Sierra Leone Sept. 26, 2013).

convicted, in order to hold an accomplice liable.⁴⁸ Similarly, the International Criminal Tribunal for Rwanda—established by the UN Security Council in 1994—has found that “[a]s far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.”⁴⁹ In *Bosnia v Serbia* the ICJ found that “State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.”⁵⁰ If this is the case for criminal liability and state responsibility—which implicate the freedom of individuals and the sovereignty of states—it cannot be any different for civil liability of corporations.

Second, BNPP’s interpretation goes too far. BNPP’s logic extends Sudan’s jurisdictional immunity to the private corporations that helped Sudan, even though that immunity was never meant to protect anyone but Sudan itself. In BNPP’s world, if an accomplice cannot be held liable

⁴⁸ Prosecutor v. Brđanin, IT-99-36-A, Appeal Judgement, ¶ 355 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Prosecutor v. Krstić, IT-98-33-A, Appeals Chamber Judgement, ¶ 143 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

⁴⁹ Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, ¶ 531 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

⁵⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, I.C.J. 2007, ¶ 182 (Feb. 26).

whenever the primary tortfeasor is a state, then a corporation could shield itself from liability simply by choosing to assist a state actor rather than a private one. Conduct that would create liability if the principal were a private individual would create none if the principal were a government. And because states, far more often than private individuals, are the actors behind genocide, adopting BNPP's rule immunizes corporations that knowingly assist state-sponsored genocide from any accomplice liability, which this Court should find deeply troubling.

Third, a narrow reading of the Swiss Code tailored to this case's particular facts would create anomalous results in other cases. Where the primary tortfeasor is not the state itself but a state official, that official's immunity can disappear, for example, when an international court charges the official with an international crime such as genocide, war crimes, or crimes against humanity. Under BNPP's mangled interpretation, a corporation that helps a state commit genocide would escape liability because the state retains its immunity, while a corporation that helps a state official commit the identical genocide would face liability or not depending on whether that official was later indicted by an international tribunal. The same conduct by the corporation would produce opposite results based on a fact — whether and how a third party chooses to prosecute the individual official — that has nothing to do with the corporation's own culpability.

C. BNPP's Position Would Cause Swiss Law to Be in Conflict with the Laws of the Vast Majority of Countries Outside of Africa.

Not only is BNPP's position about Swiss law's supposed favorability to corporations aiding and abetting crimes at odds with the law of Africa, but it is also at odds with the law of other nations. Most states make provision for direct corporate criminal responsibility, including for international crimes,⁵¹ in their domestic law.⁵² One study on corporate liability and international criminal law concluded that "over the last two decades the number of countries where corporations can be held criminally accountable has grown exponentially," such that "corporate criminal liability has become 'common' to the majority of the countries in the world,"⁵³ and corporate liability "qualifies as a general principal of

⁵¹ Ramasastry, *supra* note 21, at 16.

⁵² The Special Tribunal for Lebanon concluded that "corporate liability for serious harms is a feature of most of the world's legal systems and therefore qualifies as a general principle of law." Prosecutor v. New TV S.A.L. & Al Khayat, STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 67 (Special Trib. Leb. Oct. 2, 2014). *See also* Ramasastry, *supra* note 21 (surveying 16 countries, including South Africa); Francesca Albanese (Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967), *From Economy of Occupation to Economy of Genocide*, U.N. Doc. A/HRC/59/23, annex ¶ 4 (June 30, 2025).

⁵³ Alessandra De Tommaso, *Corporate Liability and International Criminal Law* 171, 181 (2023), (noting: "it is evident that, over the past 20 years, [corporate criminal liability] ... has gained recognition in a relevant number of jurisdictions around the world," as "countries in Europe, Africa, Asia, and South America have progressively moved away from the principle of *societas delinquere non potest* to accept the possibility of imposing criminal liability to corporate entities").

law applicable under international law.”⁵⁴ In 2007 John Ruggie—the UN-appointed expert who led the drafting of the United Nations Guiding Principles on Business and Human Rights (“UNGPR”)—concluded that by “far the most consequential legal development is the *gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards*.”⁵⁵ A 2014 study commissioned by the UN Human Rights Office concluded that “most jurisdictions appear[ed] to recognise the possibility of corporate criminal responsibility.”⁵⁶ BNPP’s reading of Swiss law as uniquely shielding corporations from liability for aiding and abetting international crimes is not a defensible interpretation of an outlier legal system. Rather, it is a position at odds with laws of nations and international law.

D. New York is an Appropriate Forum for This Case.

Plaintiffs are members of the African diaspora who fled from their home country—Sudan—in the face of appalling physical and sexual violence, which BNPP enabled. These Plaintiffs had to completely restart

⁵⁴ See *supra* note 52.

⁵⁵ John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/35, ¶ 84 (Feb. 19, 2007) (emphasis added).

⁵⁶ Jennifer A. Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* (2013) (prepared for the Office of the U.N. High Commissioner for Human Rights), <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

their lives in the United States where they were admitted as refugees and later became citizens. BNPP, having displaced the Plaintiffs to the United States, now complains of the *inconvenience* of answering their suit in an American court. BNPP's complaint disrespects the rights of displaced human rights victims and ignores the United States' substantial interest in the enforcement of international human rights law.

BNPP does not spare a word for the *inconvenience* Plaintiffs would suffer in re-trying this case in Switzerland. Plaintiffs would be forced to submit to a foreign court, whose proceedings are conducted far from where the Plaintiffs now live in languages they may not know. Further, they would have to once again give testimony regarding the unspeakable crimes—including slaughter, torture, and gang-rape—that they witnessed and suffered. This would certainly be *inconvenient*—not to mention, retraumatizing. The convenience of a multinational bank (and its desire to litigate in its own courts) does not outweigh the “deference” owed to its victims’ choice of forum. *Irragorri v. Int’l Elevator, Inc.*, 243 F.3d 678, 680 (2d Cir. 2001).

In similar circumstances, this Court has recognized that U.S.-resident victims of international human rights abuses have a strong interest in being able to sue accomplice corporations in an American forum, even if the plaintiffs do not live in the particular district in which they bring suit. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102-

03, 108 (2d Cir. 2000) (reversing dismissal of a Nigerian-born U.S. Lawful Permanent Resident, whose suit arose from the massacres of the Ogoni people in Nigeria). Further, the authorities on which BNPP relies bear no factual resemblance to this case, where Plaintiffs are U.S. citizens and brought the case in U.S. courts. *See, e.g., Figueiredo Ferraz v. Rep. of Peru*, 665 F.3d 384, 387, 392 (2d Cir. 2011) (Brazilian corporation attempting to confirm arbitral award against Peruvian government, arising from a transaction in Peru).

Beyond the hardships that would be inflicted on the Plaintiffs by retrial in Switzerland, there is a substantial public interest in this case being decided in the United States—the United States’ substantial interest in the enforcement of *jus cogens* norms. This Court has recognized that Congress “has expressed a policy of U.S. law favoring the adjudication of” certain human rights violations “in U.S. courts.” *Wiwa*, 226 F.3d at 106 (“torture committed under color of law of a foreign nation in violation of international law is ‘our business’”). This is consistent with the international—and African law—*jus cogens* norms against genocide, which is “binding on all nations, and is derived from values taken to be fundamental by the international community.” *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 61-62 (2d. Cir. 2019). BNPP’s suggestion that this case—involving now U.S.-citizen Plaintiffs, who were victimized in Sudan, with the help of a French multinational bank, in violation of the

universally binding norms of international law—is “overwhelmingly Swiss” is risible. BNPP Br. at 62.

CONCLUSION

Faced with facts as extreme as those in this case, the vast majority of countries throughout Africa, and indeed throughout the world, would easily find that the law of aiding and abetting creates civil liability for the kinds of conduct found by the jury here. BNPP’s insistence that Swiss law would supposedly insulate this conduct asks this Court to place Swiss law in an extreme place compared to that of other countries. This Court should decline that invitation, and affirm the district court’s decision.

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Respectfully submitted,

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