

U.S. Supreme Court Rules on Retroactivity of New FSIA Cause of Action



On 18 May 2020, the U.S. Supreme Court (the **Supreme Court**) handed down its decision in *Opati v. Republic of Sudan*. It ruled that a new cause of action added in the Foreign Sovereign Immunities Act (the **FSIA**), which allowed plaintiffs to seek punitive damages from foreign governments who sponsor terrorist activities, could be applied retroactively.

The case at hand relates to the 1998 Al Qaeda bombings of the U.S. Embassies in Kenya and in Tanzania.

Following these terrorist attacks, several victims sued the Sudanese government in U.S. courts claiming damages, as Sudan had allegedly supported and protected Al Qaeda.

The plaintiffs relied on an exception to the FSIA's general rule that foreign governments enjoy immunity and cannot, in principle, be brought before U.S. courts. According to that exception, the immunity enjoyed by foreign governments does not apply to acts of terrorism and to States that sponsored such terrorist activities. However, at the time, this exception did not allow plaintiffs to seek punitive damages.

In 2008, the FSIA (28 USC 1605A(c)) was amended to provide plaintiffs (who were U.S. nationals, members of the U.S. army, employees of the U.S. government or their legal representatives) an express federal cause of action to seek recovery (including punitive damages) from a government that supported the terrorist activities from which they were a victim. It remained debatable, however, whether this new cause of action extended to existing lawsuits initiated under the previous regime.

While the District Court considered that it did extend to existing lawsuits and, therefore, awarded punitive damages to the victims of the 1998 Al Qaeda attacks, that decision was later reversed by the U.S. Court of Appeals for the District of Columbia Circuit.

Before the Supreme Court, the plaintiffs relied on the *Altmann* case whereby the Supreme Court had found that the FSIA (and the exceptions to sovereign immunity provided therein), adopted in 1976, applied retroactively and that therefore the plaintiff (Maria Altmann) could validly rely on one of those exceptions to seek recovery, from the Austrian government, of paintings stolen by the Nazis in the 1930's (for further information on this case, see the excellent [Woman in Gold](#) movie).

Sudan responded to that argument by stating that *"it may be one thing to retract immunity retroactively consistent with Altmann, because all that does is open a forum to hear an otherwise available legal claim. But it is another thing entirely to create new rules regulating primary conduct and impose them retroactively"*.

The Supreme Court found that although legislation normally applies prospectively (see: *Landgraf v. USI Film Products*), the *"principle of prospectivity"* can be overcome if it is shown that the U.S. Congress clearly intended to authorize the retroactive use of the newly adopted legislation. In that

respect, the Supreme Court – relying on the legislative text – held that by adopting the new cause of action the Congress “*expressly authorized punitive damages under a new cause of action; and [...] explicitly made that new cause of action available to remedy certain past acts of terrorism*”.

Consequently, victims of the 1998 embassy bombings were considered to be entitled to seek punitive damages against the Sudanese government.

Copyright © 2016 International Litigation Blog.

All Rights Reserved.

Reproduction totale ou partielle interdite.