

## Your Bank May Be an International Terrorist: The Inconsistent Application of Tort Law Principles to Financial Services Under the Anti-Terrorism Act

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### I. The Business of Terrorism

In today's world, it often feels like terrorism is everywhere. But has international terrorism become so pervasive that it has touched one of the most secure and sophisticated institutions in the Western world? Has funding international terrorism become a business opportunity for our banks? In a recent federal court decision, *Owens v. BNP Paribas* (hereinafter *Owens II*),<sup>1</sup> the United States District Court for the District of Columbia dismissed a lawsuit filed against an international bank by the victims and families affected by the 1998 American embassy bombings. The dismissed complaint alleged that the bank was civilly liable for the victims' injuries under the Anti-Terrorism Act (ATA).<sup>2</sup> In dismissing this claim, the court addressed the ill-defined proximate causation requirement necessary to trigger liability under the ATA, as well as the concept of secondary liability under the ATA.<sup>3</sup> But, the court's analysis of this claim is flawed due to its minimized consideration of the innate foundation tort law provides for the ATA.

In 1998, Osama bin Laden's international terrorist organization, al Qaeda, bombed the United States embassies in Kenya and Tanzania, killing over two hundred people and injuring thousands more.<sup>4</sup> Despite the occurrence of the attacks in 1998, the legally pertinent time period for the provision of liability began in the early 1990s, when the Sudanese government invited bin Laden and al Qaeda to relocate to Sudan, giving rise to a symbiotic relationship between the nation and the terror organization.<sup>5</sup> Sudan provided a safe haven for al Qaeda members to live, train, and own

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1. *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 100 (D.D.C. 2017) [hereinafter *Owens II*].

2. Amended Complaint ¶1, [*Owens II*] (No. 15-1945).

3. *Id.* at 90.

4. *Id.* at 86-87.

5. *Id.* at 88.

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businesses free from probing Western intelligence agencies.<sup>6</sup> In exchange, the terrorists generated funds for the nation's economy, as well as manufactured and provided weapons to the Sudanese government.<sup>7</sup> As a result of this relationship, the United States declared Sudan to be a state-sponsor of terrorism in 1993, a status it maintains today.<sup>8</sup> The United States went on to impose a variety of sanctions on the Sudanese government, including a ban on defense exports and sales, eventually leading to a complete trade embargo in 1997.<sup>9</sup> The embargo banned the exportation of any financial services to Sudan, including the processing of financial transactions for the Sudanese government, without a license from the U.S. Treasury Department's Office of Foreign Assets Control (OFAC).<sup>10</sup> Additionally, sanctions were imposed on the National Bank of Sudan and all major Sudanese commercial banks.<sup>11</sup>

The role of BNP Paribas and its potential connection to the 1998 terrorist attacks was not pursued by the victims and families affected until after BNP Paribas made certain statements during a separate legal action in 2014 regarding its violations of the financial sanctions placed on Sudan.<sup>12</sup>

Relying on those statements, the plaintiffs brought suit against the multinational financial services company BNP Paribas, S.A., and a number of its affiliates (collectively, BNPP).<sup>13</sup> In July of 2014, BNPP pled guilty to conspiring to violate the International Emergency Economic Powers Act, as well as the Trading with the Enemy Act.<sup>14</sup> BNPP also admitted to violating United States sanctions imposed on Sudan, Iran, and Cuba, conspiring with other banks to circumvent such sanctions, and knowingly, intentionally, and willfully moving more than 8.8 billion dollars through the American financial system on behalf of sanctioned entities between the years 2002 and 2007.<sup>15</sup> Specifically regarding Sudan, the bank admitted during the 2014 litigation that it "willfully and knowingly structured, conducted, and concealed U.S. dollar transactions using the U.S. financial system on behalf of banks and other entities located in or controlled by Sudan."<sup>16</sup> Strikingly, BNPP admitted that its employees recognized the central role BNPP played in providing sanctioned entities access to the U.S. financial system, thereby indirectly supporting terrorism and human rights abuses.<sup>17</sup>

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6. *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242, 280 (D.D.C. 2016), *aff'd*, 864 F.3d 751 (D.C. Cir. 2017) [hereinafter *Owens I*].

7. *See id.*

8. *Owens II*, 235 F. Supp. 3d at 87.

9. *Id.* at 88.

10. *Id.*

11. *Id.*

12. Amended Complaint, *supra* note 2, ¶ 73-74.

13. *Id.* ¶ 30.

14. *Owens II*, 235 F. Supp. 3d at 87.

15. Amended Complaint, *supra* note 2, ¶ 73; Notice of Defs.' Motion to Dismiss at 4, [*Owens II*] (No. 15-1945).

16. Amended Complaint, *supra* note 2, ¶ 77.

17. *Id.* ¶ 78.

The subject of the 2014 litigation focused on the actions of BNPP from 2002 to 2007.<sup>18</sup> BNPP admitted that its illegal activities began in 1997—shortly after the imposition of U.S. sanctions against Sudan—when BNPP’s Geneva branch (BNP Paribas Suisse) agreed to become the only bank in Europe to work with Sudanese government banks, despite such activity being specifically prohibited by the United States.<sup>19</sup> As a result of this activity, nearly all of the major Sudanese banks held U.S. dollar-denominated accounts through their relationship with BNPP.<sup>20</sup> Further, BNPP admitted to using satellite banks in Africa, Europe, and the Middle East for the purpose of circumventing U.S. sanctions and that some of these satellite banks had “no other business purpose than to clear payments for Sudanese clients.”<sup>21</sup>

The plaintiffs have already succeeded in their civil suit against the Republic of Sudan for providing material support to the al Qaeda terrorists who carried out the 1998 embassy attacks in the case of *Owens v. Republic of Sudan* (“*Owens I*”).<sup>22</sup> Upon learning of the bank’s admittances in the course of the 2014 sanctions litigation, the same plaintiffs filed the case of *Owens II* to seek civil damages from BNPP under the ATA for the bank’s involvement with Sudan in relation to the 1998 terrorist attacks.<sup>23</sup>

## II. The Bad Guy Got Away: Owens II

### A. CRITICAL ISSUES

In *Owens II*, the court granted the defendant’s motion to dismiss, holding that the plaintiffs failed to state a claim upon which relief could be granted.<sup>24</sup> BNPP provided three different arguments for the court to consider when dismissing the claim: (1) that the plaintiffs’ arguments were premised on theories of secondary civil liability, which does not exist in the ATA; (2) that the plaintiffs did not sufficiently plead a causal connection between the bank’s actions and the plaintiff’s injuries; and (3) that the plaintiff’s claims are time barred.<sup>25</sup> Only addressing the first two arguments, the court dismissed the plaintiffs’ secondary liability claims, holding that the ATA does not provide liability for aiding and abetting primary violators.<sup>26</sup> Thus, the plaintiffs could only be successful in a primary liability claim, for which the court held the pleadings did not establish the required element of proximate causation.<sup>27</sup>

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18. Notice of Defs.’ Motion to Dismiss, *supra* note 15, at 5.

19. Amended Complaint, *supra* note 2, ¶ 82.

20. *Id.*

21. *Id.* ¶ 88.

22. *Owens I*, 174 F. Supp. 3d at 280.

23. Amended Complaint, *supra* note 2, ¶ 130.

24. *Owens II*, 235 F. Supp. 3d at 100.

25. *Id.* at 90. See Mot. to Dismiss at 9.

26. *Owens II*, 235 F. Supp. 3d at 95.

27. *Id.* at 100.

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**B. COURT'S INTERPRETATION AND APPLICATION OF THE ATA**

**1. *Statutory Interpretation of the ATA***

Before addressing either of the defendant's arguments for dismissal, the court began by discussing its interpretation of the relevant provisions of the ATA.<sup>28</sup> The plaintiffs asserted their private right of action under Section 2333(a) of the ATA. The provision reads in full:

(a) *Action and jurisdiction.* 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.<sup>29</sup>

The court interpreted the statute so as to require three elements: "(1) injury to a U.S. national; (2) [involving] an act of international terrorism; and (3) causation."<sup>30</sup> Notably, the court provided no requirement related to a purported defendant's state of mind.

Federal courts that have addressed cases of civil liability under the ATA have held that Section 2333 creates a private federal cause of action for individuals injured by acts of international terrorism and that "common law tort principles provide[ ] clear and well-settled rules" for claims arising from violations of the statute.<sup>31</sup> Thus, because a Section 2333 claim can provide for treble damages, which are typically only prescribed to intentional tort claims, the intent requirement for Section 2333 requires some kind of deliberate misconduct by the defendant, *i.e.*, something more than mere negligence.<sup>32</sup>

The court went on to state that an act of deliberate misconduct under Section 2333 must relate to an act of international terrorism. In the case at bar, the plaintiffs claimed that this requirement was satisfied by BNPP's provision of "material support" to terrorist organizations, which is classified as an act of international terrorism by Section 2339 of the ATA.<sup>33</sup>

The court held that the scienter requirement of Section 2333 and the scienter requirement for the requisite act of international terrorism both

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28. *Id.* at 90.

29. 18 U.S.C.A. § 2333(a) (West).

30. *Owens II*, 235 F. Supp. 3d at 90. The court determined that causation requirement of Section 2333(a) is proximate causation, not cause in fact.

31. 195 A.L.R. Fed. 217 (originally published in 2004). See *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 280 (1st Cir. 2005); *Gilmore v. The Palestinian Interim Self-Gov't Auth.*, 422 F. Supp. 2d 96, 99 (D.D.C. 2006).

32. *Owens II*, 235 F. Supp. 3d at 90 (citing to *Boim v. Holy Land Foundation for Relief and Development* ("*Boim III*"), 549 F.3d 685, 692–93 (7th Cir. 2008) (en banc) (internal quotation marks omitted); see also *Gill v. Arab Bank, PLC*, 893 F.Supp.2d 474, 503 (E.D.N.Y. 2012); *Wultz v. Islamic Republic of Iran*, 755 F.Supp.2d 1, 42 (D.D.C. 2010); *Goldberg v. UBS AG*, 660 F.Supp.2d 410, 428 (E.D.N.Y. 2009)).

33. Section 2339 criminalizes the following as actions of international terrorism:

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must be met in order to succeed on a primary liability claim under Section 2333.<sup>34</sup> So in the case of *Owens II*, the plaintiffs had to show that (1) the bank had at least a reckless disregard for the nature of their actions under Section 2333, and that (2) the bank intentionally or knowingly provided material support to a terrorist organization in order to establish an “act of international terrorism” under Section 2339 to succeed on their primary liability claim under Section 2333.<sup>35</sup>

## 2. *Aiding and Abetting Liability Under the ATA*

After explaining its interpretation of the statutory requirements of the plaintiffs’ claim, the court discussed whether the ATA provides liability for aiding and abetting. The court noted that Section 2339 already provides a form of secondary liability for “impos[ing] liability for attempt and conspiracy.”<sup>36</sup> The court held, however, that the plaintiffs failed to sufficiently plead the scienter requirement of Section 2339, thereby eliminating the plaintiffs’ primary liability claim under Section 2333 and any secondary liability claim under Section 2339.<sup>37</sup> Thus, the plaintiffs could have prevailed only if the ATA provided for secondary liability for aiding and abetting under Section 2333.<sup>38</sup>

While courts initially held that the ATA provided such liability under this section,<sup>39</sup> recent courts have held that there is no aiding and abetting liability under the ATA.<sup>40</sup> The court discussed recent Second and Seventh Circuit decisions, which held the ATA cannot impose civil liability for aiding and

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(A) Providing material support to terrorists, knowing or intending that the provided support will be used to carry out an act of violence against a U.S. national or general public,

(B) Knowingly providing, attempting, conspiring to provide material resources to a foreign terrorist organization, and

(C) Willingly providing or collecting funds, knowing or intending that the funds will—directly or indirectly—be used to carry out an act of terrorism.

18 U.S.C.A. § 2339(A-C); *Owens II*, 235 F. Supp. 3d at 91.

34. *Owens II*, 235 F. Supp. 3d at 90-91.

35. *Owens II*, 235 F. Supp. 3d at 91. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010) (discussing the state-of-mind requirement, the Court clarified that “Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”).

36. *Owens II*, 235 F. Supp. 3d at 95.

37. *Id.* at 99.

38. *Id.* at 91.

39. See, e.g., *Boim v. Quranic Literacy Inst. (“Boim I”)*, 291 F.3d 1000, 1019–21 (7th Cir. 2002), *overruled sub nom. by Boim v. Holy Land Found. for Relief & Dev. (“Boim III”)*, 549 F.3d 685 (7th Cir. 2008) (en banc); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute & S’holder Deriv. Litig.*, 690 F.Supp.2d 1296, 1309–10 (S.D. Fla. 2010).

40. See *Owens II*, 235 F. Supp. 3d at 91. See also, e.g., *Rothstein v. UBS AG*, 708 F.3d 82, 97–98 (2nd Cir. 2013) (concluding that the ATA does not incorporate civil liability for aiding and abetting); *Boim III*, 549 F.3d at 689 (overruling *Boim I* holding that permitted civil aiding and abetting liability under the ATA); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute &*

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abetting because the statute itself does not provide for it.<sup>41</sup> Both courts relied heavily on the Supreme Court case, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, which precluded liability for aiders and abettors under the federal securities laws.<sup>42</sup> In fact, *Central Bank* popularized the presumption that a federal civil liability statute that is silent on aiding and abetting liability intends not to provide aiding and abetting liability.<sup>43</sup>

In adopting this presumption, the *Owens II* court rejected the plaintiffs' contention that Congress intended to create a broad scope of liability "at any point along the causal chain of terrorism," by noting that policy cannot govern interpretation.<sup>44</sup> Additionally, the court held that the ATA in fact explicitly includes forms of secondary liability in its criminal provisions, and therefore, the absence of provisions for secondary liability in the civil liability provisions was, thus, a conscious act on the part of Congress.<sup>45</sup>

### 3. *Causation Under the ATA*

The court then goes on to address the parties' dispute regarding the causation requirement of Section 2333(a).<sup>46</sup> Again, this provision of the ATA states that a U.S. national may sue for damages if their person or property is "injured 'by reason of' an act of international terrorism."<sup>47</sup> Both the plaintiffs and the defendant agreed that this "by reason of" language means that proximate cause is necessary, but the parties disagreed as to what the proximate cause requirements are.<sup>48</sup> The defendant contended that proximate cause requires a more direct causal connection between a defendant's actions and the injury, while the plaintiffs asserted a looser standard that the injury need only be a "reasonably foreseeable result of defendants' conduct."<sup>49</sup>

After evaluating both proposed standards, the court noted that the plaintiffs' standard was actually applied in an analogous suit: *Rothstein v. UBS AG*.<sup>50</sup> In *Rothstein*, victims of various terrorist attacks in Israel between 1997 and 2006 alleged that the defendant bank was civilly liable for their injuries under the ATA because the bank was providing funds to Iran, another state

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S'holder Deriv. Litig., Nos. 08-01916-MD, 08-020641-Civ KAM, 2015 WL 71562 (S.D. Fla. Jan. 6, 2015) (reversing earlier decision permitting secondary liability after *Rothstein*).

41. *Owens II*, 235 F. Supp. 3d at 92.

42. *Owens II*, 235 F. Supp. 3d at 93; *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). See *Rothstein*, 708 F.3d at 97 (citing *Central Bank*); *Boim III*, 549 F.3d at 689 (same).

43. *Central Bank*, 511 U.S. at 191; accord *Boim III*, 549 F.3d at 689.

44. *Owens II*, 235 F. Supp. 3d at 93.

45. *Id.* at 95.

46. *Id.*

47. 18 U.S.C.A. § 2333(a).

48. *Owens II*, 235 F. Supp. 3d at 95.

49. Mot. to Dismiss at 11–12; Pl.'s Response to Motion to Dismiss at 8–9, [*Owens II*] (No. 15–1945).

50. *Owens II*, 235 F. Supp. 3d at 87, 97.

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sponsor of terrorism.<sup>51</sup> The plaintiffs claimed that either the terrorist organization known as Hezbollah or the terrorist organization known as Hamas was responsible for the series of bombings that injured or killed the plaintiffs, and that Iran was providing material support to both of these organizations during the time of the attacks.<sup>52</sup> Even with the plaintiffs' weaker formulation of causation—that the injury only be foreseeable—the *Rothstein* court still found that “[w]ithout a more concrete connection” to prove that Iran did or was likely to have funneled money processed by the defendant bank directly to the terrorists who harmed the plaintiffs, that liability for the defendants was precluded.<sup>53</sup> Thus, the *Rothstein* court held that plaintiffs' injuries were not a “natural” consequence of the bank's conduct with Iran.<sup>54</sup> The *Owens II* court adopted the *Rothstein* court's approach and subsequently applied proximate cause as it is “typically defined” by requiring that the plaintiffs show that their injuries were “the natural and probable consequence of the [defendant's acts] and ought to have been foreseen in light of the circumstances.”<sup>55</sup>

In attempting to prove such causation, the plaintiffs pled the following facts for the relevant 1997–1998 time frame: (1) BNPP became the exclusive European bank providing financial services to Sudanese banks; (2) BNPP created regional satellite banks to further this assistance to Sudan; and (3) BNPP used these satellite banks to get around the United States' sanctions on Sudan.<sup>56</sup> The court reasoned that the proposed facts, even if taken as true, could only establish that BNPP had a connection to Sudan prior to 1998, but that the plaintiffs provided no facts to show that the funds processed by BNPP were being explicitly used by Sudan to support al Qaeda.<sup>57</sup> In fact, the court reasoned that the Sudanese government had a variety of non-terrorism related responsibilities to which it could have applied the BNPP funds.<sup>58</sup> The court reasoned:

[T]he fact that money was transferred to or for a state-sponsor of terrorism makes it more likely that the money was used for terrorism than if the transfers had been to a state that was not a sponsor of terrorism . . . It is not sufficient to merely allege that it was “foreseeable” that if defendants processed transactions for Sudan, Sudan *might give some* of that money to al Qaeda.<sup>59</sup>

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51. *Rothstein*, 708 F.3d at 91.

52. *Id.* at 87.

53. *Owens II*, 235 F. Supp. 3d at 97 (discussing *Rothstein*, 708 F.3d at 91).

54. *Id.*

55. *Id.* at 97 (quoting *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 105 (D.D.C. 2003)).

56. Amended Complain, at ¶¶ 82–83, 90–91.

57. *Owens II*, 235 F. Supp. 3d at 98–99.

58. *Id.* at 98.

59. *Id.* (emphasis theirs).

The plaintiffs also argued that money is fungible, and thus, any money that BNPP supplied to Sudan should be treated as if it was funneled to al Qaeda, even if the actual BNPP funds were being used for non-terrorist activities. But the court rejected this argument, noting that if all financial transactions with a state-sponsor of terrorism were fungible, OFAC would not distribute licenses to permit certain financial transactions with Sudan.<sup>60</sup> Additionally, the court held that to adopt the plaintiffs' argument of fungibility "would mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state," and that such strict liability could not feasibly exist.<sup>61</sup> Therefore, the plaintiffs failed to allege that the bank's actions with Sudan were the proximate cause of their injuries sustained in the bombings.<sup>62</sup>

### **III. Making Them Pay: Proper Application of Tort Law Principles**

With *Owens II* now on appeal, it is possible that the D.C. Circuit could reverse or remand the district court's decision. This is due to the court's misapplication—or lack of application—of tort law principles to the ATA. The court inconsistently applied tort concepts to interpret the ATA's silence regarding aiding and abetting liability, incorrectly assumed that strict liability could not be applied to BNPP, and mischaracterized the danger of BNPP's activities. Each of these mistakes will be addressed in turn.

First, the court dealt with statutory silence within the ATA in inconsistent ways. Regarding the lack of an intent requirement in Section 2333, the court accepted case law that applied the spirit of tort law to the ATA.<sup>63</sup> The court supplemented the statute's silence regarding intent with related tort law, deducing that the treble damages provided for in the statute must equate it with torts that require recklessness.<sup>64</sup> Therefore, despite the silence of Section 2333 regarding intent, the court held that traditional tort law imputed the requirement of reckless intent to the statute.<sup>65</sup> But, when discussing how the same statute is silent regarding aiding and abetting liability, the court did not apply the same reasoning.<sup>66</sup> Generally, tort law imparts liability for aiding and abetting.<sup>67</sup> As a result, applying the spirit of

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60. *Id.* at 100 ("[T]he 'money is fungible' argument urged by plaintiffs does not appropriately extend to this context."). See *Holder*, 561 U.S. at 31.

61. *Owens II*, 235 F. Supp. 3d at 100.

62. *Id.*

63. *Id.* at 90.

64. *Id.*

65. *Id.*

66. *Id.* at 92.

67. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIAB. § 15 (AM. LAW INST. 2000); RESTATEMENT (SECOND) OF TORTS § 876 (1979). See *Aetna Cas. & Sur. Co. v. Lealey Const. Co.*, 219 F.3d 519, 532 (6th Cir. 2000) ("[W]e conclude that the Supreme Court of Ohio would recognize aiding and abetting liability . . ."); *Connecticut Nat. Bank v. Giacomi*, 659 A.2d 1166,

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tort law—as the court did in its scienter discussion—should have resulted in the provision of aiding and abetting liability being imputed to Section 2333.<sup>68</sup> Rather, the court deferred to federal securities case law in declining to impose aiding and abetting liability.<sup>69</sup> As a result, the court’s reasoning in *Owens II* is flawed, and should be overturned at the appellate level to allow aiding and abetting liability claims to arise under Section 2333 of the ATA.

The court also applied flawed reasoning when discussing how the tort concept of aiding and abetting cannot be applied because another tenant of tort law—strict liability—cannot be applied to the ATA.<sup>70</sup> The court pointed out that there is no mention of strict liability in the ATA and that no one appears to have suggested that strict liability applies.<sup>71</sup> Further, the court notes how strict liability cannot be applied to all activities with state sponsors of terrorism, lest the court contradicts Congress.<sup>72</sup> Because Congress allows some activity to occur with state sponsors of terrorism if the entity has the appropriate permission from OFAC, the court reasoned that construing strict liability for BNPP’s activities would make the actions explicitly permitted by Congress illegal.<sup>73</sup> Thus, because the tort concept of strict liability is inviable in the context of the ATA, the court reasoned, other tort concepts such as aiding and abetting should also be precluded from application under the ATA.<sup>74</sup> But the court’s premise is flawed.

Strict liability provides that “one who carries on an abnormally dangerous activity is subject liability for harm,”<sup>75</sup> regardless of if the actor had any intent to inflict the harm.<sup>76</sup> An “abnormally dangerous activity” is determined by considering a number of factors.<sup>77</sup> Notable amongst these factors are:

[The] inability to eliminate the risk by the exercise of reasonable care;  
. . . [the] extent to which the activity is not a matter of common usage;  
. . . [the]inappropriateness of the activity to the place where it is carried

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1178 (1995) (“Additionally, to the extent that § 876 of the Restatement (Second) of Torts provides for aider and abettor liability, an aggrieved party may have a tort cause of action.”); *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 846 (1994) (“Liability may also be imposed on one who aids and abets the commission of an intentional tort . . .”).

68. *Owens II*, 235 F. Supp. 3d at 95.

69. *Id.*

70. *Id.* at 94.

71. *Id.* (citing *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 501 (E.D.N.Y. 2012)).

72. *Id.* (citing *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 501 (E.D.N.Y. 2012)).

73. *Id.* at 100.

74. *Owens II*, 235 F. Supp. 3d at 100 (quoting *Rothstein v. UBS AG*, 708 F.3d 82, 96 (2d Cir. 2013)).

75. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

76. *See id.* at comment (e) (“The liability stated in this Section is not based upon any intent of the defendant to do harm . . . The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity.”).

77. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

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on; and . . . [the]extent to which its value to the community is outweighed by its dangerous attributes.<sup>78</sup>

It seems very feasible that the spirit of strict liability is alive and well in the ATA. In the case of *Holder v. Humanitarian Law Project*, the Supreme Court of the United States discussed how Congress, in constructing Section 2339 crimes, held that “terrorist organizations are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>79</sup> Therefore, the *Owens II* court recognized that even if you provide money to a terrorist organization only to be used for peaceful activities, you are still furthering the violent activities of that organization and are liable under the ATA.<sup>80</sup> Juxtaposing this conclusion against the tort foundation of the ATA, it appears that any donation to a terrorist organization, regardless of intent, should be sufficient to engender liability.<sup>81</sup> Therefore, providing funds to a terrorist organization is akin to an “abnormally dangerous activity” because all funds for a terrorist organization are fungible.

Of course, the facts do not show that BNPP gave any funds directly to al Qaeda, only that BNPP supplied funds to Sudan.<sup>82</sup> So, the court held that to treat BNPP’s funding to Sudan the same as if the bank had given directly to a terrorist organization “would mean that *any* provider of U.S. currency to a state sponsor of terrorism would be strictly liable for injuries subsequently caused by a terrorist organization associated with that state.”<sup>83</sup> But, this mischaracterized what BNPP’s activities actually were. The funds at issue in this case were not simply funds provided to a state sponsor of terrorism; the funds were provided to a state sponsor of terrorism *in knowing violation* of sanctions placed on that state sponsor to deter continued terrorist support.<sup>84</sup> Therefore, holding such activity as abnormally dangerous would not contradict Congress’s intention to permit certain financial activities under OFAC. Further, holding such activity as abnormally dangerous would not mean that any provider of U.S. currency to a state sponsor of terrorism would be strictly liable; only that *illegal* or non-permitted providers of U.S. currency to a state sponsor of terrorism would be strictly liable.

It is this combination of both characteristics of BNPP’s funds—that they were not only provided to a state sponsor of terrorism, but that they were also provided illegally by intentionally violating sanctions on that state sponsor—that should be evaluated as an “abnormally dangerous activity” for strict liability. And, again, looking back at some of the factors to classify “abnormally dangerous activities,” BNPP’s activities seem to fit the bill for

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78. *Id.* at §§ (c-f).

79. *Holder*, 561 U.S. at 29 (internal citations omitted).

80. *Owens II*, 235 F. Supp. 3d at 100.

81. See RESTATEMENT (SECOND) OF TORTS § 519 (comment e).

82. *Owens II*, 235 F. Supp. 3d at 98.

83. *Id.* at 100 (citing *Rothstein*, 708 F.3d at 515-16) (emphasis added).

84. *Id.* at 88.

strict liability. For example, one of the factors is whether the risk of injury from the activity can be eliminated by reasonable care.<sup>85</sup> Indeed, this very purpose is served by applying for a license through OFAC, which certainly would not permit funding that has a risk of being channeled to terrorist organizations.<sup>86</sup> Another factor is the “inappropriateness of the activity to the place where it is carried on,” and here, BNPP’s actions were clearly inappropriate as they were illegally providing U.S. dollar funding to a nation subjected to a complete trade embargo.<sup>87</sup> Another factor is the “extent to which its value to the community is outweighed by its dangerous attributes.”<sup>88</sup> Certainly the dangers of funding a state sponsor of terrorism would be high, but the court does not mention any value given to the community of Sudan, or any other community for that matter, that was supplied by BNPP’s activities.<sup>89</sup> Even from this cursory glance, it is clear that there is some merit to the application of strict liability to BNPP’s activities that the court should not have so quickly dismissed.

#### **IV. Conclusion**

In the days after al Qaeda’s attacks on September 11, 2001, President Bush issued an executive order prohibiting any American transactions with entities linked to terrorism.<sup>90</sup> In his remarks on the order, the President stated, “We will starve the terrorists of funding, turn them against each other, root them out of their safe hiding places and bring them to justice.”<sup>91</sup> Although these remarks were issued three years after the terrorist attacks in question, they could not be more relevant to the circumstances in *Owens II*. Sudan was sheltering al Qaeda soldiers not only from bodily harm, but also from justice, as the terrorists continued to plot and kill from their Sudanese home.<sup>92</sup> BNPP knowingly funded the Sudanese with American dollars, and in doing so, intentionally violated the sanctions put in place to protect Americans.<sup>93</sup> Yet, the court unduly narrowed the paths of justice available to the victims of the 1998 attacks by inconsistently applying the ATA’s foundation of tort law. Additionally, in order to deprive the terrorists of funding, strict liability should be considered for banks that intentionally circumvent sanctions to fund state sponsors of terrorism. While the D.C. Circuit may still affirm this decision, the interests of justice warrant at least a

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85. RESTATEMENT (SECOND) OF TORTS § 520(c).

86. See *Owens II*, 235 F. Supp. 3d at 88.

87. RESTATEMENT (SECOND) OF TORTS § 520(e).

88. *Id.* at § 520(f).

89. *Owens II*, 235 F. Supp. 3d at 100.

90. *Bush: ‘We Will Starve the Terrorists’*, CNN.COM (Sept. 24, 2001 10:19AM), <http://edition.cnn.com/2001/US/09/24/ret.bush.transcript/index.html>.

91. *Id.*

92. See *Owens I*, 174 F. Supp. 3d at 280.

93. Amended Complaint, *supra* note 2, ¶ 77.

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more in-depth examination of whether the illegal provision of American money, which may have been used to murder Americans, is an abnormally dangerous activity.

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