



*Countering the Financing of Terrorism:
International & Domestic Law & Policy*

**PRIVATE LITIGATION AGAINST
TERRORISM FINANCING**

W. Allen Woolley
Locke Lord LLP

ABA Business Law Virtual Section Annual Meeting
Monday, September 21, 2020

TERRORISM LAWSUITS AGAINST NON-TERRORISTS

- Initial legislation permitted suits only against terrorists – who often have no US assets
 - No compensation for victims
 - Little impact on reducing terrorism

Lawsuits against terrorists themselves



Uncollectable default judgments

- Expansion in the past 2 decades:
 - Plaintiffs seek deeper, more accessible pockets
 - Legislatures and courts expanded law to allow claims against *non-terrorists* who provide funds, support, services to terrorists

COMPETING POSITIONS

Drivers of Legislation and Judicial Results

- Victims want viable sources of compensation
- US law needs to cut the financial “lifeline” of terrorism organizations



- Legitimate organizations should be able to provide financing and services without having to defend terrorism suits

LITIGATION TARGETS

Examples of Non-Terrorist Defendants

- ❑ Banks/lenders providing funds that go to terrorist groups
- ❑ Financial services firms facilitating movement of funds
- ❑ Corporations conducting business with governments or entities that sponsor terrorism
- ❑ Banks and entities accused of affiliation with or of being alter egos of state sponsors of terrorism
- ❑ Charities providing humanitarian aid that may be used for terrorist activities
- ❑ Social media platforms accused of facilitating terrorism

CIVIL TERRORISM LITIGATION

Statutory Bases

The Anti-Terrorism Act of 1990 (ATA)	<ul style="list-style-type: none">• Claims by US nationals for international terrorism• Treble damages and fees• Aiding and abetting liability under JASTA
Alien Tort Claims Act a/k/a Alien Tort Statute (ATS)	<ul style="list-style-type: none">• Violation of treaties or laws of nations• Claims by <i>foreign</i> nationals for conduct in the US
Torture Victims Protection Act (TVPC)	<ul style="list-style-type: none">• Claims for “torture” or “extra-judicial killing” under authority of a foreign nation• Standing for US or foreign nationals• Conduct occurring inside or outside of the US
Terrorism Exception to the Foreign Sovereign Immunities Act (FSIA)	<ul style="list-style-type: none">• Claims by US nationals for personal injury or death against State Sponsors of Terrorism• Permits tort claims against foreign states

THE ANTI-TERRORISM ACT OF 1990

Civil Remedies Provision

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. §2333(a)

THE ANTI-TERRORISM ACT

Requirements for Civil ATA Claims

- “National of the United States”
 - Citizen or person who owes allegiance to the US
 - Need not live in the US at the time of the terrorist act
 - Includes “estate, survivors, or heirs” (including non-nationals)
- “Injured in his or her person, property, or business”
- Injured “by reason of an act of international terrorism” as defined in 18 U.S.C. §2331(1)

THE ANTI-TERRORISM ACT

Act of International Terrorism - Elements

Acts must:

- Be violent or dangerous to human life
- Be a violation of criminal laws of US or any State
 - “Material support” (incl. “financial services”) (18 USC §2339A/B)
 - “Financing” (18 USC §2339C)
- Appear (objectively, not subjectively) intended to:
 - intimidate or coerce a civilian population,
 - influence a government’s policy by intimidation/coercion, or
 - affect conduct of a government by mass destruction, assassination or kidnapping
- Occur primarily outside the US

18 U.S.C. §2331(1)

THE ANTI-TERRORISM ACT

Liability for Non-Terrorist Defendants

TWO TYPES OF LIABILITY

Primary Liability

- For providing “material support” of terrorist acts or organizations
- Material support can itself be an act of “international terrorism”

Secondary Liability

- JASTA (2016) amendment to ATA (18 U.S.C. §2333(d)(2))
- Creates liability for “aiding and abetting” designated terrorists

PRIMARY LIABILITY UNDER THE ATA

The Boim III Paradigm

- *Boim v. Holy Land Foundation* (7th Cir. 2008)
 - U.S. charities provided “material support” to Hamas
 - *Primary liability* for killing of American teenager in Jerusalem
- Satisfied requirements for **Acts of International Terrorism:**

Violation of criminal laws



Providing “material support” for terrorists or terrorist acts in violation of ATA criminal provisions (18 USC 2339A/B)

Violent or dangerous to human life



Judge Posner’s analogy: Financial support is dangerous to human life like giving a “loaded gun” to a child

Intent to accomplish terrorist objectives



Defendant charities were ideologically aligned with Hamas

PRIMARY LIABILITY UNDER THE ATA

Recent Holdings

- *Boim III* still good law, but courts have been reluctant to extend to financing cases
- “Material support” in violation of ATA criminal provisions is *not* sufficient in itself to be act of international terrorism
- Cases regularly dismissed where plaintiff fails to allege *all elements* of “international terrorism”
 - “Violent or dangerous to human life” element – funding and financial transactions not inherently violent or dangerous to human life
 - “Apparent intent” element - banks/financial firms do not have terrorist intent – their objective is *profit*

SECONDARY LIABILITY

Aiding and Abetting under JASTA

Justice Against Sponsors of Terrorism Act (JASTA)

- Enacted in 2016 to give “broadest possible basis” to seek relief against persons/entities that provide support to designated foreign terrorist organizations (FTOs)
- Adds “**aiding and abetting**” liability to ATA where:
 - International Terrorism committed by designated FTO
 - Defendant aids and abets by:
 1. knowingly providing substantial assistance
 2. conspiring with person who committed act

18 U.S.C. §2333(d)(2)

ANTI-TERRORISM ACT LIABILITY

Proximate Cause Requirement

- ATA is a “tort statute” – requires proof of causation
- “Proximate cause”
 - Conduct is **substantial factor** in causing injury
 - Injury is **foreseeable consequence** of conduct
- Cases dismissed *on the pleadings* where link between defendant’s conduct and terrorist act is too attenuated
 - Defendant provides services to entity or government that has legitimate functions beyond support for terrorists
 - Superseding causes: giving loaded gun to *parent*, who then decides to give gun to child

ANTI-TERRORISM ACT LIABILITY

Recent Trends in Financing Cases

Banks/financial services firms liable only where they deal directly with FTO (or fundraiser/front organization)

- Motions to dismiss granted where defendants deal with commercial entities or governments with legitimate functions
 - Causation too attenuated if funds may have legitimate purposes
 - No secondary JASTA liability because no substantial assistance or conspiracy with FTO
 - No primarily liability for international terrorism because financing not violent and apparent intent is to make a profit
- No civil ATA liability even where conduct evades U.S. sanctions or violates criminal laws

NON-ATA STATUTORY BASES

Civil Terrorism Litigation

- 1) Alien Tort Statute (ATS)
- 2) Torture Victims Protection Act (TVPA)
- 3) Terrorism Exception to Foreign Sovereign Immunities Act

THE ALIEN TORT STATUTE (ATS)

Judiciary Act of 1789

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

28 U.S.C. §1350

THE ALIEN TORT STATUTE

Claims under the ATS

- Strictly jurisdictional – no affirmative cause of action
 - Permits *common law* claims for violations of US treaties or “the law of nations” – i.e. universal norms under international law
 - Status of terrorism and terrorism financing uncertain –
 - Courts have not recognized “universal norm against terrorism”
 - *Nahl v. Jaoude* (2d Cir. 2020) (no position on terror financing)
 - But egregious terrorist acts (e.g. suicide bombings, assassinations) have been basis for ATS claims
- Covers claims brought by “aliens” (foreign nationals)
 - Gap filler for ATA, which only covers claims by US nationals
 - Used for foreign plaintiffs in ATA cases

THE ALIEN TORT STATUTE

Limitations on Scope of ATS

- Recent Supreme Court rulings
 - *Kiobel v. Royal Dutch Petroleum* (2013) – presumption against ATS jurisdiction for conduct occurring outside territory of US
 - *Jesner v. Arab Bank* (2018) – no claims against foreign corporations
- Post-*Kiobel/Jesner* ATS claims
 - May still permit claims against domestic corporations and individuals (including officers and employees of foreign corporations)
 - Still permit claims for domestic acts of terrorism
- Seminal ATS case, *Filartiga v. Pena-Irala* (2d Cir. 1980), codified (in part) in Torture Victims Protection Act

TORTURE VICTIMS PROTECTION ACT OF 1991 (TVPA)

- Plaintiff: US or foreign national
- Defendant: individual (e.g. government/corporate official)
- 2 types of conduct:
 1. **Torture** -- intentional infliction of physical or mental pain to obtain confession, punish, intimidate or coerce, or discriminate
 2. **Extrajudicial killing** – deliberated killing not authorized by judgment of court affording judicial guarantees recognized as indispensable by civilized peoples
- “Under actual or apparent authority, or color of law, of any foreign nation”
- Secondary liability against individuals who ordered, abetted, or assisted in torture or extrajudicial killing
- Must exhaust any available local remedies

TVPA §2(a) (codified as note following 28 U.S.C. §1350)

TORTURE VICTIMS PROTECTION ACT

Use for Terrorism Claims

- Statutory basis for claims not permitted under ATA and ATS
 - Unlike ATA, permits claims by US or foreign nationals
 - Unlike ATS, covers conduct in or outside of the US
- TVPA has been used as basis for terrorism litigation against financial supporters
 - Secondary liability creates exposure for officers of corporations that financially support government-condoned torture/killing
 - E.g. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Deriv. Litig.* (S.D. Fla. 2016) – secondary liability claims under TVPA against senior executives of the Chiquita banana company alleging that they implemented, reviewed, approved and/or concealed the company's financial support for a Columbian terror organization that committed human rights abuses

FOREIGN SOVEREIGN IMMUNITIES ACT

Terrorism Exception to the FSIA

- For claims against foreign states
- FSIA amended starting in the mid-1990s to:
 - 1) Remove immunity of foreign governments for terrorist acts
 - 2) Create affirmative cause of action for US nationals against officials/employees/agents of State Sponsors of Terrorism
- Requirements for affirmative cause of action
 - Plaintiff: US national (or US military/employee)
 - Defendant: designated State Sponsor of Terrorism (North Korea, Iran, Sudan, Syria) or official/employee/agent
 - Conduct: torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources
 - Arbitration: opportunity to arbitrate if acts occurred in foreign state

28 U.S.C. §1605A

TERRORISM EXCEPTION TO THE FSIA

Expansion under JASTA

- JASTA (2016) expanded **exception to immunity** to permit money damages claims against *any* foreign state
 - Not limited to designated State Sponsors of Terrorism
 - Claims for physical injury or death occurring in the US
 - Claims caused by:
 - International terrorism in the US (brought under ATA)
 - Tortious acts (not mere negligence) of the foreign state or its officials/agents, regardless of where the acts occurred
- *Does not* expand affirmative cause of action under §1605A

28 U.S.C. §1605B

CONCLUSION

- Current trend: Courts are dismissing cases against financiers
 - Legitimate business and financial transactions with governments or commercial entities that have non-terrorist functions
 - Defendant motivated by profit rather than shared ideology
 - Defendant did not deal directly with terrorists or front organizations
- But not a time for complacency
 - Pendulum may swing back – another 9-11 could provoke new legislation, different approaches by courts
 - *Boim* is still good law, and JASTA is still an expansive statute
 - Cases are still being brought. Plaintiff lawyers are still looking for ways to go after entities with US assets.
 - *The right case can be successful*
- Prudent to know who you are doing business with and to be wary of supporting groups that may have terrorist ties

W. ALLEN WOOLLEY

Allen Woolley is a Partner in the Litigation Department of Locke Lord LLP, focusing on commercial, tort, and employment litigation. Allen has handled a wide variety of complex commercial, bankruptcy, environmental, employment, ERISA, and product liability matters in both state and federal courts. He has tried cases in both state and federal courts and has acted as lead counsel on litigation matters, appeals and arbitrations. Of particular note, Allen has been instrumental since 2016 in ongoing litigation of the seminal Anti-Terrorism Act case, *Boim v. Holy Land Foundation*, and is co-author of a chapter on private litigation against terrorism financing to be published in a forthcoming ABA book on financing for terrorism.



<https://www.lockelord.com/professionals/w/woolley-w-allen?lang=en>

Atlanta | Austin | Boston | Brussels | Chicago | Cincinnati | Dallas | Hartford | Hong Kong | Houston | London | Los Angeles
Miami | New Orleans | New York | Princeton | Providence | San Francisco | Stamford | Washington DC | West Palm Beach

ATTORNEY ADVERTISING. Locke Lord LLP disclaims all liability whatsoever in relation to any materials or information provided. This presentation is provided solely for educational and informational purposes. It is not intended to constitute legal advice or to create an attorney-client relationship. If you wish to secure legal advice specific to your enterprise and circumstances in connection with any of the topics addressed, we encourage you to engage counsel of your choice. © 2020 Locke Lord LLP