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# The Need to Refocus the U.S. Government's Post-9/11 Counter-Terrorist Financing Strategy Directed at al Qaeda to Target the Funding of ISIS

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# THE NEED TO REFOCUS THE U.S. GOVERNMENT'S POST-9/11 COUNTER- TERRORIST FINANCING STRATEGY DIRECTED AT AL QAEDA TO TARGET THE FUNDING OF ISIS

Jimmy Gurulé\*

## I. INTRODUCTION

The Islamic State of Iraq and Syria ("ISIS") is the most deadly and well-funded foreign terrorist organization in the world. There are estimates that ISIS has an annual budget of over \$2 billion to finance its goal of establishing a caliphate, or Islamic state, governed by its twisted version of Islamic law.<sup>1</sup> Flush with funds, the terror group has acquired and controls large swaths of territory in Syria and Iraq, and the threat it poses extends to Jordan, Saudi Arabia, Egypt, Libya, Yemen, Lebanon, and beyond.<sup>2</sup> While depriving ISIS of funding is a central component of the United States government's strategy to degrade and destroy ISIS, these efforts have been ineffective.<sup>3</sup> ISIS is largely self-financed, and its sources of funding are different from those of al Qaeda.<sup>4</sup> As a result, the government needs to reevaluate and refocus its post-9/11 counter-terrorist financing strategy directed at al Qaeda to effectively disrupt and deprive ISIS of funding.

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\* Professor of Law, Notre Dame Law School. The author served as Under Secretary for Enforcement, United States Department of the Treasury, from 2001 to 2003. This Article was originally delivered in part as testimony at a hearing entitled *Terrorist Financing and the Islamic State* before the House Financial Services Committee, 113th Congress (Nov. 13, 2014), and in part as introductory remarks at the Valparaiso University Law Review Symposium: National Security Up Close and Personal (Nov. 14, 2014).

<sup>1</sup> See Al-Araby al-Jadeed, *Islamic State Group Sets Out First Budget, Worth \$2bn*, AL-ARABY (Jan. 4, 2015), <http://www.alaraby.co.uk/english/news/2015/1/4/islamic-state-group-sets-out-first-budget-worth-2bn> [<http://perma.cc/WV3W-4Z98>] (discussing that Sheikh Abu Saad al-Ansari, one of the Islamic State's senior religious leaders, disclosed the budget for ISIS).

<sup>2</sup> *Terrorism in Africa: The Imminent Threat to the United States: Hearing Before Subcomm. on Counterterrorism and Intelligence of the H. Comm. on Homeland Sec.*, 114th Cong. 3, 7 (2015) (statement of Daniel L. Byman, Research Director, Center for Middle East Policy) [hereinafter Byman].

<sup>3</sup> *Terrorist Financing and the Islamic State: Hearing Before the H. Comm. on Fin. Serv.*, 113th Cong. 7, 8 (2014) (statement of David Cohen, Under Secretary for Terrorism and Financial Intelligence, U.S. Treasury Department) [hereinafter Cohen testimony].

<sup>4</sup> See *id.* at 64 (distinguishing the Islamic State from other terrorist groups because it derives most of its finances from terrorist activities in Syria and Iraq).

## II. THE DANGER AND THREAT POSED BY ISIS

ISIS emerged in the “global consciousness in June [2014] when its fighters seized Mosul, Iraq’s second-largest city, after moving into Iraq from [its original] base in Syria.”<sup>5</sup> The terrorist group is attempting to redraw the map of the Middle East and establish an Islamic caliphate led by Abu Bakr al-Baghdadi, the self-appointed caliph.<sup>6</sup> In territories throughout both Iraq and Syria, ISIS has been swiftly expanding its control by seizing towns along supply routes, critical infrastructure, and border crossings.<sup>7</sup> Most recently, ISIS fighters have seized control of Ramadi, the capital of Iraq’s Anbar province, and the historic city of Palmyra in central Syria.<sup>8</sup> The Central Intelligence Agency estimates that ISIS has between 20,000 and 31,500 fighters in Iraq and Syria, and approximately 15,000 of the jihadists are foreign recruits.<sup>9</sup> ISIS has also gained support from a number of important jihadist groups, including Boko Haram in Nigeria and Ansar Bayt al-Maqdis in Egypt.<sup>10</sup> Both terrorist groups have pledged allegiance to ISIS and are now considered official affiliates of ISIS.<sup>11</sup> Former Secretary of Defense Chuck Hagel stated that “[ISIS] is as sophisticated and well-funded as any group that we have

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<sup>5</sup> Ben Hubbard & Eric Schmitt, *Military Skill and Terrorist Technique Fuel Success of ISIS*, N.Y. TIMES (Aug. 27, 2014), <http://nyti.ms/1tEDcVI> [<http://perma.cc/65BQ-L2PT>].

<sup>6</sup> See Tim Arango & Eric Schmitt, *U.S. Actions in Iraq Fueled Rise of a Rebel*, N.Y. TIMES (Aug. 10, 2014), <http://nyti.ms/1vvUBTx> [<http://perma.cc/7WZ7-U4B4>] (discussing Abu Bakr al-Baghdadi’s mission to remove religious minorities such as Shiites and Yazidis to establish a caliphate).

<sup>7</sup> See Gregor Aisch et al., *How ISIS Works*, N.Y. TIMES (Sept. 16, 2014), <http://nyti.ms/1qa7gTm> [<http://perma.cc/FKZ5-L36U>] (observing that recently, ISIS has advanced deeper into Syria and overthrowing cities’ and towns’ resources).

<sup>8</sup> See Tim Arango, *Key Iraqi City Falls to ISIS as Last of Security Forces Flee*, N.Y. TIMES (May 17, 2015), <http://www.nytimes.com/2015/05/18/world/middleeast/isis-ramadi-iraq.html> [<http://perma.cc/RUQ9-7CSK>] (explaining that upon seizure of Ramadi, ISIS ransacked military headquarters seizing stores of weapons and killing citizens loyal to the government); Anne Barnard & Hwaida Saad, *ISIS Fighters Seize Control of Syrian City of Palmyra, and Ancient Ruins*, N.Y. TIMES (May 20, 2015), [http://www.nytimes.com/2015/05/21/world/middleeast/syria-isis-fighters-enter-ancient-city-of-palmyra.html?\\_r=0](http://www.nytimes.com/2015/05/21/world/middleeast/syria-isis-fighters-enter-ancient-city-of-palmyra.html?_r=0) [<http://perma.cc/4UAL-UCGU>] (reporting that ISIS overthrew the city of Palmyra).

<sup>9</sup> *Current Terrorist Threat to the United States: Hearing Before the S. Select Comm. on Intelligence*, 114th Cong. (2015) (statement of Nicholas J. Rasmussen, Director, National Counterterrorism Center).

<sup>10</sup> See Byman, *supra* note 2, at 6–7 (providing that the Islamic State has other affiliates located in Libya, Yemen, and the Arabian Peninsula).

<sup>11</sup> See *id.* (noting ISIS, as of March 2015, has seven official affiliates or “provinces”).

seen.<sup>12</sup> They're beyond just a terrorist group.<sup>13</sup> They marry ideology, a sophistication of strategic and tactical military prowess.<sup>14</sup> They are tremendously well-funded."<sup>15</sup>

The acts of brutality committed by ISIS include the beheadings of two American journalists; the torture and ruthless slaughter of civilians; the persecution of minorities; and gross violations of human rights that constitute war crimes, crimes against humanity, and genocide.<sup>16</sup> ISIS uses "mass executions, public beheadings, rape, and symbolic crucifixion displays to terrorize the population into submission and 'purify' the community . . . ." <sup>17</sup> On June 10, 2014, members of the extremist group "systematically executed some 600 male inmates from a prison outside the northern Iraqi city of Mosul."<sup>18</sup> On October 31, 2014, the United Nations Security Council condemned ISIS's kidnapping and murder of "scores" of Sunni tribesmen in the Anbar province.<sup>19</sup> Media reports of this incident suggest that more than 300 bodies were found in mass graves.<sup>20</sup> After

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<sup>12</sup> Chuck Hagel, U.S. Sec'y of State & Martin E. Dempsey, Chairman, Joint Chiefs of Staff, *U.S. Dep't of Def., Press Briefing in the Pentagon Briefing Room*, 4 (Aug. 21, 2014), <http://www.defense.gov/News/News-Transcripts/Article/606917> [<http://perma.cc/2PWT-LHK9>].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Press Release, Dep't of Defense, Dep't of Defense Press Briefing by Secretary Hagel and General Dempsey in the Pentagon Briefing Room (Aug. 21, 2014), <http://www.defense.gov/News/News-Transcripts/Article/606917> [<http://perma.cc/2PWT-LHK9>].

<sup>16</sup> See Joshua Berlinger, *New York Times: ISIS Hostages Were Tortured before Beheadings*, CNN (Oct. 26, 2014), <http://www.cnn.com/2014/10/26/world/meast/isis-beheading-torture/> [<http://perma.cc/3UAX-PKZS>] (stating that an American journalist was the first western civilian executed by ISIS on camera, as well as another American journalist, a British aid worker, and British taxi driver); William Saletan, *The ISIS Atrocities We Can't Forget*, SLATE (Sept. 3, 2014, 7:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/foreigners/2014/09/don\\_t\\_watch\\_isis\\_s\\_murder\\_of\\_steven\\_sotloff\\_honor\\_him\\_by\\_remembering\\_the.html](http://www.slate.com/articles/news_and_politics/foreigners/2014/09/don_t_watch_isis_s_murder_of_steven_sotloff_honor_him_by_remembering_the.html) [<http://perma.cc/Y2QF-KKZ6>].

<sup>17</sup> Byman, *supra* note 2, at 6.

<sup>18</sup> *Iraq: ISIS Executed Hundreds of Prison Inmates*, HUMAN RIGHTS WATCH (Oct. 30, 2014), <http://www.hrw.org/news/2014/10/30/iraq-isis-executed-hundreds-prison-inmates> [<http://perma.cc/C9B5-FHHH>].

<sup>19</sup> See Press Release, Security Council, Security Council Press Statement on Iraq, U.N. Press Release SC/11625-IK/694 (Oct. 31, 2014), <http://www.un.org/press/en/2014/sc11625.doc.htm> [<http://perma.cc/XZX8-4G46>] (noting that these tribesmen, with the Iraq government, have been combating terrorism). *But see Security Council Condemns ISIL's Murder of Sunni Tribesman in Anbar*, U.N. NEWS CENTRE (Oct. 31, 2014), <http://www.un.org/apps/news/story.asp?NewsID=49227#.VF4dIPnF98H> [<http://perma.cc/3GWG-95X8>] (urging the world to unite in a "common effort" to stop Islamic State of Iraq and the Levant's ("ISIL") rampant violence).

<sup>20</sup> See Raheem Salman, *Bodies of Hundreds of Iraqi Tribesmen Fighting Against ISIS Found in Mass Grave*, HUFF. POST (Oct. 31, 2014, 3:59 PM), [http://www.huffingtonpost.com/2014/10/30/iraq-mass-grave\\_n\\_6074612.html](http://www.huffingtonpost.com/2014/10/30/iraq-mass-grave_n_6074612.html) [<http://perma.cc/77Y6-8TLA>] (reporting that the mass graves contained Sunni Muslim men between the ages of eighteen and fifty-five).

seizing Badoush Prison, the gunmen from ISIS separated the Sunni and Shia inmates and then forced the Shia men to kneel along the edge of a ravine before executing them with assault rifles and automatic weapons.<sup>21</sup> The day after the Mosul massacre, ISIS carried out the mass killing of Shia soldiers in the city of Takrit.<sup>22</sup> In this event, ISIS claimed to have executed 1700 Shia troops and uploaded videos on the Internet showing their gunmen slaying the captives.<sup>23</sup> Further, the sectarianism ISIS foments is worsening Shi'a-Sunni tension and poses a grave threat to Middle East stability.<sup>24</sup>

While ISIS threatens regional security in the Middle East, the terror group also poses a serious threat to United States national security interests.<sup>25</sup> According to a recent United Nations Security Council report, foreign recruits fighting in Iraq and Syria originate from more than eighty countries, including the United States.<sup>26</sup> The risk of future terrorist attacks may increase when the foreign fighters return home.<sup>27</sup> These battle-hardened and militarily-trained jihadists may be deliberately tasked by terror cells to commit terrorist attacks on the homeland.<sup>28</sup>

Finally, ISIS's ability to use social media to influence "lone wolf" terrorist attacks should not be underestimated.<sup>29</sup> On October 22, 2014, a terrorist attack in Ottawa, Canada, resulted in the death of a Canadian soldier.<sup>30</sup> The terrorist proceeded to attack the Centre Block parliament

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<sup>21</sup> *Id.*

<sup>22</sup> *See id.* (detailing that in this massacre, the Human Rights Watch estimated 560 to 770 captives were killed).

<sup>23</sup> *Id.*

<sup>24</sup> *See* Byman, *supra* note 2, at 7 (explaining how ISIS disrupts the stability in the Middle East more than Al Qaeda ever has).

<sup>25</sup> *See* Rep. of the Analytical Support and Sanctions Monitoring Team (2014) submitted pursuant to resolution 2161 (2014), transmitted by Letter Dated 29 October 2014 from the Analytical Support and Sanctions Monitoring Team in accordance with paragraph (a) of annex I to Sec. Council resolution 2083 (2012) addressed to the Chair of the Sec. Council Comm. pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, ¶ 37, U.N. Doc. S/2014/770 (Oct. 27, 2014), [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2014\\_770.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_770.pdf).

<sup>26</sup> *Id.* at ¶¶ 14, 31.

<sup>27</sup> *See id.* at ¶ 35 (warning that traumatized and "no background" returnees pose a threat to society as they are more likely to commit terrorist acts).

<sup>28</sup> *See id.* at ¶¶ 35-36 (revealing attacks that were carried out by individuals tasked by terror cells such as: an attack in January 2013, by thirty-two terrorist fighters in Algeria; the 2012 shooting by Mohammed Merah in France, killing French Army personnel and Jewish citizens, and the 2014 Belgian murders of four Jewish individuals).

<sup>29</sup> Byman, *supra* note 2, at 7.

<sup>30</sup> Jon Williams et al., *Canada PM Calls Parliament Shooting a "Terrorist" Act*, ABC NEWS (Aug. 23, 2015), <http://abcnews.go.com/International/canada-pm-calls-parliament-shooting-terrorist-act/story?id=26372013> [<http://perma.cc/VEK3-KAU7>].

building, where members of the Canadian Parliament were present.<sup>31</sup> The Prime Minister of Canada characterized the incident as a terrorist attack.<sup>32</sup> Recently, the New York City Police Commissioner called a hatchet attack in the subway, which left two New York Police Department Officers injured, a terrorist attack.<sup>33</sup> Such “lone wolf” attacks are not limited to North America.<sup>34</sup> A French magazine, *Charlie Hebdo*, was attacked in Paris on January 7, 2015, in a deadly shooting claimed by a branch of al Qaeda.<sup>35</sup> The next day, a small kosher grocery store in Paris was attacked, resulting in the death of four innocent civilians.<sup>36</sup> The gunman in the grocery store terrorist incident claimed to be a member of ISIS.<sup>37</sup> In Copenhagen, on February 15, 2015, a gunman opened fire at a cultural center holding a free speech debate, killing two victims.<sup>38</sup> He had sworn allegiance to ISIS on his Facebook page before the shooting.<sup>39</sup> Both the incident in Paris and

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Laila Kearney, *NYC Police Say Hatchet Attack by Islam Convert Was Terrorism*, REUTERS (Oct. 24, 2014, 6:22 PM), <http://www.reuters.com/article/2014/10/24/us-usa-newyork-hatchet-idUSKCN0IC2RG20141024> [<http://perma.cc/V3PQ-KQZ6>].

<sup>34</sup> See Michael S. Schmidt & Eric Schmitt, *Potential Holiday Threats Assessed With Focus on ‘Lone Wolf’ Terrorists*, N.Y. TIMES (July 2, 2015), [http://www.nytimes.com/2015/07/03/us/lone-wolf-terrorists-seen-as-big-threat-authorities-say.html?\\_r=0](http://www.nytimes.com/2015/07/03/us/lone-wolf-terrorists-seen-as-big-threat-authorities-say.html?_r=0) [<http://perma.cc/L28D-E33W>] (revealing that the U.S. Defense Secretary Ashton B. Carter recognizes that Europe and other places in the world are vulnerable to these “lone wolf” attacks).

<sup>35</sup> See *Yemen Al Qaeda Leader Who Claimed Credit for Charlie Hebdo Attack Killed in U.S. Drone Strike*, NBC NEWSWORLD (May 7, 2015), <http://www.nbcnews.com/news/world/al-qaeda-arabian-peninsula-leader-nasr-al-ansi-killed-u-n355631> [<http://perma.cc/FN7F-3CNX>] (highlighting that Nasr bin Ali al-Ansi, an Al Qaeda Leader claimed responsibility through a video online for the Charlie Hebdo deaths); James Gordon Meek, *Al Qaeda Gave Charlie Hebdo Killers \$20k*, ABC NEWS (Jan. 14, 2015, 7:40 AM ET), <http://abcnews.go.com/International/al-qaeda-laid-plan-charlie-hebdo-massacre-video/story?id=28213640> [<http://perma.cc/GAT6-MQZ6>]; see also Catherine E. Shoichet, *Al Qaeda Branch Claims Charlie Hebdo Attack Was Years in the Making*, CNN (Jan. 21, 2015), <http://www.cnn.com/2015/01/14/europe/charlie-hebdo-france-attacks> [<http://perma.cc/X5AR-KVE2>] (identifying the Al Qaeda affiliate as Yemen’s Al Qaeda in the Arabian Peninsula “AQAP” who gave one of the Charlie Hebdo shooters, identified as brothers Cherif Kouachi and Said Kouachi, \$20,000 for terrorist operations three years ago).

<sup>36</sup> Catherine E. Shoichet & Josh Levs, *Al Qaeda Branch Claims Charlie Hebdo Attack Was Years in the Making*, CNN (Jan. 21, 2015), <http://www.cnn.com/2015/01/14/europe/charlie-hebdo-france-attacks/> [<http://perma.cc/QTC4-BE6M>].

<sup>37</sup> See *id.* (providing that police found two ISIS flags in the gunman’s apartment and he told authorities that he belonged to ISIS).

<sup>38</sup> Ralph Ellis et al., *Denmark Terror Suspect Swore Fidelity to ISIS Leader on Facebook Page*, CNN (Feb. 23, 2015, 12:23 PM), <http://www.cnn.com/2015/02/16/europe/denmark-shootings/> [<http://perma.cc/9FSV-KM48>].

<sup>39</sup> *Id.*

Copenhagen were labeled as terrorist attacks, by the President of France and the Prime Minister of Denmark respectively.<sup>40</sup>

### III. THE PRINCIPAL SOURCES OF FUNDING FOR ISIS

ISIS has fundamentally different methods of obtaining funding than al Qaeda and other foreign terrorist organizations. Al Qaeda and affiliated terrorist groups receive the vast majority of their funding from external sources, such as corrupt charities, deep-pocket donors, state sponsors of terrorism, and other terrorist sympathizers. For example, Al Rashid Trust, WAFA Humanitarian Organization, Revival of Islamic Heritage Society, various branches of Al Haramain Foundation, Global Relief Foundation, and Benevolence International Foundation are charities accused of raising money for al Qaeda.

According to the Department of State, Hezbollah receives substantial sums of funding, training, weapons, explosives, and logistical support from Iran and Syria. The organization's annual operating budget is estimated between \$200 and \$500 million, including approximately \$100 million from Iran. In light of its support from Iran, Hezbollah does not rely on charities to raise funds as much as other terrorist groups, such as al Qaeda and Hamas. Hezbollah also depends on a wide variety of criminal activities, including fraud and the drug trade, to raise money to support its terrorist efforts, while some funds come from charitable donations.

Hamas' annual budget is disputed due to its control over Gaza. The Council on Foreign Relations lists Hamas's annual budget as \$70 million.<sup>41</sup> However, in 2010 Hamas stated that its budget was \$540 million, the vast majority of which comes from "undisclosed" foreign aid, such as Iran and the Muslim Brotherhood in Egypt.<sup>42</sup>

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<sup>40</sup> Dean Schabner, *Copenhagen Synagogue Shooting Victim Dies; City on Edge After Two Attacks*, ABC NEWS (Feb 14, 2015, 9:21 PM), <http://abcnews.go.com/International/copenhagen-synagogue-shooting-victim-dies-city-edge-attacks/story?id=28968413> [<http://perma.cc/7WNK-6UC2>]; Matthew Weaver et al., *Charlie Hebdo: Officials Establish Link Between Gunmen in Both Attacks – As it Happened*, THE GUARDIAN (Jan. 12, 2015 9:52 PM), <http://www.theguardian.com/world/live/2015/jan/09/charlie-hebdo-manhunt-kouachi-terrorist-links-live-updates#block-54b022e6e4b01f977f44914f> [<http://perma.cc/BR8G-BKVK>].

<sup>41</sup> Zachary Laub, *Hamas*, COUNCIL ON FOREIGN REL. (Aug. 1, 2014), [www.cfr.org/israel/hamas/p8968](http://www.cfr.org/israel/hamas/p8968) [<http://perma.cc/TQH9-9KDV>].

<sup>42</sup> Nidal Al-Mughrabi, *Foreign Fund for Hamas Hit by Syria Unrest-Diplomats*, REUTERS (Aug. 21, 2011), <http://www.reuters.com/article/2011/08/21/uk-palestinians-hamas-finance-idUSTRE77K19120110821> [<https://perma.cc/T4RG-88RU>].

Further, the CIA estimates that Taliban leaders and their allies receive \$106 million a year from donors outside Afghanistan.<sup>43</sup> According to Stanley A. McChrystal, former Commander of United States and NATO forces in Afghanistan, other sources of funding come from imposing a tax on local Afghans, ransom payments, and the opium drug trade.<sup>44</sup>

ISIS is the most well-funded terrorist organization in history. However, in contrast to other terrorist groups that rely on external sources of funding, ISIS is primarily self-funded. ISIS has four major sources of financing. First, ISIS receives substantial funding from the illicit sale of oil from oil fields and refineries under its controls in Iraq and Syria. The proceeds from the sale of ISIS oil are estimated between \$1 million to \$2 million a day.<sup>45</sup> The oil fields controlled by ISIS produce approximately 20,000 to 30,000 barrels daily.<sup>46</sup>

Second, extortion and illicit taxation systems are also a significant source of income for ISIS.<sup>47</sup> Extortion payments bring in “several million dollars a month” for ISIS.<sup>48</sup> Third, ISIS profits from looting ancient artifacts in Iraq and Syria. The income received from the theft of antiquities is second only to the revenue the terrorist group derives from illicit oil sales.<sup>49</sup> The scale of ISIS’s looting and profits from trafficking in

<sup>43</sup> Craig Whitlock, *Afghan Insurgents’ Diverse Funding Sources Pose Challenges*, WASH. POST (Sept. 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/26/AR2009092602707.html> [<https://perma.cc/5DDL-632F>].

<sup>44</sup> Memorandum from U.S. Army General Stanley A. McChrystal to Sec’y of Def. Robert M. Gates, COMISAF’s Initial Assessment (Aug. 30, 2009), [http://nsarchive.gwu.edu/NSAEBB/NSAEBB292/Assessment\\_Redacted\\_092109.pdf](http://nsarchive.gwu.edu/NSAEBB/NSAEBB292/Assessment_Redacted_092109.pdf) [<https://perma.cc/VB8C-ADA2>].

<sup>45</sup> Aisch et al., *supra* note 7. These funding figures were reported at the end of 2014. However, the amount of money ISIS receives from the sale of oil on the black market has been reduced as a result of military strikes and resultant damage on ISIS-controlled oil refineries.

<sup>46</sup> Keith Johnson & Jamila Trindle, *Treasury’s War on the Islamic State*, FOREIGN POLICY (Oct. 23, 2014), <http://foreignpolicy.com/2014/10/23/treasurys-war-on-the-islamic-state/> [<https://perma.cc/5BNL-4XMX>].

<sup>47</sup> Charles Lister, *Cutting off ISIS’ Cash Flow*, BROOKINGS (Oct. 24, 2014, 10:30 AM), <http://www.brookings.edu/blogs/markaz/posts/2014/10/24-lister-cutting-off-isis-jabhat-al-nusra-cash-flow> [<http://perma.cc/7TW5-E3QU>].

<sup>48</sup> Johnson & Trindle, *supra* note 46.

<sup>49</sup> Justine Drennan, *The Black-Market Battleground*, FOREIGN POLICY (Oct. 17, 2014), [http://www.foreignpolicy.com/articles/2014/10/17/the\\_black\\_market\\_battleground\\_syria\\_iraq\\_isis](http://www.foreignpolicy.com/articles/2014/10/17/the_black_market_battleground_syria_iraq_isis) [<http://perma.cc/F7S8-YP9X>]; see also Loveday Morris, *Islamic State Isn’t Just Destroying Ancient Artifacts – It’s Selling Them*, WASH. POST (June 8, 2015), [https://www.washingtonpost.com/world/middle\\_east/islamic-state-isnt-just-destroying-ancient-artifacts-its-selling-them/2015/06/08/ca5ea964-08a2-11e5-951e-8e15090d64ae\\_story.html](https://www.washingtonpost.com/world/middle_east/islamic-state-isnt-just-destroying-ancient-artifacts-its-selling-them/2015/06/08/ca5ea964-08a2-11e5-951e-8e15090d64ae_story.html) [<http://perma.cc/B6LC-5XYZ>] (“Iraqi officials say it is the group’s second most important commercial activity after oil sales, earning the militants tens of millions of dollars.”).



antiquities is unprecedented.<sup>50</sup> Moreover, tracking and recovering the stolen artifacts poses a difficult challenge for law enforcement. According to one expert, "The material is gradually, incrementally laundered in the world-antiquities market, and it becomes very difficult to establish when, where, who, what, why, at that point in time."<sup>51</sup> The looting of the cultural artifacts of Iraq carried out by ISIS has drawn strong condemnation by the United Nations General Assembly.<sup>52</sup> Finally, kidnappings for ransom constitute another major source of ISIS funding.<sup>53</sup> Ransom payments have netted ISIS approximately \$20 million this year alone.

#### IV. RECOMMENDATIONS TO DISRUPT ISIS FUNDING STREAMS AND RESTRICT ISIS'S ACCESS TO THE U.S. FINANCIAL SYSTEM

##### A. *Targeting for Designation under Executive Order 13224 Individuals and Entities That Enable ISIS to Sell Oil on the Black Market*

Following the terrorist attacks of September 11, 2001, the U.S. government developed a strategy to dismantle the financial network of al Qaeda and affiliated terrorist organizations, and disrupt the flow of funds to foreign terrorists. The centerpiece of the government's counter-terrorist financing strategy is to freeze the assets of suspected terrorists, terrorist-related entities, deep-pocket donors, and other financial supporters of terrorism, and prohibit such individuals and entities from doing business in the United States. The strategy is preemptive in nature, intending to prevent the financing of terrorist attacks and killing of innocent civilians.

The authority to block terrorist funds derives from Executive Order ("E.O.") 13224 issued by President George W. Bush on September 23, 2001.<sup>54</sup> President Bush invoked this authority under the International Emergency Economic Powers Act ("IEEPA").<sup>55</sup> The IEEPA authorizes the

<sup>50</sup> Drennan, *supra* note 49.

<sup>51</sup> *Id.* (quoting Michael Danti, a prominent archaeologist leading a U.S. funded effort to document this destruction).

<sup>52</sup> See Meetings Coverage, General Assembly, Expressing Outrage Over Attacks on Cultural Heritage of Iraq, General Assembly Unanimously Adopts Resolution Calling for Urgent Action, U.N. GA/11646 (May 28, 2015), <http://www.un.org/press/en/2015/ga11646.doc.htm> [<http://perma.cc/5EQL-STLQ>] (condemning ISIL's pillaging and looting of Iraq).

<sup>53</sup> See Johnson & Trindle, *supra* note 46 (stating how the Islamic State has made millions from ransoms).

<sup>54</sup> Exec. Order No. 13224, 3 C.F.R. 786-90 (2001), *reprinted as amended in* 50 U.S.C. § 1701 (1977) note (Supp. IV 2004), <http://www.treasury.gov/resource-center/sanctions/Documents/13224.pdf> [<http://perma.cc/P6CT-PAT3>] [hereinafter E.O. 13224].

<sup>55</sup> Congress enacted IEEPA in 1977, which was amended by the USA Patriot Act in 2001. See International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-07 (2012)) [hereinafter IEEPA]; Uniting and

President to declare a national emergency “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside of the United States, to the national security, foreign policy, or economy of the United States.”<sup>56</sup> After declaring a national emergency, the IEEPA grants the President broad economic powers, including the authority to block the transfer of any property in which “any foreign country or national thereof has any interest. . . .”<sup>57</sup> Simply stated, “once the President has declared a national emergency, the IEEPA authorizes the blocking of property to protect against the threat.”<sup>58</sup>

President Bush determined that the grave acts of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Washington, D.C., and Pennsylvania on September 11, 2001, and the continuing threat of terrorist attacks against U.S. nationals constituted “an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”<sup>59</sup> E.O. 13224 provides that “because of the pervasiveness and expansiveness of the financial foundations of foreign terrorists, financial sanctions may be appropriate for these foreign persons that support or otherwise associate with these foreign terrorists.”<sup>60</sup>

Under E.O. 13224, President Bush invoked the IEEPA to initially designate twelve individuals and fifteen entities and freeze their assets in the United States. These twenty-seven individuals and groups are labeled “Specially Designated Global Terrorists” (“SDGTs”) and identified in the Annex to the Order. The designations included “core members of al Qaeda, affiliated terrorist groups, Islamic charities suspected of funding al Qaeda, and other businesses believed to be a front for al Qaeda.” With respect to the twenty-seven SDGTs, the legal implications are two-fold. First, the property and interests in property in the United States of these persons and entities are ordered to be blocked.<sup>61</sup> Second, U.S. persons are

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Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (codified in scattered sections of 5 app., 8, 12, 15, 18, 18 app., 21, 22, 28, 31, 42, 47, 49, and 50 U.S.C.). JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 367 n.245 (2008); S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001), [http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf) [<http://perma.cc/C3EL-3XGU>].

<sup>56</sup> 50 U.S.C. § 1701 (2012).

<sup>57</sup> 50 U.S.C. § 1702(a)(1)(B) (2012).

<sup>58</sup> *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 735 (D.C. Cir. 2007).

<sup>59</sup> E.O. 13224, *supra* note 54.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; See E.O. 13224, *supra* note 54, at § 1(a)–(d); see also 31 C.F.R. § 594.201(a) (2004).

prohibited from engaging in any transactions with such persons and entities.<sup>62</sup>

E.O. 13224 is broad in scope. The Order authorizes blocking the property or property interests of foreign persons and entities that are (1) "owned or controlled by," or "act for or on behalf of," (2) "assist in, sponsor, or provide financial, material, or technological support for," or (3) "otherwise associated" with foreign terrorists.<sup>63</sup> Finally, E.O. 13224 authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate persons determined "to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals, or the national security, foreign policy, or economy of the United States."<sup>64</sup>

The initial list of twenty-seven SDGTs has grown to over 800 individuals and entities covered by the Order.<sup>65</sup> Generally, the list of SDGTs consists of suspected terrorists, terrorist sympathizers, charities and other front entities, and persons believed to provide funding and other assistance to al Qaeda and affiliated terrorist groups.

Perhaps because of the fundamentally different ways in which al Qaeda and ISIS raise funds, since May 2014, only four ISIS members have been designated SDGTs by the Treasury Department.<sup>66</sup> Of those four, only two were involved in financing ISIS. One facilitated the movement of funds from Kuwait to Syria, and one raised money from external donors. However, neither was involved in the terrorist organization's major sources of funding. Thus, it appears that the Treasury Department has not

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<sup>62</sup> See E.O. 13224, *supra* note 54, at § 2(a) (stating how U.S. citizens are prohibited from having transactions with those in the Islamic State).

<sup>63</sup> *Id.* § 1(c), (d)(i)–(ii).

<sup>64</sup> *Id.* § 1(b).

<sup>65</sup> See OFFICE OF FOREIGN ASSETS CONTROL, U.S. TREASURY, TERRORISTS ASSET REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES RELATING TO TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM PROGRAM DESIGNEES, 5–6 (2013), <http://www.treasury.gov/resourcecenter/sanctions/Programs/Documents/tar2013.pdf> [<http://perma.cc/5W9F-MS95>] (stating that on December 31, 2014, a total of 893 individuals and entities had been designated SDGTs under E.O. 13224, which includes sixty Foreign Terrorist Organizations designated by the Secretary of State pursuant to the Antiterrorism and Effective Death Penalty Act of 1996).

<sup>66</sup> Press Release, U.S. Dep't of Treasury, Treasury Designates Al-Qa'ida Leaders in Syria (May 14, 2014), <http://www.treasury.gov/press-center/press-releases/Pages/jl2396.aspx> [<http://perma.cc/CL3W-T8YH>] [hereinafter Al-Qa'ida Leaders Press Release] (designating Abd Al-Rahman Mustafa Al-Qaduli "for acting for on behalf of ISIL," and also designating a member of al Qaeda); Press Release, U.S. Dep't of Treasury, Treasury Designates Three Key Supporters in Syria and Iraq (Aug. 6, 2014), <http://www.treasury.gov/press-center/press-releases/Pages/jl2605.aspx> [<http://perma.cc/DW5H-TYSL>] [hereinafter Three Supporters Press Release] (designating two individuals associated with the Syria-based, al Qaeda-linked terrorist organization Al Nusrah Front, and Abd al-Rahman Khalaf 'Ubayd Juday' al-Anizi, a financial facilitator for ISIL).

gained its footing in identifying and designating individuals involved in the principle methods of funding for ISIS.

ISIS-related designations by the Treasury Department raise two primary concerns. First, few individuals associated with ISIS have been designated for asset freeze under E.O. 13224.<sup>67</sup> The dearth of ISIS-related designations is deeply disturbing. Second, none of the Treasury designations include individuals engaged in any of the major sources of funding for ISIS. While E.O. 13224 authorizes designating individuals merely “associated with” foreign terrorists, the Treasury Department should refocus its efforts and prioritize its resources on targeting individuals that are enabling ISIS to sell oil on the black market. The illicit oil trade is generating hundreds of millions of dollars annually for ISIS. The Treasury Department should target those individuals and entities selling and purchasing oil from ISIS and designate them under E.O. 13224 for being “otherwise associated” with a foreign terrorist. Once designated, United States persons are prohibited from doing business with such individuals and entities, and their assets located in the United States should be blocked.<sup>68</sup> The Treasury Department should also focus its designations on entities that are providing material, parts, and technological support to maintain the oil refineries controlled by ISIS. Finally, financial institutions that are knowingly receiving and transferring funds from the sale of ISIS oil should be designated under E.O. 13224, and these entities should be prohibited from doing business in the United States. If ISIS is generating \$1 to \$2 million a day from the illicit sale of oil, it is difficult to imagine that banks are not being used to receive and transfer large sums of money to entities controlled by ISIS.

To maximize the effectiveness of ISIS-related designations, the Treasury Department should prioritize targeting individuals and entities that are involved in the sale of oil for ISIS. More specifically, the Treasury Department should target for designation the middlemen and persons

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<sup>67</sup> See Al-Qa’ida Leaders Press Release, *supra* note 66 (designating Abd Al-Rahman Mustafa Al-Qaduli “[as] acting for on behalf of ISIL”). The State Department designated a few members of ISIS, but none of these individuals are involved in providing financial assistance to ISIS. *Id.*; Press Release, U.S. Dep’t of State, Terrorist Designation of Abu Mohammed al-Adnani (Aug. 18, 2014), <http://www.state.gov/r/pa/prs/ps/2014/230676.html> [<http://perma.cc/E5S9-YR9D>]; Press Release, U.S. Dep’t of State, Designation of Foreign Terrorist Fighters (Sept. 24, 2014), <http://www.state.gov/r/pa/prs/ps/2014/09/232067.htm> [<http://perma.cc/C8DB-S27C>]; see, e.g., Press Release, U.S. Dep’t of State, Terrorist Designation of Denis Cuspert (Feb. 9, 2015), <http://www.state.gov/r/pa/prs/2015/02/237324.htm> [<http://perma.cc/PJY4-4NPB>].

<sup>68</sup> See Press Release, U.S. Dep’t of Treasury, Specially Designated Nationals List (SDN) (Sep. 10, 2015), <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> [<http://perma.cc/7T9E-R6AG>] (stating the general steps taken against those whom the U.S. Treasury Department deems as terrorists).

transporting the oil, as well as the border guards and Turkish officials looking the other way as oil is smuggled into Turkey. The Treasury Department should also target any foreign businesses involved in the illicit oil trade, including companies that purchase the oil.

According to Treasury Department sources, ISIS has collected tens of millions in ransom payments so far this year. Banks are likely involved in the transfer of funds from the collection of large hostage-ransom payments. Any foreign bank with a United States branch that knowingly transfers funds for ISIS or ISIS-controlled entities should be subject to severe economic sanctions.

Treasury Department designations should also focus on persons suspected of trading in stolen Iraqi and Syrian artifacts. These individuals could have assets in the United States that would be subject to blocking under E.O. 13224. Such individuals could also be engaged in business activities in the United States. If so, U.S. persons would be prohibited from doing business with such individuals. Ultimately, designating individuals and entities involved in the major sources of funding for ISIS should be a top priority.

The purpose of designating individuals under E.O. 13224 is not merely to place their names on a "name and shame" list. The designations are intended to freeze the assets of individuals providing funding and other financial assistance to foreign terrorist organizations, and prohibit such persons from doing business in the United States. It is not the number of SDGT designations that matters most, but the quality of the designations. The relevant standard for determining who should be designated under E.O. 13224 should be whether the designations will disrupt ISIS's ability to raise funds and finance their terrorist activities. To be effective, the SDGT designations should focus on the principal sources of ISIS funding. Focusing designations on members of ISIS that are not involved in the internal funding of ISIS will have limited impact in disrupting ISIS's ability to raise funds and finance deadly terrorist attacks.

#### *B. Increase the Number of Terrorist Financing Prosecutions*

The Department of Justice ("DOJ") has a mixed record of prosecuting terrorist financing cases. Since the September 11, 2001 terrorist attacks, there have been very few major terrorist financing prosecutions. The DOJ should make it a top priority to investigate and criminally prosecute individuals and entities involved in the major sources of funding for ISIS. Individuals and companies that purchase oil from ISIS, as well as entities that provide technological services to maintain ISIS oil refineries, as well as financial institutions that knowingly engage in transferring funds generated from the illicit oil trade, are providing material support to a

foreign terrorist organization, in violation of 18 U.S.C. § 2339B. Such individuals and entities are enabling ISIS to raise hundreds of millions of dollars to finance terrorist activities and should be prosecuted and punished to the full extent of the law. Individuals involved in other major sources of ISIS funding should also be held criminally accountable. To increase the number of terrorist financing prosecutions, the Treasury Department should enhance their efforts in collecting financial intelligence information and sharing such information with the DOJ.

Congress has enacted important legislation aimed at cutting off financial assistance and services to foreign terrorist organizations. The “material support” statutes, 18 U.S.C. §§ 2339A and 2339B, enable federal prosecutors to prosecute persons that provide “material support or resources,” including money, financial services, transportation, and other forms of assistance, to foreign terrorists and foreign terrorist organizations.<sup>69</sup> Congress recognized that “[c]utting off ‘material support or resources’ from terrorist organizations deprives them of the means with which to carry out acts of terrorism and potentially leads to their demise.”<sup>70</sup>

Section 2339A makes it a crime to provide “material support or resources” “knowing or intending” that they are to be used to prepare for or carry out terrorist-related crimes, such as terrorist bombings and extrajudicial killings.<sup>71</sup> By contrast, § 2339B punishes whoever knowingly provides “material support or resources” to a “foreign terrorist organization” (“FTO”) with knowledge that the organization has been designated a FTO by the Secretary of State, or has engaged in or engages in terrorist activities.<sup>72</sup> Upon conviction, both §§ 2339A and 2339B

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<sup>69</sup> See 18 U.S.C. § 2339A(b)(1) (2012) (defining “material support or resources” as: “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials”).

<sup>70</sup> Humanitarian Law Project v. Mukasey, 552 F.3d 916, 932 (9th Cir. 2009).

<sup>71</sup> 18 U.S.C. § 2339A(a) (2012).

<sup>72</sup> 18 U.S.C. § 2339B(a)(1) (2012). Furthermore, 18 U.S.C. § 2339B(a)(1) states that: [A] person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged in or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

*Id.*

authorize a term of imprisonment of not more than fifteen years, and, if death of any person results, imprisonment of any term of years or for life.<sup>73</sup>

Section 2339A requires proof that the defendant acted with a heightened state of mind or mens rea not required under § 2339B.<sup>74</sup> To convict for a violation of § 2339A, the Government must prove that the defendant provided material support or resources "knowing or intending" that they are to be used to carry out a terrorism-related crime.<sup>75</sup> To prove a violation of § 2339B, the defendant must have knowledge that the organization is a designated FTO or has engaged or engages in acts of terrorism.<sup>76</sup>

In *Holder v. Humanitarian Law Project*, the Supreme Court held that in order to sustain a conviction under 18 U.S.C. § 2339B, the Government is not required to prove that the defendant intended to further the terrorist activities of the FTO by the provision of material support or resources.<sup>77</sup> Under § 2339B, the defendant is criminally liable even if he intended to provide money or other forms of assistance for a humanitarian purpose or purpose totally unrelated to the group's terrorist activities, if he had knowledge that the group has been designated a FTO or has engaged or engages in terrorist activities.<sup>78</sup>

The scope of liability under § 2339B is broad and extends to aiders and abettors and persons that conspire to violate the statute.<sup>79</sup> Anyone that aids and abets the provision of material support or resources to a FTO, or conspires to do, may also be prosecuted under the statute.<sup>80</sup> Finally, § 2339B, but not § 2339A, has extraterritorial application.<sup>81</sup> "Pursuant to § 2339B(d)(2), federal courts may exercise jurisdiction for violations of the statute that occur outside of the United States."<sup>82</sup> Section 2339B(d)(1)(E) provides that there is jurisdiction over a violation of § 2339B if "the offense occurs in or affects interstate or foreign commerce," regardless of where the provision of material support actually occurred.<sup>83</sup> Therefore, someone who provides material support or resources to an FTO, and the prohibited

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<sup>73</sup> 18 U.S.C. § 2339A(a)(1); 18 U.S.C. § 2339B(a)(1).

<sup>74</sup> 18 U.S.C. § 2339A(a).

<sup>75</sup> *Id.*

<sup>76</sup> 18 U.S.C. § 2339B(a)(1).

<sup>77</sup> 561 U.S. 1, 15–17 (2010).

<sup>78</sup> See *id.* at 36–37 (noting that money can be directed to funding violent activities, humanitarian aid, and training in dispute resolution).

<sup>79</sup> 18 U.S.C. § 2339B(d)(1)(F).

<sup>80</sup> *Id.*

<sup>81</sup> 18 U.S.C. § 2339B(d).

<sup>82</sup> See 18 U.S.C. § 2339B(d)(2) ("There is extraterritorial Federal jurisdiction over an offense under this section").

<sup>83</sup> 18 U.S.C. § 2339B(d)(1)(E).

conduct occurs entirely outside the United States, may be prosecuted under § 2339B.<sup>84</sup>

Participation in the sale of ISIS oil is clearly a violation of the material support statute, 18 U.S.C. § 2339B.<sup>85</sup> First, ISIS has been designated a “foreign terrorist organization” by the Secretary of State.<sup>86</sup> Second, the transportation, distribution, and purchase of ISIS oil constitute the provision of “material support or resources” to a FTO.<sup>87</sup> The shipment of ISIS oil constitutes “transportation” under the definition of “material support or resources.”<sup>88</sup> The provision of any other form of assistance in the illicit distribution of oil for ISIS arguably involves a “service” provided to a FTO.<sup>89</sup> Further, the payment for ISIS oil constitutes the provision of funding, which is prohibited under the statute.<sup>90</sup> Further, the transfer of funds from one bank account to another for the payment of ISIS oil constitutes the provision of “financial services” under the statute.<sup>91</sup> Thus, banks that knowingly transfer funds involving the sale of ISIS oil engage in prohibited conduct under the material support statute. Finally, the fact that the transportation, distribution, and sale of oil occurred outside the United States is not a defense. As previously noted, § 2339B expressly authorizes extraterritorial application of the statute, if the provision of material support or resources affects foreign commerce.<sup>92</sup> Since the sale of oil affects foreign commerce, federal courts have jurisdiction over the offense.

The critical issue is whether the persons involved in the distribution and sale of ISIS oil had knowledge that they were acting for or on behalf of a FTO or foreign organization that engages in terrorist activities. In light of widely published media reports of ISIS members participating in the barbaric beheading of two American journalists, and committing other atrocities, this would be an easy element for prosecutors to prove.<sup>93</sup>

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<sup>84</sup> 18 U.S.C. § 2339B(d)(1).

<sup>85</sup> 18 U.S.C. § 2339A(a)(1).

<sup>86</sup> See also 8 U.S.C. § 1189 (2012) (authorizing the Secretary of State to designate a foreign group as a Foreign Terrorist Organization); Press Release, U.S. Dep’t of State, Terrorist Designations of Groups Operating in Syria (May 14, 2014), <http://www.state.gov/r/pa/prs/ps/2014/05/226067.htm> [<http://perma.cc/2BWU-84BR>] (amending the designation of Al Qaida in Iraq to add the alias Islamic State of Iraq and the Levant (“ISIL”) as its primary name).

<sup>87</sup> 18 U.S.C. § 2339A(b)(1).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 18 U.S.C. § 2339B(d)(1)(E).

<sup>93</sup> Chelsea J. Carter & Ashley Fantz, *ISIS Video Shows Beheading of American Journalist Steven Sotloff*, CNN (Sep. 9, 2014, 6:32 PM), <http://www.cnn.com/2014/09/02/world/meast/isis-american-journalist-sotloff/> [<http://perma.cc/3V8V-XBX6>].



Knowledge also can be proven by evidence that the defendant engaged in willful blindness and deliberately avoided learning the truth. Finally, § 2339B only requires proof of knowledge.<sup>94</sup> Prosecutors are not required to prove that the individuals that facilitated the sale of oil for ISIS intended that the profits from the sale be used to commit a terrorist attack or fund other terrorist-related activities.

While the material support statute, 18 U.S.C. § 2339B, provides federal prosecutors an invaluable prosecutorial tool to prevent the financing of terrorism, prosecuting terrorist financiers and persons that provide financial assistance to terrorists has not been a priority for the DOJ. Since the September 11, 2001, terrorist attacks, there have been relatively few major terrorist financing prosecutions. The most significant prosecution under the material support statute involves prosecuting members of the Holy Land Foundation for Relief and Development ("HLF"), a charity headquartered in Richardson, Texas.<sup>95</sup> The Government alleged that HLF was the principal fundraiser for Hamas, raising over \$12 million for the terrorist organization in the United States.<sup>96</sup> In 2010, five members of HLF were convicted by a federal jury for providing and conspiracy to provide financial assistance to Hamas, in violation of 18 U.S.C. § 2339B.<sup>97</sup> However, the initial charges in the HLF case were filed in 2004.<sup>98</sup>

Since the prosecution of the members of the HLF, there have been few, if any, major terrorist financing prosecutions targeting the financial networks, deep-pocket donors, or front organizations responsible for raising large sums of money for al Qaeda and affiliated terrorist groups. Moreover, the DOJ has failed to bring criminal charges against anyone for raising funds for ISIS.

It is difficult to explain or justify the low number of terrorist financing prosecutions by the DOJ. Whatever the reason for the paucity of cases, Congress needs to ensure that prosecuting terrorist financing cases is a top priority, and that the DOJ is allocating sufficient prosecutorial resources for this purpose. One way to ensure a greater emphasis on terrorist financing prosecutions is to require the DOJ to submit an annual report to Congress, which includes the number of terrorist financing cases investigated and prosecuted by the DOJ, including the status of any pending terrorist financing cases, and the number of criminal convictions for providing funds and financial assistance to foreign terrorist organizations.

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<sup>94</sup> 18 U.S.C. § 2339B(a)(1).

<sup>95</sup> *United States v. El-Mezain*, 664 F.3d 467, 485 (5th Cir. 2011).

<sup>96</sup> *Id.* at 486–87.

<sup>97</sup> *Id.* at 538.

<sup>98</sup> *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 777 (5th Cir. 2006).

Disrupting the financing of ISIS is critical to preventing the expansion of ISIS in the Middle East, and the commission of terrorist attacks in the United States by lone-wolf terrorists trained or inspired by ISIS. Prosecuting individuals and entities under the material support statute, that are enabling ISIS to sell its oil abroad, could reduce an important stream of ISIS funding and prevent acts of terrorism.

*C. Prioritize the Imposition of Civil Monetary Penalties on Banks that Willfully Violate the Bank Secrecy Act and Create a Risk of Terrorist Financing*

The Bank Secrecy Act ("BSA") imposes important legal duties on financial institutions to prevent money laundering and terrorist financing.<sup>99</sup> The centerpiece of the federal regulatory scheme established by the BSA is the requirement that banks and other financial institutions establish, implement, and maintain written programs and procedures to prevent money laundering and terrorist financing.<sup>100</sup> Every financial institution is required to establish an anti-money laundering or counter-terrorist financing program that includes the following minimum requirements: "(1) the development of internal policies, procedures, and internal controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs."<sup>101</sup>

Suspicious activity reporting ("SAR") forms the cornerstone of the BSA reporting system.<sup>102</sup> Identifying and reporting suspicious transactions "is critical to the United States' ability to utilize financial information to combat terrorism, terrorist financing, money laundering, and other financial crimes."<sup>103</sup> A transaction is suspicious if it: (i) "involves funds derived from illegal activities or is . . . conducted . . . to . . . disguise funds or assets derived from illegal activities"; (ii) "is designed to evade [the reporting or record-keeping] requirements of the [BSA]" (e.g., structuring transactions to avoid currency transaction reporting); or (iii) "has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable

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<sup>99</sup> See Bank Secrecy Act, Pub. L. No. 91-508, tits. I & II, 84 Stat. 1114, 1118 (1970).

<sup>100</sup> See 18 U.S.C. § 5318(h)(1) (2012).

<sup>101</sup> 31 U.S.C. § 5318(h)(1); 31 C.F.R. § 1020.210 (2012).

<sup>102</sup> 31 C.F.R. § 1010.311 (2012).

<sup>103</sup> FED. FIN. INSTITUTIONS EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI MONEY LAUNDERING EXAMINATION MANUAL 60 (2014), [https://www.ffiec.gov/bsa\\_aml\\_infobase/documents/BSA\\_AML\\_Man\\_2014\\_v2.pdf](https://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2014_v2.pdf) [<https://perma.cc/NC9H-8PHT>] [hereinafter FFIEC Manual].

explanation for the transaction after examining the available facts, including the background and possible purposes of the transaction.”<sup>104</sup>

A suspicious transaction should be reported to the Treasury Department if it involves or aggregates at least \$5000 in funds or other assets.<sup>105</sup> Federal regulations requires that a SAR be electronically filed through the BSA E-Filing System no later than thirty calendar days from the date of the initial detection of facts that may constitute a basis for filing a SAR.<sup>106</sup> However, if no suspect can be identified, the time period for filing a SAR is extended to sixty days.<sup>107</sup>

For all accounts, banks should have systems in place to detect unusual or suspicious transactions. “A transaction includes a deposit; a withdrawal; a transfer between accounts; and exchange of currency; an extension of credit; a purchase or sale of any stock, bond, certificate of deposit or other monetary instrument or investment security; or any payment, transfer, or delivery by, through, or to a bank.”<sup>108</sup>

The requirement to monitor suspicious transaction is ongoing, and, in certain circumstances, the bank should consider closing the customer account. The bank “should continue to review the suspicious activity to determine whether other actions may be appropriate, such as bank management determining that it is necessary to terminate a relationship with the customer or employee that is the subject of the filing.”<sup>109</sup>

The failure to comply with federal banking regulations intended to prevent banks from being used to facilitate the financing of terrorism could result in the imposition of large civil monetary penalties by the Financial Crimes Enforcement Network (“FinCEN”), an agency within the Treasury Department responsible for enforcing the BSA. In fact, FinCEN has imposed multi-million dollar civil penalties against numerous banks for non-compliance with the BSA for creating a money laundering risk, including, for example, ABN AMRO Bank (\$30 million), Riggs Bank (\$25 million), and Israel Discount Bank of New York (\$12 million). However, these cases involved non-compliance with the anti-money laundering provisions of the BSA, and were not related to terrorist financing.

There have been very few cases where the BSA violation involved concerns of terrorist financing. The scarcity of terrorist financing cases raises serious questions about FinCEN’s enforcement of the BSA provisions intended to prevent the financing of terrorism. It is unclear

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<sup>104</sup> 31 C.F.R. § 1020.320(2)(i)–(iii) (2012).

<sup>105</sup> *Id.* § 1020.320(2).

<sup>106</sup> *Id.* § 1020.320(b)(3).

<sup>107</sup> *Id.*

<sup>108</sup> FFIEC Manual, *supra* note 103, at 60–61.

<sup>109</sup> *Id.* at 69.

whether the lack of rigorous enforcement of the BSA counter-terrorist financing regulations is due to the lack of personnel and other resources, or lax oversight by the Federal regulators.

In 2005, FinCEN imposed a \$24 million civil penalty against the New York branch of Arab Bank, a foreign bank headquartered in Amman, Jordan. Action taken by FinCEN was motivated by concerns that Arab Bank was being used by front entities to transfer money to Hamas. More specifically, Arab Bank's New York branch allegedly handled wire transfers of more than \$20 million involving forty-five suspected Hamas terrorists and affiliated terrorist groups.<sup>110</sup> However, the Bank failed to file suspicious transaction reports with FinCEN involving such transactions. In February 2005, Arab Bank was ordered to cease its traditional banking activities in New York, including wire transfer service and opening accounts. In August 2005, FinCEN announced the imposition of a \$24 million fine for failure to implement an effective anti-money laundering and counter-terrorist financing program. According to FinCEN, Arab Bank's failure to implement an adequate system of internal controls to comply with the BSA regulations "posed heightened risks of money laundering and terrorist financing."

While Arab Bank maintained correspondent accounts that operated in jurisdictions that posed a heightened risk of terrorism and terrorist financing, the Bank only monitored transactions of individuals and entities that it considered direct customers of the Bank. It failed to monitor the financial transactions of originators and beneficiaries of international funds transfers that did not maintain accounts at Arab Bank. The bank also failed to implement procedures for obtaining and utilizing publicly available information to monitor and identify suspicious transactions. According to FinCEN, names similar to those of originators and beneficiaries in funds transfers cleared by Arab Bank appeared in congressional testimony, indictments in the United States, and research and media reports linked to terrorist activities.<sup>111</sup> FinCEN also found that Arab Bank failed to comply with directives given by financial regulatory officials in the Palestinian Territories intended to prevent terrorist financing. Foreign financial regulators issued circulars containing the names of suspected terrorists and ordered institutions holding accounts in the names of those individuals to either freeze their accounts or place them on a terror watch list. However, Arab Bank lacked internal

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<sup>110</sup> Glenn R. Simpson, *Arab Bank's Link to Terrorism Poses Dilemma for U.S. Policy*, WALL ST. J. (Apr. 20, 2005, 12:01 AM), <http://www.wsj.com/articles/SB111396116907311600> [<http://perma.cc/AXH9-AL4X>].

<sup>111</sup> *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 264 (E.D.N.Y. 2007); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 575-77, 589 (E.D.N.Y. 2005).

procedures for cross-checking the names of these suspected terrorists against wire funds cleared by the bank. Thus, the accounts of these suspected terrorists were not frozen as requested.

Banks that knowingly transfer funds to suspected terrorists and fail to report such suspicious transactions to FinCEN violate the requirements of the BSA. Under the BSA, FinCEN may impose substantial civil penalties against the offending banks for such violations. FinCEN enforcement actions are therefore an important tool to hold financial institutions accountable for failing to prevent the transfer of funds to terrorists. However, if the BSA authority to punish banks that do business with foreign terrorists is rarely used, it cannot serve as an effective deterrent to ensure that banks are not being used to transfer money to terrorists to finance acts of terrorism.

*D. Amend the Civil Provision of the Anti-Terrorism Act to Afford Victims of International Terrorism a Meaningful Remedy*

The Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a), provides "a private right of action for civil damages for any national of the United States injured by 'reason of an act' of 'international terrorism' (or the victim's estate) to sue those responsible for the act in a U.S. court for treble damages, no matter where in the world the act occurred."<sup>112</sup> While the civil tort statute is outside the jurisdiction of the Treasury Department, it is an important statutory tool to enable the victims of terrorist attacks to hold banks and bank officials liable for knowingly transferring funds and providing financial services to terrorists. However, the statute needs to be amended by Congress to provide an effective remedy for the victims of terrorism.

The purpose of the civil tort provision of the ATA is to deter acts of international terrorism by punishing terrorists and their financial supporters "where it hurts them most: at their lifeline, their funds."<sup>113</sup> However, these private tort actions have been largely ineffective. The threat of a large civil monetary judgment has no deterrent effect on foreign terrorists or foreign terrorist organizations that "are unlikely to have

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<sup>112</sup> 18 U.S.C. § 2333 et seq., is the civil remedies provision of the Anti-Terrorism Act, added Oct. 29, 1992, Pub. L. No. 102-572, Title X, § 1003(a)(4), 106 Stat. 4506, codified as amended. For information on the legislative history of the ATA, see *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 265–66 (E.D.N.Y. 2007). For the interpretation of § 2333(a) as referenced above, see *United States v. Phosphorous, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 955 (7th Cir. 2003) (en banc) (Wood, J., dissenting), *overruled en banc* by *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012).

<sup>113</sup> See *Estate of Ungar v. Palestinian Auth.*, 304 F. Supp. 2d 232, 238 (D.R.I. 2004) (reiterating Senator Grassley's comment during the floor debates of 18 U.S.C. § 2333).

assets, much less assets in the United States.”<sup>114</sup> As a result, ATA lawsuits have been filed almost exclusively against secondary actors, such as charitable organizations and domestic and foreign corporations. However, the ATA has been primarily used against financial institutions. These private tort actions allege that banks have committed acts of “international terrorism” by providing financial services to terrorist organizations that resulted in plaintiffs’ injuries.<sup>115</sup> These claims have been largely unsuccessful. To date, only one bank has been held liable under the ATA.<sup>116</sup>

To sustain a claim under § 2333(a), plaintiffs must prove that they were injured “by reason of an act of international terrorism.”<sup>117</sup> The term “international terrorism” includes “violent acts” or “acts dangerous to human life” that are a violation of the criminal laws of the United States.<sup>118</sup> Violations of the federal material support statutes, 18 U.S.C. §§ 2339A,

<sup>114</sup> *Boim v. Holy Land Found.*, 291 F.3d 1000, 1021 (7th Cir. 2007).

<sup>115</sup> See, e.g., *Weiss v. Nat’l Westminster Bank*, 768 F.3d 202, 207 (2d Cir. 2014); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 121, 123 (2d Cir. 2013); *Rothstein v. UBS AG*, 708 F.3d 82, 86, 94 (2d Cir. 2013); Suppl. Mem. of Law of HSBC Holdings PLC, at 6, *Freeman v. HSBC Holdings PLC*, No. 14-CV-06601 (E.D.N.Y. 2015); *Wultz v. Bank of China*, 32 F. Supp. 3d 486, 488–89 (S.D.N.Y. 2014); *Linde v. Arab Bank, PLC*, 944 F. Supp. 2d 215, 216–17 (E.D.N.Y. 2013); *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 426 (E.D.N.Y. 2013); *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 561, 566–67 (E.D.N.Y. 2012); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 427 (E.D.N.Y. 2009); *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 292 (E.D.N.Y. 2007); *Stutts v. De Dietrich Group*, 465 F. Supp. 2d 156, 159 (E.D.N.Y. 2006).

<sup>116</sup> See *Linde v. Arab Bank*, 269 F.R.D 186, 205 (E.D.N.Y. 2010); see also Stephanie Clifford, *Arab Bank Liable for Supporting Terrorist Efforts, Jury Finds*, N.Y. TIMES (Sept. 22, 2014), [http://www.nytimes.com/2014/09/23/nyregion/arab-bank-found-guilty-of-supporting-terrorist.html?\\_r=0](http://www.nytimes.com/2014/09/23/nyregion/arab-bank-found-guilty-of-supporting-terrorist.html?_r=0) [<http://perma.cc/UXB4-83SN>] (discussing the Arab Bank case and the case holding).

<sup>117</sup> 18 U.S.C. § 2333(a) (2012). Section 2331(1) defines “international terrorism” as activities that

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended—
  - (i) to intimidate or coerce a civilian population;
  - (ii) to influence the policy of a government by intimidation or coercion; or
  - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside of the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which the perpetrators operate or seek asylum[.]

*Id.* § 2331(1)(A)–(C) (2012).

<sup>118</sup> 18 U.S.C. § 2331(1)(A).

2339B, and terrorist financing statute, 18 U.S.C. § 2339C, have been held to involve “acts dangerous to human life” and, therefore, constitute acts of “international terrorism” for purposes of § 2333(a).<sup>119</sup> Section 2339A makes it a crime to provide “material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out” a violation of one or more of the violent crimes enumerated in the statute.<sup>120</sup> Section 2339B prohibits “knowingly” providing material support or resources to a “foreign terrorist organization.”<sup>121</sup> Finally, § 2339C punishes providing or collecting funds “with the intention that such funds be used, or with the knowledge that such funds are to be used . . . to carry out” one of the crimes enumerated in the terrorist financing statute.<sup>122</sup>

A bank that provides financial services to a foreign terrorist organization, such as ISIS, that kills Americans abroad may violate § 2333(a).<sup>123</sup> A violation is based on a chain of statutory incorporations by reference.<sup>124</sup> The first link in the statutory chain is § 2333(a), which provides a civil cause of action for injuries suffered by reason of an act of “international terrorism.”<sup>125</sup> The second statutory link is § 2331, which defines “international terrorism” to include activities that involve “acts dangerous to human life that are a violation of the criminal laws of the United States,” and “appear to be intended . . . to intimidate or coerce a civilian population” or “affect the conduct of a government by . . . assassination,” and “transcend national boundaries in terms of the means by which they are accomplished” or “the persons they appear intended to intimidate or coerce, or the locale in which the perpetrators

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<sup>119</sup> See *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68–69 (2d Cir. 2012) (“The Seventh Circuit, and several district courts in this Circuit, have concluded that a defendant’s violation of the criminal material-support statutes . . . constitutes an act of ‘international terrorism’ within the meaning of section 2331(1) . . . .”); *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000, 1016 (7th Cir. 2002) (“We are using sections 2339A and 2339B not as independent sources of liability under section 2333, but to amplify what Congress meant by ‘international terrorism.’”); *Goldberg*, 660 F. Supp. 2d at 427; *Almog*, 471 F. Supp. 2d at 268 (“violations of sections 2339A, 2339B(a)(1), and 2339C can serve as predicate crimes giving rise to liability under the ATA”); *Weiss*, 453 F. Supp. 2d at 613; *Strauss v. Credit Lyonnais, S.A.*, No. 06-CV-0702 (CPS), 2006 WL 2862704, at \*1 (E.D.N.Y. 2006) (holding that “[v]iolations of 18 U.S.C. § 2339B and § 2339C are recognized as international terrorism under 18 U.S.C. § 2333(a)”; *Linde v. Arab Bank*, 384 F. Supp. 2d 571, 581 (E.D.N.Y. 2005).

<sup>120</sup> 18 U.S.C. § 2339A(a) (2012).

<sup>121</sup> *Id.* § 2339B(a)(1) (2012).

<sup>122</sup> *Id.* § 2339C(a)(1)(A)–(B) (2012).

<sup>123</sup> *Id.* § 2333(a) (2012); *id.* § 2339B.

<sup>124</sup> See *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 690, 721 (7th Cir. 2008); see also *Goldberg*, 660 F. Supp. 2d at 426 (noting the chain of references for violations of statutes in international terrorism).

<sup>125</sup> 18 U.S.C. § 2333(a); see also *Boim*, 549 F.3d at 690.

operate or seek asylum.”<sup>126</sup> The next link involves the material support statutes, 18 U.S.C. §§ 2339A, 2339B, and terrorist financing statute, 18 U.S.C. § 2339C.<sup>127</sup> Arguably, the provision of financial services to a foreign terrorist organization constitutes an “act dangerous to human life,” and qualifies as an act of “international terrorism” under § 2333(a).<sup>128</sup> The final statutory link involves 18 U.S.C. § 2332(a), which punishes whoever kills a United States national outside of the United States.<sup>129</sup> Ultimately, the courts have held that “[b]y this chain of statutory incorporations by reference to § 2333(a) to § 2331(1) to § 2339A, [§ 2339B or § 2339C], to § 2332” a bank’s provision of financial services or funds to a terrorist organization that targets Americans outside the United States may support a claim under § 2333(a).<sup>130</sup>

There are two principal reasons why the ATA has proven ineffective against banks. First, providing financial services to persons that commit acts of international terrorism involves secondary conduct. The terrorists that actually committed the terrorist attack are primarily liable for killing or injuring United States nationals. At most, the bank aided and abetted the terrorists by transferring funds and providing other financial services to such persons. However, the ATA is silent on whether civil liability extends to aiders and abettors of acts of international terrorism. Moreover, the courts are deeply divided on the issue. The United States Court of Appeals for the Second and Seventh Circuits hold that 18 U.S.C. § 2333(a) does not authorize a cause of action against aiders and abettors.<sup>131</sup> In contrast, the United States District Courts for the Southern District of Texas, District of Columbia, and Southern District of Florida have reached the opposite conclusion, finding that the ATA extends to secondary actors.<sup>132</sup>

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<sup>126</sup> 18 U.S.C. § 2331(1)(A)–(C) (2012).

<sup>127</sup> 18 U.S.C. §§ 2339A, 2339B, 2339C (2012).

<sup>128</sup> See *Boim*, 549 F.3d at 690; *Goldberg*, 660 F. Supp. 2d at 427.

<sup>129</sup> 18 U.S.C. § 2332(a)(1)–(3) (2012).

<sup>130</sup> *Boim*, 549 F.3d at 690.

<sup>131</sup> See *Rothstein v. UBS AG*, 708 F.3d 82, 98 (2d Cir. 2013) (“We doubt that Congress, having included in the ATA several express provisions with respect to aiding and abetting in connection with the criminal provisions, can have intended § 2333 to authorize civil liability for aiding and through its silence.”); *Boim*, 549 F.3d at 689 (“[S]tatutory silence on the subject of secondary liability means there is none . . .”).

<sup>132</sup> See, e.g., *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 56 (D.D.C. 2010) (holding that “civil liability under the ATA extends to aiders and abettors who provide money to terrorists”); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309 (S.D. Fla. 2010) (holding that plaintiffs stated a claim for primary liability, secondary liability, and conspiracy liability under the ATA); *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011) (alleging that plaintiffs sufficiently stated claims under ATA based on aiding and abetting liability and primary liability).



In a jurisdiction that does not recognize aiding and abetting liability under the ATA, plaintiffs face a difficult burden of proof. Plaintiffs must prove that the provision of financial services to terrorists was the proximate cause of the injuries suffered by plaintiffs. More specifically, plaintiffs must prove that the provision of financial services was a "substantial factor" in the subsequent terrorist attack.<sup>133</sup> The injury from a terrorist attack must also have been "reasonably foreseeable" as a natural consequence of the bank's conduct.<sup>134</sup> Except in the most extreme cases, a person would not reasonably expect or foresee that the provision of routine banking services would result in a terrorist bombing killing innocent civilians.

If, on the other hand, the ATA civil claims are filed in a jurisdiction that authorizes liability for aiders and abettors, plaintiffs only have to prove that the terrorists (principals) committed an act of international terrorism that caused plaintiffs' injuries, and the bank's provision of financial services "substantially assisted" the criminal violation.<sup>135</sup> There is no requirement that it was reasonably foreseeable that the provision of routine banking services would result in a terrorist attack. Plaintiffs therefore have an easier burden of proof in a jurisdiction that recognizes aiding and abetting liability under the ATA.

The second reason why plaintiffs have been largely unsuccessful in holding banks liable under the ATA involves the meaning of the term "international terrorism." Under the ATA statute, "international terrorism" requires proof that the prohibited conduct "appear to be intended . . . (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping."<sup>136</sup> Plaintiffs face a difficult legal hurdle to prove that the

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<sup>133</sup> See *Goldberg*, 660 F. Supp. 2d at 429 ("proximate causation requires that plaintiffs show defendant's actions were 'a substantial factor in the sequence of responsible causation,' and that the injury was 'reasonably foreseeable or anticipated as a natural consequence'"); *Rothstein*, 708 F.3d at 91 (discussing that the defendant's action must be a "substantial factor in the sequence of responsible causation"); see also *Strauss v. Credit Lyonnais*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013) ("[A] reasonable juror could conclude that the sizable amount of money sent from Defendant to Hamas front organizations was a substantial reason that Hamas was able to perpetrate the terrorist attacks at issue, and that Hamas' increased ability to carry out deadly attacks was a foreseeable consequence of sending millions of dollars to groups controlled by Hamas.").

<sup>134</sup> See also *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 572 (E.D.N.Y. 2012) ("Assuming plaintiff could demonstrate that the Bank acted recklessly, it has not shown that his—an American's—injuries were reasonably foreseeable by the Bank as a result of the size and timing of funds transfers put in issue by plaintiff.").

<sup>135</sup> See *Wultz*, 755 F. Supp. 2d at 57 (discussing that the plaintiff must show that the aiders and abettors had "substantially assisted" the criminal violation).

<sup>136</sup> 18 U.S.C. § 2331(1)(A)–(B) (2012).

provision of basic banking services “appear[s] to be intended” for a terrorism-related purpose. The bank’s transfer of funds was more likely committed for a financial purpose, such as making money from the international funds transfers, and totally unrelated to any of the terrorism purposes set forth in the statute. The different application of the statute could result in inconsistent verdicts and encourage forum shopping. Whether plaintiffs are successful in litigating an ATA claim should not turn on the jurisdiction where the lawsuit is filed.

The aiding and abetting problem can be easily solved by legislative amendment. If Congress intended to prohibit banks from knowingly providing financial services to terrorists, 18 U.S.C. § 2333(a) should be amended to expressly authorize aiding and abetting liability. Prohibiting aiding and abetting under the statute would also solve the “appear to be intended” issue. While plaintiffs would have to prove that the acts of the *principals* “appear to be intended” for a terrorism-related purpose, such requirement would not apply to aiders and abettors. Plaintiffs would have to prove that the secondary actor had knowledge that the funds were being transferred to foreign terrorists and such services “substantially assisted” the principals in committing the acts of terrorism.

The civil provision of the ATA is applicable against ISIS, ISIS-controlled entities, and banks that knowingly transfer funds and provide financial services to ISIS. For example, under a theory of aiding and abetting a violation of § 2333(a), the surviving family members of slain American journalists James Foley and Steven Sotloff could bring suit under the ATA against the individuals and entities that facilitated the sale of ISIS oil, as well as banks that knowingly received and transferred funds for ISIS. Arguably, these individuals and entities provided substantial assistance to ISIS, enabling the terrorist organization to finance its terrorist activities, and thereby aided and abetted acts of international terrorism. However, the statute needs to be amended to expressly permit liability under a theory of aiding and abetting.

## V. CONCLUSION

ISIS is a violent and ruthless terrorist organization that poses an imminent threat to regional stability in the Middle East, and further seeks to inspire lone wolf attacks around the globe, including the United States. Moreover, the terror group is flush with funds to finance its goal of establishing a caliphate state in the Middle East. To effectively disrupt the flow of funds to ISIS, the Treasury Department needs to refocus and intensify its efforts under E.O. 13224, targeting individuals and entities involved in the principal sources of ISIS funding, such as the illicit oil

trade, trafficking in stolen artifacts from Iraq and Syria, and kidnap ransom payments.

The Treasury Department should work more closely with the DOJ in sharing financial intelligence information to increase the number of successful terrorist financing prosecutions under the material support statutes. Moreover, the Treasury should make more effective use of its civil regulatory authorities under the BSA to ensure that banks are not being used for terrorist financing purposes. Finally, Congress should amend the civil provision of the ATA to provide the victims of international terrorism an effective remedy to hold banks accountable that knowingly transfer funds to ISIS and other international terrorist organizations. Collectively, these proposals will enhance the effectiveness of the United States Government's efforts to disrupt and reduce the flow of funds to ISIS, prevent future acts of terrorism, and save innocent lives.