Flying Under The Radar
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The case of *Opati v. Republic of Sudan*, 206 L. Ed. 2d 904 (S. Ct. May 18, 2020) flies under the radar. This important opinion of the Court, authored by Justice Gorsuch, unmasks national entities responsible for terrorism or encouraging terrorism abroad.

As the Court pointed out, in 1998 Al-Qaeda detonated number of truck bombs outside the United States Embassies in Kenya and Tanzania. The Court noted that hundreds died and thousands were injured. Victims and their families sued the Republic of Sudan in federal court. The allegation was that the nation state assisted Al-Qaeda in perpetrating the attack. After years of litigation, the plaintiffs proved that Sudan's role in the attacks permitted the plaintiffs to obtain compensatory and punitive damages. On appeal, Sudan argued that the Foreign Sovereign Immunities Act barred punitive damages. The Second Circuit agreed. The United States Supreme Court wisely vacated that decision.

Perhaps the wheel is turning on foreign sovereign immunity, which has been stuck in the mud for way too long.

Sudan has been engaged in many wars against humanity. For years, Sudan's Arab population made it state policy to murder black Africans. The world turned away and did little to address the genocide.

It is an odd quirk of history that while Israel is condemned for nonexistent fantasy violations of international law, the Arab states supporting Sudan in the United Nations were never chastised in any significant way. It is truly a disgrace of United States policy and Western European morality that third world nations, especially in the Arab world, have been given a green light to butcher those who do not follow the Islamic path.

The *Opati* opinion begins its analysis with the court of Chief Justice Marshall, who, in *Schooner Exchange v. McFaddon*, 11 U.S. 116, 7 Cranch 116 (1812) explained that foreign sovereigns do not enjoy an inherent right to be held immune from suit in American courts. Nevertheless, American law appears to have given a free pass to virtually every terrorist and dangerous nation state that has been engaged in the murder of innocents.

We are now learning about the anti-Semitic behavior of the Roosevelt administration during the Holocaust of the Jews of Europe. There will be no justice in America for the acts of the Roosevelt administration, which encouraged and, some would argue, supported Hitler's final solution.

In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA). The FSIA holds foreign states and their instrumentalities immune from the jurisdiction of federal and state courts. This law did have a number of exemptions. One of them is a

terrorism exemption Congress added to the law in 1996. The exception permits "certain" plaintiffs to bring suits against countries who have committed or supported specific acts of terrorism and who are designated by the State Department as state sponsors of terror. As originally enacted, the exception shielded those countries from punitive damages. It should be noted that this was during the term of President Bill Clinton.

Congress amended the FSIA in the National Defense Authorization Act for Fiscal Year 2008. The change in the law had the effect of freeing claims brought under the terrorism exception from the FSIA's bar on punitive damages.

In the trial court, Sudan declined to participate in this litigation. The trial court did detail that Sudan had knowingly served as a safe haven near the United States Embassy and allowed Al-Qaeda to plan and train for the attacks. Sudan provided hundreds of Sudanese passports to al-Qaeda, allowing al-Qaeda operatives to travel under the Sudan-Kenya border without restriction and permitted the passage of weapons and money to supply Al-Qaeda in Kenya.

The district court awarded a total of $10.2 billion in damages, including $4.3 billion in punitive damages to plaintiffs. At that point, Sudan suddenly decided to appear and appeal. Sudan took the position that it could not be held responsible for punitive damages.

Fortunately, the United States Supreme Court was not as restrictive as it has been in some other terrorist cases.

The Court was clear to explain that it understood the implications of its decision. The Court of Appeals refused to allow punitive damage award for foreign-national family members proceeding under state law for "the same reason" that it refused punitive damages for the plaintiffs proceeding under the federal cause of action. It follows that the Court of Appeals must also reconsider its decision concerning the availability of punitive damages for claims proceeding under state law, therefore.

The judgment of the Court of Appeals with respect to punitive damages was reversed.

The implications of this decision have a great deal to do with the Court's thinking. In past cases, the district and circuit courts, with the stamp of approval of the United States Supreme Court, have found all kinds of reasons to let terrorists and their state allies walk away without paying compensation. Sovereign immunity, stressed interpretations of due process, location of the terrorist incidents and questioning the constitutionality of congressional enactments have all given terrorists and their state sponsors a free ride. Hopefully, this decision will signal that the United State Supreme Court is willing to hold accountable organizations and countries doing business in the United States with assets in the United States which assist in terrorism against Americans here or abroad. The time has come to hold the murderers of Americans accountable regardless of where they hide. There should not be jurisdictional issues or

constitutional questions about a judgment in the United States Court against individuals, entities or countries doing business in this country with assets in the United States who have American blood on their hands.

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