JUDICIAL AIDING AND ABETTING OF TERROR

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Table of Contents

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I. Introduction

Foreign terrorism is big business. Before a bomb is detonated, a trigger is pulled or a knife is plunged into the body of a victim, much has to happen and significant amounts of money and organizing are needed.[2] In many ways, foreign terrorism is a game of "whac-a-mole",[3] where the visible arms of terror, whether it be those who engage in the terror acts or those who organize the acts, not only appear and disappear without warning but also change their outwardly identifiable features (both physical and organizational) when discovery is imminent. Terror financiers create new identities when authorities finally corner them, terror organizations change affiliations when existing affiliations attract too much scrutiny, and intermediaries are set up to parse out the activities of both organizers and supporters to evade legal liability, including aiding and abetting liability, for the terror acts.

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[2] Al-Qaeda reportedly required $30 million a year in funding prior to launching the September 11, 2001, terror attacks on the United States. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 169-72 (2004), https://www.9-11commission.gov/report/911Report.pdf.

[3] Whac-a-mole is an arcade game where the player faces a table with pre-cut holes while holding a mallet. When toy moles appear randomly coming out of a hole, the player must react quickly to hit it with a mallet to score, or the mole rapidly disappears only to surface elsewhere. The name of this game is often used as shorthand for futile situations. For a more detailed description and images, *see* Eric L. Talley, *Discharging the Discharge-for-Value Defense*, 18 N.Y.U. J. L. & BUS. 147, 190-191 (2021).

Because foreign terror organizations tend to change structure, names and operational leadership rapidly, it is no exaggeration to state that those who aid and abet foreign terror organizations through financial, logistical and reputational support are just as dangerous as the terror organizations themselves.

One of the most illustrative cases of terror support "whac-a-mole" is the series of cases relating to the murder of David Boim by Hamas terrorists in Israel in 1996.[4] The parents of David Boim sued a number of individuals and entities that provided materials, support and funds to Hamas, alleging aiding and abetting liability under the Anti-Terrorism Act (the "ATA").[5] The details of the proceedings in that case will be discussed in detail *infra*, but the court ultimately found a number of entities and individuals liable to the Boims under the ATA for having aided and abetted the murder of David Boim. Once judgment was rendered against those entities who aided and abetted Hamas, though, the various entities took actions to evade satisfying the judgement[6] and the Boims had to continue their litigation against the entities that were formed as alter-egos to replace the original judgment debtors. Though that ATA litigation is still ongoing as of the date of this article, a new law, known as the Justice Against Sponsors of Terrorism Act ("JASTA"),[7] was enacted to facilitate civil lawsuits against those who aid and abet foreign terror, with an emphasis on providing victims of the September 11, 2001 Islamic terror attacks (the "9/11 Terror Attacks") with recourse against state actors who may have been involved in, or

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[4] *See* Andrew Kerr, *Reps. Omar and Tlaib among Democrats tied to group with alleged links to Hamas slaying*, WASH. EXAMINER (July 13, 2022), https://www.washingtonexaminer.com/news/house/ilhan-omar-rashida-tlaib-democrats-hamas-american-muslims-palestine ("David Boim was 17 when members of Hamas, a designated Foreign Terrorist Organization, shot and killed him at a bus stop in the West Bank in 1996. Boim's parents successfully sued a network of American-based Palestinian nonprofit groups in federal court for financing the terrorists that killed their son, and a federal judge ultimately awarded the family a $156 million judgment under the Anti-Terrorism Act following a jury trial in 2004.").

[5] Anti-Terrorism Act, 18 U.S.C. § 2333(a) (1990).

[6] *See* Kerr, *supra* note 4 ("But the groups never paid up. Shortly after the judgment was levied, the groups claimed they were bankrupt and went out of business. One of the groups, the Holy Land Foundation, had its monetary assets seized by the United States, and five of its leaders were sentenced to decades in prison in 2008 for providing material support to Hamas.").

[7] Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016).

otherwise facilitated, the attacks. In many ways, the issue of aiding and abetting liability under the ATA was a secondary issue when Congress considered JASTA, with the primary concern being the bar foreign sovereign immunity principles imposed on civil litigants.

Because the ATA did not explicitly provide for aiding and abetting liability, even though courts had found that there was an aiding and abetting cause of action implied within the ATA, JASTA explicitly included a claim for aiding and abetting as well as revising applicable foreign sovereign immunity principles to allow for claims to be made against foreign states. The problem, though, is that Congress also provided courts with a specific case known as *Halberstam*[8] to use in determining whether aiding and abetting liability should attach in particular cases, but that case had nothing to do with foreign terror or the nuances of terror financing. As a result, courts are now reading into JASTA a set of conditions for aiding and abetting liability that are utterly unworkable in cases involving funding and support of foreign terror.[9]

In particular, because many terror victims[10] have initiated litigation against the deep pockets of large financial institutions that process payments, rather than the organizations that solicit and collect funding and other support for foreign terror organizations, a serious legal question has come to the fore: what level of knowledge and causation should be required to be proven in order to hold liable those who provide the lifeblood of foreign terror organizations? While a large financial institution is an alluring target for victims of foreign terror due to such institutions' assets, courts have been grappling with the reality of how financial institutions operate and whether they knowingly facilitate terror simply by having a customer who collects support for foreign terror organizations, and is likely the only party aware of the intended use of the funds being processed.[11] In many ways, litigants are asking courts to hold financial institutions strictly liable for providing financial services, something that is untenable.

This article posits that the focus on bringing suit against financial institutions has unintentionally weakened laws prohibiting providing support to foreign terror organizations and the focus of such

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[8] Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983).

[9] *See generally*, Brief on Behalf of Jewish Organizations and Allies, as Amici Curiae Supporting Petitioners, Tzvi Weiss, et al., v. Nat'l Westminster Bank PLC, 993 F.3d 144 (2d Cir. 2021) (No. 21-381) (*cert. denied*).

[10] See e.g., the vast number of plaintiff party to the suit in Weiss. *Id.* at 144.

[11] *Id.* at 172.

suits should be on those who use the financial institutions for these purposes rather than the financial institutions that have limited knowledge as to who receives the funds and what those funds will be used for.

This article will examine the history of federal laws that provide recourse to victims of foreign terror to determine the extent to which aiding and abetting liability has been incorporated, explicitly and implicitly, in such laws. Next, this article will provide an overview of how terror financing and support occurs. After reviewing the facts of the *Halberstam* case and the legislative history of JASTA, this article will examine whether court treatment of aiding and abetting liability under JASTA comports with the intention of Congress in enacting the law or whether Congress actually intended for the reference to *Halberstam* to be limited to claims against foreign sovereigns and financial institutions, rather than all other parties that facilitate terror. Finally, this article will examine a case study and make recommendations on how to bring JASTA in line with precedent under the ATA and the task of combating foreign terror financing and support.

II. The History of Federal Laws Providing Recourse for Victims of Foreign Terror

The ATA was enacted to provide American victims of foreign terror with recourse for their losses and injuries.[12] On its face, the ATA did not include an explicit cause of action for aiding and abetting liability, but as plaintiffs began asserting claims it became clear that the purpose of the ATA could not be realized if aiding and abetting liability was excluded as a cause of action.[13] The reason for this is best illustrated by the *Boim* case.

The Hamas terrorists who murdered David Boim were part of an organization that carefully structured itself to avoid the reach of foreign courts, including those in the United States. Like an American organized crime syndicate, Hamas compartmentalizes its various operations and personnel to ensure that it can continue operating even if parts of its organization are discovered and dismantled, and in this way,

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[12] *Administration's Draft Anti-Terrorism Act of 2001: Hearing before the H. Comm. on the Judiciary*, 107th Cong. 18 (2001) (John Ashcroft, Attorney-General).

[13] *Id*. at 16 ("Our laws treat these criminals and those who aid and abet them more severely than our laws treat terrorists. We would make harboring a terrorist a crime.").

it can survive even when lower level members of the organization are prosecuted.[14] Unlike organized crime syndicates, terror organizations tend to rely on third parties, rather than their own activities, for funding. Consequently, terror organizations like Hamas or PFLP either create or enlist the help of those who are sympathetic to the terror mission of such groups to engage in facially charitable fundraising to provide financial support to the terror organizations. The Boim litigation, which was initiated in 2001 and is still ongoing at the time of publication of this article, exemplifies the important role courts have had in ensuring that the purposes of the ATA are fulfilled.

Because Hamas is essentially judgment proof in the United States, the Boims had to find the source of Hamas' support and focus on those individuals and entities that played a primary role in fundraising for the terror organization. After exhaustive investigations and research, the Boims determined that there were a wide range of Hamas supporters who facilitated the murder of their son. The Boims filed suit under pre-JASTA ATA, naming as defendants the Quranic Literacy Institute, Holy Land Foundation for Relief and Development, Islamic Association for Palestine, American Muslim Society, d/b/a/ Islamic Association for Palestine in Chicago, American Middle Eastern League for Palestine, United Association for Studies and Research, Mohammed Abdul Hamid Khalil Salah, a/k/a Abu Ahmed, Mousa Mohammed Abu Marzook, a/k/a Abu Omar Musa, Amjad Hinawi, Palestinian Authority, Estate of Khalil Tawfiq Al-Sharif, and a number of John Does.[15]

The Boim defendants responded that the ATA did not apply to the acts they were alleged to have committed and/or facilitated because the only theory that would comport with the facts of the case is one of aiding and abetting, which the defendants claimed was not a cause of

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[14] To address the problem of organized criminal enterprises availing themselves of a decentralized structure that insulated the leadership from liability for acts committed by underlings, Congress enacted the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (1970). *See generally*, U.S. DEP'T. OF JUSTICE, STAFF OF THE ORGANIZED CRIME AND GANG SECTION, CRIM. RICO: 18 U.S.C. §§ 1961–1968: A MANUAL FOR FEDERAL PROSECUTORS, at 4-6 (6th ed. 2016), https://www.justice.gov/archives/usam/file/870856/download.

[15] Defendants Hinawi and Al-Sharif are the two Hamas terrorists who murdered the Boim's son and the remainder of the defendants were alleged to have aided and abetted the murder. Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000, 1021 (7th Cir. 2002).

action provided for under the ATA.[16] The Boims argued that an aiding and abetting cause of action was, in fact, provided for under the ATA, even if the specific words "aiding and abetting" were not to be found in the statute.[17] The District Court agreed with the Boims as to whether the ATA should be interpreted to include an aiding and abetting cause of action, but noted that the Boims would still have to establish the knowledge and intent elements of an aiding and abetting cause of action.[18]

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[16] "Defendants assert that the allegations in the complaint make clear that plaintiffs' only theory of liability is that the defendants aided and abetted David Boim's murder. They argue that the text of § 2333, which provides for a civil cause of action for those injured by an act of international terrorism, does not mention liability for aiding and abetting. They claim that plaintiffs' action is therefore an attempt to go beyond the plain language of the statute and read into § 2333 an implied right to sue those who are not direct participants in international terrorism. The defendants conclude that the complaint must be dismissed because it does not allege that Salah 'participated directly in the murder,' that 'an employee of the [QLI] pulled the trigger' of the gun that killed David Boim, or that HLF, IAP, AMS or AMELP actually participated in the murder. Because, according to defendants, Central Bank bars the court from finding that an implied aiding and abetting cause of action exists, plaintiffs complaint must be dismissed." *Id*.

[17] "Plaintiffs respond that the defendants are incorrect that their sole theory of recovery is one for aiding and abetting principals Hinawi and Al-Sharif in the murder of David Boim. They argue that according to the text of 18 U.S.C. §§ 2331, 2333, any participant in 'international terrorism' is liable for the consequences of such 'international terrorism,' whether or not that participant directly committed or suborned the violent act that caused the harm. They claim that they are alleging that all of the defendants have themselves directly committed an 'act of international terrorism' that harmed the plaintiffs. In other words, plaintiffs are asserting that the funding of a terrorist organization is itself an act of 'international terrorism' under § 2331. In addition, plaintiffs respond that the text of § 2333 does in fact extend civil liability to aiders and abettors of 'international terrorism.'" *Id*.

[18] *Id*. at 1018 ("Aiding and abetting acts of international terrorism, which is itself a criminal violation, is certainly an activity that "involves violent acts or acts dangerous to human life." *See* United States v. McVeigh, 153 F.3d 1166, 1193 (10th Cir. 1998) (discussing that defendant was charged with aiding and abetting the use of a weapon of mass destruction in violation of 18 U.S.C. § 2332a and 18 U.S.C. § 2). Plaintiffs may therefore bring a cause of action under § 2333 that is based on a theory that defendants aided and abetted international terrorism. Again, the elements of aiding and abetting plaintiffs

On appeal, the Seventh Circuit affirmed the District Court's decision and noted that, in the context of imposing aiding and abetting liability for funding foreign terror "if we failed to impose liability on aiders and abettors who knowingly and intentionally funded acts of terrorism, we would be thwarting Congress' clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence."[19] This point is critical to understanding why the Second Circuit's interpretation of JASTA undermines the Congressional purpose of that statute.

Moreover, the Seventh Circuit clarified when aiding and abetting liability may attach under the ATA for providing support to foreign terror groups.

> In short, we answer the three questions certified by the district court as follows: funding, simpliciter, of a foreign terrorist organization is not sufficient to constitute an act of terrorism under 18 U.S.C. § 2331. However, funding that meets the definition of aiding and abetting an act of terrorism does create liability under sections 2331 and 2333. Conduct that would give rise to criminal liability under section 2339B is conduct that "involves" violent acts or acts dangerous to human life, and therefore may meet the definition of international terrorism as that term is used in section 2333. Finally, as we have set forth the elements of an action under section 2333, civil liability for funding a foreign terrorist organization does not offend the First Amendment so long as the plaintiffs are able to prove that the defendants knew about the organization's illegal activity, desired to help that activity succeed and engaged in some act of helping.[20]

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will be required to prove, including knowledge and intent, rebut defendants' contention that unknowing contributions to organizations could result in liability. United States v. Zafiro, 945 F.2d 881, 887 (7th Cir.1991) (citations omitted), aff'd, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (elements of aiding and abetting include: "knowledge of the illegal activity that is being aided and abetted, a desire to help that activity succeed, and some act of helping")) (emphasis added).

[19] *Boim I*, at 1021.

[20] *Id*. at 1028.

On remand, the jury found a number of the defendants liable to the Boims in the amount of $52 million, which the district court trebled to $156 million.[21] This was again appealed to the Seventh Circuit, which vacated the judgement against four of the defendants due to purported errors the lower court made.[22] The Seventh Circuit again sent the case back to the lower court, stipulating that

> [T]he Boims will have to demonstrate an adequate causal link between the death of David Boim and the actions of HLF, Salah, and AMS. This will require evidence that the conduct of each defendant, be it direct involvement with or support of Hamas's terrorist activities or indirect support of Hamas or its affiliates, helped bring about the terrorist attack that ended David Boim's life. A defendant's conduct need not have been the sole or predominant cause of the attack; on the contrary, consistent with the intent of Congress that liability for terrorism extend the full length of the causal chain, even conduct that indirectly facilitated Hamas's terrorist activities might render a defendant liable for the death of David Boim. But the plaintiffs must be able to produce some evidence permitting a jury to find that the activities of HLF, Salah, and AMS contributed to the fatal attack on David Boim and were therefore a cause in fact of his death.[23]

This represented a significant change in the burden imposed on the Boims, as the dissent explained.

> I will now return to my main point and what the majority seems most concerned about—that is, what needs to be proven to establish that in fact the defendants before us aided the terrorists. The majority refers to this requirement variously as cause-in-fact, direct cause, factual cause, causal chain, and causal link. No one would seriously dispute that there must be a causal link between the defendants and the terrorist act. A person or entity

[21] Boim v. Quranic Literacy Inst. (*Boim III*), 511 F.3d 707, 710 (7th Cir. 2007).
[22] *Id*. at 710-11.
[23] *Id*. at 710.

> knowingly giving money to another terrorist group is not responsible for a murder committed by agents of Hamas.
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> But just what does "causal link" mean in this context, and how must one prove that the link exists between the defendants and Hamas? The majority wisely declines to set up an absurd requirement that the money given to Hamas by the defendants must be traced directly to, say, purchasing the gun used in the attack. Money, the majority recognizes, is fungible. At times, though, it seems that the majority is requiring a pretty clear trail leading from a defendant to the specific act which caused David's death. For instance, the majority says that what "is strikingly absent from the district court's analysis is any consideration of a causal link between the assistance that the court found AMS/IAP to have given Hamas and the murder of David Boim." The majority also says that "there must be proof that the defendant aided and abetted [Hamas] in the commission of tortious acts that have some demonstrable link with David Boim's death." But then there is the statement that "[n]othing in Boim I demands that the plaintiffs establish a direct link between the defendants' donations (or other conduct) and David Boim's murder . . . ."
>
> The majority's bottom line, with which I do not disagree, assuming I read it correctly, seems to be that what must be shown is that the defendant established a funding network or provided "general support" for terrorist activities; if that is established, then the fact finder could infer that establishing the network was a cause of Hamas terrorism. That is especially true if the funding was within a reasonable time of the terrorist act and if it was significant.[24]

In other words, the majority imposed a confusing, perhaps contradictory, standard of causation, one without basis in precedent.

This contradiction was remedied when the case was reheard by the Seventh Circuit *en banc* and the district court's judgment was reinstated, except with regard to one individual defendant and the Holy

[24] *Id.* at 759 (Evans, J., dissenting).

Land Foundation (the latter of which required further proceedings to determine whether it knew that Hamas was a terror organization).[25]

In pertinent part, the *en banc* Seventh Circuit made the following determinations:

Providing for aiding and abetting liability in foreign terror cases allows victims to get to the deep pockets that fund terror. In this regard, the Seventh Circuit noted that "[d]amages are a less effective remedy against terrorists and their organizations than against their financial angels."[26]

Addressing the standard for causation under the ATA, the Seventh Circuit determined that liability should be based on "the fact of contributing to a terrorist organization rather than the amount of the contribution."[27]

The Seventh Circuit went on to address the standard for knowledge that must be shown for aiding and abetting liability under the ATA to attach, stating that there had to be knowledge by the person or entity making the donation to a terror group that the money would be used either to prepare for or carry out the act of terror.[28] In reference to the particular facts of the Boim case, the Seventh Circuit reasoned:

> [w]e know that Hamas kills Israeli Jews; and Boim was an Israeli citizen, Jewish, living in Israel, and therefore a natural target for Hamas. But we must consider the knowledge that the donor to a terrorist organization must be shown to possess in order to be liable under section 2333 and the proof required to link the donor's act to the injury sustained by the victim. The parties have discussed both issues mainly under the rubrics of "conspiracy" and "aiding and abetting." Although those labels are significant primarily in criminal cases, they can be used to establish tort liability, see, e.g., Halberstam v. Welch, 227 U.S. App. D.C. 167, 705 F.2d 472 (D.C. Cir. 1983); Restatement (Second) of Torts §§ 876(a), (b) (1979), and there is no

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[25] Boim v. Quranic Literacy Inst. (*Boim III*), 549 F.3d 685, 705 (7th Cir. 2008) ("judgment of the district court is affirmed except with respect to (1) Salah, as to whom the judgment is reversed with instructions to enter judgment in his favor; (2) the Holy Land Foundation, as to which the judgment is reversed and the case remanded for further proceedings consistent with this opinion").
[26] *Id*. at 690.
[27] *Id*. at 691.
[28] *Id.*

> impropriety in discussing them in reference to the liability of donors to terrorism under section 2333 just because that liability is primary. Primary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors.[29]

The court went on to flesh out the standard for the *mens rea* element that would need to be established to impose liability for terror financing.[30] As long as the donor "knows the character of [the terror] organization", the *mens rea* element is satisfied.[31] Yet another related issue that the Seventh Circuit resolved was how to deal with a terror organization that had some portion of its activities focused on humanitarian activities, something that Hamas is well known for.[32] The court explained that there could be no way to parse out funding for humanitarian causes that a terror organization undertakes, stating:

> Hamas's social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of the killed, wounded and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas's popularity among the Palestinian population and providing founder for indoctrinating schoolchildren….Anyone who knowingly contributes to the nonviolent wing of an organization he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability. To require proof that the donor intended that his contribution be used for terrorism—to make a benign intent a defense—would as a practical matter eliminate donor

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[29] *Id.* at 691-92.
[30] *Id.*
[31] *Id*. at 695.
[32] *Id.* at 698 ("If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services "account" and depositing it in its terrorism "account.").

> liability except in cases in which the donor was foolish enough to admit his true intent.[33]

Finally, the Seventh Circuit addressed the issue of terror groups using intermediaries, acting as fronts and proxies, to isolate the donors from liability, setting forth a cogent example of how intermediaries are used and concluding that donors have a duty to know the nature of the entity that they are funding:

> Nor should donors to terrorism be able to escape liability because terrorists and their supporters launder donations through a chain of intermediate organizations. Donor A gives to innocent-appearing organization B which gives to innocent-appearing organization C which gives to Hamas. As long as A either knows or is reckless in failing to discover that donations to B end up with Hamas, A is liable. Equally important, however, if this knowledge requirement is not satisfied, the donor is not liable. And as the temporal chain lengthens, the likelihood that a donor has or should know of the donee's connection to terrorism shrinks. But to set the knowledge and causal requirement higher than we have done in this opinion would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare). Donor liability would be eviscerated, and the statute would be a dead letter.[34]

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[33] *Id*. at 698-699.

[34] *Id*. at 701-02. In subsequent proceedings, the Seventh Circuit described how Hamas donors such as the Holy Land Foundation ("HLF") allowed individuals to designate that their funds would be used to pay the family of terrorists who were killed in the course of their terror activities. "Mr. Abu-Baker, who served as HLF's President and Chief Executive Officer…admitted that HLF frequently received donations from people who wanted their money to go to the family or children of a "shaheed" or "martyr," and that HLF made it a practice to try to accommodate the requests of those donors. According to the Boims, a "shaheed" or "martyr" is someone who dies while serving Hamas' agenda, whether in a suicide bombing or some other terrorist attack, or at the hands of an Israeli soldier." Boim v. Quranic Literacy Inst., No. 00C2905, 2012 U.S. Dist. LEXIS 126063 at *25-26 (N.D.Ill. Aug.31, 2012).

The foregoing proceeding was the end of the substantive litigation, with the remainder, including proceedings that continue to the date of publication of this article, focused on collecting the judgment and identifying the successors to and alter egos of the original judgment debtors.[35]

Thus, at the conclusion of the substantive proceedings in Boim, aiding and abetting liability was clearly established as a cause of action under the ATA and the Seventh Circuit set out the following requirements to establish such a case, analogizing to the standards for civil and criminal tort liability for parties who are not primarily liable for the injury or damage. The Seventh Circuit explained that criminal, rather than civil, aiding and abetting principles were most appropriate to use in the context of aiding and abetting liability under the ATA but decided that general tort principles should apply.[36]

First, there must be support provided to a terror organization (directly or indirectly), whether it be money or some other form of support.[37]

Second, the person or entity that provided the support "must have known that the money would be used in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad."[38] The knowledge threshold required to be shown, though, is quite low. According to the Seventh Circuit,

> [a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist

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[35] *See, e.g.,* Boim v. Am. Muslims for Palestine, 9 F.4th 545, 555 (7th Cir. 2021) (finding facts sufficient to support a finding that American Muslims for Palestine was an alter ego for Holy Land Foundation for Relief and Development).

[36] *Boim III*, 549 F.3d at 692. ("When a federal tort statute does not create secondary liability, so that the only defendants are primary violators, the ordinary tort requirements relating to fault, state of mind, causation, and foreseeability must be satisfied for the plaintiff to obtain a judgment.").

[37] *Id.* at 690. (explaining that "whoever provides material support or resources . . ., knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332]," must be liable for a federal crime).

[38] *Id*. at 691.

> activities. And that is the only knowledge that can reasonably be required as a premise for liability.[39]

Third, the donor must have engaged in a form of intentional misconduct where the person or party acted with willful disregard of the interests of others, as opposed to simple negligence.[40] The Seventh Circuit explained, "to give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care."[41] Thus, a donor who provided funds to a charity that acted as a front for Hamas would have to either know that the charity was raising funds for Hamas or have been on notice of the same (even if the donor did not do further research on the nature of the charity).[42]

Fourth, while in general, there must be some level of causation that can be shown in tort cases, the Seventh Circuit dispensed with causation in ATA aiding and abetting cases, deciding that supporting a terror organization is causation in and of itself.[43] As the dissent noted,

> Causation, as the majority acknowledges, is a staple of tort law, ante at 18, and yet the majority relieves the plaintiffs of any obligation to demonstrate a causal link between whatever support the defendants provided to Hamas and Hamas's terrorist activities (let alone David Boim's murder in particular). Instead, the majority simply declares as a matter of law that any money given to an organization like Hamas that engages in both terrorism and legitimate, humanitarian activity, necessarily enables its terrorism, regardless of the purpose for which the money was given or the channel through which the organization received it.[44]

At the conclusion of the substantive *Boim* litigation, in the Seventh Circuit an ATA aiding and abetting liability case could be made

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[39] *Id*. at 698-99.
[40] *Id*. at 692.
[41] *Id*. at 693.
[42] *Id.*
[43] *Id.* at 709.
[44] *Id*.

simply by showing that a defendant provided support to a terror organization with either knowledge that the recipient entity was a terror organization or a willful disregard for that fact.[45] Even but-for causation standards were dropped in *Boim III*.[46]

As is discussed *infra*, other Circuit Courts of Appeal deviated from the *Boim* formulation of aiding and abetting liability, most notably in the Second Circuit, and the enactment of JASTA effectively made *Boim* moot for aiding and abetting claims under the ATA.[47]

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[45] *Id.* ("[T]he majority simply declares as a matter of law that any money given to an organization like Hamas that engages in both terrorism and legitimate, humanitarian activity, necessarily enables its terrorism, regardless of the purpose for which the money was given or the channel through which the organization received it.").

[46] *Id*. at 721. The court stated:

> "I believe that the following is a fair summary of the formal requirements that the en banc majority has announced for proving a case under § 2333:
>
> > 1. Act requirement: the defendant must have provided material assistance, in the form of money or other acts, directly or indirectly, to an organization that commits terrorist acts.
> >
> > 2. State of mind requirement: the defendant must either know that the donee organization (or the ultimate recipient of the assistance) engages in such acts, or the defendant must be deliberately indifferent to whether or not it does so.
> >
> > 3. Causation: there is no requirement of showing classic "but-for" causation, nor, apparently, is there even a requirement of showing that the defendant's action would have been sufficient to support the primary actor's unlawful activities or any limitation on remoteness of liability."). Because the enactment of JASTA changed the law with regard to aiding and abetting under the ATA, Seventh Circuit cases subsequent to Boim III are not discussed herein. *See, e.g.,* Kemper v. Deutsche Bank AG, 911 F. 3d 383, 396 (7th Cir. 2018).

[47] *See* Kemper, at 391. ("Deutsche Bank argues that *Boim III* is no longer good law on this point because later Supreme Court decisions have held that when a statute such as the ATA uses the phrase "by reason of," liability under that statute requires but-for causation.").

III. The Mechanics of Terror Financing and Support

In general terms, there are two objectives of foreign terror financing. The first use of funding is for the organizational needs of the terror group, which include routine items such as shelter, training, communications and transportation.[48] The second use of funding is for those items that are traditionally associated with terror, such as weapons, training specific to carrying out terror attacks, and associated materials.[49] At times, the two components may not be so distinct, as certain items that have innocuous uses, such as cell phones, can also function as components of terror weapons (many times, cell phones are used to trigger bombs).[50]

Making matters more complex, foreign terror organizations often have charitable purposes that go along with the terror activities. The case *of Holder v. Humanitarian Law Project*,[51] a challenge to the provisions of the Material Support Statute by terror organizations operating in Sri Lanka and Turkey, is illustrative of the complexity of terror organization financing. In *Holder*, the Supreme Court found that even though foreign terror organizations combine charitable and political activism with their terror activities, money is fungible and when terror organizations receive funding: even if that funding is designated for the charitable activities of the organization, it inevitably ends up supporting the overall mission of the terror organization.[52]

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[48] Anne L. Clunan, *The Fight Against Terrorist Financing*, 121 POL. SCIENCE QUARTERLY 569, 570 (Winter, 2006/2007).

[49] *Id.*

[50] Connor Simpson, *It Could've Been This Easy for Boston's Bombers to Use a Cellphone Detonator*, THE ATLANTIC (April 24, 2013), https://www.theatlantic.com/national/archive/2013/04/boston-bombers-cell-phone-detonator/315933/ ("You would think making a cellphone detonator would be a complex process, requiring more than a basic understanding of electronics, but that's not the case. We were able to figure it out in a little under an hour with a little bit of Googling and intuition. Indeed, it's a little scary how easy it is to discover how to make something that eventually can be part of a larger, terrifying weapon.").

[51] Holder v. Humanitarian L. Project, 561 U.S. 1, 30 (2010) ("[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts.").

[52] *Id*. at 31 ("Money is fungible, and "[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such

A discussion of how foreign terror organizations prototypically use affiliates to conceal their fundraising is contained in the court opinion on the litigation that followed the murder of David Boim by Hamas terrorists in 1996.[53] In that case, the court explained the structure as follows.

> Hamas' organizational presence is global. Terrorist operatives in Gaza and the West Bank receive their instructions, as well as the funds, weapons, and practical support they need to carry out their missions, from Hamas organizers throughout the world. Upon information and belief, Hamas currently has command and control centers in the United States, Britain, and several Western European countries. The leaders of these control centers coordinate fund-raising from sympathetic parties in these countries, they launder and channel money to Hamas operatives in the West Bank and Gaza, they arrange for the purchase of weapons and the recruitment and training of military personnel, and they work with local commanders in the West Bank and Gaza to plan terrorist attacks.
>
> The organization's military wing depends on foreign contributions solicited by these overseas control centers. Approximately one-third of Hamas' multi-million dollar annual budget comes from fund-raising activity in North America and Western Europe. Hamas' other sources of funding include local contributions and support from several Middle Eastern governments.
>
> Hamas' presence in the United States is significant but covert. It conducts its affairs through a network of front

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moneys could be put." But "there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities,
and those ultimately used to support violent, terrorist operations." Thus, "[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives." (internal citations omitted). *See also*, Schanzer Testimony, *infra* note 97 and Clunan, *supra* note 48.

[53] *Boim III*, 549 F.3d 685.

> organizations that ostensibly have religious and charitable purposes. Upon information and belief, the organizational defendants in this case are Hamas' main fronts in the United States. These organizations' purportedly humanitarian functions mask their mission of raising and funneling money and other resources to Hamas operatives to support their terrorist campaigns.[54]

In a related proceeding related to the seizure of assets from those facilitating terror funding, the relevant court provided the following detailed examination of how Hamas fundraising in the US was structured. The length of this passage is necessary to provide a full example of how foreign terror financing occurs.

> On January 25, 1993, Mohamad Salah ("Salah"), a naturalized American citizen and Chicago area resident, was arrested by the Israeli government while in Israel allegedly to promote the activities of the HAMAS organization. In January 1995, Salah pled guilty in an Israeli military court to being a member of HAMAS and to channeling funds to HAMAS, including funds transferred through one of the subject bank accounts that he held jointly with his wife, Maryam Azita Salah. Salah was sentenced to a term of five years imprisonment. On February 10, 1995, the United States Treasury Department's Office of Foreign Asset Control, having reason to believe that Salah acted on behalf of HAMAS, which President Clinton has designated in Executive Order 12947 as a terrorist organization threatening to disrupt the Middle East Peace Process, froze all known Salah bank accounts but on a monthly basis licensed Mrs. Salah to withdraw a living stipend. Also, on July 27, 1995, the Department added Salah to the list of Specially Designated Terrorists because of his alleged participation in terrorist activities in the Middle East.
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> The government claims that after his arrest Salah made a series of statements to Israeli authorities detailing his

[54] Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1005 (N.D. Ill. 2001).

activities in the United States and abroad as a HAMAS military operative. These statements comprise a significant portion of the allegations set forth against Salah in the Wright Affidavit. Salah allegedly stated that his involvement with HAMAS began approximately in 1988. He divulged that he recruited and trained, domestically and abroad, new candidates for membership in HAMAS military cells that performed terrorist acts in Israel and the Occupied Territories. These recruiting activities allegedly included, among other things, conducting interviews and background checks and identifying and classifying prospective candidates on the basis of expertise and knowledge in chemicals, explosives, and the construction of terrorist devices that might be used in HAMAS military operations in Israel and elsewhere. Salah allegedly admitted that these training activities included mixing poisons, developing chemical weapons, and preparing remote control explosive devices. The government alleges that Salah also admitted acting as a financial conduit and directly financing domestic and international travel and terrorism training for new HAMAS members.

Further, Salah allegedly stated that he took extended trips within the United States and abroad on behalf of HAMAS. For example, in August and September 1992, Salah went on a sixteen day trip to Israel and the Occupied Territories. During this trip, Salah funneled approximately $100,000 to an alleged HAMAS operative, Salah Al-Arouri, which, according to both Salah and Al-Arouri, was used to purchase weapons. Al-Arouri allegedly admitted to Israeli officials that he gave an individual named Musa Dudin approximately $45,000 of the money he received from Salah so that Dudin could purchase weapons in September 1992. Al-Arouri further related that Dudin purchased the weapons as planned and that these weapons were subsequently used in terrorist attacks, including a suicide attack resulting in the murder of an Israeli soldier in Hebron in October 1992. The government alleges that

at least half of the funds Salah gave to Al-Arouri originated from the Salahs' LaSalle Bank account no. XXXXX4532.

The government also alleges that, in January 1993, at the request of Mousa Abu Marzook, the leader of HAMAS, Salah traveled to Israel on behalf of HAMAS. This trip allegedly was designed to help reorganize and restaff several military cells throughout Israel after a series of terrorist acts for which HAMAS claimed credit prompted the Israeli government to deport 415 HAMAS operatives from Israel and the Occupied Territories in December 1992. To that end, Abu Marzook allegedly instructed Salah to distribute a specified sum of money to each military cell, to meet with other HAMAS operatives to coordinate responsive terrorist attacks against Israel, and to restaff the decimated military infrastructure by placing certain individuals into leadership positions in various mosques and units. This trip was unexpectedly cut short when Israeli authorities arrested Salah on January 25, 1993. At the time of his arrest, Israeli authorities recovered from Salah $97,400 and extensive notes he had compiled from his meetings with over forty HAMAS operatives and contacts in Israel and the Occupied Territories during the preceding eleven days.

As funding for this trip, Salah allegedly admitted to Israeli authorities that he provided Abu Marzook with the account number to his LaSalle account so that Abu Marzook could wire him the funds to be distributed to the HAMAS operatives in the Middle East. Bank records also reveal that on December 29, 1992, Ismail Selim Elbarasse, an alleged HAMAS operative in the United States, wire transferred $300,000 to the LaSalle account. The Elbarasse wire transfer originated from an account at the First American Bank of McLean, Virginia, which Elbarasse held jointly with Abu Marzook. Bank records also indicate that in early January 1993 Salah withdrew a significant portion of the $300,000 that Elbarasse had wired into his account. Within days of this withdrawal, Elbarasse wire transferred $135,000

into the LaSalle Bank account and, five days later, wire transferred an additional $300,000. During this same period, Nassar Al-Khatib, an alleged supporter and financial backer of HAMAS and a close associate of Abu Marzook, wire transferred $50,000 into the LaSalle account and $200,000 into Standard Bank & Trust account no. XXXXXX8806.

For at least the twenty-five month period preceding his arrest in Israel, Salah was associated with and claimed to be an employee of QLI [Quranic Literary Institute]. QLI is based in Oak Lawn, Illinois and represents itself as a not-for-profit research institute devoted to the translation and publication of sacred Islamic texts. The government has obtained an employment verification letter that QLI issued for Salah to the Standard Bank & Trust Company of Evergreen Park, Illinois. The letter, printed on QLI letterhead and signed by QLI Corporate Secretary and Trustee Amer Haleem, states that Salah began working for QLI as a computer analyst on January 1, 1991. QLI provided this letter to Standard Bank & Trust to enable Salah to obtain a mortgage loan in excess of $100,000 for his residence in Bridgeview, Illinois. Additionally, when Salah opened his account with the First National Bank of Chicago, QLI Treasurer Abraham Abusharif orally verified that Salah was employed at QLI. The government alleges that QLI and Salah falsely represented to the banks the true nature of their relationship to provide a cover for Salah who was a high-level HAMAS military operative.
The government also alleges that QLI and individuals and entities related to QLI likely financed Salah's HAMAS-related expenditures since 1991 **through structured transactions designed to conceal QLI as the source**. For example, in October 1991, QLI President Ahmad Zaki Hameed transferred $18,000 to Salah through three $6,000 checks drawn from his personal bank account. Salah also received $ 40,500 in the form of five cashier's checks each in the amount of $8,100 from Linda Abusharif, the sister of QLI Treasurer Abraham Abusharif. Bank records reflect that Salah countersigned these checks and deposited them in his

> LaSalle Bank account. The government further alleges that QLI entered into a business transaction involving the purchase, lease, and sale of real property in Woodridge, Illinois. The government claims that the money used to finance this transaction was transferred to the United States for the purpose of supporting the terrorist activities of HAMAS. This land deal, which **was structured so as to conceal QLI**, yielded in the first year $110,000, a sum nearly equal to the amount an overseas entity, Faisal Financial, transmitted to Salah in 1992.[55]

What this shows is that foreign terror organizations use charitable fronts to obscure the fact that the fundraising the charities do is actually on behalf of a designated terror organization, and that the charities are fully aware, and approving, of the unlawful use of this structure to fund terror. Whether the financial intermediaries are aware of the true nature of the transactions is obviously something that has to be determined on a case by case basis, but there should be no doubt that it is common knowledge in the finance industry that charities are often used by foreign terror organizations to conceal terror financing.[56] At the very least, these institutions should be deemed to have constructive knowledge of these illicit uses of charities for purposes of compliance with various banking laws such as those governing knowing your customer and anti-money laundering requirements.[57]

In addition to the fact that foreign terror organizations often mix charitable and political aims in their terror activities, they also avail themselves of complex funding strategies that include the use of money laundering, third party charitable organizations, criminal activities, and fraudulent use of corporate structures.[58] Further, while terrorism was

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[55] United States v. One 1997 E35 Ford Van, 50 F. Supp. 2d 789, 793-95 (N.D. Ill. 1999) (emphasis added).

[56] *See* Dan Ryan, *FinCEN, Know Your Customer Requirements*, HARV. L. SCH. F. ON CORP. GOV., (Feb. 7, 2016), https://corpgov.law.harvard.edu/2016/02/07/fincen-know-your-customer-requirements/.

[57] *Id*. (stating how financial institutions in the United States are required to conduct due diligence reviews of their customers and activities).

[58] *See generally*, Shima Baradaran, Michael Findley, Daniel Nielson & Jason Sharman, *Terror Funding*, 162 U. PENN. L. REV. 477 (2014); *see also*, Clunan, *supra* note 48 at 570 ("Funds can be raised through illicit means, such as drug and human trafficking, arms trading, smuggling, kidnapping,

generally financed by state actors in the past, as states have moved away from overt sponsorship of groups like Hamas, Hezbollah or the Popular Front for the Liberation of Palestine ("PFLP"), the vacuum has been filled by a variety of non-state actors, such as non-profit activist groups to non-governmental organizations, using criminal activity such as drug dealing to fill their coffers.[59] Compounding the problem of preventing terror financing, foreign terror organizations saw the writing on the walls of banks and began moving to untraditional means of moving money, outside of the reach of regulators: "additional efforts to regulate the informal financial system (for example, money remitters and other money services businesses) were also thwarted. The informal system was increasingly important as money launderers and terrorists shifted their operations outside the formal financial system."[60]

While terrorism is reprehensible, when it comes to finance, terrorists are clever and quick to adapt to the plodding advances of law and regulation.

IV. JASTA, Halberstam and Congressional Intent Relating to Aiding and Abetting Liability for Foreign Terror

Prior to the enactment of JASTA, the ATA had been, by many measures, a successful tool in the war against foreign terror.[61] Twenty

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robbery, and arson, which are more amenable to traditional anti-money-laundering tools. Terrorists also receive funds from legitimate humanitarian and business organizations. Charities raising funds for humanitarian relief in war-torn societies may or may not know that their funds are going to terrorism. Corrupt individuals at charities or at recipient organizations may divert funds to terrorist organizations. This appears to be one of the main means through which al Qaeda raises funds. Legitimate funds are commingled with funds destined for terrorists, making it extremely difficult for governments to track terrorist finances in the formal financial system.") (emphasis added).

[59] Clunan, *supra* note 48, at 574-576 ("Terrorist organizations relied increasingly on other means, licit and illicit, to fund their activities. Terrorists had long been involved in drug trafficking and organized crime, but until 1999, the international community had not explicitly linked these").

[60] *Id.* at 586.

[61] *See Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 13 (2016) (explaining the reason for the enactment of JASTA, even after the success of ATA, but needing to move forward with new legislation).

years after its enactment, though, in response to the 9/11 Terror Attacks and the need for legislation that would allow victims of both the 9/11 Terror Attacks and other terror attacks (primarily, though not exclusively, Islamic terror attacks) to seek compensation from state and other sponsors of terror, such as Saudi Arabia[62]as well as individuals, entities and states those who aided and abetted the foreign terror organizations, Congress enacted JASTA. JASTA was supposed to provide a more robust range of legal tools to victims of terror and as drafted, it did just that, codifying aiding and abetting liability under the ATA.[63]

As the Findings and Purpose Section (the "Purpose Section") of JASTA reads, JASTA was enacted to "recognize the substantive causes of action for aiding and abetting and conspiracy liability under chapter 113B of title 18, United States Code"[64] in order to "provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States."[65] The Congressional hearings prior to the enactment of JASTA confirm this: "JASTA seeks to ensure that those, including foreign governments, who sponsor terrorist attacks on U.S. soil are held fully accountable for their actions. In addition, JASTA attempts to enhance the effectiveness of U.S. efforts at combatting terrorism and combatting terrorist financing by making those who provide financial support to foreign terrorist organizations liable for their conduct."[66]

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[62] *See id.* (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary). ("Mr. Speaker, if any foreign government, if it can be shown to have supported a terrorist attack on U.S. soil, American victims ought to have the right to sue that country. Based on the 28 pages held secret for years, there may be evidence that the country of Saudi Arabia and their officials may have had some involvement in planning the elements of that attack. I don't know. That is what the courtroom is for. Whether this involvement rises to the level to be held accountable at trial is an issue for a jury of Americans to decide. It is interesting that Saudi Arabia objects to this legislation. Me thinks they object too much.").

[63] *See id*.

[64] JASTA § 2(a)(4).

[65] JASTA § 2(b).

[66] *Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Const. & Civil Just. of the H. Comm. on the Judiciary*,

While the purpose of JASTA could not have been clearer, Congress made what can only be described as a material mistake in adding an additional element to the law's Purpose Section when it incorporated the *Halberstam* decision as the framework for determining how aiding and abetting liability should be ascertained under JASTA. Under no logical interpretation of the text or legislative history of JASTA can it be said that JASTA was intended to curtail the rights of victims of foreign terror to seek compensation from foreign terror organizations or those who provide support for such organizations, yet courts' strict application of the *Halberstam* case's principles has effectively made asserting claims for aiding and abetting liability in foreign terror cases an impossibility in almost every situation compared to the standard that was set out for the ATA under Boim.

As the Purpose Section acknowledges, foreign terror groups act through "affiliated groups or individuals [to] raise significant funds," and notes that the fundraising from groups and individuals either "knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States. . . ."[67]

As Senator Richard Blumenthal observed in his response to then-President Obama's veto of JASTA, JASTA was intended to supplement existing law (i.e., the ATA) by providing additional, not fewer, avenues of recourse for victims of foreign terror.

> When all is said and done, the Justice Against Sponsors of Terrorism Act simply closes a loophole that was created by the courts, contrary to the intent of this body. That loophole, in effect, permits foreign governments to **aid and abet crimes against the citizens of this country as long as its aiding and abetting occurred outside of our borders**.
>
> Think of it as a missile launched from another country by terrorists with the support and assistance of that foreign government. That foreign government can evade any and all responsibility simply because the

114th Cong. 13 (2016) (statement of Rep. Trent Franks, Chairman, Subcomm. on the Const. and Civil Just.).

[67] JASTA, §(2)(a)(3) and (4).

> missile was launched outside our borders. Similarly, the missile of terrorism can be launched outside our borders and the foreign government, including Saudi Arabia, is able to evade all responsibility under the decision made by the Second Circuit Court of Appeals in New York, which created that loophole. So that foreign government can give terrorists bags of money and tons of explosives to carry out murder within our borders, as long as it does so outside our borders. That is wrong.
>
> The principle here is broader and bigger than Saudi Arabia or even the 9/11 victims. It is about simple justice. Our law should recognize the reality that global crimes can be sponsored and supported outside our borders and inflict grave harm, including murder, on the citizens of our country within our borders.
>
> This loophole will be closed by this measure for the benefit of not only the 9/11 victims but also potential victims in the future. It will send a message and deter violent crime in this country aided and abetted by foreign governments in the future. It will deter that kind of violence through an ideal and a tradition that is uniquely American. It is a system of justice that imposes accountability and makes sure that everybody has a fair day in court.[68]

JASTA was intended to expand existing federal anti-terrorism laws to allow victims to sue foreign government hiding behind the doctrine of foreign sovereign immunity to evade justice in United States' courts, in addition to all of the existing remedies provided under the ATA.[69] Senator John Cornyn explained in his response to the President's veto of JASTA: "Finally, JASTA is not a sweeping

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[68] Justice Against Sponsors of Terrorism--Veto; 114 CONG. REC. S2040 (daily ed. Sept. 28, 2016) (statement of Sen. Richard Blumenthal). (emphasis added).

[69] *Id*. ("So we will fix this law by extending this 1976 provision, the Foreign Sovereign Immunities Act, to allow the families and the victims of the 9/11 tragedy to seek justice in a court of law in an American court.").

legislative overhaul that dramatically alters international law. It is an extension of law that has been on the books since 1976."[70]

Thus, it is certain that rather than limiting aiding and abetting liability in foreign terror civil suits, JASTA was intended to expand such liability to include foreign governments, as well as non-governmental actors, while preserving the scope of recourse against those who aid and abet terror.[71] Further, JASTA was enacted to resolve a circuit split regarding aiding and abetting liability under the ATA, which is discussed in the next subsection.[72] Complicating matters, though, is the fact that Congress was focusing on financial institutions that provide financial services to foreign terror organizations rather than individuals and non-profit organizations that are, effectively, fronts used by foreign terror organizations to fundraise.[73]

The *Weiss* court, discussed in detail *infra*, made this clear when addressing whether the defendant bank, which had constructive knowledge of the ultimate disposition of the funds it was transferring, had the requisite level of knowledge under JASTA for an aiding and abetting finding.

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[70] *Id*. This was obviously in reference to the sovereign immunity provisions of JASTA.

[71] *See* discussion *infra* note 76 and accompanying text.

[72] *See Justice Against Sponsors of Terrorism Act: Hearing Before the Subcomm. On the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 2 (2016) (statement of Trent Franks, Chairman, Subcomm. on the Constitution and Civil Justice). ("Second, JASTA amends the Antiterrorism Act to clarify that those who aid, abet, or conspire with a foreign terrorist organization are subject to civil liability. There is currently a split in the Federal Courts of Appeal on the question of whether the Antiterrorism Act permits lawsuits based on aiding and abetting terrorists.").

[73] *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). While by their terms, neither the ATA nor JASTA limit secondary liability solely to financial institutions, plaintiffs generally seek the deepest pockets available when seeking compensation and banks are the ultimate exemplars of deep pockets. *See* Michael M. Wiseman, Sullivan & Cromwell, *Anti-Terrorism Act Liability for Financial Institutions,* HARV. L. SCH. F. (March 16, 2013), https://corpgov.law.harvard.edu/2013/03/16/anti-terrorism-act-liability-for-financial-institutions/. Non-profit organizations and individuals, on the other hand, are often "judgment proof", especially when it comes to monetary judgments for international terror claims, which often are in the hundreds of millions of dollars.

> Plaintiffs cannot demonstrate that Defendant had the requisite knowledge required by JASTA. As explained in Linde, "[a]iding an abetting requires the secondary actor to be 'aware' that, by assisting [*239] the principal, it is itself assuming a 'role' in terrorist activities." Linde, 882 F.3d at 329 (quoting Halberstam, 705 F.2d at 477). Thus, JASTA requires Plaintiffs to show that, [**43] "in providing [financial] services, [Defendant] was 'generally aware' that it was thereby playing a 'role' in [the terrorist organization's] violent or life-endangering activities," which "requires more than the provision of material support to a designated terrorist organization." *Id.* (citing Halberstam, 705 F.2d at 477). Accordingly, knowledge under JASTA "is different from the mens rea required to establish material support in violation of 18 U.S.C. § 2339B, which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities." *Id.* (citing Holder v. Humanitarian Law Project, 561 U.S. 1, 16-17, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)).
>
> Plaintiffs again rely on evidence that tends to support a finding that Defendant had the requisite scienter required for providing material support to a terrorist organization under § 2339B to support their claim that Defendant had the requisite scienter for aiding and abetting liability under JASTA. See, Opp. at 24-25 (discussing Defendant's "massive, illicit funds transfers" for Interpal and the Union of Good). However, as discussed in detail above, Plaintiffs present no evidence that creates a jury question as to whether Defendant generally was aware that it played a role in any of Hamas's [**44] or even Interpal's or the Union of Good's violent or life-endangering activities. Evidence that Defendant knowingly provided banking services to a terrorist organization, without more, is insufficient to satisfy JASTA's scienter requirement.[74]

[74] Weiss v. National Westminster Bank PLC ("*Weiss V*"), 381 F.Supp.3d 223, 238-39 (E.D.N.Y. 2019) (emphasis added).

This is the fatal flaw that most JASTA cases against financial institutions will face: Unlike 18 U.S.C. 2339B, which includes something closer to a strict liability[75] standard, once it is shown that the provider of support knows that a foreign terror organization is involved, JASTA requires more intimate knowledge of the nature of the ultimate recipient of the funds or support. Financial institutions are required under U.S. law to have robust protections in place to ensure that they are not being used to launder money or finance terror, but those requirements largely assume that the client is being fulsome in its account application and operating documents and thus don't involve conducting the type of due diligence that would uncover a well-hidden connection between a client and terror groups.[76] For this reason, victims of foreign terror attacks should take legal action against the customer who has the relationship with the terror group rather than the financial

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[75] *See* Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 862 (2004) ("One of the crucial unsettled issues concerning § 2339B is the mens rea required for a conviction. The government has contended that the crime is essentially one of strict liability where a person can be convicted without having a guilty mental state. This article contends, on the other hand, that the statute as enacted requires that a person know that he is donating to a group that has been designated by the Secretary of State as a foreign terrorist organization.").

[76] *See* Ryan, *supra* note 56. By way of example, one expert recommended that financial institutions focus on the following points when engaging in regulatory "know your customer" reviews:

> How complex is the customer's ownership structure? Is the customer operating in a heavily regulated industry? Is the customer's home jurisdiction (or any of its neighboring jurisdictions) subject to sanctions, or home to terrorist organizations? Does the customer's home jurisdiction lack effective AML regulations or have high levels of corruption? To what extent is the customer's business cash-based? Has the customer taken any measures to mask the identity of its shareholders (e.g., via nominee shareholders or bearer shares)? Is the institution's relationship with the customer face-to-face?

Id. (highlighting that a customer who is a proxy for a terror group will be well trained in how to respond to these inquiries without tipping off the financial institution as to its ties to terror.

institution itself, even though the deep pockets are at the financial institution.

One possible explanation for the incorporation of *Halberstam* in JASTA is that Congress intended to use the *Halberstam* test only for claims related to foreign governments, as a political nod to the concerns of Saudi Arabia that without the requirement that there be direct knowledge that they were aiding terrorists the Saudis couldn't be held liable for aiding and abetting the 9/11 Terror Attacks. For example, Rep. Goodlatte had this to say about the knowledge requirement of JASTA:

> Mr. GOODLATTE. Mr. Speaker, I yield myself such time as I may consume. Mr. Speaker, the Justice Against Sponsors of Terrorism Act has been introduced over several successive Congresses and has twice passed the Senate. Over the years that this legislation has been considered, I have worked with its sponsors to make the bill's language more precise in order to ensure that any unintended consequences are kept to a minimum.
>
> In particular, I have worked to make sure that JASTA's extension of secondary liability under the Anti-Terrorism Act closely tracks the common law standard for aiding and abetting liability and is limited to State Department-designated foreign terrorist organizations.
>
> Secondary liability should only attach to persons who have actual knowledge that they are directly providing substantial assistance to a designated foreign terrorist organization in connection with the commission of an act of international terrorism. JASTA, as revised in the Senate Judiciary Committee, ensures that aiding and abetting liability is limited in this manner.[77]

The legislative history of JASTA makes it clear that the amendment to the ATA was intended to codify the expansive scope of aiding and abetting liability from *Boim* while also providing recourse against foreign governments under very limited circumstances. What the record does not show, and what is not logical, is that civil aiding and

[77] Justice Against Sponsors of Terrorism Act, 114 CONG. REC. (daily ed. Sept. 9, 2016).

abetting liability as it relates to non-governmental actors who form a powerful cadre of those facilitating terror was to be reduced in any manner. Indeed, the opposite is what Congress intended.

A. The Weakening of Aiding and Abetting Liability under the ATA.

The genesis of JASTA's aiding and abetting liability problems can be traced back to an ATA case in the Second Circuit involving hundreds of American victims of foreign terror and the financial institution, National Westminster Bank PLC ("NatWest") that processed transactions on behalf of an entity raising funds for the designated foreign terror organization, Hamas, which engaged in the terror attacks leading to the plaintiffs' injuries and deaths.

That litigation had a long and complicated history in the Eastern District of New York, spanning over a decade. The litigation commenced with *Weiss v. National Westminster Bank PLC*, 453 F.Supp.2d 609 (E.D.N.Y. 2006) ("*Weiss I*"), moved on to *Weiss v. National Westminster Bank PLC*, 936 F.Supp.2d 100 (E.D.N.Y. 2013) ("*Weiss II*"), which was vacated and remanded by *Weiss v. National Westminster Bank PLC*, 768 F.3d 202 (2d Cir. 2014) ("*Weiss III*"), proceeded to *Weiss v. National Westminster Bank PLC*, 278 F.Supp.3d 636 (E.D.N.Y. 2017) ("*Weiss IV*") and culminated in *Weiss v. National Westminster Bank PLC*, 381 F.Supp.3d 223 (E.D.N.Y. 2019) ("*Weiss V*").[78] *Weiss*, unlike *Boim*, though, features a financial institution as the defendant and was decided under the ATA as amended by JASTA.[79]

In *Weiss*, over two hundred plaintiffs sued NatWest, alleging that one of its customers, an organization named Interpal, was a known terror financier that used NatWest's services to fund Hamas.[80] The plaintiffs argued that, based on news reports and government action, NatWest knew or should have known that, by allowing Interpal to

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[78] *Weiss V* was affirmed by the Second Circuit in 993 F.3d 144 (2d Cir. 2021).
[79] The court rejected plaintiff's attempt to amend its complaint to include an aiding and abetting allegation, finding that such an amendment would "fail as a matter of law." Weiss V at 238. Plaintiffs in this case also unsuccessfully alleged a primary violation of the ATA by NatWest, with the Second Circuit agreeing with the lower court that the plaintiffs failed to establish that NatWest had the requisite knowledge that it was furthering the unlawful aims of Hamas. Weiss v. Nat'l Westminster Bank, PLC., 993 F.3d 144, 151 (2d Cir. 2021).
[80] *Id.* at 226.

transfer funds to a number of purported charities for the ultimate benefit of Hamas, NatWest was aiding and abetting Hamas' terror acts.[81]

Throughout the proceedings in *Weiss*, there was ample evidence presented that NatWest knew that the charities Interpal was funding had been accused of being a front for Hamas.[82] Under *Boim*, such knowledge would have been sufficient to find aiding and abetting liability, but the enactment of JASTA along with court decisions, such as *Linde*, interpreted the JASTA provisions of the ATA effectively changed the entire landscape of ATA aiding and abetting liability.[83]

While this article takes issue with some aspects of the *Halbertstam*/JASTA calculus for knowledge in an aiding and abetting claim, it is hard to argue that, in the specific case of *Weiss,* NatWest ignored its obligations to know its customer and report suspicious activities.[84]

Specifically, for a number of years, NatWest's compliance officers reviewed the activities of Interpal to determine whether it was, in fact, a legitimate charity.[85] As the court's opinion recites,

> NatWest also quoted testimony and declarations from the managers of its customer-relations, fraud-prevention, and anti-money-laundering groups stating that the Bank was aware of Interpal's "alleged" links to Hamas (NatWest Rule 56.1 Supplemental Statement ¶ 16 (emphasis in Statement)), but that the Bank had no tolerance for the funding of terrorism, did not want to be related in any way to such activities, and would have taken quick action to terminate its relationship with Interpal "if the bank believed that Interpal was funding terrorism . . . ."

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[81] *Id.*

[82] *Id.* at 233 (mentioning plaintiff's claim that the Union of Good, which was designated as a Specially Designated Global Terrorist ("SDGT") in 2008 as an organization created by Hamas leadership, was NatWest's customer).

[83] *Id.* at 230.

[84] While the author of this article supported the Weiss plaintiffs' petition for a writ of certiorari and still believes that the Supreme Court should have granted the petition, the Weiss case was not necessarily the best case for the Supreme Court to review court interpretations of JASTA.

[85] Weiss, 933 F.3d, at 155.

> In addition, NatWest cited facts that plaintiffs had conceded in responding to the Bank's First Summary Judgment Motion (made when the then-operative Weiss action complaint alleged 15 terrorist attacks), including the following.
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> • Plaintiffs "admit[ted] they 'do not contend that any of the funds Interpal transferred from the accounts it maintained with NatWest to HAMAS was used specifically to finance any of the terrorist attacks that injured Plaintiffs and/or killed their loved ones.'" (First Summary Judgment Rule 56.1 Statement and Response ¶ 248 (quoting Plaintiffs' response to an interrogatory));
>
> • Plaintiffs' expert Dr. Levitt "offers no evidence that any funds transferred by Interpal through its NatWest accounts was used to perpetrate the 15 attacks" (id . ¶ 253);
>
> • Nor did Dr. Levitt "opine that any of the 12 Charities [that he addressed] participated in" or "recruited" "any of the perpetrators of the 15 attacks"; he did not offer any opinion as to what individuals or entities planned and executed the attacks at issue (id . ¶¶ 254, 261);
>
> • Plaintiffs' expert "Spitzen does not opine that any of the 13 Charities requested that someone carry out any of the 15 attacks" (id . ¶ 272).[86]

Of particular importance are the facts that United States government agencies had initially named Interpal as a "Specially Designated Global Terrorist"[87] and that the United Kingdom's Charity Commission for England and Wales (which regulated NatWest) went as far as freezing Interpal's accounts before ultimately determining that

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[86] *Id*.

[87] Office of Foreign Assets Control, *SDGT Designations*, U.S. DEP'T OF THE TREASURY (Aug. 31, 2003), https://ofac.treasury.gov/recent-actions/20030821 [https://perma.cc/96EF-UV9U]; *see also*, Weiss v. Nat'l Westminster Bank ("*Weiss II*"), 936 F.Supp.2d 100, 109 (E.D.N.Y. 2013), *vacated and remanded*, 768 F.3d 202 (2d Cir. 2014) (stating that the Charity Commission temporarily froze Interpal's bank accounts).

there was not sufficient evidence of Interpal's connections to Hamas to support sanctions against Interpal. Indeed, as the United States Solicitor General explained,

> During its relationship with Interpal, NatWest repeatedly investigated suspicious activity on Interpal's accounts and disclosed its suspicions to the U.K. government. See Weiss Pet. App. 15a-17a, 149a-150a. In August 2003, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) designated Interpal a Specially Designated Global Terrorist based on its role in fundraising for Hamas. *Id.* at 9a-10a. The Charity Commission then froze Interpal's accounts and commenced an investigation. *Id.* at 149a. In September 2003, the Commission found no "clear evidence" that Interpal "had links to Hamas' political or violent militant activities" and concluded that its bank accounts "should be unfrozen and the [i]nquiry closed." Ib*Id.* (citation omitted).
>
> Following the OFAC designation, NatWest sought guidance from the Financial Sanctions Unit of the Bank of England. Weiss Pet. App. 150a. The Bank explained that there were "presently no plans to list" Interpal under the U.K.'s "Terrorism Order," and that there was "no need [for NatWest] to take any further action." Ib*Id.* (citation omitted). The Bank reminded NatWest that "payments to, or for the benefit of, Hamas are prohibited," and directed NatWest to report suspicions of such payments to governmental entities. Ib*Id.* (citation omitted). NatWest began reviewing Interpal's accounts every six months, and it closed the last of those accounts in March 2007.[88]

In terms of a financial institution fulfilling its legal obligations to know its customers and monitor suspicious activity, even though there were numerous public reports indicating that Interpal was providing financial support to Hamas, it is also clear that NatWest

[88] Brief for the United States as Amicus Curiae, Opposing Petitioners, Weiss, et al, v. National Westminster Bank PLC, 993 F.3d 144 (2d. Cir. 2021) (No. 21-381) (*cert. denied*).

adhered to industry standards and government requirements when monitoring Interpal's accounts.

What this points to, as discussed herein, is that while the deep-pocket financial industry defendant in a JASTA case may be the obvious choice for plaintiffs, JASTA is most applicable to the financial industry's clients (in the case of *Weiss*, Interpal and the 13 front groups used by Hamas for funding) rather than the financial company itself. Of course, in cases such as *Linde*, where a financial institution's clients were known Hamas operatives and the funding instructions explicitly stated that they were to compensate the families of Islamic suicide bombers,[89] the financial institution is the appropriate defendant.

Thus, in certain situations, especially when the financial institutions' customers are publicly and extensively documented to be terror operatives, a JASTA aiding and abetting claim may be a viable option for terror victims. By way of example, a number of JASTA civil aiding and abetting claims against financial institutions have survived initial challenges in the terrorism context. In *Bartlett v. Société Générale De Banque Au Liban Sal*,[90] a JASTA aiding and abetting claim filed against a number of financial institutions on behalf of over a thousand victims of Islamic terror attacks, the Eastern District of New York denied the defendant banks' motion to dismiss the claims, finding that there was ample publicly available information on the banks' clients' affiliation with terror organizations to fulfill the "general awareness" prong of JASTA claims.[91] Similarly, in *Averbach v. Cairo Amman Bank*,[92] the Southern District of New York denied the defendant bank's motion to dismiss a JASTA aiding and abetting claim, finding that

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[89] Linde v. Arab Bank, PLC, 97 F.Supp.3d 287, 304–05 (E.D.N.Y., 2015).

[90] Bartlett v. Société Générale de Banque Au Liban SAL, 19-CV-00007 (CBA) (VMS), 2020 U.S. Dist. LEXIS 229921 (E.D.N.Y., Nov. 25, 2020).

[91] *Id.* at 53-54 ("[T]he Amended Complaint alleges that each Defendant "knew" certain Bank Customers were Hezbollah affiliates and that Hezbollah was responsible for attacks such as those inflicted upon the Plaintiffs. (E.g., Am. Compl. ¶¶ 1604, 1646, 1679.) These assertions would, on their own, be conclusory. But Plaintiffs substantiate these assertions with specific factual averments supporting the inference that Defendants were generally aware of these customers' nefarious activities and that, by providing them access to financial services, they had assumed a role in Hezbollah's terrorist attacks. Specifically, Plaintiffs assert general awareness based on certain Bank Customers' designation as SDGTs and Bank Customers' open and notorious affiliation with Hezbollah (including through public media reports).")

[92] Averbach v. Cairo Amman Bank, 19-cv-0004-GHW-KHP, 2022 U.S. Dist. LEXIS 66799 (S.D.NY., Jan. 21, 2020).

publicly available information tying the defendant bank's customers to terrorism also satisfied the "general awareness"[93] and "knowingly and substantially assisted"[94] prongs of JASTA in pleadings. Nonetheless, many instances of terror financing evade the level of publicity needed to hold a financial institution liable, which is why this article recommends focusing on the customers rather than the financial institutions alone.

B. Weiss and the Most Recent Attempt to have the Supreme Court resolve the Circuit Split on Aiding and Abetting Liability

Weiss represents the most illustrative way in which courts have misinterpreted JASTA to weaken the protections which the law was intended to bolster. While this article does not disagree with the result in *Weiss*, the reasoning in that case, especially as it relates to knowledge, may lead future courts in the wrong direction.

In the pivotal matter of defendant bank's knowledge regarding the ultimate disposition of the funding it facilitated, this article argues that the Weiss court misapplied *Halberstam* and did so in a manner that undermines the law in question, JASTA.

The facts of *Halberstam* have to be considered in order to understand that court's decision, especially as it relates to the elements that were applicable in *Weiss* and the application of JASTA. *Halberstam*

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[93] *Id.* at 42-43 ("[I]t is more than plausible that CAB was aware of U.S. and Israel designations, as well as comments by then-President Bush and the U.S. Treasury Department, which would be red flags that the above-mentioned customers were closely intertwined with Hamas and assisting with its violence agenda during the relevant period. This is particularly so insofar as CAB was required to follow "know your customer" rules, as it not only maintained a correspondent banking relationship with U.S. banks, but it also was required to follow guidelines promulgated by the Financial Action Task Force ("FATF"). (SAC ¶¶ 1103-1120 and n.70.) That the six Israel-designated CAB customers were receiving funds from HLF after it was designated an SDGT and before some of the Attack in this case, also contribute to a plausible inference that CAB was generally aware it was assisting unlawful activities of Hamas at least through these six customers.").

[94] *Id.* at 63 ("[O]n balance, at least at the pleading stage, Plaintiffs have plausibly alleged that CAB knowingly and substantially assisted Hamas' terror activities. Thus, I recommend that CAB's motion to dismiss Plaintiffs' aiding-and-abetting claim under JASTA be denied.").

was not a case about foreign terror. Rather, it was about a more mundane and routine series of criminal acts that consisted of theft and murder, with only two individuals involved, both in the same household. While theft and murder are not mundane as a matter of fact, as a matter of law they are dramatically different from foreign terror and what Congress meant to address in enacting JASTA, especially in light of the reality that terror financing generally is structured to conceal the ultimate uses of the money, and the identities of those providing it.[95]

In the Findings section of JASTA, Congress explicitly stated that "foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds outside of the United States for conduct directed and targeted at the United States."[96] The fact that terrorist financing is designed to be opaque has been documented numerous times, including in testimony before Congress shortly before the enactment of JASTA.[97]

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[95] Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 § 2(b) (2016) ("The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.").

[96] *Id*. at § 2(a)(3).

[97] Dr. Jonathan Schanzer presented testimony on the complex web of financing, involving non-profit organizations and terror front groups, in the context of Islamic terror directed at Israel and the so-called BDS Movement. In his testimony, Dr. Schanzer explained that terror financing is quite sophisticated and often uses nominally lawful front groups, especially charities, to obfuscate the purposes for which the funding is ultimately used. *See* Jonathan Schanzer, *Israel Imperiled: Threats to the Jewish State*, FOUND. FOR DEFENSE OF DEMOCRACIES (Apr. 19, 2016), https://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf [https://perma.cc/7J6D-FBKT] ("FDD recently conducted research that endeavored to track the activities of former employees from organizations targeted by the U.S. government for terrorism finance violations. Our research yielded a surprising and troubling outcome. In the case of three organizations that were designated, shut down, or held civilly liable for providing material support to the terrorist organization Hamas, a significant contingent of their former leadership appears to have pivoted to leadership positions within the American BDS campaign. The Holy Land Foundation for Relief and Development (HLF), the Islamic Association for Palestine (IAP), and KindHearts for Charitable Development

Consequently, while JASTA refers to *Halberstam* in its Findings section, that reference must be considered in the context of all the Findings, including the Finding that terror funding often is routed through "affiliated groups," as well as the underlying purpose of the law in providing victims of terror with a civil remedy that can dissuade third parties from funding terror organizations.[98]

When applied to *Weiss*, the Second Circuit put too much weight on *Halberstam's* dicta regarding the knowledge of the defendant as to the crimes she aided and abetted and in doing so, undermined the purpose of JASTA, which is to respond to the complex and institutionally opaque nature of terror financing.[99]

In *Halberstam*, the court was right to have imposed a fairly stringent knowledge requirement before it imposed liability on the secondary defendant since the primary and secondary defendants lived together and the secondary defendant had intimate and day-to-day knowledge of the primary defendant's actions. Imposing a lesser knowledge standard could have easily created liability for a large universe of individuals and entities who likely had no understanding of the actual criminal enterprise.

This standard could never be used for terror financing prosecutions, because, as Congress acknowledged, terror financing is usually structured to ensure that only the primary actor (the terror

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were three organizations implicated in financing Hamas between 2001 and 2011.").

[98] Justice Against Sponsors of Terrorism Act: Hearing before the Subcomm. on the Constitution and Civil Justice of the Comm. on the Judiciary H.R., 114th Cong., 2d Sess. 2040 (2016) ("Expanding the scope of civil litigation can ensure justice for victims, deter and redress specific attacks and enhance our Nation's counterterrorism efforts. The prospect of litigation can prompt sovereigns to disentangle their operations from terrorist networks, or to provide justice to victims. Judicial processes, or state-to-state negotiated settlements, can provide a reckoning with history, demonstrate current commitment to right conduct, and enhance relationships with the U.S. government and financial community.").

[99] Weiss v. Nat'l Westminster Bank, PLC., 993 F.3d 144 (2d Cir. 2021) ("However, the second and third Halberstam elements require proof that at the time the defendant (directly or indirectly) aided the principal, the defendant was "generally aware" of the overall wrongful activity and was "knowingly" assisting the principal violation. Halberstam, 705 F.2d at 477.").

organization) is aware of exactly what the funds will be used for.[100] However, to ensure that innocent parties are not swept up in criminal investigations, Congress also imposed a requirement that the secondary defendants have some level of explicit knowledge of who they are supporting.[101] This is why JASTA does not include the requirement imposed by the Second Circuit with regard to knowledge of a specific terror incident.[102] All that should matter, and all that does matter legally, is that the financial institution is aware that it is providing funding for a terror group's activities.

Indeed, the *Halberstam* court cited to a number of cases where vicarious liability attached, notwithstanding the fact that the secondary defendant was only remotely involved in the primary defendant's wrongful act. One such case cited by the *Halberstam* court was *Keel v. Hainline*,[103] where a student in a classroom was found to be liable for an injury to a classmate even though the student in question did not have a direct role in the injury-causing act (of throwing an object). The *Keel* court noted that even though the student in question only collected the thrown objects for another student who threw the object, the fact that the student in question had thrown such objects at others and was aware that the objects he collected would likely be thrown again, was sufficient to establish liability for aiding and abetting.[104]

There is no question in the *Weiss* case that NatWest was generally aware that it was providing funding support where the

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[100] *See* JASTA § 4(b)(2) ("(2) LIABILITY.—In an action under subsection (a) for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189), as of the date on which such act of international terrorism was committed, planned, or authorized, 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.").

[101] *Id*.

[102] *Id.*

[103] Keel v. Hainline, 331 P.2d 397 (Ok. 1958).

[104] *Id*. at 400 ("It is undisputed that defendant Keel participated in the wrongful activity engaged in by the other defendants of throwing wooden blackboard erasers at each other back and forth across a class room containing 35 to 40 students, although most of the testimony indicates that defendant Keel's participation was limited to the retrieving of such erasers and handing them to other defendants for further throwing.").

ultimate beneficiary was a designated terror organization.[105] Even under *Halberstam*, this should be sufficient to establish aiding and abetting liability, notwithstanding the fact that JASTA does not actually incorporate every element of *Halberstam*. In *Weiss*, though, the fact that the financial institution clearly engaged in due diligence and relied on government determinations as to whether the third party (Interpal) was involved in funding terror led to the correct decision to not apply aiding and abetting liability.[106]

This is an important consideration in determining when knowledge of the specific purpose of funding triggers JASTA aiding and abetting liability. For example, in *Linde*, the Second Circuit found that under JASTA there is no requirement that the plaintiff show specific knowledge of a particular terror attack when alleging a violation of the aiding and abetting provisions of JASTA; rather, all that must be shown is that the defendant had general awareness that it was providing support to a terrorist group's violent activities. In *Linde*, where a bank was alleged to have violated, as a principal, the provisions of the ATA, the court distinguished between JASTA's liability provisions for principals versus those for an aider and abettor: "We further agree that, under an aiding and abetting theory of ATA liability, plaintiffs would not have to prove that the bank's own acts constitute foreign terrorism satisfying all the definitional requirements of § 2331(1)."[107] Since the plaintiffs in *Linde* brought its case against the subject bank as a principal, the *Linde* court did not deal with the requirements for a JASTA aiding and

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[105] *Weiss V*, 381 F.Supp.3d 223, 233 (E.D.N.Y. 2019) ("On appeal from this Court's initial grant of summary judgment to Defendant, the Second Circuit held that Plaintiffs' allegations survive summary judgment as to whether Defendant had the requisite scienter under the material support statute, § 2339B. *See Weiss II*, 768 F.3d at 205. The Second Circuit explained that § 2339 'requires only a showing that [Defendant] had knowledge that, or exhibited deliberate indifference to whether, Interpal provided material support to a terrorist organization, irrespective of whether Interpal's support aided terrorist activities of the terrorist organization.'").

[106] *Weiss II*, 936 F.Supp.2d 100, 116 (E.D.N.Y. 2013) ("The resolution of this motion would be different if the evidence indicated that NatWest failed to monitor the various international terrorist sanctions lists to ensure its compliance, or, that upon learning of OFAC's designation of Interpal, did nothing. The undisputed evidence shows that NatWest did not ignore OFAC's listing of its customer; rather, NatWest thoroughly pursued its investigation of Interpal, internally and with every appropriate British law enforcement and regulatory agency.").

[107] Linde v. Arab Bank, PLC, 97 F.Supp.3d 287, 328 (E.D.N.Y., 2015).

abetting claim and stated "[t]he possibility of liability on that theory [aiding and abetting] would have to be pursued at a retrial on remand."[108]

In *Boim*, the Seventh Circuit analogized the support provided by the defendants to terror groups in that case to "handing a loaded gun to a child," but in *Linde*, in large part due to the fact that the defendant was a financial institution that was in the business of providing financial services to a wide variety of entities, rather than an activist group that specifically knew the details of the terror group its clients were funding, the Second Circuit made a critical distinction:

> We conclude only that providing routine financial services to members and associates of terrorist organizations is not so akin to providing a loaded gun to a child as to excuse the charging error here and compel a finding that as a matter of law, the services were violent or life-endangering acts that appeared intended to intimidate or coerce civilians or to influence or affect governments. That conclusion is only reinforced by our holding, in the context of a challenge to proof of the causation element of an ATA claim, that the mere provision of "routine banking services to organizations and individuals said to be affiliated with" terrorists does not necessarily establish causation. In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d at 124.[109]

This distinction is central to the need for courts to treat the provision of support to foreign terror organizations by activist groups that are intimately familiar with the activities of those they support differently from the provision of routine financial services by banks and other financial services companies for the ultimate benefit of foreign terror organizations.

The Second Circuit then utterly defied the intent of Congress in enacting JASTA when it decided *Siegel v. HSBC Northern Holdings, Inc*.,[110] a case dealing with aiding and abetting liability under JASTA, when it applied theories that relate to principal liability under the ATA to the aiding and abetting provisions of JASTA to require that the bank

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[108] *Id.* at 329.
[109] *Id.* at 327.
[110] Siegel v. HSBC Northern Holdings, Inc., 933 F.3d 217 (2d. Cir. 2019).

providing funding to the designated terror group Al Qaeda knew that it was playing a role in specific terror attacks.[111]

In *Siegel*, the financial institution, HSBC Northern Holdings, Inc. ("HSBC") knew that its customer, the Saudi bank Al Rajhi Bank ("ARB"), was intimately involved in funding and supporting terror groups.[112] As the *Siegel* court explained, the government of Saudi Arabia was monitoring ARB for funding terror, a senior official at ARB had been identified as a supporter of Al Qaeda in Iraq ("AQI"), and a report from the United States Senate stated that after the 9/11 Terror Attacks, evidence showed that ARB was funding terror.[113]

The defendant bank's knowledge of its customer's support for terror was so clear that the *Siegel* court described the following details:

> [I]n 2002, the [defendant bank's] officer in charge of Commercial and Institutional Banking stated in an email to a colleague that [the defendant banks'] relationship with ARB had become "fairly high profile" and that compliance officers within the company were concerned "that Al Rajhi's account may have been used by terrorists," which, "[i]f true, . . . could potentially open [defendant bank] up to public scrutiny and/or regulatory criticism." *Id.* at ¶ 110 (quoting email from Douglas Stolberg, Commercial and Institutional Banking Div., [defendant bank], to another senior [defendant bank] official (2002)). In 2003, [defendant bank] Financial Intelligence Group raised concerns about one of ARB's clients that had been linked to al-Qaeda.[114]

The only thing the defendant bank didn't have specific knowledge of was that ARB was funding an Al Qaeda terror attack, and

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[111] *Id.* at 224-25

[112] *Id.* at 220 ("Despite HSBC's knowledge of ARB's support of terrorist organizations, HSBC "provided [ARB] with a wide range of banking services," including "wire transfers, foreign exchange, trade financing, and asset management services." TAC ¶ 90.").

[113] *Id*. ("In 2002, one of ARB's senior officials appeared on a list of investors who supported al-Qaeda, and The Wall Street Journal reported that the government of Saudi Arabia was monitoring ARB accounts for links to terrorist organizations.").

[114] *Id*.

on this basis the *Siegel* court determined that the plaintiffs had not satisfied two of the factors from *Halberstam*, incorporated through JASTA: Producing evidence that defendant bank was (i) generally aware of its role in the wrongful activity and (ii) provided "substantial assistance" to the terror group.[115]

The *Siegel* court acknowledged that the defendant bank likely knew that ARB had ties to AQI but found that it was implausible to assume that from this, the defendant bank knew it was supporting AQI.[116] Further, using a six-factor test from *Halberstam* as described in *Linde*, the *Siegel* court determined that whatever assistance defendant bank provided to the terror group, it was not "substantial."[117]

To understand how harmful the *Siegel* court's interpretation of the six Halberstam factors is to the efficacy of JASTA's purpose, it is useful to review the Siegel court's analysis of these factors:

> The plaintiffs here have not plausibly alleged that HSBC encouraged the heinous November 9 Attacks or provided any funds to AQI. To be sure, the plaintiffs did allege that HSBC provided hundreds of millions of dollars to ARB, but they did not advance any non-conclusory allegation that AQI received any of those funds or that HSBC knew or intended that AQI would receive the funds. As for the third factor, as the plaintiffs themselves allege, HSBC was not "present" at the time of the November 9 Attacks. Indeed, HSBC had ceased transacting any business with ARB ten months prior. On the fourth factor—defendant's relation to the principal—the plaintiffs do not plead any non-conclusory allegations that HSBC had any relationship with AQI. Similarly, on the fifth factor—defendant's state of mind—the plaintiffs do not plausibly allege that HSBC knowingly assumed a role

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[115] *Id*. at 224-225.

[116] *Id*.

[117] *Id.* at 225 ("Six factors are relevant to demonstrating "substantial assistance": "(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." *Linde*, 882 F.3d at 329 (citing *Halberstam*, 705 F.2d at 483-84).").

> in AQI's terrorist activities or otherwise knowingly or intentionally supported AQI.
>
> Finally, on the sixth factor—the duration of defendant's assistance—the plaintiffs allege that HSBC provided banking services to ARB for twenty-five years. That certainly bespeaks a lengthy relationship but not necessarily of assistance in terrorism. Cf. Halberstam ,705 F.2d at 484 ("The length of time an alleged aider-abettor has been involved with a tortfeasor almost certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant's state of mind."). As already noted, ARB is a large bank with vast operations, and the plaintiffs do not allege—even conclusorily—that most, or even many, of HSBC's services to ARB assisted terrorism. Further, the plaintiffs' pleadings acknowledge that HSBC terminated its relationship with ARB in January 2005, ten months before the November 9 Attacks. In these circumstances, the length of the relationship alone does not admit an inference of aiding and abetting terrorism. That fact, together with the plaintiffs' failure adequately to allege that HSBC funds ever reached AQI, or any of the other factors relevant to aiding and abetting, compel the conclusion that the plaintiffs fail plausibly to plead a claim against HSBC even on their expansive view of JASTA.[118]

Clearly, JASTA was not intended to impose strict liability on any financial institution that happened to have a customer funding terror, but the Siegel court took such a literal approach to JASTA's incorporation of *Halberstam* that its holding would provide blanket immunity for any financial institution involved in terror financing so long as the institution employed a set of internal procedures designed to ensure that the six factors from Halberstam couldn't be satisfied due to the financial institution's intentional dereliction of its obligations to know its customers and investigate suspicious activity.

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[118] *Id.*

In sum, the Second Circuit utterly undermined the purpose of JASTA by creating from whole cloth, from *Linde* to *Siegel* to *Weiss*, a requirement of specific knowledge that was never explicitly set out in the text of JASTA and is, in fact, contrary to the purpose of JASTA. The only logical explanation for this result is that as much as Halberstam may be a standard for civil aiding and abetting liability in routine domestic cases, its requirements are simply unworkable in cases involving global terror financing where the observable ties between financiers and terror organizations are intentionally obfuscated.

In *Boim*, the court understood that terror financiers often create such complex structures that financial institutions aren't readily able to discern the true purpose of a transaction, concluding that financiers should not

> [E]scape liability because terrorists and their supporters launder donations through a chain of intermediate organizations . . . But to set the knowledge and causal requirement higher than we have done in this opinion would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare). Donor liability would be eviscerated, and the statute would be a dead letter."[119]

Weiss, on the other hand, essentially directs financiers to use intermediaries to escape liability. This is obviously not what Congress intended in enacting JASTA.

The Second Circuit's over-reliance on specific elements of the *Halberstam* case, and its erroneous interpretation of JASTA in *Siegel*, has the effect of nullifying much of what Congress intended in enacting JASTA, as terror financiers will simply interpose facile, and false, statements about charitable purposes and financial institutions will claim a form of safe harbor from JASTA by relying on those statements rather than engaging in a robust inquiry to ensure that they are depriving terror of its lifeblood.[120]

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[119] *Boim III*, 549 F.3d 685, 701-02 (7th Cir. 2008).

[120] *Siegel*, 933 F.3d at 224 ("Specifically, the plaintiffs have failed to allege adequately two of the three Halberstam elements of civil aiding-and-abetting: (1) that HSBC was "generally aware" of its role as part of an "overall illegal or tortious activity at the time that [it] provide[d] the assistance," and (2) that HSBC "knowingly and substantially assist[ed] the principal violation.").

Just as it would be inequitable to impose strict liability on third parties for the acts of terror organizations that they may have had minimal dealings with, it would be contrary to principles of justice and the intention of Congress for courts to read into JASTA specific knowledge requirements that would have the effect of providing immunity so long as the primary and secondary actors structured their relationship with facile firewalls.[121] This is particularly true in the case of third parties that purport to be charitable or humanitarian organizations, but have deep connections to terror organizations.

V. Case Study on Applying JASTA to Non-Bank Entities

While financial institutions have been named in a number of JASTA aiding and abetting claims, they are often inappropriate parties since it is rare for a financial institution to have the kind of knowledge of those who use its services for support of terror to satisfy JASTA requirements. Other entities, operating as front groups for designated foreign terror organizations, are oftentimes far more appropriate defendants, even if they don't offer the deep pockets of financial institution defendants.[122]

As a case study, consider a recent revelation regarding seven purported humanitarian groups that have been infiltrated and co-opted by the U.S. designated foreign terror organization, PFLP. The author's civil rights non-profit organization wrote a letter to the United States Department of Justice in October 2022 (the "2022 DOJ Letter")[123]

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[121] Jonakait, *supa* note 78 (""One of the crucial unsettled issues concerning § 2339B is the mens rea required for a conviction. The government has contended that the crime is essentially one of strict liability where a person can be convicted without having a guilty mental state. This article contends, on the other hand, that the statute as enacted requires that a person know that he is donating to a group that has been designated by the Secretary of State as a foreign terrorist organization.").

[122] Chalos, *supra* note 73 ("While by their terms neither the ATA nor JASTA limit secondary liability solely to financial institutions, plaintiffs generally seek the deepest pockets available when seeking compensation and banks are the ultimate exemplars of deep pockets.").

[123] Letter from Marc Greendorfer, President of Zachor Legal Institute, to Merrick Garland, Attorney General of the United States (Oct.25, 2022) (on file with author and available at https://zachorlegal.org/wp-content/uploads/2022/10/Final-DOJ-Letter-2022.pdf?ios_app=true) [hereinafter "2022 DOJ Letter"].

setting out the findings of an investigation by Israel's security agency, the Shin Bet, into the seven groups where the Israeli government concluded that the groups are, in fact, front organizations controlled by and acting on behalf of and controlled by the PFLP (the "Shin Bet Report").

The 2022 DOJ Letter asked the Department of Justice to investigate the seven organizations (the "Seven PFLP Proxies") identified in the Shin Bet report as illegal terrorist groups[124] that act on behalf of the PFLP, an entity that the United States Department of State has designated as a foreign terrorist organization since October 8, 1997.[125]

The Shin Bet Report was based on first person testimony of individuals working at one of the Seven PFLP Proxies, whose testimony detailed how the PFLP infiltrated and took control of the Seven PFLP Proxies.[126] Based on the testimony, the Shin Bet raided the offices of the Seven PFLP Proxies, obtained further evidence in support of the claim that the PFLP was controlling and using the groups as fronts for illegal

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[124] *Israel Designates "Samidoun as a Terrorist* Organization, NBCTF (Feb. 21, 2021), https://nbctf.mod.gov.il/en/Pages/211021EN.aspx. (Samidoun was designated as a terror organization in February 2021); *The Minister of Defense designated six organizations of the "Popular Front for the Liberation of Palestine" as terror* organizations, NBFTC (Jan. 3, 2021), https://nbctf.mod.gov.il/en/Pages/211021EN.asp. (UPWC, Addameer, Bisan, Al Haq, DCI-P and UAWC were each designated as a terror organization in October 2021).

[125] Foreign Terrorist Organizations, U.S. DEP'T OF STATE, https://www.state.gov/foreign-terrorist-organizations/ (last visited Feb 16, 2024) (listing the PFLP as a Designated Foreign Terrorist Organization).

[126] Adam Kredo & Matthew Foldi, *DOCUMENT: Here's Why Israel Designated Six Palestinian Charities as Terror Groups*, THE WASHINGTON FREE BEACON (Dec. 6, 2021), https://freebeacon.com/national-security/document-heres-why-israel-designated-six-palestinian-charities-terror-groups/ ("The dossier, which bears the logo of the Shin Bet, Israel's national security agency, provides the firmest evidence to date that the Popular Front for the Liberation of Palestine (PFLP), a U.S.- and E.U.-designated terrorist group responsible for several airplane hijackings throughout the 1960s and '70s, among other atrocities, operates a network of nonprofit groups to embezzle millions of dollars in funding from the European Union and international nongovernmental organizations (NGOs).").

activity to support terror, and that the government of Israel designated the Seven PFLP Proxies as terror groups.[127]

The 2022 DOJ Letter, quoting from the Shin Bet Report, informed the Department of Justice of the identities of the Seven PFLP Proxies as:

1. The Samidoun Palestinian Prisoner Solidarity Network ("Samidoun");
2. The Union of Palestinian Women's Committees ("UPWC");
3. ADDAMEER - Prisoner Support and Human Rights Association ("Addameer");
4. Bisan Center for Research and Development ("Bisan");
5. Al-Haq Organization ("Al Haq");
6. Defense for Children International—Palestine ("DCI-P"); and
7. Union of Agricultural Work Committees ("UAWC").[128]

The 2022 DOJ Letter explained:

> [t]he Seven PFLP Proxies operate across the United States with impunity, participating in events on college campuses and organizing protests in major American cities and worldwide that have on more than one occasion descended into violence.
>
> Even though the activities of the Seven PFLP Proxies are well known, the United States has yet to designate the organizations as terrorist entities under relevant laws and regulations or, as far as public records indicate, commence investigations into the terror affiliations and activities of these groups.[129]

Of particular importance in the context of JASTA and the knowledge requirements for establishing aiding and abetting liability with regard to actors who are not facially connected to specific terror incidents, the 2022 DOJ Letter set forth the findings of the Shin Bet

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[127] *Id.* ("Since the dossier was produced, Israel raided the offices of several NGOs cited in the dossier in an attempt to secure further proof of their PFLP ties.").
[128] 2022 DOJ Letter, *supra* note 123.
[129] *Id.* at 2.

Report, including excerpts of testimony and details on how each of the Seven PFLP Proxies is connected to the PFLP.[130]

> The testimony of members of one of the Seven PFLP Proxies, and the resulting investigations, provide clear and convincing evidence that the Seven PFLP Proxies have been incorporated into the PFLP's hierarchy and constitute an inseparable part of that designated foreign terrorist organization's operational structure.
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> The publicly available sections of the Shin Bet report on the Seven PLFP Proxies provide explicit information on how the PFLP's self-proclaimed civil society institutions employ fraud and forgery to divert donations that were intended to fund humanitarian operations and funnel them, instead, to support the PFLP's terrorist activities. The Seven PFLP Proxies operate in coordination with each other and also act as a facially humanitarian network that is essential to the conduct of the PFLP's core mission of engaging in terrorism.
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> The Shin Bet's report also details how the heads of the Seven PFLP Proxies are senior PFLP operatives, as are numerous other Seven PFLP Proxies' employees, who have directly engaged in terrorism.
>
> The PFLP has built a financial system supported by an infrastructure of the Seven PFLP Proxies who raise money on various humanitarian pretexts while committing fraud and forgery of documents, thus directing money to the PFLP. According to the testimony of one informant, Said Abedat, "I worked in a variety of methods to fund PFLP activities through Lajan Al Amal Al Sahi (HWC), and we financed PFLP activities such as activities for universities, funding for the PFLP's sick and injured, funding for families of PFLP shahids (martyrs) and prisoners."[131] Like with

[130] *Id.*

[131] Said Abedat's police testimony held on April 7, 2021. Said Abedat is a PFLP activist and was HWC's accountant.

> the Holy Land Foundation, another "charitable" organization that the United States has prosecuted for similar violations of federal laws,[132] the Seven PFLP Proxies operate facially as humanitarian organizations, engaging in a modicum of lawful activities while focusing on providing unlawful financial and other support for their ultimate parent organization, the PFLP.
>
> This infrastructure of humanitarian organizations maintains collaborations and knowledge transfers between the organizations on how to carry out the unlawful financial activity. In the words of Said Abedat and Amru Hamudeh's police testimony, who were simultaneously PFLP activists and HWC employees:
>
> "The [Seven PFLP Proxies] are interconnected and constitute a lifeline for the organization from an economic and organizational standpoint, that is, money laundering and funding of the PFLP's activities".
>
> "All of these committees, mentioned above, operate in full cooperation with one another and with PFLP senior operatives, and they meet one another many times. And all of these committees, mentioned above, affiliate to the PFLP and operate on behalf of the PFLP [. . .] The PFLP operates all the activities mentioned above for a number of goals:
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> - *Employing workers that support the PFLP, and thus PFLP ideas are disseminated among the Palestinian people and PFLP supporters make a living from this work.*

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[132] Holy Land Found. Indictment, Prepared Remarks of Attorney General John Ashcroft (July 27, 2004), https://www.justice.gov/archive/ag/speeches/2004/72704ag.htm. ("As the U.S. Government began to scrutinize individuals and entities in the United States who were raising funds for terrorist groups in the mid-1990s, the indictment alleges that the Holy Land Foundation intentionally cloaked its financial support for HAMAS behind the mantle of charitable activities.").

> - *External funding, through the operation of different centers like nurseries, a center for special needs. This way, the PFLP operates these centers and can easily receive funding and donations for these activities as well as for activities connected to the PFLP."*[133]

The 2022 DOJ Letter further described how the Seven PFLP Proxies, at the direction of the PFLP, engage in fraud, money laundering and forgery on behalf of the PFLP to both raise funds and hide the true purpose of the funding from unsuspecting donors.[134]

Moreover, the 2022 DOJ Letter detailed the organizational structure and affiliations of the Seven PFLP Proxies, demonstrating that the seven organizations are not only de facto subsidiaries of the PFLP but they also have significant interconnections with each other.[135] The 2022 DOJ Letter provided the Department of Justice with extensive documentation on how the Seven PFLP Proxies, and Samidoun in particular, are not only proxies for the PFLP but are fully aware that they are working to support terror unlawfully and intend to support and promote the terror campaigns of terror groups.[136]

A. Case Study Conclusion and Analysis

The 2022 DOJ Letter concluded with the following summary:

> The investigation that led to the designation of the Seven PFLP Proxies as terrorist organizations shows that PFLP established a network of proxy institutions that operate under the guise of civilian-humanitarian organizations. These institutions, claiming to be civil society organizations, present themselves as working towards humanitarian goals, yet they act under PFLP leadership and in accordance with that organization's directives to fund and promote terror activities. The

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[133] 2022 DOJ Letter, *supra* note 123, at 3.
[134] *Id*. at 3-5.
[135] *Id.* at 5 (stating that the "the Seven PFLP Proxies are interconnected and constitute a lifeline for the organization from an economic and organizational standpoint, that is, money laundering and funding of the PFLP's activities").
[136] *Id.* at 5-9 (stating Samidoun, which claims to be a network in support of Palestinian prisoners was founded by PFLP operatives in 2012).

> Seven PFLP Proxies constitute a critical part of the PFLP's existence, particularly in strengthening and building power.
>
> . . .
>
> As with many other terror organizations of late, the Seven PFLP Proxies specialize in stochastic terrorism through the BDS apparatus, where the vilification of Jews and methodologies for promoting attacks on Jews is introduced and promoted. The primary focus for this violence is the American Jewish community, already under withering attack by BDS supporters at a time when antisemitism is at epidemic levels in the United States and around the world.[137]

With regard to the premise of this article, the terror activities of the PFLP are well documented in public sources and it has been amply documented through the Shin Bet Report that the Seven PFLP Proxies are deeply connected to and operate with the intent to further the terror objectives of the PFLP. These facts thus satisfy the "general awareness" prong of JASTA's aiding and abetting pleading requirements in a case where victims of PFLP terror sue one or more of the Seven PFLP Proxies.

B. Analysis of the Actions of the Seven PFLP Proxies Compared to Recent JASTA Aiding and Abetting Proceedings.

The *Averbach* proceedings illustrate how a JASTA aiding and abetting claim against the Seven PFLP Proxies could proceed without a financial institution being involved.

For purposes of this analysis, we will assume the following hypothetical facts: A PFLP terror unit attacked a restaurant in Jerusalem, Israel, where many tourists, including Americans, were dining. A number of American nationals were murdered in the attack, which was the subject of many months of planning by PFLP operatives. Further, $250,000 in PFLP funds were expended in the planning and execution of the attack. In the years prior to the attack, the Seven PFLP Proxies actively engaged in money laundering and fraud to supply PFLP with

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[137] *Id*. at 9.

some of the funding for the attack and members of Samidoun, one of the Seven PFLP Proxies, had engaged in a years-long campaign to have the leader of the PFLP terror unit freed from an Israeli prison (which occurred several months prior to the attack). After the attack, Samidoun activists in the United States and abroad celebrated the murders and issued public calls for donations in honor of the PFLP's successful terror mission.

In *Averbach*, victims (including estates of the deceased) of Hamas terror attacks in Israel sued Cairo Amman Bank ("CAB") based on CAB's provision of financial services to a number of individuals and purported charities that were affiliated with Hamas.[138] As with all JASTA aiding and abetting claims, the key issues faced by the plaintiffs in *Averbach* were proving that CAB (1) was generally aware that it was providing support to a designated foreign terror organization (Hamas, in this case) and (2) provided substantial assistance to Hamas in relation to the terror attacks.[139]

The publicly available information in *Averbach* included the United States Government's listing of Hamas as a "specially designated terrorist" organization in 1995, a "foreign terrorist organization" in 1997, and a "specially designated global terrorist" organization in 2001.[140] Furthermore, seventeen purported charities that were CAB customers were widely known to be proxies for Hamas and integral to Hamas' fundraising activities.[141] And much like the Seven PFLP

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[138] Averbach v. Cairo Amman Bank, 19-cv-0004-GHW-KHP, 2022 U.S. Dist. LEXIS 66799 at *11 (S.D.NY., Jan. 21, 2020) ("Generally, Plaintiffs allege that CAB aided and abetted Hamas's terrorism by providing millions of dollars to Hamas by knowingly: (1) maintaining accounts and/or facilitating payments for prominent Hamas leaders; (2) maintaining accounts for Hamas charities/organizations in the West Bank and Gaza Strip; (3) maintaining accounts and/or providing financial services for groups openly affiliated with or belonging to Hamas; and (4) facilitating reward payments to the families of Hamas suicide bombers and other "martyrs," and Hamas prisoners.").

[139] *Id*. at 6.

[140] *Id*. at 3.

[141] *Id*. at 13-17 ("Plaintiffs also allege that CAB maintained accounts for seventeen Islamic charitable organizations in the West Bank and Gaza Strip that were integral parts of Hamas. (SAC ¶¶ 766-1096.) Plaintiffs allege that CAB knew these organizations were integral parts of Hamas because prior to the Attacks (or at least some of them) Hamas acknowledged the relationships in various Arab and western media channels and media outlets independently

Proxies, most of the purported charities in *Averbach* were named by the government of Israel as Hamas affiliates[142] and the purported charities did not directly participate in Hamas terror attacks.[143]

The *Averbach* court examined these facts under the JASTA aiding and abetting pleading requirements, which, as the court indicated, consist of the following:

> Plaintiffs need to plead three statutory elements: (1) an injury arising from an act of international terrorism; (2) that the act was committed, planned, or authorized by a designated Foreign Terrorist Organization ("FTO"); and (3) that the defendant aided or abetted an act of international terrorism by knowingly providing

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identified these organizations as being affiliated with Hamas. (SAC ¶ 764.) For example, Plaintiffs pleaded the Islamic Center (or Complex) of Gaza (Al-Mujama Al-Islami) had a fundraising brochure that explicitly linked this group to Al-Aqsa Foundation in Germany and referred to the 'fragrance of the blood of the martyrs and wounded which watered the pure soil' and confirmed that donors to this group 'are committing Jihad with your monies . . .' (SAC ¶¶ 798, 805.); the Islamic Society - Gaza (Al-Jam'iya Al-Islamiya) organized ceremonies in honor of the 'martyr' families and also organized a mass wedding in Gaza where the Qassam Brigades distributed fliers that called for a renewal of the Jihad against Israel (SAC ¶¶ 833, 836.); a senior leader of Hamas gave an interview to Jordanian newspaper, Al-Watan, saying that the Al-Salah Islamic Society (Jam'iyat al-Salah al-Islamiya) was an integral part of Hamas's social infrastructure and it serves as a key node in Hamas' finance and support which goes to the families of 'martyrs' (SAC ¶¶ 863, 864, 865, 871, 882.); the Islamic Charitable Society (al-Jam'iya al-Khiriya al-Islamiya al-Khalil) received money from the HLF, which was designated by the United States as a Specially Designated Global Terrorist in 2001, and was run by Abd al-Khaleq al-Natshe a Hamas spokesman and one of the prominent Hamas individuals identified above (SAC ¶¶ 904, 907, 908, 912.)…."

[142] *Id*. at 18.

[143] *Id*. at 20 ("Notably, none of these organizations nor prominent individuals identified in the SAC as having CAB accounts are alleged to have directly participated in any of the Attacks, except for al-Sayed who is alleged to have planned the Park Hotel bombing (which occurred on March 27, 2002). Instead, Plaintiffs claim that the charitable/social activities of the organizations provide support and funds to Hamas's militant arm, which in turn is responsible for the attacks. The services that CAB provided to the Account Holders included regular banking services and the transfer of funds internationally.").

> substantial assistance. *Id.* The third element, the components of which are based on a case called Halberstam v. Welch, 705 F.2d 472, 227 U.S. App. D.C. 167 (D.D.C. 1983), requires a showing that: (a) the person whom the defendant aided performed a wrongful act that caused injury, (b) the defendant was "generally aware of his role as part of an overall illegal or tortious activity at the time that he provide[d] the assistance," and (c) "the defendant . . . "knowingly and substantially assist[ed] the principal violation." Honickman v. BLOM Bank SAL, 6 F.4th 487, 494 (2d Cir. 2021) (quoting Halberstam, 705 F.2d at 477)).[144]

In finding that the *Averbach* plaintiffs satisfied the JASTA aiding and abetting pleading requirements, the court explained that "references to contemporaneous public sources such as media reports and foreign designations can be considered when determining the plausibility of the knowledge component of the third element of an aiding-and-abetting claim," that "it is not necessary at the pleading stage to allege that the defendant 'knew or should have known of the public sources,'" that "neutral acts (such as providing banking services) must be assessed 'in the context of the enterprise they aided'—that is, against the historical background of the [designated foreign terror organization's] activities . . .," and "[f]inally, that the aid was indirect, that is, that the aid was given to an intermediary, does not doom the claim. JASTA contemplates liability for indirect as well as direct aid to a [designated foreign terror organization]."[145]

After applying these standards to the facts alleged in pleadings, the *Averbach* court held that the plaintiffs had satisfied their JASTA pleading requirements and denied defendant CAB's motion to dismiss the aiding and abetting complaint.[146]

With the Seven PFLP Proxies under the facts set forth in the hypothetical above, a similar outcome should result from a JASTA aiding and abetting claim.

First, like Hamas, the PFLP has been a United-States-designated foreign terror organization since 1997 and has also been

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[144] *Id*. at 9.
[145] *Id.* at 9-10.
[146] *Id*. at 63.

designated as a Specially Designated Global Terrorist.[147] The PFLP has also been featured in media reports on terrorism for decades.

Second, the Shin Bet Report, even in the limited version that has been made publicly available, clearly names each of the Seven PFLP Proxies and identifies each such entity's deep ties to the PFLP and PFLP terror activities.[148]

Third, while financial institutions that have been the subject of JASTA aiding and abetting claims generally have only had arm's length dealings with the terror organizations they are accused of aiding, the Seven PFLP Proxies are not only openly supportive of PFLP terror, they are also managed by the PFLP and should be seen as alter-egos of the PFLP.

These three points would clearly satisfy the "general awareness" prong of JASTA's incorporation of *Halberstam*'s aiding and abetting requirements. After satisfying the general awareness requirement, a court hearing a JASTA aiding and abetting claim against the Seven PFLP Proxies would have to examine whether the Seven PFLP Proxies "knowingly and substantially" assisted the PFLP in its terror attack.[149]

While no longer dispositive as precedent for ATA aiding and abetting liability after the enactment of JASTA, the *Boim* case nonetheless has important guidance for certain fact-based inquiries in a JASTA aiding and abetting case. To wit, when examining the type of activities that an alleged aider and abettor has engaged in that constitute substantial assistance to a terror group, the following discussion from *Boim III* would be relevant.

> The court proceeded to find AMS/IAP liable to the Boims. The Boims' theory was that AMS/IAP had supported Hamas by paying for Hamas leaders to come to the United States in order to attend and speak at conferences, helping to distribute pro-Hamas literature and propaganda, and using that literature and propaganda to solicit donations for Hamas's cause, and on the basis of this support was liable for David Boim's

[147] U.S. DEP'T OF STATE, *supra* note 125.
[148] 2022 DOJ Letter, *supra* note 123.
[149] Averbach v. Cairo Amman Bank, 19-cv-0004-GHW-KHP, 2022 U.S. Dist. LEXIS 66799 at *9 (S.D.NY., Jan. 21, 2020).

> murder, which AMS/IAP conceded was committed at Hamas's behest.[150]

Much like how the court found that the purported humanitarian groups in *Boim* (that is, AMS and IAP) were providing substantial assistance to Hamas, the Seven PFLP Proxies engage in identical acts on behalf of the PFLP.[151] The following are examples of how one of the Seven PFLP Proxies, Samidoun, and the PFLP interact and cooperate:

1. *In March 2021, following the Israeli designation of Samidoun as a terror organization, the PFLP released a statement in the name of its "Israeli prisons branch," in which the terror group stated that they "stand with the Samidoun network and support it," adding that the decision will only "strengthen the insistence of the Samidoun network to continue its campaigns."[152] This statement was published, inter alia, on the website of the PFLP in Lebanon.[153]*
2. *In December 2021, the Samidoun website published a statement expressing "solidarity" with the PFLP and its imprisoned Secretary-General, Ahmed Sadat, pledging to continue working together with the PFLP.[154]*

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[150] *Boim III*, 511 F.3d 707, 717 (7th Cir. 2002).

[151] 2022 DOJ Letter, *supra* note 123, at 1 ("[E]ntities that provided, and continue to provide, material support to designated foreign terror organizations, including, but not limited to, Hamas, the Popular Front for the Liberation of Palestine ('PFLP') . . . .").

[152] *Palestinian, International Organizations Support Samidoun against Israeli "Terrorist"* Designation, SAMIDOUN (Mar. 6, 2021) https://samidoun.net/2021/03/palestinian-international-organizations-support-samidoun-against-israeli-terrorist-designation/ [https://perma.cc/F4U2-DUJN].

[153] *See id.* (quoting statement issued by PFLP regarding Samidoun's work to support Palestinian prisoners).

[154] *20 Years Since His Kidnapping: "Samidoun" Announces the UN Week Of Solidarity With Saadat and the Prisoners*, SAMIDOUN (Dec. 11, 2021), https://tinyurl.com/bdens26n [https://perma.cc/Y3RD-CRBR] ("The Israeli occupation and its supporters and to organize the wildest popular movement in solidarity with the revolutionary leader Ahmed Saadat and in support of the struggles of the Palestinian prisoner movement.").

3. *In 2018, Samidoun leaders, Khaled Barakat and Charlotte Kates, confirmed the coordination between Samidoun and the PFLP while speaking behind a PFLP banner.*[155]
4. *In May 2022, a rally organized by Samidoun focused on urging Samidoun supporters to take action to free imprisoned PFLP member, Georges Abdallah, and support PFLP leader, Khalida Jarrar.*[156]
5. *An article from the Palestinian news outlet, Sawa, from 2016 referred to "a delegation from the [PFLP], which included Khaled Barakat, Mohammed Khatib, . . . and Palestinian community activist Mustafa Awad," who are all also members of Samidoun.*[157]

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[155] Louis Brehony, *Interview with Khaled Barakat and Charlotte Kates*, REVOLUTIONARY COMMUNIST GROUP (May 18, 2018, 1:29 PM), https://www.revolutionarycommunist.org/middle-east/palestine/5225-interview-with-pflp-and-samidoun [https://perma.cc/H7WA-KUEX] ("The PFLP's role on the ground is a growing one. Over 50 comrades have been hit by live fire in the recent return marches and the movement in Gaza and hundreds are imprisoned by the Israeli occupation. The PFLP reaches all segments of Palestinian society, including organising students, youth, women and workers, as well as playing a role in the military resistance. The Front has had a central role throughout the last year in building the popular movement against the siege on Gaza, and the comrades of the Front have organised demonstrations that have brought thousands to the streets.").

[156] *15 May, Vancouver: Nakba 74 Rally and March*, SAMIDOUN (May 8, 2022), https://samidoun.net/2022/05/15-may-vancouver-nakba-74-rally-and-march/ [https://perma.cc/PS#N-XDXT] ("All power to our people defending Jerusalem and Palestine for 74 years from Zionism and land theft. From Turtle Island to Palestine, we resist settler colonialism in all its forms.").

[157] *The Embassy of South Africa Receives the Popular Front*, SAWA (May 7, 2016), https://tinyurl.com/yc2r7c59 [https://perma.cc/GV64-YCS8] ("Mr. Elwin Buck, Deputy Ambassador of the Republic of South Africa in the capital of the European Union (Brussels), received a delegation from the Popular Front for the Liberation of Palestine (PFLP), which included Khaled Barakat, Mohammed Al-Khatib, Charlotte Keats and Palestinian community activist Mustafa Awad.").

6. The PFLP itself has frequently acknowledged that Samidoun member, Khaled Barakat, is a "leader" of the PFLP.[158]

From this, and the testimony of members of the Seven PFLP Proxies in the Shin Bet Report regarding their control of the Seven PFLP Proxies and funding of the PFLP through fraud and money laundering, it is patently clear that there are deep and extensive ties between the PFLP and the purported humanitarian groups that constitute the Seven PFLP Proxies.[159] In fact, the ties between the two are closer than were the ties between other purported humanitarian groups, like the Holy Land Foundation, and terror groups like Hamas, from other ATA cases.[160]

As it is clear that the Seven PFLP Proxies are "generally aware" that they are providing support for the PFLP (an understatement of monumental proportions), the next step is to apply Halberstam's six factor test to determine whether the support constitutes knowing and

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[158] *The Full Text of the Speech of PFLP Leader Khaled Barakat at the Festival Commemorating Abu Ali Mustafa in Berlin*, PFLP (Aug. 29, 2016, 9:09 PM), https://pflp.ps/post/13936/%D8%A7%D9%84%D9%86%D8%B5-%D8%A7%D9%84%D9%83%D8%A7%D9%85%D9%84-%D9%84%D9%83%D9%84%D9%85%D8%A9-%D8%A7%D9%84%D9%82%D9%8A%D8%A7%D8%AF%D9%8A-%D9%81%D9%8A-%D8%A7%D9%84%D8%AC%D8%A8%D9%87%D8%A9-%D8%A7%D9%84%D8%B4%D8%B9%D8%A8%D9%8A%D8%A9-%D8%AE%D8%A7%D9%84%D8%AF-%D8%A8%D8%B1%D9%83%D8%A7%D8%AA-%D9%81%D9%8A-%D9%85%D9%87%D8%B1%D8%AC%D8%A7%D9%86- [https://perma.cc/GV64-YCS8].

[159] 2022 DOJ Letter, *supra* 123, at 2 ("The publicly available sections of the Shin Bet report on the Seven PLFP Proxies provide explicit information on how the PFLP's self-proclaimed civil society institutions employ fraud and forgery to divert donations that were intended to fund humanitarian operations and funnel them, instead, to support the PFLP's terrorist activities.").

[160] *Id.* at 3 ("Like with the Holy Land Foundation, another 'charitable' organization that the United States has prosecuted for similar violations in federal laws, the Seven PFLP Proxies operate facially as humanitarian organizations, engaging in a modicum of lawful activities while focusing on providing unlawful financial and other support for their ultimate parent organization, the PFLP.").

substantial assistance to the PFLP.[161] As the *Averbach* court summarized, the six factor test consists of the following: "(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."[162]

1. Halberstam Factor One: Nature of the Act Encouraged

In *Averbach*, with regard to *Halberstam's* first factor, the court examined several of defendant bank's actions.[163] First, the court noted that the defendant bank processed money transfers from a specially designated global terrorist to known members of Hamas, a designated foreign terrorist organization, as well as to Hamas' intermediaries that, like the Seven PFLP Proxies, were purported humanitarian organizations that were actually fronts for laundering money for Hamas.[164] Second, the court explained that the defendant bank's customers made "martyr payments" to the families of Hamas terrorists who were killed in the course of carrying out terror attacks.[165] Based on this, the court concluded that it was clear that funding, especially for

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[161] *Id.* ("The PFLP has built a financial system supported by an infrastructure of the Seven PFLP Proxies, who raise money on various humanitarian pretexts while committing fraud and forgery of documents, thus directing money to the PFLP.").

[162] Averbach v. Cairo Amman Bank, 19-cv-0004-GHW-KHP, 2022 U.S. Dist. LEXIS 66799 at *15 (S.D.NY., Jan. 21, 2020).

[163] *Id.* ("[T]he court must evaluate whether the allegations in the complaint 'plausibly bridge the gap' between the banking services and Hamas's terrorist attacks.").

[164] *Id.* ("The allegations that CAB processed transfers of money from HLF, after it was designated an SDGT, into the accounts of customers who at the time were also designated by Israel as Hamas-affiliated entities and publicly reported to be making martyr payments from CAB accounts, together with public information that HLF was using its money to fund terrorism, while not as strong and direct as the allegations in *Kaplan* or *Bartlett*, render it at least plausible at the pleading stage that CAB's assistance was important to the nature of Hamas' terrorist attacks.").

[165] *Id.*

martyr payments, was integral to Hamas' ability to recruit terrorists and carry out terror attacks.[166]

With the Seven PFLP Proxies, the analysis is much more direct. The Seven PFLP Proxies engage in unlawful acts (that is, fraud and money laundering) and knowingly send the proceeds of those acts to the PFLP to fund PFLP terror operations.[167] While those funding the terror organization in *Averbach* were separate entities from the defendant bank, those funding the terror organization in this PFLP hypothetical would be the defendants in a JASTA aiding and abetting case.[168]

Thus, the first *Halberstam* factor is satisfied in this hypothetical.[169] The second *Halberstam* factor requires the court to examine the amount of assistance provided by the alleged aider and abettor.[170] In *Averbach*, the court noted:

> "Plaintiffs do not need to allege the funds actually went directly to Hamas. Honickman, 6 F.4th at 500. JASTA authorizes claims against a Defendant who provides 'support, directly or indirectly,' to [terrorists],' and in

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[166] *Id*. at *15 ("Taken together as a whole, the allegations plausibly assert that the banking services provided by CAB through at least some of its Hamas-affiliated customers was important to Hamas' illegal activities, because Hamas could not recruit individuals to commit violence on its behalf without promising them money in the form of "martyr" payments or money to indoctrinate youth to grow up to become terrorists.").

[167] Holder v. Humanitarian L. Project, 561 U.S. 1, 31 (2010) ("Money is fungible, and '[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.' But 'there is reason to believe that foreign terrorist organizations do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations.' Thus, '[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.'").

[168] *Averbach*, 2022 WL 2530797, at *5 ("Notably, none of these organizations nor prominent individuals identified in the SAC as having CAB accounts are alleged to have directly participated in any of the Attacks, except for al-Sayed who is alleged to have planned the Park Hotel bombing (which occurred on March 27, 2002). Instead, Plaintiffs claim that the charitable/social activities of the organizations provide support and funds to Hamas's militant arm, which in turn is responsible for the attacks.").

[169] *See id.* at *15.

[170] *Id.* at 16*. (*Honickman* also clarified the second *Halberstam* factor—the amount of assistance.).

> doing so eschewed any directness requirement. 18 U.S.C. § 2333(d)(2). So long as the factual allegations permit a reasonable inference that the defendant recognized the money it transferred to its customers would be received by the FTO, this element is satisfied."[171]

The defendant bank in *Averbach* provided financial services to the affiliates of Hamas, which resulted in funding for Hamas, and that satisfied this factor.[172] In the Seven PFLP Proxies hypothetical, the nature of the assistance from the Seven PFLP Proxies is not only knowingly and intentionally financing the PFLP through money laundering and fraud, but also engaging in global activism to help the PFLP recruit members, obtain positive public relations, and further its agenda to turn public opinion against Israel.

Halberstam factor two is clearly satisfied.

2. Halberstam Factor Three: Defendants' Presence or Absence at the Time of the Tort

The third *Halberstam* factor is one that is very difficult to satisfy in most JASTA aiding and abetting claims, as it requires the defendant, who by virtue of the fact that it is alleged to have only aided and abetted rather than acted as a principal, be at the scene of the terror attack. In *Averbach*, the defendant bank was obviously not at the scene of the Hamas attack and the *Averbach* court found that the third Halberstam factor was not satisfied.

In the Seven PFLP Proxies hypothetical, it is possible that members of the various organizations alleged to have aided and abetted the PFLP may have been at the scene of the attack since a number of PFLP operatives are known to be embedded at the Seven PFLP Proxies.

Without regard to whether the third *Halberstam* factor can be conclusively satisfied in the Seven PFLP Proxies hypothetical, the fact that the individuals working for the Seven PFLP Proxies are also PFLP members makes the case for substantial assistance strong. While the *Averbach* court did not state the defendant bank's absence from the scene of the attack was not dispositive, courts must weigh each of the

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[171] *Id.*

[172] *Id.* (describing the services provided by the bank and their chain of relationship to Hamas).

six *Halberstam* factors based on the facts of each case,[173] and the facts in the Seven PFLP Proxies hypothetical arguably make the third factor tangential to the other factors. It is not clear whether Halberstam factor three has been satisfied in the Seven PFLP Proxies hypothetical.

3. Halberstam Factor Four: Defendant's Relationship to the Principal

The fourth *Halberstam* factor, examining the defendant's relationship to the principal, is one that can be very intensive but it is also one that, in traditional aiding and abetting analysis, is less important than the other factors.[174] In the context of aiding and abetting terrorism, though, this factor should be one that courts focus on more than in other types of aiding and abetting litigation. In a typical crime, the parties likely are not invested in anything other than a monetary return on their efforts.[175] As a result, as long as the parties receive pecuniary rewards for their collaboration everything else is secondary. In global terror, on the other hand, advancing ideology and weakening an enemy is the primary objective and the relationship of a party aiding and abetting the primary actor can be far more relevant in determining the importance of the assistance being provided.[176] That is, if a supporter of a terror organization is also an adherent of the terror organization's ideology and objectives, the assistance provided ultimately satisfies the interest of the aider and abettor, without regard to any other outcome. Thus, a defendant who shares the objectives of the principal likely has a vested interest in its assistance being substantial.

In *Averbach*, the defendant bank's relationship with the principal (Hamas) was attenuated, as the bank dealt with affiliates of

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[173] As the court in *Honickman* noted, "No factor is dispositive; the weight accorded to each is determined on a case-by-case basis." Honickman v. Blom Bank SAL, 6 F.4th 487, 500 (2d Cir. 2021).

[174] "This factor recognizes that one's encouragement of a tort may be more effective or less effective depending on one's relationship to the person being encouraged." Bartlett, at *14. This factor is less important than other factors in the analysis. *Id.* (citing Halberstam, 705 F.2d at 488)." *Averbach* at 16*.

[175] RANYA AHMED, HOW IDEOLOGY INFLUENCES TERROR, 2 (Cambridge Scholars Publishing, 2020) ("Terrorist acts are unique because they are committed with political or social objectives in mind. They are not perpetrated for monetary gain.").

[176] *Id.* (discussing the fundamental aims of a terrorist organization).

Hamas rather than Hamas itself.[177] Nonetheless, the *Averbach* court determined that the fourth *Halberstam* factor had been satisfied, explaining that "[p]laintiffs plausibly plead that CAB had the capacity to assist Hamas by facilitating financial transactions for Hamas' cause through its Hamas-affiliated customers."[178]

As the Shin Bet Report reveals, the Seven PFLP Proxies are as closely related to the principal (the PFLP) as can be, absent a finding that the Seven PFLP Proxies are an alter ego of the PFLP. PFLP operatives embedded with the Seven PFLP Proxies have acknowledged "[t]he [Seven PFLP Proxies] are interconnected and constitute a lifeline for the organization from an economic and organizational standpoint, that is, money laundering and funding of the PFLP's activities."[179]

Consequently, while the fourth *Halberstam* factor is not typically the factor with the most weight in a non-terror aiding and abetting case, in the context of JASTA, it is one of the most important factors. Here, the Seven PFLP Proxies are not only aiding and abetting the principal but, in many ways, they are united with the principal. This satisfies *Halberstam* factor four.

4. Halberstam Factor Five: Defendant's State of Mind

The fifth *Halberstam* factor requires the court to examine the defendant's state of mind to determine whether the defendant knowingly or intentionally supported the primary actor's tortious activities.[180] In *Averbach*, the court stated that if the defendant bank knew it was involved in the fundraising process for Hamas, this factor would be satisfied.[181] While the defendant bank in that case didn't explicitly know that its financial services were for the specific benefit of Hamas' terror, it did know that some of its customers were Hamas operatives.[182] Further, the defendant bank had constructive knowledge

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[177] *Averbach*, 2022 WL 2530797, at 17* ("CAB relies on multiple cases rejecting primary liability cases against banks alleged to have provided banking services to affiliates of FTOs").
[178] *Id*. at 16*.
[179] *Id.*
[180] *Halberstam*, 705 F.2d at 484 ("Fifth, evidence as to the *state of mind* of the defendant may also be relevant to evaluating liability.").
[181] *Averbach*, 2022 WL 2530797 at *14.
[182] *Id.* at *15.

that the payments being processed were to "martyrs" on behalf of Hamas, due to widespread media reporting on this issue.[183]

In the Seven PFLP Proxies hypothetical, the knowledge that the provision of support to the PFLP is not just constructive, it is actual. As the Shin Bet Report indicates, PFLP operatives embedded at the Seven PFLP Proxies intentionally engaged in fraud and money laundering to fund the PFLP and also provided many other types of non-financial support, such as publicity campaigns, to support the PFLP.[184]

Unlike a financial institution that generally has no actual knowledge that it is funding terror, the Seven PFLP Proxies not only have actual knowledge that they are funding and other supporting terror, they exist for that very purpose. Thus, *Halberstam* factor five is satisfied.

5. Halberstam Factor Six: Duration of Assistance.

The sixth *Halberstam* factor involves a review of how long the defendant has been providing assistance to the primary actor.[185] Time is certainly a major element of this factor but, as the *Averbach* court noted, the quality of the assistance is also considered in this factor.[186] The *Averbach* court concluded that *Halberstam* factor six was satisfied in the pleadings due to the lengthy relationship between the defendant bank and its customers, which started in the 1990s and ended in the early 2000s.[187]

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[183] *Id.* at 61 ("Nevertheless, on balance, due to the fact that CAB held accounts and processed high dollar transactions for senior military leaders of Hamas and to Hamas-affiliated organizations, including some transactions that may have been "martyr" payments based on public reporting at the time, the allegations are sufficient to push this factor in favor of finding the plausibility that CAB providing knowing substantial assistance.").

[184] *The Foreign Funding of the PFLP Through the Network of "Civil Society" Organizations,* SHIN BET (May 2, 2021)

[185] *Averbach*, 2022 WL 2530797 at *17 (The sixth Halberstam factor—duration of assistance—assesses "the length of time an alleged aider-abettor has been involved with a tortfeasor" and goes to the "quality and extent of their relationship and probably influences the amount of aid provided as well. . . .").

[186] *Id*. at *17.

[187] *Id.* (The specific fund transfers identified are not the measure. The SAC alleges that CAB maintained relationships with Hamas-affiliated customers from the years "1990s to 2004.").

In the Seven PFLP Proxies hypothetical, the relationship with the PFLP has existed for many years and, as indicated in the Shin Bet Report, is not only ongoing, it is strengthening. A full review of the history of each of the Seven PFLP Proxies' history with the PFLP would be needed to conclusively determine that the sixth *Halberstam* factor has been satisfied, including discovery of each entities records that would show the quality and duration of the affiliation, but from the facts available in the Shin Bet Report it is likely that the relationship between the Seven PFLP Proxies and the PFLP is more than sufficient to satisfy *Halberstam* factor six.

C. Conclusion of the Halberstam Factor Analysis.

The Seven PFLP Proxies hypothetical shows that at least five of the six *Halberstam* substantial assistance factors would be satisfied, with the only questionable factor being whether the Seven PFLP Proxies have been present at the terror attack. Since it is not necessary for a plaintiff to satisfy each of the six Halberstam factors, especially in the context of a terror attack, there is no dispute whether a plaintiff can successfully overcome a motion to dismiss in JASTA aiding and abetting litigation against the Seven PFLP Proxies.[188]

VI. Recommendations for Aligning JASTA in Practice with Congressional Intent

This article has shown that JASTA was intended to expand, rather than limit, opportunities for victims of international terror to obtain compensation from those who enable foreign terror organizations.[189] While on its face JASTA accomplishes this important objective, the incorporation of *Halberstam* into JASTA has led to a number of adverse consequences that terror organizations and their supporters can and have used to insulate themselves from civil liability in the United States. In particular, as courts rightfully act to ensure that financial institutions are not subjected to strict liability for aiding and

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[188] *Id.* at *15 (No factor is dispositive, and the weight accorded to each is determined on a case-by-case basis. Kaplan, 999 F.3d at 856; Honickman, 6 F.4th at 500. What is required is that, on balance, the relevant considerations plausibly show that CAB substantially assisted the acts of terrorism that ultimately harmed Plaintiffs).

[189] Justice Against Sponsors of Terrorism--Veto; 114 CONG. REC. S2040 (daily ed. Sept. 28, 2016).

abetting liability, the precedent that results from such decisions has created loopholes that are being exploited by terror groups that intentionally withhold certain information from purported humanitarian groups that fund them.

As this article demonstrated with the case study using the *Averbach* proceedings in a hypothetical situation based on actual incidences of terror groups coordinating with purported humanitarian organizations, a flexible application of *Halberstam's* six factors should be employed for non-financial service defendants. In particular, where an alleged aider and abettor has been co-opted by a foreign terror organization, as in the case of the Seven PFLP Proxies, the *Halberstam* test as it relates to knowledge should be presumed satisfied.

The realities of terror financing make a flexible approach to disrupting the flow of funding and support necessary as terror organizations continually evolve and improvise several steps ahead of court rulings. This pragmatic solution would align JASTA with pre-JASTA precedent and ensure that the objectives of JASTA are fulfilled in a fair and workable manner.