



EMORY
LAW

Emory Corporate Governance and Accountability
Review

Volume 11 | Issue 3

2024

Challenges and Recent Developments in Establishing Civil Aiding and Abetting Liability Under the Anti-Terrorism Act

Amanda Fox Perry

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/ecgar>



Part of the [Business Organizations Law Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Amanda F. Perry, *Challenges and Recent Developments in Establishing Civil Aiding and Abetting Liability Under the Anti-Terrorism Act*, 11 Emory Corp. Governance & Accountability Rev. 227 (2024).

Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol11/iss3/1>

This Article is brought to you for free and open access by the Emory Corporate Governance and Accountability Review at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Corporate Governance and Accountability Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

CHALLENGES AND RECENT DEVELOPMENTS IN ESTABLISHING CIVIL AIDING AND ABETTING LIABILITY UNDER THE ANTI-TERRORISM ACT

Amanda Fox Perry*

TABLE OF CONTENTS

I. OVERVIEW OF FEDERAL ANTI-TERRORISM LAWS	227
A. <i>Background on the Anti-Terrorism Act</i>	229
II. LIABILITY UNDER THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT (JASTA)	231
A. <i>International Act of Terrorism</i>	232
B. <i>Act Was Carried Out by a Foreign Terrorist Organization</i>	233
C. <i>Defendant Aided and Abetted the Attack</i>	234
1. <i>General Awareness</i>	234
2. <i>Knowing and Substantial Assistance</i>	236
a. <i>Nature of the Act Assisted</i>	237
b. <i>Amount and Kind of Assistance</i>	237
c. <i>Presence at the Time of the Tortious Conduct</i>	238
d. <i>Defendant's Relationship to the Tortious Actor</i>	238
e. <i>State of Mind</i>	239
f. <i>Duration</i>	239
3. <i>Recent Developments</i>	240
III. CONCLUSION	241

I. OVERVIEW OF FEDERAL ANTI-TERRORISM LAWS

The landscape of federal tort law for acts of international terrorism has been shaped by countless terrorist attacks, murders, hostage takings, and hijackings, many of which most Americans are not familiar. Among a few of the flashpoints that have shaped American law are the murder of Leon Klinghoffer, an American tourist who was shot and thrown overboard by terrorists who hijacked the cruise ship *Achille Lauro* in 1985,¹ Palestinian Islamic Jihad's 1995 attack

* Amanda Fox Perry is the managing partner of Fox McKenna PLLC, a law firm in Washington, D.C. She specializes in terrorism litigation arising under the Foreign Sovereign Immunities Act, the Anti-Terrorism Act, and the Terrorism Risk Insurance Act.

on a tourist bus in Gaza that killed U.S. student Alisa Flatow,² and the 2002 Hezbollah bombing of the cafeteria at the Hebrew University in Jerusalem that killed Marla Bennett.³ Other significant events shaping American foreign policy are the mass attacks and hijackings that horrified the nation, including the December 1988 bombing of PanAm Flight 103 over Lockerbie, Scotland, that killed 259 Americans;⁴ the October 1983 bombing of the U.S. Marines Barracks in Beirut, Lebanon, in which 241 American servicemembers were killed on a peacekeeping mission;⁵ and the September 11th attacks on the United States, which killed nearly 3,000 people.⁶ This is a small representation of thousands of American victims of international terrorism, spanning hundreds of attacks over the course of fifty years.

In each of these cases, survivors and representatives of the victims' estates brought civil claims against foreign governments that sponsored the terrorists or terrorist organizations that perpetrated the attacks and the entities and individuals that provided material support to the terrorist organizations.⁷

The federal laws allowing victims to seek justice in civil courts have been developing and evolving slowly over the years, beginning in 1992 with the passage of the Anti-Terrorism Act ("ATA").⁸ The ATA allows Americans who are injured in an act of international terrorism to sue an entity designated as a foreign terrorist organization ("FTO").⁹ Under the ATA, Americans can sue terrorists and their supporters in federal court and recover triple their damages, costs of the lawsuit, and attorneys' fees.¹⁰

This Article focuses on the ATA and the hurdles plaintiffs must clear to establish defendants' liability for aiding and abetting acts of international terrorism. However, it is worth noting that victims of certain attacks may also be eligible to assert a claim under the "terrorism exception" to the Foreign

¹ See generally *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro* in *Amministrazione Straordinaria*, 937 F.2d 44,46 (2d Cir. 1991).

² *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 6 (D.D.C. 1998).

³ *Bennett v. Islamic Republic of Iran*, 507 F. Supp. 2d 117, 122 (D.D.C. 2007).

⁴ *In re Air Disaster at Lockerbie, Scot.*, 37 F.3d 804, 810 (2d Cir. 1994).

⁵ *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003).

⁶ Press Statement, Anthony Blinken, Sec'y of State, U.S. Dep't of State, 22nd Anniversary of the September 11, 2001 Attacks (Sept. 11, 2023), <https://www.state.gov/22nd-anniversary-of-the-september-11-2001-attacks/>.

⁷ See *supra* notes 2-6.

⁸ See generally 18 U.S.C.A. § 2333 (West). The ATA was originally enacted in 1990, repealed in 1991 due to an enrolling error, and then re-enacted in 1992. Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U.L. REV. 559, 561 n.1 (2018).

⁹ 18 U.S.C.A. § 2333(d)(2) (West).

¹⁰ 18 U.S.C.A. § 2333(a) (West).

Sovereign Immunities Act (“FSIA”), which allows U.S. citizens, employees, and members of the military to bring a private right of action against foreign governments for sponsoring acts of terrorism that injure or kill the plaintiff.¹¹ To sue under the FSIA, the defendant government must be listed on the State Department’s list of State Sponsors of Terrorism.¹² That list currently includes Iran, Syria, Cuba, and North Korea.¹³ Additionally, judgment holders may be eligible to participate in the U.S. Victims of State Sponsored Terrorism Fund, established by Congress to facilitate the collection of otherwise hard-to-enforce judgments arising under 28 U.S.C. § 1605A.¹⁴

A. *Background on the Anti-Terrorism Act*

In light of the challenges American victims of international terrorism faced in bringing civil claims against their perpetrators, Congress enacted the ATA to “provid[e] victims of terrorism with a remedy” by imposing “liability at any point along the causal chain of terrorism.”¹⁵ In doing so, Congress reasoned the ATA could also cut off the flow of money to terrorists.¹⁶ However, most terrorist acts, especially those carried out by designated terrorist organizations, depend to some degree on the involvement of secondary contributors, and the ATA as it was originally written did not provide a cause of action for secondary liability.¹⁷

In 2016, the ATA was amended by the Justice Against Sponsors of Terrorism Act (“JASTA”) “to provide for a form of secondary civil liability.”¹⁸ Under JASTA, victims of terrorist attacks carried out by a designated foreign terrorist organization may sue the organization directly.¹⁹ They may also bring claims against any individual or entity that aided and abetted or conspired with the

¹¹ See 28 U.S.C.A. §1605A (West).

¹² 28 U.S.C.A. §1605A(h)(6) provides that a “state sponsor of terrorism” means “a country the government of which the [U.S.] Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. § 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371), section 40 of the Arms Export Control Act (22 U.S.C. § 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.” 28 U.S.C.A. § 1605A(h)(6) (West).

¹³ *State Sponsors of Terrorism*, BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, <https://www.state.gov/state-sponsors-of-terrorism/>.

¹⁴ *Welcome to the U.S. Victims of State Sponsored Terrorism Fund*, U.S. VICTIMS OF STATE SPONSORED TERRORISM FUND, U.S. Dep’t of Just., <http://www.usvsst.com/> (last visited Apr. 30, 2023); 28 U.S.C.A. § 1605A (West).

¹⁵ S. Rep. No. 102-342, at 22 (1992).

¹⁶ *Id.*

¹⁷ See *Abecassis v. Wyatt*, 7 F. Supp. 3d 668, 676-77 (S.D. Tex. 2014).

¹⁸ *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 483 (2023).

¹⁹ 18 U.S.C.A. § 2333(d)(2) (West).

foreign terrorist organization to commit the terrorist attack.²⁰ Under this theory of secondary liability, victims are able to pursue claims against financial institutions, charities, and individuals who enable the attacks by providing monetary and other material supports, such as training or a safe harbors, to a foreign terrorist organization.²¹

One example is the recent, high-profile case, *Atchley v. AstraZeneca UK Ltd.*, in which plaintiffs brought claims under the ATA, as amended by JASTA, against a large medical supply and manufacturing corporation for its sponsorship of Jaysh al-Mahdi, a terrorist organization responsible for the deaths of hundreds of U.S. servicemembers and civilians in Iraq during the Iraq war.²² The plaintiffs alleged that the defendant sponsored the terrorist organization by making corrupt payments to secure supply contracts with Iraq's Ministry of Health, which was openly controlled by Jaysh al-Mahdi.²³ The corrupt payments were made in the form of kickbacks and extra supplies that the terrorists sold on the black market, generating further revenue for their terrorist activities.²⁴

In recent years, courts have seen an influx of ATA cases alleging social media platforms' sponsorship of terrorism through its algorithms and revenue-sharing programs.²⁵ In these cases, plaintiffs allege that social media platforms, including Facebook, Twitter, and Google, to name a few, enable terrorists to recruit, fundraise, and spread propaganda, thereby strengthening terrorist organizations' ability to plan for and execute terrorist attacks.²⁶ Plaintiffs also allege that social media advertising schemes provide terrorists with revenue to finance their activities.²⁷ To date, courts have maintained that the nexus between social media platforms and specific terrorist attacks is too attenuated to satisfy the requirements of an aiding and abetting claim under JASTA.²⁸

²⁰ *Id.*

²¹ *See id.*

²² *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 209 (D.C. Cir. 2022).

²³ *Id.* at 209.

²⁴ *Id.*

²⁵ *See* Andrew Chung, *Supreme Court to Scrutinize U.S. Protections for Social Media*, REUTERS (Oct. 3, 2022, 2:02 PM), <https://www.reuters.com/legal/supreme-court-scrutinize-us-protections-social-media-2022-10-03/>.

²⁶ *See* *Twitter, Inc., v. Taamneh*, 598 U.S. 471 (2023); *Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021).

²⁷ *See Gonzalez*, 2 F.4th at 880-81; *Twitter*, 598 U.S. at 482.

²⁸ *Gonzalez*, 2 F.4th at 910; *Twitter*, 598 U.S. at 506-07.

The ATA also criminalizes “willfully provid[ing] or collect[ing] funds” to be used to carry out terrorist attacks.²⁹ Federal law also makes it illegal to launder money in connection with these crimes.³⁰ In October 2022, French cement manufacturer Lafarge, as well as its Syrian subsidiary, pleaded guilty to providing material support to ISIS and the Al-Nusra Front.³¹ It was the first time the Department of Justice prosecuted a case of corporate material support for terrorism.³² Lafarge reportedly profited to the tune of \$70 million from a scheme in which it paid ISIS and Al-Nusra in exchange for its permission to operate a cement factory in Syria.³³ Lafarge also provided ISIS and Al Nusra with a share of its profits as consideration for the terrorists’ assistance in weakening Lafarge’s competition.³⁴ Lafarge was ordered to pay \$777.78 million in fines to the federal government.³⁵

The ATA contains a provision stating that a final decree rendered in favor of the United States or a foreign government in criminal proceedings arising under certain federal laws estops the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding.³⁶ Many of the ATA cases brought on the basis of aiding and abetting liability have relied on this provision. For example, six months after Lafarge pleaded guilty, victims of ISIS attacks in Syria filed suit in the Eastern District of New York, relying on the defendant’s guilty plea as evidence of its wrongdoing.³⁷

II. LIABILITY UNDER THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT (JASTA)

The Justice Against Sponsors of Terrorism Act (“JASTA”), codified at 18 U.S.C.A. § 2333(d)(2), contains a liability provision, which can be broken down

²⁹ 18 U.S.C.A. § 2339C(a) (West); *see also id.* § 2339A(a) (making it illegal to “provide[] material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out” a terrorist attack); *id.* § 2339B(a) (“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 . . .”).

³⁰ *Id.* § 1956(a).

³¹ Press Release, U.S. Att’y’s Off., E. Dist. of N.Y., Lafarge Pleads Guilty to Conspiring to Provide Material Support to Foreign Terrorist Organizations (Oct. 18, 2022), <https://www.justice.gov/usao-edny/pr/lafarge-pleads-guilty-conspiring-provide-material-support-foreign-terrorist>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (noting that the “United States District Judge William F. Kuntz, II sentenced the defendants to terms of probation and to pay financial penalties, including criminal fines of \$90.78 million and forfeiture of \$687 million, totaling \$777.8 million”).

³⁶ 18 U.S.C.A. § 2333(b)-(c) (West).

³⁷ Complaint, *Murad v. Lafarge S.A.*, No. 1:23-cv-09186 (E.D.N.Y. Dec. 14, 2023).

and best understood in three parts. First, the action must be “for an injury arising from an act of international terrorism.”³⁸ Second, the attack must have been “committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized.”³⁹ Finally, if the previous two elements are substantiated, the plaintiff may assert liability against “any person who aid and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.”⁴⁰ Each of these elements are discussed in turn.

A. *International Act of Terrorism*

The first requirement a plaintiff must establish is that he or she was injured by an international act of terrorism,⁴¹ which includes activities that would violate the criminal laws of the United States and that, *inter alia*, “involve violent acts or acts dangerous to human life” and “appear to be intended to intimidate or coerce a civilian population” or government.⁴² A “donation to a terrorist group that targets Americans outside the United States” qualifies as an act of international terrorism, violating the ATA’s provisions that criminalize the provision of “material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out” attacks that injure or kill Americans.⁴³

In *Linde v. Arab Bank*, the Second Circuit held that “the provision of material support to a terrorist organization does not invariably equate to an act of international terrorism.”⁴⁴ The Seventh Circuit weighed in on this in *Boim v. Holy Land Foundation for Relief and Development*, noting that although the provision of material support to terrorists may violate § 2331(1), it does not necessarily rise to an act of international terrorism in the absence of an apparent intent to intimidate or coerce.⁴⁵ In support of this distinction, the court noted that certain aid provided by international humanitarian organizations, such as

³⁸ 18 U.S.C.A. § 2333(d)(2) (West).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 18 U.S.C.A. § 2331(1)(A)-(B) (West).

⁴³ *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690-91 (7th Cir. 2008) (en banc); 18 U.S.C.A. § 2339A(a) (West).

⁴⁴ *Linde v. Arab Bank, PLC*, 882 F.3d 314, 326 (2d Cir. 2018).

⁴⁵ *Boim*, 549 F.3d at 698-99.

Doctors Without Borders, would be an example of support without the requisite intent.⁴⁶

In *Boim*, the Seventh Circuit held that defendants who contributed to Hamas and Hamas-affiliated charities could be held liable for the FTO's 1996 murder of an American in Israel because they knew that Hamas uses its resources to target Israeli Jews.⁴⁷ The court also found that the contributions satisfied the requirements for "international terrorism" because they would enable Hamas to kill or injure Israelis.⁴⁸ Moreover, in light of the foreseeability of the consequences, the plaintiffs met the burden for an act of international terrorism because the donations appear to be intended to intimidate or coerce a civilian population.⁴⁹

B. Act Was Carried Out by a Foreign Terrorist Organization

Secondary liability for aiding or abetting acts of terrorism applies only when the principal act of international terrorism is "committed, planned, or authorized by an organization . . . designated as a foreign terrorist organization."⁵⁰ The State Department maintains the list of designated FTOs.⁵¹ Some known terrorist entities are not listed for political reasons.⁵² For example, Jaysh al-Mahdi was not listed because, according to the plaintiffs in *Atchley*, policymakers wanted to avoid "overly antagonizing" Shiite cleric Muqtada al Sadr's followers and to maintain the ability of the U.S. government to work with the Sadrists "if and when doing so would serve the national interest."⁵³ Consequently, the *Atchley* plaintiffs alleged that Jaysh al-Mahdi carried out the attacks in collaboration with Hezbollah, which is listed as an FTO, enabling the *Atchley* plaintiffs to satisfy the second requirement of establishing secondary liability under the ATA.⁵⁴

⁴⁶ *Id.*

⁴⁷ *Id.* at 688-90.

⁴⁸ *Id.* at 688-90, 694.

⁴⁹ *Gonzalez v. Google, LLC*, 2 F.4th 871, 899 (9th Cir. 2021) (citing *Boim*, 549 F.3d at 694).

⁵⁰ 18 U.S.C.A. § 2333 (West).

⁵¹ See generally *Foreign Terrorist Organizations*, BUREAU OF COUNTERTERRORISM U.S. DEP'T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited May 7, 2024).

⁵² Colin J. Beck & Emly Miner, *Who Gets Designated a Terrorist and Why?*, 91 SOC. FORCES 837, 848-50 (2013).

⁵³ *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 216 (D.C. Cir. 2022) (quoting citation omitted).

⁵⁴ *Id.* at 216-19.

C. Defendant Aided and Abetted the Attack

When Congress broadened the scope of the ATA with the passage of JASTA, it left unanswered two questions with which the courts have since grappled: (1) what does it mean to aid and abet and (2) what precisely must the defendant have aided and abetted?

In the absence of a statutory definition of aiding and abetting, Congress instructed the courts to apply the D.C. Circuit's 1983 ruling in *Halberstam v. Welch* as a framework for analyzing claims of aiding and abetting liability.⁵⁵ *Halberstam* was "widely recognized as the leading case regarding Federal civil aiding and abetting and conspiracy liability."⁵⁶ In *Halberstam*, the court addressed the scope of secondary liability for common law causes of action, in this case, the wrongful death of Halberstam who defendant Welch killed in the course of a burglary.⁵⁷ The plaintiff's widow brought claims against Welch's girlfriend, Hamilton, whom the plaintiff alleged had aided and abetted Welch's long-running burglary career by falsifying his tax returns, maintaining financial accounts on his behalf, and taking other steps to conceal his ill-gotten gains.⁵⁸ Although Hamilton was not present for Halberstam's murder, the D.C. Circuit held her liable under theories of conspiracy and aiding and abetting.⁵⁹ In coming to its conclusion, the Court determined

[a]iding and abetting includes the following elements: (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.⁶⁰

The general awareness and knowingly and substantially elements are discussed in the following Sections.

1. General Awareness

Under the ATA, aiding and abetting does not require the defendant to have had the specific intent to cause injury. Instead, the defendant must have been "generally aware of his role" in an illegal or tortious activity, from which the

⁵⁵ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(5) 130 Stat. 852 (2016).

⁵⁶ *Id.*

⁵⁷ *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

⁵⁸ *Id.* at 474-75, 486, 488.

⁵⁹ *Id.* at 488.

⁶⁰ *Id.* at 477 (emphasis added).

injury in question was foreseeable.⁶¹ In *Kaplan v. Lebanese Canadian Bank*, victims of Hezbollah attacks in Israel alleged that the defendant bank knew that some of its customers were key players in the FTO because the relationships were repeatedly publicized on its websites and in the media.⁶²

The district court dismissed the plaintiffs' claims, stating that the plaintiffs had not established the defendant "knowingly and intentionally supported [Hezbollah] in perpetrating the rocket attacks," seemingly conflating the general awareness requirement with actual knowledge of its role in the attacks.⁶³ The Second Circuit noted:

[w]hile the word "aware" normally denotes full recognition of the existence or qualities of an object or circumstance, *Halberstam's* attachment of the "generally" modifier imparts to the concept "generally aware" a connotation of something less than full, or fully focused, recognition.⁶⁴

Consequently, the Second Circuit reversed, holding that under JASTA and *Halberstam* liability for civil aiding and abetting does not require the defendant to be actually aware of its role in the specific attack or to have specific intent.⁶⁵ "Whether a defendant's material support to an FTO suffices to establish general awareness is a fact-intensive inquiry."⁶⁶ There is an actual knowledge requirement in JASTA, but it is in the context of the "knowing and substantial" element of the aiding and abetting framework set forth by *Halberstam*.⁶⁷ For example,

[i]f the defendant knowingly—and not innocently or inadvertently—gave assistance, directly or indirectly, and if that assistance was substantial, then aiding and abetting is sufficiently established if the defendant was "generally aware" that it was playing a role in international terrorism.⁶⁸

Finding that the plaintiffs in *Kaplan* had plausibly alleged that defendants knew their customers were "integral parts" of the FTO, based on the publicity

⁶¹ *Kaplan v. Lebanese Canadian Bank*, SAL, 999 F.3d 842, 859-60 (2d Cir. 2021); *Honickman v. BLOM Bank SAL*, 6 F.4th 487, 496 (2d Cir. 2021).

⁶² *Kaplan*, 999 F.3d at 845, 862.

⁶³ *Id.* at 852 (quoting *Kaplan v. Lebanese Canadian Bank*, SAL, 405 F. Supp. 3d 525, 536 (S.D.N.Y. 2019)); *Kaplan*, 999 F.3d at 864.

⁶⁴ *Kaplan*, 999 F.3d at 863.

⁶⁵ *Id.* at 860, 863-64.

⁶⁶ *Id.* at 860.

⁶⁷ *Id.* at 863-64.

⁶⁸ *Id.* at 864.

surrounding those relationships, the plaintiffs satisfied the aiding and abetting requirement of general knowledge.⁶⁹

However, the general awareness requirement is different where the aiding and abetting passed through a third-party intermediary before a terrorist organization. This distinction is evident when comparing *Kaplan* to *Ofisi*. *Kaplan* is distinguishable from *Ofisi v. BNP Paribas, S.A.*, in which victims of the 1998 U.S. Embassy bombings in Kenya and Tanzania brought ATA claims against defendant BNP Paribas (“BNP”), a French bank that had for several years provided financial services to Sudan’s banking system in violation of U.S. sanctions.⁷⁰ One of the banks, Al Shamal Bank, had al Qaeda terrorists as customers, including Osama bin Laden.⁷¹ Plaintiffs alleged that in providing Al Shamal Bank, and in turn, al Qaeda terrorists, with access to foreign markets, BNP enabled al Qaeda to carry out the embassy attacks that injured or killed the plaintiffs.⁷² In a situation where there is an intermediary between the alleged aider-abettor and the terrorist, as was at issue in *Ofisi*,

the general awareness requirement is satisfied if: (1) the defendant was aware of the intermediary’s connection to the terrorist organization, and (2) the intermediary is “so closely intertwined” with the terrorist organization’s illegal activities as to give rise to an inference that the defendant was generally aware of its role in the organization’s terrorist activities.⁷³

The District of Columbia Circuit Court of Appeals held that BNP was not generally aware of any role in the attacks and that the plaintiffs had not alleged that BNP was aware of the connection between Al Shamal Bank and al Qaeda.⁷⁴ Instead, it noted, in reliance on the district court pleadings, “the relationship between Al Shamal and [b]in Laden was not widely reported until *after* the 1998 embassy bombings.”⁷⁵

2. *Knowing and Substantial Assistance*

In determining whether a defendant’s contributions knowingly and substantially assisted the act that caused the injury, *Halberstam* set forth a six-

⁶⁹ *Id.* at 864-65.

⁷⁰ *See Ofisi v. BNP Paribas, S.A.*, 77 F.4th 667 (D.C. Cir. 2023).

⁷¹ *See id.* at 675.

⁷² *Id.* at 670-71.

⁷³ *Id.* at 673 (quoting *Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 867-68 (D.C. Cir. 2022)).

⁷⁴ *Ofisi*, 77 F.4th at 673.

⁷⁵ *Id.* at 675 (alteration in original) (emphasis in original) (quoting *Ofisi v. BNP Paribas, S.A.*, 278 F. Supp. 3d 84, 101 (D.C. Cir. 2017)).

factor test, noting that while each factor must be weighed according to the circumstances of the claim, a plaintiff must show that “on balance, the relevant considerations show that defendants substantially assisted the acts of terrorism.”⁷⁶ The six factors identified in *Halberstam* to weigh are: “(i) the nature of the act assisted, (ii) the amount and kind of assistance, (iii) the defendants’ presence at the time of the tort, (iv) the defendants’ relationship to the tortious actor, (v) the defendants’ state of mind, and (vi) the duration of assistance.”⁷⁷ The application of these factors in recent cases will be discussed below.

a. Nature of the Act Assisted

The court in *Halberstam* held that “the nature of the act assisted ‘dictates what aid might matter, i.e., be substantial.’”⁷⁸ In that case, Hamilton’s assistance in converting stolen goods into wealth was important to Welch’s “burglary enterprise.”⁷⁹ In *Atchley*, the court held that the financial assistance provided by the defendants was “indisputably important” to Jaysh.⁸⁰ The court considered the proportionality test discussed in *Halberstam*, noting:

‘a defendant’s responsibility for the same amount of assistance increases with the blameworthiness of the tortious act or the seriousness of the foreseeable consequences.’

The extraordinary blameworthiness of Jaysh al-Mahdi’s terrorist attacks increases the responsibility of persons acting as defendants allegedly did. In relation to such vicious acts, even ‘relatively trivial’ aid could count as substantial.⁸¹

The *Atchley* court held that the “nature of the act assisted” factor supported a finding of substantiality in AstraZeneca’s support to Jaysh al Mahdi.⁸²

b. Amount and Kind of Assistance

In *Halberstam*, the court held that “although the *amount of assistance* Hamilton gave Welch may not have been overwhelming as to any given burglary in the five-year life of this criminal operation, it added up over time to an essential part of the pattern.”⁸³ In *Atchley*, the plaintiffs alleged that the

⁷⁶ *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 220, 221 (D.C. Cir. 2022).

⁷⁷ *Id.* (quoting *Halberstam v. Welch*, 705 F.2d 472, 483-84 (D.C. Cir. 1983)).

⁷⁸ *Atchley*, 22 F.4th at 222 (emphasis in original) (citing *Halberstam*, 705 F.2d at 484).

⁷⁹ *Atchley*, 22 F.4th at 222.

⁸⁰ *Id.* (quoting *Gonzalez v. Google, LLC*, 2 F.4th 871, 905 (9th Cir. 2021)).

⁸¹ *Atchley*, 22 F.4th at 222 (citation omitted) (quoting *Halberstam*, 705 F.2d at 484, n.13).

⁸² *Atchley*, 22 F.4th at 222.

⁸³ *Halberstam*, 705 F.2d 472, 488 (D.C. Cir. 1983) (emphasis in original).

defendants gave Jaysh al-Mahdi at least several million dollars per year in cash or medical supplies for multiple years.⁸⁴ The court dismissed the argument that assistance must be indispensable to the act assisted to establish liability.⁸⁵ Furthermore, it dismissed the argument that Iran's substantial role in arming and financing Jaysh al-Mahdi minimized the significance of AstraZeneca's support, noting that "[n]othing in the JASTA suggests Congress intended secondary liability to extend only to the top funder of a terrorist action."⁸⁶ It held that this factor weighed in favor of substantiality.⁸⁷

c. Presence at the Time of the Tortious Conduct

Presence at the time of the terrorist act is not required.⁸⁸ In *Halberstam*, Linda Hamilton was "not present at the time of the murder or even at the time of any burglary," but because "the success of the tortious enterprise clearly required expeditious and unsuspecting disposal of the goods," the *Halberstam* court nonetheless concluded that she played a substantial role in the business.⁸⁹ In *Atchley*, as in *Halberstam*, the defendants were not physically present at the attacks on plaintiffs, and the court accordingly found that the factor weighed against AstraZeneca's provision of money and goods to the terrorists as meeting the requirement of substantial assistance.⁹⁰

d. Defendant's Relationship to the Tortious Actor

In assessing a defendant's relationship with a FTO, courts consider whether the defendant's "position of authority [gives] greater force to his power of suggestion."⁹¹ In *Atchley*, the court assessed whether there existed a special relationship between the defendant and the FTO, as existed in *Halberstam*, in which Hamilton was the live-in girlfriend of the tortfeasor.⁹² Finding none, the *Atchley* court held that the factor should be given no weight in either direction.⁹³

⁸⁴ *Atchley*, 22 F.4th at 210.

⁸⁵ *Id.* at 222.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Halberstam*, 705 F.2d at 488.

⁸⁹ *Id.*

⁹⁰ *Atchley*, 22 F.4th at 223.

⁹¹ *Id.* (quoting *Halberstam*, 705 F.2d at 484) (alteration in original).

⁹² *Atchley*, 22 F.4th at 223.

⁹³ *Id.*

e. State of Mind

Aiding-and-abetting liability extends to participants like Hamilton, who may seek only financial gain but pursue it with a general awareness of aiding some type of tort or crime.⁹⁴ In *Halberstam*, Hamilton’s “knowing” assistance “evidence[d] a deliberate long-term intention to participate in an ongoing illicit enterprise” of “some type of personal property crime at night.”⁹⁵ Hamilton’s knowing assistance sufficed to support her aiding-and-abetting liability for the murder, because violence is a “natural and foreseeable consequence” of such property crimes.⁹⁶ In *Atchley*, the defendant’s state of mind—that of “general awareness” —weighed in favor of substantiality because plaintiffs plausibly pled that the defendants knowingly gave assistance to the FTO and were generally aware that proceeds from the sale of the goods would be used to finance terrorist attacks.⁹⁷ The court noted that “Congress did not limit secondary liability to those who are ‘one in spirit’ with terrorists, or who substantially assist terrorism with a specific desire to advance terroristic outcomes.”⁹⁸

f. Duration

Under *Halberstam*, “[t]he length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant’s state of mind.”⁹⁹ In *Halberstam*, Hamilton’s assistance lasted for five years.¹⁰⁰ Accordingly, the *Atchley* court determined that whether the defendant’s aid lasted four years or a decade, it was a significant amount of time.¹⁰¹ More importantly, it noted that “[t]he allegations do not describe a one-off transaction by a firm unfamiliar with its counterparty, but a set of enduring, carefully cultivated relationships consisting of scores of transactions over a period of years.”¹⁰²

⁹⁴ *Id.* at 224.

⁹⁵ *Halberstam*, 705 F.2d at 488.

⁹⁶ *Id.*

⁹⁷ *Atchley*, 22 F.4th at 223-24 (quoting *Halberstam*, 705 F.2d at 484).

⁹⁸ *Atchley*, 22 F.4th at 224.

⁹⁹ *Halberstam*, 705 F.2d at 484.

¹⁰⁰ *Id.* at 487.

¹⁰¹ *Atchley*, 22 F.4th at 224.

¹⁰² *Id.*

3. *Recent Developments*

In May 2023, the Supreme Court issued a unanimous decision in the high-profile *Taamneh v. Twitter* case, the latest and most consequential ATA case arising from terrorists' use of social media platforms.¹⁰³ In *Taamneh*, American victims of terrorist attacks committed by ISIS brought claims against Twitter, Google, and Facebook, alleging that their platforms provided material support that enabled ISIS to carry out terrorist attacks that wounded or killed the plaintiffs.¹⁰⁴

The Court, in considering the *Halberstam* framework, noted that the court in *Halberstam* warned “that its formulations should ‘not be accepted as immutable components’” but “should be ‘adapted as new cases test their usefulness in evaluating vicarious liability.’”¹⁰⁵ The Supreme Court further noted *Halberstam*'s observation that “the elements and factors it provided could ‘be merged or articulated somewhat differently without affecting their basic thrust.’”¹⁰⁶ Finding flexibility, the Court determined that JASTA and *Halberstam* “rest on the same conceptual core that has animated aiding-and-abetting liability for centuries: that the defendant consciously and culpably participate[d] in a wrongful act so as to ‘make it succeed.’”¹⁰⁷

The Court then narrowed the scope of liability significantly, explaining that “aiding and abetting is inherently a rule of secondary liability for *specific wrongful acts*.”¹⁰⁸ Finding that the social media platforms' relationships with the terrorists were too attenuated and that the plaintiffs had not established that the platforms had “culpably associated” themselves with the terrorists, the Court emphasized that there must be a substantial connection between the defendant's conduct and the specific terrorist act. The Court held that simply having a service that terrorists use – in this case, a social media platform – does not establish aiding and abetting liability, even if the subsequent attacks injured or killed the plaintiffs.¹⁰⁹

Furthermore, the Court held that a company's mere recklessness or general awareness that its services could be used by terrorists is not enough to constitute

¹⁰³ See generally *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

¹⁰⁴ *Id.* at 478-79.

¹⁰⁵ *Id.* at 487 (citing *Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983)).

¹⁰⁶ *Id.*

¹⁰⁷ *Twitter*, 598 U.S. at 493 (citing *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

¹⁰⁸ *Twitter*, 598 U.S. at 494.

¹⁰⁹ *Id.* at 504.

aiding and abetting.¹¹⁰ Instead, there must be clear evidence of intent to assist in a specific act of terrorism. The Court reasoned that holding companies liable for failing to stop wrongdoers from using their services would “take aiding and abetting far beyond its essential culpability moorings.”¹¹¹

The Supreme Court’s ruling in *Taamneh* narrowed the definition of aiding and abetting liability by requiring a more direct connection between the wrongdoer’s action and the act of terrorism. However, it left a door open, noting that there may be “situations where the provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods to a terrorist group could constitute aiding and abetting a foreseeable attack . . . [such aid would be] more direct, active, and substantial” than what was alleged in the *Taamneh* case.¹¹²

III. CONCLUSION

It is unclear what the district courts will do with ATA cases in light of the *Taamneh* decision. There are several high-profile ATA cases pending in federal appellate courts, and the *Atchley* case currently waits to hear if the Supreme Court will grant its writ of certiorari. Consequently, the issue may soon be revisited. It remains to be seen if the plaintiffs in any of the cases will satisfy the “conscious, voluntary, and culpable” standard outlined in *Taamneh* or if they will be able to distinguish their claims in other ways.¹¹³

As new terrorist attacks occur, the ATA will likely continue to be a favored tool among victims of terrorism. The October 7, 2023, attacks in Israel will almost certainly bring a new wave of FSIA and ATA cases against Iran, Hamas, and other entities who may have played a role in supporting the entities responsible for the attacks. In particular, the cryptocurrency industry may find itself at the forefront of criminal and civil investigations stemming from the attacks, as it has long been known as a means for foreign governments, including Iran and North Korea, to circumvent U.S. sanctions.¹¹⁴

¹¹⁰ *Id.* at 504.

¹¹¹ *Id.* at 503.

¹¹² *Id.* at 502.

¹¹³ See generally *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 498 (2023).

¹¹⁴ E.g. William Reinsch & Andrea Palazzi, *Cryptocurrencies and U.S. Sanctions Evasion: Implications for Russia*, CTR. FOR STRATEGIC & INT’L STUD. (Dec. 20, 2022), <https://www.csis.org/analysis/cryptocurrencies-and-us-sanctions-evasion-implications-russia>; Eric Lob, *Iran and Cryptocurrency: Opportunities and Obstacles for the Regime*, MIDDLE E. INST. (Dec. 27, 2022), <https://www.mei.edu/publications/iran-and-cryptocurrency-opportunities-and-obstacles-regime>.

The government's application of the criminal provisions of the ATA will likely continue to pave the path for victims wishing to pursue civil aiding and abetting claims against entities that support FTOs. Following the Lafarge guilty plea, the DOJ announced that it was directing more prosecutors and resources to focus on counterintelligence and export controls.¹¹⁵ In November 2023, the DOJ announced that the crypto platform Binance pleaded guilty to violating sanctions and failing to register as a money transferring service, further indicating that the cryptocurrency industry will be under heightened scrutiny. Following the October 7th attacks in Israel, members of Congress introduced new legislation to regulate crypto, citing its reported role in enabling terrorist attacks through the provision of financial services.¹¹⁶

In light of *Taamneh*, the October 7th attacks, and a renewed interest by lawmakers in hindering assistance to terrorism through cryptocurrencies and other means, the ATA may be prime for further clarification by Congress.

¹¹⁵ Eun Young Choi, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Keynote Remarks at GIR Live: Sanctions & Anti-Money Laundering Meeting (Nov. 16, 2023), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-eun-young-choi-delivers-keynote-remarks-gir-live>.

¹¹⁶ Letter from Joint Members of U.S. S. & H.R., to Brian E. Nelson, Under Sec'y for Terrorism & Fin. Intel., U.S. Dep't of Treasury, and Jake Sullivan, Nat'l Sec. Advisor, White House (Oct. 17, 2023).