COMBATTING INTERNATIONAL TERRORISM WITH CIVIL CAUSES OF ACTION

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INTRODUCTION

"Jihad needs very many things. Firstly it needs money. Much is dependent on money today for jihad."

- Omar Abu al-Chechen, Syrian Terrorist Leader[1]

The war against international terrorism is waged on many fronts. It is waged with conventional military campaigns in open combat, and by Special Operations Forces in the dark of night. It is fought by intelligence services and law enforcement agencies. It is also fought in the courtroom. This includes both criminal prosecutions of terrorists and those who support them, and increasingly, civil causes of action brought by victims and their families.

There are two main ways for victims of terrorism to bring civil claims for acts of terror. The first, and most well-established, is to file suit directly against a state sponsor of terrorism under an exception in the Foreign Sovereignties Immunity Act.[2] The second, less well-known way, is to file directly against persons who have materially assisted Foreign Terrorist Organizations in carrying out the attacks.[3] This is a rapidly developing area of law that has the potential not only to compensate victims, but to help defeat terrorist groups by depriving them of the funding that is essential to their operations.[4]

I. CIVIL JUDGMENTS AGAINST STATE SPONSORS OF TERRORISM

Federal law provides a private right of action against foreign countries that are designated state sponsors of terrorism, for acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts.[5] Under 28 U.S.C. § 1650A, suit may be brought against these states for personal injury or death caused by any of the acts listed above.[6] Liability extends to any

1 Thomas Grove, *Militants from Russia's North Caucasus join "jihad" in Syria*, REUTERS, (Mar. 6, 2013, 2:25 PM), https://www.reuters.com/article/us-syria-crisis-russia-militants/militants-from-russias-north-caucasus-join-jihad-in-syria-idUSBRE9251BT20130306.

2 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605A(a)(1)(c) (2012).

3 *Id.* at § 1605A(a)(1).

4 *See Human Rights, Terrorism and Counter-terrorism*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., (July 2008), https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

5 Foreign Sovereign Immunities Act § 1605A.

6 *Id.*

official, employee, or agent of the foreign state who was acting within the scope of his or her office, employment, or agency.[7]

A complete understanding of the specific terms in the statute is essential to bringing a successful case under § 1605A. Because sovereign immunity is a jurisdictional concern, in order to succeed, the complaint must allege that the state or its agent committed unlawful acts *exactly* as defined under the statute.[8] The definitions of "torture" and "extrajudicial killing" are incorporated into § 1605A through the Torture Victim Protection Act of 1991 (TVPA).[9] The TVPA is a federal law that imposes civil liability for acts committed by a state or its agents under actual or apparent authority of the state or under the color of law.[10] This qualification is important. It means that torture or extra-judicial killing will not be actionable under § 1605A unless the plaintiff is able to show that the person carrying out the act was doing so as an agent of the foreign state.

TVPA defines extrajudicial killing as a "deliberated killing not authorized by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[11] The definition specifically excludes executions that are lawfully carried out under the authority of a foreign nation.[12] "Torture" under the TVPA means:

> any act . . . by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining . . . information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.[13]

The term "aircraft sabotage" is incorporated into § 1605A from Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[14] Similarly, the definition of "hostage taking" is

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[7] *Id.*

[8] *Id.*

[9] Torture Victim Protection Act of 1991 § 3(a)–(b); 28 U.S.C. § 1350 (2012).

[10] Torture Victim Protection Act of 1991 § 2(a); 28 U.S.C. § 1350 (2012).

[11] Torture Victim Protection Act § 3(a).

[12] *Id.*

[13] Torture Victim Protection Act § 3(b)(1).

[14] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 974 U.N.T.S. 14118.

incorporated into § 1605A from Article 1 of the International Convention Against the Taking of Hostages.[15]

The term "material support or resources" is incorporated into § 1605A from 18 U.S.C. § 2339A, which is a criminal statute making it unlawful to knowingly provide any sort of material support to terrorists.[16] Under § 2339A, material support or resources is defined as, "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, and transportation, except medicine or religious materials."[17] As will be discussed below, material support has been construed quite broadly by the courts. However, when making allegations under § 1605A, it is imperative to check the statute carefully to ensure that the facts in the complaint precisely support the statutory definitions. Complaints that do not meet the statutory definitions may be dismissed *sua sponte*.[18]

A. Subject Matter Jurisdiction: Foreign Sovereign Immunities Act

In general, federal district courts have original jurisdiction over all civil matters arising under the Constitution, laws, or treaties of the United States.[19] Because international terrorism is regulated by federal law and by numerous international treaties ratified by the United States, it might seem obvious that the federal courts would have "federal question jurisdiction" over civil terror-related actions against foreign states.[20] However, in most instances, this is not the case. Even if the wrongful act in question meets one or more of the statutory definitions outlined above, the Foreign Sovereign Immunities Act ("FSIA") will prevent a plaintiff from filing suit against the great majority of foreign states.[21]

The FSIA provides immunity to foreign nations against suit in any U.S. court, federal or state.[22] Therefore, unless there is an exception which explicitly allows the suit to be brought, the court will lack subject matter

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[15] International Convention Against the Taking of Hostages, art. 1, Dec. 17, 1979, 1316 U.N.T.S. 21931.

[16] 18 U.S.C. § 2339A(a)–(b)(1) (2012).

[17] *Id.*

[18] 28 U.S.C. § 1605A(h) (2012); *See* Legal Information Inst., *sua sponte*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/sua_sponte [hereinafter *Cornell Law School*].

[19] 28 U.S.C. § 1331 (2012).

[20] 18 U.S.C. § 2338 (2012).

[21] Foreign Sovereign Immunities Act § 1605.

[22] Foreign Sovereign Immunities Act § 1604.

jurisdiction and will have no choice but to dismiss the suit *sua sponte*.[23] Prior to 1996, suits against foreign nations in terrorism actions were routinely dismissed.[24] For example, in 1995, a suit against Libya in connection with the bombing of Pan Am Flight 103 over Lockerbie, Scotland, was dismissed because, at that time, there was no terrorism exception in the FSIA.[25]

Fortunately for some victims of terrorism, § 1605A now has just such an exception, albeit a narrow one. In 1996, as part of the Antiterrorism and Effective Death Penalty Act, the FSIA was amended to allow suits for money damages against foreign nations that have been specifically designated by the U.S. Secretary of State as "state sponsors of terrorism."[26] At present there are only four nations on this list. They are North Korea, Sudan, Syria, and most significantly, Iran.[27]

If all of the above requirements are met, an eligible plaintiff who was injured in an act of terrorism sponsored by one of the four designated states may bring suit against that state in U.S. federal court. Eligible plaintiffs include nationals of the United States; members of the United States armed forces; employees or contractors working for the United States government and acting within the scope of employment; or legal representatives of any of the above.[28] If successful, the plaintiff may collect damages for "economic [harm], solatium [(emotional distress)], pain and suffering, and punitive damages."[29] Actions may also be brought for "reasonably foreseeable property loss, whether insured or uninsured . . . and loss claims under life and property insurance policies."[30]

Since the 1996 amendment, there have been many successful civil suits against state sponsors of terrorism. *Flatow v. Iran*, which defined the scope of personal and subject matter jurisdiction under the FSIA exception, is one of the most influential.[31] Alisa Flatow was a twenty-year-

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[23] *Id; See also* CORNELL LAW SCHOOL *supra* note 18.

[24] *See* Jennifer K. Elsea, CONGRESSIONAL RESEARCH SERVICE, *Suits Against Terrorist States by Victims of Terrorism*, 1 (Aug. 8, 2008), https://fas.org/sgp/crs/terror/RL31258.pdf.

[25] Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306, 309 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 239, 247 (2d Cir. 1996).

[26] *See* Elsea, *supra* note 24, at 5; Anti-Terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (Apr. 12, 1996).

[27] *State Sponsors of Terrorism*, U.S. DEP'T. OF STATE, https://www.state.gov/j/ct/list/c14151.htm (last visited Jan. 21, 2019, 6:06 PM).

[28] Foreign Sovereign Immunities Act § 1605A(c).

[29] *Id.*

[30] *Id.*

[31] Flatow v. Iran, 999 F. Supp. 1, 1 (D.D.C. 1998). Flatow v. Iran, 999 F. Supp. 1, 1 (D.D.C. 1998); *See* Josh Lipowsky, *The Cost of Terrorism: Victims Fight Back in Court,* Forbes Opinion (Aug. 31, 2015, 2:48 PM), https://www.forbes.com/sites/realspin/2015/08/31/the-cost-of-terrorism-victims-fight-back-in-court/#2286e58a4991.

old American citizen and a student at Brandeis University who was participating in a semester abroad study program in Israel.[32] She was traveling in a bus near the Gaza Strip when a suicide bomber drove a van full of explosives into the bus. Alisa was taken by helicopter to a hospital in Israel, where she later died as the result of her wounds.[33] Her family brought suit against Iran and its agents under the FSIA terror exception.

In its findings of fact, the court stated that the attack was carried out by Shaqaqi faction of Palestine Islamic Jihad, a terrorist cell whose purpose is to carry out attacks in Gaza, and whose sole source of funding is Iran.[34] At the time of the attack, Iran was providing approximately two million dollars annually to the group.[35] The court further found that Alisa's death was caused by a "willful and deliberate act of extrajudicial killing" carried out by the group, which was acting under the direction of Iran.[36]

The *Flatow* Court, citing legislative intent to impose substantial financial liability on state sponsors of terrorism,[37] set precedent by broadly interpreting the FSIA terrorism exception. The court determined that a plaintiff need only meet a "minimum threshold of contacts" to establish subject matter and personal jurisdiction.[38] This minimum threshold requires only that the foreign state provide "general sponsorship" of the responsible terrorist group.[39] In a default judgment, the court found Iran responsible for Alisa Flatow's death and awarded damages to her estate in excess of $20 million for lost earnings, pain and suffering, and compensation for emotional distress to her family.[40] In addition, the court awarded punitive damages of $225 million, which was estimated to be three times the amount of Iran's annual expenditure for terrorist activities that year.[41]

Significantly, the *Flatow* court interpreted the FSIA exception to be retroactive. In other words, plaintiffs may now bring civil cases against foreign states for terrorist acts that occurred even *before* the 1996 amendments, as long as the defendant was designated as a state sponsor of terror when the act occurred.[42] This has enabled many suits that had

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[32] *Flatow*, 999 F. Supp. at 1.

[33] *Id.* at 6–10.

[34] *Id.* at 10–11.

[35] *Id.* at 11.

[36] *Id.* at 15.

[37] *Id.* at 13.

[38] *Id.* at 21–23.

[39] *See id.* at 23.

[40] *Id.* at 34.

[41] *Id.*

[42] *Id.* at 13-14.

previously been barred. One such case is *Valore v. Islamic Republic of Iran*, in which a group of plaintiffs successfully sued Iran for the 1983 bombing of the U.S. Marine Corps barracks in Lebanon.[43]

It is critical that the foreign state defendant be designated as a state sponsor of terrorism. The *Valore* case was successful because the terrorist attack was linked through expert testimony to Iran, which is a designated state sponsor of terror.[44] On the other hand, the United States Court of Appeals for the Second Circuit affirmed the dismissal of a case against the Kingdom of Saudi Arabia.[45] This was a consolidated case in which multiple plaintiffs brought suit against hundreds of Saudi government officials, entities, and financial institutions, alleging their material support to the 9/11 attacks.[46]

The court found that it lacked subject matter jurisdiction for the claims against Saudi Arabia and its government officials, because Saudi Arabia has never been designated by the State Department as a state sponsor of terrorism.[47] Therefore the FSIA terrorism exception did not apply.[48] The court further found that none of the other FSIA exceptions applied to the Kingdom.[49] In addition to the terror exception, the FSIA contains an exception for personal injury or death caused by a foreign sovereign's tortious act.[50] However, the court declined to characterize international terrorism as a tort.[51] Additionally, FSIA has an exception for a foreign state's commercial activity within the United States, but the court held that this exception did not apply because supporting terrorism is not "trade, traffic, or commerce."[52] It is clear, then, that in order for a terrorism claim under the FSIA to survive dismissal the attack must have been sponsored by a nation specifically designated as a state sponsor of terror. No other FSIA exception allows such a suit.

B. Evidence Satisfactory to the Court: Iran is the Number One State Sponsor of Terrorism

In order to prevail in a FSIA case, the plaintiff must show proximate cause between the state sponsorship of terror and the specific act which

[43] Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52 57, 61–64, 90 (D.D.C. 2010).
[44] *Id*. at 61–63.
[45] *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 75, 96 (2d Cir. 2008).
[46] *Id*. at 75.
[47] *Id*. at 75–76, 89.
[48] *Id*.
[49] *Id*. at 75.
[50] 28 U.S.C. § 1605(a)(5).
[51] *In re Terrorist Attacks*, 538 at 75.
[52] *Id*. at 75–76.

caused the injury.[53] Courts have determined that in terrorism cases, proximate cause requires only "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered."[54]

As will be discussed below, in the vast majority of FSIA cases the foreign state will refuse to participate in the proceedings, and thus will be subject to default judgment.[55] When the defendant defaults, the plaintiff will present her case directly to the court.[56] The legal standard for default judgment is "evidence satisfactory to the court."[57] This is not a very demanding standard. Satisfactory evidence simply means "[evidence] which is sufficient to induce a belief that the thing is true. In other words, it is simply credible evidence."[58] The FSIA leaves it to the court to determine precisely how much and what kinds of evidence the plaintiff must provide.[59] In terrorism cases, such evidence will almost always be provided by expert witnesses.

Although there are four countries currently designated as state sponsors of terror, Iran is by far the most active and prolific exporter of terrorism in the world today, and is the country against which most FSIA actions are filed.[60] Ever since Shia cleric Ayatollah Khomeini came to power during Iran's Islamic Revolution in 1979, Iran has engaged in and supported terrorism as an instrument of national policy.[61] Iran's support for terrorist groups such as Hezbollah, Hamas, and al Qaeda is well-known and extensively documented. Iran was designated by the United States as a state sponsor of terrorism in 1984.[62] Since then, the State Department has consistently named Iran the "foremost state sponsor of terrorism," and it remains so to this day.[63] Iran is estimated to provide

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[53] Havlish v. Bin Laden (*In re* Terrorist Attacks on September 11, 2001), 2011 U.S. Dist. LEXIS 155899, at *202 (S.D.N.Y. 2011).

[54] *Id.*

[55] *Id.* at *84.

[56] *Id.* at *79–81.

[57] *Id.* at *83.

[58] *Satisfactory Evidence*, BOUVIER'S LAW DICTIONARY (8th ed. 1914).

[59] Kim v. Democratic People's Republic of Korea, 774 F.3d 1044, 1047 (D.C. Cir. 2014).

[60] *See* David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, FED. JUD. CTR. 79 (2d ed. 2018), https://www.fjc.gov/sites/default/files/materials/41/FSIA_Guide_2d_ed_2018.pdf [hereinafter *Judge's Guide*]; Matthew Lee, *Iran still top state sponsor of terrorism, U.S. report says*, PBS (July 19, 2017), https://www.pbs.org/newshour/world/iran-still-top-state-sponsor-terrorism-u-s-report-says.

[61] *Havlish,* 2011 U.S. Dist. LEXIS 155899, at *84–86.

[62] *Id.* at *85.

[63] *Country Reports on Terrorism 2016*, U.S. DEP'T OF STATE (June 2017), https://www.state.gov/j/ct/rls/crt/2015/257517.htm.

between $300 and $500 million dollars of support to international terrorism each year.[64]

Iran carries out its terrorist acts primarily through the use of agents and proxies.[65] One such agent is the Iranian Revolutionary Guard Corps ("IRGC"). Iran's military is separated into two parts.[66] One part is the "regular" military, which consists of the Iranian Army, Navy, and Air Force.[67] This part of the Iranian military is similar to other militaries around the world, in that its primary mission is to safeguard Iran and her people.[68] The other part of the Iranian military is the radical IRGC.[69] The IRGC was established in 1979 following the Iranian revolution.[70] In contrast to the regular Iranian military, the main purpose of the IRGC is not to defend the country, but to guard the Shia Islamic revolution and spread Islamist principles throughout the world.[71] The IRGC answers directly to, and is controlled by, the Supreme Leader of Iran.[72] It is one of the most powerful organizations in Iran, and exerts considerable foreign policy influence.[73]

Most of Iran's state sponsorship and assistance to terror groups comes through a special branch of the IRGC known as the "Quds Force" ("IRGC-QF").[74] In October 2007, the IRCG-QF was designated as a Specially Designated Global Terrorist, pursuant to Presidential Executive Order 13224.[75] In making the announcement, the United States Treasury Department stated that the IRGC-Q "provides lethal support in the form of weapons, training, funding, and guidance to select groups of Iraqi Shia militants who target and kill coalition and Iraqi forces and innocent Iraqi

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[64] Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 88 (D.D.C. 2010).

[65] *See* Lee, *supra* note 60.

[66] DANIEL BYMAN ET AL., Iran's Security Policy in the Post-Revolutionary Era 32 (RAND corp. ed. 2001).

[67] Ali Alfoneh, *Eternal Rivals? The Artesh and the IRGC*, MIDDLE EAST INST. (Nov. 15, 2011), https://www.mei.edu/publications/eternal-rivals-artesh-and-irgc.

[68] Bernd Kaussler, *The Iranian Army: Tasks and Capabilities*, MIDDLE EAST INST. (Nov. 15, 2011), https://www.mei.edu/publications/iranian-army-tasks-and-capabilities.

[69] *See* Alfoneh, *supra* note 67.

[70] *Id.*

[71] *Id.*

[72] Cohen v. Islamic Republic of Iran, 238 F. Supp. 3d 71, 78 (D.D.C. Mar. 1, 2017).

[73] *See* Ray Takeyh, *How Powerful Is Iran's Revolutionary Guard Corps?*, COUNCIL ON FOREIGN REL. (June 16, 2016), https://www.cfr.org/expert-brief/how-powerful-irans-revolutionary-guard-corps.

[74] John Baure, *Iran Revolutionary Guard Closer to Terrorist Designation*, CTR. FOR SECURITY POL'Y (July 6, 2018), https://www.centerforsecuritypolicy.org/2018/07/06/iran-revolutionary-guard-closer-to-terrorist-designation/.

[75] *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism,* U.S. DEP'T OF TREASURY (Oct. 25, 2007), https://www.treasury.gov/press-center/press-releases/Pages/hp644.aspx.

citizens."[76] One of the many terror groups directly supported and funded by the IRGC-QF is Hezbollah.[77]

Hezbollah is a Lebanese-based Shia group that supports and orchestrates terror attacks against Americans around the world on behalf of Iran.[78] It is a proxy of the Iranian state. Senior United States officials have called Hezbollah the "A-Team of Terrorists," describing it as al Qaeda's "equal, if not far more capable."[79] In 1997, Secretary of State Madeleine Albright designated Hezbollah a Foreign Terrorist Organization pursuant to 8 U.S.C. § 1189.[80] Hezbollah publically claims that the "first root of vice is America," and its primary stated goal is the destruction of the United States and Israel.[81]

Hezbollah carries out its operations primarily by training, funding, and supporting other terrorist organizations. The group has organized an extensive network throughout the Middle East from which it recruits members of the local populations to carry out their terrorist activities.[82] Speaking about the way in which the group "outsources" its support to other organizations, the Hezbollah Commander said, "'[w]e shouldn't be called [the] Party of God. . . . We're not a party now, we're international. We're in Syria, we're in Palestine, we're in Iraq and we're in Yemen."[83]

Hezbollah is not the only notorious terrorist organization that Iran directly supports. Another such group is al Qaeda. Although al Qaeda is a

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[76] *Id.*

[77] *Islamic Revolutionary Guard Corps (IRGC)*, COUNTER EXTREMISM PROJECT, https://www.counterextremism.com/sites/default/files/threat_pdf/Islamic%20Revolutionary%20Guard%20Corps%20%28IRGC%29-10302018.pdf (last visited Feb. 24, 2019).

[78] HEZBOLLAH MANIFESTO (1985), reprinted in ANTI-AMERICAN TERRORISM AND THE MIDDLE EAST: A DOCUMENTARY READER 50 (Barry Rubin & Judith Colp Rubin eds., Oxford Univ. Press) (2002).

[79] Rebecca Leung, *Hezbollah: "A-Team of Terrorists,"* CBS (Apr. 18, 2003), https://www.cbsnews.com/news/hezbollah-a-team-of-terrorists/; *Current and Future Worldwide Threats to the National Security of the United States: Hearing Before the Committee on Armed Services*, 108th Cong. 60 (2003) (statement of the Hon. George J. Tenent, Fmr. Director of Central Intelligence).

[80] Norman Kempster, *U.S. Designates 30 Groups as Terrorists*, L.A. TIMES (Oct. 9, 1997), http://articles.latimes.com/print/1997/oct/09/news/mn-40874.

[81] HIZBULLAH'S DOCUMENTS 41, 49, 52, 122 (Joseph Alagha trans., Pallas Publications) (2011).

[82] *Hezbollah: History & Overview*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/history-and-overview-of-hezbollah (last visited Feb. 24, 2019).

[83] Matthew Levitt, *Major Beneficiaries of the Iran Deal: IRGC and Hezbollah*, WASH. INST. FOR NEAR EAST POL'Y (Sept. 17, 2015), https://docs.house.gov/meetings/FA/FA13/20150917/103958/HHRG-114-FA13-Wstate-LevittM-20150917.pdf.

Sunni extremist organization[84] and Iran practices Shia Islam,[85] this religious rivalry has not stopped Iran from supporting al Qaeda in the common cause of attacking the United States and our allies. Beginning as early as 1991, al Qaeda and Iran have worked closely together through Hezbollah.[86] Multiple meetings between top al Qaeda leaders, including second-in-command Ayman al Zawahiri, and Hezbollah leaders such as Imad Mughniyah, the chief operations officer of Hezbollah, have been documented and proven in federal court.[87] Following these meetings, al-Qaeda leader Osama bin Laden began sending terrorist operatives to Hezbollah training camps in Lebanon and Iran, where they were trained by Hezbollah instructors in intelligence and security and in the building of explosive devices.[88]

After the formation of this alliance, Iran became a critical transit point for funding and logistics in support of terrorist activities in Afghanistan and Pakistan.[89] According to the U.S. Treasury Department, Iran "serve[d] as the core pipeline through which [al Qaeda] moves money, facilitators and operatives from across the Middle East to South Asia."[90] Through this network, Iran has been directly or indirectly involved in multiple large scale terror attacks against the United States and Israel.

According to the U.S. State Department, since the 1990s the Iran-al Qaeda alliance has been behind hundreds of terrorist attacks against U.S. national interests, and is responsible for *all* of the most significant ones.[91] Included in these are the 1983 bombing of the U.S. Marine Corps barracks in Lebanon which killed 214 Marines and Sailors;[92] the 1996 attack on the

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[84] Bernard Haykel, *The Enemy of My Enemy is Still My Enemy*, N.Y. TIMES, https://archive.nytimes.com/www.nytimes.com/ref/opinion/26haykel.html?ref=todayspaper, (last visited Feb. 24, 2019).

[85] *Sunnis and Shia: Islam's ancient schism*, BBC (Jan. 4, 2016), https://www.bbc.com/news/world-middle-east-16047709.

[86] Thomas Joscelyn, *The Al Qaeda-Iran Connection*, WKLY. STANDARD (Aug. 8, 2018), https://www.fdd.org/analysis/2018/08/08/the-al-qaeda-iran-connection/.

[87] Havlish v. Bin Laden, 2011 U.S. Dist. LEXIS 155899, at *111 (S.D.N.Y. Dec. 22, 2011).

[88] *Id.* at 112–113.

[89] Thomas Joscelyn, *Treasury Exposes 'Secret Deal' Between Iran and Al Qaeda*, WKL'Y STANDARD (July 29, 2011), https://www.weeklystandard.com/thomas-joscelyn/treasury-exposes-secret-deal-between-iran-and-al-qaeda.

[90] *U.S. Accuses Iran of 'Secret Deal' With Al-Qaeda,* RADIO FREE EUROPE RADIO LIBERTY, (July 28, 2011), https://www.rferl.org/a/us_accuses_iran_of_secret_deal_with_al_qaeda/24280157.html.

[91] *See CIA docs from Osama bin Laden raid suggest Iran-al Qaeda link,* CBS (Nov. 2, 2017), https://www.cbsnews.com/news/iran-osama-bin-laden-al-qaeda-before-september-11-terror-attacks-cia-documents/.

[92] Jim Michaels, *Recalling the deadly 1983 attack on the Marine barracks*, USA TODAY (Oct. 23, 2013), https://www.usatoday.com/story/nation/2013/10/23/marines-beirut-lebanon-hezbollah/3171593/.

Khobar Towers military barracks in Saudi Arabia which killed nineteen servicemen and wounded over 500;[93] and the 1998 attacks on American embassies in Kenya and Tanzania which killed more than 300 and wounded over 5,000.[94] It also includes the 9/11 attacks which killed over 3000 Americans in our own country.[95]

Even after the terrorist attacks of 9/11 and the wars that followed, Iran, working through Hezbollah and other proxies, has continued its attacks on the United States and its interests. In 2003, Hezbollah Secretary-General Hassan Nasrallah proclaimed "Let the entire world hear me. Our hostility to the Great Satan [America] is absolute . . . . Regardless of how the world has changed after 11 September, Death to America will remain our reverberating and powerful slogan: Death to America!"[96]

Iran's support for international terrorism continues unabated to this day. The linkages between Iran and terrorism have been proven time and again in the courtroom. Iran has been held factually and legally responsible in United States federal courts for its support of the Khobar Towers bombing,[97] the bombings in Kenya and Tanzania,[98] and the terrorist attacks on 9/11,[99] among many others. In these cases, the evidence presented, predominantly through expert witness affidavits and testimony, was more than sufficient to convince the judge by "sufficiency of the evidence" that Iran's actions in providing financing, training, logistical support, safehouses, and weapons to terrorists fully supported a finding of civil liability.

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[93] David D. Kirkpatrick, *Saudi Arabia Said to Arrest Suspect in 1996 Khobar Towers Bombing*, NEW YORK TIMES (Aug. 26, 2015), https://www.nytimes.com/2015/08/27/world/middleeast/saudia-arabia-arrests-suspect-khobar-towers-bombing.html.

[94] *See* Thomas Joscelyn, *The Al Qaeda – Iran Connection*, WKL'Y STANDARD (Aug. 7, 2018), https://www.weeklystandard.com/thomas-joscelyn/iran-helped-al-qaeda-with-the-1998-u-s-embassy-bombings-in-africa; *1998 US Embassies in Africa Bombings Fast Facts*, CNN (July 31, 2018), https://www.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/index.html.

[95] Nelly Lahoud, *Iran Through the Lens of al-Qaeda*, ATLANTIC COUNCIL (Sept. 12, 2018), https://www.atlanticcouncil.org/blogs/iransource/iran-through-the-lens-of-al-qaeda; *September 11 Terror Attacks Fast Facts,* CNN (Sept. 3, 2018), https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html.

[96] *Hassan Nasrallah: In His Own Words*, COMM. FOR ACCURACY IN MIDDLE EAST REP. IN AMERICA (July 26, 2006), https://www.camera.org/article/hassan-nasrallah-in-his-own-words/.

[97] Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 248, 264 (D.D.C. 2006).

[98] Owens v. Republic of Sudan, 826 F. Supp. 2d 128, 132, 146 (D.D.C. 2011).

[99] Havlish v. Bin Laden, No. 03-CV-9848-GBD, 2011 U.S. Dist. LEXIS 155899, at * 194–204 (S.D.N.Y. Dec. 22, 2011).

C. Personal Jurisdiction - Service of Process

As described above, under *Flatow* the federal courts will usually have subject matter jurisdiction over a foreign state sponsor of terrorism. However, before the case can be heard, the plaintiff must give the defendant notice sufficient to meet the requirements of constitutional due process.[100] Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[101] Service must be reasonably structured to assure that the person to whom it is directed receives it,[102] and may include an obligation to take "reasonable followup [sic] measures" in the event that the plaintiff learns that service of process has failed.[103] Service of process to foreign states is controlled by statute, under 28 U.S.C. § 1608.[104]

This statute provides a four-step hierarchy for serving a foreign state. These methods of service must be attempted in ascending order, but only to the extent that each is feasible in a specific case or applicable to a specific defendant.[105] The first two steps are,

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents.[106]

Neither of these steps are applicable in terrorism cases. The "special arrangements" discussed in step (1) usually refer to business arrangements, in which case the method of process service will be set out in a contract.[107] No such business arrangements exist between United States persons and the four countries designated as state sponsors of terror.[108] Similarly, there are no international conventions for the service of process in place between the United States and any of the state sponsors of terror, so step (2) likewise does not apply and may be skipped.[109]

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[100] Flatlow v. Islamic Republic of Iran, 999 F. Supp. 1, 19–20 (D.D.C. 1998).

[101] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

[102] *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 221–22 (2006).

[103] *Id.* at 222.

[104] *See* 28 U.S.C. § 1608(a) (2012).

[105] *See id.*

[106] § 1608(a)(1)–(2).

[107] *See* Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 67–70 (D.D.C. 2010); *see also* Judge's Guide, *supra* note 60, at 14.

[108] *Valore*, 700 F. Supp. 2d at 69–70; *see also* Judge's Guide, *supra* note 60.

[109] *Valore,* 700 F. Supp. 2d at 69–70.

The next step, and the first one that applies in FSIA terror cases, is to serve the foreign defendant by sending a copy of the summons and complaint and a notice of suit to the clerk of the court.[110] The clerk will then send the package to the head of the ministry of foreign affairs in the state being served.[111] All products in the package must be translated into the official language of the foreign state.[112] Additionally, the package must be delivered by a carrier such as DHL Worldwide Express ("DHL"), because, for somewhat obvious logistical concerns, most major couriers do not make deliveries to the four countries designated as state sponsors of terrorism.[113] However, even after all of these steps are fulfilled, the foreign ministry will almost certainly refuse to accept delivery of the package.[114]

Thirty days after DHL reports that it has attempted to deliver the package to the ministry of foreign affairs, the plaintiff may institute the final step by again sending the package to the clerk of the court and submitting an affidavit requesting that it be mailed to the foreign government.[115] The clerk will then send the package to the Secretary of State in Washington, D.C., addressed to the attention of the Director of Special Consular Services.[116] In the case of Iran, the Secretary of State's office will transmit a copy of the papers to the U.S. Embassy in Bern, Switzerland, which will send a copy to their Swiss counterpart in Bern known as the Federal Department of Foreign Affairs (FDFA).[117] The FDFA will attempt to deliver a copy to the foreign state's embassy in Bern.[118] Once again the package will almost surely be rejected, but regardless of whether it is accepted or not, at this point service of process is finally considered complete under § 1608 and the state has sixty days to respond.[119]

This process is time-consuming and expensive, and can impose significant burdens upon victims of terrorism.[120] On the whole, the

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[110] 28 U.S.C. § 1608(a) (2012).

[111] § 1608(a)(3).

[112] *Id.*

[113] *State Sponsors of Terrorism*, U.S. DEP'T OF ST., https://www.state.gov/j/ct/list/c14151.htm (last visited Feb. 21, 2019).

[114] *See* Brief for Veterans of Foreign Wars of the United States as Amicus Curiae Supporting Respondents, Republic of Sudan v. Harrison, 138 S. Ct. 293 (2017) (No. 16-1094).

[115] *See* 28 U.S.C. § 1608(a)(4) (2012).

[116] *Id.*

[117] Murphy v. Islamic Republic of Iran, 778 F. Supp. 2d 70, 73 (D.D.C. 2011); *see generally FDFA (Swiss Fed. Dep't of Foreign Aff.),* GENEVA INTERNET PLATFORM, https://www.giplatform.org/actors/fdfa-swiss-federal-department-foreign-affairs (last visited Apr. 1, 2019).

[118] *Id.*

[119] *See* 28 U.S.C. § 1608(d).

[120] *Murphy*, 778 F. Supp. 2d at 73.

procedure takes at least several months, sometimes much longer, and can cost thousands of dollars.[121] One of the most expensive parts of the process is getting the package translated into the official language of the foreign state. For example, having all the necessary documents translated into Farsi for service of process to the Iranian Foreign Ministry may take several weeks and cost thousands of dollars.

Additionally, the fees imposed by the State Department for service of process are quite large. The Department charges a fee of $2275 dollars to attempt service through diplomatic channels.[122] This fee must be paid for each defendant, even when multiple defendants are agents of the same foreign state and only one package is actually delivered to the embassy.[123] Courts have been critical of the State Department's exorbitant fees, and at least one judge has pointed out that for many injured plaintiffs, the primary hurdle to obtaining relief has been imposed by the executive branch of the U.S. government.[124]

D. Recovering Damages

Under 28 U.S.C. § 1608(d), once served with process the foreign state has sixty days to answer with a responsive pleading.[125] After sixty days, if the defendant has not responded, the plaintiff may file an affidavit with the court requesting a default judgment.[126] Once this affidavit is accepted by the court, the plaintiff may file a motion for default.[127] If the plaintiff proves her case by evidence satisfactory to the court, a default judgment will be entered and a copy of the judgment sent to the foreign state.[128]

Judgments against Iran can be enormous. For example, in 2010, Iran was found civilly liable for the bombing of the Marine barracks in Lebanon.[129] The court awarded the plaintiffs compensatory damages of over $ 6.5 million, and punitive damages of *$1 billion*.[130] The court based its punitive award calculation on the affidavit testimony of Dr. Patrick Clawson, a well-known terrorism expert.[131] Dr. Clawson recommended that, in order to deter Iran from continuing its support of terrorism, the

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[121] *Id*.
[122] *Murphy*, 778 F. Supp. 2d at 73.
[123] *Id*. at 72–74.
[124] *Id*. at 74.
[125] 28 U.S.C. § 1608(d) (2012).
[126] *Id*. § 1608(e).
[127] *Id.*
[128] *Id.*
[129] Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 57, 75–77 (D.D.C. 2010).
[130] *Id.* at 84, 89.
[131] *Id.* at 88–89.

court should calculate the damage award by multiplying Iran's estimated annual expenditure in support of terrorism by a factor of three to ten.[132]

Taking Dr. Clawson's advice, the court estimated Iran's annual terrorism expenditure as $200 million and multiplied it by a factor of five, resulting in the $1 billion judgment.[133] The court noted that this monetary amount for punitive damages was significantly higher than any previously rendered against Iran, but said that it was "justified by the continuing need to punish and deter Iran from its increasing support of terrorism, and is further justified as the product of well settled case law on the methodology by which punitive-damages awards in FSIA cases are calculated."[134] The court further stated, "[i]n the hopes that Iran is paying more attention to the cases that have been brought against it, the court seeks to send the strongest possible message that Iran's support of terrorism against citizens of the United States absolutely will not be tolerated by the courts of this nation."[135]

The awards seem to be getting larger. In 2012, a U.S. District Court for the Southern District of New York found that the Islamic Republic of Iran, its Supreme Leader Ayatollah Ali-Hoseini Khamenei, its former Iran president Ali Akbar Hashemi Rafsanjani, the Iranian Revolutionary Guards, the Iranian Ministry of Information and Security, and Iran's proxy Hezbollah were all liable for direct and material support to al Qaeda in carrying out the 9/11 attacks.[136] A default judgment was entered in favor of hundreds of family members of 9/11 victims for nearly $1.4 billion in compensatory damages and over *$7 billion* in punitive damages.[137]

However, getting a huge default judgment and actually collecting the money are very different matters. In general, there are three ways in which a plaintiff can attempt to collect on a judgment against Iran. The first is to attach an asset of the foreign state.[138] The second is to seek payment from the United States Victims of State Sponsored Terrorism Fund (USVSST Fund).[139] The third way is to hold the judgment as an asset.[140]

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[132] *Id.*

[133] *Id.*

[134] *Id.* at 89–90.

[135] *Id.* at 89.

[136] Havlish v. Bin Laden, No. 03-CV-9848-GBD, 2011 U.S. Dist. LEXIS 155899, at *203 (S.D.N.Y. Dec. 22, 2011).

[137] Havlish v. Bin Laden (In re Terrorist Attacks on September 11, 2001), 03 MDL 1570 (GBD) (FM), 2012 U.S. Dist. LEXIS 110673, at * 105–110 (S.D.N.Y. Jul. 30, 2012).

[138] 22 U.S.C. § 8772(a) (2018).

[139] Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C. § 20144(d)(1) (2015).

[140] *See* 22 U.S.C. § 8772(b).

E. Attachment Under Peterson

As mentioned above, the first way to attempt to collect is to attach an asset owned by the offending state sponsor of terrorism, most commonly Iran. In August of 2012, Congress passed 22 U.S.C. § 8772, also known as the "Iran Threat Reduction and Syria Human Rights Act of 2012."[141] Congress has explicitly stated that the purpose of § 8772 is to "ensure that Iran is held accountable for paying the judgments."[142] This statute allows seized or frozen Iranian financial assets held in the United States to be attached in order to satisfy judgments awarded against Iran.[143] The statute requires the court to first determine whether Iran holds equitable title to, or the beneficial interest in, the assets that the plaintiff is attempting to attach.[144] It also requires that the court determine that "no other person possesses a constitutionally-protected interest in the assets."[145] If these conditions are met, the asset may be attached.[146]

Interestingly, § 8772 was enacted specifically to address a case that was currently in litigation before the federal courts.[147] Congress even went so far as to cite that case by name and case number.[148] The case was *Peterson et al. v. Islamic Republic of Iran et al.* The plaintiffs were nearly one thousand representatives of hundreds of Americans killed in Iran-sponsored terrorist attacks, including the bombing of the Marine Corps barracks.[149] In an attempt to collect on judgments of over $2.65 billion, the plaintiffs moved for the turnover of approximately $1.75 billion in bonds held in New York bank accounts.[150] These assets had previously been frozen by the U.S. government as part of the sanctions against Iran.[151] The plaintiffs alleged that these assets were still owned by Bank Markazi, the Central Bank of Iran, and should be turned over to partially satisfy the judgment.[152]

From 2008 to 2012 the *Peterson* case slowly made its way through the federal court system, until Congress intervened by passing § 8772.[153] The

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[141] Iran Threat Reduction and Syria Human Rights Act, 22 U.S.C. § 8772 (2012).

[142] *Id.* § 8772(a)(2).

[143] *Id.* § 8772(a)(1).

[144] *Id.* § 8772(a)(2).

[145] *Id.*

[146] *Id.*

[147] *Id.* § 8772(b).

[148] *Id.*

[149] *See* Peterson v. Islamic Republic of Iran, No. 10 CIV. 4518 KBF, 2013 WL 1155576 at *1 (S.D.N.Y. Mar. 13, 2013), *aff'd sub nom,* Bank Markazi v. Peterson, 136 S.Ct. 1310, 1319 (2016).

[150] *See Bank Markazi* at 1320; *Peterson* at *1–2.

[151] *See Bank Markazi* at 1318; *Peterson* at *1–2.

[152] *See Bank Markazi* at 1319–20; *Peterson* at *2, 5, 23.

[153] *See* 22 U.S.C. § 8772; *see also Bank Markazi*, 136 S.Ct at 1320; *Peterson* at *22.

statute explicitly states that the assets described therein were those "identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ)."[154]

After the enactment of this law, the *Peterson* plaintiffs updated their motions to include claims under the newly passed § 8772.[155] The defendants objected, claiming that it was a violation of Constitutional separation of powers for Congress to pass legislation intended to affect a particular pending case, because Congress was essentially directing a verdict in a matter currently before the Court.[156] However, the district court disagreed, finding that Congress does have the power to change the law, even during pending litigation.[157] Both the Second Circuit and the U.S. Supreme Court affirmed.[158] Over a strong dissent by Chief Justice Roberts, the Court found that Congress has the power to alter a foreign state's immunity, and that includes the power to pass a law that is dispositive over judicial proceedings currently in progress.[159]

Thus, one way to collect against Iran is to attach Iranian assets to satisfy judgments. This has led to several interesting cases. For example, plaintiffs who were awarded a $71.5 million judgment against Iran recently attempted to attach Iranian antiquities which are on loan to a Chicago museum.[160] The items included hundreds of clay tablets known as the Persepolis Collection, which had been loaned by Iran to the University of Chicago in 1937.[161] However, on February 21, 2018, the Supreme Court ruled 8-0 against the plaintiffs, finding that neither § 8772 nor the FSIA commercial activity exception applied to Iranian property being used by a third party such as the University museum.[162] The impact of this recent decision upon other suits seeking attachment of Iranian assets remains to be seen.

F. USVSST Fund

Another way to collect on a judgment against a state sponsor of terror is to receive a disbursement from the United States Victims of State

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[154] 22 U.S.C. § 8772(b).

[155] *See Bank Markazi* at 1320; *Peterson* at *9–10.

[156] *See Bank Markazi* at 1321–1322; *Peterson* at *21–22.

[157] *See Bank Markazi* at 1322; *Peterson* at *21–22.

[158] *See Bank Markazi* at 1329; Peterson v. Islamic Republic of Iran 758 F.3d 185, 191 (2d Cir. 2014).

[159] *Bank Markazi* at 1329.

[160] Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 820 (2018).

[161] *Id.* at 821.

[162] *Id.* at 827.

Sponsored Terrorism Fund ("USVSST Fund").[163] This fund was enacted in accordance with 34 U.S.C. § 20144, known as the Justice for United States Victims of State Sponsored Terrorism Act.[164] This Act established the USVSST Fund, which is intended to compensate eligible victims of state-sponsored terrorism.[165] Eligible persons include those who (1) hold a final judgment issued by a U.S. district court awarding compensatory damages arising from acts of international terrorism sponsored by a state that is not immune from the FSIA; (2) were taken and held hostage from the United States Embassy in Tehran, Iran from November 4, 1979 to January 20, 1981; or (3) are the personal representative of a deceased individual in either of those two categories.[166]

The fund was established 2015, and is administered by the Criminal Division of the Department of Justice (DOJ).[167] Money for the fund comes from forfeiture proceeds, penalties, and fines imposed in civil and criminal matters involving prohibited transactions with state sponsors of terrorism.[168] Upon its inception in 2015, Congress funded the USVSST with $1.025 billion in seized monies and fines. Recent prosecutions and enforcement actions have increased the total available in the fund to more than $1.1 billion.[169] According to Acting Assistant Attorney General David Blanco,

> [t]he Criminal Division aggressively prosecutes terrorist financiers and others who abuse the U.S. financial system to commit crimes . . . to seize their assets and illicit funds. Through this program, we will continue to be resolute in our commitment to victims of state sponsored terrorism and aggressively search for illicit funds and assets to compensate them for their losses.[170]

However, there are several limitations on the USVSST. For example, the fund only makes payments to victims of state sponsors of terrorism and their instrumentalities.[171] It does not pay out to victims of non-state actors such as al Qaeda or Hamas, unless there is a judgment against a *state* for sponsoring their activities.[172] Additionally, only compensatory

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[163] *See* 34 U.S.C. § 20144 (2015).

[164] *Id.*

[165] *See id.* § 20144(e).

[166] *Id.* § 20144(c).

[167] Press Release, U.S. Dep't of Justice Office of Pub. Affairs, Dep't of Justice Compensates Victims of State Sponsored Terrorism (Apr. 6, 2017) (https://www.justice.gov/opa/pr/department-justice-compensates-victims-state-sponsored-terrorism).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *See* § 20144(c)(2)(A)(i).

[172] *See id.*

damages may be paid from the fund.[173] Punitive damages are not eligible.[174] Although the reason for this limitation is not expressly addressed, presumably it is because the sheer size of the punitive awards in terrorism cases would quickly drain the fund if they were allowed.

The fund is overseen by a Special Master, who is charged with determining the amount that each eligible plaintiff will receive.[175] Eligible claims are paid on a *pro rata* basis out of available funds. Disbursements will be made until all outstanding amounts have been paid to all of the eligible victims, or the Fund terminates in 2026.[176] The first Special Master was appointed in May 2016, and the first disbursement was made in 2017.[177] As of May 5, 2017, the USVSST Fund had issued over $1 billion in payments to eligible claimants.[178]

The amount that each claimant receives is determined by a formula calculated by the Special Master. For each disbursement, the Special Master determines the "payment percentage," which is the percentage that each claimant will receive of her eligible claim.[179] The payment percentage is determined based on the amount available in the fund to pay to all eligible claimants, divided by the total amount of outstanding compensatory damage awards.[180] However, there is a statutory cap on the amount that may be paid to each claimant.[181] The cap is $20 million for individuals and $35 million for families.[182]

The mathematical formula takes this damage cap into consideration when calculating the payment percentage.[183] Additionally, as will be explained more fully below, the payout percentage also takes into account any compensation that has been paid to claimants from sources other than the Fund.[184] For the initial disbursement in 2017, the payment percentage was set at 13.66%.[185] This means that each claimant was paid 13.66% of their outstanding compensatory damages.[186]

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[173] *Id.*

[174] *Id.*

[175] *See* § 20144(b).

[176] *See* § 20144(d)(3)(A)(i); § 20144(e)(6)(A).

[177] KENNETH R. FEINBERG, U.S. VICTIMS OF STATE SPONSORED TERRORISM FUND, SUPPLEMENTAL REPORT FROM THE SPECIAL MASTER, 2, 4, 12 (2017).

[178] *Id.* at 12.

[179] *Id.* at 3–4.

[180] *Id.*

[181] § 20144(d)(3)(A)(ii)(I–II).

[182] *Id.*

[183] Feinberg, *supra* note 177, at 3–4.

[184] *Id.*

[185] *Id.*

[186] *See id.*

These payouts will continue until all claimants have been paid their capped compensatory damage awards, or the fund expires in 2026, whichever occurs first.[187] In order to prevent earlier claimants from receiving disproportionately larger amounts than those who get judgments nearer to the expiration of the Fund, individual payments will be suspended after a claimant has been paid 30% of the award.[188] Payments to these claimants will not restart until all the other outstanding claimants have received 30% of their judgments, at which time payments will continue for all claimants.[189] Therefore, it is unlikely that any claimant will ever receive more than 30% of her award. While 30% of the capped compensatory damage amount is a far cry from the enormous judgments awarded by the courts, this can still be a huge sum of money for an injured plaintiff.

G. Other Sources of Compensation

As mentioned above, payments from other sources will be taken into consideration when determining the overall payment percentage, and when calculating the amount that a particular claimant will be paid. Collateral sources include any life insurance, pension funds, death benefit program, or payment by federal, state, or local governments.[190] It also includes any monies collected from attached assets under *Peterson*.[191] If payments from other sources are equal or greater than 30% of a claimant's compensatory award, that claimant will not receive payment from the Fund until all other eligible claimants have received their 30%.[192] However, if the amount from other sources is less than 30%, that claimant will continue to receive payments until the 30% mark is reached.[193]

As a simple example, imagine an individual claimant with no family members and no compensation from other sources. If this claimant receives a judgment of $45 million, the individual cap would apply, limiting the compensatory amount to $20 million. For simplicity of math, assume that the payment percentage in the next scheduled payout will be set at 10%. In this case, on January 1st of that year our hypothetical claimant will receive $2 million, or 10% of his compensatory damages as limited by the individual cap. If the claimant had also received money from another source, his payment would be reduced by that amount. For

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[187] § 20144(d)(3)(A)(i); § 20144(e)(6)(A).

[188] § 20144(d)(3)(B)(i–ii).

[189] *Id.*

[190] § 20144(j)(6).

[191] *Id. See also* Peterson v. Islamic Republic of Iran, No. 10 CIV. 4518 KBF, 2013 WL 1155576 at 34 (S.D.N.Y. Mar. 13, 2013).

[192] § 20144(d)(3)(B)(i–ii).

[193] *Id.*

example, if he had received $500,000 from assets attached in a *Peterson* verdict, he would collect $1.5 million from the Fund.

Attorneys' fees are limited to 25% of the dispersal, inclusive of costs.[194] In this example, the attorney would get $375,000 and the client would get the remaining $1.125 million. The payment percentage would be recalculated with each disbursement of the fund, until our hypothetical plaintiff received 30% of his potential pay-out, or $6 million, minus the $1.5 million (25% of $6M) for the attorney. At that time his payments from the USVSST Fund would be suspended until all other plaintiffs had received 30% of their awards.

H. Judgment as an Asset

In addition to attaching Iranian property or receiving payment from the USVSST Fund, successful plaintiffs have an asset, at least in theory, in their judgments against a foreign state sponsor of terror.[195] If any of the four state sponsors of terror nations were to desire a normalization of diplomatic relations with the United States, it may first be required to settle the outstanding judgments against it. Although it seems highly unlikely at present, it does at least represent a theoretical third way for plaintiffs to collect judgments against state sponsors of terrorism and possibly to collect some of the punitive as well as compensatory damages.

In summary, state sponsors of terror can be held civilly liable for their actions in U.S. federal courts. The court will have subject matter jurisdiction under the FSIA terrorism exception, and personal jurisdiction via the service of process methods set out by law. The foreign state will almost surely default, after which the plaintiff may present her case directly to the court. If she proves her case by evidence satisfactory to the court, she stands to receive a very large judgment. Although she is likely never to recover more than 30% of her capped compensatory damages, these amounts can be quite substantial both for the client and the attorney.

II. THE ANTI-TERRORISM ACT - CIVIL LIABILITY OF PERSONS

In contrast with FSIA claims against state sponsors of terror, 18 U.S.C. § 2333, better known as the Anti-Terrorism Act (ATA), provides a civil remedy for acts of international terrorism committed by a *person*.[196] Under the ATA, any national of the United States, or his/her estate, survivors, or heirs, may bring a civil cause of action for injuries suffered to his/her person, property, or business by reason of an international act

[194] § 20144(f)(1).
[195] *See* 22 U.S.C. § 8772(b).
[196] *See* 18 U.S.C. § 2333.

of terrorism.[197] Under the statute, the word "person" includes not only individuals, but also corporations, companies, associations, firms, partnerships, societies, and joint stock companies.[198] The successful plaintiff may recover threefold the damages he/she sustains, in addition to the costs of the suit and attorney fees.[199]

Prior to 2016, the ATA only allowed actions against defendants who were *primarily* responsible for committing acts of international terrorism.[200] However, on September 28, 2016, Congress made a major change to the ATA. Overriding President Obama's veto, the Legislature enacted the Justice Against Sponsors of Terrorism Act ("JASTA").[201] Under JASTA, civil liability may also extend to any person who "*aids and abets* by knowingly providing substantial assistance, or who *conspires* with the person who committed" the act.[202] This secondary liability is retroactive, applying to any acts of terrorism that occurred after September 11 2001, if the civil action was pending on or after the date that the JASTA was enacted into law.[203]

In overriding the Presidential veto and enacting JASTA, Congress made it clear that the purpose of the ATA is to

> provide civil litigants with the *broadest possible basis*, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States.[204]

Specifically, Congress found that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," and that there is a "vital national interest in providing" victims of terrorism "with full access to the court system in order to pursue civil

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[197] § 2333(a).

[198] § 2333(d)(1); *see also* 1 U.S.C. § 1.

[199] § 2333(a).

[200] Matthew H. Kirtland & Andrew James Lom, *Layperson's guide - Justice Against Sponsors of Terrorism Act*, (Dec. 2016), https://www.nortonrosefulbright.com/en-us/knowledge/publications/d1a384e4/laypersons-guide--justice-against-sponsors-of-terrorism-act.

[201] *See generally* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4(a), § 2333(d), 130 Stat. 852 (2016). *See also* Scott Horsley & Ailsa Chang, *Congress Overrides Obama's Veto On Sept. 11 Lawsuit Bill*, NAT'L PUBLIC RADIO, INC. (Sept. 28, 2016), https://www.npr.org/2016/09/28/495709481/sept-11-lawsuits-vote-today-could-be-first-reversal-of-an-obama-veto.

[202] § 2333(d)(2).

[203] 18 U.S.C. § 2333 note (2013) (Special Rule Relating to Certain Acts of International Terrorism).

[204] Justice Against Sponsors of Terrorism Act § 2(b) (emphasis added).

claims against those who have knowingly or recklessly provided material support or resources, directly or indirectly, to the terrorists."[205]

A. Elements of the ATA

Courts have determined that primary liability under the ATA has three elements[206]. These are (1) unlawful action, specifically an act of international terrorism; (2) the requisite mental state; and (3) causation.[207] The requisite mental state is knowledge.[208] More specifically, the defendant must either have actual knowledge that the recipient of the material support is an organization that engages in terrorist acts, or *deliberate indifference* to whether or not the organization does so.[209] The plaintiff must also establish that "the defendant was aware of a 'substantial probability' that Americans would be injured by" such acts.[210] Finally, the plaintiff must show that the terrorist act was a proximate cause of the plaintiff's injury.[211]

B. Subject Matter Jurisdiction

There is no question that federal courts have original subject matter jurisdiction over ATA cases. The ATA is a federal law, and the defendant is a person and not a foreign state.[212] Therefore, unlike suits against *state* sponsors of terror, there no issues of sovereign immunity under the ATA.

C. Personal Jurisdiction

Congress has expressed its clear intent to establish personal jurisdiction over those who materially support terrorism.[213] In the official Congressional notes to JASTA, Congress stated:

> Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to . . . acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being

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[205] Justice Against Sponsors of Terrorism Act § 2(a).

[206] Hussain v. Dahabshii Transfer Services, 230 F. Supp. 3d 167, 170–71 (S.D.N.Y. 2017).

[207] *Id.*

[208] *Id.* n. 2.

[209] *Id.* (emphasis added).

[210] *Id.*

[211] *Id.*

[212] 18 U.S.C. § 2333(d)(1); *see also* 1 U.S.C. § 1.

[213] Justice Against Sponsors of Terrorism Act § 2(a)(6).

brought to court in the United States to answer for such activities.[214]

However, notwithstanding the clear intent of Congress, in order to bring a successful case under the ATA a plaintiff still must satisfy the well-established judicial requirements for personal jurisdiction.[215] This includes proper service of process, establishing the defendant's minimum contacts with the forum, and ensuring constitutional due process.[216]

D. Service of Process

The ATA allows causes of action to be brought against both U.S. persons and foreign persons.[217] Service of process over U.S. persons follows the standard Federal Rules of Civil Procedure, just as with any other domestic defendant.[218] Service of process against a foreign defendant is also governed by the Rules, although the process is slightly more complex. Rule 4(f)(1) states that persons residing in other counties may be served by any "internationally agreed [upon] means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."[219] The Hague Convention is the most commonly used way to serve foreign defendants outside of the U.S., and it provides several alternative means to effectuate valid service of process.[220] Thus, service of process under the ATA is significantly less difficult, time consuming, and costly than serving a foreign state under the FSIA exception.

E. Minimum Contacts and Due Process

Service of process is only the first part of establishing personal jurisdiction. The plaintiff must also show that the defendant has sufficient connections in the forum. This requires a two-step analysis. First, the plaintiff must establish that the defendant has sufficient contacts in the forum so as to reasonably expect to be brought into court here.[221] Then, the plaintiff must show that the exercise of personal jurisdiction over the

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[214] *Id.*

[215] *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 343–344. (2d Cir. 2016), *cert. denied sub nom,* Sokolow v. Palestine Liberation Org., 138 S. Ct. 1438 (2018).

[216] *See id.*

[217] 18 U.S.C. § 2333(d)(1); *see also* 1 U.S.C. § 1.

[218] FED. R. CIV. P. 4(e).

[219] FED. R. CIV. P. 4(f).

[220] Edward M. Spiro & Judith L. Mogul, *Service of Process by Email On Defendants Located Outside the U.S.,* N.Y. L.J. (Apr. 19, 2016) https://www.law.com/newyorklawjournal/almID/1202755221818/service-of-process-by-email-on-defendants-outside-the-us/.

[221] *See* Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d 451, 460 (S.D.N.Y. 2008).

foreign defendant would not violate the due process protections in the United States Constitution.[222]

There are two categories of personal jurisdiction which can satisfy the first step of the analysis. The first of these is "general personal jurisdiction." General personal jurisdiction means that the defendant's contacts with the forum are so substantial that it may be sued on all claims, even those that are unrelated to contacts within the forum.[223] In the case of an individual defendant, general jurisdiction is most commonly established by showing that the defendant is domiciled in the forum. Similarly, when the defendant is an entity, general jurisdiction can only be established if the plaintiff can show that the entity is "at home" in the forum.[224]

For example, in the seminal case of *Daimler A.G. v. Bauman,* the Supreme Court found that general jurisdiction did not exist over Daimler, the German-based automotive company which owns Mercedes-Benz. In that case, plaintiffs attempted to sue Daimler for Mercedes-Benz's support to the "dirty war" in Argentina.[225] Despite the fact that Daimler owned dozens of Mercedes-Benz dealerships in California and conducted substantial business there, the Supreme Court found that general jurisdiction did not exist because the German-based company was not "at home" in California.[226]

If the Court determines that general personal jurisdiction does not exist, it will continue its analysis to determine whether the defendant can be brought into court under the second category of personal jurisdiction, known as "specific personal jurisdiction." Specific personal jurisdiction can only be established if the defendant has sufficient contacts in the forum, and those contacts are *related to the subject of the litigation*.[227] Significantly, the contacts must be created by the defendant. Whether the plaintiff is connected to the forum is not the relevant issue. It is the defendant's contacts that matter.[228]

It has been established that under the ATA, specific personal jurisdiction in the United States can be established even for acts of terror that occurred outside of our borders, if the plaintiff is able to show that the terrorist act was expressly aimed at the United States.[229] For example,

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[222] *Id*.

[223] Waldman v. Palestine Liberation Org., 835 F.3d 317, 325 (2d Cir. 2016).

[224] Daimler A.G. v. Bauman, 134 S. Ct. 746, 760 (2014).

[225] *Id.* at 751.

[226] *Id*.

[227] Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014).

[228] *Id.* at 1121–1122.

[229] Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 173 (2d Cir. 2013).

personal jurisdiction has been established over Osama bin Laden and al Qaeda for their attacks against U.S. interests on foreign soil, because these defendants are known to specifically target the United States.[230] On the other hand, personal jurisdiction has been found not to exist in cases where the acts of terror were random in nature.[231]

For example, in April of 2018 the Supreme Court denied certiorari in an ATA case brought against the Palestinian Authority ("PA") and the Palestinian Liberation Organization ("PLO").[232] In this case, the relatives of victims who had been killed in seven separate terror attacks in Israel brought suit in the United States against the PA and the PLO for their support of the attacks. The District Court found for the plaintiffs, awarding a judgment of $655.5 million.[233] As a threshold issue, the District Court determined that it had general personal jurisdiction over the PLO and the PA because the PLO is registered in the United States as a foreign agent, and it maintains a diplomatic office in Washington D.C. as well as a mission to the United Nations in New York City.[234]

However, the Second Circuit vacated the judgment, finding a lack of personal jurisdiction.[235] The Second Circuit disagreed with the district court's determination that the offices in New York and Washington, and the PLO's status as a registered agent, were sufficient under *Daimler* to consider the defendants "at home" in the United States.[236] On the contrary, the Court said that the evidence clearly established that the defendants were "at home" in Palestine.[237] Furthermore, even if these contacts had established the defendants as "at home" here, these diplomatic offices were not related to the subject of the litigation.[238] Therefore, general jurisdiction did not apply.

Having concluded that general jurisdiction did not exist, the Second Circuit next conducted a *de novo* review to determine whether specific personal jurisdiction could be established.[239] Although the victims were all American citizens, the court pointed out that it is the connection between the *defendant* and the forum, not the plaintiff, which is

[230] Mwani v. Bin Laden, 417 F.3d 1, 4 (D.C. Cir. 2005).

[231] Waldman v. Palestine Liberation Org., 835 F.3d 317, 343–44 (2d Cir. 2016).

[232] Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d 451 (S.D.N.Y. 2008), *vacated sub nom*, Waldman v. Palestine Liberation Org., 835 F.3d 317 (2d Cir. 2016), *and cert. denied sub nom,* Sokolow v. Palestine Liberation Org., 138 S. Ct. 1438 (2018).

[233] *Waldman*, 835 F.3d at 322.

[234] *Id.* at 323, 325–26.

[235] *Id.* at 322, 344.

[236] *Id.* at 332–33.

[237] *Id.*

[238] *Id.* at 341.

[239] *Id.* at 327.

dispositive in establishing personal jurisdiction.[240] Therefore, the fact that the victims were Americans was not enough to establish personal jurisdiction.[241] Additionally, although the court recognized that expressly targeting the United States can be sufficient to establish specific personal jurisdiction under the ATA, no such express targeting was shown in this case.[242] Unlike Osama bin Laden and al Qaeda which have been clearly proven to intentionally target American interests, here the evidence showed that the focal point of the attacks was not the United States but Israel, and the fact that Americans were among the victims was not an express attack against the United States but random chance.[243] Once it determined that neither general nor specific personal jurisdiction existed, the Second Circuit had no choice but to vacate the judgment and remand with instructions to dismiss.[244]

Even if the plaintiff is able to show that personal jurisdiction—either personal or specific—exists over the defendant, she still must establish that bringing the defendant into court in the forum would not violate Constitutional due process. In the case of foreign defendants, this can sometimes be a difficult hurdle for a plaintiff to overcome. For example, in the famous case of *Asahi Metal Industry Co. v. Superior Court*, the U.S. Supreme Court held that a Japanese company that produced defective valve stems for tires did not have a sufficient relationship with California to satisfy the due process requirements in the Constitution.[245] In this case, the company had placed its products in a long stream of commerce, which ultimately resulted in their being sold in California, where they were implicated in several traffic accidents.[246]

In *Asahi*, the Court articulated a five-factor test for determining whether serving a foreign defendant would be a violation of Constitutional due process.[247] These factors are: the burden on the defendant; the interests of the forum state in the litigation; the interest of the plaintiff in litigating the matter in that state; whether allowance of jurisdiction would serve interstate efficiency; and whether the allowance of jurisdiction serves interstate policy interests.[248] In *Ahasi*, the Court found that the interest the forum state was small compared to substantial burden that

[240] *Id.* at 335.
[241] *Id.* at 338–39.
[242] *Id.*
[243] *Id.*
[244] *Id.* at 322, 344.
[245] Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987).
[246] *See, e.g.*, *id.* at 105–06.
[247] *Id.* at 113.
[248] *Id.*

would be imposed upon the defendant.[249] In making its decision, the Court put particular emphasis on the difficulty that would be imposed by requiring a Japanese company to defend in a foreign country under a completely unfamiliar judicial system.[250]

Based on *Asahi*, it might appear that even if personal jurisdiction can be established, it would be difficult to bring a foreign defendant to trial in the United States without violating constitutional due process. Fortunately for plaintiffs, this does not seem to be the case. The United States has a very large interest in litigating terrorism cases, as do the plaintiffs. Additionally, intentional acts of terror aimed at U.S. interests are a far cry from a manufacturer placing a valve stem into a stream of commerce over which it did not exercise complete control. Therefore, applying the *Asahi* five factor test, it seems clear that these strong interests outweigh any potential hardships on foreign defendants.

Put simply, knowingly aiding and abetting and/or conspiring to commit acts of terror against the United States is not like placing a defective valve stem in the stream of commerce with no knowledge that it would cause an injury at all, much less in California. Therefore, plaintiffs are often able to establish personal jurisdiction in ATA cases, and Constitutional due process will most likely not be a barrier to recovery.

F. Who is Subject to Suit Under the ATA

The scope of potential defendants in terrorism cases is quite specific. In order to bring suit under the ATA, the plaintiff's injury must arise from an act that was committed, planned, or authorized by a group designated by the U.S. State Department as a "Foreign Terrorist Organization" (FTO) as of the date on which the act was committed.[251] The statute does not apply to any domestic terrorist group, nor to any international group that is not on the State Department's FTO list.[252]

Additionally, not every bad act committed by an FTO qualifies under the ATA. In order to bring suit, the act must meet the statutory definition of an "act of international terrorism."[253] That term is strictly defined as:

> [A]ctivities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

[249] *Id.* at 114.

[250] *Id.* at 114–16.

[251] *See* 18 U.S.C. § 2333(a), (d)(2).

[252] § 2333(d)(2); *see* 8 U.S.C. § 1189(a); *see also Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Jan. 28, 2019).

[253] *See* 18 U.S.C. § 2333(d).

> appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.[254]

Thus, only when the injuries or death have been caused by a designated FTO, as the result of an act which meets the above definition of an international act of terrorism, will a plaintiff be eligible to bring a civil cause of action under the ATA.

G. The ATA Incorporates Criminal Material Support Statutes

It is a federal crime to provide material support to terrorists. 18 U.S.C. § 2339 (series), commonly referred to as the "Material Support" statutes, contains three subsections.[255] The first part, § 2339A, was passed in 1994 in the aftermath of the first World Trade Center bombing.[256] It was based on a congressional finding that "foreign organizations [known to] engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[257]

Section 2339A states:

> Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out . . . [a terrorist act] . . . or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.[258]

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[254] § 2331(1)(A)–(C).

[255] *See id.* § 2339(A)–(C).

[256] *See* Emily Goldberg Knox, Note, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 HASTINGS L.J. 295, 303 (2014); *see also* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2021–23 (1994).

[257] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1246 (1996).

[258] § 2339A.

The *mens rea* element is important. In order to be prosecuted under §2339A, the defendant must know or intend that the support will assist the carrying out of a terrorist act.[259]

In 1995, following the Oklahoma City bombing, Congress added a second section to the material support statute.[260] Section § 2339B was added to close a perceived loophole in § 2339A, which would allow a person to donate money to a terror group as long as the donor thought that the money would be spent for purposes other than terrorism.[261] The section states:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.[262]

To violate § 2339B, a person must have knowledge either that the organization is a designated FTO, *or* that the organization engages in terrorist activity. [263] However, it is not required that the person actually know that the money will be used to finance terrorist activities.[264] Donating money to an FTO, *for any purpose*, is sufficient for prosecution.[265]

In 2010, the U.S. Supreme Court confirmed the constitutionality of § 2339B and clarified its scope.[266] In *Holder v. Humanitarian Law Project*, an advocacy group (the HLP) raised a Constitutional challenge to the statute.[267] The HLP wanted to provide support to the Kurdistan Workers Liberation Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both of which had been designated as FTOs.[268] The HLP had no intent to finance any terrorist activities, but wanted only to assist with political advocacy and provide training on the use of international and humanitarian law.[269]

The HLP asserted that § 2339B requires proof that a defendant intends to further terrorist activities.[270] The Supreme Court rejected this

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[259] *Id.*

[260] Knox, *supra* note 256, at 303.

[261] *Id.*

[262] § 2339B.

[263] *Id.*

[264] Knox, *supra* note 256, at 304–05.

[265] Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demand of Prevention*, 42 HARV. J. ON LEGIS. 15, 17–18 (2005).

[266] *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[267] *Id.* at 8.

[268] *Id.* at 10.

[269] *Id.* at 16.

[270] *Id.*

interpretation as inconsistent with the plain text of the statute.[271] The Court made it clear that the only knowledge requirement is knowledge that the organization is connected to terrorism, and *does not* require any specific intent to further the organization's terrorist activities.[272] The Court also rejected the HLP's claims that § 2339B is a violation of the due process clause of the Fifth Amendment for being impermissibly vague.[273] The Court found that the statute was sufficiently narrow to put defendants on notice, and that the knowledge requirement served to clarify how the law is to be applied.[274] The Court further rejected the assertion that the statute impermissibly bans "pure political speech" in violation of the First Amendment.[275] The Court stated that Congress had not banned speech of any kind, but had only criminalized *conduct* that materially supports terror-related organizations.[276]

Significantly, § 2339B explicitly discusses the obligations of financial institutions. Under the statute, any financial institution that becomes aware that it has possession or control of any funds in which an FTO or its agent has an interest, is required to retain possession or control of such funds and report it to the Secretary of the Treasury.[277] Failure to comply can subject the financial institution to a penalty of $50,000 per violation, or twice the amount which the financial institution was required to retain and report.[278]

Section 2339B also allows for extraterritorial jurisdiction. This allows the courts to impose liability on persons or financial institutions even for acts that take place beyond our borders, and extends to any offense affecting interstate or foreign commerce.[279] It also imposes liability over any offender who aids or abets any person over whom such jurisdiction exists.[280]

The most recent section in the material support statutes is § 2339C.[281] Section 2339C implements the International Convention for the Suppression of the Financing of Terrorism, and it is the only terrorist

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[271] *Id.*
[272] *Id.* at 16–17.
[273] *Id.* at 20–21.
[274] *Id.*
[275] *Id.* at 25.
[276] *Id.* at 26.
[277] 18 U.S.C.S. § 2339B(a)(2)(A)–(B) (LexisNexis 2018).
[278] § 2339B(b)(A)–(B).
[279] § 2339B(d)(1)(C), (E).
[280] § 2339B(d)(1)(F).
[281] *See* 18 U.S.C.S. § 2339C (LexisNexis 2018); Michael Taxay, *What to Charge in a Terrorist Financing or Facilitation Case*, 62 U.S. ATTY'S BULL. 9, 11 (2014).

financing statute that specifically addresses the collection of funds.[282] This section makes it a crime to willfully provide or collect funds with the *intention* that such funds be used, or with the *knowledge* that such funds are to be used, in full or in part, in order to carry out acts of terrorism.[283] It imposes liability for funds provided or collected by "any means, directly or indirectly."[284]

The term "funds" is defined very broadly under the material support statutes. "'[F]unds' means assets of every kind, whether tangible or intangible, movable or immovable, however acquired."[285] It includes "legal documents or instruments in any form … evidencing title to, or interest in, such assets."[286] Such instruments include "coin, currency, bank credits, traveler's checks, bank checks, money orders, shares, securities, bonds, drafts, and letters of credit."[287]

While the statute does not explicitly address the recent phenomenon of "cryptocurrency" such as Bitcoin, the broad wording of the statute and several recent cases seem to indicate that this is a type of currency that would be subject to the ATA. For example, in 2017 a Long Island woman was indicted for using Bitcoin and other cryptocurrencies to commit bank fraud and launder money in support of ISIS, a designated FTO.[288] Although not a civil ATA case, this indictment indicates that the Department of Justice clearly considers Bitcoin to be currency under the meaning of federal banking laws.

Importantly, under § 2339C it is *not* required that the funds were actually used to carry out a predicate act, nor that the offense was committed within the borders of the United States.[289] It is sufficient if the funds were *directed towards* a predicate act against a national of the United States or his/her property, or towards any government property, anywhere in the world.[290] Attempts or conspiracies to commit such offenses are punished in the same manner as a primary violation.[291]

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[282] Taxay, *supra* note 281, at 11.

[283] § 2339C(a)(1)(A)–(B).

[284] *Id.*

[285] § 2339C(e)(1).

[286] *Id.*

[287] *Id.*

[288] *Long Island Woman Indicted for Bank Fraud and Money Laundering: Defendant Stole and Laundered Over $85,000 Using Bitcoin and Other Cryptocurrencies*, U.S. DEP'T OF JUST. (Dec. 14, 2017), https://www.justice.gov/usao-edny/pr/long-island-woman-indicted-bank-fraud-and-money-laundering-support-terrorists.

[289] *See* 18 U.S.C.S. § 2339C(b)(2)(A)–(C) (LexisNexis 2018).

[290] § 2339C(b)(2)(C)(i)–(iv).

[291] *See id.* § 2339C(a)(2).

The statute also explicitly criminalizes concealment of such activities.[292] It is an offense for any United States national, or any legal entity organized under the laws of the United States, to knowingly conceal or disguise the nature, location, source, ownership, or control of material support or funds provided in violation of § 2339B or §2339C.[293] Violations of §2339C may result in imprisonment for as long as ten years or a civil penalty of at least $10,000 per violation, or both.[294]

Because §2339C is a fairly new statute its full impact remains to be seen. Thus far, it has been used far less frequently than the other 2339 sections.[295] This is probably because it overlaps substantially with the other sections, and its scope is narrower because it only applies to the provision or collection of funds and not to material support more generally.[296] Additionally, the *mens rea* requirement in § 2339C is more stringent, requiring a specific intent of willfulness in providing the funds, and knowledge or intent for the funds to be used in a terrorist act.[297]

H. The Importance of Funding

Despite its limitations, the very enactment of §2339C serves to highlight the important role that financial funding plays in international terrorism. Terrorism simply cannot exist without financial support. According to the testimony of Stuart A. Levey, the former Under-Secretary of Terrorism and Financial Intelligence:

> [t]he maintenance of those terrorist networks, like al Qaeda, which threaten our national security, is expensive – even if a particular attack does not cost much to carry out. As the 9/11 Commission explained, groups like al Qaeda must spend money for many purposes – to recruit, train, travel, plan operations, and bribe corrupt officials, for example. If we can eliminate or even reduce their sources and conduits of money, we can degrade their ability to do all of these things, and thus can make them less dangerous.[298]

The importance of reducing funding to illicit activities, including terrorism, has been recognized for many decades. For example, the Bank

[292] *See id.* § 2339C(c).

[293] *See id; see also* 18 U.S.C.S. § 2339B (LexisNexis 2018).

[294] *See* § 2339C(d), (f).

[295] Taxay, *supra* note 281, at 11.

[296] *Id.*

[297] *Id.*

[298] Press Release, Testimony of Stuart A. Levey, Under Secretary Terrorism and Fin. Intelligence (Aug. 23, 2004), https://www.treasury.gov/press-center/press-releases/pages/js1869.aspx.

Secrecy Act, Title 31 U.S.C. Sections 5311 et seq. ("BSA"), was enacted in 1970 to address an increase in criminal money laundering though U.S. financial institutions.[299] The BSA requires banks to maintain programs designed to detect and report suspicious activity that might be indicative of money laundering and other financial crimes.[300] The required programs include Anti-Money Laundering ("AML") programs, and "Know Your Customer" ("KYC") programs to identify and prevent illegal financial transactions.[301] Under the BSA, it is a crime for a financial institution to fail to implement or effectively supervise the AML and KYC programs.[302]

Due to its status as the number one state sponsor of terrorism in the world,[303] transactions with Iran have received particular scrutiny. On May 6, 1995, President Clinton issued Executive Order 12959, which imposed comprehensive trade and financial sanctions on Iran due to the "unusual and extraordinary threat" that this country presents to the United States.[304] This executive order prohibits any financial transactions by United States persons relating to goods or services of Iranian origin.[305] It also prohibits any transaction that "evades or avoids, or has the purpose of evading or avoiding," these sanctions.[306] To implement these sanctions, the Secretary of the Treasury promulgated the Iranian Transactions Regulations, Title 31, Code of Federal Regulations, part 560 ("ITRs").[307] The ITRs completely prohibit U.S. depository institutions from servicing Iranian accounts, and from directly crediting or debiting Iranian accounts.[308]

In summary, financing is critical to terrorist organizations. As a result, financial institutions are required under the BSA to establish effective AML and KYC programs. Additionally, they are specifically prohibited from conducting financial transactions with Iran, due to the known policy of that country to provide material support to terrorists. Failure to comply with any of the above constitutes a federal crime.

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[299] *See* 31 U.S.C.S. § 5311 (LexisNexis 2018). *See also* Federal Deposit Insurance Act of 1970, Pub. L. No. 91-507, § 101, 84 Stat. 1114, 1114–15 (1970).

[300] *See* 31 U.S.C.S. § 5318A(b)(1)(A) (LexisNexis 2018).

[301] *See id.* § 5318(h); *see also* BD. OF GOVERNORS OF THE FED. RES. SYS. *Know Your Customer*, BANK SECRECY ACT MANUAL 1, 1 (1997), https://www.federalreserve.gov/boarddocs/SupManual/bsa/bsa_p5.pdf.

[302] See 31 U.S.C.S. § 5322 (LexisNexis 2018).

[303] *1995 Patterns of Global Terrorism*, FED'N OF AM. SCIENTISTS, https://fas.org/irp/threat/terror_95/ tersst.htm#Iran (last visited Feb. 25, 2019).

[304] *See* Exec. Order No. 12959, 60 Fed. Reg. 24757, 24757 (May 6, 1995).

[305] *See id.*

[306] *See id.* at 24757–58.

[307] *See* Iranian Transactions and Sanctions Regulations, 31 C.F.R. pt. 560 (2011) (amended 2018).

[308] *See id.* § 560.211.

I. Civil Actions based on Criminal Material Support to Terrorism: Conflicting Interpretations

Courts have dismissed many private civil causes of action in terrorism cases under Rule 12(b)(6).[309] For years, it was well-settled law that the ATA did not provide a civil cause of action for secondary liability (aiding/abetting and conspiracy).[310] Therefore, unless the plaintiff was able to make plausible allegations that the defendant *directly and personally* provided material support, the case would be dismissed for failure to state a claim upon which relief can be granted.[311] Although the 2016 Justice Against Sponsors of Terrorism Act (JASTA) has expanded civil liability under the ATA to include aiding/abetting and conspiracy,[312] there is very little uniformity among the circuit courts as to how strictly JASTA should be construed. At present, there appears to be at least three different interpretations of secondary liability under the ATA.[313]

1. Interpretation (1): Strict Construction of Secondary Liability

In *Brill v. Chevron*, decided in 2017, the District Court in the Northern District of California dismissed a case brought by 329 individual plaintiffs against the Chevron Corporation.[314] The plaintiffs accused Chevron of providing material support to Saddam Hussein, who used the funds to direct and pay for twenty-one separate terrorist attacks in Israel.[315] In 1990, following the First Gulf War, the United Nations ("UN") placed an embargo on Iraqi oil.[316] By 1996, the embargo had become so effective that it led to famine for the people of Iraq.[317]

[309] *See e.g.*, O'Neill v. Asat Tr. Reg. (In re Terrorist Attacks on September 11, 2001 (Asat Tr. Reg.)), 714 F.3d 659 (2d Cir. 2013), Linde v. Arab Bank, 97 F. Supp. 3d 287 (E.D.N.Y. 2015), Goldberg v. UBS AG, 660 F. Supp. 2d 410 (E.D.N.Y. 2009).

[310] Rothstein v. UBS AG, 708 F.3d 82, 97 (2d Cir. 2013) ("[T]he Supreme Court noted that [in 2013] 'Congress ha[d] not enacted a general civil aiding and abetting statute.'" (quoting Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 182 (1994))).

[311] *Id.* at 97–98.

[312] Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, § 2(a)(4), 130 Stat. 852 (2016).

[313] *See, e.g.*, Linde v. Arab Bank, No. 16-2119-cv (L) at 29–33 (2d Cir. Feb. 9, 2018); Hussein v. Dahabshiil Transfer Serv's Ltd., 230 F. Supp. 3d 167, 175 (S.D.N.Y. 2017); Brill v. Chevron, Corp., No. 15-cv-04916-JD, 2017 U.S. Dist. LEXIS 4132, at *15–16 (N.D. Cal. Jan. 9, 2017).

[314] Brill v. Chevron, Corp., No. 15-cv-04916-JD, 2017 U.S. Dist. LEXIS 4132, at *7 (N.D. Cal. Jan. 9, 2017).

[315] *Id.*

[316] *Id.* at *8.

[317] *Id.*

In response to the famine, the UN established an "oil-for-food" program, under which the Iraqi government was permitted to sell a limited quantity of oil, with the restriction that all proceeds would be deposited into a UN-supervised escrow account which Iraq could draw upon only to purchase humanitarian goods for the Iraqi people.[318] Beginning in 2000, Hussein managed to turn this humanitarian program into an opportunity to collect bribes by conditioning its oil sales on the payment of secret surcharges.[319] The plaintiffs accused Chevron of paying such surcharges to Iraq and concealing the payments in the accounting records by falsely designating the bribes as "premiums."[320] The Securities and Exchange Commission ("SEC") filed criminal charges against Chevron for the illegal activity, and Chevron paid over twenty-seven million dollars in fines and disgorgement.[321] The plaintiffs subsequently filed a private civil suit against Chevron under the ATA.[322]

Because Saddam Hussein was not designated as an FTO, both sides stipulated that secondary liability did not apply.[323] The court stated, "As an initial matter, both sides agree that there is no aiding and abetting liability under the ATA, and consequently the complaint must state a claim against Chevron as the primary violator. The court accepts that undisputed position, which is consistent with what other circuit courts have found."[324]

The court determined that in order to show primary liability, the plaintiffs would need to prove that Chevron itself committed acts dangerous to human life which would be in violation of U.S. law if they had been committed within the jurisdiction of the United States, in accordance with the definition of "international terrorism" under the ATA.[325] Additionally, the plaintiffs would have to show that Chevron's acts appeared to be intended to intimidate or coerce a civilian population, or to influence or affect the conduct of a government.[326] The court found that the plaintiffs' complaint contained no allegation that Chevron's kickbacks to Saddam Hussein would have the foreseeable consequence of intimidating the civilian population or coercing a government.[327] The

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[318] *Id.*
[319] *Id.*
[320] *Id.* at *8–9.
[321] *Id.* at *9.
[322] *Id.* at *7.
[323] *Id.* at *15–16.
[324] *Id.*
[325] *Id.* at *16–17.
[326] *Id.* at *17.
[327] *See id.* at *17–20.

court dismissed the case without prejudice in order to allow the plaintiffs to amend their ATA claim to encompass these definitional elements.[328]

However, the court expressed doubt that even an amended complaint would be successful to show primarily liability, because the plaintiffs do not allege that Chevron participated in the attacks or provided money "directly to" Saddam Hussein, nor that the money that Chevron paid was actually used to carry out the attacks.[329] As this case demonstrates, under a strict interpretation of JASTA, it is very difficult to prove primary liability against persons who provided only indirect support to terrorists.

Of note, the plaintiffs in *Chevron* also attempted to show a violation of 2339C, which criminalizes providing funds with the knowledge that they are to be directed towards terrorist acts, or the concealment thereof.[330] However, the court dismissed that portion of the complaint with prejudice, because the acts of terrorism in question occurred prior to the enactment of 2339C.[331] Therefore, the court did not opine on whether Chevron's actions violated 2339C, nor whether such a violation, if proven, would be sufficient to establish primary civil liability under the ATA.

2. Interpretation (2): Material Support is a Primary Violation of the ATA

On the other hand, some courts have held that even if the statute still forbids secondary liability, a violation of § 2339 may be a *primary* violation of the ATA.[332] This view is based on the close connection between the ATA and the criminal material support statutes.[333] The definition of "international terrorism" in the ATA is explicitly incorporated by reference in § 2339, and each of the three sections of § 2339 imposes liability for *conspiracy* to provide material support.[334] Therefore, under this view, a person who conspires to violate § 2339 is not a *secondary* violator of the ATA, but a *primary* violator.[335] In this view, the question of whether the ATA allows secondary liability becomes practically irrelevant.[336]

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[328] *Id.* at *20–21.

[329] *See id.*

[330] *Id.* at *16–17. *See* 18 U.S.C.S. § 2339C(a), (c) (LexisNexis 2018).

[331] Brill, *supra* note 314, at *17.

[332] *See* Hussein v. Dahabshiil Transfer Serv's Ltd., 230 F. Supp. 3d 167, 174–75 (S.D.N.Y. 2017).

[333] *Id.* at 175.

[334] *Id.*

[335] *Id.*

[336] *See id.*

This view was articulated in the recent case of *Hussein v. Dahahshiil Transfer Services*.[337] In that case, relatives of United States citizens who were killed by an FTO in Somalia brought a civil cause of action for conspiracy to violate the ATA.[338] The plaintiffs filed suit against several financial entities, alleging that they were part of a network that engaged in the transfer of funds to the Middle East and South Asia for the purpose of funding terrorist organizations.[339]

The plaintiffs alleged that the defendants conspired to provide support to al Shabaab, a designated FTO, by intentionally adopting substandard AML and KYC banking policies.[340] These allegations were based only upon a series of four small transactions between individuals in the United States and individuals who were allegedly associated with al Shabaab.[341] The transfers were sent through U.S.-based Dahabshiil entities, and altogether totaled only $950.[342] The defendant moved for dismissal under Rule 12(b)(6), because the alleged conspiracy asserted a claim for secondary liability which they claimed is not actionable under the ATA.[343]

The court began by reviewing the three essential elements of liability under the ATA: unlawful action, knowledge, and causation. All parties agreed that providing material support to an FTO in violation of § 2339, if proven, would satisfy the "unlawful action" element.[344] The court then analyzed the *mens rea* requirement of knowledge, stating, "[b]ecause the material support statutes require the same (or a greater) showing of *mens rea* than does § 2333(a), a plausible allegation . . . of the material support provisions establishes both 'unlawful action' and scienter for purposes of § 2333(a)."[345] In other words, violation of a criminal material support statute would, in and of itself, satisfy both the first and the second elements of the ATA. Most importantly, the court explicitly stated that criminal conspiracy to materially support terrorism is a *primary*, not a secondary, violation of the ATA.[346] Therefore, the defendants' motion to dismiss due to impermissible secondary liability was rejected.

However, the court went on to determine that in this particular case, the plaintiffs had not sufficiently alleged a violation of any of the material

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[337] *Id*. at 174–75.
[338] *See id*. at 170, 170.
[339] *Id*.
[340] *Id*. at 172–73.
[341] *Id*. at 173.
[342] *Id*.
[343] *Id*. at 170–71, 174.
[344] *Id*. at 171.
[345] *Id*.
[346] *Id*. at 175.

support statutes.[347] The complaint had failed to allege that any of the defendants transferred money while on notice that the funds might go to al Shabaab.[348] Nor did the plaintiffs show that the defendants failed to adequately maintain their AML or KYC programs.[349] All in all, the complaint did little more than allege that the defendants did business in a "dangerous country . . . involv[ing] potentially risky transactions."[350] Based on the plaintiffs' failure to state facts sufficient to support an allegation of conspiracy under the criminal material support statutes, the court dismissed the case.[351]

Despite the failure of this particular claim, the ramifications of the court's analysis are potentially profound. In contrast to previous opinions in cases like *Chevron*, here the court made it clear that financial institutions that violate the criminal material support statutes may be civilly liable as primary violators of the ATA, even without a showing that the defendant directly participated in the attack or even that the material support was actually used to carry out the attack. Under this view, material support in violation of any of the three § 2339 provisions would seem to be sufficient to bring a civil case under the ATA. As the court put it, if a plaintiff is able "plausibly to allege a conspiracy to provide material support, that would potentially give rise to a civil claim under § 2333(a)."[352]

3. Interpretation (3): The ATA, as Amended by JASTA, Now Permits Secondary Liability

As explained above, Congress amended the ATA in late 2016 with the express intent of allowing secondary liability.[353] Because this is still a fairly new change, there is not a large amount of case law interpreting the new statute. One very recent case that might be instructive is *Linde v. Arab Bank*, decided by the Second Circuit Court of Appeals in February of 2018.[354] This was an appeal by Arab Bank against a judgment of one hundred million dollars in favor of the plaintiffs.[355] Arab Bank, headquartered in Jordan, is one of the largest banks in the Middle East.[356]

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[347] *Id.* at 176.

[348] *Id.*

[349] *Id.* at 177.

[350] *Id.* at 178.

[351] *See id.*

[352] *Id.* at 176.

[353] Justice Against Sponsors of Terrorism Act, 114 Pub. L. 222, § 2(a)(4), (b), 130 Stat. 852 (2016).

[354] *See* Linde v. Arab Bank, No. 16-2119-cv (L) (2d Cir. Feb. 9, 2018).

[355] *Id.* at 2.

[356] *Id.* at 12–13.

At trial, a jury found the bank liable for providing financial services to Hamas, its leaders, and charities that funded its activities including payments to the families of suicide bombers.[357] The jury determined that these acts were violations of § 2339B, and found the defendant civilly liable under the ATA.[358] In lieu of further litigation, the parties stipulated to a damage award of one hundred million dollars in addition to a confidential settlement agreement which provided for certain plaintiffs to receive specified payments based on the outcome of an appeal.[359] The agreement specifically disallowed the parties from seeking a new trial.[360]

The original trial took place in August of 2014, prior to the enactment of JASTA, so the court dismissed the secondary liability claims of aiding and abetting and conspiracy.[361] However, the court seemed to accept the view that a violation of the material support statutes—§ 2339B in this case—was a primary violation of the ATA.[362] To this point, the trial court instructed the jury that a finding that Arab Bank had violated § 2339B was sufficient to constitute "international terrorism" under the ATA.[363] The jury found for the plaintiffs, and the bank appealed.[364]

On appeal, the bank asserted that the judge's jury instruction regarding the definition of "international terrorism" was improper and prejudicial.[365] It also asserted that the judge had improperly instructed the jury on proximate rather than "but-for" causation, and that the evidence at trial was insufficient to prove causation under either theory.[366] The Second Circuit sided with the bank on the first point, but ruled against it on the second.[367]

The Second Circuit determined that the district court's instruction that a violation of § 2339B would automatically meet the definition of international terrorism under the ATA was improper, because that term has several elements, all of which must be satisfied.[368] Specifically, the act must have occurred outside of the United States; it must be an act that would be a violation of federal law if it had occurred inside the United States; it must involve violence or endanger human life; and it must appear to be intended to intimidate or coerce a civilian population or to

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[357] *Id.* at 5.
[358] *Id.* at 2, 8.
[359] *Id.* at 2, 5–6.
[360] *Id.* at 39.
[361] *Id.* at 6–7, 9.
[362] *Id.* at 10.
[363] *Linde v. Arab Bank*, 97 F. Supp. 3d 287, 322–23 (E.D.N.Y. 2015).
[364] *Id.* at 298–99, 322–23.
[365] *Id.* at 322–23.
[366] *Linde*, No. 16-2119-cv (L), slip op. at 6, 28–29.
[367] *Id.* at 28–30.
[368] *Id.* at 35.

influence a government.[369] The court found that since it is possible to commit a violation of § 2339B by conduct that does not involve violence nor appear intended to coerce a population or government, a violation of § 2339B does not *necessarily* meet the definition of international terrorism under the ATA.[370] Therefore, the jury should have been instructed on each of these definitional elements separately.[371]

The plaintiffs countered that the distinction was no longer relevant, because Congress had added "aiding and abetting" liability to the ATA with the 2016 JASTA.[372] Significantly, the court agreed with this assertion, stating that under the amended statute the plaintiff would *not* have to prove that the bank's own actions satisfied all the definitional elements of international terrorism.[373] However, since that amendment had not yet been enacted when the case was originally sent to the jury, the court was unable to decide whether aiding and abetting had been proven.[374] As a result, the court vacated the judgment and remanded.[375] However the court, in dicta, indicated that on remand the evidence might be sufficient to succeed under a theory of secondary liability under the amended ATA.[376]

Additionally, the court found no error with the district court's proximate cause instruction.[377] The court found that the evidence in the record was not clearly insufficient to prove secondary liability, which is now authorized under the ATA.[378] Therefore, the court determined, the proper remedy was not reversal, but to vacate and remand.[379] Despite this, the parties will not pursue further litigation due to the settlement agreement.[380] *Arab Bank* is a significant step in the development of terrorism litigation because even though the court did not directly reach a decision on secondary liability, it recognized that the JASTA has created it as a cause of action under the ATA.

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[369] *Id.* at 8–9.
[370] *Id.* at 24–25.
[371] *Id.* at 25.
[372] *Id.* at 28.
[373] *Id.* at 29–30.
[374] *Id.* at 27–30.
[375] *Id.*
[376] *Id.*
[377] *Id.* at 35–36.
[378] *Id.*
[379] *Id.*
[380] *Id.* at 36–37.

J. The Importance of the Pleading

Regardless of which theory the plaintiff seeks to recover under, the importance of a well-written complaint cannot be overstated. This is especially true in light of the stricter federal standards articulated in *Twombly/Iqbal,* which require allegations be specific enough to show that the alleged conduct is "plausible," not merely "possible."[381] Given the complexity of terrorism cases, especially those involving material support and financing, plaintiffs should err towards pleading with a high degree of specificity, being careful to provide facts sufficient to plausibly show that all the elements of the statutes are satisfied. In particular, plaintiffs must pay special attention to the definitions of the terms which are embedded in the ATA.

For example, as discussed above, the *Chevron* court dismissed the case because the plaintiffs failed to allege that the acts in question were committed in order to coerce or intimidate the civilian population or effect the policy decisions of a government. The requirement to make this allegation is not immediately obvious when casually reading the material support statutes, as the definition of "international terrorism" is incorporated from a separate section of the ATA.

III. TAKING THE NEXT STEP: HOLDING U.S. BANKS ACCOUNTABLE UNDER THE ATA

The JASTA amendments to the ATA may have opened the door to secondary liability for acts of terror conducted with funds obtained through illicit transactions knowingly funneled through U.S.-based banks. Although it has traditionally been difficult to establish civil liability over banks for their roles in supporting terrorist activity, the Second Circuit's "aiding and abetting" dicta in *Arab Bank* indicates that the JASTA may have made it easier by eliminating the requirement to show that the bank's own actions satisfied all the definitional elements of international terrorism.

However, even under a theory of secondary liability, holding a U.S.-based bank accountable for overseas acts of terror committed by an FTO is rather complex. It is not as simple as the facts of *Arab Bank,* where the defendants were accused of transacting with the terrorists directly. On the contrary, it is very unlikely that any bank with a significant business presence inside the United States would have dealt directly with a group like al Qaeda or Hamas. Rather, it is much more likely for such a bank to

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[381] Ashcroft v. Iqbal, 556 U.S. 662, 686–87 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 (2007).

support terrorism in a more attenuated way, by dealing with third parties which the bank knows (or should know) are likely to provide material support to terrorists. Such third parties include the four state sponsor of terror nations themselves, as well as other financial institutions which are known to provide material support to FTOs.

Federal courts have held that it is not necessary to show that the defendant bank had specific intent to support terrorism.[382] It is only necessary to show that the bank acted with knowledge that the organization with which it is doing business is *connected* to terrorism.[383] Routine banking practices alone are usually not enough to raise an inference of such knowledge.[384] However, knowledge may be inferred when banks were aware of unusual activity that is not part of the bank's ordinary course of business.[385] For example, National Westminster Bank was found to have knowledge under the ATA when it was aware of large transfers of money to the Israeli West Bank and Gaza during a highly-publicized Palestinian uprising.[386] Similarly, the plaintiffs were found to have sufficiently alleged knowledge when Credit Lyonnais Bank conducted transactions with third party banks which the government of Israel had designated as terrorist fronts.[387]

Thus, it seems well-settled that unusual banking activity can be sufficient to support an inference of knowledge, if there is a foreseeable risk that the money will end up in terrorist hands. As explained above, financial funding is essential to terrorists. It is the fuel that enables their heinous acts. Terrorist organizations simply cannot exist without money. As a result, there are many criminal laws that apply to banks. In addition to the material support statutes, these include the Bank Secrecy Act which requires banks to maintain effective AML and KYC programs.[388] There are also numerous federal laws which prohibit transactions with known terrorist organizations and with state sponsors of terror.[389]

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[382] *See Linde*, No. 16-2119-cv (L), slip op. at 31–32.

[383] Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 44–46 (D. D.C., 2010).

[384] *In re* Terrorist Attacks on September 11, 2001, 714 F.3d 118, 124 (2d Cir. 2013).

[385] Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 588 (E.D.N.Y, 2005).

[386] Weiss v. Nat'l Westminster Bank PLC, 453 F. Supp. 2d 609, 625–626 (E.D.N.Y. 2006).

[387] Strauss v. Credit Lyonnais, S.A., No. 06-0702, 2006 U.S. Dist. LEXIS 72649, at *47 (E.D.N.Y, Oct. 5, 2006).

[388] *See generally* Federal Deposit Insurance Act, Pub. L. No. 91-508, § 101, 84 Stat. 1114, 1115 (1970); *see also Bank Secrecy Act 101: Six Things Every AML Person Needs to Know*, ACAMSTODAY, (Dec. 4, 2012), https://www.acamstoday.org/six-things-every-aml-person-needs-to-know/.

[389] *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 2001, 115 Stat. 272 (2001); *see also* 31 CFR §§ 594-97.

Following the 9/11 terror attacks, the Department of Justice increased its scrutiny of banking practices in an attempt to reduce the amount of money making its way into terrorist coffers.[390] Since then, numerous banks have been charged with criminal banking law violations. These banks almost always enter into deferred prosecution agreements with the DOJ.[391] Under these agreements proceedings in a criminal case are put off for a period of time.[392] After the end of the time period, if the defendant has fulfilled all of the conditions, the charges are dismissed and no plea is entered.[393] However, if the defendant does not comply, the prosecution continues.[394]

Banks that have entered into such agreements include, but are not limited to:

- **HSBC Bank USA:** In December of 2012, the bank admitted knowingly and willfully violating the BSA by failing to maintain adequate AML and KYC programs, and concealing prohibited transactions for sanctioned entities in Iran, Libya, Sudan and Burma in violation of U.S. law, resulting in fines of $1.25 billion and a five-year probation period.[395]
- **ING Bank N.V:** In June of 2012, the DOJ and the New York County District Attorney's Office entered into simultaneous deferred prosecution agreements with ING Bank relating to 20,000 transactions totaling $1.6 billion processed through the U.S. financial system on behalf of Cuban and Iranian entities from the early 1990s through 2007, resulting in a fine of $619 million.[396]
- **Barclays Bank**: In August of 2010, the DOJ and the New York County District Attorney's Office entered into deferred prosecution agreements with Barclays Bank for activity relating to transactions illegally conducted for customers in Cuba, Iran, Libya, Sudan, and Burma

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[390] Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, THE NEW YORKER, (Jul. 31, 2017), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail.

[391] *Id.*

[392] Michael R. Cohen, *General Concepts of a Deferred Prosecution Agreement (DPA)*, AVVO (Aug. 14, 2011), https://www.avvo.com/legal-guides/ugc/general-concepts-of-a-deferred-prosecution-agreement-dpa.

[393] *Id.*

[394] *Id.*

[395] *Deferred Prosecution Agreement*, United States v. HSBC Bank USA., 2012 WL 6020512 (E.D.N.Y. 2012) (No. 12-763) [hereinafter *Prosecution Agreement*].

[396] Press Release, Dep't of Justice Office of Pub. Affairs, ING Bank N.V. Agrees to Forfeit $619 Million for Illegal Transactions with Cuban and Iranian Entities (Jun. 12, 2012) (on file with author).

from the mid-1990s until September 2006, resulting in a fine of $298 million.[397]

- **ABN Amro Bank:** In May of 2010, the DOJ entered into a deferred prosecution agreement with ABN Amro Bank for removing information from wire transfers from 1995 to 2005 for customers in Iran, Libya, the Sudan, Cuba, and other sanctioned countries, resulting in a fine of $500 million.[398]
- **Credit Suisse Bank:** In December of 2009, the DOJ entered into a deferred prosecution agreement with Credit Suisse relating to alterations on wire transfers from 1995 to 2006 from Iran, Cuba, Burma, and Libya, resulting in a fine of $536 million.[399]
- **Lloyd's Bank:** In January of 2009, the DOJ and the New York County District Attorney's Office entered into deferred prosecution agreements with Lloyd's Bank for wire stripping transactions from the mid-1990s through September 2007, resulting in a fine of $217 million.[400]
- **Australia and New Zealand Bank Group Ltd**.: In August of 2009, the Treasury Department entered into a settlement with the Australia and New Zealand Bank Group relating to currency exchanges from 2004 to 2006, for transactions processed through U.S. correspondent accounts for customers in Cuba and Sudan, resulting in fines of $5.75 million.[401]

As part of the deferred prosecution agreements, these banks are required to acknowledge that the criminal allegations are "true and accurate," and to agree that they will not, "in litigation or otherwise," deny responsibility or contradict any statement contained in the agreements.[402]

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[397] Press Release, Dep't of Justice Office of Pub. Affairs, Barclays Bank PLC Agrees to Forfeit $298 Million in Connection with Violations of the International Emergency Economic Powers Act and the Trading with the Enemy Act (Aug. 18, 2010) (on file with author).

[398] Press Release, Dep't of Justice Office of Pub. Affairs, Former ABN Amro Bank N.V. Agrees to Forfeit $500 Million in Connection with Conspiracy to Defraud the United States and with Violation of the Bank Secrecy Act (May 10, 2010) (on file with author).

[399] Press Release, Dep't of Justice Office of Pub. Affairs, Credit Suisse Agrees to Forfeit $536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York State Law (Dec. 16, 2009) (on file with author).

[400] Press Release, U.S. Dep't of Treasury, U.S. Treasury Department Announces Settlement With Lloyds TSB Bank, PLC. (Dec. 22, 2009) (on file with author).

[401] Settlement Agreement at 1, 5, *U.S. v. Australia and New Zealand Banking Group Ltd.*, No. MUL-464334 (Aug. 21, 2009) https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/anz_08242009.pdf.

[402] *Prosecution Agreement*, *supra* note 395.

A. Congressional Intent: Secondary Liability Under the ATA (*Halberstam v. Welch*)

Congress specifically stated that civil liability under the ATA is to be guided by *Halberstam v. Welch*.[403] This is the case which set the modern standard for federal civil aiding and abetting and conspiracy liability.[404] In *Halberstam*, the co-defendant, Linda Hamilton, was held civilly liable as a joint venturer and coconspirator for the killing of Dr. Michael Halberstam, a Washington D.C. physician.[405] Dr. Halberstam was shot and killed by Bernard Welch, Linda Hamilton's live-in boyfriend, as Welch was burglarizing Halberstam's home. At trial, the district court held Ms. Hamilton jointly and severally liable for the murder, even though she played no direct part in burglary or the killing.[406]

Bernard Welch, while living with Ms. Hamilton, had committed a five year-long string of nighttime burglaries, amassing a fortune in stolen goods. Ms. Hamilton never accompanied Welch during the burglaries, and claimed that she did not have knowledge of his crimes. However, by the time Welsh was finally apprehended, the couple had an income of over one million dollars per year from the criminal enterprise.[407] The district court found that Hamilton was aware of her boyfriend's regular nighttime outings, and of the great disparity between the couple's meager legitimate income and their actual accumulated wealth.[408] Ms. Hamilton also had actual knowledge that Welch had installed a smelting furnace in the couple's garage, which he routinely used to smelt pieces of gold and silver into bars.[409]

Furthermore, after the police arrested Welch, they discovered in the couple's basement fifty boxes which contained over three thousand stolen items including antiques, furs, jewelry, silverware and various household and personal effects.[410] Although Hamilton claimed that she rarely went into the basement, she admitted that she did have a key and free access to the space.[411] Additionally, when Welch sold gold and silver bars to refineries in other states, Hamilton had typed up the transmittal letters. She also kept inventories and business records which showed money coming in from buyers, but indicated no money being paid out to

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[403] Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 2 (a)(5), 130 Stat. 852, 852 (2016).

[404] *Id.*

[405] Halberstam v. Welch, 705 F. 2d 472, 474, 488 (D.C. Cir. 1983).

[406] *Id.* at 474.

[407] *Id.* at 475.

[408] See *id.* at 475–76.

[409] *Id.* at 474–75.

[410] *Id.* at 476.

[411] *Id.*

suppliers.[412] Based on this evidence, the district court found Ms. Hamilton civilly liable for Welch's acts, both for the burglaries and the murder, under theories of conspiracy and aiding and abetting.[413]

Ms. Hamilton appealed to the U.S. Court of Appeals for the District of Columbia.[414] The court stated the issue on appeal as "what kind of activities of a secondary defendant (Hamilton) will establish vicarious liability for tortious conduct (burglaries) by the primary wrongdoer (Welch), and to what extent will the secondary defendant be liable for another tortious act (murder) committed by the primary tortfeasor while pursuing the underlying tortious activity."[415] To resolve the issue, the court conducted an in-depth analysis of aiding and abetting, and conspiracy liability that is instructive to the future application of the JASTA to defendant banks.[416]

B. Conspiracy under the ATA

> Civil conspiracy is not independently actionable, but will only lie as a means for establishing vicarious liability for the underlying tort.[417] The court stated the elements of civil conspiracy as: (1) an *agreement* between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.[418]

The court pointed out that in a civil conspiracy action, the agreement need only be "tacit, as opposed to explicit."[419] In other words, to prove liability for civil conspiracy, the plaintiff need only prove a tacit agreement to participate in a wrongful activity, and show an overt tortious act in furtherance of the agreement.

The key focus in a conspiracy case is the *agreement* to act in an unlawful manner. It has long been recognized that in most cases, it is not possible, or necessary, to prove the existence of such an agreement using direct evidence.[420] Rather, "[a] conspiracy . . . may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances

[412] *Id.* at 475–76.
[413] *Id.* at 474, 476.
[414] *Id.* at 474.
[415] *Id.* at 476.
[416] *See id.* at 476–77.
[417] *Id.* at 479.
[418] *Id.* at 477 (emphasis added).
[419] *Id.*
[420] *See id.* at 477–78.

which vary according to the purpose to be accomplished."[421] Accordingly, a conspiracy may be established if the plaintiff can show that the defendants "pursued the same object, although by different means, one performing one part and another, another part."[422]

The *Halberstam* Court relied on *Peterson v. Cruickshank* in its analysis of conspiracy.[423] In *Peterson,* a defendant husband was held civilly liable for conspiring to falsely imprison his female companion in a sanitarium, where she received electric shock treatments.[424] At trial Peterson was held liable even though he did not direct the doctor at the sanitarium either to imprison her, or to administer the shocks.[425] His liability was based on circumstantial evidence that pointed to a common intent between the defendants.[426] These included Peterson's payment of the sanitarium bills; his past stormy personal relationship with the woman which provided him with a motive to have her restrained; and evidence of a conversation during which Peterson told a codefendant doctor of his falling out with the woman and his willingness to pay all bills for her "treatment."[427] Shortly after this conversation with Peterson, the doctor confined the woman to the sanitarium and secured, under suspicious circumstances, her "consent" to shock treatments.[428] Despite the fact that there was no direct evidence of an agreement, the court deemed the facts of the case sufficient to support an *inference* of a common objective between the codefendants, and the trial court's holding was affirmed.[429]

In summary, civil conspiracy liability depends on an agreement to engage in wrongful conduct. The agreement need not be explicit, and may be inferred from the defendant's actions. "Once the conspiracy has been formed, all its members are liable for the injuries [suffered]."[430] This is true regardless of whether the defendant actively participated in, or benefitted from, the wrongful act.[431]

C. Aiding and Abetting under the ATA

The *Halberstam* court also analyzed civil liability for aiding and abetting. The elements of aiding and abetting are:

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[421] Davidson v. Simmons, 280 N.W.2d 645, 648–49 (Neb. 1979).
[422] *Id.*
[423] *Halberstam*, 705 F.2d at 480.
[424] Peterson v. Cruickshank, 300 P.2d 915, 918 (Cal. Dist. Ct. App. 1956).
[425] *See id.* at 925, 928.
[426] *Id.* at 929.
[427] *Id.* at 925–27.
[428] *Id.* at 926–27.
[429] *Id.* at 928.
[430] *Halberstam*, 705 F.2d at 481.
[431] *Id.*

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; and (3) the defendant must *knowingly and substantially assist* the principal violation.[432]

One need not perform overt wrongful acts in order to be liable for aiding and abetting.[433] Even offering advice or encouragement to the wrongdoer will suffice, if it operates as "moral support to a tortfeasor and . . . has the same effect upon the liability of the adviser as participation or physical assistance."[434]

For example, in *Rael v. Cadena*, a defendant was held civilly liable for shouting "Kill him!" and "Hit him more!" at an assailant, even though the defendant did not actively participate in the assault.[435] It is important to note that the words of encouragement need not be as explicit as those in *Rael*.[436] Even mere suggestive words, especially when spoken by a person in authority, have been found to provide substantial advice and encouragement.[437] In *Cobb v. Indian Springs, Inc.*, a security guard who urged a younger fellow employee with a new car to "run [the car] back up here and see what it will do," was held civilly liable when the young driver struck the plaintiff while trying to avoid a pedestrian during his high-speed test run.[438] The appellate court affirmed that the guard's encouragement was substantial because he had first proposed the trial drive even though he could have foreseen the risk, and his position of authority gave his suggestion extra weight.[439]

Civil aiding and abetting liability may also be based on small, seemingly non-nefarious *acts* of assistance.[440] For example, *Keel v. Hainline* concerned a group of students who were throwing erasers at one another in a classroom.[441] The plaintiff, who was not participating in the game, was struck by an eraser. The eraser shattered her glasses and she lost the use of an eye.[442] A student who had not thrown a single eraser, but who had retrieved and handed erasers to the throwers, was found

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[432] *Id.* at 477.
[433] *See id.* at 478.
[434] *Id.*
[435] Rael v. Cadena, 604 P.2d 822, 822 (N.M. Ct. App. 1979).
[436] *See Halberstam*, 705 F.2d at 481.
[437] *Id.* at 481–82.
[438] Cobb v. Indian Springs, Inc., 522 S.W.2d 383, 387 (Ark. 1975).
[439] *Id.*
[440] *Halberstam*, 705 F.2d at 482.
[441] Keel v. Hainline, 331 P.2d 397, 398–99 (Okla. 1958).
[442] *Id.*

liable for the injury.[443] By supplying the erasers, he had *substantially assisted* the wrongful activity that resulted in the injury.[444] This was true even though it was not clear whether the defendant had actually handed any erasers to the particular boy who actually threw the one that struck the plaintiff.[445]

In summary, a defendant can be held civilly liable for knowing acts or words which substantially encourage a wrongdoer's action. Unlike conspiracy, which focuses on an agreement between coconspirators, aiding and abetting analysis focuses on the nature of the assistance provided, and whether it was knowing and substantial. A person who knowingly provides such assistance or encouragement may be held civilly liable for the reasonably foreseeable acts done in connection with the assistance.[446]

D. Interpreting the ATA under Halberstam

The D.C. Circuit's application of civil conspiracy and aiding-abetting liability in *Halberstam* is critical to understanding the ATA because Congress specifically stated that the interpretation of the statute is to be guided by this case.[447] In *Halberstam*, the circuit court affirmed that Ms. Hamilton was civilly liable for the acts of her boyfriend, both for conspiracy and for aiding-abetting.[448] For conspiracy, the court determined that her actions were sufficient allow a factfinder to infer that an agreement had been reached.[449] For aiding and abetting, the court found that her acts were knowing and substantial enough to sustain a finding of civil liability, even though she never actively participated in either the burglaries or the murder.[450]

The precedent cases that *Halberstam* relied on in its analysis of the two theories of secondary liability are perhaps even more instructive than the holding of the case itself. In *Peterson*, the defendant was held liable for conspiracy as a result of a conversation which implied that he wanted his female companion to be falsely imprisoned in a sanitarium.[451] In *Keel*, a boy was held liable for aiding and abetting, merely for handing out erasers.[452] These cases indicate that the scope of conspiracy and aiding and abetting are quite broad. It is through this wide lens that Congress

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[443] *Id.* at 400.

[444] *Id.*

[445] *Id.*

[446] *Halberstam*, 705 F.2d at 481.

[447] Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 2(a)(5), 130 Stat. 852 (2016).

[448] *Halberstam*, 705 F.2d at 474.

[449] *Id.* at 487.

[450] *Id.* at 487–88.

[451] Peterson v. Cruickshank, 300 P.2d 915, 925, 927–28 (Cal. Dist. Ct. App. 1956).

[452] *Halberstam*, 705 F.2d at 482.

has specifically directed us to view the civil cause of action for injuries suffered to person, property, or business by reason of an international act of terrorism.

E. Applying Halberstam to Banks Under the ATA

As explained above, under the ATA, conspiracy liability depends on an agreement to engage in an unlawful act. The agreement may be inferred from the defendant's actions. It also requires an injury caused by an unlawful overt act performed by one of the parties to the agreement. Finally, it requires that the overt act must have been done in furtherance of the common scheme.

When applying the *Halberstam* standard to the alleged illegal conduct of banks, the first two elements of conspiracy will be easily satisfied. However, the remaining two elements are more problematic. For example, take the hypothetical case of "Bank A." Bank A is a very large international financial institution with multiple locations inside the U.S. Further suppose that "Bank B" is a small bank located in the Middle East. Due to a repeated history of maintaining accounts for known terrorist organizations, the U.S. government has enacted regulations prohibiting U.S. banks from conducting any business with Bank B. In violation of the law, Bank A conducts millions of dollars in transactions with Bank B, intentionally removing any indications of the source of transactions from its business records. This arrangement goes on for many years. One day, a designated FTO which maintains accounts with Bank B detonates an explosive device, killing U.S. nationals. The families of the victims file a civil suit against Bank A under the ATA.

There is no doubt in this hypothetical scenario that Bank A has entered into an agreement with Bank B, and that this agreement meets the definition of "wrongful" under the ATA. However, although the victims of the terror attack and their families have certainly been injured, it is less clear that these injuries were caused by the overt acts of one of the parties to the agreement. Whether or not this element will be satisfied depends on how many degrees of separation the court and the jury is willing to allow. If the parties to the agreement are considered only to be Bank A and Bank B, it is not likely that this element will be met, since neither of the banks personally committed the act of terrorism. However, if the FTO is also considered to have been a party to the agreement, it is possible that this element may be satisfied.

Similarly, whether the terror attack was done in furtherance of a common scheme will depend on how broadly the court is willing to construe conspiracy liability. If the plaintiffs are required to show that Bank A, Bank B, and the FTO were all involved in a common scheme to commit an act of terrorism, it is almost certain that the complaint will be

dismissed. It would be nearly impossible to make the case that a major bank was an active participant in such a scheme.

On the other hand, if the plaintiffs are required only to show that Bank A was involved in a common scheme to launder money, which it should reasonably know would end up in the hands of a terrorist organization, which would likely use the funds to conduct terror attacks, the plaintiffs may then be able to allege a sufficient claim for relief. In *Halberstam*, the defendant was liable for her bookkeeping related to the proceeds of a burglary scheme that resulted in a murder, when she knew (or should have known) that the funds were part of an ongoing and dangerous criminal enterprise. Likewise, a bank that conceals its entry into an illegal agreement with another bank that is a known supporter of terror may be found liable as a conspirator for the results of a terrorist attack. Although conceivable under the explicit terms of the ATA, this would require a rather broad interpretation of conspiracy, and it remains to be seen if courts are willing to go this far.

Aiding and abetting, under the *Halberstam* interpretation, is probably an easier case for a plaintiff to make than conspiracy. Aiding and abetting requires only that the bank knowingly and substantially assist another party while being "generally aware" of that party's role in an illegal activity.[453] The analysis focuses on the nature of the assistance provided, whether it was knowing and substantial, and whether the acts were reasonably foreseeable.[454] In *Keel*, a boy was held liable simply for handing an eraser to another boy who then threw it. Handing an eraser to another person is not, by itself, a wrongful act. There is nothing illegal about it. Yet the boy was still liable, because providing the eraser substantially aided the thrower, and under the circumstances it was reasonably foreseeable that it would be thrown.

On the surface, it seems that *Halberstam* provides a clear pathway to holding banks secondarily liable for material support to international terrorism. However, it remains far from certain that courts will be willing to construe liability so far. For one thing, courts will be acutely aware that such an interpretation might open up a floodgate of litigation from plaintiffs seeking to hold international banks liable for nearly every act of international terrorism since 9/11 which are not time barred by the ten year statute of limitations. Therefore, even if a case survives dismissal, the court will probably construe the elements narrowly. For instance, in both *Keel* and *Halberstam*, there was a clear chain of events supported by tangible evidence and eye-witness testimony which connected the defendants' actions to the wrongful act. In complex banking cases

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[453] *Id.* at 477.
[454] *Id.*

involving multiple financial institutions, it may be much more difficult to establish such a clear connection.

F. A Case to Watch

Whether courts are willing to hold large banks secondarily liable for terrorist acts is an open question, but a currently pending case has the potential to be a landmark decision. On Veteran's Day of 2014, *Freeman v. HSBC* was filed in Brooklyn, New York.[455] The plaintiffs are more than 130 families of Americans who were killed or injured in Iraq by Iranian-designed and manufactured IEDs.[456] The complaint alleges that several international banks and their subsidiaries conspired with Iran and Iranian banks, resulting in the transfer of billions of U.S. dollars to Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF), the FTO Hezbollah, and other terrorist organizations and entities which used the money to build the IEDs.[457]

The illicit transactions were conducted in violation of U.S. banking laws and the material support statutes in a manner designed to circumvent detection by U.S. regulators and law enforcement agencies.[458] As described above, HSBC has already admitted the facts sufficient to establish criminal culpability for these actions in its deferred prosecution agreement with the DOJ, and thus will be prohibited from denying those actions at trial.[459] The success of the claim seems likely to turn on proximate cause, and how closely the plaintiffs are able to tie the illegal transactions to the actual construction and provision of the IEDs. This is the first case of its kind. It is a developing area of law, and the case may not survive a motion to dismiss. But if this claim, or one like it, does eventually go forward, it will send shockwaves around the financial world, putting the banking industry on notice that illegally conducting business with terrorists and their supporters will not be tolerated.

CONCLUSION: FSIA VERSUS ATA: ADVANTAGES AND DISADVANTAGES

FSIA and ATA claims are quite different, and there are advantages and disadvantages with each. FSIA claims have the advantage of being a relatively well-settled area of law. Many of these cases have been successfully brought, primarily against Iran, and have resulted in huge judgments in favor of the plaintiffs. Additionally, since state sponsors of

[455] Freeman v. HSBC, No. 14-CV-6601, 2018 U.S. Dist. LEXIS 127289, at *10 (E.D.N.Y. Jul. 27, 2018).

[456] *See id.*

[457] *Id.* at *12–13.

[458] *Id.* at *106.

[459] *Id.*

terrorism almost always fail to respond to service of process, the case will be presented directly to a federal judge using a fairly low "evidence satisfactory to the court" standard of proof and the plaintiff will have the advantage of presenting her case without objection from the opposing side. Furthermore, federal judges in Washington, D.C. are becoming quite familiar with these cases and will routinely take judicial notice of prior decisions in favor of plaintiffs. Another major advantage is that since there is no defendant, a verdict in favor of the plaintiff will not be appealed.

One of the disadvantages of making a claim under the FSIA is the limited scope of possible defendants, since the exception to sovereign immunity only applies to the four designated state sponsors of terror.[460] Another disadvantage is the expense and time required to serve process on the foreign defendant. Additionally, although the verdicts are sometimes enormous, practically speaking, the actual recovery is limited to periodic payouts from sanctioned funds based on a *pro-rata* determination of each plaintiff's claims weighed against the claims from all other successful plaintiffs.[461] Furthermore, that fund only pays compensatory, not punitive, damages and there is a cap of $20 million per person and $35 million per family.[462] Finally, the awards will be paid out in several disbursements over a number of years, and there is no realistic expectation of ever recovering any more than 30% of the capped compensatory damages.[463] Despite these disadvantages, the FSIA avenue provides plaintiffs with a fairly reliable way to be compensated for losses related to terrorism, and the eventual payout is probably worth the time and expense of making the claim. This represents a marked improvement in the legal landscape for victims of terrorism over the past several years.

In contrast to claims under the FSIA, the ATA offers the advantage of a wider array of possible defendants, since the claims are not limited to designated state sponsors of terror. This seems especially true under the recent JASTA amendment which opens up the possibility of secondary liability. Additionally, unlike a default judgment under FSIA, the plaintiff would be able to demand a jury trial. Families of terror victims would probably make very sympathetic witnesses in front of a jury. Perhaps most significantly, any recovery would be against a person or entity rather than a foreign state, so the plaintiff should be able to collect the full

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[460] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (2012); *see also Privileges and Immunities*, at 1, https://www.state.gov/documents/organization/153980.pdf (last visited April 3, 2019); U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm (last visited April 3, 2019).

[461] Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C.S. § 20144(d)(3)(A)(i) (LEXIS through Pub. L. No 115-391).

[462] § 20144(d)(3)(A)(ii).

[463] § 20144(d)(3)(B).

judgment rather than being limited to a 30% payout. Furthermore, this would include not only compensatory damages, but any punitive damages as well.

One major disadvantage of ATA claims is that this is still an evolving area of law, the boundaries of which are not clearly defined. There are potentially great rewards, particularly for the first successful plaintiffs, but there are also significant risks of dismissal. In the case of large banks, courts may be hesitant to impose secondary liability for terrorist attacks, since doing so could open international banks to crippling liability. Judgments of this scope against major banks could push some of them to the brink of being put out of business and rock the financial world.

Additionally, unlike a state sponsor of terror who will almost surely default, the defendant in an ATA case is likely to put up a very vigorous defense. This is especially true with large banks, who have nearly unlimited financial resources and top-notch legal teams with hundreds of experienced attorneys.

One of the most difficult hurdles for the plaintiff will likely be showing proximate cause. In other words, how the illicit funds led to the act of terror which caused the plaintiff's injury. This would probably require the testimony of experts in the financial field, giving highly complex technical testimony which jurors may not be able to easily follow. And finally, even if a plaintiff is successful at the district court level, the defendant would be able to appeal circuit court and possibly even to the Supreme Court of the United States.

Fortunately for plaintiffs, causes of action under the ATA and the FSIA are not mutually exclusive. In other words, the plaintiff may bring both suits simultaneously, or even sequentially. Both statutes have a ten-year statute of limitations, so the best course of action, if the statute of limitations permits, might be for the plaintiff to file a FSIA claim first. Since Iran has been linked numerous times in federal courts for nearly every act of terror in the world, filing against Iran seems the logical first step. The plaintiff could then file a separate suit for secondary liability under the ATA, possibly using proceeds from the successful FSIA judgment to fund the legal expenses of the ATA claim.

Even if the FSIA claim were to be ultimately dismissed, bringing suit against major banks for their roles in financing terror attacks might shine the light of day onto their illegal activities, causing a public outcry and forcing the banks to change their behavior. Money is the lifeblood of terrorism, but it is also the lifeblood of banks. Banks should be held accountable for their illegal and irresponsible actions. If a boy with an eraser must answer for his actions, an international bank should be forced to as well.