The Potential Impact of Terrorism Lawsuits Under the Antiterrorism Act on Ordinary Corporate, Banking and Sovereign Enterprises

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In the last 30 years, the U.S. Congress has enacted several laws enabling victims of terrorism to seek damages in U.S. federal courts. The central piece of legislation in this regard, the Antiterrorism Act of 1990 (ATA), has twice been expanded in recent years to create secondary liability for any entity or person that knowingly "aids or abets" a terrorist act and to narrow the defenses available in such actions.

The trend towards the naming of "mainstream" enterprises as defendants reflects the gradual expansion of ATA liability over the last 30 years and the difficulties plaintiffs have enforcing judgments against the states and entities that directly perpetrate terrorism. Organizations faced with an ATA lawsuit confront a number of unique legal and reputational challenges, and the companies that do business with such defendants need to understand the framework of the ATA and the nature of the allegations accompanying ATA claims. ATA cases can also present special issues post-judgment for banks and financial institutions because the statute specifically allows plaintiffs to enforce judgments against assets of certain foreign governments (*i.e.*, bank accounts and other assets) that have been frozen pursuant to U.S. sanctions laws.

The ATA's Basic Legal Framework for Terrorism Claims in US Courts

Prior to 1990, plaintiffs who were victims of terrorist attacks were able to access the courts of the United States to obtain compensation from the alleged perpetrators, provided that personal jurisdiction could be established against the wrongdoer and that the claim could be proven under ordinary tort principles.[1]

In 1990, Congress enacted the ATA, creating a new federal right of action of any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism."[2] "International terrorism" is defined to include "violent acts or acts dangerous to life" occurring overseas that violate U.S. criminal laws (or would violate such laws if committed in the United States), and performed to intimidate or coerce populations or public policy.[3] Plaintiffs in an ATA case are permitted to pursue relief in a U.S. district court and, if liability is established, to collect treble damages, plus attorneys' fees.[4]

[1] Additionally, the Foreign Sovereign Immunities Act of 1976 (FSIA) has long permitted claims against state actors involving "a tortious act or omission" that causes injury within the United States. Thus, the survivors and representatives of Orlando Letelier, a former Chilean diplomat, and of Ronni Moffitt, Letelier's coworker, asserted tort claims against Chile and others for their deaths in the 1976 bombing of Letelier's car, which plaintiffs ascribed to the Pinochet regime. See *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980).

[2] 18 U.S.C. § 2333(a).

[3] The full definition of international terrorism under the ATA is:

> activities that (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) 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.

Id. § 2331(1).

[4] *Id.* § 2333(a).

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This legislation, combined with a series of amendments to the rules of sovereign immunity that make available to terror victims further causes of action (in particular, by making it easier to sue "state sponsors of terrorism" in the U.S. courts),[5] has led to some sizable judgments against various countries. For example:

- Nearly $9 billion was awarded against Iran over a series of cases for the 1983 bombing of a U.S. Marines barracks in Beirut, Lebanon.[6]
- Iran was also assessed damages of more than $6 billion for alleged complicity in the terrorist attacks on 9/11.[7]
- Nearly $187 million was awarded against Cuba and the Cuban Air Force arising from the 1996 shooting down of two civilian aircraft.[8]
- Nearly $315 million was awarded against the government of Sudan (North Sudan) for injuries resulting from the bombing of the *U.S.S. Cole* by al-Qaida, which North Sudan was found to have supported.[9]
- In 2018, more than $500 million was awarded against North Korea for the torture, hostage taking and extrajudicial killing of Otto Warmbier, a student whom North Korea detained and tortured for 17.5 months.[10]

Damages in these cases often included recovery for economic losses, medical expenses, pain and suffering, emotional distress for the victims' family members and punitive damages.[11]

Additionally, a recent U.S. Supreme Court decision affirmed a victim's right to obtain punitive damages in actions against certain states. In a May 18, 2020, decision issued in *Opati v. Republic of Sudan* — an action stemming from al-Qaida's bombings of the U.S. Embassies in Kenya and Tanzania in 1998, the U.S. Supreme Court held that the 2008 amendments to the FSIA (which, as noted above, expanded the relief available to plaintiffs in cases against state sponsors of terrorism) permitted the award of punitive damages, even with respect to conduct that predated those statutory amendments.[12] Thus, the total judgment of approximately $10.2 billion in damages (including about $4.3 billion in punitive damages) was affirmed.[13]

The ATA's Special Rules About Post-Judgment Enforcement, Including Against Blocked Bank Accounts

The "mega-judgments" issued under the ATA often give rise to extensive post-judgment motion practice and litigation, in part because U.S. statutes have reduced the ability of ATA judgment debtors to claim sovereign immunity from execution of their U.S. assets.[14] For example, plaintiffs holding default judgments against Iran have been seeking turnover of property interests of alleged Iranian agencies or instrumentalities, including a commercial skyscraper in Manhattan (although aspects of that case remain ongoing, and the judgment has not yet been finally satisfied).[15]

U.S. statutes also provide special rules for enforcement of terrorism-related judgments against state sponsors of terrorism whose bank accounts or other assets have been blocked by reason of U.S. sanctions laws and regulations.[16] The result is that, if a bank holds frozen assets of a foreign government classified as a state sponsor of terrorism (*e.g.*, Iran) that have been blocked under U.S. sanctions laws, ATA plaintiffs may seek to attach those assets in satisfaction of judgments held against that government. Furthermore, Congress has shown a willingness to expand the ability of plaintiffs to pursue accounts or assets linked to a judgment defendant (and to reduce the defenses to enforcement available in particular cases). For example: (i) in 2012, Congress enacted a special law to facilitate enforcement against Iran in one particular pending federal case;[17] and (ii) in 2018, Congress enacted legislation to confirm specifically that blocked assets of "narco-terrorist" organizations could be attached in aid of ATA judgments.[18]

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[5] Under amendments to the FSIA enacted in 2008, a foreign state will not be immune from suit in the United States in an action where "money damages are sought ... for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act," if committed by state officials. 28 U.S.C. § 1605A(a)(1). Notably, however, this exception only allows full access to U.S. courts where the defendant state is officially designated as a "state sponsor of terrorism" (*e.g.*, Iran, Syria or North Sudan). See *State Sponsors of Terrorism*, U.S. Department of State. Cuba was removed in 2015.

[6] See *Fain v. Islamic Republic of Iran*, 885 F. Supp. 2d 78, 80, 83 (D.D.C. 2012).

[7] *In re Terrorist Attacks on Sept. 11, 2001*, No. 03 MDL 1570(GBD)(FM), 2012 WL 4711407 (S.D.N.Y. Oct. 3, 2012).

[8] *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1242, 1253 (S.D. Fla. 1997).

[9] *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23 (D.D.C. 2012), *vacated*, No. 10-1689 (RCL), 2019 WL 8060796 (D.D.C. Sept. 11, 2019).

[10] *Warmbier v. Democratic People's Republic of Korea*, 356 F. Supp. 3d 30 (D.D.C. 2018).

[11] See, *e.g.*, *id.* at 55-60; *Fain*, 885 F. Supp. 2d at 80-84.

[12] *Opati v. Republic of Sudan*, 590 U.S. __, __ (2020) (slip op., at 1, 5). In that case, plaintiffs established that the defendant state served as a safe haven near the embassies for al-Qaida's planning and training and permitted the passage of weapons and money to supply al-Qaida's Kenyan cell. *Id.*

[13] *Id.* at 9.

[14] See 28 U.S.C. § 1610(a)(7).

[15] See *Havlish v. 650 Fifth Ave. Co.*, 934 F.3d 174, 177 (2d Cir. 2019) (vacating turnover orders and remanding for further proceedings).

[16] See 28 U.S.C. § 1610(f)(a)(1).

[17] See Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772 (making designated assets available to satisfy judgments underlying an individual federal case, identified by docket number). This law was upheld on appeal to the U.S. Supreme Court, with the majority holding it was constitutional. *Bank Markazi v. Peterson*, 578 U.S. ___ (2016).

[18] See 22 U.S.C. § 2333(e) (expanding the range of "blocked assets" available for attachment in terrorism lawsuits to include assets "seized or frozen" by the U.S. government under the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. § 1904(b)).

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The 2016 and 2018 Amendments to the ATA Create "Secondary" ATA Liability and Eliminate Certain Defenses

In recent years, apparently as part of efforts to expand relief available to victims of terrorist attacks, Congress has enacted further legislation to expand the reach of the ATA.

In September 2016, Congress passed the Justice Against Sponsors of Terrorism Act (JASTA). This legislation, which overrode a presidential veto,[19] amended both the ATA and the FSIA by creating a federal right of action against "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."[20] Congress also stated that aiding and abetting and conspiracy claims can be asserted "as of the date on which such act of international terrorism was committed, planned, or authorized."[21] Thus, JASTA provisions are applicable to lawsuits pending at the date of enactment and have been argued to be retroactive to claims dating from September 11, 2001.[22]

Under JASTA, a plaintiff may proceed against a defendant as long as the plaintiff can allege either a "conspiracy," *i.e.*, active agreement to participate in the unlawful scheme,[23] or that the defendant engaged in "aiding and abetting," *i.e.*, "knowingly and substantially assisting" the wrongdoer, while being generally "aware" of playing a "role" in the wrongful activity.[24] At least one court has held, however, that a defendant need not know of "the specific attacks at issue" when it performed the relevant acts,[25] but need only be "generally aware" that it was "playing a role" in "violent or life-endangering activities."[26]

The scope of ATA liability was broadened further in 2018 through the Anti-Terrorism Clarification Act of 2018 (ATCA) — which, among other things, narrowed the "act of war" defense to ATA liability. The ATA excludes liability for an "act of war" — defined as "any act" occurring during a declared war, an undeclared war between nations or an "armed conflict between military forces."[27] Some courts had construed this as excluding ATA liability for acts by nonstate actors during armed conflict (even if the nonstate actor was linked to terrorism).[28] The ATCA limited the scope of the term "act of war" so that a designated terrorist organization could never be categorized as a "military force."[29]

JASTA and the ATCA are notable not only for the specific changes they effected to the ATA, but also because they serve as further evidence that lawmakers are willing to enact legislation that retroactively alters pleading and other standards applicable to pending litigation. This indicates a real possibility that Congress may enact further such legislation in the future.

Potential Impact of the ATA (and Its Recent Amendments) on Businesses With Overseas Operations

The creation of secondary ATA liability has created an opening for plaintiffs to sue private entities in various contexts. One well-publicized category of secondary ATA liability cases relates to financial institutions alleged to have provided banking services to customers that turn out to have had terrorist links. This was the basis for the allegations in *Linde v. Arab Bank*, in which a bank was found civilly liable for facilitating 24 attacks by Hamas by providing financial services to Hamas and Hamas-associated entities.[30]

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[19] President Obama vetoed JASTA on September 23, 2016. See White House, *Veto Message from the President – S.2040* (Sept. 23, 2016). On September 28, 2016, the Senate voted 97-1 to override the veto. The House of Representatives followed suit the same day, with a vote of 348-77.

[20] 18 U.S.C § 2333(d)(2). "Foreign terrorist organizations" are those entities designated as such under the Immigration and Nationality Act. See *id.*; 8 U.S.C. § 1189; see also *Foreign Terrorist Organizations*, U.S. Department of State. They include, *inter alia*, al-Qaida, FARC and ISIS.

[21] 18 U.S.C § 2333(d)(2).

[22] In a statutory note, Congress provided that JASTA "appl[ies] to any civil action (1) pending on, or commenced on or after, the date of enactment of this Act; and (2) arising out of an injury to a person, property, or business on or after September 11, 2001." Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, § 7, 130 Stat. 852, 855 (2016). It has been held that JASTA provisions do not date back to events predating September 11, 2001. See *Owens v. BNP Paribas, S.A.*, 897 F.3d 266 (D.D.C. 2018) (dismissing "aiding and abetting" claims relating to 1998 bombings in Tanzania on the grounds that JASTA's provision for aiding and abetting liability only applies to injuries arising "on or after September 11, 2001").

[23] See *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (federal civil conspiracy liability requires proof of four elements: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme").

[24] *Id.*; *accord Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018) (citing *Halberstam*, 705 F.2d at 487).

[25] *Id.*

[26] *Id.* (citation omitted).

[27] 18 U.S.C. §§ 2333(4), 2336(a).

[28] See *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185, 203-04 (D.D.C. 2013) (finding that Hezbollah rocket attacks, if made during the Iran-Lebanon conflict of 2006, came within the "act of war" exception under the ATA).

[29] ATCA § 2 (amending 18 U.S.C. § 2331).

[30] See *Linde v. Arab Bank, PLC*, 882 F.3d 314, 318 (2d Cir. 2018). This led the parties to stipulate to the entry of a $100 million damages award. Simultaneously with that stipulation, the parties entered into a settlement agreement providing for various payments to the bellwether plaintiffs depending on the result on appeal. *Id.*

The evidence in *Linde* was unique in that the defendant bank processed payments that actually bore the hallmarks of payments for suicide bombings.[31] Nevertheless, other banks have already faced ATA lawsuits based on what appear to be far more attenuated links to alleged foreign wrongdoers.[32] For example, an international bank that processes payments for customers linked to the Iranian or Syrian governments may later find itself facing ATA allegations.

Other scenarios that have given rise to alleged ATA claims involve:

- health care providers that provided medical goods or services to foreign governments that were later accused of terrorist attacks;
- companies that made "protection payments" to protect their employees against attacks from regional guerrilla organizations (*e.g.*, FARC in Colombia);
- companies that offer mobile telephony services in regions where armed groups (*e.g.*, the Taliban) operate; and
- social media companies alleged to have provided platforms to terrorists.

[31] *Id.* at 325. Despite this, the Second Circuit vacated the district court's judgment because its instruction on the "act of international terrorism" element was erroneous. *Id.*

[32] For example, in several reported cases commenced since 2017 in the U.S. federal district courts, ATA plaintiffs have sued banks, seeking to establish ATA "aiding and abetting" liability based on the fact that the banks had processed payments for customers later found (or alleged) to be linked to the perpetrators of attacks on U.S. armed forces in Iraq.

None of these scenarios has, to date, resulted in a final ATA judgment against a private company. In each case, a plaintiff is likely to face significant legal hurdles, including in identifying the relevant "aiding and abetting" actions, the requisite knowledge that such actions were linked to harmful activity, and the causal link between the defendant's actions and the harm sustained by the plaintiff. In many such cases, there also may arise objections to personal and subject matter jurisdiction, as well as possible constitutional defenses.

Being named as a defendant in an ATA case will have a significant reputational impact not just on the defendants concerned, but also on those who conduct business with them.[33] Additionally such cases often garner significant media attention. Moreover, if a case ultimately proceeds to trial, the defendants are unlikely to face a sympathetic jury. Precisely because of this, courts are expected to carefully scrutinize new allegations of secondary liability to ensure that they meet applicable federal pleading standards. Nevertheless, the expansion of the ATA to include secondary "aiding and abetting" claims, as well as the continuing stream of pro-plaintiff legislation (sometimes retroactive in nature), indicate that the ATA does create new risks for private companies and banks, particularly those with operations in troubled foreign regions. Allegations made under the ATA may cause counterparties to stop doing business with those implicated, international regulators to probe activities and customers to walk away.

[33] Discovery in these actions, once it proceeds, further opens up the possibility of potential cost and reputational harm.

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