

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.

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.

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.

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.

Implications for International Non-governmental Organizations (INGOs)

Lawsuits brought under the ATA have alleged that a variety of activities—including banking, charitable payments, and donations 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, 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. It is imperative that INGOs maintain robust due diligence and compliance processes, and exercise caution when working in proximity to terrorist groups.

ATA Court Rulings

Many court rulings have been favorable to plaintiffs, including in cases with implications for INGOs. 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)).

However, the Atchley case indicated that it may make a difference if aid given to a third party was later stolen or diverted. Here, 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 InterAction and the Charity & Security Network](#)).

At the same time, several federal appeals courts have found that there is no secondary liability when the attacks were perpetrated by self-radicalized individuals. And the opinion in [Keren Kayemeth Leisrael - Jewish Nat’l Fund v. Educ. for a Just Peace in the Middle E](#), No. 21-7097 (D.C. Cir. 2023) held that plaintiff’s direct and secondary liability claims failed to establish proximate causation.

In a 2023 ruling, the U.S. Supreme Court rejected the 9th Circuit Court of Appeals’ expansive reading of “knowing and substantial assistance” as well as its interpretation of what the object of aiding and abetting must be ([Taamneh v Twitter](#), U.S. Supreme Court No. No. 21-1496). In this case, the Supreme Court ruled that the ATA requires the plaintiff to show that the defendant supported a specific act of international terrorism, rather than the person committing the act. It also stated that “aids and abets” refers to a “conscious, voluntary, and culpable participation in another’s wrongdoing.” Otherwise, it said, “mostly passive actors like banks become liable for all of their customers’ crimes by virtue of carrying out routine transactions.” This opinion is a positive step for INGOs and should narrow the scope of their potential liability when working in proximity to foreign terrorist organizations.

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