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Angela A. Barkin

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COMMENTS

CORPORATE AMERICA—MAKING A KILLING: AN ANALYSIS OF WHY IT IS APPROPRIATE TO HOLD AMERICAN CORPORATIONS WHO FUND TERRORIST ORGANIZATIONS LIABLE FOR AIDING AND ABETTING TERRORISM

I. INTRODUCTION

American people must understand this war on terrorism will be fought on a variety of fronts, in different ways. . . . We will starve the terrorists of funding, turn them against each other, rout them out of their safe hiding places and bring them to justice. . . . We have developed the international financial equivalent of law enforcement's "Most Wanted" list. And it puts the financial world on notice. *If you do business with terrorists, if you support or sponsor them, you will not do business with the United States of America. . . . Money is the lifeblood of terrorist operations. Today, we're asking the world to stop payment. . . .*¹

Al Manar is the network television station of Lebanon's Party of God, more commonly known as Hezbollah.² Al Manar enjoys tremendous influence in Lebanon and throughout the Middle East, as it reaches nearly 10 million viewers each day.³ According to Avi Jorisch, a Soref research fellow at the Washington Institute for Near East Policy, Al Manar's avowed purpose is "to wage psychological warfare."⁴ The station spews hatred for both Israel and the United States by encouraging and recruiting suicide bombers as it seeks to accomplish the goals of Hezbollah.⁵ Hezbollah is an Iranian-backed and Iranian-funded group which has been implicated in numerous terrorist attacks against primarily the United States and Israel.⁶ Some of these include the 1982 attack against the U.S. Marine barracks in Beirut, killing 241 Americans; the 1984 attack on the U.S. Embassy in Beirut, killing 12 Americans; and the 1994 attack on the Israeli Embassy and Jewish cultural

1. President George W. Bush, Address at The Rose Garden (Sept. 24, 2001) (emphasis added).

2. Avi Jorisch, *Hezbollah Hate With a U.S. Link: Subsidiaries' TV Ad Money Serves an Odious Goal*, L.A. TIMES, Oct. 13, 2002, at M5.

3. Richard Byrne, *Desperately Seeking Hezbollah* (Dec. 19, 2002), available at http://www.bostonphoenix.com/boston/news_features/other_stories/multipage/documents/02598656.htm (last visited Apr. 13, 2003) (on file with author).

4. *Id.*

5. *Id.*

6. Jorisch, *supra* note 2.

center in Buenos Aires, killing 85 people.⁷ Sheik Hassan Izz-Adin, a member of Hezbollah's political council and director of Hezbollah's media relations unit which directly oversees Al Manar, stated: "America will fall just like the Romans and the British. While it now controls the world, this will change. We cannot accept American domination and American terrorist actions."⁸ Furthermore, U.S. and European Intelligence officials and terrorism experts suggest that Hezbollah is "increasingly teaming up with al Qaeda on logistics and training for terrorist operations," including the "coordination on explosives and tactics training, money laundering, weapons smuggling and acquiring forged documents."⁹ The United States placed Hezbollah on its terrorist list in 1995.¹⁰

Even more shocking than the Hezbollah terrorist regime against America and Israel is the financial support that Al Manar enjoys from Lebanese subsidiaries of major American corporations, including PepsiCo, Proctor & Gamble and Western Union.¹¹ These corporations, among others, buy air time from Al Manar to advertise their products in the Middle East. The U.S. has placed all branches of Hezbollah under a ban, including its media network, because it believes that even Hezbollah's "charitable wings are 'fronts' to funnel money to support terrorism."¹² The American government recognizes the threat to America itself and America's ally, Israel, and to Middle Eastern peace. The American government has waged financial war against such terrorist groups.¹³ And yet, major American corporations, through their Middle Eastern subsidiaries, actively finance this terrorist group by paying to advertise their products via Al Manar.

This comment discusses whether it is appropriate to hold corporations liable for aiding and abetting terrorism through the financing of terrorist organizations. Part II discusses the criminal liability imposed on individuals or entities that fund terrorist groups. It does so by detailing statutory provisions as well as case law. Part III explores the concept of holding corporations civilly liable for aiding and abetting terrorism. Specifically, it will discuss corporate liability for aiding and abetting terrorism under the Seventh Circuit's

7. *Id.* See also Dana Priest & Douglas Farah, *Terror Alliance Has U.S. Worried; Hezbollah, Al Qaeda Seen Joining Forces*, WASH. POST, June 30, 2002, at A01 (discussing the following: the 1983 attack on the U.S. Embassy in Beirut, where a Hezbollah suicide bomber killed 63 people, including 17 Americans and six of the CIA's top Middle East experts; the suicide bombing six months later that killed 58 French and 241 American servicemen, the largest peacetime loss for the U.S. military; the 1996 attack on Khobar Towers (U.S. military housing complex in Saudi Arabia) for which Hezbollah's intelligence officer, Imad Mughniyah, was implicated, killing 19 U.S. servicemen; and the mid-1980s kidnapping of 18 Americans in Lebanon, three of whom were executed).

8. Jorisch, *supra* note 2.

9. Priest & Farah, *supra* note 7.

10. Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

11. Jorisch, *supra* note 2.

12. Byrne, *supra* note 3.

13. President George W. Bush, Address at The Rose Garden (Sept. 24, 2001).

analysis in *Boim v. QLI and HLF*¹⁴, and the Ninth Circuit's analysis of corporate liability for aiding and abetting international human rights violations in *Doe v. Unocal*¹⁵. Finally, part IV will apply both analyses to the issue of this comment, namely whether American corporations can be held liable for aiding and abetting terrorism when they give money to terrorist organizations by advertising on their networks. It will also thoroughly discuss the urgent policy considerations requiring courts to hold these corporations liable for aiding and abetting terrorism, as demonstrated by a trend of cases as well as the national and international war against terrorism.

II. CRIMINAL LIABILITY FOR PROVIDING FUNDS TO TERRORISTS

The United States prohibits individuals and corporations from funding terrorism under statutory provisions and case law. Moreover, along with violating national law, providing such funds to terrorist groups constitutes a violation of international law.

A. Statutory Provisions

Title 18 of the United States Code provides that a federal cause of action exists against anyone who “provides material support or resources . . . knowingly *or* intending that they are to be used in preparation” for an act of terrorism.¹⁶ This crime is punishable by fines or imprisonment for not more than 15 years or both; however, if the death of any person results from the terrorist act, imprisonment may be for any number of years or for life.¹⁷ It is significant to note that Congress intended this to apply to any individual or entity that knows *or* intends for its funds to be used to carry out terrorist acts. Thus, knowledge that one's funds will be used for the preparation or carrying out of a terrorist act, without intent that the funds be used for such purpose, is sufficient to hold the provider of the funds criminally liable. Likewise, 18 U.S.C.S. § 2339B maintains that:

Whoever, within the United States or subject to the jurisdiction of the United States, *knowingly provides* material support or resources to a foreign terrorist organization . . . shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.¹⁸

Here, Congress completely removed the requirement of intent, requiring only that a provider know the funds are going to a terrorist organization.

14. 291 F.3d 1000 (2002).

15. 2002 WL 31063976 (9th Cir. 2002).

16. 18 U.S.C.S. § 2339A (2002) (emphasis added).

17. 18 U.S.C.S. § 2339A (2002).

18. 18 U.S.C.S. § 2339B (2002) (emphasis added).

Criminal liability for funding terrorist organizations will therefore lie with any person or organization that knowingly provides material support to terrorists.¹⁹ Knowledge that the funds are going to a terrorist organization is therefore sufficient for criminal liability.

Congress explains why knowledge alone, without intent, is sufficient for liability in its statutory findings: "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."²⁰ The U.S. Court of Appeals for the Ninth Circuit furthers this rationale in its decision not to allow plaintiffs to donate money to the charitable branch of two designated terrorist organizations: "[m]aterial support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used."²¹ The intent of the provider of funds exercises no influence on the terrorists' use of the funds and therefore has no bearing on the issue of liability.

Furthermore, the United States is a Party to the International Convention on the Suppression of the Financing of Terrorism, which prohibits the provision of financial assistance to terrorist organizations.²²

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used *or in the knowledge* that they are to be used, in full or in part, in order to carry out . . . [an act of terrorism or] any other act intended to cause death or serious bodily injury to a civilian, or to any other person. . . .²³

This Convention applies to direct involvement or complicity in the provision of funds to terrorists, with the intention or knowledge that any part of the funds may be used for terrorist acts. Knowledge alone, without intent, is therefore sufficient for liability under the Convention.

This is likely due in large part to the Parties "[b]eing convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of

19. 18 U.S.C.A. § 2339B (2002); 18 U.S.C.S. § 2339A (defining "material support or resources" as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets," but does not include humanitarian assistance to persons not directly involved in such violations).

20. Prohibition on International Terrorist Fundraising; Congressional Findings and Purpose Act, *reprinted in* Antiterrorism and Effective Death Penalty Act of 1996, § 301(a)(7), Pub. L. No. 104-132, 110 Stat. 1214, 1247.

21. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000).

22. International Convention on the Suppression of the Financing of Terrorism, Jan. 10, 2000, 39 I.L.M. 268, *adopted by* the General Assembly Dec. 9, 1999.

23. *Id.* at arts. 11(a) and (b) (emphasis added).

its perpetrators.”²⁴ The provision of such funds is an offense whether or not the funds are actually used to carry out the proscribed act.²⁵

B. Case Law

United States courts have upheld the constitutionality of 18 U.S.C.S. §§ 2339A and 2339B. First, in *Humanitarian Law Project v. Reno*, the Ninth Circuit Court of Appeals held both provisions to be constitutional and within the federal government’s power to enact.²⁶ In that case, the plaintiffs desired to give support to the nonviolent, humanitarian and political activities of a designated terrorist organization. They therefore sought a preliminary injunction barring enforcement of 18 U.S.C.S. §§ 2339A and 2339B against them.²⁷ The plaintiffs claimed both provisions were unconstitutional because they criminalize the giving of support to an organization regardless of whether the donor intends to further the organization’s unlawful activities.²⁸ The Ninth Circuit rejected the plaintiffs’ claims, explaining that “there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. . . . [n]or, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.”²⁹ Furthermore, the court rejected the plaintiffs’ attack on the provisions because they prohibit the provision of material support even if the donor does not have the intent to aid in the unlawful activity:

[m]aterial support given to a terrorist organization can be used to promote the organization’s unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used. We therefore do not agree . . . that the First Amendment requires the government to demonstrate a specific intent to aid an organization’s illegal activities before attaching liability to the donation of funds.³⁰

The court found that because the restriction of support was aimed specifically at stopping aid to terrorist groups, the federal government had the power to enact such laws and that much latitude would be given to the government in “selecting the means to bring about the desired goal.”³¹ The court then noted Congress’ explicit finding in 18 U.S.C.S. § 2339B, that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that con-

24. *Id.* at Intro.

25. United Nations Summary of the International Convention on the Suppression of the Financing of Terrorism (Dec. 9, 1999), available at <http://untreaty.un.org/English/ter-sumen.htm#4> (last visited Sept. 21, 2003).

26. *Humanitarian Law Project*, 205 F.3d at 1135.

27. *Id.* at 1133.

28. *Id.*

29. *Id.*

30. *Id.* at 1134.

31. *Id.* at 1136.

duct.”³² From this, the court notes, “it follows that all material support given to such organizations aids their unlawful goals,” either because the organization uses the funds for terrorist activities, or because the contribution frees up other monies to be used for terrorist activities.³³ Therefore, the Ninth Circuit upheld Title 18 U.S.C.S. §§ 2339A and 2339B as constitutional and within the federal government’s power to enact.

Moreover, the Ninth Circuit’s analysis and treatment of Title 18 U.S.C.S. §§ 2339A and 2339B was adopted by the Seventh Circuit in 2002.³⁴ There, plaintiffs argued the provisions would “chill legitimate fundraising for humanitarian purposes,” and asked the court to reject the Ninth Circuit’s holding in *Humanitarian Law Project v. Reno*.³⁵ The Seventh Circuit refused to do so, noting the government’s “paramount” interest in preventing terrorism and upholding 18 U.S.C.S. §§ 2339A and 2339B as constitutional.³⁶ Thus, case law demonstrates the validity and constitutionality of the criminal statutes regarding the provision of funds to terrorist organizations, even though the statutes do not require an intent to further terrorist activities for criminal liability.

III. CIVIL LIABILITY FOR PROVIDING FUNDS TO TERRORISTS

Along with imposing criminal liability for funding terrorists, Title 18 of the United States Code provides civil remedies for victims of international terrorism. Moreover, recent case law demonstrates that an individual or corporation that provides funds to a terrorist organization may not only be held criminally liable for providing the funds, but may also be held civilly liable for aiding and abetting terrorism.

A. Statutory Provisions

Title 18 U.S.C.S. § 2333 specifically provides civil remedies for victims of international terrorism:

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.³⁷

32. *Id.* (quoting Antiterrorism and Effective Death Penalty Act of 1996, § 301(a)(7), Pub. L. No. 104-132, 110 Stat. 1214, 1247 [hereinafter AEDPA]).

33. *Humanitarian Law Project*, 205 F.3d at 1136.

34. *Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1025 (7th Cir. 2002).

35. *Id.*

36. *Id.* at 1027.

37. 18 U.S.C.S. § 2333(a) (2003).

International terrorism includes activities that “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.”³⁸ Conduct giving rise to criminal liability under 18 U.S.C.S. §§ 2339A and 2339B, namely funding terrorist organizations, has indeed been classified as conduct that “involve[s] violent acts or acts dangerous to human life,” and may therefore meet the definition of international terrorism under 18 U.S.C.S. § 2333.³⁹ Furthermore, while funding itself is not sufficient to constitute an act of international terrorism under 18 U.S.C.S § 2331, funding that meets the definition of aiding and abetting terrorism does in fact create liability under §§ 2331 and 2333.⁴⁰

B. Case Law

Current case law suggests that corporations who provide funds to terrorist organizations by advertising on their networks may be civilly liable for aiding and abetting terrorism. Such corporate liability will be discussed below, relying primarily on the Seventh Circuit’s decision in *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development* and the Ninth Circuit’s decision in *Doe v. Unocal*.

1. Aiding and Abetting Analysis Under *Boim v. QLI* and *HLF*

In a case of first impression, the Seventh Circuit discussed the liability of defendant corporations who supplied funds to the terrorists responsible for the death of David Boim, Plaintiffs’ son.⁴¹ The court found two theories of liability by which Plaintiffs could proceed, namely, that conduct giving rise to criminal liability under 18 U.S.C.S. § 2339B may meet the definition of international terrorism as used in 18 U.S.C.S. § 2333, and funding that meets the definition of aiding and abetting an act of terrorism creates civil liability under 18 U.S.C.S §§ 2331 and 2333.⁴²

Seventeen-year-old David Boim held dual citizenship in the United States and Israel. The Boims were living in Israel in 1996, where David was studying at a yeshiva.⁴³ On May 13, 1996, David was waiting with fellow students at a bus stop when he was murdered by two members of the military wing of Hamas.⁴⁴ The Boims describe Hamas as “an extremist, Palestinian

38. 18 U.S.C.S. § 2331(1)(A) (2003).

39. *Boim*, 291 F.3d at 1015.

40. *Id.* at 1028.

41. *Id.* at 1001.

42. *Id.* at 1028.

43. *Id.* at 1002.

44. *Id.* Both men responsible for the murder were apprehended and then released pending trial. One man died in a suicide bomb attack, killing five people and injuring 192 others. The other confessed at trial to his participation in David’s murder and was sentenced to ten years’ imprisonment. *Id.*

militant organization that seeks to establish a fundamentalist Palestinian state."⁴⁵ Hamas has two branches, one political and one military. It seeks to advance its political objectives through acts of terrorism and acts to prevent Middle East peace by violently attacking civilians.⁴⁶ Hamas enjoys a "global presence," as terrorist operatives in Gaza and the West Bank receive their instructions, funds, weapons and practical support for their terrorist acts from Hamas organizers throughout the world. In fact, the Boims allege that Hamas has command and control centers in the United States, Britain and several Western European countries.⁴⁷ Hamas was designated as a terrorist organization in 1995 by Executive Order.⁴⁸

The Boims allege that Hamas' military wing depends on foreign contributions, and that defendants Quaranic Literacy Institute (QLI) and the Holy Land Foundation for Relief and Development (HLF), are the main fronts for Hamas in the United States.⁴⁹ In other words, it is alleged that QLI and HLF mask their mission of raising money for Hamas in support of terrorist activities with a humanitarian, charitable front.⁵⁰ The Boims allege such monies were used to buy terrorist materials, such as vehicles, machine guns and ammunition, which were used to kill their son.⁵¹

The Seventh Circuit held that two theories of liability exist against the corporations who allegedly funded Hamas, the terrorist organization responsible for the death of David Boim. First, criminal liability under 18 U.S.C.S §§ 2339A and 2339B may meet the civil definition of international terrorism. Second, funding that meets the definition of aiding and abetting creates civil liability for injuries incurred in the terrorist acts.

In its first theory of liability, the Seventh Circuit held that "Congress undoubtedly intended that the persons providing financial support to terrorists should also be held criminally liable for those violent acts."⁵² The court noted sections 2339A and 2339B further Congress' goal to cut off the flow of money to terrorists by imposing criminal liability on those who give financial support to terrorist organizations.⁵³ The court found no reason, textu-

45. *Id.*

46. *Id.*

47. *Id.*

48. Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

49. *Boim*, 291 F.3d at 1003.

50. *Id.* ("QLI is an Illinois not-for-profit corporation that purports to translate and publish sacred Islamic texts, but the Boims believe it is also engaged in raising and laundering money for Hamas." *Id.* QLI employed one defendant, Salah, who is the admitted United States based leader of the military branch of Hamas. Salah is named on a list of Specially Designated Terrorists compiled by the U.S. Treasury Department's Office of Foreign Assets Control. *Id.* HLF is also a non-profit corporation whose purported mission is to fund humanitarian relief. HLF's director has acknowledged providing money to Hamas, and the Boims allege this is HLF's true mission.) *Id.*

51. *Id.* at 1004.

52. *Id.* at 1014 (further noting that the Congressional record for section 2333 "indicates an intention to cut off the flow of money in support of terrorism generally").

ally, structurally, or logically to construe civil liability, imposed by section 2333, more narrowly than its corresponding criminal provisions:

Because Congress intended to impose criminal liability for funding violent terrorism, we find that it also intended through sections 2333 and 2331 (1) to impose civil liability for funding at least as broad a class of violent terrorist acts. If the plaintiffs could show that HLF and QLI violated either section 2339A or section 2339B, that conduct would certainly be sufficient to meet the definition of “international terrorism” under sections 2333 and 2331.⁵⁴

Therefore, acts sufficient to constitute criminal liability for financing terrorism would be sufficient to meet the definition of “international terrorism” under 18 U.S.C.S. §§ 2331 and 2333.

The Seventh Circuit also found that corporations could be held civilly liable for acts of international terrorism through an aiding and abetting theory. Aiding and abetting liability extends liability beyond those who actually engage in the proscribed conduct to reach those who do not engage in that conduct at all, but who give a certain degree of aid to those who do.⁵⁵ In *Boim*, the court held that aiding and abetting liability was available for 18 U.S.C.S. §§ 2331 and 2333, despite the fact that the statute did not expressly provide for such.⁵⁶ The court expressed four reasons for allowing this.

First, section 2333 involves an express right of action for plaintiffs who are injured by reason of an act of international terrorism, rather than an implied right of action. Courts are much more likely to infer Congressional intent to extend aiding and abetting liability when such an express right exists.⁵⁷ When only an implied right of action exists, courts are reluctant to pile inference upon inference.⁵⁸ Second, the court found that Congress, in the terms and history of section 2333, expressed its intent to apply general tort law principals.⁵⁹ Such principles include aiding and abetting liability.⁶⁰ Third, Congress expressed its intent in section 2333 to “render civil liability at least as extensive as criminal liability in the context of the terrorism

54. *Id.* at 1015.

55. *Id.* at 1018.

56. *Id.* at 1020. (Defendants argued that aiding and abetting liability was not an option for §§ 2331 and 2333 because the Supreme Court held in *Central Bank v. First International Bank* that a private plaintiff could not maintain an aiding and abetting suit under section 10(b) of the Securities Exchange Act of 1934 since such liability was not covered by the statute); see *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177-78, 183-84 (1994) (developing a statute-by-statute approach to determine whether Congress intended to extend aiding and abetting liability to a civil statute).

57. *Id.* at 1019-1020 (stating “[i]t is not much of a leap to conclude that Congress intended to extend section 2333 liability beyond those persons directly perpetrating acts of violence. . . . [T]he statute itself defines international terrorism so broadly—to include activities that ‘involve’ violent acts”).

58. *Id.* at 1019.

59. *Id.*

cases.⁶¹ Criminal liability attaches to aiders and abettors of terrorism under 18 U.S.C. § 2339B,⁶² and therefore civil liability should attach as well.

Finally, Congress' purpose to thwart financing of terrorism cannot be met unless liability attaches beyond the persons directly involved in the acts of terrorism: "if we failed to impose liability on aiders and abettors who knowingly and intentionally funded acts of terrorism, we would be thwarting Congress' clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence."⁶³ Moreover, the court notes that "there would not be a trigger to pull or a bomb to blow up" without the necessary resources to acquire such weapons of terrorism.⁶⁴ Thus, the Seventh Circuit ruled that aiding and abetting liability could be attached to sections 2331 and 2333. However, in an unusual twist to its general purpose, the court then adds another requirement: for a defendant to be liable for aiding and abetting terrorism, there must be intent to further the unlawful act. The court states the Plaintiffs must "prove that the defendants knew of Hamas' illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities."⁶⁵

2. Aiding and Abetting Analysis Under *Doe v. Unocal*

The Ninth Circuit specifically addressed corporate liability for aiding and abetting human rights violations in *Doe v. Unocal*.⁶⁶ Under the Ninth Circuit's analysis of aiding and abetting, American corporations may be liable for aiding and abetting international terrorism through advertising on terrorist-owned networks.

In 1988, the Myanmar Military established a state owned company, Myanmar Oil and Gas, to produce and market the nation's oil and gas resources.⁶⁷ Four years later, in 1992, Myanmar Oil licensed a French oil company, Total, to produce, transport, and market natural gas from deposits off the coast of Myanmar.⁶⁸ This was referred to as "the Project."⁶⁹ Also in 1992, Unocal acquired a twenty-eight percent interest in the Project from Total.⁷⁰ Unocal set up a subsidiary, the Unocal Myanmar Offshore Company, in Myanmar to manage its gas production interest in the Project and another subsidiary, the Unocal International Pipeline Corporation, to manage

61. *Id.*

62. 18 U.S.C. § 2339B (2003) (creating liability for aiding and abetting violations of any other criminal provisions).

63. *Boim*, 291 F.3d at 1021.

64. *Id.*

65. *Id.* at 1023.

66. *See generally Doe v. Unocal*, 2002 WL 31063976 (9th Cir. 2002).

67. *Unocal*, 2002 WL 31063976, at *1.

68. *Id.*

69. *Id.*

70. *Id.*

its gas transportation interest in the Project.⁷¹

It was undisputed that the Myanmar Military provided services, such as security, for the Project, and that Unocal was aware of this.⁷² Unocal was likewise aware that the Myanmar Military was allegedly committing human rights violations in connection with the Project.⁷³ The Plaintiffs filed suit against Unocal, alleging its civil liability for aiding and abetting the human rights violations.⁷⁴

The Ninth Circuit provided an extensive analysis of third party liability in its *Unocal* decision. The relevant theories from that analysis for holding American corporations liable for aiding and abetting international terrorism are federal common law tort principles and international law.

a. Federal Common Law Tort Principle: Reckless Disregard

The Ninth Circuit recognized three federal common law tort principles by which Unocal could be held liable for aiding and abetting the human rights violations: joint venture liability,⁷⁵ agency liability⁷⁶ and reckless dis-

71. *Id.*

72. *Id.* at *2. Several documents demonstrate Unocal's understanding and awareness of the Myanmar Military's provision of security: a 1995 Unocal memorandum stated that "[f]our battalions of 600 men each will protect the [pipeline] corridor" and "[f]ifty soldiers will be assigned to guard each survey team." *Id.* Likewise, a 1995 Unocal briefing document states that "[a]ccording to our contract, the government of Myanmar is responsible for protecting the pipeline." *Id.* (emphasis omitted). Again, a 1995 cable from the U.S. Embassy in Myanmar reported that Unocal's on-site representative "stated forthrightly that the companies have hired the Burmese military to provide security for the project." *Id.* (emphasis omitted). Finally, Unocal's on-site representative indicated that "Total/Unocal uses [aerial photos, precision surveys, and topography maps] to show the [Myanmar] military where they need helipads built and facilities secured." *Id.* at *3.

73. *Id.* at *4. Unocal was made aware by its own consultants and partners in the Project, the Control Risk Group. *Id.* Furthermore, Unocal's Vice President of International Affairs and Unocal's representative expressed knowledge of the forced labor. *Id.*

74. *Id.* at *3. Plaintiffs alleged that "the Myanmar Military forced them, under threat of violence, to work on and serve as porters for the Project." *Id.* Plaintiffs further alleged that "the Myanmar Military subjected them to acts of murder, rape, and torture." *Id.* at *4. One woman alleged that she and her baby were thrown into a fire after her husband tried to escape, severely injuring her and killing her baby. *Id.* Other villagers spoke of the summary executions of those who refused to work or who were too weak to work effectively. *Id.*

75. 46 AM. JUR. 2D, *Joint Ventures* § 1 (1994).

A joint venture is frequently defined as an association of persons, with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation, or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise.

Id. See also 46 AM. JUR. 2D, *Joint Ventures* § 41 (1994) (requiring both parties to be able to act as both principal and agent), and 46 AM. JUR. 2D, *Joint Ventures* § 16 (2002) (explaining that co-venturers act as both principals and agents because they mutually share the right to control and manage the business).

regard. Due to the specific confines of this comment, analyzing American corporations' liability for aiding and abetting terrorism by advertising on terrorist-owned networks, the distant nature of the relationship between the American corporations and the terrorist organizations likely renders joint liability and agency liability irrelevant. Reckless disregard, on the other hand, provides a strong basis for holding the American corporations liable for aiding and abetting terrorism. As such, this comment will only review the court's analysis of the federal common law tort principle of reckless disregard.

Two theories of recklessness or reckless disregard exist under federal common law.⁷⁷ The first is civil-law recklessness, or "objective recklessness."⁷⁸ The United States Supreme Court has stated that "[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."⁷⁹ The second theory of reckless disregard is criminal law's "subjective recklessness," or "willful recklessness."⁸⁰ This doctrine requires "actual knowledge of a substantial risk which the defendant subsequently disregards."⁸¹ "Deliberate indifference" has also been found to constitute willful recklessness. In *Farmer*, the Supreme Court noted that "[w]ith deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness."⁸²

Finally, the United States Supreme Court has stated that intent is irrelevant under reckless disregard: "[p]roof of even willful recklessness does not require proof of intent; it requires only that a defendant have acted in conscious disregard of known dangers."⁸³ Likewise, in *Medina v. City of Den-*

76. See 3 AM. JUR. 2D, *Agency* § 1 (2002) (stating that an agency relationship is established when the parties create "a fiduciary relationship by which a party confides to another the management of some business to be transacted in the former's name or on his or her account, and by which such other assumes to do the business and render an account of it") and 3 AM. JUR. 2D, *Agency* § 1 (2002) (explaining that an agency relationship is one in which the agent acts in the principal's place).

77. *Unocal*, 2002 WL 31063976, at *34.

78. *Id.*

79. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (holding that a prison official could not be liable for "denying the inmate humane conditions of confinement unless the officials knew of and disregarded an excessive risk to inmate health or safety . . ." when an inmate alleged that prison officials violated his 8th Amendment rights by their "deliberate indifference to his safety") (citing *W. Keeton, et. al., PROSSER AND KEETON ON LAW OF TORTS* § 34 (5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS* § 500 (1965)).

80. *Unocal*, 2002 WL 31063976, at *34.

81. *Id.* (citing *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 (6th Cir. 2002)).

82. *Farmer*, 511 U.S. at 836 (stating that "[i]t is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.").

83. *Unocal*, 2002 WL 31063976, at *35.

ver, the court stated:

reckless intent does not require that the actor intended to harm a particular individual; reckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences. Thus, reckless intent involves *disregard of a particular risk rather than intent to cause a particularized harm*.⁸⁴

In *Unocal*, the Ninth Circuit found that, assuming the plaintiffs' factual allegations were true, Unocal could be liable for aiding and abetting the human rights violations under the subjective or objective standards by choosing to use the Myanmar Military in connection with the Project.⁸⁵ This is true because Unocal had actual knowledge that the Myanmar Military would likely use forced labor and engage in human rights abuses if it provided the security for the Project. And despite ample warnings and acknowledgements of the risk, "Unocal recklessly disregarded that known risk, determined to use and in fact did use the services of that military to perform pipeline-related tasks, and thereby set in motion international law abuses that were foreseeable to Unocal."⁸⁶

b. International Law

The Ninth Circuit found that Unocal could also be liable for aiding and abetting human rights violations under principles of international law. Those principles "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."⁸⁷ International law is an appropriate avenue to address because "[i]t is . . . well settled that the law of nations is part of federal common law."⁸⁸ Among the various sources for ascertaining international law, the statutes and recent decisions of the In-

84. *Medina v. City of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (granting summary judgment in favor of police who recklessly pursued a felon and injured Plaintiff, not because reckless behavior was not a means for liability but because the police were entitled to qualified immunity) (quoting *Archuleta v. McShan*, 897 F.2d 495, 499 n.8 (10th Cir. 1990)) (emphasis added).

85. *Unocal*, 2002 WL 31063976, at *35.

86. *Id.* at *34.

87. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (emphasis added).

88. *In Re Estate of Ferdinand E. Marcos Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (plaintiff's son was tortured and killed by military personnel acting under the authority of the President of the Philippines); see also *Doe v. Unocal*, 2002 WL 31063976, at *12 (9th Cir. 2002) (stating four reasons for applying international law: (1) "the needs . . . of the international system" are better served by applying international law, rather than national law; (2) "the relevant policies of the forum" are better served by looking at different areas of law, including international law; (3) it is consistent with case law to apply international law, and it is similar to the Restatement Second of Torts; and (4) it satisfies the "basic polic[y] . . . to provide tort remedies for violations of international law").

ternational Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are particularly relevant.⁸⁹

To be liable under an aiding and abetting theory, the International Tribunals require the demonstration of both the *actus reus* and *mens rea* elements. The ICTY held that “the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”⁹⁰ The ICTY clarified, holding that the “assistance need not constitute an indispensable element, that is, a *condition* [sic] *sine qua non* for the acts of the principal.”⁹¹ Instead, the acts must only “make a significant difference to the commission of the criminal act[s] by the principal.”⁹² Similarly, the ICTR defines the *actus reus* of aiding and abetting as “all acts of assistance in the form of either physical or moral support” that “substantially contribute to the commission of the crime.”⁹³

The second element necessary for aiding and abetting is *mens rea*. To meet this element, the International Criminal Tribunal for the former Yugoslavia requires actual or constructive (i.e. reasonable) “knowledge that [the] actions will assist the perpetrator in the commission of the crime.”⁹⁴ It is therefore “not necessary . . . to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime.”⁹⁵ Furthermore, it is not even necessary that the aider and abettor knows of the exact crime that the principal intends to commit. Instead, the ICTY held that if the defendant “is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”⁹⁶ Likewise, the ICTR finds the *mens rea* element satisfied if the accused “knew of the assistance he was providing in the commission of the principal offence.”⁹⁷ Like the ICTY, the ICTR does not require one to have the intent to commit the

89. *Unocal*, 2002 WL 31063976, at *12 (quoting *Mechinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002)).

90. *Prosecutor v. Furundzija*, IT-95-17/1-T, ¶ 235, *reprinted in* 38 I.L.M. 317 (1999), *reproduced/reformatted on* website for the International Criminal Tribunal for the Former Yugoslavia (Feb. 10, 1999) *available at* <http://www.un.org/icty> (last visited Oct. 3, 2003) (Defendant, a leader of the Croatian Defense Council Military Police, was liable for aiding and abetting his officers' interrogation methods, which included torture to extract information).

91. *Id.* ¶ 209; *see also* *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, ¶ 391 (Feb. 22, 2001), *available at* <http://www.un.org/icty/foca/trialc2/judgement/index.htm> (last visited Oct. 3, 2003).

92. *Prosecutor v. Furundzija*, IT-95-17/1-T, ¶ 233, *reprinted in* 38 I.L.M. 317 (1999).

93. *Prosecutor v. Musema*, ICTR-96-13-A, ¶ 126 (Jan. 27, 2000), *available at* <http://www.ictor.org> (last visited Oct. 3, 2003).

94. *Prosecutor v. Furundzija*, IT-95-17/1-T, ¶ 245, *reprinted in* 38 I.L.M. 317 (1999).

95. *Id.*

96. *Id.*

97. *Prosecutor v. Musema*, ICTR-96-13-A, ¶ 180 (Jan. 27, 2000), *available at*

principal offense.⁹⁸ Instead, it is sufficient if the aider and abettor “knew or had reason to know” that the principal had the intent to commit the offense.⁹⁹

Thus, under international law, one may be liable for aiding and abetting a principal offender by providing any type of assistance with the knowledge of the principal’s intent to commit the offense. Knowledge alone is sufficient for aiding and abetting liability. Intent to commit the act, or intent for the principal to commit the act, is unnecessary.

Because the standards set forth above by the ICTY and the ICTR are similar in nature to the standard for aiding and abetting under domestic tort law, the Ninth Circuit felt justified in applying it. The Restatement of Torts states: “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”¹⁰⁰

In *Doe v. Unocal*, the Ninth Circuit found that the *actus reus* element of aiding and abetting was satisfied, assuming Plaintiff’s allegations were true, based on Unocal’s practical assistance to the Myanmar Military’s use of forced labor. This assistance took the form of hiring the Military to provide security; hiring the Military to build infrastructure along the pipeline; and Unocal’s use of photos, surveys and maps to show the Military where to provide such security and build such infrastructures.¹⁰¹ The court further noted that Unocal’s assistance had a “substantial effect” on the use of forced labor which “most probably would not have occurred in the same way” without someone hiring the military and showing them where to provide security and build infrastructures.¹⁰²

Likewise, the court found a reasonable fact finder could conclude that Unocal met the *mens rea* element of aiding and abetting (actual or constructive knowledge that their actions would assist the commission of the crime). The evidence indicates that Unocal knew the Military was using forced labor.¹⁰³ Moreover, Unocal knew or should have known that its assistance in hiring, paying and instructing the Military about where to build and provide security “would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor.”¹⁰⁴ Therefore, under principals of international law and tort law, Unocal could be liable for aiding and abetting the Myanmar Military in its commission of human rights violations. In the same way, American corporations who know, or should know their funds are going to a terrorist organization, should be liable for aiding and abetting terrorism.

98. *Id.*

99. *Id.* ¶ 182.

100. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

101. *Unocal*, 2002 WL 31063976, at *14.

102. *Id.*

103. *Id.*

104. *Id.*

IV. HOLDING U.S. CORPORATIONS LIABLE FOR PROVIDING FUNDS TO TERRORISTS

As described in the introduction of this comment, American corporations, including PepsiCo, Proctor & Gamble, and Western Union, currently allow Lebanese subsidiaries of their companies to advertise their products on Al Manar, the official media network of the international terrorist organization, Hezbollah.¹⁰⁵ This necessarily entails payment from the American corporations to Hezbollah's media network,¹⁰⁶ which ultimately means that U.S. corporations are providing funds to a known terrorist organization. Corporations, such as PepsiCo, Proctor & Gamble and Western Union, who fund terrorist organizations by choosing to advertise their products on terrorist television, should be held liable for aiding and abetting international terrorism.

A. Liability Under the Boim Analysis

As discussed in detail above, the Seventh Circuit held that a defendant could be civilly liable for aiding and abetting terrorism if the defendant knew of the illegal activities, the defendant engaged in some act of helping the illegal activities, and the defendant desired to help those activities succeed.¹⁰⁷ The first and second requirements for aiding and abetting terrorism are easily fulfilled. While the third requirement, a desire or intent for the terrorist activity to succeed, may not be present, that requirement is entirely unfounded and misplaced, as will be discussed below.

First, the American corporations must know of the illegal activities. Hezbollah was listed as a designated terrorist organization in 1995.¹⁰⁸ Additionally, Hezbollah and its media network, Al Manar, have become nationally and internationally known in their attacks on American and Israeli citizens. The American corporations, therefore, had sufficient information regarding Hezbollah to know of its terrorist activities.

Second, the corporations must engage in some act of helping the illegal activities. The American corporations are providing funds to Hezbollah. As Congress noted: "[f]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution* to such an organization *facilitates that conduct*."¹⁰⁹ Thus, the corporations indeed aid the illegal activities by giving Hezbollah any amount of money, for whatever pur-

105. Jorisch, *supra* note 2.

106. *Id.* ("Why are local Lebanese subsidiaries of major American corporations—like PepsiCo, Proctor & Gamble and Western Union—lending comfort and support to terrorists by advertising on Hezbollah television?")

107. *Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1023 (7th Cir. 2002).

108. Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

109. AEDPA, Pub. L. No. 132, § 301(a)(7), 110 Stat. 1214, 1247 (1996) (emphasis added).

pose. Even if the corporations' specific funds are not used to further terrorist activities, their funds free up other funds to be used for such purposes.

Third, the Seventh Circuit would require the corporations to intend to further the unlawful act in order to be liable for aiding and abetting terrorism. This requirement is more than questionable; it is, in fact, rather perplexing. If, as the court noted in *Boim*, Congress intended to impose civil liability upon the same people it imposed criminal liability upon for financing terrorists,¹¹⁰ the court should not place a higher requirement for civil liability than that required for criminal liability. Intent, therefore, should not be required for civil liability when it is not required for criminal liability. The fact that the court did require intent for civil liability demonstrates that it likely misread sections 2339A and 2339B: "Congress has made clear . . . through the criminal liability imposed in sections 2339A and 2339B, that even small donations made *knowingly and intentionally* in support of terrorism may meet the standard for civil liability in section 2333."¹¹¹ 18 U.S.C.S. § 2339A says "knowing *or* intending," and section 2339B says "knowingly provides" material support.¹¹² The court therefore either misread those sections, mistaking the "or" for an "and," or it completely contradicted its prior statement indicating that civil liability should be imposed upon the same people criminal liability should be imposed upon. Either way, the requirement of intent has no rational place or purpose in civil liability for aiding and abetting terrorism.

Moreover, when a funder has the knowledge that his money is going into the hands of terrorists and therefore could be used to fund terrorist activities, but does not *intend* for his money to be used that way, his conduct is no less culpable than one who does intend for his money to further terrorist activity. His funds are no less useful to the terrorist organization and the risk of mass death and terror becomes no less prevelant simply because that particular funder, though knowing how his funds could be used, did not want them to be used in such a manner. As the Ninth Circuit unequivocally stated, "[m]aterial support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used."¹¹³ Intent is therefore immaterial to the funding of terrorist organizations.

Placing intent into the requirements of civil liability for aiding and abetting is inconsistent with the criminal counterparts of 18 U.S.C.S § 2333, and with the very intent and purpose of Congress. Allowing a defendant to be

110. *Boim*, 291 F.3d at 1014 (stating "it would be counterintuitive to conclude that Congress imposed criminal liability in sections 2339A and 2339B on those who financed terrorism, but did not intend to impose civil liability on those same persons through section 2333").

111. *Id.* at 1015 (emphasis added).

112. See 18 U.S.C.S. § 2339A (2002) and 18 U.S.C.S. § 2339B (2002).

113. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2001) (holding that Plaintiffs could not provide material support to the charitable wings of two organizations that had been designated as foreign terrorist organizations).

free from liability when he clearly *knew* his funds were going to a terrorist organization, simply because a plaintiff cannot show the defendant *desired* for the terrorist activities to succeed, would indeed thwart Congress' goal of putting an end to the financing of terrorism. Knowledge that one's funds will be, or could be, used for terrorist activities is just as culpable as the intent for them to be used that way.

B. Liability Under the Unocal Analysis

The American corporations may also be liable for aiding and abetting terrorism by advertising on terrorist-owned networks based on the Ninth Circuit's analysis of corporate liability in *Unocal*. Liability in this case could be attached under both the reckless disregard and international law theories.

1. Federal Common Law Tort Principle: Reckless Disregard

As noted above, there are two types of reckless disregard. The first is civil law recklessness, or objective recklessness, when "a person . . . acts or (if the person has a duty to act) fails to act in the face of an unjustifiable high risk of harm that is either known or so obvious that it should be known."¹¹⁴ The second theory of reckless disregard is the criminal law's subjective recklessness, or willful recklessness,¹¹⁵ requiring "actual knowledge of a substantial risk which the defendant subsequently disregards."¹¹⁶ Finally, deliberate indifference has also been found to constitute willful recklessness.¹¹⁷

First, U.S. corporations who give money to terrorist owned networks in order to advertise their products on those networks are liable under civil law recklessness, or objective recklessness. These corporations are acting "in the face of an unjustifiable high risk of harm," namely that Hezbollah will use the funds provided by the corporations to further its acts of terrorism. There is no higher risk of harm than the loss of life itself. Moreover, even if the corporations successfully claimed they did not know Hezbollah owned Al Manar or that Hezbollah was an international terrorist organization, both facts are so obvious they should have been known. Indeed, Hezbollah has been officially designated as an international terrorist organization since 1995.¹¹⁸ Moreover, several newspapers have made the connection between Al Manar and Hezbollah and have made very clear Hezbollah's designation as a terrorist organization.¹¹⁹

Furthermore, it is likely that U.S. corporations have fulfilled subjective reckless disregard, as it is difficult to fathom how they would convince any

114. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

115. *Doe v. Unocal*, 2002 WL 31063976, at *34 (9th Cir. 2002).

116. *Id.* (citing *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 (6th Cir. 2002)).

117. *Farmer*, 511 U.S. at 836.

118. Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

119. See generally *Jorisch*, *supra* note 20, and *Byrne*, *supra* note 3.

reasonable fact finder they did not have actual knowledge of the risk that comes with giving money to a terrorist organization. Very few individuals, let alone the very corporations who advertise on Al Manar, have not heard of Hezbollah and do not know it as a terrorist organization. This is especially true with the recent publicity it has received for its alleged ties with Al Qaeda.¹²⁰

Finally, in their decision to advertise on Hezbollah television, thereby paying funds to Hezbollah, the U.S. corporations have acted with deliberate indifference to the risk created. They may not share Hezbollah's intent to commit terrorist acts against America and Israel, but in an effort to sell their products and increase profits, those corporations have chosen to advertise on Hezbollah television, regardless of the fact that their funds may be used for terrorist acts. Even if those particular funds are not specifically used for a terrorist attack, at the very least, their funds will make it possible for Hezbollah to free up other funds to finance an attack. Such deliberate indifference to so serious a risk surely rises to the level of willful recklessness,¹²¹ allowing for the corporations to be liable for aiding and abetting terrorism. This is particularly true when balanced against the corporations' real purpose for engaging the risk: to gain higher profits.

2. International Law

As noted above, international law requires two elements to be met for aiding and abetting. First, the *actus reus* element requires "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime,"¹²² or "acts of assistance in the form of either physical or moral support" that "substantially contribute to the commission of the crime."¹²³ Moreover, the "assistance need not constitute an indispensable element . . . for the acts of the principal."¹²⁴ U.S. corporations who advertise on Hezbollah television have fulfilled these definitions of *actus reus* because they have provided "practical assistance" in the form of money. Such assistance to terrorists has proven to be so substantial and effective that the United States, along with 131 other States around the world have signed

120. See generally Priest & Farah, *supra* note 7.

121. See *Farmer*, 511 U.S. at 836 (stating that "[i]t is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm . . . is the equivalent of recklessly disregarding that risk").

122. *Prosecutor v. Furundzija*, IT-95-17/1-T, ¶ 235, reprinted in 38 I.L.M. 317, 364 (1999), reproduced/reformatted on website of the International Criminal Tribunal for the Former Yugoslavia (Feb. 10, 1999) available at <http://www.un.org/icty> (last visited Oct. 3, 2003) (emphasis added).

123. *Prosecutor v. Musema*, ICTR-96-13-A, ¶ 126 (Jan. 27, 2000), available at <http://www.ictor.org> (last visited Oct. 3, 2003).

124. *Id.* ¶ 209; see also *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, ¶ 391 (Feb. 22, 2000), available at <http://www.un.org/icty/foca/trial2/judgement/index.htm> (last visited Oct. 3, 2003).

the International Convention on the Suppression of the Financing of Terrorism, which prohibits the provision of financial assistance to terrorist organizations. That Convention requires all Member States to enact and enforce legislation prohibiting individuals and entities from financing terrorist organizations.¹²⁵ The American corporations will therefore be unsuccessful in alleging their financial assistance to Hezbollah is not substantial. Moreover, the specific amount received by Hezbollah from the American corporations in relation to the amount of money received by Hezbollah from other sources is irrelevant in light of the fact that the assistance does not have to be “an indispensable element” to Hezbollah’s terrorist acts.¹²⁶

Second, a reasonable fact finder would likely find the *mens rea* element, “knowledge that [the] actions will assist the perpetrator in the commission of the crime,”¹²⁷ or the accused “knew of the assistance he was providing in the commission of the principal offence,”¹²⁸ satisfied by the corporations’ actions. As discussed in the reckless disregard portion of this analysis, the U.S. corporations will have a difficult time arguing they did not know that a terrorist-owned network might use its funds, whether through donations, profits, or fundraising, for terrorism. Moreover, as discussed above, the U.S. corporations would not have to share Hezbollah’s intent to commit terrorist acts, nor would they have to know specifically what acts Hezbollah intended to commit. Instead, with the mere knowledge that an act of terrorism “will probably be committed, and [it] is in fact committed, [they have] intended to facilitate the commission of that crime, and [are] guilty as . . . aider[s] and abettor[s].”¹²⁹ This is especially true in light of the fact that the intent to aid in the commission of the crime is not necessary for liability to attach to an aider and abettor.¹³⁰ Thus, it is not a defense for the U.S. corporations to say they did not intend for their funds to be used toward acts of terrorism.

Therefore, based on the Ninth Circuit’s analysis for holding a corporation liable for aiding and abetting the commission of a crime (there for human rights violations and here for terrorism), U.S. corporations who provide monetary assistance to terrorists by advertising on terrorist-owned television, may be liable for aiding and abetting terrorism.

C. Policy Reasons For Holding U.S. Corporations Liable for Aiding and Abetting Terrorism

Not only does the current law on aiding and abetting support the notion that American corporations who advertise on terrorist-owned networks

125. International Convention on the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270, adopted by the General Assembly Dec. 9, 1999.

126. Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, ¶ 391 (Feb. 22, 2001).

127. Prosecutor v. Furundzija, IT-95-17/1-T, ¶ 245.

128. Prosecutor v. Musema, ICTR-96-13-A, ¶ 180 (Jan. 27, 2000).

129. Prosecutor v. Furundzija, IT-95-17/1-T, ¶ 246.

130. Prosecutor v. Musema, ICTR-96-13-A, ¶ 182.

should be liable for aiding and abetting terrorism, but national and international policy demand such a result. First, a trend of cases are emerging, which allow corporations to be held liable for aiding and abetting violations of international law. Second, holding the corporations liable is consistent with the national and international war on terrorism.

1. Trend of Cases Holding Corporations Liable for Aiding and Abetting Violations of International Law

It is becoming increasingly clear that corporations can be liable for violations of international law through a recent trend in United States federal courts, international tribunals, international treaties, and practices of international corporations.¹³¹ Specifically, United States courts are consistently holding that international law does permit corporations to be held liable, international law holds accountable those who provide assistance to human rights violators, and the United States has a strong interest in hearing human rights suits.¹³²

As discussed above in detail, the Ninth Circuit held, in *Doe v. Unocal*, that Unocal could be liable for aiding and abetting human rights abuses committed by the Myanmar Military, based on Unocal's involvement and assistance to the Military, and its knowledge of such abuses.¹³³ Likewise, the United States District Court in New York found a plaintiff's claim alleging the defendant corporation aided the Nigerian Government in human rights violations in Nigeria could proceed.¹³⁴ Furthermore, in *Talisman Energy*, the court found liability could exist, despite the fact that Talisman's "primary interest was in oil extraction, not in ethnic cleansing . . ." because "[t]he fact that the allegedly unlawful acts also generated oil revenue does not mean they were not war crimes."¹³⁵

Similarly, American corporations who finance terrorist organizations by advertising on terrorists' networks should be held liable for aiding and abet-

131. See generally *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (relying on this trend, specifically *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 (S.D.N.Y. 2002), in its refusal to dismiss Plaintiffs' claims that Defendant aided and abetted the Sudanese Government's ethnic genocide of Christian and non-Muslim minorities in southern Sudan).

132. *Id.*

133. See generally *Doe v. Unocal*, 2002 WL 31063976 (9th Cir. 2002). See also *supra* Section IV.B of this comment for a more elaborate discussion of Unocal's potential liability under a theory of aiding and abetting.

134. See generally *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 (S.D.N.Y. 2002). Plaintiffs allege Royal Dutch Petroleum "recruited the Nigerian police and military to suppress the MOSOP [Movement for the Survival of the Ogoni People] . . . to ensure [its] . . . activities could proceed as usual." *Id.* Royal Dutch "provided logistical support, transportation, and weapons to Nigerian authorities to attack Ogoni villages and stifle opposition to [Royal Dutch's] oil-excavation activities." *Id.*

135. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

ting terrorism. The fact that the advertisements generate profit for PepsiCo, Proctor & Gamble and Western Union, does not mean their funds will not assist terrorist activities. Based on the current trend in case law, these corporations would be unsuccessful in claiming they cannot be held liable for aiding and abetting terrorism because international law does not hold individuals or corporations liable for violating international law. The corporations would likewise be unsuccessful in claiming they cannot be held liable because international law only holds principal offenders liable for unlawful acts. Finally, the corporations would be unsuccessful in claiming United States courts will not exercise jurisdiction over them.

In short, the trend in case law demonstrates these corporations should be liable for aiding and abetting terrorism, as it is a violation of national and international law; corporations may be held liable for violating international law; and courts, including those in the United States, are willing to hear such cases.

2. National and International War on Terrorism

Not only does the trend in case law indicate that American corporations should be held liable for aiding and abetting terrorism through the financing of terrorist organizations, the national and international war on terrorism demands it. First, the United States has declared its unmistakable goal and intention to fight terrorism. It has done so by enacting specific laws and policies regarding terrorism,¹³⁶ signing treaties targeting terrorism,¹³⁷ and repeatedly addressing terrorism to the American people as well as to the nations.¹³⁸

136. See generally 18 U.S.C.S. § 2331 (2003), 18 U.S.C.S. § 2333 (2003), 18 U.S.C.S. § 2339A (2002), 18 U.S.C.S. § 2339B (2002).

137. Besides the most relevant treaty (International Convention on the Suppression of the Financing of Terrorism, Jan. 10, 2000, 39 I.L.M. 268, adopted by the General Assembly Dec. 9, 1999), the United States has ratified nine other treaties in its "war" on terrorism: Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 164; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Dec. 23, 1971, 24 U.S.T. 565; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975; International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, T.I.A.S. No. 11080; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1988 U.S.T. LEXIS 198; and International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249.

138. See, e.g., President George W. Bush, Address at The Rose Garden (Sept. 24, 2001); Celina B. Realuyo, Office of the Coordinator for Counterterrorism, Remarks to Western Union International Compliance Conference (Sept. 18, 2002); Secretary O'Neill, Address at The Rose Garden (Sept. 24, 2001); Secretary Colin Powell, Address at The Rose Garden (Sept. 24, 2001).

As a means to aid its war on terrorism, the United States has specifically and strategically launched an attack against those who fund terrorist organizations: “[t]o root out terrorism, we not only need to capture terrorists and their supporters and bring them to justice *but we must stem the flow of funds that keep them in business.*”¹³⁹ Congress has made clear its intention to cut off the flow of money to terrorists because that would effectively cripple terrorist organizations. United States courts have acknowledged such intent and have given Congress much deference regarding it: “Congress’ purpose . . . could not be met unless liability attached beyond the persons directly involved in acts of violence. . . . [T]here would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism.”¹⁴⁰ Failing to hold American corporations liable for aiding and abetting terrorism when they finance such organizations by advertising on their networks, would therefore thwart Congress’ intention to cut off the flow of money to terrorists. Moreover, allowing such corporations to pay money to terrorist organizations severely undercuts the United State’s purported war on terrorism.

Furthermore, American corporations should be liable for aiding and abetting terrorism regardless of their “intentions” in paying the terrorist-owned networks. It has been noted above and bears repeating here: “[m]aterial support given to a terrorist organization can be used to promote the organization’s unlawful activities, *regardless of donor intent.* Once the support is given, the donor has no control over how it is used.”¹⁴¹ The Ninth Circuit based this conclusion largely on Congress’ explicit inclusion of a finding into 18 U.S.C.S. § 2339B, that any contribution to a terrorist organization facilitates its terrorist acts.¹⁴²

In other words, all support given to terrorist organizations is deemed to aid in their unlawful goal, regardless of whether the funder intended to further that goal. The court further rationalized its finding with the fact that terrorist organizations do not keep public books indicating where the money given to them is used. Moreover, even if the particular donor’s money is not used in a terrorist activity, “giving support intended to aid an organization’s

139. Celina B. Realuyo, Office of the Coordinator for Counterterrorism, Remarks to Western Union International Compliance Conference (Sept. 18, 2002) (referencing President Bush’s Executive Order 13224 that expands the U.S. government’s power to target terrorist organizations . . . “and subject their financiers and supporters to economic sanctions for aiding and abetting terrorism;” and noting the multilateral institutions such as the Financial Action Task Force and international financial institutions that the United States joined in order to combat money laundering and terrorist financing).

140. *Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1021 (7th Cir. 2002).

141. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1134 (9th Cir. 2000) (emphasis added).

142. *Id.* at 1136 (quoting AEDPA, § 301(a)(7), Pub. L. No. 104-132, 110 Stat. 1214, 1247).

peaceful activities frees up resources that can be used for terrorist acts.”¹⁴³ It is therefore no defense that the specific donation was not used for an act of terrorism.

Furthermore, the corporations’ liability falls under an aiding and abetting theory which “focuses on whether a defendant *knowingly* gave ‘substantial assistance’ to someone who performed wrongful conduct, *not on whether the defendant agreed to join the wrongful conduct.*”¹⁴⁴ Holding American corporations liable for aiding and abetting terrorism when they provide funds to terrorist-owned networks is therefore consistent with the United States’ war on terrorism. Failing to do so, on the other hand, directly undermines and cripples the effectiveness and the ability to succeed in such a war.

The United States is not alone in its war on terrorism by any means. Numerous countries and the United Nations share its sentiments regarding those who commit terrorism and those who enable terrorism through money or other resources. The United Nations adopted UNSC resolutions 1373 and 1390, directing member states to criminalize terrorist financing as well as adopt regimes to detect, deter, and freeze terrorist assets.¹⁴⁵ Moreover, General Assembly Resolution 51/210 called upon all States to take domestic measures that would prevent the financing of terrorist organizations, regardless if the funding is direct or indirect or given for a “charitable” purpose.¹⁴⁶ Finally, the International Convention on the Suppression of the Financing of Terrorism, which 132 States have signed and forty-three have ratified, addresses why such a Treaty is necessary:

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole, *Noting* that the number and seriousness of acts of international terrorism depends on the financing that terrorists may obtain. . . . *Being convinced* of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators. . . .¹⁴⁷

With these considerations in mind, the International Convention on the Suppression of the Financing of Terrorism was drafted. The International community has seen and responded to the need to cut off the flow of money to terrorists in order to fight terrorism effectively. It would therefore be consistent with international law to hold corporations that fund terrorist organizations, for whatever reasons, liable for aiding and abetting terrorism.

143. *Id.*

144. Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) (emphasis added).

145. Celina B. Realuyo, Office of the Coordinator for Counterterrorism, Remarks to Western Union International Compliance Conference (Sept. 18, 2002).

146. G.A. Res. 51/210 (Dec. 17, 1996) ¶ 3(f).

147. International Convention on the Suppression of the Financing of Terrorism, Jan. 10, 2000, 39 I.L.M. 268, adopted by the General Assembly Dec. 9, 1999.

Finally, the American corporations should be held liable for aiding and abetting terrorism because it simply makes no sense to do otherwise. Hezbollah is a known terrorist organization. It has been officially designated as a terrorist organization since 1995.¹⁴⁸ The corporations therefore either know, or reasonably should know, of Hezbollah's terrorist activities. The corporations continue to advertise on Al Manar, despite such knowledge. In other words, the corporations, with a total and complete disregard of human life and human rights, continue to give money to an organization which has committed and intends to commit further acts of terrorism. It makes no difference how these corporations *intend* their money to be used. It makes no difference that these corporations would rather their money not be used for acts of terrorism, because such intentions make the terrorist acts no less destructive and no less fatal. If, as Congress says, terrorist organizations are "so tainted by their criminal conduct that any contribution . . . facilitates that conduct,"¹⁴⁹ then American corporations are facilitating Hezbollah's acts of terrorism, and they must be held accountable. A disregard for life is no better than a desire to end life. The law must not distinguish between the two; terrorists certainly do not, nor do their victims. Thus, American corporations who provide funds to terrorist-owned networks should be held liable for aiding and abetting terrorism for one simple, yet compelling reason: they *are* aiding and abetting terrorism.

V. CONCLUSION

It is clearly appropriate to hold American corporations liable for aiding and abetting terrorism, when they fund terrorist organizations by advertising on terrorist-owned networks. Ample support for this conclusion lies in the federal common law tort principal of reckless disregard as well as international law. Support is further found in the Seventh and Ninth Circuits' holdings, that corporations should be liable for aiding and abetting violations of national and international law, when they knowingly participate in the principal's unlawful conduct. Moreover, it will serve Congress' intent to starve terrorists of the funding necessary to keep them in existence. Lastly, it is not permissible to condemn the terrorists, while at the same time benefitting the terrorists' financiers. Motivation for higher profits cannot justify the risk of human life. In short, American corporations must get it through their "make-a-profit-at-all-costs" mind-set, that America is serious when she warns: "*If you do business with terrorists, if you support or sponsor them, you will not do business with the United States of America.*"¹⁵⁰

Angela A. Barkin*

148. Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

149. AEDPA, § 301(a)(7), Pub.L. No. 104-132, 110 Stat. 1214, 1247.

150. President George W. Bush, Address at The Rose Garden (Sept. 24, 2001) (emphasis added).

* J.D. Candidate, June 2004, California Western School of Law; B.A., Concordia

