SECONDARY LIABILITY UNDER THE ANTI-TERRORISM ACT

IMPLICATIONS FOR INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

The Anti-Terrorism Act (ATA), passed in 1992, is a federal law that provides a civil cause of action for international terrorism and entitles plaintiffs to treble damages and attorney fees. Defendants can be held directly liable under the ATA for an injury to a U.S. national caused by an act of international terrorism.

To establish a primary liability claim under the ATA, two intent requirements must be met: the intent requirement of the underlying crime (such as material support of terrorism) and the ATA's intent requirement.

The ATA defines an "Act of International Terrorism" as one that:

- Involves violence or endangers human life.
- Violates U.S. criminal law (usually laws prohibiting material support of terrorism).
- Appears to be **intended** to intimidate or coerce a civilian population, influence government policy, or affect government conduct by specified means.
- Occurs outside the U.S.

Secondary Liability

In 2016, Congress passed the Justice Against Sponsors of Terrorism Act (JASTA), which amended the ATA to add secondary liability, allowing plaintiffs to sue the person or entity that aided and abetted and/or conspired with a Foreign Terrorist Organization that committed, planned, or authorized an act of terrorism. Congress stated that the purpose of the act was to provide plaintiffs with the "broadest possible basis" for claims against entities or persons that have provided material support, directly or indirectly, to foreign organizations.

To set forth an aiding-and-abetting (or secondary) liability claim, the plaintiff must show:

- A *wrongful act* by the entity the defendant aided.
- Defendant's *general awareness* of their role.
- *Knowing and substantial* assistance.

For a **conspiracy claim** under the ATA, the plaintiff must show that two or more persons agreed to participate in an illegal act, an injury was caused by an unlawful overt act performed by one of the parties to the agreement, and the overt act was performed in furtherance of a common scheme.

What is "knowing" assistance?

Courts have stated that the defendant must be "generally aware" of their role in part of the act of terrorism at the time they provided assistance to the principal actor. This requirement encompasses foreseeability—was the crime a natural and foreseeable consequence of the activity the defendant helped to undertake?

Was the assistance "substantial"?

In determining this, the court considers:

- The nature of the act encouraged.
- The amount of assistance given by the defendant.
- Defendant's presence or absence at the time of the injury.
- Defendant's relation to the principal actor.
- Defendant's state of mind.
- The period of defendant's assistance.

Recent Rulings More Favorable to Plaintiffs

Recent court rulings have been more favorable to plaintiffs, including in cases with implications for non-governmental organizations (NGOs). For example, plaintiffs can successfully allege aiding and abetting even when support goes to an intermediary rather than the terrorist, particularly if the relationship between the intermediary and the terrorist was highly publicized at the time (***Atchley v. Astrazeneca UK*** (D.C. Cir. 2022)).

In a case against Twitter, on appeal to the U.S. Supreme Court, the 9th Circuit Court of Appeals found that plaintiffs plausibly alleged aiding-and-abetting liability, including the knowledge requirement, even though the perpetrator of the terrorist attack did not use the defendant' social media platform to plan or carry out the attack, the defendant lacked terroristic intent, and the defendant took efforts to prevent terrorists from using its online service. Despite Twitter's efforts to detect and prevent terrorists from using its platform, its vast user base allegedly included ISIS supporters. Here, the court found that the defendant "knowingly" provided substantial assistance to the terrorist act under JASTA, as it could have taken more "meaningful" or "aggressive" action to prevent use of its platform. (***Taamneh v. Twitter*** (9th Cir. 2021)).

At the same time, defendants have been successful arguing that economically motivated actions do not demonstrate terrorist intent, and the fact that aid given to a third party was later stolen or diverted may make a difference. In the *Atchley* case, the court noted,

> "Recognizing proximate causation here is a far cry from holding the causation requirement met by non-governmental organizations 'providing assistance to a non-sanctioned organization if the aid is later stolen, diverted, or extorted by groups that engage in terrorism.' " (Citing Amicus Brief of the Charity & Security Network and InterAction).

In addition, several federal appeals courts have found that there is no secondary liability when the attacks were perpetrated by self-radicalized individuals.

Implications for International Non-governmental Organizations (INGOs)

Lawsuits have been brought under the ATA alleging that a variety of activities—including banking, charitable payments, and donation of free goods—have aided terrorism. Any of these claims could potentially implicate INGOs, including those providing aid and development assistance to vulnerable populations in proximity to listed terrorist groups. The implications are even more serious for INGOs that must engage in minimal, ordinary, and necessary transactions with a terrorist group that is the de facto governing authority to access civilians and provide aid, even if that support is limited to what is necessary to access civilian populations and is provided in a manner consistent with international humanitarian law.

Plaintiffs' lawyers have been active and coordinated in filing ATA cases and they have sued a broad range of entities. It is imperative that INGOs maintain robust due diligence and compliance processes, and exercise caution when working in proximity to terrorist groups. A petition for rehearing has been pending since February 2022 in *Atchley* (D.C. Cir. 2022) as to aiding and abetting and personal jurisdiction, and the Supreme Court will hear the *Taamneh* case this term.

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