

U.S. Insight: U.S. Supreme Court Upholds \$4.3 Billion Award of Punitive Damages Against the Republic of Sudan

On May 18, 2020, the Supreme Court of the United States issued its decision in *Opati v. Republic of Sudan*,¹ which held that the provision of punitive damages in the state-sponsor of terrorism exception, 28 U.S.C. § 1605A, in the Foreign Sovereign Immunities Act (“FSIA”) applies retroactively and upheld the award of \$4.3 billion in punitive damages against the Republic of Sudan in connection with terrorist attacks that predated the enactment of Section 1605A.

Evolution of the FSIA’s State-Sponsor of Terrorism Exception

In 1976, Congress enacted the FSIA as a comprehensive statute that governs all aspects of litigation against foreign states in U.S. courts. Foreign states are presumptively immune from the jurisdiction of U.S. courts unless one of the FSIA’s enumerated exceptions to immunity applies. But, even where an exception enumerated in 28 U.S.C. § 1605 or 1607 applies, the FSIA precludes the imposition of punitive damages against foreign states in such cases.²

As originally enacted, the FSIA did not provide an exception abrogating immunity in terrorism cases. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDP”), which created a novel exception to foreign sovereign immunity in cases where the foreign state allegedly committed or supported an act of terrorism and had been designated as a state-sponsor of terrorism by the U.S. State Department.³ However, the AEDP, as originally enacted, did not override the FSIA’s prohibition on the imposition of punitive damages.⁴ In addition, courts held that the AEDP merely provided an exception to foreign sovereign immunity and did not provide a separate cause of action against a foreign state.⁵

In the National Defense Authorization Act of 2008 (“NDAA”), Congress substantially overhauled the FSIA’s state-sponsor of terrorism exception. The exception was moved from Section 1605(a)(7) to a new section of the U.S. Code, 28 U.S.C. § 1605A, thereby exempting terrorism cases from the FSIA’s general prohibition on the imposition of punitive damages against foreign states under Section 1606. The new Section 1605A(a) provides that foreign states are not entitled to immunity in actions to recover money

¹ *Opati v. Republic of Sudan*, 590 U.S. ___ (2020).

² 28 U.S.C. § 1606.

³ 28 U.S.C. § 1605(a)(7) (repealed).

⁴ 28 U.S.C. § 1606.

⁵ See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31 (D.D.C. 2009) (discussing the history of the FSIA’s terrorism exception).

damages for personal injury caused by “an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act” by an official, employee or agent of the foreign state while acting in the scope of their office, employment or agency.⁶ Section 1605A abrogates immunity only with respect to foreign states that have been designated as state sponsors of terrorism by the State Department and only where the claimant or victim was a U.S. national, a member of the U.S. armed forces or an employee or contractor of the U.S. government at the time of the alleged act of terrorism.⁷

Section 1605A(c) creates a private right of action for U.S. nationals, members of the U.S. armed forces, U.S. government employees and contractors as well as legal representatives of such persons against state-sponsors of terrorism for acts falling within the scope of Section 1605A(a). It also explicitly provides for the recovery of punitive damages.⁸ The NDAA further provides that Section 1605A(c) would apply in lawsuits already pending in U.S. courts and provided a window for plaintiffs in previously dismissed lawsuits to file new actions under Section 1605A(c).⁹

The District Court Enters Default Judgments Against Sudan

The *Opati* case was one of several consolidated lawsuits filed against Sudan in the United States District Court for the District of Columbia by victims and family members of victims of al Qaeda’s attacks on the U.S. Embassies in Kenya and Tanzania in 1998 who claimed that Sudan materially assisted al Qaeda in carrying out the attacks.¹⁰

Following an *ex parte* evidentiary hearing, the district court entered default judgments against Sudan.¹¹ It concluded that Sudan was not entitled to immunity because the requirements of Section 1605A(a) had been satisfied. Sudan had been designated as a state-sponsor of terrorism by the State Department at the time of the Embassy bombings.¹² In addition, the court determined that the bombings of the U.S. Embassies constituted “extrajudicial killings” under Section 1605A(a)(1) and that Sudan had materially supported al Qaeda by providing sanctuary and logistical support to Osama Bin Laden and the al Qaeda operatives who carried out the bombings.¹³

⁶ 28 U.S.C. § 1605A.

⁷ 28 U.S.C. §§ 1605A(a)(2)(A)(i)-(ii).

⁸ 28 U.S.C. § 1605A(c).

⁹ See *Opati* at p. 4 (discussing NDAA, 122 Stat. 338, §§ 1083(c)(2)-(3)).

¹⁰ See *Owens v. Republic of Sudan* (“*Owens I*”), 826 F. Supp. 2d 128 (D.D.C. 2011).

¹¹ Sudan briefly appeared at the outset of the litigation, but thereafter withdrew from the case until it reappeared after the entry of the default judgments. See *Owens v. Republic of Sudan*, 864 F.3d 751, 762 (D.C. Cir. 2017).

¹² *Owens I* at 149.

¹³ *Id.* at 139.

The district court also found that the plaintiffs properly asserted new federal causes of action under Section 1605A(c) – except for the plaintiffs who were non-American family members of victims of the attacks. It nevertheless held that these foreign plaintiffs could assert state law claims against Sudan and recover punitive damages even though such damages are only expressly provided for under Section 1605A(c).

The district court awarded the plaintiffs a total of \$10.2 billion in damages, including \$4.3 billion in punitive damages.¹⁴ Following entry of judgment, Sudan appeared and moved to vacate the judgments under Rule 60(b) of the Federal Rules of Civil Procedure on a variety of grounds. In particular, Sudan argued that the grant of punitive damages in Section 1605A(c) did not apply retroactively in cases arising out of acts of terrorism predating the enactment of Section 1605A in 2008. It also argued that the foreign national family members – who were awarded over \$7 billion – were not entitled to punitive damages on their state law claims. The district court rejected these arguments and denied Sudan’s Rule 60(b) motion.¹⁵ Sudan appealed that decision to the D.C. Circuit.

D.C. Circuit Vacates Award of Punitive Damages But Otherwise Affirms the Judgments

The D.C. Circuit affirmed the finding of jurisdiction under Section 1605A(a). It held that the bombings of the U.S. Embassies constituted extrajudicial killings under Section 1605A(a)(1) notwithstanding the fact that the bombings were committed by al Qaeda rather than a state actor.¹⁶ It further concluded that the district court’s findings that Sudan provided material support to al Qaeda in connection with the bombings were not erroneous.¹⁷

The D.C. Circuit also rejected Sudan’s argument that Section 1605A(a) only abrogated immunity with respect to claims brought by a person who was physically injured by an act of terrorism or a legal representative of such a victim. Thus, while only a victim or a legal representative of a victim can state a cause of action directly under Section 1605A(c), the D.C. Circuit held that Section 1605A(a) nevertheless abrogated Sudan’s immunity with respect to state law claims brought by foreign national family members of victims who were not legal representatives of such victims.¹⁸

Nevertheless, the D.C. Circuit vacated the award of \$4.3 billion in punitive damages on the grounds that the provision of punitive damages in Section 1605A(c) did not apply retroactively to authorize the imposition of punitive damages in actions arising out of

¹⁴ *Owens*, 864 F.3d at 765.

¹⁵ *Owens v. Republic of Sudan (“Owens II”)*, 174 F. Supp. 3d 242 (D.D.C. 2016).

¹⁶ *Owens*, 864 F.3d at 778.

¹⁷ *Id.* at 799.

¹⁸ *Id.* at 805-07.

acts of terrorism that predated the enactment of Section 1605A in 2008. The D.C. Circuit distinguished the Supreme Court's decision in *Republic of Austria v. Altmann*, which held that the FSIA's immunity provisions applied retroactively in cases arising out of conduct that predated the FSIA's enactment in 1976 even though the FSIA contains no clear statement of retroactive effect.¹⁹ The D.C. Circuit reasoned that the jurisdictional immunity provisions at issue in *Altmann* merely codified the State Department's preexisting "restrictive theory" of immunity, whereas the punitive damages provisions of Section 1605A(c) were "essentially substantive" and altered a foreign state's liability for past conduct.²⁰

The D.C. Circuit acknowledged that the NDAA expressly provides that pending cases brought under the FSIA's prior iteration of the terrorism exception, Section 1605(a)(7), were to be treated as though they had been brought under Section 1605A, and provided a window for claimants in previously dismissed actions to bring claims under Section 1605A(c). However, it explained that those provisions in the NDAA were not sufficiently explicit to overcome the presumption against retroactive legislation set forth in the Supreme Court's decision in *Landgraf v. USI Film Products*.²¹ Accordingly, because the D.C. Circuit found that the provision of punitive damages under Section 1605A(c) did not apply retroactively, it held that none of the plaintiffs could recover punitive damages on new federal claims under Section 1605A(c) or state law claims.²²

The Supreme Court Reverses – Upholds Retroactive Application of Section 1605A

The Supreme Court granted the plaintiffs' petition for certiorari to address the question of whether, as a matter of statutory interpretation, the punitive damages provision in Section 1605A(c) applies retroactively. The Court unanimously agreed that Section 1605A(c) applies retroactively and reversed the D.C. Circuit's decision to vacate the award of punitive damages.²³

The Court found no need to address the plaintiffs' argument that *Altmann* created an exception to the presumption against retroactivity expressed in *Landgraf*. It held that, even assuming *Landgraf* applied, Congress was as clear as it could have been that the provision of punitive damages in Section 1605A(c) applies retroactively.²⁴ It explained that Congress enacted Section 1605A(c) to provide a newly created federal cause of action that explicitly authorizes the imposition of punitive damages and, in other sections of the NDAA, Congress authorized claimants in pending or previously

¹⁹ *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

²⁰ *Owens*, 864 F.3d at 815.

²¹ *Id.* at 814-17 (discussing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)).

²² *Id.* at 818.

²³ *Opati*, at p. 7.

²⁴ *Opati*, at pp. 8-9.

dismissed lawsuits to assert new claims under Section 1605A(c). As the Court itself put it: “Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy past acts of terrorism.”²⁵ Thus, Congress clearly intended the provision of punitive damages in Section 1605A(c) to apply retroactively.

While the Court reversed the D.C. Circuit’s vacatur of the award of punitive damages with respect to all plaintiffs, it expressly declined to address the issue of whether foreign family members of victims could obtain punitive damages on their state law claims because that issue was not raised in the petition for certiorari.²⁶ The Court merely held that the D.C. Circuit erred in concluding that the presumption against retroactivity precluded the award of punitive damages on state law claims. It thus remanded the case to the D.C. Circuit with instructions to “reconsider its decision concerning the availability of punitive damages for claims proceeding under state law.”²⁷

²⁵ *Id.* at p. 9.

²⁶ Notably, the U.S. government took the position in its *amicus* brief on the merits that punitive damages may be recovered on state law claims brought under Section 1605A based on acts of terrorism that predate 2008. See U.S. Brief, *Opati v. Republic of Sudan*, dated September 2019, at p. 33.

²⁷ *Opati*, at p. 12.

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