INTERNATIONAL LAW — ACT OF STATE DOCTRINE — SECOND CIRCUIT HOLDS THAT ACTS OF GENOCIDE BY SUDANESE GOVERNMENT ARE NOT AFFORDED ACT OF STATE DOCTRINE DEFERENCE. — *Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019).

For several decades, federal laws such as the Alien Tort Statute[1] (ATS) and the Torture Victim Protection Act of 1991[2] (TVPA) enabled foreign nationals to sue in United States federal courts for overseas violations of international human rights law.[3] This ability eventually led to a surge in foreign plaintiffs seeking damages from corporations for transnational harms under federal law.[4] But recently the Supreme Court narrowed the scope of the ATS and TVPA, prohibiting their use to sue corporations.[5] Some scholars have seen these rulings as a death knell for this trend of transnational litigation[6] and wondered whether such plaintiffs will turn to state options instead.[7] Recently, in *Kashef v. BNP Paribas S.A.*,[8] victims of the Sudanese genocide filed state law claims against a financial institution for assisting the Sudanese government, and the Second Circuit held that the act of state doctrine did not bar these claims.[9] Its reading of the act of state doctrine conforms with precedent and principles and preserves the plaintiffs' day in court. Moreover, by holding that Sudan's human rights abuses violated *jus cogens* norms, the court offered an avenue for state law claims to proceed without running afoul of due process and other fairness concerns.

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[1] 28 U.S.C. § 1350 (2012).

[2] *Id.*

[3] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 885, 887 (2d Cir. 1980).

[4] *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 365–68 (2011).

[5] *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018) (holding that the ATS does not allow suit against corporations); Mohamad v. Palestinian Auth., 566 U.S. 449, 451–52 (2012) (holding the same for the TVPA); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (restricting the range of international law violations that could give rise to an ATS or TVPA claim).

[6] Rebecca J. Hamilton, International Decision, Jesner v. Arab Bank, *138 S. Ct. 1386 (2018)*, 112 AM. J. INT'L L. 720, 720 (2018) ("The exclusion of transnational human rights litigation from U.S. federal courts is, for most practical purposes, now complete."). *But see* William S. Dodge, Jesner v. Arab Bank*: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations*, JUST SECURITY (Apr. 26, 2018), https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations [https://perma.cc/4542-7E6P] (arguing that ATS suits against U.S. corporations are still possible).

[7] *See, e.g.*, Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 739 (2012) ("Perhaps we are about to witness a new wave of human-rights litigation . . . based on state law or even foreign law.").

[8] 925 F.3d 53 (2d Cir. 2019).

[9] *Id.* at 55. The act of state doctrine provides that a country's judiciary "will not sit in judgment on the acts of the government of another [country], done within its own territory," as a mark of "respect [for] the independence of every other sovereign state." Kashef v. BNP Paribas SA, 316 F. Supp. 3d 770, 776 (S.D.N.Y. 2018) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964)).

In 1989, Omar al-Bashir became Sudan's leader following a military coup, displacing the democratically elected government.[10] Under his rule, the government of Sudan supported international terrorism and committed numerous human rights abuses against its population.[11] These included "mass rape, torture, deliberate infection with HIV, and [forcing people] to watch the murder and rape of their family members."[12] In response, the U.S. government imposed economic sanctions on Sudan in 1997 and again in 2006.[13] Meanwhile, beginning in 1997, BNP Paribas S.A. and its worldwide subsidiaries (collectively "BNPP")[14] became the government of Sudan's principal bank.[15] It designed schemes to help Sudanese entities evade U.S. sanctions and access the U.S. financial system.[16] BNPP was aware that these entities "play[ed] a pivotal part" in supporting the Sudanese government and that the government "commit[ed] human rights abuses."[17] The Department of Justice and New York state authorities investigated BNPP's actions and, in 2015, secured guilty pleas from BNPP for committing federal and state felonies.[18] Federal authorities mandated BNPP pay nearly nine billion dollars in forfeitures and fines, "the largest financial penalty ever imposed in a criminal case."[19]

In 2016, a putative class of victims of the Government of Sudan's human rights abuses, residing lawfully in the United States ("plaintiffs"), filed suit in the Southern District of New York against BNP Paribas S.A. and several of its branches, subsidiaries, and employees.[20] They asserted twenty claims against BNPP under New York state tort law.[21] The claims included a mix of primary liability (negligence per se, intentional infliction of emotional distress, and so forth) and secondary liability allegations (conspiracy or aiding and abetting of battery, assault,

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[10] Alan Cowell, *Military Coup in Sudan Ousts Civilian Regime*, N.Y. TIMES, July 1, 1989, at 1.

[11] *See, e.g.*, Exec. Order No. 13,067, 62 Fed. Reg. 59,989 (Nov. 5, 1997).

[12] *Kashef*, 925 F.3d at 57.

[13] *Id.* at 55 (first citing Exec. Order No. 13,412 § 1, 71 Fed. Reg. 61,369 (Oct. 17, 2006); and then citing Exec. Order No. 13,067 § 1, 62 Fed. Reg. 59,989 (Nov. 5, 1997)).

[14] *Id.*

[15] Kashef v. BNP Paribas SA, 316 F. Supp. 3d 770, 774 (S.D.N.Y. 2018).

[16] *See Kashef*, 925 F.3d at 55–57. The schemes included removing information from transactions that would identify involvement of any Sudanese entity and conducting transactions through unaffiliated satellite banks. *Id.* at 56.

[17] *Id.* at 56 (citations omitted).

[18] *Id.*

[19] *Id.* (citing Press Release, Dep't of Justice, BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act (May 1, 2015) [hereinafter DOJ Press Release]).

[20] *Kashef*, 316 F. Supp. 3d at 774.

[21] *See* Second Amended Complaint at ii–iv, *Kashef*, 316 F. Supp. 3d 770 (No. 16-cv-03228) [hereinafter Amended Complaint].

wrongful death, and so forth).[22] In their complaint, plaintiffs also alleged that the Sudanese government "engaged in systematic, widespread human rights abuses . . . in contravention of international law."[23]

The district court dismissed all of plaintiffs' claims.[24] Judge Nathan held that, as a threshold matter, the act of state doctrine barred consideration of eighteen of plaintiffs' twenty claims.[25] She defined the doctrine[26] and stated that it also bars claims against private entities if an inquiry into "the motives of [a] foreign government" is necessary to determine whether the defendant's alleged conduct caused the plaintiff's injury.[27] According to the district court, to impose secondary liability on BNPP, the court would have to conclude that the *Sudanese government* engaged in tortious conduct within its territorial boundaries against its own people, which the court was precluded from doing.[28] Judge Nathan rejected an alternative argument for those secondary liability claims, that BNPP "facilitated circumvention of U.S. sanctions."[29] In the court's view, the executive branch was better suited for such judgments.[30] And as for most of the primary liability claims, Judge Nathan held that the act of state doctrine also barred their adjudication since they required suffering a cognizable injury.[31] Again, such a finding would have impermissibly required the court to determine that the Sudanese government inflicted those injuries upon the plaintiffs.[32] The court dismissed the two remaining claims on the merits.[33]

Additionally, the district court held that many of plaintiffs' claims were untimely except as to two plaintiffs who were minors.[34] The adult plaintiffs suffered their last injury in 2009 but filed their suit seven years later, in 2016.[35] While they claimed they were entitled to a seven-year statute of limitations,[36] Judge Nathan disagreed.[37] Alternatively, plaintiffs

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[22] *Kashef*, 925 F.3d at 57.

[23] Amended Complaint, *supra* note 21, at 60.

[24] *Kashef*, 316 F. Supp. 3d at 774.

[25] *Id.* at 776, 779. These eighteen claims included both primary and secondary liability allegations. *Id.* at 779.

[26] *Id.* at 776 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964)).

[27] *Id.* (quoting O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 453 (2d Cir. 1987)).

[28] *Id.* at 777–78.

[29] *Id.* at 777.

[30] *Id.* (citing *Sabbatino*, 376 U.S. at 467).

[31] *Id.* at 778.

[32] *Id.* at 778–79 (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

[33] *See id.* at 782–84. The claims were for commercial bad faith and unjust enrichment. *Id.* at 782.

[34] *Id.* at 779.

[35] *Id.*

[36] *See* Amended Complaint, *supra* note 21, at 100 (citing N.Y. C.P.L.R. 213-b (McKinney 2019)).

[37] *Kashef*, 316 F. Supp. 3d at 780–81.

argued their claims were timely because they were entitled to equitable tolling given BNPP's "elaborate steps" to conceal its conduct.[38] While the court agreed, it held that such tolling applied only until June 2014 when BNPP's fraud became "widely publicized."[39] Judge Nathan reasoned that the publicity should have put the plaintiffs on notice.[40] Plaintiffs appealed.

The Second Circuit vacated and remanded.[41] Writing for the unanimous panel, Judge Parker[42] held that the district court applied the act of state doctrine too "broad[ly]"[43] and that its determination of untimeliness was "erroneous[]."[44] Judge Parker began his analysis by stating that applying the act of state doctrine is "ultimately and always a judicial question."[45] He clarified that the doctrine is neither limitless nor a "categorical rule of abstention" for courts.[46] The panel then held that the act of state doctrine did not apply for three reasons.

First, Judge Parker pointed to Supreme Court precedent holding that a case does not implicate the act of state doctrine when the factual question "is not whether the [foreign sovereign's] alleged acts are valid, but whether they occurred."[47] In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*,[48] the plaintiff corporation unsuccessfully bid for a Nigerian government contract, which defendants had secured by bribing Nigerian officials.[49] Ruling for the plaintiff would have required the Court to find that Nigerian officials had taken illegal bribes, which in turn would have rendered the contract at issue unofficial under Nigerian law.[50] Still, writing for a unanimous Court, Justice Scalia held that the plaintiff's claim did not implicate the act of state doctrine.[51] Ruling in the plaintiff's favor required noting only the *existence* of the bribes, and the inquiry that such a finding would entail was permissible even if it could "embarrass foreign governments."[52] Similarly, in *Kashef*, the circuit court reasoned that no one contested whether the Sudanese

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[38] *Id.* at 781.
[39] *Id.*
[40] *Id.*
[41] *Kashef*, 925 F.3d at 55.
[42] Judge Parker was joined by Judge Sack and Judge Chin.
[43] *Kashef*, 925 F.3d at 59.
[44] *Id.* at 55.
[45] *Id.* at 58 (quoting Republic of Philippines v. Marcos, 806 F.2d 344, 358 (2d Cir. 1986)).
[46] *Id.* (citing W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990)).
[47] *Id.* at 59 (quoting *Kirkpatrick*, 493 U.S. at 406).
[48] 493 U.S. 400.
[49] *Id.* at 401–02.
[50] *Id.* at 406.
[51] *Id.* at 409–10.
[52] *Id.* at 409; *see id.* at 408–09.

government's atrocities were "valid"; the petitioners contended only that they "occurred."[53] As a result, the act of state doctrine did not apply.[54]

Second, Judge Parker explained that only "official" acts receive "deference" under the act of state doctrine, and to be *official* an act must be "imbued with some . . . formality."[55] Leading Supreme Court cases have applied the doctrine in response to a government expropriation decree[56] and a command by the highest officer of a country's military.[57] The panel cited circuit precedent in which the doctrine did not apply because defendants failed to show that a state "officially approved" their acts of torture.[58] Similarly, Judge Parker held that the actions injuring the *Kashef* plaintiffs could not be worthy of the doctrine's deference because they were not the Sudanese government's "officially sanctioned policies."[59] In fact, they violated Sudan's constitution.[60]

Third, as an alternative holding, the Second Circuit held that the acts in question — "genocide, mass rape, and ethnic cleansing" — violated *jus cogens* norms, "peremptory norm[s] of international law . . . accepted and recognized by the international community of states as a whole . . . from which no derogation is permitted."[61] Judge Parker noted that *jus cogens* norms are the codification of customary international laws that are "binding on all nations" and "enjoy the highest status within international law."[62] The court reasoned that since act-of-state deference is predicated on deeming a foreign sovereign's actions "valid,"[63] and a *jus cogens* violation can never be valid under international law, the Sudanese government's actions prompting the plaintiffs' claims could "never . . . trigger[] the act of state doctrine."[64]

Finally, the panel held the plaintiffs' claims were timely under a different New York law than the one the district court considered.[65] Under the separate state law, plaintiffs have one year from the termination of a criminal action against a defendant to initiate a civil action respecting the same "event or occurrence."[66] Since BNPP's judgment of conviction

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[53] *Kashef*, 925 F.3d at 60.
[54] *Id.*
[55] *Id.*
[56] *Id.* (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 406 (1964)).
[57] *Id.* (citing Underhill v. Hernandez, 168 U.S. 250, 254 (1897)).
[58] *Id.* at 61 (quoting Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995)).
[59] *Id.*
[60] *Id.* (citing THE INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN, 2005, pts. 1–2).
[61] *Id.* (quoting Carpenter v. Republic of Chile, 610 F.3d 776, 779 n.4 (2d Cir. 2010)).
[62] *Id.* (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992)).
[63] *Id.* at 61–62 (quoting W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990)).
[64] *Id.* at 62.
[65] *Id.*
[66] *Id.* (quoting N.Y. C.P.L.R. 215(8)(a) (McKinney 2019)).

for its federal offenses was filed on May 1, 2015, and plaintiffs filed their civil action on April 29, 2016, it was timely.[67]

There are two main observations worth noting about *Kashef*. First, the panel's reading of the act of state doctrine conforms with precedent and principles. The Supreme Court clarified the scope of the doctrine in *Kirkpatrick*, and the *Kashef* plaintiffs' claims lie outside it. This case also does not implicate the doctrine's separation of powers principles that are meant to prevent judicial overreach. The court was merely following the other branches' policies and actions with respect to Sudan. Second, *Kashef* also perpetuated a new trend by allowing those injured in foreign regimes to seek redress through state law given the contraction of federal law options by the Supreme Court. Such civil lawsuits still face their own set of procedural and substantive hurdles for plaintiffs. But by recognizing the severity of Sudan's abuses in its *jus cogens* holding, the circuit court tackled some doctrinal and normative concerns about these lawsuits and preserved the plaintiffs' day in court.

The *Kashef* panel correctly held that the limitation of the act of state doctrine in *Kirkpatrick* applied in this case. The district court believed that to adjudicate plaintiffs' claims, it would need to "pass judgment on the acts of the Government of Sudan" and conclude that *those* actions amounted to state law violations.[68] But this misreads plaintiffs' claims. The plaintiffs did not contest the validity of the Sudanese government's acts but sought only to "obtain damages from private parties" who facilitated their occurrence.[69] To guide its analysis, the district court relied on *Banco Nacional de Cuba v. Sabbatino*,[70] where the Court laid out three factors to consider before invoking the act of state doctrine.[71] However, in *Kirkpatrick*, the Court clarified its jurisprudence by noting that courts should consider the *Sabbatino* factors only *after* the act of state doctrine is "technical[ly] availab[le]."[72] The doctrine applies only if *both* steps sanction its application. Indeed, the *Sabbatino* factors exist to prevent "unquestioning judicial acceptance" even of official acts by foreign sovereigns; courts should not invoke them to "expand[] judicial incapacities" where such official acts are not "directly" implicated.[73] The *Kirkpatrick* Court thus warned that subsequent courts should not casu-

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[67] *Id.* at 63.

[68] Kashef v. BNP Paribas SA, 316 F. Supp. 3d 770, 777 (S.D.N.Y. 2018).

[69] *Id.* (quoting Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint at 19, *Kashef*, 316 F. Supp. 3d 770 (No. 16-cv-03228)).

[70] 376 U.S. 398 (1964); *see Kashef*, 316 F. Supp. 3d at 777 (citing *Sabbatino*, 376 U.S. at 428).

[71] *See Sabbatino*, 376 U.S. at 428.

[72] *See* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990).

[73] *Id.*; *see also id.* ("[I]t is something quite different to suggest that those underlying policies [beneath the *Sabbatino* factors] are a doctrine unto themselves, justifying expansion of the act of state doctrine . . . into new and uncharted fields.").

ally expand the act of state doctrine into new domains, because the judiciary's duty to decide "cases and controversies properly presented" is more important.[74]

The principles animating the act of state doctrine further illustrate that *Kashef* was correctly decided. The act of state doctrine arises out of the separation of powers undergirding the federal government.[75] Some scholars have pointed out that courts are ill-equipped to rule on disputes arising outside the United States because they lack the "institutional competence"[76] or "constitutional authority"[77] to be active in foreign affairs. Moreover, due to judicial principles such as stare decisis and the case or controversy requirement, courts are not nimble enough to respond to changing international concerns.[78] Some argue that this separation of powers rationale is intertwined with international comity principles.[79] When American courts have adjudicated lawsuits involving acts in the territory of other states, they have faced persistent criticism from abroad.[80] These concerns are amplified when the court evaluates the actions of a foreign government.[81]

In *Kashef*, these concerns were mitigated because both the legislative and executive branches of the United States government had already recognized Sudan's actions as violations of international law and implemented sanctions.[82] Moreover, the Department of Justice — a subset of the executive branch — had already prosecuted and secured a conviction against BNPP for its conduct in violation of those sanctions; the plaintiffs' cause of action was born from that prosecution.[83] Nine bipartisan House Representatives, including the two Co-Chairs of the House Caucus on Sudan and South Sudan, submitted an amicus brief in *Kashef*.[84] They

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[74] *Id.* at 409; *see also* U.S. CONST. art. III, § 2.

[75] *Kirkpatrick*, 493 U.S. at 404 (describing how the jurisprudential foundation for the act of state doctrine has changed from "international comity," *id.* (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918)), to "domestic separation of powers," *id.*).

[76] *See, e.g.*, Curtis A. Bradley, Principal Paper, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 550 (1997).

[77] *Id.* at 551.

[78] *Id.* at 550.

[79] *See, e.g.*, William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2092 (2015).

[80] *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (cataloguing the objections of the governments of Indonesia, South Africa, Canada, and Papua New Guinea to various lawsuits in American courts involving acts in their territories).

[81] *See* José A. Cabranes, Essay, *Witholding Judgment: Why U.S. Courts Shouldn't Make Foreign Policy*, FOREIGN AFF., Sept./Oct. 2015, at 125, 129.

[82] *See* H.R. Con. Res. 467, 108th Cong. (2004); sources cited *supra* note 13.

[83] *Kashef*, 925 F.3d at 62–63; *see also* DOJ Press Release, *supra* note 19; *cf.* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018) ("[J]udicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.").

[84] *See* Brief of Members of Congress as Amici Curiae at 1, *Kashef*, 925 F.3d 53 (No. 18-1304).

argued that if the panel applied the act of state doctrine against the plaintiffs, it would actually "*contradict*[]" the legislative and executive branches.[85] Judge Parker's opinion correctly did not acknowledge this argument or lean on it.[86] But by avoiding an overly expansive reading of the act of state doctrine, *Kashef* makes room for claims against foreign actors for engaging in deplorable conduct in gross violation of international norms.

Beyond its circumscribed reading of the act of state doctrine, the Second Circuit also added fuel to a recent trend by allowing those injured by foreign regimes to seek redress through state, rather than federal, law. The *Kashef* plaintiffs are Sudanese refugees living lawfully in the United States.[87] They are suing two North American subsidiaries of BNPP as well as the French parent company.[88] They are seeking damages for injuries they suffered in Sudan, as Sudanese citizens, due to human rights violations committed by the Sudanese regime.[89] The *Kashef* plaintiffs could not sue BNPP under the TVPA or ATS in light of the Supreme Court's recent jurisprudence exempting corporations from their ambit.[90] In the wake of this contraction of federal law options, some scholars have posited that the "next wave of transnational litigation" involving plaintiffs "alleging human rights violations" will likely turn to "state courts or . . . state law."[91] State law, under this purview, could offer plaintiffs several advantages such as "avoid[ing] application of the federal forum non conveniens doctrine and strict federal pleading standards,"[92] and also help them circumvent the Supreme Court's limits on corporate liability for international law violations.[93] Through that lens, it becomes clear why plaintiffs (such as those in *Kashef*) would turn to state law to get another shot at accessing the other benefits of suing in American courts.[94]

Such state law civil lawsuits still pose their own set of procedural and substantive hurdles for plaintiffs. Indeed, some argue that such

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[85] *Id.* at 3.

[86] *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1708–10 (1997) (arguing such "executive suggestion[s]" have "no legal basis" and violate due process, *id.* at 1709).

[87] Amended Complaint, *supra* note 21, at 11. Most of them are naturalized American citizens, while others are permanent resident aliens or "waiting to become eligible" for that status. *Id.*

[88] *Id.* at 31–32.

[89] *Id.* at 11.

[90] *See* cases cited *supra* note 5.

[91] Christopher A. Whytock et al., *Foreword: After* Kiobel *— International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 5 (2013).

[92] *Id.*

[93] *See* Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 48–49 (2013).

[94] *See* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 508–09 (2008) (listing benefits of suing in American courts for foreign plaintiffs, such as liberal pretrial discovery, jury trials in civil litigation, higher damage awards, contingent fee arrangements, and the absence of attorneys' fees payments for unsuccessful parties).

claims "will rarely be successful."[95] Choice-of-law considerations may prohibit the U.S. state from applying its law to the dispute.[96] In fact, applying a state's law to foreign defendants could raise concerns under the Due Process Clause, because those defendants would lack fair notice that the state's law could regulate their conduct.[97] Concerns about preemption by federal foreign affairs[98] and forum non conveniens considerations[99] also keep open the possibility that alien plaintiffs in state courts will face an uphill battle, as they did in federal law contexts.[100] At this stage, the *Kashef* plaintiffs have only survived dismissal on a threshold defense; several stages remain before they can obtain a favorable judgment, and experience suggests they may not get one.

But the Second Circuit may have eased the plaintiffs' path. By recognizing the severity of Sudan's abuses in its *jus cogens* holding, the court's analysis offers an avenue for the claims to proceed without running afoul of due process concerns. Judge Parker held that *jus cogens* norms "enjoy the highest status within international law" and "no derogation is permitted" from them.[101] Once the act of state doctrine did not protect it, BNPP might have argued it lacked fair notice that its conduct in Sudan could constitute a tort under New York state law or

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[95] Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 40 (2013).

[96] *See* Childress, *supra* note 7, at 744–49; *see also* Supplemental Brief of Defendants BNP Paribas S.A. and BNP Paribas North America, Inc. in Further Support of Their Motion to Dismiss the Second Amended Complaint at 3–6, Kashef v. BNP Paribas SA, 316 F. Supp. 3d 770 (S.D.N.Y. 2018) (No. 16-cv-03228) (arguing that if the court were to apply American law, New York's choice-of-law analysis would require the application of federal common law, not New York state law).

[97] *See* Anthony J. Colangelo & Kristina A. Kiik, *Spatial Legality, Due Process, and Choice of Law in Human Rights Litigation Under U.S. State Law*, 3 U.C. IRVINE L. REV. 63, 66–72 (2013).

[98] *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) ("[A]t some point an exercise of state power that touches on foreign relations must yield to the National Government's policy . . . ."). *But see* Goldsmith, *supra* note 86, at 1711 (arguing that preemption is unjustified when state laws "are facially neutral and were not designed with the purpose of influencing U.S. foreign relations").

[99] *See generally* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1444 (2011) (describing how legal standards for forum non conveniens may "create a transnational access-to-justice gap").

[100] Childress, *supra* note 7, at 728 (noting that federal courts have restricted the scope of the ATS by "interpreting international law narrowly [and] . . . employing domestic procedural devices that limit the application of international law in domestic courts").

[101] *Kashef*, 925 F.3d at 61 (first quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992); and then quoting Carpenter v. Republic of Chile, 610 F.3d 776, 779 n.4 (2d Cir. 2010)). There is a separate debate about the relevance of customary international law in federal law. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849–70 (1997) (arguing that customary international law should not be part of federal common law absent authorization by the political branches), *with* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998) (arguing the opposite). But that debate is not implicated here because the *Kashef* panel cited recent circuit precedent for the proposition that no derogation is permitted from *jus cogens* norms, *Kashef*, 925 F.3d at 61 (quoting *Carpenter*, 610 F.3d at 779 n.4), and it was bound to follow that precedent due to stare decisis, *id.* at 62.

be governed by it. But BNPP cannot make such an argument if it is sued for facilitating acts that violate "universal norms of international law applicable everywhere," and constitute conduct "viewed with universal abhorrence."[102] The *jus cogens* holding also addresses one normative concern about such lawsuits: that claims pigeonholed into common law tort actions do not adequately address "the gravity and the seriousness" of human rights violations and may instead "belittl[e] the importance" of the allegations.[103] The *Kashef* plaintiffs claimed they were victims of assault and had suffered emotional distress, but the torture they underwent seems beyond battery.[104] By tying the plaintiffs' tort claims to the explicit violations of the law of nations, the panel corrected this tonal mismatch.

Finally, the *jus cogens* holding provides the *Kashef* plaintiffs with symbolic and strategic advantages going forward. One key motivation for suing foreign corporations under the ATS was to "transform[] a tort case into a human-rights case."[105] Symbolically, the judicial recognition of human rights violations has been a "major goal" of international human rights lawsuits and part of their expressive function.[106] Strategically, judicial recognition ups the ante on the corporation being sued. Labeling it a "human-rights abuser or violator of international law" worsens its public-relations issues and increases plaintiffs' chance of a monetary settlement.[107] In the absence of a viable ATS option, these may be the only victories available to human rights abuse victims who sue foreign corporations under state law.

The Second Circuit in *Kashef* issued a favorable ruling for the plaintiffs, and preserved their day in court. But the plaintiffs still have to overcome several hurdles, both substantive and procedural, to reach trial. Their state law claims may well go the same way several federal law claims in the same domain would: the way of the corporate defendants.[108] Nevertheless, *Kashef*'s careful reading of the act of state doctrine and generous view of state law claims offer the plaintiffs both symbolic vindication and a strategic advantage moving forward.

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102 Colangelo & Kiik, *supra* note 97, at 72 (noting that, in such instances, state law can "provide the vessel" for relief).

103 Parrish, *supra* note 95, at 41.

104 *See Kashef*, 925 F.3d at 57 (describing the atrocities alleged by the plaintiffs).

105 Childress, *supra* note 7, at 725.

106 Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 86 (2005). *But see* Samuel Moyn, *Why the Court Was Right About the Alien Tort Statute*, FOREIGN AFF. (May 2, 2013), https://www.foreignaffairs.com/articles/united-states/2013-05-02/why-court-was-right-about-alien-tort-statute [https://perma.cc/Y5R2-FFN9] (arguing that such litigation is a "boon" for American law schools and their students who want to "sav[e] the world" but narrows perceptions of human rights and distracts from fundamental change).

107 Childress, *supra* note 7, at 725; *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991).

108 *See* Childress, *supra* note 7, at 728.