The Inadequate Reach of Aiding and Abetting Liability under the Antiterrorism Act

For U.S. nationals injured or killed in a terrorist attack, the civil remedies provision of the Antiterrorism Act (ATA), 18 U.S.C. § 2333, provides victims with a means of holding the perpetrators accountable in federal court. Two recent amendments to the ATA allow secondary liability claims against defendants who aid and abet acts of international terrorism. As a result, ATA claims have increasingly targeted a new class of defendants—deep-pocketed, multinational corporations—by alleging that they are indirectly liable because they provided substantial assistance to the attacks by doing business with terrorists.

However, the current ATA regime limits secondary liability claims to only those acts perpetrated by a U.S. government-designated foreign terrorist organization (FTO). Thus, defendants who knowingly provided substantial assistance to the terrorist attacks of non-designated perpetrators may escape civil liability. Using an FTO designation as the touchstone of secondary liability has devastating consequences for plaintiffs who have otherwise put forward plausible and well-pleaded claims. It also fails to adequately account for the consequences of modern non-international armed conflict.

This Note addresses the consequences of this statutory gap. It also examines another statutory constraint—the "act of war" exception—and the function it plays in defining the contours of ATA liability. Ultimately, this Note proposes that Congress remove the requirement for an FTO designation in the secondary liability provision, 18 U.S.C. § 2333(d). Doing so would better conform the secondary liability provision to the tort objectives underlying the ATA's legislative purpose, while maintaining sufficient judicial controls on the scope of ATA liability, including the act of war exception.

INTRODUCTION

On the afternoon of July 17, 2014, Malaysia Airlines Flight 17 (MH17) departed from Amsterdam Schiphol Airport with fifteen crew members and 283 passengers on board.[1] MH17 was to fly over Germany, Poland, and Ukraine before continuing on to its final destination in Kuala Lumpur, Malaysia.[2] Instead, tragedy struck the flight while it cruised at nearly 33,000 feet over eastern Ukraine. Less than three hours into its voyage, MH17 was lost and all 298 souls on board had perished.[3]

A scramble to discover what happened to MH17 ensued. Shortly after the initial reports that the plane was missing, reports emerged that it had been shot down by a missile.[4] An armed conflict between the Ukrainian government and Russian-backed separatist militias had been raging in eastern Ukraine for months, so there was already reason to suspect that a surface-to-air missile attack was to blame.[5] Ultimately, the official investigation of the Dutch Safety Board confirmed what many already suspected: MH17 was destroyed by a Russian-made surface-to-air missile launched from a 320-square

1. *Crash of Malaysia Airlines flight MH17*, DUTCH SAFETY BD. 23 (Oct. 13, 2015), https://www.onderzoeksraad nl/en/media/attachment/2018/7/10/debcd724fe7breport_mh17_crash.pdf [https://perma.cc/79S4-RRHN].

2. *Id.*

3. *Id.* at 25–28.

4. *See, e.g.*, Shaun Walker et al., *Missile Destroys Malaysia Airlines Plane Over Ukraine, Killing 298 People*, GUARDIAN (July 17, 2014, 10:36 PM), https://www.theguardian.com/world/2014/jul/17/malaysia-airlines-plane-missile-attack-ukraine [https://perma.cc/AZL3-587S].

5. *See generally Global Conflict Tracker: Conflict in Ukraine*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/interactive/global-conflict-tracker/conflict/conflict-ukraine [https://perma.cc/AZ7J-XRVM].

kilometer area in eastern Ukraine.[6]

The Donetsk People's Republic (DPR), a pro-Russian separatist organization that controlled much of the rebel-held territory in eastern Ukraine at the time, is widely accused of firing the missile that destroyed MH17.[7] Since the separatists had shot down several Ukrainian military aircraft in the weeks prior to the MH17 attack, investigators suspected that the DPR had mistaken the airliner for yet another military target.[8] In accordance with the findings of a joint investigation, several governments also accused Russia of supplying the missile to the Ukrainian separatists shortly before it was fired.[9] By June 2019, international prosecutors charged four men—three with ties to Russian military and intelligence, and one Ukrainian officer of a DPR combat unit—with murder for shooting down MH17.[10]

Five years after the MH17 attack, the family of Quinn Lucas Schansman, an eighteen-year-old U.S. citizen killed on the flight, filed suit in a U.S. district court against multiple defendants, including two Russian state-owned banks and two U.S.-based money transfer firms, for their provision of financial services to the DPR.[11] The complaint in *Schansman v. Sberbank* alleges that Sberbank, VTB Bank, Western Union, and Moneygram knew their banking and money-transfer services were being used to support the DPR's "terrorist activities" in

6. DUTCH SAFETY BD., *supra* note 1, at 253–56.

7. Richard Pérez-Peña, *The MH17 Charges, Explained*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/world/europe/mh17-crash html [https://perma.cc/7X4R-CQDM]; Andrew E. Kramer, *Russian Military Supplied Missile That Shot Down Malaysian Jet, Prosecutors Say*, N.Y. TIMES (May 24, 2018), https://www.nytimes.com/2018/05/24/world/europe/russia-malaysia-airlines-ukraine-missile.html [https://perma.cc/9EMZ-Z2SV]; *Ukraine Separatist Social Media Site Claims Plane Downing*, RADIO FREE EUR. (July 17, 2014, 4:42 PM), https://www.rferl.org/a/ukraine-separatist-leader-boasts-downing-plane/25460930 html [https://perma.cc/B9B9-B62Y].

8. *See, e.g.*, Pérez-Peña, *supra* note 7; DUTCH SAFETY BD., *supra* note 1, at 181–85.

9. Kramer, *supra* note 7. In July 2020, the Netherlands brought a case against Russia in the European Court of Human Rights for its role in the attack on MH17, in which about two-thirds of the victims were Dutch citizens. *See* Thomas Erdbrink, *The Netherlands Brings Russia to Court Over the Downing of MH17*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/world/europe/netherlands-russia-mh17-ukraine.html [https://perma.cc/2X6B-GPVJ].

10. Andrew E. Kramer, *Four to Face Murder Charges in Downing of Malaysia Airlines Flight 17*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/world/europe/mh17-ukraine-russia-suspects.html [https://perma.cc/575W-8ZMB].

11. First Amended Complaint, Schansman v. Sberbank, 1:19-cv-02985 (S.D.N.Y. Oct. 8, 2019), ECF No. 104; Michelle Nichols, *Family of American Killed in Downed MH17 Jet Sues Russia Banks, Money-Transfer Firms*, REUTERS (Apr. 4, 2019, 10:29 AM), https://www.reuters.com/article/us-ukraine-crisis-mh17-usa/family-of-american-killed-in-downed-mh17-jet-sues-russia-banks-money-transfer-firms-idUSKCN1RG1UR [https://perma.cc/DJ3Y-9VXF].

eastern Ukraine, including the attack on MH17.[12] Brought under the civil remedies provision of the Antiterrorism Act (ATA), 18 U.S.C. § 2333, which allows the survivors of a U.S. national who is killed by an act of international terrorism to bring suit against the perpetrators in federal court, the *Schansman* plaintiffs seek money damages from these corporate defendants for the loss of their son.[13]

Before 2016, plaintiffs had difficulty mobilizing the ATA's civil remedies provision to hold corporate defendants—like the banks in *Schansman*—accountable for aiding and abetting acts of international terrorism by having provided services to their perpetrators.[14] By pursuing these claims, plaintiffs hoped to increase their chances at recovering damages, since defendants like banks, pharmaceutical companies, and social media firms have deeper and more accessible pockets than their alleged terrorist counterparts. In response to courts mostly barring such claims, Congress enacted the Justice Against Sponsors of Terrorism Act of 2016 (JASTA), which amended the ATA's civil remedies provision to impose secondary liability on defendants who knowingly aid and abet terrorist acts "committed, planned, or authorized" by a U.S. government-designated foreign terrorist organization (FTO).[15]

As sophisticated corporate defendants are increasingly made the target of suits alleging secondary liability for terrorist attacks, courts have seen an increase in litigation probing the frontiers of ATA liability. While JASTA greatly expanded the scope of liability under the ATA, some plaintiffs still face two obstacles to successfully recovering damages from the deep pockets of corporate defendants.

First, because JASTA limited the scope of the ATA's secondary liability provision, 18 U.S.C. § 2333(d), to cover only terrorist acts perpetrated by designated FTOs, plaintiffs must show that the acts of international terrorism that the defendants aided and abetted were "committed, planned, or authorized" by such a group.[16] As a result, even where a defendant has knowingly aided and abetted an act of international terrorism and the plaintiff otherwise sets forth a plausible ATA claim, a lack of an FTO designation alone can bar suit.

Second, even if the lack of an FTO designation does not act as

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12. First Amended Complaint ¶¶ 4–14, *Schansman*, *supra* note 11.

13. *See* Nichols, *supra* note 11; 18 U.S.C. § 2333(a).

14. *See generally* Olivia G. Chalos, Note, *Bank Liability Under the Antiterrorism Act: The Mental State Requirement Under § 2333(a)*, 85 FORDHAM L. REV. 303, 310–12 (2016).

15. 18 U.S.C. § 2333(d); *see also* Ingrid Wuerth, *Justice Against Sponsors of Terrorism Act: Initial Analysis*, LAWFARE (Sept. 29, 2016, 2:19 PM), https://www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis [https://perma.cc/XL6P-7E2Q].

16. 18 U.S.C. § 2333(d)(2).

a bar to suit, some defendants can raise the statutory "act of war" exception, 18 U.S.C. § 2336(a), which precludes ATA claims against the perpetrators of an alleged act of international terrorism if the attack occurred "in the course of . . . armed conflict between military forces of any origin."[17] Where the act of war exception is raised and the alleged perpetrator is neither a foreign military nor a designated FTO, the ATA ultimately leaves to courts the determination of whether the exception applies.[18] When raised, litigants are compelled to argue: (1) whether the alleged terrorist act occurred "in the course of" armed conflict; and (2) whether the perpetrators constitute a "military force" for the purposes of the ATA.[19] The latter question demands that courts deliberate the nature and repercussions of modern non-international armed conflict, or protracted armed confrontation involving one or more non-state actors,[20] while cautiously accounting for prudential concerns as a result of their judicial role.

The plaintiffs in *Schansman* face both of these obstacles. First, because the DPR is not a designated FTO, aiding and abetting liability under the ATA is unavailable and the plaintiffs have instead attempted to creatively assert primary liability on the defendants.[21] The plaintiffs' prospects would be better, however, if an aiding and abetting claim were available. Second, because the act of war exception was invoked by several defendants, the court will consider whether the suit should be precluded on that basis.[22] To do so, the court must determine: (1) whether the attack on MH17 occurred in the course of an armed conflict between the DPR and the Ukrainian government; and (2) whether the DPR constitutes a "military force of any origin" under

17. *See* 18 U.S.C. §§ 2336(a), 2331(4).

18. As will be discussed, the Anti-Terrorism Clarification Act of 2018 (ATCA) bars organizations designated by the U.S. Government as a Foreign Terrorist Organization or a Specially Designated Global Terrorist from raising the act of war exception. *See* Harry Graver & Scott R. Anderson, *Shedding Light on the Anti-Terrorism Clarification Act of 2018*, LAWFARE (Oct. 25, 2018, 12:00 PM), https://www.lawfareblog.com/shedding-light-anti-terrorism-clarification-act-2018 [https://perma.cc/Z6YY-5KNK].

19. *See* 18 U.S.C. §§ 2331(4), 2331(6).

20. *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, INT'L COMM. RED CROSS (Mar. 2008), https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf [https://perma.cc/PK4G-CBE6].

21. The complaint in *Schansman* describes the DPR's conduct and alleges that it is consistent with the conclusion that the DPR is a terrorist organization, or at least that it operates as one, despite its lack of a formal FTO designation by the U.S. Secretary of State. *See* First Amended Complaint ¶¶ 398–407, 408–17, *Schansman*, *supra* note 11.

22. *See* Memorandum in Support of Defendants' Joint Motion to Dismiss at 21–25, Schansman v. Sberbank, 1:19-cv-02985 (S.D.N.Y. Nov. 11, 2019), ECF No. 110; Memorandum in Support of Defendant's Motion to Dismiss at 1–2, Schansman v. Sberbank, 1:19-cv-02985 (S.D.N.Y. Nov. 5, 2019), ECF No. 115.

the ATA.[23] Future courts will increasingly grapple with the latter question, as the proliferation of non-international armed conflict—and with it, the asymmetric tactics used by non-state parties that often result in civilian casualties—creates fertile ground for the issue to arise. How federal courts adjudicate this question will set the boundary for the scope of secondary liability claims under the ATA.

Part I of this Note provides background on the ATA civil remedies provision and examines how two pieces of legislation, the Justice Against Sponsors of Terrorism Act and the Anti-Terrorism Clarification Act (ATCA), established the current scope of aiding and abetting liability under the ATA. It also analyzes how the statutory act of war exception is applied. Part II explains how the current scope of secondary liability—by its limited application to only those attacks perpetrated by U.S. government-designated terrorist organizations—has resulted in a troubling gap through the examination of two illustrative cases. It also explores how federal courts would likely approach the act of war exception if the secondary liability provision were expanded to cover more consequences of modern non-international armed conflicts. Finally, Part III argues that Congress should expand the scope of secondary liability, because doing so would provide civil recourse to more victims of terrorism and better promote the ATA's underlying objectives of compensating victims and deterring future attacks. It also argues that the act of war exception could serve as a better judicial regulator of the scope of secondary liability than a formal FTO designation, because federal courts are competent and well-suited to decide whether perpetrators constitute "military forces of any origin."

I. BACKGROUND

Part I discusses the ATA's legislative history, the civil remedies provision, 18 U.S.C. § 2333, and two statutory amendments that defined the scope of secondary liability under § 2333: JASTA and ATCA. It also examines a statutory exception to ATA claims, which forecloses civil liability for injury or loss by reason of an "act of war."

A. Origin of the Antiterrorism Act

On October 7, 1985, four members of the Palestinian Liberation Organization (PLO) hijacked and took control of the *Achille Lauro*, an Italian cruise ship.[24] Later that day, the hijackers shot and

23. *See* 18 U.S.C. §§ 2331(4)(C), 2331(6)(B).

24. Jennifer Latson, *A Murder That Shocked the World, at Sea and on Stage*, TIME MAG.

killed Leon Klinghoffer, a sixty-nine-year-old U.S. citizen who was confined to his wheelchair, and then threw his body overboard.[25] Klinghoffer's family sued the PLO for his murder, alleging that his killing "was an act of international terrorism perpetrated by a terrorist organization."[26] In the course of deciding that it could exercise jurisdiction over the defendant, the U.S. district court in Manhattan noted that Klinghoffer's widow was only able to maintain her civil action because the attack violated admiralty law and the PLO had sufficient assets and activities in New York.[27] If the attack had instead taken place in another country, the court could not have exercised jurisdiction.[28] The Klinghoffer case thus alerted congressional observers to a jurisdictional gap that could bar a future court's ability to vindicate the interests of U.S. victims of international terrorism.[29]

B. The Civil Remedies Provision (18 U.S.C. § 2333)

After several initial iterations,[30] Congress filled this jurisdictional gap by enacting the Antiterrorism Act of 1990, which provided a civil cause of action for U.S. victims of international terrorism.[31] This provision of a civil remedy for victims of terrorism was one of many steps Congress took during the early 1990s to construct a statutory anti-terrorism regime. In subsequent years, Congress enacted both the Violent Crime Control and Law Enforcement Act of 1994, which imposed criminal sanctions through terrorism and material support statutes,[32] and the Antiterrorism and Effective Death Penalty Act of 1996, which added additional criminal sanctions for acts of

(Oct. 7, 2015, 10:30 AM), https://time.com/4055773/achille-lauro/ [https://perma.cc/3YVB-8494].

25. *Id.*

26. Chalos, *supra* note 14, at 308–10 (providing a comprehensive account of the ATA's legislative history); *see* Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991).

27. *See Klinghoffer*, 739 F. Supp. at 859, 861–63.

28. Chalos, *supra* note 14, at 309.

29. H.R. REP. NO. 102-1040, at 5 (1992).

30. *See, e.g.*, Anti-Terrorism Act of 1987, Pub. L. No. 100-204, §§ 1001–05, 101 Stat. 1331, 1406–07 (1987); Antiterrorism Act of 1991, S. 740, 102d Cong. (1991); Antiterrorism Act of 1992, H.R. 2222, 102d Cong. (1992).

31. Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250–53 (1990).

32. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

terrorism.[33]

The civil remedies provision of the ATA, 18 U.S.C. § 2333, provides that "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."[34] To understand the scope of liability under § 2333, a review of the statutory interpretation of two phrases is essential.

First, the condition that the injury sustained was "by reason of" the terrorist act has been interpreted to require a showing of proximate cause, because identical language in the Racketeer Influenced and Corrupt Organizations Act (RICO) has been similarly interpreted.[35] Thus, to impose liability under § 2333, the resulting injury or death must have been a reasonably foreseeable result of the defendant's actions—here, an act of international terrorism.[36] In addition to a proximate cause requirement, ATA suits—like other tort claims—may also be subject to dismissal on public policy grounds, as demonstrated by the recent dismissals of several ATA suits against social media firms that were precluded by the Communications Decency Act.[37]

Second, the ATA defines an act of "international terrorism" as conduct that involves

> violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States . . . [and] 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

33. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

34. 18 U.S.C. § 2333(a).

35. *See* Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000, 1011 (7th Cir. 2002) (citing Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 265–68 (1992), where the Court held that "by reason of" in the RICO statute requires a showing that the defendant's conduct proximately caused the plaintiff's injury).

36. *Boim I*, 291 F.3d at 1011–12.

37. *See, e.g.*, Fields v. Twitter, 217 F. Supp. 3d 1116 (N.D. Cal. 2016) (barring an ATA claim by families of deceased government contractors killed by Jordanian police officer, for which the Islamic State of Iraq and Syria (ISIS) claimed responsibility, alleging Twitter provided material support to ISIS, because the claim was preempted by the Communications Decency Act (CDA)), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *see also* Force v. Facebook, 934 F.3d 53 (2d Cir. 2019); Gonzalez v. Google, 335 F. Supp. 3d 1156 (N.D. Cal. 2018), *argued*, No. 18-16700 (9th Cir. Mar. 26, 2020). For more on the CDA's preemption of ATA suits against social media companies, see Jaime M. Freilich, *Section 230's Liability Shield in the Age of Online Terrorist Recruitment*, 83 BROOK. L. REV. 675 (2018).

> conduct of a government by mass destruction, assassination, or kidnapping.[38]

Courts applying this statutory definition have held that conduct violating a predicate federal criminal offense is not alone sufficient to support a claim under § 2333; the perpetrator must also have *intended* the act to intimidate, coerce, or influence the conduct of a civilian population or government.[39] In addition, acts of *international* terrorism must also "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."[40] This latter provision makes clear that the civil remedies provision is limited to terrorist acts that transcend the territorial jurisdiction of the United States—either in their means, targets, or origins—and are thus distinguished from acts of *domestic* terrorism, for which Congress has provided a separate definition.[41]

C. The "Act of War" Exception

A statutory exception bars claims under § 2333 for "injury or loss by reason of an act of war."[42] Under 18 U.S.C. § 2331(4), an "act of war" means "any act occurring in the course of (A) declared war; (B) armed conflict, whether or not war has been declared, between two or more nations; or (C) *armed conflict between military forces of any origin*."[43] Subsections A and B cover armed conflict between states,

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38. 18 U.S.C. §§ 2331(1)(A)–(B).

39. *See, e.g.*, Linde v. Arab Bank, PLC, 882 F.3d 314, 326 (2d Cir. 2018) (holding bank's violation of material support statute alone did not constitute an act of international terrorism), *vacating* 97 F. Supp. 3d 287 (E.D.N.Y. 2015) (holding that a Jordanian bank's acts of providing financial services to a terrorist organization that carried out twenty-four attacks in Israel itself constituted an act of international terrorism for the purposes of an action under the ATA, if the bank knew it was providing material support to a terrorist organization).

40. 18 U.S.C. § 2331(1)(C).

41. *See* 18 U.S.C. § 2331(5).

42. 18 U.S.C. § 2336(a). Similar clauses are not unusual in other contexts. For example, ubiquitous "war exclusion clauses" absolve insurers of the obligation to pay out insurance claims when the covered life or property was harmed or destroyed as a result of armed conflict. Despite the ubiquity of similar clauses, the ATA's act of war exception's operation as a determinant of whether an ATA claim is available remains a pressing issue where claims premised on secondary liability are concerned, as will be discussed in Part II. *See, e.g.*, Holiday Inns Inc. v. Aetna Ins. Co., 571 F. Supp. 1460 (S.D.N.Y. 1983) (holding that the insurer of a Beirut hotel severely damaged during the civil war in Lebanon failed to establish that damage to the hotel fell within excluded perils of insurrection, civil war, or war).

43. 18 U.S.C. § 2331(4) (emphasis added).

or international armed conflict, whether it is formally declared or not. On the other hand, the text of subsection C, by excepting injuries or losses sustained from armed conflict by military forces "of any origin," indicates that the exception's scope is broader than just covering conflicts between recognized governments.[44] Ultimately, subsection C invites an inquiry into whether the scope of the act of war exception includes claims for harms sustained by a plaintiff during the course of a non-international armed conflict,[45] where only one—or none—of the parties involved is an internationally recognized state actor.

Though informative, a review of the ATA's legislative history does not conclusively resolve this question. In its report, the Senate Judiciary Committee articulated the act of war exception's purpose as one meant to "bar actions [under § 2333] for injuries that result from military action by recognized governments as opposed to terrorists, even though governments also sometimes target civilian populations," and that "[i]njuries received by noncombatants as a result of open, armed conflict, including civil war, should not be actionable."[46] By recognizing that noncombatant civilians may suffer casualties in the course of armed conflict, the Senate reflected an absolute intent to bar claims against internationally recognized state governments for military action resulting in civilian casualties by acknowledging that such actions might at times be permissible under the international law of armed conflict.[47] Furthermore, while the Senate expressed an intent to

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44. *See, e.g.*, Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 511–12 (E.D.N.Y. 2012) ("[a]cts of this type are distinguished explicitly from the actions of recognized governments . . . .").

45. Under Common Article 3 of the Geneva Conventions of 1949, non-international armed conflicts (NIAC) are those in which one or more non-state armed groups are involved. Generally, classification as a NIAC requires two conditions: (1) the hostilities much reach a "minimum level of intensity"; and (2) non-governmental groups must be considered "parties to the conflict," meaning they possess organized armed forces. For further discussion of what constitutes a NIAC under the international law of armed conflict, see generally Int'l Comm. of the Red Cross, *Non-international armed conflict*, https://casebook.icrc.org/glossary/non-international-armed-conflict [https://perma.cc/CM2R-6GH8].

46. S. REP. NO. 102-342, at 47 (1992).

47. Under the international law of armed conflict, states must adhere to a general principle that military attacks shall be limited to military objectives, rather than civilian objects (people and places). However, the law also recognizes that the line between legitimate military objectives and civilian objects may, in practice, be blurred. Generally, the principle of "proportionality in attack" is applied to determine whether a military attack, which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof," is prohibited by counter-balancing the "concrete and direct military advantage anticipated." *See* Int'l Comm. of the Red Cross, *Rule 14: Proportionality in Attack*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14#refFn_29_27 [https://perma.cc/9ZAH-HGUV]. For further discussion, see generally Beth Van Schaack, *Evaluating Proportionality and Long-Term Civilian Harm under the Laws of War*, JUST SEC. (Aug. 29, 2016), https://www.justsecurity.org/32577/evaluating-proportionality-long-term-

bar claims arising from a recognized government's military actions in the course of "civil war," it did not determinatively address (if at all) whether the actions of quasi- or non-state actors—whose international legitimacy is in dispute—could constitute a military force "of any origin" under § 2331(4)(C). As a result, a court's analysis and resolution of whether § 2331(4)(C) should apply instead turns on its determination of whether it believes an alleged terrorist attack was perpetrated by a "military force" within the meaning of the ATA.

D. Antiterrorism Act Claims Before 2016

Before the ATA was amended in 2016, claims under § 2333—typically pursued by the survivors of U.S. victims of terrorist attacks abroad—shared two common features. First, the defendants were usually the organizations alleged to have directly perpetrated the alleged act of international terrorism, rather than those who facilitated the attacks through financial support or other indirect means. For example, many ATA claims were brought against Palestinian organizations, alleging that the defendants were responsible for the deaths of U.S. citizens.[48] Second, ATA claims were generally resolved through the entry of default judgments[49] or out-of-court settlements.[50] Even when default judgments were entered against absentee defendants, courts would occasionally grant them post-judgment relief.[51] Altogether, the prospects for a plaintiff to prevail on an ATA claim and then successfully collect on a judgment were poor.[52]

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civilian-harm-law-war/ [https://perma.cc/8TMS-CX8U].

48. *See, e.g.*, Knox v. Palestine Liberation Org., 306 F. Supp. 2d 424 (S.D.N.Y. 2004); Gilmore v. Palestinian Interim Self-Gov't Auth., 422 F. Supp. 2d 96 (D.D.C. 2006).

49. *See, e.g.*, Biton v. Palestinian Interim Self-Gov't Auth., 239 F.R.D. 1 (D.D.C. 2006).

50. *See, e.g.*, Linde v. Arab Bank, PLC, 882 F.3d 314 (2d Cir. 2018) (reviewing post-trial settlement agreement); *see also* Eliot Kim, *Summary: Second Circuit Opinion in* Linde v. Arab Bank, LAWFARE (Feb. 26, 2018, 3:35 PM), https://www.lawfareblog.com/summary-second-circuit-opinion-linde-v-arab-bank [https://perma.cc/2HPA-4GK5].

51. *See, e.g.*, Gilmore v. Palestinian Interim Self-Gov't Auth., 843 F.3d 958 (D.C. Cir. 2016); Knox v. Palestine Liberation Org., 442 F. Supp. 2d 62 (S.D.N.Y. 2006) (granting the wife of a terrorism victim killed during a PLO attack a default judgment of $10 million in damages for loss of consortium and mental anguish under the ATA), *relief from judgment granted*, 248 F.R.D. 420 (S.D.N.Y. 2008).

52. *See* Boim v. Quranic Literacy Inst. (*Boim III*), 549 F.3d 685, 690–91 (7th Cir. 2008) (en banc) (Posner, J.) ("Terrorist organizations have been sued under § 2333 . . . but to *collect* a damages judgment against such an organization, let alone a judgment against the terrorists themselves (if they can be identified and thus sued), is . . . well-nigh impossible. These are foreign organizations and individuals, operating abroad and often covertly, and they are often impecunious as well."), *cert. denied*, 558 U.S. 981 (2009).

E. Courts Diverge on Secondary Liability under the Antiterrorism Act

Before 2016, attempts by creative plaintiffs to diverge from the course of a typical ATA claim resulted in little to mixed success.[53] During this period, courts addressing ATA claims that sought to impose secondary liability for terrorist attacks disagreed on whether § 2333 permitted such claims. In these suits, innovative ATA plaintiffs sued financial institutions under § 2333, alleging that the defendant banks could be held indirectly liable for acts of international terrorism because they had provided financial services to the perpetrators. Even though § 2333 did not explicitly provide for it at the time, these claims sought to superimpose an aiding and abetting theory of liability on the civil remedies provision to target corporations, financial institutions, and other deep-pocketed third parties. For plaintiffs, these defendants were attractive alternatives to terrorist organizations who either were out of the reach of U.S. courts and/or lacked assets to satisfy judgments against them.[54] Subsequent court decisions produced a split of authority on whether these claims could continue.

In its first consideration of the case in 2002, the Seventh Circuit in *Boim v. Quranic Literacy Institute (Boim I)* held that § 2333 allowed plaintiffs injured by an act of international terrorism to sue defendants under an aiding and abetting theory of liability.[55] In *Boim I*, the parents of a teenage boy who was murdered while waiting for a bus in the West Bank sued his attackers, who were known members of the military wing of Hamas.[56] The Boims also brought ATA claims against two U.S. not-for-profit corporations, the Quranic Literacy Institute and the Holy Land Foundation for Relief and Development, alleging that the

53. In addition to the attempts to impose secondary liability discussed, some plaintiffs also attempted to impose ATA liability on foreign sovereigns. Generally, these claims were rejected because the statute does not circumvent the sovereign immunity traditionally afforded to foreign states. *See, e.g.*, Lawton v. Republic of Iraq, 581 F. Supp. 2d 43 (D.D.C. 2008) (dismissing a suit against the state of Iraq because the ATA does not provide for a cause of action against foreign states); *but cf. Gilmore*, 843 F.3d at 968 (finding that the defendant was not a sovereign state entitled to immunity). The ATA bars claims against foreign states and their officers acting within their official capacities or under the color of legal authority. 18 U.S.C. § 2337(2); *see, e.g.*, Smith v. Islamic State of Afg., 262 F. Supp. 2d 217, 225–26 (S.D.N.Y. 2003) (rejecting plaintiffs' argument that the state sponsor of terrorism exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), applied to their ATA claim—arising from the September 11 attacks and brought against Afghanistan, the Taliban, al-Qaeda, Osama bin Laden, Saddam Hussein, and Iraq—and dismissing claims against defendants who were foreign states and their officers).

54. *See supra* note 52 and accompanying text.

55. *Boim I*, 291 F.3d 1000, 1020 (7th Cir. 2002).

56. *Id.* at 1002.

organizations aided and abetted the attack that killed their son, because their purported humanitarian missions were a façade for funneling money to Hamas to support its terrorist activities.[57] Upon examination of the statute's text, structure, and legislative history, the Seventh Circuit concluded that aiding and abetting liability could be imposed.[58] For the *Boim I* panel, failing to impose liability on those who knowingly and intentionally fund acts of terrorism would thwart Congress' intent to "cut off the flow of money to terrorists at every point in the causal chain of violence."[59]

Before the Seventh Circuit revisited the question in 2008, the majority of federal district courts that considered aiding and abetting liability under § 2333 adopted the reasoning set forth in *Boim I*.[60] However, when the Seventh Circuit revisited the question en banc in *Boim III*, it reversed its earlier conclusion and held that § 2333 does not impose aiding and abetting liability.[61] In writing for the majority, Judge Posner, relying principally on the reasoning of *Central Bank of Denver v. First Interstate Bank of Denver* with respect to the availability of secondary liability,[62] was unequivocal: "statutory silence on the subject of secondary liability means there is none."[63]

Accordingly, in 2012, the U.S. District Court for the Eastern

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57. *Id.* at 1003–04.

58. *Id.* at 1016–21.

59. *Id.* at 1021; *see* S. REP. NO. 102-342, at 22 (1992) ("By [the civil remedy's] provisions for compensatory damages, treble damages, and the imposition of liability at any point along the causal chain of terrorism, [the ATA] would interrupt, or at least imperil, the flow of money.").

60. *See, e.g.*, Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) ("For the reasons set forth comprehensively by the Court of Appeals for the Seventh Circuit in [*Boim I*], I conclude that aiding and abetting liability is available under the ATA."); Morris v. Khadr, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) ("As the United States Court of Appeals for the Seventh Circuit has held, § 2333 liability extends to both on-the-ground terrorists and those who aid and abet them.").

61. *See Boim III*, 549 F.3d 685, 689 (7th Cir. 2008).

62. The *Boim I* panel had concluded in its opinion that *Central Bank* was inapposite, because the ATA created an express, not an implied, cause of action. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (holding that Section 10(b) of the Securities and Exchange Act of 1934, which prohibits securities fraud, does not reach aiding and abetting liability because Congress made no explicit reference to secondary liability).

63. *Boim III*, 549 F.3d at 689. However, the Seventh Circuit did adopt an expansive theory of primary liability to hold target financiers potentially liable via a series of statutory incorporations tying the material support statute, 18 U.S.C. § 2339A, to the civil remedies provision. *Id.* at 691–92. Ultimately, JASTA's provision for aiding and abetting liability (discussed below) makes formulating this chain of incorporations unnecessary to hold financiers liable where the perpetrators have been designated as a foreign terrorist organization by the U.S. Government.

District of New York adopted the Seventh Circuit's reasoning in *Boim III* in deciding *Gill v. Arab Bank*, where the plaintiff—who was wounded by gunfire into Israel from Gaza during a Hamas-sponsored attack—alleged that a Jordanian bank aided and abetted Hamas by providing it financial services.[64] The court declined to follow an earlier opinion by the same district court in *Linde v. Arab Bank*, which had relied on the now-eschewed reasoning of the *Boim I* panel.[65] The next year, in an ATA suit against an international bank, *Rothstein v. UBS AG*, the Second Circuit agreed with the Seventh Circuit's reasoning in *Boim III* and declined to read aiding and abetting liability into § 2333.[66]

Even after the *Boim III* panel reversed its earlier holding, some courts still disagreed with the Seventh Circuit on the availability of aiding and abetting liability.[67] In *Wultz v. Islamic Republic of Iran*, for example, where the family of an American killed in a suicide bombing brought an ATA claim against a Chinese bank for executing wire transfers for the terrorists, the U.S. District Court for the District of Columbia acknowledged the *Boim III* decision but decided, upon a review of the statute's text, legislative history, and persuasive authority, that the ATA incorporated traditional tort law principles, including secondary liability.[68]

F. Two Statutory Amendments to the ATA Civil Remedies Provision

1. Justice Against Sponsors of Terrorism Act of 2016

In 2016, Congress resolved the inconsistency between courts over whether § 2333 permitted claims based on aiding and abetting liability when it enacted JASTA.[69] In the face of the executive

64. Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 484–88 (E.D.N.Y. 2012).

65. *Id.* at 500; *see Linde*, 384 F. Supp. 2d at 583 ("For the reasons set forth comprehensively by the Court of Appeals for the Seventh Circuit in [*Boim I*], I conclude that aiding and abetting liability is available under the ATA.").

66. Rothstein v. UBS AG, 708 F.3d 82, 97–98 (2d Cir. 2013) ("We doubt that Congress, having included in the ATA several express provisions with respect to aiding and abetting in connection with the criminal provisions, can have intended § 2333 to authorize civil liability for aiding and abetting through its silence."); *see also In re* Terrorist Attacks on Sept. 11, 2001, 714 F.3d 118, 123–24 (2d Cir. 2013).

67. *See, e.g.*, *In re* Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 690 F. Supp. 2d 1296, 1309–10 (S.D. Fla. 2010); Abecassis v. Wyatt, 704 F. Supp. 2d 623, 663–65 (S.D. Tex. 2010) (surveying various federal courts' treatment of the *Boim III* panel's analysis of the issue).

68. Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 54–57 (D.D.C. 2010).

69. Justice Against Sponsors of Terrorism Act of 2016, Pub. L. No. 114-222, 130 Stat.

branch's staunch opposition to its amendment of the Foreign Sovereign Immunities Act,[70] JASTA also amended the ATA's civil remedies provision to provide for aiding and abetting liability in some cases. In pertinent part, the amendment to § 2333 allows secondary liability for "an injury arising from an act of international terrorism committed, planned, or authorized by . . . a foreign terrorist organization" to be asserted as to "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."[71] Thus, while § 2333(d) now explicitly provides for aiding and abetting liability for persons who knowingly facilitate acts of international terrorism, Congress limited recovery to plaintiffs whose injuries resulted from the acts, planning, or authority of a U.S. Department of State-designated foreign terrorist organization (FTO).[72]

Furthermore, in its statutory notes, Congress prescribed the D.C. Circuit's opinion in *Halberstam v. Welch* as providing the proper legal framework for how civil aiding and abetting liability under the ATA should function.[73] In short, to be held liable on an aiding-abetting basis, *Halberstam* requires that an ATA defendant have knowingly and substantially assisted the principal violation—or the terrorist attack that resulted in the victim's injury.[74] *Halberstam* identifies six factors bearing on "'how much encouragement or assistance is substantial enough' to satisfy [the knowing and substantial assistance

852 (2016) [hereinafter JASTA].

70. The Obama Administration expressed staunch opposition to the bill out of a concern that it infringed on the Executive's ability to pursue its foreign policy prerogatives and the bill's apparent abrogation of sovereign immunity. Despite this opposition, Congress enacted JASTA by overriding President Obama's veto. *See* Office of the Press Secretary, ***Veto Message from the President*** — S.2040, WHITE HOUSE (Sept. 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040 [https://perma.cc/7URS-6LGW]; *see generally* Dan Cahill, ***The Justice Against Sponsors of Terrorism Act: An Infringement on Executive Power***, 58. B.C. L. REV. 1699 (2017).

71. 18 U.S.C. § 2333(d)(2). By statute, JASTA was made applicable to any civil action: (1) pending, or commenced on or after, its enactment date on Sept. 28, 2016; or (2) arising out of an injury sustained on or after the Sept. 11, 2001 attacks. *See* JASTA, *supra* note 69.

72. 18 U.S.C. § 2333(d)(2). Furthermore, JASTA specified that a "person" as to whom aiding and abetting liability could be asserted includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. *See* 18 U.S.C. § 2333(d)(1).

73. Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852 (2016).

74. *See* Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983) (holding that "[a]iding-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").

element]: (1) the nature of the act encouraged, (2) the amount of assistance given by defendant, (3) defendant's presence or absence at the time of the tort, (4) defendant's relation to the principal, (5) defendant's state of mind, and (6) the period of defendant's assistance."[75]

Through JASTA, Congress explicitly authorized imposing secondary liability on culpable third parties like corporate entities, such that liability should "extend . . . to all points along the causal chain of terrorism."[76] In doing so, Congress found it was "necessary to recognize the substantive causes of action for aiding and abetting and conspiracy liability . . . [and that there was a] vital interest in providing persons and entities injured as a result of terrorist attacks . . . to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries."[77] After JASTA was enacted, courts responded in kind by recognizing that the scope of liability under § 2333 had fundamentally changed.[78]

2. Anti-Terrorism Clarification Act of 2018

Two years later, Congress again amended the ATA's civil remedies provision, through ATCA, for three purposes: (1) narrowing the scope of the act of war exception; (2) attaching narco-terrorism assets; and (3) broadening the scope of personal jurisdiction for ATA claims.[79] The first purpose—narrowing the scope of the act of war exception to claims under § 2333—is germane to this Note.

ATCA makes the act of war exception unavailable to any person or entity designated by the U.S. Department of State as a "foreign terrorist organization" (FTO), or by the U.S. Department of the Treasury as a "specially designated global terrorist" (SDGT), by excluding any FTOs or SDGTs from the definition of "military force" under § 2331.[80] In addition, if the defendant has not been designated an FTO or SDGT, courts may still find a defendant is subject to liability by

75. Linde v. Arab Bank, PLC, 882 F.3d 314, 329 (2d Cir. 2018) (citing *Halberstam*, 705 F.2d at 483–84).

76. *See Boim I*, 291 F.3d 1000, 1016–21 (7th Cir. 2002).

77. *See* JASTA, *supra* note 69.

78. *See, e.g.*, Owens v. BNP Paribas, 897 F.3d 266, 278 (D.C. Cir. 2018) (affirming dismissal of an ATA suit against a bank because the version of the ATA in effect when the terrorist bombings took place before JASTA amended § 2333 to impose aiding and abetting liability, which would have allowed the suit to continue).

79. Anti-Terrorism Clarification Act of 2018, Pub. L. No. 115-253, 132 Stat. 3183 (2018) [hereinafter ATCA]; *see generally* Henry Graver & Scott R. Anderson, *supra* note 18.

80. 18 U.S.C. § 2331(6).

independently determining that they do not constitute a "military force" within the meaning of the exception.[81] As a result, if the perpetrator of an act of international terrorism is not a designated entity, the latter provision leaves the determination of what constitutes a "military force" under the ATA to a court. This, in turn, is determinative of whether a defendant has grounds to invoke the exception, because it determines whether it could have committed an "act of war" under § 2331. A review of the legislative record confirms this open door exists; Congress "intended to preserve the courts' ability to make a determination as to whether a person in addition to an FTO or an SDGT is not a military force of any origin. In other words, this language was included to make clear *a person in addition to an FTO or an SDGT may be found not to be a military force*."[82]

Congress narrowed the act of war exception because it found that the definition of "military force" under § 2331 had been incorrectly applied by some courts, "allowing designated terrorist entities and their supporters to avoid liability for terrorist attacks in some cases."[83] Discussing the impetus for ATCA's amendment to the act of war exception, Representative Goodlatte lamented that "[d]efendants accused of aiding and abetting acts of international terrorism have been attempting to use this exception as a means of avoiding civil liability . . . ."[84] The act of war exception, he said, "should not be a liability shield for those who aid or abet attacks carried out by designated terrorist organizations."[85] In particular, Congress was contemplating the result in *Kaplan v. Central Bank of Iran*, where the court decided that rocket attacks launched against Israel by Hezbollah during the 2006 Israel-Lebanon conflict constituted an "act of war," despite Hezbollah's designation as an FTO.[86] However, in a majority of cases, courts did not allow defendant terrorist organizations to successfully invoke the exception.[87] Thus, Congress enacted ATCA to extinguish the

81. *See* 18 U.S.C. § 2331(6)(B).

82. H.R. REP. NO. 115-858, at 4 n.11 (2018) (emphasis added).

83. *Id.* at 9.

84. 164 CONG. REC. H6617 (daily ed. July 23, 2018) (statement of Rep. Goodlatte).

85. *Id.*

86. Kaplan v. Cent. Bank of the Islamic Republic of Iran, 961 F. Supp. 2d 185, 204 (D.D.C. 2013), *aff'd in part, vacated in part*, 896 F.3d 501 (D.C. Cir. 2018). During the House floor discussion of ATCA, the *Kaplan* case, which represented a minority view that a designated FTO could constitute an "armed force of any origin" under the ATA, was specifically invoked as a primary reason for the bill by Representative Goodlatte. *See* H.R. REP. NO. 115-858, at 4 (2018).

87. *See, e.g.*, Morris v. Khadr, 415 F. Supp. 2d 1323, 1333–34 (D. Utah 2006) (holding a claim by survivors of U.S. Army soldiers wounded and killed in Afghanistan made a prima facie showing that an attack by al-Qaeda was not an "act of war" subject to exclusion under

minority view expressed in *Kaplan* by ensuring that designated FTOs and SDGTs could not invoke the act of war exception to dismiss a claim. However, where the perpetrator is not a U.S. government-designated terrorist organization, whether the act of war exception applies remains an open question.

II. THE ATA CIVIL REMEDIES PROVISION'S SECONDARY LIABILITY GAP

Part II identifies and examines a gap in the scope of secondary liability under § 2333(d)—as enacted by JASTA and modified by ATCA—that has made it arduous for some plaintiffs harmed by acts of international terrorism to vindicate their injuries. It also further explores the "act of war" exception and identifies the crucial function it could play, if the scope of secondary liability were broader.

A. The Liability Gap for Aiding and Abetting International Terrorism under the ATA

1. Aiding and Abetting Liability After JASTA and ATCA

As discussed in Part I, the joint result of Congress' two amendments to § 2333, JASTA and ATCA, was simultaneously: (1) to impose aiding and abetting liability for third parties who knowingly supported terrorist attacks by U.S. government-designated foreign terrorist organizations; and (2) to foreclose an FTO's ability to invoke the act of war exception. As a result of JASTA, plaintiffs may now sue corporate entities under § 2333 to hold them liable for aiding and abetting an act of international terrorism by providing substantial assistance to its perpetrators. However, such claims are compensable only when a U.S. government-designated FTO committed, planned, or authorized the attack.[88] When this condition is met, however, ATCA

18 U.S.C. § 2336(a)); Est. of Klieman v. Palestinian Auth., 424 F. Supp. 2d 153, 166–67 (D.D.C. 2006) (holding that a PLO attack on a civilian bus was not committed "in the course of" armed conflict, because the attack on non-combatant citizens violated the established norms of warfare and armed conflict under international law); Weiss v. Arab Bank, PLC, No. 06 CV 1623(NG)(VVP), 2007 WL 4565060, at *4–5 (E.D.N.Y. Dec. 21, 2007); Stansell v. BGP, Inc., No. 8:09-cv-2501-T-30AEP, 2011 WL 1296881, at *11 (M.D. Fla. 2011).

88. *See, e.g.*, First Amended Complaint at 9, Cabrera v. Black & Veatch Special Projects Corp., No. 1:19-cv-03833-EGS, 2020 WL 5361723 (D.D.C. June 5, 2020), ECF No. 82; Michael R. Gordon & Jessica Donati, *U.S., International Contractors Sued for Allegedly Paying Protection Money to Taliban*, WALL ST. J. (Dec. 27, 2019, 12:48 PM), https://www.wsj.com/articles/u-s-international-contractors-sued-for-allegedly-paying-

forecloses the ability of sophisticated, well-resourced corporate defendants to invoke the act of war exception by arguing that the FTO should be exempt from suit because its conduct occurred in the course of "armed conflict between *military forces of any origin*."[89] The current regime has thus cleared a significant potential hurdle to an ATA plaintiff's recovery.

These parameters for aiding and abetting liability under § 2333(d) seem to be precisely what Congress intended to establish through JASTA and ATCA. First, because JASTA amended § 2333 to explicitly impose secondary liability on those who aid and abet an act of international terrorism perpetrated by an FTO, it appears that Congress did not intend for the pre-JASTA statute to provide for secondary liability—as the Second and Seventh Circuits had previously concluded.[90] If this were not the case, the statutory limitation imposing secondary liability on only those who aid and abet terrorist acts *perpetrated by designated FTOs* might otherwise meaningless. Second, ATCA foreclosed the ability of a designated FTO to invoke the act of war exception to escape liability—argued successfully by the defendants in *Kaplan*[91]—and thereby conformed § 2333 more closely to its purpose: to provide the victims of terrorism with an opportunity to pursue justice in U.S. courts. Indeed, speaking in support of the bill on the House floor, Representative Nadler stated that "to read the act of war exception otherwise . . . threatens to undermine the ATA's entire purpose."[92]

2. The Resulting Statutory Gap in Aiding and Abetting Liability

These amendments to the civil remedies provision have left a gap in the scope of secondary liability under the ATA—whether intended or not. In short, when those who perpetrate an act of international terrorism are *not* a U.S. government-designated FTO, the secondary liability provision, § 2333(d), does not make liable persons who aid and abet their terrorist attacks. Thus, for at least some U.S.

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protection-money-to-taliban-11577468921 [https://perma.cc/7YKF-DVXX].

89. *See* 18 U.S.C. § 2331(4)(C) (emphasis added).

90. Owens v. BNP Paribas, 897 F.3d 266, 278 (D.C. Cir. 2018) ("JASTA does not indicate that Congress merely "clarified" existing law when it amended § 2333 . . . If anything, JASTA's passage confirms that Congress knows how to provide for aiding and abetting liability explicitly and that the [previous] version of § 2333 in effect . . . did not provide for that liability. At the very least, nothing in JASTA shows with sufficient clarity that [it] . . . merely clarified § 2333's preexisting meaning.").

91. *See supra* note 86 and accompanying discussion of *Kaplan* and ATCA.

92. 164 CONG. REC. H6617 (daily ed. July 23, 2018) (statement of Rep. Nadler).

victims of terrorist attacks, holding banks, corporations, or other third parties accountable for aiding and abetting the terrorist attacks that injured them remains virtually foreclosed under the ATA.

This gap is problematic for two reasons. First, the ATA does not similarly limit liability for an act of "international terrorism," as defined by 18 U.S.C. § 2331, to violent acts committed, planned, or authorized by a designated foreign terrorist organization. Instead, as previously discussed, the statute merely requires that the violent act, or "act dangerous to human life": (1) violated a predicate criminal statute; (2) occurred extraterritorially or transnationally; and (3) appeared to be intended to intimidate, coerce, or influence the conduct of a civilian population or government.[93] Accordingly, the ATA civil remedies provision recognizes that covered a terrorist attack may be committed by individuals, groups, or organizations without a formal designation by the U.S. government, given that nothing in the definition of an act of "international terrorism" requires that it was perpetrated by a designated FTO.[94]

Second, the gap is also problematic because scenarios could arise where a target defendant—a bank, for example—may, by providing substantial assistance, have knowingly aided and abetted an act of international terrorism committed, planned, or authorized by a group that is not formally designated as an FTO by the U.S. government, but for all intents and purposes conducts itself as one. Under the current law, a civil suit seeking to impose secondary liability on that bank under § 2333(d) would likely be dismissed, because aiding and abetting liability currently turns on the existence of a formal FTO designation.

3. Two Instructive Matters: Schansman and Atchley

a. Schansman v. Sberbank

The troubling effect of this liability gap is no hypothetical matter; the problem is real. In *Schansman v. Sberbank*, where the family of a U.S. citizen killed in an attack on Malaysia Airlines Flight 17 (MH17) brought an ATA claim against two U.S.-based money transfer firms and two Russian banks, this liability gap is all too apparent.[95] In short, the *Schansman* plaintiffs were left to attempt to impose *primary*

93. *See* 18 U.S.C. § 2331(1).

94. In other contexts, Congress has placed explicit limits on who can be sued under § 2333. For example, a plaintiff could not successfully maintain an ATA suit against a foreign government for an injury caused by its military in the course of armed conflict, due to the statutory "act of war" exception. *See* 18 U.S.C. §§ 2335–2337.

95. *See* First Amended Complaint, *Schansman*, *supra* note 11.

liability under § 2333(a) for the MH17 attack by alleging that the defendants caused the death of their kin by knowingly providing material support—banking and money transfer services—to members and representatives of the Donetsk People's Republic (DPR), even though the group's past perpetration of, and continuing intent to commit, acts of international terrorism was clear.[96] Because the DPR is not a U.S. government-designated FTO,[97] the complaint does not attempt to impose aiding and abetting liability on the defendants via § 2333(d), even though it seems to sufficiently plead facts—if taken as true—that would sustain a claim premised on secondary liability, if an FTO designation were not required.

This is troubling, because whether or not the *Schansman* plaintiffs will be able to vindicate the loss of their kin through the ATA could turn on the fact that the DPR lacks an FTO designation,[98] even though its actions almost certainly amount to an act of international terrorism under § 2331. Here, the DPR, acting to influence the policies of the Ukrainian government, caused the death of Quinn Lucas Schansman when its militants launched a surface-to-air missile that brought down a civilian airliner in eastern Ukraine.[99] If, as the plaintiffs allege, the defendant financial institutions knowingly, or with reckless or willful blindness, aided and abetted the DPR's attack on MH17, the *Schansman* plaintiffs' injury seems of the exact nature that Congress intended the ATA to vindicate by imposing liability "at any point along the causal chain of terrorism."[100] However, as the plaintiffs already seem to have anticipated, lacking an FTO designation for the perpetrators in this case likely forecloses this avenue to recovery.[101]

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96. First Amended Complaint ¶¶ 4, 68, *Schansman*, *supra* note 11 ("Defendants provided their services directly to prominent DPR leaders and DPR fundraisers who were unambiguous about their intent: to arm and equip the DPR to carry out terrorist acts in service of undermining the Government of Ukraine, intimidating and coercing civilians, increasing the Russian Federation's control over territory in eastern Ukraine, and ultimately advancing a political and ideological agenda to reestablish the 'Russian Empire' through the creation of 'Novorossiya' (New Russia)."). To support its argument that the DPR constitutes a terrorist organization, the complaint then characterizes "Novorossiya" as both an "aspirational geographical territory" like the Islamic State's aspirational "Caliphate," and a "violent extremist political movement." *Id.* at 2 n.1.

97. *See* U.S. Department of State, *Foreign Terrorist Organizations*, https://www.state.gov/foreign-terrorist-organizations/ [https://perma.cc/2HHQ-M6V3].

98. *See generally In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 833–35 (S.D.N.Y. 2005) (holding that providing routine banking services, without having knowledge of terrorist activities, was insufficient to subject a bank to liability).

99. *See* Pérez-Peña, *supra* note 7.

100. *See* S. REP. NO. 102-342, at 22 (1992).

101. At the time of publication, litigation in *Schansman v. Sberbank* was ongoing, so whether the plaintiffs would succeed on their primary liability theory was unknown.

b. Atchley v. AstraZeneca

In another case, *Atchley v. AstraZeneca*, the problematic consequences of the liability gap become even clearer. In *Atchley*, the plaintiffs—who are U.S. military veterans and civilians who were killed or wounded in Iraq between 2005 and 2009, as well as their families—sued five multinational pharmaceutical and medical device companies, in part under § 2333(d), for aiding and abetting acts of international terrorism by a group known as *Jaysh al-Mahdi* ("Mahdi Army") that caused their injuries.[102] The plaintiffs alleged that the defendants, in order to win lucrative Iraqi procurement contracts, provided the Iraqi Ministry of Health, which was de facto controlled by members of the Mahdi Army and plagued by corruption and profiteering, with cash payments, in kind drugs, and free equipment, which its officials then sold in regional black markets for profit.[103] They alleged that the defendants knew or recklessly disregarded that these goods would aid and abet the organization's terrorist operations against Americans by providing it with the means to pay its fighters, who "likely killed more than 500 Americans and wounded thousands more – likely making it responsible for more American casualties in Iraq than any other terrorist group."[104]

Despite its openly notorious reputation, the Mahdi Army was never designated an FTO by the State Department.[105] As the plaintiffs argue, the U.S. Secretary of State refrained from formally designating the group as an FTO because of strategic and diplomatic concerns that U.S. policymakers would later need the flexibility to engage with the group's influential leader if and when it would serve U.S. interests in Iraq—not as a signal of approval for its activities, nor as a green light for private companies to deal openly with the group.[106] Even if the

102. *See* Third Amended Complaint ¶ 13, Atchley v. AstraZeneca U.K. Ltd., No. 17-cv-02136-RJL, 2020 WL 755075 (D.D.C. Jan. 21, 2020), ECF No. 124 ("Jaysh al-Mahdi waged a violent campaign that involved an array of asymmetrical terrorist tactics: Jaysh al-Mahdi fighters attacked civilians and service members indiscriminately; engaged in mass sectarian cleansing; targeted medics in attacks; conducted kidnappings, torture, and executions; and hid from U.S. troops in mosques, schools, ambulances, and hospitals.").

103. *Id.* ¶¶ 70–77, 116–19, 142, 145.

104. *Id.* ¶¶ 1–16.

105. *See* U.S. Department of State, *supra* note 97; *see also* Bill Roggio & Caleb Weiss, *Muqtada al Sadr reactivates Mahdi Army, Promised Day Brigade*, LONG WAR J. (Jan. 3, 2020), https://www.longwarjournal.org/archives/2020/01/muqtada-al-sadr-reactivates-mahdi-army-promised-day-brigade.php [https://perma.cc/UV8Z-SZF8]; *see generally* Ctr. for Int'l Sec. & Coop., *Mapping Militant Organizations: Mahdi Army*, STAN. UNIV. (last modified May 2019), https://cisac fsi.stanford.edu/mappingmilitants/profiles/mahdi-army [https://perma.cc/E28Z-HLQP].

106. Third Amended Complaint ¶ 355, Atchley v. AstraZeneca U.K. Ltd., *supra* note 102,

plaintiffs' allegations were taken as true, and the defendants had in-fact aided and abetted the Mahdi Army's attacks on U.S. military and civilian personnel, the lack of a formal FTO designation nevertheless threatened to foreclose the plaintiffs' aiding and abetting liability claim from the start.

In support of their motion to dismiss, the defendants pointed to this exact deficiency as their primary defense to the aiding and abetting count under § 2333(d).[107] Aware of this obstacle, the plaintiffs offered a creative argument that the Mahdi Army's ties to Hezbollah—a designated FTO—should cure this deficiency, but the defendants countered that generally alleged support from Hezbollah is too attenuated from each attack to support liability under the ATA.[108] Unfortunately for the plaintiffs, the district court agreed with the defendants on both issues and granted their motion to dismiss.[109] In doing so, the court held that the plaintiffs' failure to allege that the defendants had aided and abetted an FTO-designated perpetrator of terrorist attacks was "fatal" to their claim.[110]

4. Legislative Purpose and the Liability Gap

As the *Schansman* and *Atchley* suits demonstrate, requiring an FTO designation as the touchstone of secondary liability under the

("Indeed, the diplomatic decision to refrain from designating [the Mahdi Army] as an FTO (which allowed U.S. officials to engage with the Sadrists when necessary) is not inconsistent with the reality that [the Mahdi Army] acted and functioned as a terrorist group. Plaintiffs' claims hinge on the latter point; they expressly disclaim any challenge to the former.").

107. Memorandum in Support of Defendants' Motion to Dismiss at 54–55, 61, Atchley v. AstraZeneca U.K. Ltd., No. 1:17-cv-02136-RJL, 2019 WL 1780356 (D.D.C. Apr. 4, 2019), ECF No. 111-1 ("Congress . . . confined aiding-and-abetting liability to instances where . . . [the] act of international terrorism was 'committed, planned, or authorized' by an entity designated by the Secretary of State as an FTO . . . [The Mahdi Army] is not, and has never been, an FTO.").

108. *Id.* at 61 ("Plaintiffs allege that Hezbollah operatives were involved in only 22 of the 300-plus attacks at issue—covering only 35 of the 395 primary victims. For the remaining (and vast majority of) attacks, Plaintiffs make no concrete factual allegations demonstrating that Hezbollah 'planned' or 'authorized' those attacks, let alone 'committed' them alongside [the Mahdi Army]."); *see also* Memorandum in Support of Defendants' Motion to Dismiss at 68, Atchley v. AstraZeneca U.K. Ltd., No. 1:17-cv-02136-RJL, 2018 WL 2981543 (D.D.C. Apr. 26, 2018), ECF No. 72-1 ("Alleging that Hezbollah generally trained, supported, or inspired [the Mahdi Army] is a far cry from alleging that Hezbollah decided on and arranged in advance, or gave official permission or approval to, the *specific* [Mahdi Army] attacks that injured Plaintiffs.") (emphasis added).

109. Atchley v. AstraZeneca U.K. Ltd., No. 1:17-cv-02136-RJL, 2020 WL 4040345, at *10–11 (D.D.C. July 17, 2020), *appeal filed*, No. 20-7077 (D.C. Cir. Aug. 21, 2020).

110. *Id.* at *10.

ATA, instead of simply requiring that the predicate acts were those within the statutory definition of international terrorism, could lead, and has led to, anomalous and disastrous results for some plaintiffs. By all accounts, however, this limitation on the scope of secondary liability is what Congress intended. In other words, using the FTO designation as a prerequisite to aiding and abetting liability under § 2333(d) seems to be a calculated public policy decision, even if it sometimes results in the dismissal of plausible claims that one might otherwise expect to be successful. One could reasonably infer a number of rationales for this decision. The gap may have been maintained as a deferral to the executive branch's traditional supremacy in national security and foreign policy affairs. Or, it could have been imposed out of a concern that foregoing such limitation would subject corporate entities to too much liability without sufficient notice. Whatever the reasoning, one effect is clear: requiring an FTO designation acts as a potential shield to corporate defendants who would otherwise be liable under the ATA.

In that sense, the secondary liability gap under § 2333(d) is problematic, because it is not clear that this concession is necessary. Sophisticated corporate defendants, such as banks and social media companies, that are targets of ATA claims seeking to impose aiding and abetting liability for terrorist attacks already have a multitude of other avenues to avoid liability or defend against a meritless claim, as is further discussed in Part III.[111] As is discussed in the next section, if § 2333(d) no longer restricted secondary liability to designated FTOs, and instead focused on whether the predicate act itself was covered by the civil remedies provision, the act of war exception could act as a sufficient regulator on the scope of secondary liability under the ATA.

B. A Reconceptualized Role for the "Act of War" Exception

1. Broader Secondary Liability Would Lead to More "Act of War"

111. For example, if § 2333(d) did not limit claims to those premised on secondary liability arising from terrorist attacks by designated FTOs, ATA claims in these suits would still have to show that the defendant *knowingly*, or with reckless disregard, provided *substantial* assistance to the perpetrators of the terrorist acts. As previously discussed, § 2333(a) also requires a showing of proximate cause. *See* Mimi Derle, *Bank Liability under JASTA: The Knowledge/Awareness Requirement of Financial Institutions*, AM. UNIV. NAT'L SEC. L. BRIEF (Nov. 25, 2019), https://nationalsecuritylawbrief.com/2019/11/25/bank-liability-under-jasta-the-knowledge-awareness-requirement-of-financial-institutions [https://perma.cc/7MHD-372R].

Litigation

If the liability gap were filled—that is, if § 2333(d) imposed secondary liability for terrorist attacks beyond those committed by designated FTOs—additional determinative weight would be placed on whether the injury suffered by the plaintiff was the result of an "act of international terrorism."[112] Instead of focusing on whether the attack was perpetrated by a designated FTO, the scope of § 2333(d) would turn, in significant part, on whether the violent act violated a predicate federal or state criminal statute and whether it appeared to be intended by the perpetrators to intimidate, coerce, or influence a civilian population or a government's conduct.

In the cases where the predicate conduct does constitute an act of international terrorism,[113] one avenue for defendants to dismiss a secondary liability claim would be to invoke the act of war exception. To do so, defendants would argue that the perpetrators, who were not a designated FTO,[114] conducted the attack that occurred "in the course of . . . armed conflict between military forces of any origin[,]" and thus they should be excluded from ATA liability.[115] As financial institutions and corporate entities face new ATA claims based on secondary liability, these sophisticated and well-resourced defendants—experienced in defending tort litigation—would likely litigate the act of war

112. If the gap were filled through a statutory amendment, for example, a crude revision of 18 U.S.C. § 2333(d) to that effect might read: "In an action under [§ 2333(a)] for an injury arising from an act of international terrorism committed, planned, or authorized by an organization [], liability may be asserted as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." *Cf.* 18 U.S.C. § 2333(d). If enacted, these changes would place additional importance on whether the injury suffered was the result of an "act of international terrorism," because the ability of a defendant to avoid liability if the perpetrators were not designated FTOs would be abrogated.

113. *See* 18 U.S.C. § 2331(1).

114. See discussion *supra* Section I.F.2., addressing how ATCA foreclosed the possibility that designated FTOs and SDGTs could constitute a "military force" under the ATA. Thus, U.S. government-designated terrorist organizations cannot invoke the "act of war" exception. *See* 18 U.S.C. §§ 2331(6), 2336(a). In addition, the view that a designated terrorist organization could not constitute a "military force" under the ATA was also the majority view before Congress enacted ATCA. *See* Weiss v. Arab Bank, No. 06 CV 1623(NG)(VVP), 2007 WL 4565060, at *5 (E.D.N.Y. Dec. 21, 2007) (finding "a designated terrorist organization cannot constitute a 'military force of any origin' . . . . To find otherwise would pervert the very purpose of the ATA, which was enacted to deter terrorist activity and hold liable those who engage in it."); *see also* Morris v. Khadr, 415 F. Supp. 2d 1323, 1334 (D. Utah 2006) ("Al-Qaeda is not a 'nation'; the people who fight in its behalf thus cannot be 'armed forces' or the 'military.' It is, instead, a 'group' that systematically uses violent and destructive acts in its attempts to coerce the United States into acceding to its demands.").

115. *See* 18 U.S.C. §§ 2331(4)(C), 2336(a).

exception any time the perpetrators of the alleged acts of international terrorism were not FTOs. On the other side of the equation, the ongoing proliferation of non-international armed conflict often involving non-U.S. government-designated groups, and the resultant rise in civilian casualties, increases the likelihood that these suits will arise. Thus, to envision the scope of secondary liability under an expanded § 2333(d), it is worthwhile to examine the mechanics of the act of war exception.

2. Applying the "Act of War" Exception

If defendants invoked the act of war exception in response to broader secondary liability, courts would, in turn, be increasingly pushed to adjudicate whether or not the perpetrators constitute a "military force of any origin" under § 2331(4). This would result because whether or not the act of war exception applies would turn on a court's finding of whether the act: (1) occurred in the course of armed conflict; and (2) whether the perpetrators constitute a "military force."[116] However, when the perpetrators are not the military of a recognized government,[117] whether they constitute a "military force" is a difficult question that the dynamics of modern non-international armed conflict, asymmetric warfare, and international politics make inherently complex.[118] Perhaps, unsurprisingly, tension could arise between what a court determines to constitute a military force for ATA purposes—thereby regulating the scope of secondary liability—and what other observers might intuitively think of as a "military force" because of its organization, behavior, resources, and conduct.

In *Schansman v. Sberbank*, whether the DPR, the pro-Russian separatist organization in eastern Ukraine, constitutes a "military force of any origin" illustrates this tension.[119] At the motion to dismiss

116. *See* 18 U.S.C. §§ 2331(4)(C), 2331(6)(B), 2336(a).

117. It is clear that the scope of § 2333(a) does not reach the actions of militaries of recognized governments in the course of declared war or armed conflict between nations. *See* 18 U.S.C. §§ 2331(4)(A)–(B), 2336(a). Recognizing that states may lawfully take military actions that result in noncombatant civilian casualties under some circumstances, Congress intended the act of war exception to "bar actions [under § 2333] for injuries that result from military actions by recognized governments as opposed to terrorists, even though governments sometimes target civilian populations." *See* S. REP. NO. 102-342 (1992); *see also* note 47 *supra* for further discussion of the principle of proportionality in attack in the international law of armed conflict.

118. *See generally* Rogier Bartels, *When Do Terrorist Organizations Qualify as 'Parties to an Armed Conflict Under International Humanitarian Law*, 56 MIL. L. & L. WAR REV. 451 (2018).

119. *See* First Amended Complaint, *Schansman*, *supra* note 11.

stage, the defendants argued that the act of war exception should bar the claim, which arises from the DPR's attack on MH17 in the course of "armed separatist conflict in eastern Ukraine," because the DPR "engages in military activities, including combat operations against opposing military targets, with a goal of claiming and defending territory."[120] Furthermore, while the defendants concede that an *intentional* attack on non-combatant civilians might not constitute an act of war under the ATA, they contend that the DPR's attack on MH17 was unintended—and thus should not be subject to that distinction—because "the DPR believed it had successfully shot down a Ukrainian military aircraft (an AN-26) over the disputed territory with no civilian casualties."[121] In response, the plaintiffs contended that the DPR was a "terrorist group . . . that engaged in a pattern and practice of attacking and intimidating civilians and operated with no regard for civilian life, often murdering and torturing civilians," and further urged the court to consider the Ukrainian government's own designation of the DPR as a terrorist organization.[122] Moreover, recognizing that whether the court finds that the DPR constitutes a "military force of any origin" would be outcome-determinative, the plaintiffs urged that the court reserve the question for adjudication on summary judgment or by a jury.[123]

The claim in *Atchley v. AstraZeneca* is likewise illustrative, because the organization behind the terrorist acts that injured the plaintiffs, or killed their family members, was not a designated FTO. In their motion to dismiss, the defendants argued that the suit should be barred by the act of war exception, because: (1) Iraq was in a state of non-international armed conflict during the relevant period; (2) the Mahdi Army constituted a military force "of any origin"; and (3) the attacks occurred in the course of that conflict.[124] In support of their argument, the defendants pointed to the plaintiffs' own description of the Mahdi Army that tended to show it acted as a "military force," including its having amassed more than 60,000 fighters, its traditional military command structure, and its use of complex infantry tactics and military weapons.[125] Here, in a suit attempting to impose liability

120. *See* Memorandum in Support of Defendants' Joint Motion to Dismiss at 21–25, Schansman v. Sberbank, 1:19-cv-02985 (S.D.N.Y. Nov. 11, 2019), ECF No. 110.

121. *Id.* at 24–25.

122. Memorandum in Opposition to Defendants' Motions to Dismiss at 69, Schansman v. Sberbank, 1:19-cv-02985 (S.D.N.Y. Dec. 20, 2019), ECF No. 122.

123. *Id.* at 70.

124. Memorandum in Support of Defendants' Motion to Dismiss at 28–38, Atchley v. AstraZeneca U.K. Ltd., *supra* note 107.

125. *Id.* at 32–35. Here, the defendants' arguments invoke principles of the international law of armed conflict to establish that the Mahdi Army was a "military force of any origin."

under § 2333(d) on pharmaceutical companies for allegedly aiding and abetting the Mahdi Army's attacks on U.S. military and civilians, an outcome-determinative issue rested on whether the court found that the organization constituted a "military force" within the meaning of the ATA, when its conduct and operations might clearly indicate to other observers that it was a military force in a practical sense. If the court had decided that the act of war exception under § 2336(a) applied, the claim would have been dismissed. Instead, the district court declined to consider the question and granted the defendants' motion to dismiss on other grounds.[126]

C. The "Act of War" Exception as the Principle Limitation on the Scope of Secondary Liability

If the scope of secondary liability under § 2333(d) were extended to cover terrorist attacks beyond those perpetrated by designated FTOs, courts would likely be confronted with increased litigation on the act of war exception, because sophisticated defendants would argue the merits of its application to the perpetrator's conduct to avoid liability under the ATA. In short, if the secondary liability gap were filled, courts would be left to decide what constitutes a "military force of any origin" under the ATA to determine whether such liability should be imposed. In doing so, courts would have to grapple with the realities of modern non-international armed conflict, asymmetric warfare, and its civilian victims. For several reasons discussed in Part III, increased litigation of this kind, and subsequent decisions by courts determining the scope of secondary liability for acts of international terrorism, is preferable to the current system in which a lack of a formal FTO designation functions as an absolute bar to imposing secondary liability under § 2333(d).

Under Common Article 3, non-governmental groups involved in a non-international armed conflict must be considered as "'parties to the conflict,' meaning that they possess organized armed forces." Int'l Comm. of the Red Cross, *supra* note 45. Organized armed forces, for example, operate under a certain command structure and have the capacity to sustain military operations—some of the characteristics that the defendants have ascribed to the Mahdi Army here. *Id.* (citing Prosecutor v. Fatmir Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 94–134 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

126. Atchley v. AstraZeneca U.K. Ltd., No. 1:17-cv-02136-RJL, 2020 WL 4040345, at *8 (D.D.C. July 17, 2020) ("[The court] decline[s] to wade into that particular factual thicket at the motion-to-dismiss stage."), *appeal filed*, No. 20-7077 (D.C. Cir. Aug.. 21, 2020).

III. CLOSING THE SECONDARY LIABILITY GAP

Part III argues that Congress should remove the limitation restricting secondary liability under § 2333(d) to only those terrorist attacks perpetrated by a U.S. government-designated foreign terrorist organization. Doing so would better conform the scope of ATA liability to the statute's tort objectives by accounting for the realities of modern non-international armed conflict. Furthermore, this Note proposes that the statutory act of war exception under § 2336(a) provides a sufficient means of regulating the scope of secondary liability under the ATA.

A. The Case for Broader Secondary Liability under the ATA Civil Remedies Provision

Section 2333(d) currently provides a cause of action against those who aid and abet an act of international terrorism only when that act was perpetrated by a U.S. government-designated foreign terrorist organization (FTO).[127] As discussed in Part II, because § 2333(d) requires a formal FTO designation to impute secondary liability, a lack thereof can have the devastating result of foreclosing ATA claims in otherwise-plausible claims like those in *Schansman* and *Atchley*.[128]

To illustrate: where a bank has aided and abetted an *undesignated* organization's act of international terrorism—or an extraterritorial act dangerous to human life in violation of a federal criminal statute, intended to influence a government's policies by coercion—by knowingly providing substantial assistance to the perpetrators, the ATA's civil remedies provision does not currently provide for aiding and abetting liability as to that bank under § 2333(d).[129] This is a problematic outcome because any U.S. victim of that terrorist attack and their families could be left without redress against the indirectly liable bank in federal court, which would escape accountability due to a seeming technicality. Moreover, because the lack of an FTO designation functions as a barrier to suit under § 2333(d), an otherwise-plausible claim against the bank would be insufficiently pled and thus likely to be dismissed prior to reaching any of the merits of that claim, with respect to the bank's substantive conduct. If by enacting JASTA,

127. 18 U.S.C. § 2333(d)(2).

128. *See* First Amended Complaint, *Schansman*, *supra* note 11; Third Amended Complaint, Atchley v. AstraZeneca U.K. Ltd., *supra* note 102.

129. While the Supreme Court has not yet addressed the question, the Second, Seventh, and D.C. Circuits have rejected the contention that § 2333(a) provides for aiding and abetting liability, as discussed in Part I. *See* Rothstein v. UBS AG, 708 F.3d 82, 97–98 (2d Cir. 2013); *Boim III*, 549 F.3d 685 (7th Cir. 2008); Owens v. BNP Paribas, 897 F.3d 266 (D.C. Cir. 2018).

Congress' goal was to provide civil recourse for U.S. victims of international terrorism by extending liability "to all points along the casual chain," the current state of affairs could hardly be said to align with that core purpose.[130]

Congress should amend § 2333(d), the civil remedies provision for secondary liability under the ATA, and remove the requirement that a designated FTO "committed, planned, or authorized" the predicate act of international terrorism. It should provide for expanded secondary liability, because doing so would: (1) enable courts to hear more victims' plausible claims; and (2) remove an unwarranted barrier to civil recourse and compensation, while preserving the judiciary's ability to regulate the scope of secondary liability.

1. Opening the Courts to Hear Plausible Claims

Expanding the scope of secondary liability to cover terrorist attacks beyond those perpetrated by designated FTOs would have the desirable effect of opening the courts to hear plausible ATA claims that would otherwise be dismissed. If the plaintiffs' claims in *Schansman* and *Atchley* are taken as true, an amendment to § 2333(d) would remove one of many barriers to suit that the plaintiffs in these otherwise compelling claims are encountering, since the DPR and the Mahdi Army, respectively, were not designated FTOs by the U.S. government.[131] In claims involving undesignated perpetrators, injured plaintiffs would no longer be left with the likely insurmountable task of showing that banks or other similarly situated defendants are *primarily* liable for the terrorist attacks. Plaintiffs would not have to attempt to impute primary liability under § 2333(a) against financial institutions, for example, by arguing on the basis of the chain of statutory incorporations discussed in *Boim III*.[132] The inadequacy of such arguments has been made clear from multiple encounters with federal courts unmoved by claims that providing "routine banking services" should give rise to primary liability under the ATA civil remedies provision.[133]

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130. *See Boim I*, 291 F.3d 1000, 1016–21 (7th Cir. 2002).

131. *See* First Amended Complaint, *Schansman*, *supra* note 11; Memorandum in Support of Defendants' Joint Motion to Dismiss, *Schansman*, *supra* note 120; Third Amended Complaint, Atchley v. AstraZeneca U.K. Ltd., *supra* note 102; Memorandum in Support of Defendants' Motion to Dismiss, Atchley v. AstraZeneca U.K. Ltd., *supra* note 107.

132. *See Boim III*, 549 F.3d 685.

133. *See, e.g.*, *In re* Terrorist Attacks on Sept. 11, 2001, 740 F. Supp. 2d 494, 518 (S.D.N.Y. 2010); Weiss v. Nat'l Westminster Bank, 381 F. Supp. 3d 223, 231 (E.D.N.Y. 2019), *argued*, No. 19-1159 (2d Cir. May 14, 2020).

Removing the FTO-designation requirement's bar to holding banks and other corporate defendants secondarily liable for supporting acts of international terrorism would also conform the civil remedies provision with two core functions of tort law: compensating victims and deterrence.[134] First, corporate defendants in these cases are often the cheapest cost avoider. As discussed below, many already have the resources to do the due diligence necessary to avoid providing services to terrorist or other politically violent organizations that are known threats to U.S. nationals abroad. Subjecting them to greater potential ATA liability increases the likelihood that victims will be compensated, while further incentivizing the defendants to implement socially desirable precautions in their business practices. Second, expanding the scope of civil liability under the ATA would also supplement other government enforcement actions—like those enforcing criminal material support statutes—and enhance the overall deterrent function of the U.S. statutory anti-terrorism regime. Third, allowing courts greater flexibility to enter judgments finding secondary liability would reinforce the collective condemnation of terrorism and its ill effects that lies at the heart of the ATA.[135]

2. Removing an Unnecessary Concession to Defendants

Furthermore, expanding the scope of secondary liability would reclaim an unnecessary concession that § 2333(d) currently makes to sophisticated corporate defendants like banks or pharmaceutical and medical device companies. Admittedly, a formal FTO designation by the U.S. government serves a valuable role by signaling to U.S. businesses which organizations they may not do business with. But asking sophisticated, multinational firms like financial institutions to practice additional prudence in evaluating the provenance and potential effects of their transactions does not create an overwhelming burden. This is especially true of those already subject to a whole host of regulatory duties with which they must monitor and comply, including prohibitions on doing business with terrorists and criminal enterprises or violating economic sanctions.[136] In *Atchley*, for example, the Mahdi Army's intent to target Americans by utilizing resources that were funneled to it through the Iraqi Ministry of Health was well-known.[137]

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134. *See* Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation*, 50 TEX. INT'L L.J. 661, 675 (2016).

135. *Id.*

136. *See generally* MARTIN A. WEISS, CONG. RES. SERV., RL33020, TERRORIST FINANCING: U.S. AGENCY EFFORTS AND INTER-AGENCY COORDINATION (2005).

137. *See, e.g.*, Melissa McNamara, *Death Squads in Iraqi Hospitals*, CBS (Oct. 4, 2006,

According to the complaint, some U.S. officials even referred to the group as the "Pill Army," because the group's commanders notoriously paid their fighters in diverted pharmaceuticals.[138] In addition, the Mahdi Army's known ties to Hezbollah—a designated FTO—arguably should have compelled the defendants to practice restraint.[139] Expecting that these multi-national pharmaceutical companies would consider what was widely known at the time, and exercise good judgment accordingly—or risk being subject to a civil suit for damages under the ATA—is not an unreasonable ask.

Some commentators denounce the prospect of extending the scope of secondary liability under the ATA. These critics argue that allowing plaintiffs to obtain damages from financial institutions or other third parties—instead of directly from terrorist organizations—effectively turns them into "financial guarantors of terrorists," though they are but "whatever multinational company had the misfortune of coming into contact with the terrorist group."[140] Critics might also argue that expanding secondary liability to reach terrorist attacks beyond those of designated FTOs would lead to unpredictable and boundless liability for multinational businesses. Ultimately, these arguments are myopic, because they lose sight of the numerous other ways the scope of ATA liability is appropriately managed by the law, which requires a showing of substantial assistance, proximate cause, and intent on the part of the defendant third-party bank or other corporate entity to impose secondary liability. Furthermore, where extension of secondary liability is undesirable for public policy reasons, suits may be restricted by law.[141] Thus, restricting secondary liability

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5:55 PM), https://www.cbsnews.com/news/cbs-death-squads-in-iraqi-hospitals/ [https://perma.cc/PVU5-45VP]; Damien Cave, *Iraq's No. 2 Health Official Is Held and Accused of Financing Shiite Militants*, N.Y. TIMES (Feb. 9, 2007), https://www nytimes.com/2007/02/09/world/middleeast/09iraq html [https://perma.cc/JK2N-X8EY].

138. Third Amended Complaint ¶¶ 165–79, Atchley v. AstraZeneca U.K. Ltd., *supra* note 102.

139. *See, e.g.*, Ctr. for Int'l Sec. & Coop., *Mahdi Army: Relationships with Other Groups*, STAN. UNIV. (last modified May 2019), https://cisac fsi.stanford.edu/mappingmilitants/profiles/mahdi-army [https://perma.cc/X29E-FFFQ] ("The Mahdi Army has been tied to Hezbollah since its inception."); *see also* Gardiner Harris, *Lawsuit Claims Three U.S. Companies Funded Terror in Iraq*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/us/johnson-ge-pfizer-terror-iraq html [https://perma.cc/WR7K-H97Z].

140. Geoffrey Sant, *So Banks Are Terrorists Now? The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 600–01 (2013). For an extensive critique of how courts' construction of secondary liability under the ATA has "ensnare[d] defendants with little to no meaningful connection with terrorism or terrorist groups," see Maryam Jamshidi, *How the War on Terror Is Transforming Private U.S. Law*, 96 WASH. U. L. REV. 559, 559 (2018).

141. See *supra* note 37 for discussion of ATA suits against social media firms dismissed

under § 2333(d) to the actions of designated FTOs unnecessarily concedes a victory to defendants where holding them accountable, or at least moving to discovery to investigate the merits of a plaintiff's allegations, would be appropriate.

B. The "Act of War" Exception as a Limitation on the Scope of Secondary Liability

If Congress amended the scope of § 2333(d) to impose secondary liability beyond those acts perpetrated by designated FTOs, then the act of war exception would serve as a better means of regulating the scope of secondary liability than the current reliance on a formal FTO designation. As discussed in Part II, if the requirement for a formal FTO designation were removed from § 2333(d), more determinative weight would be placed on whether the underlying conduct could be properly considered an act of "international terrorism." Pursuant to the statutory definition under § 2331, a violent and extraterritorial predicate act must *appear to be intended* to intimidate, coerce, or influence a civilian population or a government's conduct.[142] This is a matter for objective evaluation by the court, rather than a subjective examination of the perpetrators' intent.[143] Thus, functionally, the statutory definition of "international terrorism" serves as a threshold means of managing secondary liability under § 2333(d).

However, another effective judicial tool for regulating the scope of secondary liability could be the act of war exception. As discussed in Part I, the act of war exception foremost serves to bar suits from being brought against sovereign nations, even though violent acts by armed forces of recognized states might be intended to coerce a civilian population or to influence another government's policies by coercion.[144] On the other hand, in problematic cases like *Atchley*, where the perpetrator has arguably committed an act of "international terrorism" but is not a designated FTO, the act of war exception can also function as the primary judicial tool in determining whether the

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because Section 230 of the Communications Decency Act precluded those claims.

142. *See* 18 U.S.C. § 2331(1) (emphasis added).

143. *See, e.g.*, *Boim III*, 549 F.3d 685, 694 (7th Cir. 2008) (finding that the 18 U.S.C. § 2331(1)(B) definition is a matter of objective, "external appearance," rather than an evaluation of a defendant's subjective motive, upon deciding that donations to Hamas, with the foreseeable consequence of enabling that organization to kill or try to kill more people in Israel, made such donations "appear to be intended" to intimidate or coerce a civilian population, or affect government conduct by assassination).

144. For prior discussion of the act of war exception's legislative purpose, see *supra* notes 46–47 and accompanying text.

suit should move forward. The exception could act as a complete bar to suit in non-FTO cases like *Atchley*, because Congress provided courts with the discretion to determine whether the perpetrators are "military forces of any origin."[145] Accordingly, if the court decides that the perpetrators are "military forces of any origin," then the exception can be invoked—just as the lack of an FTO designation currently functions—as a complete bar to a secondary liability suit.[146]

1. A Superior Means of Regulating the Scope of Secondary Liability

The determination of whether the act of war exception should apply to a sufficiently pleaded act of international terrorism would provide courts with a means of regulating the scope of secondary liability that is superior to an FTO designation, while remaining flexible enough to fulfill the legislative purpose of the civil remedies provision: to reach every link in the causal chain of terrorism. Since the function of the act of war exception is to preclude ATA suits arising from the military actions of recognized states, and it cannot be invoked by designated FTOs, it would only provide courts with the limited discretion necessary to consider secondary liability in borderline claims.[147] If Congress amended § 2333(d) to remove the FTO-designation requirement for secondary liability, the act of war exception would serve as a more inclusive approach to fulfilling the tort functions of the ATA,

145. *See* 18 U.S.C. §§ 2331(4)(C), 2331(6)(B).

146. There is some ongoing disagreement between courts on whether the act of war exception is jurisdictional or an affirmative defense. *See* Kaplan v. Cent. Bank of the Islamic Republic of Iran, 961 F. Supp. 2d 185, 199–200 (D.D.C. 2013) (collecting cases and discussing the disagreement). In support of their motion to dismiss, the defendants in *Atchley* made a compelling argument that the "better reading" is that where the exclusion applies, "[n]o action shall be maintained." Memorandum in Support of Defendants' Motion to Dismiss at 35 n.83, Atchley v. AstraZeneca U.K. Ltd., No. 1:17-cv-02136-RJL, 2018 WL 2981543 (D.D.C. Apr. 26, 2018), ECF No. 72-1; *cf.* Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065, 1066–67, n.1 (D.C. Cir. 2015) (provision that "no suit" to enjoin collection of a tax "shall be maintained" is jurisdictional); *but see* Gill v. Arab Bank, PLC, 893 F. Supp. 2d 474, 508 (E.D.N.Y. 2012).

147. Recent developments have muddied the waters—further supporting the case for moving away from using an FTO designation as the touchstone of secondary liability under the ATA. In April 2019, the Trump Administration designated Iran's Islamic Revolutionary Guard Corps (IRGC) as an FTO. This was the first time an entire component of a foreign government has received an FTO designation. *See Designation of the Islamic Revolutionary Guard Corps*, U.S. DEP'T OF STATE (Apr. 8, 2019), https://www.state.gov/designation-of-the-islamic-revolutionary-guard-corps/ [https://perma.cc/K8ZB-9X6L]; *see also* Elena Chachko, *The U.S. Names the Iranian Revolutionary Guard a Terrorist Organization and Sanctions the International Criminal Court*, LAWFARE (Apr. 10, 2019, 4:05 PM), https://www.lawfareblog.com/us-names-iranian-revolutionary-guard-terrorist-organization-and-sanctions-international-criminal [https://perma.cc/3W97-BNGJ].

while allowing the courts to remain flexible enough to account for the consequences of non-international armed conflicts and limit liability where necessary.

2. The Competency of Courts in Applying the "Act of War" Exception

Courts are well-equipped to determine whether a perpetrator may successfully invoke the act of war exception—or, whether they are a "military force of any origin"—and have taken on this responsibility in the past. Recognizing that the realities of modern non-international armed conflict "prevent a simple interpretation of the ATA's act of war defense," and that it is "often difficult to distinguish between terrorist activity and civil war," the court in *Gill v. Arab Bank* ultimately held that a paramilitary, terrorist, or other non-national group must act in *substantial conformity* with the laws of war, "with attacks directed at civilians making up an incidental rather than substantial portion of its activities," to apply the act of war exception.[148] In *Biton v. Palestinian Interim Self-Government Authority*, the court held that an attack on a school bus did not occur "in the course of" armed conflict under § 2331(4), because noncombatant students and teachers were the primary target of the attack, in violation of the law of armed conflict.[149] Even though similar reasoning by courts has been challenged at times as a political question,[150] courts have not shied away from engaging with the facts in past ATA suits to determine whether or not the act of war exception applies, as demonstrated by the courts in *Gill* and *Biton*.[151]

If secondary liability was expanded beyond designated FTOs, courts litigating whether the act of war exception should apply would

148. *Gill*, 893 F. Supp. 2d at 508, 511, 515–17.

149. Biton v. Palestinian Interim Self-Gov't Auth., 412 F. Supp. 2d 1, 10 (D.D.C. 2005) ("The *fact* of the settlement at Kfar Darom might be the cause of Palestinian anger; the *settlement itself* might even be an object for attack by Palestinians and defense by Israeli military, during which children might be hurt. But the *children of the settlement* cannot be direct targets of Palestinian force without liability as terrorists.").

150. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring) (arguing that "[i]nternational terrorism consists of a web that the courts are not positioned to unweave" and that the instant case involved non-justiciable political questions on diplomacy that demanded a single-voiced statement of policy by the government).

151. *See* Kaplan v. Cent. Bank of Iran, 896 F.3d 501, 514 (D.C. Cir. 2018) ("[T]here is no dispute that a court must determine whether the circumstances involve an act of war within the meaning of the statutory exception. That interpretive exercise, unlike with a non-justiciable political question, is what courts do.") (internal quotations omitted).

have the opportunity to examine the facts and selectively extend civil recourse to the victims of modern-day non-international armed conflicts under the ATA where appropriate. Limiting the availability of secondary liability solely to cases where an FTO designation exists, on the other hand, will continue to foreclose a path to recovery for U.S. victims of otherwise-covered terrorist attacks, where a formal designation is lacking due to administrative delay or geopolitical concerns.

CONCLUSION

The ATA civil remedies provision, as amended by JASTA and ATCA, provides for secondary liability in limited circumstances for acts of international terrorism. In response, a new class of claims have been launched against deep-pocketed, corporate defendants—like financial institutions and pharmaceutical companies—alleging that their conduct aided and abetted the terrorist attacks that injured or killed U.S. nationals. However, because the ATA provides for secondary liability only when the perpetrators of the terrorist attacks have been designated an FTO by the U.S. government, corporate entities that have knowingly provided substantial assistance to the terrorist attacks of non-designated perpetrators may escape civil liability under the ATA. This consequence is devastating to plaintiffs who have put forth otherwise plausible claims, and undermines the legislative purpose of the secondary liability provision—imposing liability at any point along the causal chain of terrorism.

Therefore, Congress should amend the secondary liability provision, 18 U.S.C. § 2333(d), and remove the current limitation on its scope to only those terrorist attacks perpetrated by U.S. government-designated terrorist organizations. Doing so would expand the ability of federal courts to address a class of otherwise plausible and well-pleaded claims alleging the complicity of corporate actors in terrorist attacks that injure or kill U.S. victims. Other sufficient and effective judicial controls on the scope of secondary liability under the ATA would remain. Furthermore, if Congress amended § 2333(d) as proposed, one of these controls—the act of war exception—could satisfactorily replace the FTO designation as a means of managing the scope of secondary liability under the ATA, while balancing the corollary need for the ATA to account for the consequences of modern non-international armed conflicts and provide civil recourse to victims. The ability to hold corporate entities indirectly liable for supporting acts of international terrorism, beyond those perpetrated by designated FTOs, would also justly conform the ATA civil remedies provision with two of its tort objectives: compensating victims and

ensuring deterrence.

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