

18-1304

IN THE
United States Court Of Appeals
FOR THE SECOND CIRCUIT

Entesar Osman Kashef, Alfadel Mosabal, Abubakar Abakar, Siama Abdelnabi Hamad, Abbo Ahmed Abakar, Hawa Mohamed Omar, Jane Doe, Nyanriak Tingloth, Reverend Anderia Lual, Nicolas Hakim Lukudu, Turjuman Ramadan Adam, Johnmark Majuc, Joseph Jok, Halima Samuel Khalifa, Ambrose Martin Ulau, Sandi (Sunday) Georgari Marjan, Shafika G. Hassan, Jane Roe, Judy Doe, Sara Noureldirz Abdalla, Amir Ahmed,
Plaintiffs - Appellants,

v.

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

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

**BRIEF OF AMICUS CURIAE SOUTHERN SUDANESE
COMMUNITY CENTER OF SAN DIEGO**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), amicus curiae states as follows: The Southern Sudanese Community Center of San Diego (“SSCCSD”) is a nonprofit organization incorporated in the State of California. SSCCSD has issued no stock and therefore no publicly held corporation owns ten percent or more of any stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

This brief is filed with the consent of counsel for all parties in the case.

Amicus Southern Sudanese Community Center of San Diego (“SSCCSD”) is a non-profit 501(c)(3) organization founded in 1995 with the mission to assist South Sudanese refugees resettling in the United States by providing education, social, economic, and cultural support. There are approximately 6,000 South Sudanese refugees in San Diego, most of whom are putative class members in this action. SSCCSD assists them, working to integrate them into American society and to become self-sufficient. Most of SSCCSD’s staff are unpaid volunteers who donate their time to support this refugee community.

This case involves a subclass or subclasses of plaintiffs from South Sudan, now in the U.S., who endured violent atrocities at the hands of the Sudanese regime. Many victims of those atrocities immigrated to San Diego as refugees and are members of the community for which SSCCSD provides assistance.

SUMMARY OF ARGUMENT

The predominately black, largely Christian citizenry of what is now the Republic of South Sudan (South Sudan) challenged the legitimacy of the Republic of Sudan's (The Sudan) authority over their people and land beginning in 1983. A

¹ Pursuant to F.R.A.P. 29(a)(4)(E), amicus curiae states that no counsel for a party authored this amicus brief in whole or in part, and that no party, party’s counsel, or person or entity other than amicus curiae and its counsel contributed money that was intended to fund preparing or submitting this amicus brief.

violent civil war, Africa's longest, raged continuously for the next twenty-two (22) years, with the question of The Sudan's territorial rights over what is now South Sudan and its people at issue. During that time, the United States' political branches formally recognized the South Sudanese's right to self-sufficiency, questioned the legitimacy of The Sudan's territorial authority over what is now South Sudan, and concluded that The Sudan's actions against the South Sudanese constituted genocide and ethnic cleansing in violation of international law.

This revolutionary war for independence, which raged at all times relevant to this action, ended in favor of the South Sudanese. In 2005, a formal peace agreement recognized South Sudanese authority over their people and land. On July 9, 2011, the citizens of South Sudan formally formed a new nation that the United States immediately recognized. The United Nations General Assembly recognized and admitted South Sudan days later, on July 14, 2011.

Should the Court find that the act of state doctrine applies in general to claims at issue in this matter, it should not preclude claims involving the funding of the assault of, battery of, murder of, false imprisonment of, or theft from the South Sudanese from proceeding. The ongoing civil war, formal resolutions by the United States political branches, a peace agreement, and an official referendum call into question whether the Sudanese regime had legitimacy in South Sudan at any point after 1983 such that actions it took therein could be considered an act of state

for purposes of the doctrine. Those actions have been officially deemed violations of international law by the United States executive branch, precluding application of the act of state doctrine. Finally, as the South Sudanese formally rejected The Sudan's actions in their territory and seek redress for those wrongs, the act of state doctrine has little to no applicability and should not bar claims from proceeding.

ARGUMENT

I. The Sudan's Authority over South Sudan Has Been Formally Disputed Since 1983 and Has Officially Ceased

A. The South Sudanese Claimed Authority over South Sudan Beginning in 1983, During a Violent, Prolonged Civil War

Civil war gripped The Sudan beginning in 1983, when it commenced an Islamization campaign and announced that Shari'a Law would be codified in the nation's penal code. Jennifer Elbert, *Making U.S. Foreign Aid to South Sudan More Effective by Empowering Women*, 22 *Transnat'l L. & Contemp. Probs.* 717, 721 (2013). This caused a geographic rift, with a northern regime favoring an Arab-Islamic agenda and a southern bloc, with a large black Christian plurality, pursuing secularism. *Id.* What resulted was Africa's lengthiest civil war, with the northern Arab regime committing atrocities on and religiously persecuting a black sub-Saharan population seeking independent rule. Christopher R. Rossi, *The International Community, South Sudan, and the Responsibility to Protect*, 49

N.Y.U. J. Int'l L. & Pol. 129, 157–158 (2016). Beginning in 1983, and for all periods at issue in this litigation, the legitimacy of the northern regime's authority over the sub-Saharan south was disputed both internally and by the world at large. *Id.* See also, Angela M. Lloyd, *The Southern Sudan, A Compelling Case for Secession*, 32 Colum. J. Transnat'l L. 419 (1994).

Specifically, an entity known as the Sudan People's Liberation Army, also known as the Sudanese People's Liberation Movement (SPLM), purported to act as the sovereign over the South Sudanese beginning in 1983. Hannibal Travis, *Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations*, 25 Ariz. J. Int'l & Comp. L. 1, 8 (2008). It claimed authority in protest over "the Sudanese government's policies of imposing Islamic law on Christians and second-class citizenship on non-Arabs". *Id.*

In response, the Sudanese formally declared a Jihad (a holy war) on the black, non-Arab, predominately Christian South Sudanese, launching a campaign of "wholesale murder, abduction, rape, family separation, forced religious conversion, and [...] forced relocation". *Id.* at 12. It transported by train – using funds that should have been blocked by international sanctions – militias into the south that engaged in "looting, pillaging, and raping as they passed through". *Id.* at 13. The United States Department of State concluded in 1999 that the Sudanese kept black and Christian children alive in these looted villages to sell them as

slaves to Arabs, which in 2000 it confirmed had "a pronounced racial aspect". *Id.* at 15-16.² With more than 2,000,000 people killed in southern Sudan, and with more than 4,000,000 people displaced, in 2004 the United States Department of State concluded that genocide had occurred, that the Sudanese had engaged in acts of ethnic cleansing against the people of southern Sudan, and that the legitimacy of the Sudanese government over those regions was, at best, disputed with the SPLM a necessary party to all peace and cease-fire negotiations. Colin L. Powell, *Written Remarks of Secretary of State to Senate Foreign Relations Committee on The Crisis in Darfur* (Sept. 9, 2004).³

The United States formally recognized the rights of the South Sudanese to be free from the authority and control of the northern regime a decade earlier. On August 4, 1994, the United States House of Representatives issued a formal resolution recognizing the South Sudanese people's right of self-determination.

Salman M. A. Salman, *South Sudan Road to Independence: Broken Promises and*

² SSCSD strongly encourages the Court to consider the ethical implications of BNPP's conduct and BNPP's efforts to evade being held responsible for their misdeeds in this action. BNPP circumvented sanctions, allowing the Sudan to fund the transport of trains of violent militias into South Sudanese villages to rape and kill everyone they could for being black and Christian, keeping some children alive so that they could be forcibly recruited into the Sudanese militias or "distributed as slaves to Arabs". Travis, *supra*, 25 Ariz. J. Int'l & Comp. L. at 14-15. In simple terms, BNPP capitalized genocide and a mass Christian black child slave trade and has the temerity to come before this Court and defend its actions.

³ Available at <https://2001-2009.state.gov/secretary/former/powell/remarks/36032.htm>

Lost Opportunities, 26 Pac. McGeorge Global Bus. & Dev. L.J. 343, 386 (2013).

By the early 2000s, the United States became the largest donor of humanitarian assistance to the South Sudanese, siding with the South Sudanese in the ongoing crisis in the region. Elbert, *supra*, 22 Transnat'l L. & Contemp. Probs. at 273. The Executive Branch enacted comprehensive sanctions against The Sudan aimed at, among other matters, halting the genocide taking place in the disputed sub-Saharan south. SPA 22-73, 118-123; *see also*, SPA-151-156; JA 217-218.

B. The United States Brokered a Peace Agreement Between the SPLM and The Sudan, Establishing South Sudanese Governance

In 2005, the Bush Administration helped craft a peace agreement, the Comprehensive Peace Agreement (CPA), that formally recognized the South Sudanese's authority to rule and oversee its people and lands, ending twenty-two (22) years of civil war and disputed governance. Elbert, *supra*, 22 Transnat'l L. & Contemp. Probs. at 723. The CPA established a transitional Government of Southern Sudan. *Id.* at 722. It called for a four-year interim period, after which the South Sudanese would participate in a formal referendum to determine their rights and authority going forward. *Id.*

With greater than 97% voter participation and international oversight, 98.83% of the South Sudanese voted to formally create a new state. *Id.* On July 9,

2011, the United States, which first established consular relations in 2005, formally recognized South Sudan; it has maintained continuous diplomatic ties since that time. The United States Department of State, Office of the Historian.⁴ The United Nations General Assembly admitted South Sudan as a member on July 14, 2011. Rossi, *supra*, 49 N.Y.U. J. Int'l L. & Pol. at 158.

II. The Act of State Doctrine Should Not Apply to Acts Taken Against the South Sudanese

A. The Act of State Doctrine Does Not Apply to Acts Taken in Foreign Lands or to Unlawful Acts Such That It Can Be Applied in This Action

As the Eleventh Circuit Court of Appeals recently held:

The act of state doctrine is a judicially-created rule of decision that precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed **within its own territory**. Congress limited the reach of the act of state doctrine in the Second Hickenlooper Amendment, which provides that the doctrine does not apply where a foreign sovereign, acting within its own territory, nevertheless violates international law...

⁴ Accessible at <https://history.state.gov/countries/south-sudan>.

Comparelli v. Republica Bolivariana De Venezuela, 891 F.3d 1311, 1320 (11th Cir. 2018) (citations omitted) (Emphasis added).

As a preliminary matter, on September 9, 2004, the United States Department of State concluded in writing, referring to the Sudanese regime's actions referenced in this action, that "genocide has been committed" in violation of Article VIII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), to which both the United States and Sudan are parties. Colin L. Powell, *Written Remarks of Secretary of State to Senate Foreign Relations Committee on The Crisis in Darfur*. Accordingly, the trial court erred regardless of whether the acts in question took place within the Sudanese regime's territory. As the acts in question violated international law and United States law, the act of state doctrine cannot prevent a determination of this action on its merits.

Should this Court determine that acts of mass murder and rape, running a mass child slave trade of black Christians, and the forceful displacement of millions in willful violation of the Genocide Convention do not violate international law – should it determine that the United States Executive Branch erred in 2004 by concluding otherwise – such that the act of state doctrine could apply in this matter, SSCCSD urges this Court to nonetheless reject application of the act of state doctrine herein as to acts taken against the South Sudanese on

another fundamental ground. Those acts by the Sudanese regime were not undertaken in its own territory. Holding otherwise would set a dangerous precedent.

"Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory". *Republic of Iraq v. First Nat. City Bank*, 353 F.2d 47, 51 (2nd Cir. 1965). The act of state doctrine explicitly does not apply to extraterritorial acts. *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985). "The obvious inability of a foreign state to complete an expropriation beyond its borders reduces the foreign state's expectations of dominion over that property.... Consequently, the potential for offense to the foreign state is reduced, there is less danger that judicial disposition of the property will 'vex the peace of nations,' and there is less need for judicial deference to the foreign affairs competence of the other branches of government." *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1028-1029 (5th Cir. 1980).

Beginning in 1983, sovereignty over South Sudan was disputed. Competing factions claimed legitimacy over the region, with the SPLM ultimately gaining recognition via the CPA as South Sudan's governing body. In simple terms, on this point, South Sudan won the war. Just as the United States ceased being a Crown dependent when it declared independence in 1776, when South Sudan commenced

civil war for autonomy in 1983, The Sudan's claims to legitimacy over what is now South Sudan and the people therein became, at best, attenuated.

The United States formally recognized the South Sudanese people's rights to self-determination in 1994. In 2004, it formally recognized that the legitimacy of the Sudanese regime's rule over this area was, at best, questionable.

For purposes of analysis in this case, the Court cannot come to the conclusion that the acts in question occurred within The Sudan's undisputed realm of legitimate territorial authority. Where, as here, there was civil war, competing regimes stated a claim of sovereignty over disputed lands, and the United States Executive Branch acknowledged that there is doubt as to which party maintains legitimate authority over the region, application of the act state doctrine would violate its purpose and intent. The purpose of the act of state doctrine is to prevent the courts from overstepping the political branches and creating a conflict in the United States policy toward the foreign and several nations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Holding that the acts against the South Sudanese at issue occurred within the legitimate territory of The Sudan between 1997 through 2005 when that rule was in dispute and after 2005 when The Sudan undoubtedly had limited to no authority such that the act of state doctrine could apply would be an affront to the executive and legislative branches of the government who have reached contrary conclusions. There is simply too much

uncertainty as to the legitimacy of the Sudanese regime's sovereignty over South Sudan after it declared Jihad in 1983 to apply the act of state doctrine, which requires a finding that the acts took place within the territorial authority of the Sudanese regime, to acts against the South Sudanese or in South Sudan in this matter.

B. The Act of State Doctrine Should Not Apply to Acts Taken by the Sudanese Regime in South Sudan Due to Regime Change

The act of state doctrine restrains the judiciary from interfering with the Executive Branch's conduct of foreign affairs. *Konowaloff v. Metropolitan Museum of Art*, 702 F.3d 140, 145–46 (2d Cir. 2012). As such, "its proper application requires a balancing of interests"; it "should not be invoked if the policies underlying the doctrine do not justify its application." *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452 (2d Cir. 2000) (citations omitted).

"The doctrine demands a case-by-case analysis of the extent to which in the context of a particular dispute separation of powers concerns are implicated." *Allied Bank Int'l, supra*, 757 F.2d at 521. "This analysis must always be tempered by common sense." *Id.*

"The balance of relevant considerations may ... be shifted if the government which perpetrated the challenged act of state is no longer in existence ... for the political interest of this country may, as a result, be measurably altered."

Sabbatino, supra, 376 U.S. at 428. As such, in *Bigio*, the Second Circuit declined to invoke the act of state doctrine and instead reviewed certain acts taken by a prior government of Egypt, now "long gone," when the current government had "repudiated the acts in question." *Bigio, supra*, 239 F.3d at 453. See also, *Republic of Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986).

Here, it is questionable at best whether the Sudanese regime maintained legitimate authority over South Sudan at any time after it declared Jihad on it and civil war erupted in 1983. The South Sudanese, in almost complete unanimity, rejected the repudiated acts in question via a formal referendum. The United States Executive Branch formally, and in writing, rejected these acts. It maintains diplomatic relations with South Sudan. Via the CPA, the leadership of South Sudan formally repudiated these acts. It continues to do so. Appellants' claims do not call upon the Courts to condemn these acts or to rule upon them, but to instead condemn BNPP for intentionally and willfully circumventing sanctions put into place to limit a genocide and ethnic cleansing, not to mention a child slave trade targeting blacks and Christians.

The Court should reject application of the act of state doctrine as to acts taken against the South Sudanese under these facts. The rulers of the sovereign South Sudanese have rejected the acts in question such that there should be no bar to review them. Further, as the Ninth Circuit has noted, "*A fortiori*, when a ruler's

former domain has turned against him and seeks the recovery of what it claims he has stolen, the classification has little or no applicability. The act of state doctrine is supple, flexible, ad hoc. The doctrine is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity to a deposed leader." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360–61 (9th Cir. 1988). At least in so far as it relates to South Sudan and the South Sudanese victims of genocide, this would be such a case. Here, the South Sudanese have formally turned against the Sudanese regime, rejected its acts, and have in various forums sought retribution and reparations for the bad acts mentioned in this matter. As such, the act of state doctrine should simply not apply here to acts taken in South Sudan and against the South Sudanese.

CONCLUSION

Based on the foregoing, to the extent that the Court holds that the act of state doctrine applies to the claims at issue in this matter, it should conclude that they do

not prevent claims involving actions taken in what is now South Sudan or against the South Sudanese from proceeding.

DATED: July 12, 2018

Respectfully submitted,

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