

# No Complicity Liability for Funding Gross Human Rights Violations?

By  
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## I. INTRODUCTION

Many corporations operate in countries with poor human rights records and at times are accused of being complicit in the violations carried out by the governments of these states. International bodies have been working on guidelines to define the responsibilities of corporations in order to avoid such complicity.<sup>1</sup> During his mandate as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie developed a human rights framework and due diligence standards to determine the responsibilities of corporations.<sup>2</sup> While these developments demonstrate concern for the dangers of

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1. See, e.g., Organization for Econ. Co-Operation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (2008); U.N. Global Compact, *The Ten Principles*, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>; Draft Norms on the Responsibilities of Transnational Corp. and Other Bus. Enters. with Regard to Human Rights, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12 (2003). See also Int'l Comm'n of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes, Vol. 3: Civil Remedies* (2008), available at [http://www.icj.org/default.asp?nodeID=349&sessID=&language=1&myPage=Legal\\_Documentation&id=22851](http://www.icj.org/default.asp?nodeID=349&sessID=&language=1&myPage=Legal_Documentation&id=22851).

2. U.N. Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *Human Rights Council, A/HRC/17/31* (Mar. 21, 2011) (by John Ruggie). The guiding principles were adopted by the UN Human Rights Council in June 2011. See also Press Release, U.N. Human Rights Council, *New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council* (June 16, 2011) available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf>.

corporate complicity, these guidelines do not give rise to legally enforceable obligations.

In an attempt to achieve legal accountability, concerned parties and organizations are increasingly suing corporations for their role in human rights violations committed by regimes.<sup>3</sup> The main difficulty for courts in deciding complicity liability is where to draw the line between acceptable business interactions with regimes that clearly commit gross human rights violations, and activities that make the corporation complicit in these violations. As is, it is difficult to answer these questions with regard to corporate activities. But the issue becomes even more complicated in the context of liability for doing business with, and thus making funds available to, regimes that carry out gross human rights violations. Unlike commodities such as weapons, money is never the direct means by which gross human rights violations are perpetrated. Moreover, money is difficult to connect to a particular human rights violation because of its fungibility. For example, it is easier to link a specific weapon or even weapons sold by a particular manufacturer to an extrajudicial killing, whereas it would be difficult to link any particular loan to the same killing. Does this fungibility mean that money is always too removed for complicity liability? If not, how can a sufficiently close link between a loan and a gross human rights violation be established to avoid holding lenders responsible for every violation a borrowing regime carries out?

The expanding corporate complicity debate has largely excluded the question of responsibility for financial complicity.<sup>4</sup> Instead, to the extent that loans to regimes that committed gross human rights violations are in the legal and political spotlight, the discussion has centered primarily on the legality or legitimacy of the resulting debt.<sup>5</sup> Although the legal validity of loans and complicity liability undoubtedly share factual issues, the two legal issues hold very different consequences. To the extent that funding gross human rights violations voids a loan, the consequence of a violation would be to relieve the

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3. Litigation under the Alien Torts Act is increasing in US Courts. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003).

4. Some notable exceptions are Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325 (1998); Shaw W. Scott, Note, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497 (2005); Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*, 23 HARV. HUM. RTS. J. 157 (2010); Juan Pablo Bohoslavsky & Mariana Rulli, *Corporate Complicity and Finance as a 'Killing Agent'*, 8 J. INT. CRIMINAL JUSTICE 829 (2010).

5. SABINE MICHALOWSKI, UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT: A LEGAL PERSPECTIVE 69-96, (2007); Sabine Michalowski & Juan Pablo Bohoslavsky, *Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts*, 48 COLUM. J. TRANSNAT'L L. 59 (2009).

debtor state from its repayment obligation. If the same loan gave rise to complicity liability, the corporation could be found liable to the victims of these violations and provide them with a remedy. Victims of gross human rights violations may therefore be without a remedy unless the discussion extends beyond debt repayment and into the context of corporate complicity.<sup>6</sup>

The question of corporate complicity liability in gross human rights violations has arisen mainly in litigation before US courts under the Alien Tort Claims Act (ATCA). Recent US case law defines the *mens rea* standard of such liability,<sup>7</sup> and debates the existence of corporate complicity liability under the ATCA.<sup>8</sup> However, the decision in *South African Apartheid Litigation*<sup>9</sup> demonstrates that in the context of financing, there is a need for in-depth analysis of the *actus reus* and causation elements of complicity liability. In that case, the Court dismissed aiding and abetting claims against banking defendants for their complicity in the human rights violations committed by the South African apartheid. It based its decision on the grounds that commercial loans are too far removed from human rights violations carried out by their recipients for a legally relevant link to exist between the two.<sup>10</sup> This holding creates a sweeping exemption for commercial lenders from complicity liability, without the requirement of a case-by-case analysis or an examination of the lender's *mens rea*.

Other courts adjudicating under the ATCA have since adopted the reasoning in *South African Apartheid Litigation*.<sup>11</sup> Given the scarcity of legal analysis and authority on the problem of complicity for financing gross human

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6. Sabine Michalowski, *Trazando Paralelos entre la Responsabilidad de Bancos por Complicidad y las Deudas Odiosas*, REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO, Aug. 2009, at 279, 286-87.

7. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (suggesting a move from a *mens rea* standard of knowledge to one of primary purpose, which would considerably reduce the possibility of successful litigation against corporations); *But see Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (holding that *Talisman* was wrongly decided and that the *mens rea* standard in international law is that of knowledge).

8. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1088-91 (C.D. Cal. 2010) (rejecting the existence of such liability). In favour of such liability, see *Exxon Mobil*, 654 F.3d 11; *Flomo v. Firestone Natural Rubber Co.*, 643 F. 2d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011); *Kiobel*, 621 F.3d at 149-188 (Leval, J., concurring only in the judgment). For further discussion, see *Volker Nerlich, Core Crimes and International Business Corporations*, 8 JICJ 895 (2010); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: a Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353 (2011); Michael Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271 (2009); Lucien J. Dhooge, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247, 280-81 (2009).

9. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

10. *Id.* at 269.

11. *Nestle*, 748 F. Supp. 2d at 1096.

rights violations committed by regimes, it is likely that these arguments will prove influential far beyond litigation against banks under the ATCA. *South African Apartheid Litigation* is thus significant not only for future complicity cases under the ATCA, but also for advancing the debate on lender liability for complicity in gross human rights violations more generally.

This Article provides a detailed critique of the arguments that led the Court to exempt commercial lenders from complicity liability. This includes a critical analysis of the Court's interpretation of the *Ministries* case (*Accord United States v. Von Weizsacker*)<sup>12</sup> as an indication that Nuremberg case law declines all liability with regard to commercial loans. Courts tend to rely on Nuremberg cases as the main, if not the sole authority, that supports their rejection of complicity liability for commercial loans.<sup>13</sup> However, the relevant Nuremberg cases, as well as developments in international law, do not justify such a far-reaching conclusion, making a strong case for reconsidering complicity liability of lenders in gross human rights violations.

This Article contrasts the view of the Court in *South African Apartheid Litigation* that money is inherently neutral and loans are always too far removed from the violations carried out by their recipients with US case law on funding terrorism, which adopts the opposite view by regarding money as particularly dangerous and casts a wide net for complicity liability. Finally, this Article discusses whether the policy considerations and liability standards applied in the terrorism context are transferrable to complicity liability for funding regimes that commit gross human rights violations.

## II.

### SOUTH AFRICAN APARTHEID LITIGATION

#### A. *Litigation for Corporate Complicity under the ATCA*

Victims of the apartheid regime filed a lawsuit in the United States under the ATCA, which provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>14</sup> It was enacted as part of the Judiciary Act of 1789 to deal with cases such as piracy.<sup>15</sup> For about 200 years, the statute lay forgotten until it was rediscovered by human rights lawyers and tested in *Filartiga v. Pena-Irala*, where the Court determined that the ATCA

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12. *United States v. Von Weizsacker* (“The Ministries Case”), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 478 (Nuernberg Military Tribs. 1950).

13. The most important examples are *Khumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 293 (2d Cir. 2007); *In re South African Apartheid*, 617 F. Supp. 2d at 258-59; *Nestle*, 748 F. Supp. 2d at 1088-91, 1094-97, 1099-1100.

14. Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006).

15. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

allowed victims to sue in US courts for serious violations of international human rights law.<sup>16</sup> A string of lawsuits for gross human rights violations followed *Filartiga*, not only against individuals, but also against multinational corporations.<sup>17</sup>

The main litigation issues for corporate complicity under the ATCA are: (i) how to define what falls under the law of nations;<sup>18</sup> (ii) whether cases can be brought against corporations;<sup>19</sup> (iii) whether the ATCA encompasses liability for aiding and abetting;<sup>20</sup> and (iv) if so, what standards courts should apply to determine the *actus reus* and *mens rea* of such liability.

### B. Corporate Complicity in the South African Context and the *Khulumani* Complaint

When Nelson Mandela became the first black president of South Africa in 1994, the government established the Truth and Reconciliation Commission (TRC) to investigate and document human rights violations committed under apartheid between March 1960 and May 1994. Perpetrators who came forward and admitted their guilt received amnesty against prosecution.<sup>21</sup> The TRC had the authority to investigate the role of corporations in apartheid South Africa,<sup>22</sup>

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

17. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (Plaintiff sued Talisman Energy for aiding and abetting genocide and other gross human rights violations committed by the Sudanese government in the context of the development of oil concessions in Southern Sudan); See also *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (plaintiffs sued Shell Oil Company for complicity in the repression of Ogoni protests against the environmental damages caused by oil platforms and in the execution of Ken Saro-Wiwa). In June 2009, Shell settled out of court for \$15.5 million. Ed Pilkington, *Shell Pays Out \$15.5m Over Saro-Wiwa Killing*, THE GUARDIAN (Jun. 8, 2009, 19:07), <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa>. Plaintiffs sued UNOCAL for complicity in forced labor, rape, and a murder carried out by soldiers along a natural gas pipeline route in Myanmar. *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002). A settlement was reached in 2005 whose terms were not made public. Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, THE GUARDIAN (Dec. 14, 2004, 19:04), <http://www.guardian.co.uk/world/2004/dec/15/burma.duncancampbell>.

18. Some U.S. courts have held that grave human rights violations such as forced labour, genocide, forced disappearances, extra-judicial killings and torture as well as the violation of other norms of *ius cogens* status are violations of the law of nations. See *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 715-16 (9th Cir. 1992).

19. Decided in the affirmative for the first time in *Unocal*, 395 F.3d 932 but recently put into doubt by *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), and *Doe v. Nestle*, S.A., 748 F. Supp. 2d 1057, 1124-28 (C.D. Cal. 2010).

20. Accepted for the first time in the first *Talisman* decision, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

21. See The Promotion of National Unity and Reconciliation Act 34 of 1995 § 3 (S. Afr.).

22. For a critical discussion see, e.g., Jaco Barnard-Naudé, *For Justice and Reconciliation to Come: The TRC Archive, Big Business, and the Demand for Material Reparations*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 172 (François du Bois, Antje du Bois-Pedain eds., 2008).

but few corporations decided to come forward and take part in the process. Nevertheless, the TRC concluded that “business was central to the economy that sustained the South African state during the apartheid years”<sup>23</sup> and that:

[T]he degree to which business maintained the status quo varied from direct involvement in shaping government policies or engaging in activities directly associated with repressive functions to simply benefiting from operating in a racially structured society in which wages were low and workers were denied basic democratic rights.<sup>24</sup>

With regard to the responsibility of banks, the TRC Report suggested that there was a strong case for reparations, as “[t]he banks played an instrumental role in prolonging apartheid from the time of the debt crisis in 1985 onwards.”<sup>25</sup>

Many victims were unsatisfied with the TRC process, the government’s implementation of TRC findings, the reparations program, and the lack of redress for gross human rights violations.<sup>26</sup> In 2002, several South African victims’ organizations, including the Khulumani Support Group, filed a lawsuit in the Southern District of New York against a variety of multinational corporations, including banks, for aiding and abetting or otherwise participating in the international law violations committed by the apartheid regime. The *Khulumani* case needs to be understood as “a logical continuation of the outcome of the TRC.”<sup>27</sup>

The original complaint, submitted in 2002 by the *Khulumani* plaintiffs, alleged that:

[T]he participation of the defendants, companies in the key industries of oil, armaments, banking, transportation, technology, and mining, was instrumental in encouraging and furthering the abuses. Defendants’ conduct was so integrally connected to the abuses that apartheid would not have occurred in the same way without their participation.<sup>28</sup>

But the *Khulumani* plaintiffs took a step beyond the structural approach, i.e., the generalized role of business in apartheid-related crimes, to present specific claims against the defendants, both individually and as a group. With regard to the banking defendants, the original complaint stressed the importance of foreign financing for the apartheid regime and specifically identified the

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23. Truth and Reconciliation Commission of South Africa Final Report, Vol. 6, Section 2, 58 (2003), available at <http://www.justice.gov.za/trc/report/index.htm>.

24. *Id.* at 140.

25. *Id.* at 146.

26. See, e.g., Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367, 383-87 (2003).

27. Charles Abrahams, *The TRC’s Unfinished Business: Reparations*, in TRUTH & RECONCILIATION IN SOUTH AFRICA: 10 YEARS ON 34, 36 (Charles Villa-Vicencio & Fanie du Toit eds., 2006).

28. Complaint at 4, *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) available at [www.khulumani.net/attachments/259\\_Khulumani%20Complaint.pdf](http://www.khulumani.net/attachments/259_Khulumani%20Complaint.pdf). The decision *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) addresses the complaints of both the Khulumani and the Ntsebeza plaintiffs.

individual contributions of the various banking defendants.<sup>29</sup>

In November 2004, Judge Sprizzo of the Southern District of New York dismissed the complaint, primarily on the grounds that plaintiffs could not invoke liability for aiding and abetting under the ATCA.<sup>30</sup> On appeal, the United States Court of Appeals for the Second Circuit decided that aiding and abetting violations of the law of nations cannot give rise to liability under the ATCA and allowed the plaintiffs to amend and specify their complaints.<sup>31</sup>

The *Khulumani* plaintiffs submitted an amended complaint in October 2008, which reduced the number of defendants from more than twenty corporations to eight, including two banks. They identified banking as one of four strategic sectors—along with armaments, technology, and transportation—that had been critical in assisting “the regime to perpetuate apartheid and commit systematic acts of violence and terror . . . including extrajudicial killing; torture; prolonged unlawful detention; and cruel, inhuman, and degrading treatment.”<sup>32</sup>

The complaint alleged that the two remaining banking defendants, Barclays and UBS, had made funds available to the apartheid regime on a large scale,<sup>33</sup> and that “without the funding provided by Barclays and UBS, the apartheid regime could not have maintained control over the civilian population to the same degree, nor could it have maintained and expanded its security forces to the same degree.”<sup>34</sup> Specifically, the complaint alleged that defendant banks “directly financed the South African security forces that carried out the most brutal aspects of apartheid.”<sup>35</sup> According to the complaint, the borrowed funds were necessary to underwrite the growing costs of policing the apartheid state.<sup>36</sup>

The complaint also alleged that inclusion of these costs in non-security related budgets obscured their true nature. For example, the education budget contained costs for troops occupying black schools, while “loans to railway and harbor systems assisted in the mobilization of the armed forces and trade financing provided the computers and telecommunications equipment necessary

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29. *Khulumani* Complaint, *supra* note 28, at 407-408, 414-415, 422, 431, 440-441, 471, 480, and 491.

30. *In re* South African Apartheid Litigation, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320-24 (S.D.N.Y. 2003) (taking this contradictory view one and a half years earlier).

31. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Korman, J., concurring in part, dissenting in part).

32. First Amended Complaint at 145, *In re* South African Apartheid Litigation, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (No. 03 Civ. 4524).

33. *Id.* at 150.

34. *Id.* at 151.

35. *Id.* at 152.

36. *Id.* at 169.

to the efficient functioning of a modern army.”<sup>37</sup> The complaint makes evident how difficult it is to distinguish between “innocent” and “harmful” loans in the context of a regime that violates international law so pervasively. Most of the plaintiffs’ allegations do not refer to financing for particular crimes, but instead try to show that some of the loans went to the security forces that perpetrated crimes, demonstrating how the loans generally facilitated widespread violations.

### C. *The Decision of April 2009*<sup>38</sup>

When the case came before Judge Scheindlin in the Southern District of New York, the plaintiffs consisted of two groups: the *Khulumani* and the *Ntsebeza* plaintiffs. The plaintiffs presented their claims based on both direct and complicity liability theories. However, the Court excluded all legal bases other than liability for aiding and abetting, which was the focus of the Court’s discussion.

#### 1. *General Actus Reus and Causation Considerations*

Judge Scheindlin looked to international criminal law,<sup>39</sup> Second Circuit precedent,<sup>40</sup> and academic commentary<sup>41</sup> in holding 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.”<sup>42</sup> This definition seems to combine *actus reus* and causation, as the effect of the assistance on the crime is a question of causation, rather than of the *actus reus* itself.

Though neither party disputed this standard, they argued according to different interpretations, making it necessary for the Court to address what sort of action amounts to having a substantial effect on the commission of gross

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37. *Id.* at 170.

38. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

39. *Id.* at 257-58. The court relied, in particular, on *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 235 (Dec. 10, 1998); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 688 (May 7, 1997); *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeal Judgment, ¶¶ 127, 134 (May 9, 2007); *Accord United States v. Von Weizsacker* (“The Ministries Case”), 14 T.W.C., at 478 (1950).

40. *See, e.g., Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring) (cited in *In re South African Apartheid*, 617 F. Supp. 2d at 257-58).

41. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT’L HUM. RTS. 304, 308 (2008); Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT’L L. & POL. 39, 43-44, 55 (2005-2006); Shaw W. Scott, *supra* note 4 at 1531; Paul Hoffman & Daniel Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting under the Alien Tort Claims Act*, 26 LOY. L.A. INT’L & COMP. L. REV. 47, 71-72 (2003).

42. *In re South African Apartheid*, 617 F. Supp. 2d at 257; *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 337-38, 340 (S.D.N.Y. 2005); *Doe v. Unocal*, 395 F.3d 932, 951 (9th Cir. 2002).



human rights violations. The Court explained:

[I]t is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal. Aiding a criminal "is not the same thing as aiding and abetting [his or her] alleged human rights abuses."<sup>43</sup>

The Court continued, stating that the plaintiffs' case was not based merely on the allegation that "the defendants engaged in commerce with a pariah state."<sup>44</sup> They had rather argued that the defendant corporations provided essential assistance to the apartheid state, which had a substantial effect on the crimes that victimized the plaintiffs.<sup>45</sup> Judge Scheindlin thus opposed the views of various individuals, including Judge Sprizzo when he dismissed the case in 2004,<sup>46</sup> of Judge Korman (who was a dissenting judge when the case came before the Second Circuit in 2007),<sup>47</sup> and of some commentators,<sup>48</sup> who characterized the apartheid litigation as being about nothing other than accusing the defendants of having done business with the apartheid regime. Instead, the relevant issue for Judge Scheindlin was whether "doing business" with a regime has a substantial effect on its commission of crimes. If plaintiffs can demonstrate a substantial effect, liability does not follow from merely doing business with the regime, or from aiding and abetting the regime as such, but rather from aiding and abetting the regime's violations.<sup>49</sup>

Next, the Court queried how to determine whether a commercial activity has a substantial effect on gross human rights violations. The Court approached this question by citing with approval the statement of the ICTY:

[A]ssistance having a substantial effect "need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal." An accessory may be found liable even if the crimes could have been carried out through different means or with the assistance of another.<sup>50</sup>

The Court defined "substantial effect" by comparing two Nuremberg cases, the *Ministries Case* and the *Zyklon B Case*<sup>51</sup>. In the *Ministries Case*, the

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43. *In re South African Apartheid*, 617 F. Supp. 2d at 257.

44. *Id.* at 263.

45. *Id.* (with regard to the Ntsebeza plaintiffs); *Id.* at 266 (with regard to the Khulumani plaintiffs).

46. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 551 (S.D.N.Y. 2004).

47. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 293-94 (2d Cir. 2007).

48. See Michael Ramsey, *supra* note 8, at 280.

49. See also, *Khulumani*, 504 F.3d at 289 (Hall, J., concurring).

50. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257-58 (S.D.N.Y. 2009) (citing *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 209 (Dec. 10, 1998)).

51. U.N. War Crimes Comm'n, LAW REP. OF TRIALS OF WAR CRIMINALS (Vol. 1), Case. No. 9, *The Zyklon B Case, The Trial of Bruno Tesch and Two Others*, at 93-103 (1947).

Nuremberg Tribunal had acquitted Karl Rasche, a member of the board of managers of Dresdner Bank during the Nazi period, because the Tribunal did not regard the bank's activities as criminal:

[T]o make a loan, knowing or having good reason to believe that the borrower will use [sic] the funds in financing enterprises which are employed in using labor in violation of either national or international law . . . A bank sells money or credit in the same manner as the merchandiser of any other commodity . . . Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.<sup>52</sup>

In the *Zyklon B Case*, on the other hand, Bruno Tesch, whose factory had manufactured and sold the lethal gas used in the concentration camps, was found guilty of aiding and abetting crimes against humanity for supplying the gas used to execute allied nationals.<sup>53</sup> Judge Scheindlin explained the different outcomes in the two cases by focusing on qualitative aspects of the alleged assistance.

Money is a fungible resource, as are building materials. However, poison gas is a killing agent, the means by which a violation of the law of nations was committed. The provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans.<sup>54</sup>

Based on this analysis, Judge Scheindlin came to the conclusion that, "in the context of commercial services, provision of the means by which a violation of the law is carried out is sufficient to meet the *actus reus* requirement of aiding and abetting liability under customary international law."<sup>55</sup> Given that money can never be the direct means through which human rights violations occur, the provision of commercial loans therefore seemingly cannot meet the *actus reus* test of aiding and abetting liability as defined by Judge Scheindlin, whatever its effect on the commission of offenses.

The implications of Judge Scheindlin's approach to *actus reus* and causation in suits for aiding and abetting become more readily apparent when looking at her analysis of the claims against the automotive and technologies defendants (in this case, in addition to banks, claims were also brought against corporations that provided the South African apartheid regime with automobiles, technologies, and arms), as the Court examines the *actus reus* of these defendants in a much more nuanced way than that of the defendant banks. This Article introduces some relevant features of this analysis, followed by a discussion of the consequences of this approach for cases against corporations for complicity in the context of commercial transactions in general, and commercial loans, in particular.

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52. United States v. Von Weizsacker ("The Ministries Case"), 14 T.W.C., at 622 (1950).

53. "The Zyklon B Case", *supra* note 51, at 93-103.

54. *In re South African Apartheid*, 617 F. Supp. 2d at 258.

55. *Id.* at 259.

## 2. Claims Against the Technologies Defendants

Regarding the technologies defendants, the Court first examined the allegations “that IBM aided and abetted the South African Government’s denationalization of black South Africans through the provision of computers, software, training, and technical support.”<sup>56</sup> In this instance, IBM sold “computers used to register individuals, strip them of their South African citizenship, and segregate them.”<sup>57</sup> They also helped to develop the software “specifically designed to produce identity documents and effectuate denationalization,” which Judge Scheindlin characterized as “indispensable” to South Africa’s “geographic segregation and racial discrimination.”<sup>58</sup> Additionally, IBM allegedly provided equipment that produced records “necessary to deliberately denationalize a large proportion of Black South Africans.”<sup>59</sup> Given IBM’s activities, Judge Scheindlin held that the *Ntsebeza* plaintiffs satisfied the *actus reus* requirement for aiding and abetting arbitrary denationalization and the crime of apartheid.<sup>60</sup>

Equally, the *actus reus* requirement of aiding and abetting apartheid was met by allegations that “defendants IBM and Fujitsu supplied computer equipment ‘designed to track and monitor civilians with the purpose of enforcing the racist, oppressive laws of apartheid’” as well as the software and hardware “to run the system . . . ‘used to track racial classification and movement for security purposes.’”<sup>61</sup> This amounted to substantial assistance of the crime of apartheid because it was essential in “implementing and enforcing the racial pass laws and other structural underpinnings of the apartheid system”<sup>62</sup> and constituted “the means by which the South African Government carried out both racial segregation and discrimination.”<sup>63</sup>

Demonstrating the nuances of this approach, the Court dismissed allegations that IBM aided and abetted cruel, inhuman, or degrading treatment (CIDT). Although the documents created by IBM software “helped target” individuals, the Court held that the computers were neither an “essential element” nor “the means” of CIDT.<sup>64</sup> The Court similarly rejected the argument that “every computer system provided to the Government of South Africa or South African defense contractors” was automatically “sufficiently tied to

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56. *Id.* at 265.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 268.

62. *Id.*

63. *Id.*

64. *Id.* at 265-66.

violations of customary international law.”<sup>65</sup> For example, the Court held that “the mere sale of computers to the Department of Prisons – despite the widely held knowledge that political prisoners were routinely held and tortured without trial – does not constitute substantial assistance to that torture.”<sup>66</sup> Finally, with regard to the allegation that IBM had supplied computers to armaments manufacturers that were crucial to the South African Defense Forces, the Court suggested that “the sale of equipment used to enhance the logistics capabilities of an arms manufacturer is not the same thing as selling arms used to carry out extrajudicial killing; it is merely doing business with a bad actor.”<sup>67</sup>

These are significant clarifications of how Judge Scheindlin characterized the *actus reus* of aiding and abetting liability in the context of the provision of commercial services. First of all, even though her reliance on the *Zyklon B* case might have given a different impression, she emphasized that human rights violations can occur through means other than inherently physically harmful products. Products such as computers and software can equally qualify as means if they are specifically designed to implement particular policies or facilitate human rights violations, or if they are indispensable and essential for carrying them out. On the other hand, she rejected a finding of complicity where the computer systems were neither essential nor indispensable. The Court thus seems to replace analyzing the effects of computers and programs on the commission of the crimes with an assessment of whether they provided the direct means for committing these violations. Where, as in the allegations of CIDT, the computers and programs were not the direct means of perpetration, there was no need for further analysis of the link between the technology and the violations to assess whether its provision had a substantial effect.

It is certainly true that “the mere sale of computers to the Department of Prisons—despite the widely held knowledge that political prisoners were routinely held and tortured without trial—does not constitute substantial assistance to that torture,”<sup>68</sup> and that “the sale of computers to the South African Defense Forces does not constitute aiding and abetting any and all violations of customary international law that the military committed.”<sup>69</sup> Neither does “‘sustaining the apartheid regime’ render the technology defendants liable for aiding and abetting all violations of the law of nations committed in apartheid-era South Africa.”<sup>70</sup>

However, given that the *actus reus* test is one of practical assistance that has a substantial effect on the commission of the offenses, the essential question

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65. *Id.* at 268.

66. *Id.*

67. *Id.* at 268-69.

68. *Id.* at 268.

69. *Id.* at 269.

70. *Id.*

should be what effect, if any, the sale of computers had on the crimes' commission, rather than whether the underlying transaction provided the direct means for committing the violations.<sup>71</sup> If a substantial effect requires that the product or service provided is the direct or indispensable means through which the violations occur, this has important implications for complicity liability of lenders, as money can never be the means through which violations occur.

### 3. *Claims Against Automotive Defendants*

Plaintiffs accused Daimler, Ford, and General Motors of having aided and abetted the apartheid regime in various ways, for example by selling both military and non-military vehicles to the army and the police that were used for raids in townships and controlling protests. The Court was satisfied that the plaintiffs' allegations against all three defendants were sufficient to sustain claims for aiding and abetting extrajudicial killing:

[They] sold heavy trucks, armored personnel carriers, and other specialized vehicles to the South African Defense Forces and the Special Branch, the South African police unit charged with investigating anti-apartheid groups. These vehicles were the means by which security forces carried out attacks on protesting civilians and other anti-apartheid activists; thus by providing such vehicles to the South African Government, the automotive companies substantially assisted extrajudicial killing.<sup>72</sup>

The Court similarly found a claim of aiding and abetting extrajudicial killings and apartheid<sup>73</sup> sufficient where it alleged that: "Daimler sold 'Unimog' military vehicles to the South African Government, as well as components of the 'Casspir' and 'Buffer' vehicles that were used by internal security forces . . . to patrol the townships and . . . carry out extrajudicial killings."<sup>74</sup> The Court characterized these vehicles as "the means by which the South African Defense Forces killed black South Africans as part of the maintenance of a system of state-sponsored apartheid,"<sup>75</sup> which was sufficient to fulfill "the *actus reus* requirement of aiding and abetting, in this case of the crimes of extrajudicial killing and apartheid."<sup>76</sup>

However, the allegations that Ford and GM sold cars and trucks to the South African police and military forces, and continued to do so after the imposition of export restrictions, were insufficient to support a claim because the particular vehicles "had no military customization or similar features that link[ed] them to an illegal use" and were "simply too similar to ordinary vehicle

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71. *Id.*

72. *Id.* at 264.

73. *Id.* at 266.

74. *Id.*

75. *Id.*

76. *Id.*

sales.”<sup>77</sup> Again, the court focused on the inherent quality of the goods, rather than on the use the regime would make of them. However, this distinction seems arbitrary. Military vehicles could conceivably be sold for legitimate reasons, and ordinary vehicles could be used to carry out serious violations of international law. In line with the *actus reus* test of substantial effect, a more accurate test would focus on whether the sale of the vehicle, with or without military customization, substantially furthered the commission of the crime committed by the regime.<sup>78</sup> If a substantial effect can be shown, the *actus reus* of complicity liability is met and liability would depend on the defendant’s *mens rea*.

#### 4. Claims Against the Banking Defendants

Judge Scheindlin’s strict approach towards *actus reus* meant that she easily rejected all allegations against banking defendants because the loans provided did not directly enable human rights violations:

The *Khulumani* plaintiffs’ claims against Barclays and UBS stem primarily from the provision of loans by the two banks and the purchase of South African defense forces bonds. . . [S]upplying a violator of the law of nations with funds—even funds that could not have been obtained but for those loans—is not sufficiently connected to the primary violation to fulfill the *actus reus* requirement of aiding and abetting a violation of the law of nations.<sup>79</sup>

Given this sweeping rejection of liability, without any analysis of the use and purpose of the loans or the effect they had on the commission of gross human rights violations by the apartheid regime, it seems fair to conclude that Judge Scheindlin did not regard commercial lending as an activity that can give rise to complicity liability for the crimes it facilitated. This interpretation is aligned with the Court’s holding that commercial activities can only substantially affect the commission of gross human rights violations if they provide the direct means through which these violations are carried out.<sup>80</sup> An intermediate step is always necessary to link loaned funds to violations.

This *actus reus* or causation approach proffered by Judge Scheindlin thus exempts whole industries, such as finance, from responsibility without requiring a case-by-case analysis. Indeed, even if the defendant provided loans with the specific intent to further gross human rights violations, no liability would be incurred under Judge Scheindlin’s approach because the money provided was not the direct means to the violation.

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77. *Id.* at 267 (“The sale of cars and trucks without military customization or similar features that link them to an illegal use does not meet the *actus reus* requirement of aiding and abetting a violation of the law of nations”).

78. But see *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1096, 1101 (C.D. Cal. 2010) (distinction made by the court was cited with approval).

79. *In re South African Apartheid*, 617 F. Supp. 2d at 269.

80. *Id.* at 258.

### 5. Critical Reflections

In the *South African Apartheid Litigation* case, the *actus reus* of complicity liability for the provision of commercial goods and services depended on two factors: (1) whether the goods were inherently dangerous or neutral, and (2) whether they were the direct means through which the crimes were committed. The Court excluded as too remote from the commission of the principal offense the provision of goods, such as money, that are inherently neutral, and which cannot, by their very nature, be the instrument with which violations are carried out. On the other hand, supplying goods that are specifically designed for harmful purposes or that provide the direct means for carrying out gross human rights violations does amount to the *actus reus* of complicity liability. In those cases, defendants can only avoid complicity liability if they show that they thought the goods would be used for legitimate purposes.<sup>81</sup> With inherently harmful goods, an examination of the corporation's *mens rea* is therefore important to filter out those cases in which no liability arises. For neutral goods that are not the direct means of committing violations, however, no *mens rea* analysis is necessary as proof of liability already fails at the *actus reus* or causation stage. Therefore, while *mens rea* is irrelevant for neutral goods such as money, liability for other goods decisively depends on whether the company had the requisite *mens rea*.

The Court relied on the Rome Statute in support of its view that whether the goods provided constitute the means through which the crime is committed is relevant for deciding aiding and abetting liability.<sup>82</sup> Article 25(3)(c) of the Statute makes an accessory to a crime liable if he or she "aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."<sup>83</sup> The International Law Commission has likewise suggested that aiding and abetting liability requires that an accomplice "provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime."<sup>84</sup> Providing the means for the commission of the offense thus clearly fulfils the *actus reus* of aiding and abetting liability. This constitutes only one example of an activity that could do so. However, the Rome Statute does not necessarily require providing the direct means in order to trigger complicity liability. Nevertheless, the court in *Doe v. Nestle* approved Judge Scheindlin's

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81. *Id.* at 258, n. 157 ("Although such goods may have legitimate uses, that issue is addressed by the *mens rea* element").

82. *Id.* at 259, n. 158.

83. Rome Statute of the International Criminal Court art. 25(3)(c), July 1, 2002, 2187 U.N.T.S. 90.

84. Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, 21, U.N. Doc. A/51/10 (1996).

approach,<sup>85</sup> although it imparted a slightly different focus on the discussion. While it agreed that direct instrumentality was the test for finding liability, the Court downplayed the difference between neutral and non-neutral goods and instead looked at the nature of the transaction. It concentrated on the idea that ordinary commercial transactions, without more, do not violate international law.<sup>86</sup>

*Doe v. Nestle* supported this conclusion with the decision in *Corrie v. Caterpillar*.<sup>87</sup> In that case, Palestinians living in the Gaza Strip and the West Bank filed an ATCA claim against a bulldozer manufacturer.<sup>88</sup> The plaintiffs claimed that they had suffered harm, including death and loss of home, as a result of demolitions by Israeli military using bulldozers bought from the defendant.<sup>89</sup> They alleged that the defendant knew or should have known that the bulldozers sold to the Israeli military would be used for such purposes.<sup>90</sup>

In *Corrie*, the Court rejected a finding of liability, holding that “[o]ne who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer’s venture.”<sup>91</sup> In *Doe v. Nestle*, the Court contrasted the sale of bulldozers with the provision of customized military vehicles in the *South African Apartheid Litigation* case.<sup>92</sup> From this comparison, the Court draws the conclusion that “a plaintiff must allege something more than ordinary commercial transactions in order to state a claim for aiding and abetting human rights violations.”<sup>93</sup> This is uncontested, as commercial transactions alone do not result in any form of liability. The more important question in the context of an analysis of the *South African Apartheid Litigation* case is whether this means that commercial transactions should be excluded at the *actus reus* level, unless additional factors such as the customization of the goods are present, or whether even ordinary commercial transactions can amount to practical acts of assistance that have a substantial effect on the commission of the principal offender’s crimes.

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85. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010)

86. *Id.* at 1099.

87. *Id.* at 1095. The court in *Doe v. Nestle* also based this view on Nuremberg case law and on *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, (E.D.N.Y. 2007); *See Nestle*, 748 F. Supp. 2d at 1088-92, 1096-97, 1099-1100. Its analysis of these decisions will be discussed later on in this Article.

88. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff’d on other grounds*, 503 F.3d 974, 977 (9th Cir. 2007)

89. *Corrie*, 403 F. Supp. 2d at 1027 at 1023.

90. *Id.*

91. *Id.* at 1027.

92. *Nestle*, 748 F. Supp. 2d at 1095.

93. *Id.* at 1096.



The decision in *Corrie* seems to point towards the latter interpretation. In *Corrie*, it seems to have been decisive for discarding liability that the “seller does not share the specific intent to further the buyer’s venture.”<sup>94</sup> The Court therefore does not suggest that the sale of the bulldozers to the Israeli army did not have a substantial effect on the destruction of the homes. Instead, the determinative factor for excluding liability was the lack of *mens rea* on the part of the seller with regard to the illegal use of the goods supplied, not the commercial character of the transaction.

This becomes even clearer when taking into account that the Court’s approach in *Corrie* was informed by reliance on *Blankenship*.<sup>95</sup> Albeit in the context of discussing liability for criminal conspiracy, rather than aiding and abetting liability under the ATCA, the Court in *Blankenship* suggested that:

“Mere” sellers and buyers are not automatically conspirators. If it were otherwise, companies that sold cellular phones to teenage punks who have no use for them other than to set up drug deals would be in trouble, and many legitimate businesses would be required to monitor their customers’ activities . . . Yet this does not get us very far, for no rule says that a supplier *cannot* join a conspiracy through which the product is put to an unlawful end.<sup>96</sup>

*Blankenship* therefore does not lend support to the view that commercial transactions cannot result in liability. The issue was explained more clearly in *Pino-Pérez*, another non-ATCA case dealing with criminal aiding and abetting claims:<sup>97</sup> “One who sells a small – or for that matter a large – quantity of drugs to a kingpin is not by virtue of the sale alone an aider and abettor. It depends on what he knows and what he wants[.]”<sup>98</sup> The Supreme Court in *Direct Sales*,<sup>99</sup> yet another drug related criminal conspiracy case that was equally decided outside of the framework of the ATCA, also rejected the view that “one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end.”<sup>100</sup>

Even though these cases have been decided under a different legal framework, the ATCA cases cited and relied upon *Blankenship*<sup>101</sup> to inform the

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94. *Corrie*, 403 F. Supp. 2d at 1027.

95. *Id.*

96. *United States v. Blankenship*, 970 F.2d 283, 285-86 (7th Cir. 1992) (emphasis in original). In *Blankenship*, the defendant let his house trailer to a group that used it to cook methamphetamine, accepted a down-payment for the lease but then got cold feet and dropped out of the agreement. *Id.* at 284.

97. *United States v. Pino-Pérez*, 870 F.2d 1230, 1232 (7th Cir. 1989) (defendant was accused of aiding and abetting the operations of a kingpin whom he supplied with illegal drugs).

98. *Id.* at 1235.

99. *Direct Sales Co. v. United States*, 319 U.S. 703, 704-707 (1943) (petitioner was a drug company that sold drugs by mail order to a physician who resold them illegally).

100. *Id.* at 709.

101. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005); *Doe v. Nestle*,

discussion of the relevant liability standards for the provision of commercial goods, and *Blankenship*, in turn, referred to *Direct Sales* and *Pino-Pérez*.<sup>102</sup> These cases teach that, in the particular context of criminal liability for conspiracy or aiding and abetting, commercial transactions that might in some way further criminal offenses do not always result in liability. However, the commercial nature of the transaction does not *per se* exempt the actor from such liability. The *mens rea* of the supplier with regard to the illegal use of the goods provided is much more important than the commercial character of the transaction for determining liability. Particularly instructive in this respect is the analysis carried out by the Supreme Court in *Direct Sales*:

All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade. This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it. . . . The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise.<sup>103</sup>

While not providing binding precedents for courts delineating the limits of aiding and abetting liability in ATCA cases, these considerations are nevertheless interesting when reconsidering the analysis carried out in *South African Apartheid Litigation*. The approach adopted in *Direct Sales* supports the view that while the inherent quality of the goods or services provided, or the their relation to the commission of violations, might influence the depth of the *actus reus* and *mens rea* analysis that is required in each case, these factors should not be decisive in themselves and cannot replace a case-by-case analysis.

The implications of the foregoing discussion become clear when applying them, by way of example, to Judge Scheindlin's discussion of the claims against the automotive defendants. The military specifications of the vehicles might then have an impact at both the *actus reus* and the *mens rea* levels, but they should not be determinative at either. To the extent that military vehicles have a

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at 28.

102. *United States v. Blankenship*, 970 F.2d 283, 286 (7th Cir. 1992).

103. *Direct Sales Co.*, 319 U.S. at 710-11.

different and more substantial effect on the commission of the crimes than ordinary vehicles, this would need to be demonstrated in each case, not simply implied from the military specifications of the vehicles in and of themselves. At the same time, the inherent quality of the goods could be relevant for determining the mental state of the defendants, as the illegitimate use might be more obvious to the corporation where the good has inherently harmful qualities. Importantly, the *mens rea* would have to be established on a case-by-case basis, both where the goods are inherently harmful and where they are not, as what gives rise to liability is the mental state of the corporation in relation to the usage of the goods.

To eliminate any need to perform a case-by-case analysis of the effect of the act of assistance on the violation, and of the proximity of the defendant to it, as follows from Judge Scheindlin's approach in the *South African Apartheid Litigation* case, means that certain acts (particularly providing funding, but also selling goods that are not inherently harmful but might potentially be used for harmful purposes) are automatically shielded from liability. A corporation could, for example, escape liability by selling only commercial, but not military vehicles to a regime, with the knowledge or even intent that human rights violators use these vehicles to commit gross human rights violations. Where the impact of the sale on the violations is the same, there is no justifiable reason to distinguish between the two sales. It would be arbitrary to impose liability in one case but not the other.<sup>104</sup>

Admittedly, Judge Scheindlin's approach provides an efficient, bright-line rule, removing the need to develop more refined criteria according to which the substantial effect of commercial activities on gross human rights violations can be established. In the context of commercial loans, this is not an easy task. However, convenience and the difficulties of defining criteria cannot justify adopting an approach that leads to arbitrary results regarding liability for commercial activity. It is necessary to find a principled way to distinguish between acceptable business activities and those that give rise to complicity liability, and the net must not be so wide as to hold corporations indiscriminately liable for all offenses committed by regimes with which they do business. Nevertheless, the *actus reus* of aiding and abetting should not depend on the nature of the corporate activity, but rather on its effect on the commission of the offense. Therefore, the effect of the corporation's commercial activity, as well as its *mens rea*, need to be subjected to a thorough analysis in each case. Absence of such review would create a considerable gap in corporate accountability, encouraging, or at least providing no incentive to refrain from, business transactions that facilitate gross human rights violations indirectly. This would often leave victims of such violations without effective remedies.

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104. See also Norman Farrell, *Attributing Criminal Liability to Corporate Actors*, 8 J. INT. CRIMINAL JUSTICE 873, 891 (2010).

The undesirable consequences of the approach adopted in *South African Apartheid Litigation* become particularly obvious with regard to liability for financing gross human rights violations. In that context, it has the effect of absolving commercial lenders from all complicity liability, no matter what effect the loans might have on the commission of gross human rights violations and regardless of the *mens rea* of the financier. On the other hand, the approach might also have unfair consequences by presuming causation where inherently dangerous goods are provided to a regime that uses them to commit grave human rights violations. Under the *South African Apartheid Litigation* analysis, the fine line between acceptable business transactions and complicity liability would rest on *mens rea* alone.

### III.

#### LIABILITY FOR FUNDING GROSS HUMAN RIGHTS VIOLATIONS IN THE LIGHT OF NUREMBERG CASE LAW

In *South African Apartheid Litigation*, the Court's approach to *actus reus* and causation in the context of commercial loans decisively relied on Nuremberg case law, in particular the Court's understanding that the Nuremberg Military Tribunal's decision in the *Ministries Case* against Karl Rasche set a precedent that commercial lending does not give rise to such liability.<sup>105</sup> This Section will examine some of the relevant Nuremberg cases, analyzing whether the *South African Apartheid Litigation* interpretation does justice to the decision against Rasche. This Section also will explore more generally what courts may learn from cases decided in Nuremberg regarding liability for financing.

#### A. *The Case Against Rasche*

Karl Rasche was a member of the board of managers of the Dresdner Bank. In the report of the Office of Military Government, United States (OMGUS), he was described as "one of the key liaisons between the Dresdner Bank and the SS, Nazi Party, and government so that the bank might function as an integral part of the Nazi war machine."<sup>106</sup> He was charged with different counts of war crimes and crimes against humanity. The Tribunal started its discussion of his liability on count five (war crimes and crimes against humanity, atrocities and offenses committed against civilian populations) with the statement that:

The evidence clearly establishes that the Dresdner Bank loaned very large sums of money to various SS enterprises which employed large numbers of inmates of concentration camps, and also to Reich enterprises and agencies engaged in the

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105. *Id.* For a similar reading of that decision see *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 293 (2d Cir. 2007) (Korman, J., concurring); for additional reading, see Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L. J. 61, 91-92 (2008).

106. CHRISTOPHER SIMPSON, WAR CRIMES OF THE DEUTSCHE BANK AND THE DRESDNER BANK: OFFICE OF THE MILITARY GOVERNMENT (U.S.) REPORTS 396 (Holmes and Meier 2002).

so-called resettlement programs.<sup>107</sup>

The Tribunal had to decide whether these loans would give rise to the personal criminal liability of Rasche for the crimes charged under count five. In order to address the issue, the Tribunal first looked at Rasche's criminal responsibility for having been a member of Himmler's Circle of Friends, and for having approved, and in some instances even insisted on, large annual contributions by Dresdner Bank to a fund placed at Himmler's personal disposal.<sup>108</sup> Himmler was the Reichsfuehrer of the SS and the German Minister of the Interior, and he was also responsible for the extermination policy in Germany's concentration camps. The Tribunal rejected any liability of Rasche related to these contributions on the grounds that there was no evidence that "Rasche knew that any part of the fund to which the bank made contributions was intended to be or was ever used by Himmler for any unlawful purposes."<sup>109</sup>

This statement suggests that, had Rasche known that the funds made available to Himmler were used or had been intended to be used for unlawful purposes (i.e., had the necessary *mens rea* been present), he might have incurred liability for approving or encouraging those contributions. Moreover, the Tribunal seems to suggest that it would not have been necessary to show that the specific contributions made by Dresdner Bank were intended to be used for unlawful purposes, but rather merely that any part of the fund toward which these contributions were made had such an intended use. This sets quite a low *actus reus* standard, which takes into account the fungibility of money. On the other hand, the Tribunal implies a high *mens rea* threshold when suggesting that it cannot infer solely from the fact that Rasche knowingly provided funds to Himmler that Rasche had the requisite knowledge regarding the unlawful use of the fund.

However, the Tribunal held that Rasche did have the requisite knowledge for the loans Dresdner Bank made to SS enterprises, which employed slave labor and otherwise funded the Nazi resettlement program.<sup>110</sup> The Court reasoned that banks generally seek to learn the purposes of their loans as a matter of practice and found it inconceivable that Rasche did not have the necessary knowledge.<sup>111</sup>

It is in this context that the Tribunal made its well-known statement that

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107. United States v. Von Weizsacker ("The Ministries Case"), 14 T.W.C., at 621 (1950).

108. *Id.* at 621-22.

109. *Id.* at 622.

110. *Id.* "The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did."

111. *Id.*

has since been interpreted by some courts<sup>112</sup> and commentators<sup>113</sup> as authority for a general rejection of liability for commercial loans that finance gross human rights violations or other serious violations of international law.

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does [Rasche] stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit that the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to bring to justice those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law.<sup>114</sup>

This statement has been interpreted in a variety of ways regarding the reasons for which the Tribunal rejected Rasche's criminal liability in this context. It has sometimes been suggested that the Tribunal rejected his liability for making the loans because it insisted on a more stringent *mens rea* standard than knowledge.<sup>115</sup> However, given that the Tribunal applied a *mens rea* standard of knowledge to the analyses of both of the donations made to Himmler and the loans to the various SS enterprises, this does not seem plausible. Indeed, nothing in the above statement suggests that Rasche's intent regarding the use of the loans would have made any difference in establishing his criminal liability. Instead, it seems that Judge Scheindlin was right in suggesting that Rasche was found not guilty in this context because the Tribunal was of the view that making commercial loans, even with clear knowledge regarding their unlawful use, did not satisfy the *actus reus* for complicity liability.<sup>116</sup>

The Court rejected charges against Rasche under count six (war crimes and crimes against humanity, plunder and spoliation) for the same reason as those

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112. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 292-93 (2d Cir. 2007) (Korman, J., concurring); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1088-90 (C.D. Cal. 2010).

113. Chimène Keitner, *supra* note 105 at 91-92.

114. *United States v. Von Weizsacker* ("The Ministries Case"), 14 T.W.C., at 622 (1950).

115. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring in part, dissenting in part); Shriram Bhashyam, *Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 30 CARDOZO L. REV. 245, 269 (2008); Michael Ramsey, *supra* note 8, at 307.

116. See also Norman Farrell, *supra* note 104 at 887-888; Katherine Gallagher, *Civil Litigation and Transnational Business*, 8 J. INT. CRIMINAL JUSTICE 745, 763 (2010); Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 128-29 (2011).

under count five. These charges concerned activities in Poland, Russia, and the Baltic countries that largely consisted of giving financial assistance to agencies that were active in Germany's spoliation program in these territories.<sup>117</sup> Thus, as in the context of Rasche's liability under count five for the commercial loans made to the SS, the Tribunal rejected the possibility that liability under count six would be triggered by making funds available to those who committed crimes.

However, the general conclusion widely drawn from this case that commercial loans are always exempt from complicity liability<sup>118</sup> is put into doubt when examining the Tribunal's discussion of Rasche's liability under count seven, which implies that making loans can fulfill the *actus reus* of aiding and abetting liability. This count alleged war crimes and crimes against humanity in the context of slave labor for having "participated in the financing of SS enterprises which used concentration camp labor on a wide scale and under inhumane conditions."<sup>119</sup> It is interesting to look at the Tribunal's reasoning in some detail.

Careful consideration of the evidence as adduced by the prosecution and by the defense fails to reveal that the defendant Rasche did in fact wrongfully participate "in sponsoring, supporting, approving, and obtaining approval for loans totaling millions of reichsmarks to SS enterprises which used concentration camp labor." The testimony reveals that over time the Dresdner Bank did loan various amounts to SS enterprises that employed concentration camp labor. But the prosecution failed to establish its contention that Rasche was a bank decision-maker with respect to the making of such loans. Further, it appears that such loans were usually secured.<sup>120</sup>

The Tribunal added that even if Rasche had played a decisive role in the granting of the loans to the SS, it would be difficult to find him guilty of participation in the slave-labor program on that account as "[t]he evidence adduced by the prosecution to show knowledge on the part of Rasche as to what was taking place in the SS enterprises with respect to slave labor . . . [was] unconvincing."<sup>121</sup> Because Rasche testified credibly as to having no personal knowledge of the slave-labor program, he was not subject to complicity liability under count seven.<sup>122</sup> Therefore, the Tribunal's refusal to find Rasche liable

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117. *United States v. Von Weizsacker* ("The Ministries Case"), 14 T.W.C., at 784 (1950) ("As hereinbefore indicated, on this question in discussions in our treatment of count five, and in view of the evidence generally with respect to the credits here involved, we do not find adequate basis for a holding of guilty on account of such loans"). He was convicted, though, for having actively participated in the illegal takeover of banks and companies and in Aryanization programs in Bohemia-Moravia and Holland.

118. *Khulumani*, 504 F.3d at 292-93 (Korman, J., concurring); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009); Chimène Keitner, *supra* note 105 at 91-92.

119. *United States v. Von Weizsacker* ("The Ministries Case"), 14 T.W.C., at 853 (1950).

120. *Id.*

121. *Id.* at 853-54.

122. *Id.* at 854-55 ("The defense testimony was to the effect that the defendant had no such

turned on insufficient proof of knowledge and on his limited role in making the loans.

While the Tribunal emphasized the ordinary commercial nature of the loans,<sup>123</sup> these statements were made in the context of a detailed analysis of the particular role played by Rasche in granting them, and of his knowledge with regard to their use. This suggests that the commercial character of the transactions was mainly significant for giving Rasche little reason to be aware of the unlawful nature of the activities being financed. However, there is no reason to infer from this that their commercial nature meant that these loans could not have resulted in Rasche's liability. If this were true, the detailed discussion undertaken by the Tribunal in order to reject Rasche's responsibility under count seven would have been superfluous. Instead, it seems that the Tribunal rejected Rasche's liability under count seven because making loans is an activity that is *per se* exempt from liability, but rather because there was not sufficient proof to justify holding Rasche personally criminally liable for the loans made by Dresdner Bank.

Looking at the decision against Rasche in its entirety, the judgment does not suggest that complicity liability for commercial loans is always excluded. At best, the decision lends limited support to the approach in *South African Apartheid Litigation*. As its conclusion in this respect is primarily based on the *Rasche* decision, which rejected all liability for loans and other inherently neutral commercial goods, it stands on rather weak ground.

### B. *The Case Against Puhl*

Another relevant Nuremberg decision regarding the liability of bankers is that of Emil Puhl. Puhl had been Deputy President of the German Reichsbank during the Third Reich and played an active role in arranging "for the receipt, classification, deposit, conversion and disposal of properties taken by the SS from victims exterminated in concentration camps."<sup>124</sup> He had, *inter alia*, been actively involved in organizing the recasting of gold from the teeth and crowns of concentration camp inmates. According to the Tribunal:

The receipt, realization, and disposition of stolen goods can hardly constitute a

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knowledge. We cannot go so far as to enunciate the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrower. Rasche as an official of the loaning bank under the circumstances surrounding the loans here under consideration, as revealed by the evidence, did not thereby become a criminal partner of the SS in the slave-labor program. The Tribunal finds the defendant Rasche not guilty under count seven").

123. *Id.* at 853 ("It appears that the loans, despite the claims of the prosecution to the contrary, were for the most part short-term loans and bear all the indications of having been conducted with the same objectives in mind as usually prompt the making of loans by any banking institution").

124. *Id.* at 609.



banking operation.<sup>125</sup> . . . That this was not looked upon as an ordinary transaction within the scope of its corporate purposes or official functions by the Reich Bank officials, including Puhl, is evidenced by the extreme secrecy with which the transaction was handled<sup>126</sup> . . . His part in this transaction was not that of a mere messenger or businessman. He went beyond the ordinary range of his duties to give directions that the appropriate departments of the bank handle the matter secretly. It is to be said in his favor that he neither originated the matter and that it was probably repugnant to him. . . . But without doubt he was a consenting participant in part of the execution of the entire plan, although his participation was not a major one. We find him guilty under count five.<sup>127</sup>

Whereas Rasche's activities were typical for any bank official, Puhl had clearly engaged in activities that cannot be regarded as part of normal banking practices. Whereas "banks routinely lend money, they presumably do not routinely launder gold teeth, making the latter conduct seem more egregious and worthy of criminal punishment."<sup>128</sup> Indeed, unlike the mere provision of funds, receiving and laundering stolen property is, in itself, usually regarded as criminal behavior,<sup>129</sup> made more serious by the fact that the gold teeth were likely obtained through murder.

Puhl was also charged under count seven (war crimes and crimes against humanity, slave labor) with having been active in financing enterprises that were primarily created to exploit slave labor, including the negotiation of a massive loan between the SS and DEST, a company specifically designed to utilize concentration camp labor.<sup>130</sup> He was also accused of having assisted DEST in "securing additional large loans, obtaining reductions on interest rates on such loans, and receiving extensions of time for repayment."<sup>131</sup> However, although Puhl had held positions of considerable responsibility and authority, the Tribunal held that he did not play a decisive role and stressed that it was "doubtful whether defendant Puhl did more than act as a conduit in these particular transactions."<sup>132</sup> Accordingly, the Tribunal dismissed charges against Puhl on this count.

It seems that here again, just as in the case against Rasche regarding slave labor, the Tribunal regarded facilitating the loan as potentially relevant, but did not consider Puhl's role as sufficiently established to result in individual criminal liability.

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125. *Id.* at 617.

126. *Id.* at 618.

127. *Id.* at 620-21. (Count five consists of war crimes, crimes against humanity, and atrocities and offences committed against civilian populations.)

128. Chimène Keitner, *supra* note 105 at 92.

129. I am grateful to Dr. Jeff King, Senior Lecturer in Law, University College of London, for bringing this point to my attention.

130. United States v. Von Weizsacker ("The Ministries Case"), 14 T.W.C., at 850-51 (1950).

131. *Id.* at 851.

132. *Id.* at 852.

### C. *The Case Against Funk*

The case against Walther Funk resulted in a conviction, *inter alia*, for loans to the SS that furthered slave labor. Funk had been the Minister of Economics and also the President of the German Reichsbank. The findings of the Nuremberg Tribunal that resulted in Funk's conviction were based on several grounds. He was found guilty of having "entered into an agreement with Himmler under which the Reichsbank was to receive certain gold and jewels and currency from the SS and instructed his subordinates, who were to work out the details, not to ask too many questions." Based on this agreement, the Reichsbank received objects stolen from persons who had been exterminated in the concentration camps, including money, jewelry, watches, and gold from eyeglasses, teeth, and fillings. In addition to these activities that clearly went beyond the ordinary tasks of a politician and banker:

As Minister of Economics and President of the Reichsbank, Funk participated in the economic exploitation of occupied territories . . . As President of the Reichsbank, Funk was also indirectly involved in the utilization of concentration camp labor. Under his direction the Reichsbank set up a revolving fund of 12,000,000 Reichsmarks to the credit of the SS for the construction of factories to use concentration camp laborers.<sup>133</sup>

Without further discussion, the Tribunal concluded that while it did not find Funk to be guilty on count one (crimes against peace), they regarded him guilty under counts two, three, and four (war crimes and crimes against humanity in various respects).<sup>134</sup> Given the lack of analysis on the part of the Tribunal, it is not clear what role the loan for concentration camp labor played in reaching a guilty verdict. While, therefore, it is not possible to conclude with certainty that the loan in itself would have resulted in Funk's conviction, it was clearly one factor the Tribunal regarded as important. Thus, the decision demonstrates that making loans might give rise to criminal responsibility for aiding and abetting under international law.

### D. *The Case Against Flick*

Finally, in the *Flick* case,<sup>135</sup> two industrials, Friedrich Flick and Otto Steinbrinck, were held criminally liable because they had contributed funds to the SS with knowledge of the crimes committed by that organization. The Tribunal first stated that an organization like the SS that commits war crimes and crimes against humanity on a large scale could be nothing other than

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133. *United States v. Brandt* ("The Medical Case"), 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 171, 305-06 (Nuernberg Military Tribs. 1949).

134. *Id.* at 307.

135. *United States v. Flick* ("The Flick Case"), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1217-23 (Nuernberg Military Tribs. 1952).

criminal.<sup>136</sup> It continued that, “One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”<sup>137</sup> The Tribunal went on to emphasize that:

It remains clear from the evidence that each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas. So we are compelled to find from the evidence that both defendants are guilty on count four.<sup>138</sup>

Thus, they were convicted even though the prosecution could not show that any part of the money donated by either of them was directly used for criminal activities of the SS. This is an interesting approach to one of the most complex issues in the context of liability for providing funds, that is, whether liability requires establishing a link between a particular loan or donation and specific violations committed by the recipient. Just as the Tribunal hinted in *Rasche*, in the context of financing, it is not necessary to show that the specific contributions made by individual defendants were intended for unlawful purposes. Rather, it is sufficient that some part of the receiving fund had such an intended use.<sup>139</sup> Funding that goes toward an organization with such clearly criminal purposes and characteristics as the SS must be regarded as contributing to maintaining it, eliminating the need to examine the exact use of the funds provided.

While *mens rea* is not specifically discussed in the *Flick* decision, it seems as if, unlike in the *Rasche* case, the Tribunal infers knowledge of the unlawful use that would be made of the money from the nature of the SS and the fund made available to Himmler.<sup>140</sup> In *Rasche*, on the other hand, equally with regard to contributions made to Himmler, the Tribunal failed to find that the character

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136. *Id.* at 1217.

137. *Id.*

138. *Id.* at 1221.

139. *But see* Christoph Burchard, *Ancillary and Neutral Business Contributions to 'Corporate-Political Core Crime'*, 8 J. INT. CRIMINAL JUSTICE 919, 936-37 (2010), who suggests that the liability of the defendants in the *Flick* case rests exclusively on their membership in a criminal organization, the SS, and does therefore not provide any guidance as to the standards that apply with regard to liability as an accessory to the crime. However, given that the indictment under count four was based on the fact that they were “accessories to, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with: murders . . .” *United States v. Flick* (“The Flick Case”), 6 T.W.C., at 1223 (1952), and that the Tribunal finds them guilty on that count, concluding that they were accessories to the crimes committed by the SS, it is difficult to share Burchard’s unequivocal conclusion in this respect, even though the Tribunal refers to their liability only in terms of their membership in the SS. *United States v. Flick* (“The Flick Case”), 6 T.W.C., at 1216-17 (1952).

140. *United States v. Flick* (“The Flick Case”), 6 T.W.C., at 1217 (1952) (“An organization which on a large scale is responsible for such crimes can be nothing else than criminal. One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes”).

of the recipient individual and organization implied that the lender had knowledge of the illegitimate purposes for the funds.<sup>141</sup>

### E. Conclusions

Prior to the trials discussed above, OMGUS issued reports on the war crimes of Deutsche Bank and Dresdner Bank<sup>142</sup> that highlighted the important role of private banks and of particular bankers, including Rasche,<sup>143</sup> in preparing the German economy for the war.<sup>144</sup> In addition to analyzing many other activities carried out or coordinated by these banks, the report stressed the essential functions of bank loans for the criminal policies of the Nazi regime generally, as well as for supporting the war, in particular.<sup>145</sup> It is striking that the findings of the OMGUS Reports were not considered in the Nuremberg Tribunal's discussions concerning complicity liability for individual financial officers.

#### 1. How to Interpret the Nuremberg Case Law

Any attempt to interpret the holdings in the different cases discussed above and to reconcile their disparate outcomes with regard to loans has to take account of the fact that the Nuremberg Tribunals did not provide detailed legal justifications of all parts of their decisions. Consequently, it is not always clear what the decisive features were that sufficiently distinguished the various scenarios and resulted in their different outcomes. This makes it difficult to draw from the decisions precise and coherent principles with regard to the question of whether and under what circumstances lending in general, and commercial lending in particular, might give rise to aiding and abetting liability. There is, for example, no indication in the case law as to the importance, if any, that might have been attached to the fact that Rasche was a private banker while Funk was the president of the Reichsbank, a bank owned and controlled by the state, and an important member of the Nazi government, and Puhl the deputy president of the Reichsbank.

It is equally unclear to what extent the difference in outcomes in *Flick* and *Rasche* rests on the fact that Flick was accused of making personal financial contributions to Himmler in order to secure political favors, whereas Rasche was accused of making a commercial loan on behalf of Dresdner Bank. For the Court in *Doe v Nestle*, this was indeed the decisive difference between the two

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141. See discussion *supra* Section III(A).

142. Christopher Simpson, *supra* note 106.

143. *Id.* at 396.

144. *Id.* at 105-24.

145. *Id.* at 38-40.

cases.<sup>146</sup> It explained Rasche's acquittal and Flick's conviction by an inference from Nuremberg cases that "[w]hen a business engages in a commercial *quid pro quo*-for example, by making a loan to a third party-it is insufficient to show merely that the business person knows that the transaction will somehow facilitate the third party's wrongful acts."<sup>147</sup> Liability would, on the other hand, be the consequence where the business acts "in a non-commercial, non-mutually-beneficial manner, as with the banker in *The Flick Case* who gratuitously funded the SS's criminal activities . . . or the chemical-company employees in the *Zyklon B Case* who provided the gas, tools, and specific training that facilitated the Germans' genocidal acts."<sup>148</sup> According to the Court, "[r]egardless of whether the holdings are categorized as turning on the defendant's *actus reus* or the *mens rea*, the ultimate conclusion is clear: ordinary commercial transaction[s], without more, do not violate international law."<sup>149</sup>

The analysis raises several problems. First of all, while a financial donation like that made by Flick can easily be categorized as both non-commercial and non-mutually-beneficial, it is not obvious why the Court identified the *Zyklon B* case as one in which the business person acted in a "non-commercial, non-mutually-beneficial manner." Tesch produced and sold poisonous gas and provided training regarding its use for killing concentration camp inmates, which he did as a profitable business transaction. The fact that these are clearly reprehensible actions does not deprive them of their commercial nature.

More importantly, the conclusion that "ordinary commercial transaction[s], without more, do not violate international law"<sup>150</sup> does not extend very far.<sup>151</sup> The interesting question is, rather, that of determining what exactly is this "more" that would turn a commercial transaction into a violation of international law. Despite the contrary suggestion of the Court in *Doe v. Nestle*, it is essential to distill whether these holdings turn on the *actus reus* or the *mens rea* of aiding and abetting liability. If they were based on the *actus reus*, then "more" would presumably have to embody an activity that goes beyond making a mere commercial transaction. In a *mens rea* based interpretation, on the other hand, "more" would be the mental element with which the commercial transaction was carried out.

The problems with glossing over the Nuremberg cases' distinction between *actus reus* and *mens rea* become apparent in the *Nestle* court's comparison of

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146. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1089-90, 1094-96 (C.D. Cal. 2010).

147. *Id.* at 1094.

148. *Id.* at 1095.

149. *Id.* at 1090.

150. *Id.*

151. See also the discussion of US case law on criminal conspiracy and aiding and abetting liability in the context of commercial transactions, *supra* Section II(C)(5); See also *United States v. Blankenship*, 970 F.2d 283, 285-86 (7th Cir. 1992) (author's emphasis).

the *Farben*<sup>152</sup> and *Zyklon B*<sup>153</sup> cases.<sup>154</sup> In both cases, industrialists were accused of supplying the Nazis with large quantities of the poison gas Zyklon B that was used to exterminate concentration camp members. In the *Farben* case, the defendants were acquitted, whereas the *Zyklon B* case resulted in a conviction. The Court in *Doe v. Nestle* suggested that the different outcomes rest on the distinction that, “[i]n one case, the defendants had provided the tools and the training on using those tools for illegal purposes; in the other case, the defendants provided only the tools and were unaware of the illegal acts being done.”<sup>155</sup> As the quote itself demonstrates, there were differences both on the *actus reus* and the *mens rea* side. In *Zyklon B*, the industrialists had gone beyond supplying the gas; in *Farben* the relevant *mens rea* could moreover not be established. Indeed, the acquittal in the *Farben* case seems to have rested entirely on a lack of *mens rea*,<sup>156</sup> while the consideration of whether or not the *actus reus* consisted solely in a commercial transaction does not seem to have had any relevance for the outcome. It is, in fact, highly unlikely that, had the relevant *mens rea* with regard to the intended use of the poison gas by the Nazis been established, the Court would have acquitted the defendants on the basis that this was no more than a commercial transaction.

In *Zyklon B*, on the other hand, the defendants’ *mens rea* could be demonstrated.<sup>157</sup> Thus, the “more” in the *Zyklon B* case that was missing in the *Farben* case was the presence of the requisite *mens rea*, which explains the acquittal in one case and the conviction in the other. A clear distinction between the *actus reus* and *mens rea* elements of complicity liability is thus essential to understand the different outcomes in these two cases, rather than the commercial/non-commercial nature of the transaction. This is not to say that the fact that the defendants in the *Zyklon B* case participated more closely in the killings than those in *Farben* has no relevance, as this deepened participation made it easier to infer the necessary *mens rea* in the *Zyklon B* case.

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152. United States v. Krauch (“The I.G. Farben Case”), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1169 (Nuernberg Military Tribs. 1953).

153. U.N. War Crimes Comm’n, LAW REP. OF TRIALS OF WAR CRIMINALS (Vol. 1), Case. No. 9, The Zyklon B Case, The Trial of Bruno Tesch and Two Others, at 93-103 (1947).

154. *Nestle*, 748 F. Supp. 2d at 1090-91.

155. *Id.* at 1091.

156. United States v. Krauch (“The I.G. Farben Case”), 8 T.W.C. at 1169 (1953) (“The proof is quite convincing that large quantities of Cyclon-B were supplied to the SS by Degesch and that it was used in the mass extermination of inmates of concentration camps, including Auschwitz. But neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put. Any such conclusion is refuted by the well-known need for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, are confined in congested quarters lacking adequate sanitary facilities”).

157. “The Zyklon B Case”, *supra* note 51, at 102.

The conviction of Funk was in part based on the accusation that he made funding available to the SS for the construction of factories to use concentration camp inmates as slave laborers.<sup>158</sup> The far-reaching approach to responsibility for financing activities that was adopted in the *Flick* case equally demonstrates that a sufficient link between funding and gross violations of international law can exist.<sup>159</sup> The discussion of Rasche's liability under count seven implies that commercial loans can result in responsibility for aiding and abetting.<sup>160</sup> Thus, a closer look at Nuremberg case law does not support the categorical rejection of liability for financing activities in general and commercial loans in particular, as suggested by the Court in *South African Apartheid Litigation* based on its reading of the *Rasche* decision under count five.<sup>161</sup>

When assessing what lessons can be learned from Nuremberg for corporate complicity cases before US courts, one cannot overlook that the Nuremberg trials dealt with the liability of individuals, not corporations. Consequently, the prosecution in each case needed to establish that the individual who stood trial had acted in a way that justified criminal conviction: It was insufficient to attribute responsibility directly to the relevant corporations.<sup>162</sup> The *IG Farben Case* makes the relevance of this distinction particularly clear. There, the Tribunal explained that the individual's responsibility for corporate actions requires proof that "an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it."<sup>163</sup>

The position of the individual defendants within the corporation, including their decision-making authority and individual contributions in the context of the relevant transactions, were, accordingly, a crucial factor for establishing liability. The Tribunal found that Funk exercised a sufficiently influential position to be held personally criminally liable for the loans he authorized; whereas Puhl, although also holding a position of authority, did not play a

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158. *United States v. Brandt* ("The Medical Case"), 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 305-06 (Nuernberg Military Tribs. 1949).

159. *United States v. Flick* ("The Flick Case"), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1217-23 (Nuernberg Military Tribs. 1952).

160. *United States v. Von Weizsacker* ("The Ministries Case"), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 853-55 (Nuernberg Military Tribs. 1950).

161. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 269 (S.D.N.Y. 2009).

162. Florian Jessberger, *On the Origins of Individual Criminal Responsibility under International Law for Business Activity*, 8 J. INT. CRIMINAL JUSTICE 783, 794-95 (2010) (suggesting in this respect that "[h]ere, an issue which concerns the practice of international criminal law to this day becomes obvious: the difficulty of attributing a crime to a certain person as a (factual) problem of proof, not one of law").

163. *United States v. Krauch* ("The I.G. Farben Case"), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1153 (Nuernberg Military Tribs. 1953).

decisive role and the Tribunal acquitted him of the charges related to securing the loans. The same findings led the Tribunal to the acquittal of Rasche under count seven. Thus, it seems that whether or not funding activities gave rise to liability depended, at least in part, on the role played by the individual in initiating or granting the loan.

The focus on individual as opposed to corporate responsibility is clearly an important difference between Nuremberg case law and that of US courts on the liability of corporations under the ATCA. In the latter, no individual responsibility of members of the corporation needs to be shown.<sup>164</sup> Thus, even to the extent that Nuremberg case law, in particular the acquittal of Rasche on count five, is interpreted in the way suggested in *South African Apartheid Litigation*, it would not automatically follow that corporate responsibility for similar activities would also have to be declined. This would only be the case if it could be shown that the reasons for which individual liability was rejected by the Nuremberg tribunals similarly apply to corporate liability. Where the Nuremberg cases found that there was no liability due to the individual defendant's role within a corporation, a US court analyzing corporate liability under the ATCA is not similarly precluded. Moreover, liability under the ATCA might be easier to demonstrate given the lesser burden of proof in civil as opposed to criminal cases.

## 2. *Developments in International Law Since Nuremberg*

Although Nuremberg may be one source of persuasive authority for US courts analyzing ATCA claims, international law has further developed in the area of complicity liability since those decisions were handed down. The international legal discourse has increasingly taken up the issue of corporate complicity liability, in general,<sup>165</sup> and legal discourse has started denouncing companies that finance human rights abuses.<sup>166</sup> Had the Court in *South African Apartheid Litigation* taken account of the international legal discourse after Nuremberg, it might have reached a more nuanced decision regarding whether commercial activities, including loans, can be sufficiently linked to gross human rights violations to give rise to complicity liability.

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164. See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F. 2d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011); *But see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (rejecting the existence of corporate liability for aiding and abetting under the ATCA).

165. See, e.g., Int'l Comm'n of Jurists, *supra* note 1, Vol. 2: *Criminal Law and International Crimes* (2008), Vol. 3: *Civil Remedies*; See also Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 100, 113-14, 158-59 (2002) (arguing that the *Rasche* decision is outdated in that international criminal law and accomplice liability have since developed); Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4 at 174.

166. Shaw W. Scott, *supra* note 4 at 1533-34.



The International Commission of Jurists, for example, argues that:

[If corporate officials] have the necessary knowledge as to the impact of their actions, it is irrelevant that they only intended to carry out normal business activities. For example, vendors who sell goods or materials . . . can be responsible as accomplices if they have knowledge, judged objectively, that the purchaser would use them to commit crimes under international law.<sup>167</sup>

Awareness of the link between financing and violations of international law is also increasing.<sup>168</sup> In this respect, the International Commission of Jurists suggests that “criminal liability of a financier will depend on what he or she knows about how his or her services and loans will be utilized and the degree to which these services actually affect the commission of a crime.”<sup>169</sup> Others speak of a “trend towards criminalizing the ‘ordinary’ financing and furthering of international treaty crimes,”<sup>170</sup> and they emphasize the general recognition that it is necessary “to prevent the commission of international crimes from the very outset by drying up their financial and material foundations.”<sup>171</sup>

However, international law has not given the same attention to financing gross violations of human rights as financing has received in other areas, such as anti-corruption, organized crime, and terrorism.<sup>172</sup> It is therefore necessary to address the extent to which legal principles and standards developed in these contexts can be generalized and applied to the question of liability for funding gross human rights violations. In particular, US case law on funding terrorism raises helpful similarities and differences that may reveal potential arguments in the ATCA context of funding gross human rights violations committed by governments.

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167. Int'l Comm'n of Jurists, *supra* note 1, Vol. 2 at 22 (in the context of *mens rea*).

168. See, e.g., Anita Ramasastry (1998), *supra* note 4; Shaw W. Scott, *supra* note 4; Juan Pablo Bohoslavsky & Veerle Oppenhaffen, *supra* note 4; Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4.

169. Int'l Comm'n of Jurists, *supra* note 1, Vol. 2 at 39-40.

170. Christoph Burchard, *supra* note 139 at 931.

171. *Id.*

172. Indeed, when suggesting that international law has developed in the context of complicity for financing, Shaw W. Scott, *supra* note 4 at 1533-34, makes reference to general developments in the context of international codes of conduct for transnational corporations, but more specifically to those in the context of money-laundering and funding of terrorist activities, and also to the UN International Convention for the Suppression of the Financing of Terrorism. Christoph Burchard, *supra* note 139 at 931, similarly refers to the UN International Convention for the Suppression of the Financing of Terrorism. See also INÉS TÓFALO, *Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 335, 345-46 (Olivier De Schutter ed., Hart 2006) (refers to anti-terrorist funding laws and U.N. Security Council Resolutions on asset freezing for such funding).

## IV.

## LESSONS FROM LEGAL APPROACHES TO FUNDING TERRORISM

In the context of the fight against terrorism, more and more attention has been paid to the primary importance of tackling the funding made available to terrorists. The International Convention for the Suppression of the Financing of Terrorism,<sup>173</sup> which was adopted by the UN General Assembly in 1999, stresses in its preamble “that the financing of terrorism is a matter of grave concern to the international community as a whole” and “that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain.”

In the United States, the US Anti-Terrorism Act (ATA) makes it a criminal offense to provide material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, violations of certain laws.<sup>174</sup> The legislative definition of “material support or resources” includes currency, monetary instruments, financial securities, and financial services.<sup>175</sup> The statute prohibits providing, attempting to provide, or conspiring to provide material support or resources to designated foreign terrorist organizations, thus expressly criminalizing the act of funding or providing other financial services to such organizations.<sup>176</sup> Organizations can be designated as a foreign terrorist organization (FTO) if they are engaged in terrorist activity or terrorism that threatens “the security of United States nationals or the national security [national defense, foreign relations, or the economic interests] of the United States.”<sup>177</sup> The ATA provides criminal and civil penalties for whomever, “by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or knowledge that such funds are to be used” in order to carry out a terrorist act.<sup>178</sup> Finally, Section 2333 provides US nationals who were injured by an act of international terrorism with the civil remedy of triple damages.

This shows that with respect to funding terrorism, legislators regard money as a particularly dangerous agent, and far-reaching liability is especially created to tackle the financiers of terrorists and terrorism. This stands in stark contrast to the approach in *South African Apartheid Litigation*, where the Court considered money to be an innocent agent that was always too far removed from the

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173. G.A. Res 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

174. 18 U.S.C. § 2339A (2009).

175. 18 U.S.C. § 2339A(b)(1) (2009).

176. 18 U.S.C. § 2339B (2009); See also Nina Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004) (detailed discussion of U.S. Anti-Terrorism legislation).

177. 8 U.S.C. § 1189(a)(1)(C) (2006) (emphasis added).

178. 18 U.S.C. § 2339C (2009).

violations carried out to give rise to complicity liability.<sup>179</sup>

This dichotomy can be explained in part by the significant factual and legal differences between funding terrorism and providing loans to regimes that commit gross human rights violations. An analysis of the approach adopted in US cases in which victims of terrorist attacks file lawsuits against banks is nevertheless interesting as it can provide a different view of the link between financing and gross international law violations. Indeed, some of the legal issues arising in those cases are very similar to those the Court had to address in *South African Apartheid Litigation*. First, both types of cases involve what defendants allege is no more than routine commercial provision of banking services. Second, both cases raise the same basic questions about how to define liability given the fungibility of money and the difficulty with linking individual financial contributions to specific harmful acts. While most of the cases arising in the terrorism context are argued under the ATA, some are argued under the ATCA and are based on the same legal principles that are applicable in complicity cases for funding gross human rights violations.

#### A. *Relevance of the Routine Nature of Banking Activities*

Several of the US terrorism-related cases dealt with the question of whether providing commercial banking services can give rise to liability for the crimes committed by their recipients. However, unlike *South African Apartheid Litigation*, in the terrorism context, the question was not limited to the particular issue of bank loans, but extended to banking services more broadly.

In one case, *Burnett v. Al Baraka Inv. and Development Corp.*,<sup>180</sup> victims of the terrorist attacks of September 11, 2001 sued individuals and entities, including banks and charitable foundations, for funding and supporting Al Qaeda. The complaint included allegations against Al Rajhi, a Saudi Arabian banking and investment corporation. The plaintiffs' main allegation was that Al Rajhi was the primary bank for a number of charities that serve as Al Qaeda front groups and that "funnel terrorism financing and support"<sup>181</sup> through Al-Rajhi's financial system. The Court held that Al Rajhi was not liable because he was merely a conduit of funds.

The act of providing material support to terrorists, or "funneling" money through banks for terrorists is unlawful and actionable, but . . . Al Rajhi is alleged only to be the funnel. Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing

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179. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009); *See also Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

180. *Burnett v. Al Baraka Inv. and Dev't Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003).

181. *Id.* at 109.

services, or any other routine banking service.<sup>182</sup>

This sounds as if routine commercial activities, which as such are not forbidden, can never form the *actus reus* of liability on the part of banks. However, other decisions cast doubt on this interpretation. In *In Re Terrorist Attacks on September 11, 2001*,<sup>183</sup> victims of the attacks sued entities that allegedly provided assistance to Al Qaeda. The Court considered defendant bank's knowledge of how its services were being used and held that "there can be no bank liability for injuries caused by money routinely passing through the bank. Saudi American Bank is not alleged to have known that anything relating to terrorism was occurring through the services it provided."<sup>184</sup> Thus, the Court indicated that liability may have been available had the bank had knowledge that their services were being used for terrorism purposes. This suggests that an important factor for the Court was the bank's lack of *mens rea*, rather than the absence of an *actus reus*. While this statement was made in the context of deciding whether the provision of routine banking services can amount to material support to a terrorist organization, the Court in the same decision rejected a claim against Al Rajhi Bank for aiding and abetting terrorists on the grounds that no allegations were made that the defendant bank knew that the recipients of the money supported terrorism. The Court did not give any indication that it would have rejected aiding and abetting liability had the necessary knowledge been established.<sup>185</sup>

The decision in *Weiss v. National Westminster Bank*,<sup>186</sup> in which victims of terrorist attacks in Israel brought a claim against National Westminster Bank (NatWest) for allegedly facilitating the activities of terrorist organizations, lends support to the interpretation that the decision in *In Re Terrorist Attacks on September 11, 2001* rests decisively on the *mens rea* of the banking defendant. NatWest argued that the Court should rely on *In Re Terrorist Attacks on September 11, 2001*<sup>187</sup> for the proposition that basic banking services, such as account maintenance, should be excluded from the definition of financial services in Section 2339(B)(a)(1), the provision of which the bank was accused.<sup>188</sup> The Court found the defendant bank liable and clarified that routine banking services are not *per se* exempt from liability.

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182. *Id.*

183. *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

184. *Id.* at 834.

185. *Id.* at 832-33 ("Plaintiffs claim Al Rajhi Bank aided and abetted the September 11 terrorists by donating to certain Defendant charities and acting as the bank for these Defendants. New York law and the courts interpreting the ATA in Boim make very clear that concerted action liability requires general knowledge of the primary actor's conduct. Even with the opportunity to clarify their claims against Al Rajhi Bank, the Burnett Plaintiffs do not offer facts to support their conclusions that Al Rajhi Bank had to know that Defendant charities ... were supporting terrorism").

186. *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

187. *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

188. *Weiss*, 453 F. Supp. 2d at 624.

The Defendant misconstrued the *Terrorist Attacks* decision. In holding that there could be no liability on the basis of “routine banking business” that Court did not mean that the provision of basic banking services could never give rise to bank liability. Rather the Court relied on the routine nature of the banking services to conclude that the defendant bank had no knowledge of the client’s terrorist activities.<sup>189</sup>

The fact that the services provided are routine banking services is relevant for showing the bank may not have suspected that it was providing assistance to the commission of terrorist acts. Conversely, courts can more easily infer such knowledge from non-routine banking services that are naturally suspicious. The relevance of the routine nature of the service thus lies, primarily, in the realm of determining the relevant *mens rea* of the defendant. A similar approach was adopted in *Strauss v. Credit Lyonnais*.<sup>190</sup>

In both *Strauss* and *Weiss*, the relevant statements were made in the context of an analysis of liability for providing material support to terrorist organizations, thus clarifying that making available routine banking services can amount to the provision of material support as defined in Section 2339A(b)(1). At the same time, in both cases, the plaintiffs’ claims for aiding and abetting liability for rendering routine banking services were rejected on the grounds that “[t]he maintenance of a bank account and the receipt or transfer of funds does not constitute substantial assistance.”<sup>191</sup> The Courts relied on *In Re Terrorist Attacks on September 11, 2001*<sup>192</sup> as a precedent to support their views in this respect. However, as seen above, in that case the Court rejected the claim for aiding and abetting liability on the same grounds as that for the provision of material support (i.e., because defendants’ lacked knowledge for *mens rea*, not because of the routine nature of their services).

*Goldberg v. UBS* is another decision where the Court accepted that routine banking services might amount to the provision of material support, but did not give rise to aiding and abetting liability. The Court relied *In Re Terrorist Attacks on September 11, 2001* and the statement in *Boim I* that funding *simpliciter* cannot result in civil liability<sup>193</sup> to support its view that “performing three wire transfers for ASP [Association de Secours Palestinien] fail[s] to establish ‘substantial assistance’ of the sort required to support an aiding and abetting

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189. *Id.* at 625; See also *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 489 (S.D.N.Y. 2010).

190. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at \*12 (E.D.N.Y. October 5, 2006).

191. *Id.* at \*9; *Weiss*, 453 F. Supp. 2d at 621; See also *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009).

192. *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

193. *Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev’t (“Boim I”)*, 291 F. 3d 1000, 1011 (7th Cir. 2002).

claim.”<sup>194</sup> The relevant part of *Boim I* reads as follows:

To say that funding *simpliciter* constitutes an act of terrorism is to give the statute [the ATA] an almost unlimited reach. Any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor's intent, could be construed to “involve” terrorism . . . [T]he complaint cannot be sustained on the theory that the defendants themselves committed an act of international terrorism when they donated unspecified amounts of money to Hamas, neither knowing nor suspecting that Hamas would in turn financially support the persons who murdered David Boim. In the very least, the plaintiffs must be able to show that murder was a reasonably foreseeable result of making a donation. Thus, the Boims' first theory of liability under Section 2333, funding *simpliciter* of a terrorist organization, is insufficient because it sets too vague a standard, and because it does not require a showing of proximate cause.<sup>195</sup>

This holding addresses a theory of primary liability based on the assumption that the provision of funding involves violent conduct and consequently amounts to an act of terrorism and would, therefore, make the funder liable as the principal offender. Thus, it is not evident why it would constitute authority regarding the scope and limits of secondary liability for aiding and abetting the principal offender. More importantly, the Court does not seem to be saying that funding cannot amount to “substantial assistance” of the sort required to support an aiding and abetting claim,” as suggested by the Court in *Goldberg*,<sup>196</sup> but rather that funding without the necessary *mens rea* and without being the proximate cause of the violent acts committed cannot give rise to liability. Thus, as in *In Re Terrorist Attacks on September 11, 2001, Boim I* does not lend support to a rejection of aiding and abetting liability for certain banking activities where *mens rea* as well as proximate cause can be shown.

The role of routine banking services in aiding and abetting liability also lies at the heart of the decisions in *Linde v. Arab Bank*<sup>197</sup> and *Almog v. Arab Bank*.<sup>198</sup> The plaintiffs in both cases made detailed allegations against the defendant bank, suggesting that it materially supported the efforts and goals of several terrorist organizations, including Hamas. They alleged mainly two types of support: (1) providing banking services, including maintaining accounts, for these organizations; and (2) administering the distribution of benefits made available by the Saudi Committee, a committee created in Saudi Arabia to raise funds to support the objectives of the relevant terrorist organizations, to the families of Palestinian “martyrs” and those wounded or imprisoned in perpetrating terrorist attacks.<sup>199</sup>

Arab Bank argued that it merely provided routine banking services, a

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194. *Goldberg*, 660 F. Supp. 2d at 425.

195. *Boim I*, 291 F.3d at 1011-12.

196. *Goldberg*, 660 F. Supp. 2d at 425.

197. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005).

198. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

199. *Id.* at 262-263; *Linde*, 384 F. Supp. 2d at 576-77.

defense rejected by the Court in both cases. In *Almog*, it was argued in this respect that:

Arab Bank ignores that acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts. Nothing in the amended complaints suggests that Arab Bank is a mere unknowing conduit for the unlawful acts of others, about whose aims the Bank is ignorant. Given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing "routine" about the services the Bank is alleged to have provided. Thus, plaintiffs' allegations with respect to Arab Bank's knowledge and conduct are sufficient under their first factual theory.<sup>200</sup>

*Doe v. Nestle*<sup>201</sup> interprets the outcome in *Almog* as based on the fact "that the defendant bank did not 'merely provide . . . routine banking services' that benefitted the terrorist organization,"<sup>202</sup> and therefore regards *Almog* as supporting *Doe's* view that "[t]he act of providing financing, without more, does not satisfy the *actus reus* requirement of aiding and abetting under international law."<sup>203</sup> Rather, "some additional assistance beyond financing" is necessary, such as in *Almog*, where the bank went beyond holding and transferring funds and "took the extra step of 'solicit[ing] and collect[ing]' those funds for Hamas."<sup>204</sup>

Similarly, whereas the Court in *Goldberg* held that routine banking services might amount to the provision of material support but does not give rise to aiding and abetting liability, the *Linde* court held that performing wire transfers to unlawful organizations could qualify as aiding and abetting the overall terrorist scheme. The *Goldberg* court distinguished itself by observing that in *Linde*, "the bank was alleged to have acted essentially as the officially designated administrator for terrorism incentive payments."<sup>205</sup>

However, even though the services provided in *Almog* and *Linde* clearly went beyond the provision of ordinary banking services for the terrorist organizations concerned, the above quote from *Almog* referred to the Court's conclusions with regard to the plaintiff's theory that involved liability for providing banking services and was not related to the additional activities of which the bank was accused. The same applies to the *Linde* quote. In both cases the discussion confirms the argument that the determinative factor for

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200. *Almog*, 471 F. Supp. 2d at 291; *See also* *Linde*, 384 F. Supp. 2d at 588 ("Although the Bank would like this court to find, as did the court in *In re Terrorist Attacks*, that it is engaged in "routine banking services," here, given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing "routine" about the services the Bank is alleged to provide").

201. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

202. *Id.* at 1097.

203. *Id.* at 1099.

204. *Id.*; *See also, In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1339-1340 (S.D. Fla. 2011).

205. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009)

distinguishing harmless routine banking services from those that might result in liability is the bank's *mens rea*. It is this knowledge of the purpose for which the services are being used, and of the unlawful acts they might be facilitating, which distinguishes routine from non-routine banking services.<sup>206</sup> Under this interpretation, the fact that a bank only provided routine commercial services does not automatically exclude the *actus reus* of liability, nor does the routine nature of the services stand in the way of establishing a sufficient causal link. Instead, the nature of the service, whether it is routine and/or commercial, is primarily relevant for the *mens rea* question, not the *actus reus*. It might be easier to assume knowledge that the banking services facilitate terrorist activities if the transactions themselves fall outside of the ordinary, than in cases where routine services are being provided.<sup>207</sup>

The relevant parts of the *Almog* decision stem from an analysis of the bank's liability under the ATCA,<sup>208</sup> while the Court in *Linde* reached a similar conclusion when examining the issue in the context of a claim under the ATA. It thus seems fair to assume that the relevant arguments and conclusions are not based on the specificities of the anti-terrorism legislation but, rather, also apply to complicity liability outside of that specific legislative framework. At least in the context of funding terrorism,<sup>209</sup> the routine or commercial nature of financial services does not automatically exclude the *actus reus* of liability for aiding and abetting. When financial services further terrorist acts, liability rests on the *mens rea* with which the services were provided, not the type of service.

### B. Actus Reus and Causation in the Context of Funding Terrorism

As this prior discussion shows, some courts have concluded that defendants accused of providing "routine" banking services are not automatically shielded from liability. These courts must then determine the relevant liability standards. In this context, the controlling statute may determine the standard chosen. As explained above, when establishing liability for aiding and abetting under the ATCA, the relevant *actus reus* standard requires practical assistance that has a substantial effect on the commission of the violation of the law of nations carried out by the principal actor.<sup>210</sup> Where a case is brought under the ATA,

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206. For a similar interpretation see *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 624 (E.D.N.Y. 2006).

207. See also *Wultz v. Iran*, 755 F. Supp. 2d 1, 52-53 (D.D.C. 2010).

208. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007) (with regard to the Banks liability for aiding and abetting under the ATA, the court held that "With respect to aiding and abetting liability, the financial services provided by Arab Bank, and the administration of the benefit plan, are alleged to have provided substantial assistance to international terrorism and encouraged terrorists to act . . . . Thus, Arab Bank's alleged conduct is a sufficient basis for liability under the broad scope of the ATA").

209. *Id.* at 291.

210. See *supra* section II(C)(1).



the relevant standard depends on the exact provision on which the claim is based.

In many of the terrorism cases that involved the provision of banking services and/or funds, the plaintiffs rely on several provisions of the ATA simultaneously. In most cases, it is alleged that the banks or funders violated the prohibitions to provide material support under Sections 2339A, 2339B, and 2339C, and that this gives rise to civil liability pursuant to Section 2333.<sup>211</sup> At least in one case, plaintiffs argued that funding the commission of terrorist attacks amounts on its own to an act involving terrorism that creates primary liability under Section 2333.<sup>212</sup> To the extent that the claims allege aiding and abetting liability,<sup>213</sup> they usually argue that such liability arises out of assisting one of the acts listed in Section 2332, which includes murder, attempted murder, and serious bodily injury. Where aiding and abetting liability is at issue, courts seem to apply a substantial assistance standard.<sup>214</sup>

When interpreting the meaning of material support in the context of the ATA, courts emphasized that the term “relates to the type of aid provided rather than whether it is substantial or considerable.”<sup>215</sup> Support under Section 2339A is therefore automatically regarded as material, regardless of its intensity or effect. In *Holder v. Humanitarian Law Project*, the US Supreme Court explained: “Material support is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends.”<sup>216</sup> Justice Breyer,<sup>217</sup> in line with the majority view on this point, suggested that where the alleged support consisted in the provision of financial services, there is a presumption that such support has a significant likelihood of furthering terrorism, as “[t]hose kinds of aid are inherently more likely to help an organization’s terrorist activities, either directly or because they are fungible

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211. See, e.g., *Goldberg v. UBS AG*, 660 F. Supp. 2d 410 (E.D.N.Y. 2009); *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704 (E.D.N.Y. October 5, 2006); *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

212. *Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev’t (“Boim I”)*, 291 F. 3d 1000 (7th Cir. 2002).

213. Courts’ views are divided as to whether liability under the ATA is primary or secondary liability. *Boim v. Holy Land Found. for Relief and Dev’t (“Boim III”)*, 549 F. 3d 685 (7th Cir. 2008) and *Goldberg*, 660 F. Supp. 2d 410 adopt a primary liability approach, while other courts recognize aiding and abetting liability under the ATCA. See, e.g., *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005); see also *Wultz v. Iran*, 755 F. Supp. 2d 1, 54-55 (D.D.C. 2010).

214. See, for example, *Linde*, 384 F. Supp. 2d at 574.

215. *Boim I*, 291 F.3d at 1015.

216. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010).

217. *Id.* at 2741 (Breyer, J., dissenting that where support consisted of mere speech or association, to provide material support should be understood to require that the funder knows that “his support bears a significant likelihood of furthering the organization’s terrorist . . . not just its lawful, aims”).

in nature.”<sup>218</sup>

One of the main reasons for this broad approach to liability is the criminal nature of the organizations the money goes to, as well as that of their activities. Indeed, the very fact that an organization is designated as a foreign terrorist organization (FTO)—and many of the US cases refer to funding made available to FTOs—means that “the specified organizations ‘are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.’”<sup>219</sup> It is thus assumed that funding that goes to an FTO furthers terrorist activities, and the designation of the organization “[p]uts a donor on notice that the recipient is likely to use the material support for illegal purposes—or, more generally, that the material support will always free up resources for the FTO to commit its unlawful acts.”<sup>220</sup>

All of this seems to suggest that the mere act of providing material support to terrorist organizations in the form of funding might give rise to liability. This was the conclusion of the Seventh Circuit in *Boim III* in an *en banc* rehearing.<sup>221</sup> Gunmen allegedly acting on behalf of Hamas killed a US citizen in Israel. His parents sued various individuals and groups with connections to terrorist organizations, including charities, for having provided financial support to Hamas. The case was brought under the legal framework of the ATA.<sup>222</sup> As Section 2339B had not been enacted at the time the attack was carried out, the Court derived liability from a “chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332).”<sup>223</sup> One of the main issues in the *Boim* litigation was whether it was necessary to show a causal link between the donations made by the defendants and the death of David Boim. If so, how could this be achieved, given the fungibility of money? In particular, how close did the defendants have to be to the commission of the terrorist offense?

Judge Posner delivered the majority opinion in *Boim III*, explaining that the civil remedies provided in Section 2333 are important because “[d]amages are a less effective remedy against terrorists and their organizations than against their financial angels”<sup>224</sup> and “suits against financiers of terrorism can cut the

218. *Id.*

219. *See, e.g., Id.* at 2712 (citing Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 18 U.S.C. § 2339B (note on Findings and Purpose)).

220. Benjamin Yaster, *Resetting Scales: An Examination of Due Process Rights in Material Support Prosecutions*, 82 N.Y.U. L. REV. 1353, 1382 (2018); *See also* Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KANSAS J.L. & PUB. POL’Y 461, 462-63 (2005).

221. *Boim v. Holy Land Found. for Relief and Dev’t (“Boim III”)*, 549 F. 3d 685 (7th Cir. 2008).

222. *Id.* at 688.

223. *Id.* at 690.

224. *Id.*

terrorists' lifeline."<sup>225</sup> He therefore characterized the availability of civil remedies as "a counterterrorism measure."<sup>226</sup> He then suggested that an act that in itself would be too slight to warrant a finding that it had caused the harm suffered by the victim might become "wrongful because it is done in the context of what others are doing,"<sup>227</sup> that it would be sufficient to establish that there was a substantial probability that the defendant's act had caused the harm,<sup>228</sup> and that a defendant can be held liable:

even though there was no proven, or even likely, causal connection between anything he did and the injury. It was enough to make him liable that he had helped to create a danger; it was immaterial that the effect of his help could not be determined—that his acts could not be found to be either a necessary or a sufficient condition of the injury.<sup>229</sup>

The majority then applied its general considerations on causation to the case before it and invited to consider:

an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes \$1,000 to it, for a total of \$100,000. The organization has additional resources from other, unknown contributors of \$200,000 and it uses its total resources of \$300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of \$1,000. The tort principles that we have reviewed would make the defendant jointly and severally liable with all those other contributors. The fact that the death could not be traced to any of the contributors . . . would be irrelevant. The knowing contributors as a whole would have significantly enhanced the risk of terrorist acts . . . and this would be true even if Hamas had incurred a cost of more than \$1,000 to kill the American, so that no defendant's contribution was a sufficient condition of his death.<sup>230</sup>

This seems to relieve the plaintiffs of any burden to show causation and, in fact, seems to hold financial donors to a terrorist organization liable for all harm inflicted by it, however minor their donations, and without a requirement to establish that the funding in any way facilitated the occurrence of the particular harm for which the plaintiffs seek relief.<sup>231</sup>

While this approach to interpreting material support seems consistent with *Humanitarian Law Project*, most civil courts tend to insist on a proximate cause requirement in the context of civil litigation, and they continue to do so in the

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225. *Id.* at 691.

226. *Id.*

227. *Id.* at 696-97 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 354 (5th ed. 1984)).

228. *Id.* at 697.

229. *Id.* at 697 (referring to *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958)).

230. *Id.*

231. See also *Boim III*, 549 F.3d at 706 (Rovner, J., dissenting) and 719 (Wood, J., dissenting).

aftermath of both *Boim III* and *Humanitarian Law Project*.<sup>232</sup> Indeed, cases analyzing the implications of the Supreme Court decision in *Humanitarian Law Project* for civil liability in the context of funding terrorism made it clear that by the act of providing material support in and of itself does not trigger civil remedies, but rather only if the material support was the proximate cause for the injuries suffered by the plaintiffs. In *Rothstein*, after the Court of Appeals remanded the action based on the decision in *Humanitarian Law Project*, the Court held that:

*Humanitarian Law Project* does not address Section 2333(a)'s proximate causation requirement. Section 2333 is a remedial civil statute that provides compensation to victims who demonstrate they were injured "by reason of" an act of international terrorism. As such, establishing a proximate causal relationship between the defendant's conduct and the plaintiff's injuries is an indispensable element of a Section 2333(a) civil damages claim. By contrast, Section 2339 is a purely criminal measure that has no causation element . . . and all that is needed to sustain a Section 2339B prosecution is proof that the defendant knowingly engaged in prohibited conduct. Accordingly, any potential connection between *Humanitarian Law Project's* analysis of Section 2339B and this Court's analysis of Section 2333's proximate causation element would appear to be strained at best and more likely irrelevant.<sup>233</sup>

Thus, in cases where civil liability under Section 2333 for providing material support is at issue, the requirement that the plaintiff was injured "by reason" of an act of international terrorism makes it necessary causation, particularly proximate cause, in order to link the defendant to the plaintiff's injury.

In the context of ATA litigation, most courts require for proximate cause that "defendant's actions were 'a substantial factor in the sequence of responsible causation,' and that the injury was 'reasonably foreseeable or anticipated as a natural consequence.'"<sup>234</sup> This standard closely resembles substantial effect, but applies here in material support cases alleging civil responsibility. Although there are differences between funding terrorism and funding gross human rights violations, an analysis of how these cases approach proximate causation might then shed light on the question of whether, under certain circumstances, funding can have a substantial effect on the violations carried out by its recipient. This would run contrary to the decision in *South African Apartheid Litigation* that "supplying a violator of the law of nations with funds—even funds that could not have been obtained but for those loans—is not sufficiently connected to the primary violation to fulfill the *actus reus* requirement of aiding and abetting a violation of the law of nations."<sup>235</sup>

232. See, e.g., *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 513-14 (S.D.N.Y. 2011); *Wultz v. Iran*, 755 F. Supp. 2d 1, 53 (D.D.C. 2010); for a discussion see *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 633-34, 646 (S.D. Tex. 2011).

233. *Rothstein*, 772 F. Supp. 2d at 516; See also *Abecassis*, 785 F. Supp. 2d at 633-34.

234. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at \*17 (E.D.N.Y. October 5, 2006).

235. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 269 (S.D.N.Y. 2009).

The issue of what causal link must be shown between the funding by the defendants and the offenses committed in civil claims for providing material support to terrorist organizations was discussed in some detail in *Goldberg v UBS*,<sup>236</sup> *Weiss v National Westminster Bank*,<sup>237</sup> and *Strauss v Credit Lyonnais*.<sup>238</sup> In *Goldberg*, the relatives of a victim of a terrorist attack in Israel sued UBS for having made wire transfers to ASP, an institution that was part of Hamas' financial infrastructure.<sup>239</sup> With regard to the question of proximate cause, the Court argued that it was sufficient that the plaintiffs had alleged:

[T]he defendant transferred funds from a designated terrorist organization, ASP, to Tulkarem Zakat, an organization controlled by Hamas in the West Bank territory, . . . [had] identified three specific transfers to Tulkarem Zakat, the last of which occurred a few weeks before the terrorist bombing that killed Stuart Scott Goldberg . . . [and] that Hamas, an organization claimed to control Tulkarem Zakat, was responsible for the bombing of Bus 19.<sup>240</sup>

The Court also interpreted the ATA as expressing congressional intent to find companies liable for financial support, although money is always fungible and causation may be impossible to demonstrate:

Common sense requires a conclusion that Congress did not intend to limit recovery to those plaintiffs who could show that the *very dollars* sent to a terrorist organization were used to purchase the implements of violence that caused harm to the plaintiff. Such a burden would render the statute powerless to stop the flow of money to international terrorists, and would be incompatible with the legislative history of the ATA.<sup>241</sup>

*Weiss v. National Westminster Bank*, a case in which victims of terrorist attacks in Israel brought a claim against National Westminster Bank (NatWest) for facilitating the activities of terrorist organizations, also addressed the issue of proximate causation.<sup>242</sup> NatWest had argued that in order to succeed with their claim, "plaintiffs must allege, for example, that the funds supplied by the defendant were used to buy the specific weapons and train the specific men who killed or injured the plaintiffs."<sup>243</sup> The Court disagreed, suggesting that to prove proximate cause, it would be sufficient to assert, as the plaintiffs did, that NatWest reasonably foresaw that "funds provided directly to known terrorist groups would be used to perpetrate terrorist attacks."<sup>244</sup> The Court justified its conclusion by looking to legislative history as well as to Congress' intent to

236. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410 (E.D.N.Y. 2009).

237. *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

238. *Strauss*, 2006 WL 2862704.

239. *Goldberg*, 660 F. Supp. 2d at 416-17.

240. *Id.* at 430.

241. *Id.* at 429.

242. *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

243. *Id.* at 631.

244. *Id.* at 632 n. 17.

impose "liability at any point along the causal chain of terrorism,"<sup>245</sup> its view that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,"<sup>246</sup> and its belief that because of the fungibility of money, "giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts."<sup>247</sup>

In *Strauss v. Credit Lyonnais*,<sup>248</sup> a case based on similar facts brought against Credit Lyonnais by the same plaintiffs that sued NatWest in *Weiss*, the Court suggested that:

Because money is fungible, it is not generally possible to say that a particular dollar caused a particular act or paid for a particular gun. If plaintiffs were required to make such a showing, 2333(a) enforcement would be [so] difficult that the stated purpose would be eviscerated. Rather, where the provision of funds to a terrorist organization is a substantial factor in carrying out terrorist acts, it is thus the proximate cause of the terrorist attacks engaged in the organization.<sup>249</sup>

In *re Chiquita Brands*,<sup>250</sup> the Court cited the standards established in *Weiss* and *Strauss* with approval.<sup>251</sup> In that case, US citizens and the relatives of deceased US citizens who were kidnapped, held hostage, and murdered by the Colombian guerrilla organization known as Fuerzas Armadas Revolucionarias de Colombia (FARC), sued Chiquita for making numerous and substantial secret payments to FARC, and for providing FARC with weapons, ammunition and other supplies. The Court rejected the argument that the assistance allegedly provided to FARC by Chiquita was not substantial because of FARC's vast resources. According to the Court:

Plaintiffs have alleged sufficient facts from which a reasonable trier of fact could conclude that Chiquita's actions of providing material support to FARC would fund some of FARC's terrorist activities, including the kidnappings and murders of Americans. Thus, Plaintiffs have sufficiently alleged proximate causation.<sup>252</sup>

How substantial do individual financial contributions need to be in order to result in liability? Judge Wood suggested in her dissenting opinion in *Boim III* that it would be necessary to demonstrate that the defendant's "actions amounted to at least a sufficient cause of the terrorist act that killed David Boim,

245. *Id.* at 631 (quoting S. REP. NO. 102-342, at 22 (1992)).

246. *Id.* (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-32, § 301(a)(7), 110 Stat. 1214, 1247 (1996)).

247. *Id.* at 631-632 (quoting Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000)); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005).

248. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2362704 (E.D.N.Y. October 5, 2006).

249. *Id.* at 18.

250. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011).

251. *Id.* at 1313-14.

252. *Id.* at 1312.

even if, on these facts, there were multiple such causes.”<sup>253</sup> According to her, this would require a showing that the defendant donated to Hamas “an amount that would have been sufficient to finance the shooting at the Beit El bus stop.”<sup>254</sup> Where a finding of causation is based on the danger of harm created by a collective action, plaintiffs would need to show that each act was in itself substantial enough to have had the potential of causing the harm on its own. This approach was questioned in *In re Terrorist Attacks on September 11*:

Al Qaeda’s ability to accomplish the coordinated large-scale terrorist attacks of September 11th is dependent on the cumulative efforts and contributions of untold thousands over an extended period of time. The commingling of funds and services, and the fungible nature of money itself, essentially renders it impossible to identify the specific material support, (much less the original source thereof), that enabled al Qaeda to commit a particular terrorist attack. Individually, the financial or other material support provided by a particular person or entity may be of insignificant value. Yet, it is the collective contributions of all such sponsors that gives birth to a repository of seemingly endless financial, military, and logistical resources, from which the terrorist organization draws upon with impunity to carry out its violent attacks against innocent civilians. Such a reality bears directly on the issues of temporal and causal proximity.<sup>255</sup>

Thus, because the relevant consideration is the creation of danger through collective action, it is enough that the total of the donations is sufficiently substantial to cause the harm, although, as will often be the case with financial donations, the risk does not stem from coordinated acts, but rather from the cumulative effect of individual contributions.

In all of these cases, the courts acknowledged the same problem that the Court in *South African Apartheid Litigation* struggled with: the fungible nature of money makes it difficult, if not in most cases impossible, to link a specific financial contribution to a particular violation committed. However, in the terrorism context, this led the courts to adopt a broad “substantial factor” approach to proximate cause,<sup>256</sup> instead of concluding that the link between money and violations is always too remote to result in liability.<sup>257</sup> For an act of funding to be regarded as the proximate cause of an act of terrorism, they did not require a demonstrable causal link between the money and the specific attack suffered by the plaintiffs.<sup>258</sup>

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253. *Boim v. Holy Land Found. for Relief and Dev’t* (“Boim III”), 549 F. 3d 685, 723 (7th Cir. 2008).

254. *Id.* at 724.

255. *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 492-93 (S.D.N.Y. 2010).

256. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at \*17 (E.D.N.Y. October 5, 2006).

257. *See, e.g., Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 295 (S.D.N.Y. 2009); *Wultz v. Iran*, 755 F. Supp. 2d 1, 53 (D.D.C. 2010); for a discussion see *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 632-33, 646 (S.D. Tex. 2011).

258. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429-30 (E.D.N.Y. 2009); *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609, 632 (E.D.N.Y. 2006).

In the terrorism context, the courts find it sufficient to show that the supply of money is a substantial factor in the commission of terrorist offenses by the recipient group.<sup>259</sup> It does not matter how the group used the defendant's money, or that the group may not have needed the defendant's money to carry out its offenses.<sup>260</sup> Although the courts insist on the need to show proximate causation, they seem prepared to assume that money plays a substantial role in the commission of terrorist attacks, rather than requiring that this be proved in each case.<sup>261</sup> This approach seems to reflect the Supreme Court's view in *Humanitarian Law Project* that there is a significant likelihood that material support in the form of funding furthers terrorism because of its fungible nature and its potential to free up "other resources within the organization that may be put to violent ends."<sup>262</sup>

Liability standards thus seem fairly broad in the terrorism context, but they are not without limits. In some of the civil cases on liability for funding terrorism filed under the ATA, courts held that no proximate causal link existed between the funding and the terrorist attacks that harmed the plaintiffs. In *Rothstein v UBS*,<sup>263</sup> for example, victims and families of victims of terrorist attacks committed by Hamas and Hezbollah in Israel sued UBS. They alleged that the bank assisted the Government of Iran in financially supporting Hamas and Hezbollah by transferring US currency to Iran. The Court summarized the plaintiff's case against UBS as follows:

The Iranian government is a recognized sponsor of terrorism and has funded and supported Hamas, Hezbollah, and other Palestinian terrorist organizations; . . . these terrorist organizations require US cash dollars to carry out their activities; and . . . UBS's involvement in banknote transactions with Iranian counterparties had the effect of providing US cash dollars to the Iranian government, which, in turn, supplied the aforementioned terrorist organizations with US cash dollars that were used to facilitate terrorist acts.<sup>264</sup>

The Court rejected the claim that UBS had thereby indirectly facilitated the harm suffered by the victims at the hands of the terrorist groups, finding that:

Plaintiffs . . . must at a minimum allege facts that show a proximate causal relationship between UBS's transfers of funds to Iran and Hamas' and Hezbollah's commission of the terrorist acts that caused plaintiffs' injuries. This they have entirely failed to do. Among many other deficiencies in the causal chain, the First Amended Complaint . . . does not allege that UBS is a primary or even relatively significant source of US banknotes for the Iranian government . . . Further still, there are no specific allegations showing that the terrorist groups

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259. *In re Terrorist Attacks*, 718 F. Supp. 2d at 492-93.

260. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute Derivative Litigation*, 690 F. Supp. 2d 1296, 1314-15 (S.D. Fla. 2010); *Wultz*, 755 F. Supp. 2d at 6.

261. *Weiss*, 453 F. Supp. 2d at 631-32.

262. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010).

263. *Rothstein v. UBS AG*, 647 F. Supp. 2d 292 (S.D.N.Y. 2009).

264. *Id.* at 293.



here in question raise their funds from monies transferred from Iran.<sup>265</sup>

The Court distinguished *Strauss v. Credit Lyonnais*<sup>266</sup> and *Linde v. Arab Bank*<sup>267</sup> on the basis that in those two cases, the plaintiffs had suggested a “direct involvement between the defendant banks and the terrorist organizations or “fronts” those organizations directly controlled,”<sup>268</sup> while no such direct relationship was alleged in *Rothstein*.<sup>269</sup> Thus, not only was the impact of the supply of US currency to the Iranian government on the terrorist acts insufficiently demonstrated, but the link between the defendants and the terrorists was regarded as too tenuous to result in liability.<sup>270</sup>

The causation standards thus far discussed all stem from litigation under the ATA. However, some of the cases dealing with liability for funding terrorism brought claims under the ATCA. In *Almog v. Arab Bank*,<sup>271</sup> when analyzing whether Arab Bank’s conduct had a substantial effect on the international law violations carried out by the terrorists, the Court found that plaintiffs had sufficiently alleged that “their injuries were caused by suicide bombings or other attacks perpetrated by the terrorist organizations to which Arab Bank provided banking services.”<sup>272</sup> However, the plaintiffs would “have to prove that the Bank provided these services to the particular group responsible for the attacks giving rise to their injuries.”<sup>273</sup> Arab Bank went beyond providing financial services, as it played an active role in the implementation of the benefit plan. The Court nevertheless specifically stated that substantial effect was sufficiently alleged under both theories of the plaintiffs,<sup>274</sup> and the first liability theory was based only on the provision of financial services.<sup>275</sup> This case suggests that the mere provision of financial services could in itself result in complicity liability under the ATCA, as long as it substantially assisted terrorism. This presupposes that financial services can

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265. *Id.* at 294.

266. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704 (E.D.N.Y. October 5, 2006).

267. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005).

268. *Rothstein*, 647 F. Supp. 2d at 294.

269. *Id.*

270. *Rothstein* was cited with approval in *Wultz v. Iran*, 755 F. Supp. 2d 1, 22 (D.D.C. 2010) (stressing the decisive nature of the fact that money had allegedly been transferred directly by the Bank of China to accounts held on behalf of the Palestinian Islamic Jihad).

271. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

272. *Id.* at 291.

273. *Id.*; *See also Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005) (similar claim discussed under the ATA).

274. *Almog*, 471 F. Supp. 2d at 291 (“Plaintiffs’ allegations with respect to the substantial effect of Arab Bank’s conduct in bringing about the underlying violations of a norm of international law are also sufficient under both factual theories”).

275. *Id.* at 290 (“plaintiffs’ first factual theory focuses on Arab Bank’s knowing provision of banking services, including the maintenance of accounts, for HAMAS and other terrorist organizations, terrorist front organizations, and individual supporters of terrorist organizations”).

facilitate terrorist acts.

The decision applies standards similar to those derived from litigation under the ATA in the context of aiding and abetting liability under the ATCA. Liability requires a link between the defendant's act of assistance and the organization to which the financial services were provided, but not between the service and the specific violation that was carried out. This stands in stark contrast to the approach adopted in *South African Apartheid Litigation*, but it needs to be taken into account that the Court in *Almog* was influenced by the fact that the acts of complicity occurred in the context of terrorism. The Court stressed that its approach was:

supported by the fact that Arab Bank's alleged conduct is exactly the type of conduct that the applicable Conventions and related US laws are aimed at preventing. Both the Conventions and the ATA highlight the enabling nature of such conduct in bringing about the underlying violations of international law.<sup>276</sup>

Indeed, in all of the cases discussed above, the adoption of a broad "substantial factor" approach to proximate cause in order to overcome the causation problems due to the fungibility of money was clearly driven by the consideration that a higher standard of causation would undermine the objective to cut off all funding for terrorist organizations.

### C. Funding of Organizations with Multiple Purposes

One aspect of funding regimes that commit gross human rights violations is that however bad their human rights record, or however corrupt, regimes use funds to carry out a multitude of functions. The fungibility of money might then have a different impact than in the context of funds donated to terrorist organizations, as it might be more difficult to infer routinely that the funds made available to a government will go towards the realization of goals that are prohibited by international law. Comparable problems arose in some of the cases on terrorism financing to organizations that carry out charitable functions, or cases on financing regimes deemed to be state sponsors of terrorism.

In *Boim III*,<sup>277</sup> the Court addressed the liability of financiers who fund organizations that engage in both terrorist and social welfare services. The case involved financial donations made to Hamas, an organization that undertakes terrorist activities as well as social welfare services and charitable work.<sup>278</sup> The majority in *Boim III* was unequivocal in holding that directing support exclusively towards the non-violent activities of the organization did not excuse complicity liability.<sup>279</sup> The Court reasoned that the fungibility of money made it

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276. *Id.* at 293.

277. *Boim v. Holy Land Found. for Relief and Dev't ("Boim III")*, 549 F. 3d 685 (7th Cir. 2008).

278. *Id.* at 698.

279. *Id.* at 698-99.

possible for Hamas to receive a donation of money earmarked for social services and then transfer an amount equal to the donation from its social services "account" to its terrorism "account."<sup>280</sup> Additionally, the Court opined that Hamas' social welfare activities indirectly reinforced its terrorist activities by enhancing Hamas's popularity among the Palestinian population and funding schools that indoctrinate children.<sup>281</sup> This led to the far-reaching conclusion that anyone who knowingly contributes to an organization that engages in terrorism is knowingly contributing to the organization's terrorist activities, even if the money was explicitly dedicated to supporting its charitable work.<sup>282</sup>

In *Holder v. Humanitarian Law Project*, the US Supreme Court endorsed this view in holding that, "Money is fungible, and '[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.' . . . [but] '[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.'"<sup>283</sup>

Despite the existence of such a danger, it is doubtful that this reasoning provides sufficient justification for dispensing with any proximate cause requirement in civil litigation and for holding each donor indiscriminately liable for terrorist acts. In his dissent, Judge Rovner rightly criticized the majority's approach to causation by emphasizing that it does not leave room to distinguish individuals who purposely fund terrorism from those who are further removed and whose donation has "at most, an indirect, uncertain, and unintended effect on terrorist activity."<sup>284</sup> He argued instead that the degree of responsibility of funders should depend on who money was being donated to and for what purposes. In this respect, he distinguished several scenarios, explaining:

If indeed the defendants were directing money into a central Hamas fund out of which all Hamas expenses-whether for humanitarian or terrorist activities-were paid, it would be easy to see that the defendants were supporting Hamas's terrorism even if their contributions were earmarked for charity. In fact, the case is not as simple as that. For example, much of the money that defendant HLF provided to Hamas apparently was directed not to Hamas per se but to a variety of zakat committees and other charitable entities, including a hospital in Gaza, that were controlled by Hamas. . . . if the zakat committees and other recipients of HLF's funding were mere fronts for Hamas or were used to launder donations targeted for Hamas generally, then those donations ought to be treated as if they were direct donations to Hamas itself. But to the extent that these Hamas subsidiary organizations actually were engaged solely in humanitarian work and HLF was sending its money to those subsidiaries to support that work, HLF is one or more significant steps removed from the direct financing of terrorism and

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280. *Id.*

281. *Id.*

282. *Id.*

283. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725-26 (2010).

284. *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F. 3d 685, 705 (7th Cir. 2008).

the case for HLF's liability for terrorism is, in my view, a much less compelling one. Defendant AMS is yet another step removed, in that AMS is alleged to have contributed money not to Hamas but to HLF<sup>285</sup>

Judge Rovner accepted that donations to Hamas's humanitarian activities make other funds available for terrorism and provide cover to enhance Hamas's image.<sup>286</sup> However, he contested that someone who makes donations to Hamas's charitable subsidiaries automatically provides material support to Hamas's terrorist acts. Instead, "the donor must at least know that the financial or other support he lends to Hamas *will be used* to commit terrorist acts."<sup>287</sup> Rejecting a general rule in favor of liability for any funding that might find its way to a terrorist organization, he stressed the importance of determining a sufficiently close link between the funding and the terrorist acts for which the funders are being held liable.<sup>288</sup>

Establishing such a link would require distinguishing between financial support provided to a terrorist organization directly from financial support provided to a charitable entity controlled by that organization, or an intermediary organization.<sup>289</sup> In the first scenario, the funder is sufficiently close to the terrorist organization to be held liable for terrorist acts, whereas in the latter situations deciding proximity would require a detailed examination.<sup>290</sup> While it is not necessary to link donations or other support to a specific terrorist act, Judge Rovner suggested that it needs to be proved that the support the defendants were alleged to have given Hamas were a cause of Hamas's terrorism<sup>291</sup> and could be linked to the specific terrorist acts carried out by Hamas against the plaintiffs. Expert evidence by someone "familiar with Hamas's financial structure, or with the financing of terrorism generally"<sup>292</sup> is necessary to link the various types of support provided to Hamas, including donations to its humanitarian activities, with its terrorist acts. He argued that:

Where it is open to question, as I believe it is, whether even humanitarian support given to Hamas, to its charitable subsidiary, or to a hospital or other institution that receives funding from Hamas, actually contributes to Hamas's terrorist activities, it should be left to fact finding in individual cases . . . to evaluate, based on the evidence presented in those cases, what types of support to Hamas and its affiliated entities actually cause terrorism.<sup>293</sup>

The further removed the financier is from the organization carrying out the

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285. *Id.* at 706.

286. *Id.* at 708.

287. *Id.* at 709.

288. *Id.*

289. *Id.* at 706.

290. *Id.*

291. *Id.* at 710.

292. *Id.*

293. *Id.*

terrorist act, the more thorough this analysis has to be.<sup>294</sup> Judge Wood equally cautioned in her dissent that a showing of proximate cause was essential to decide “how far down the chain of affiliates, in this shadowy world, the statute was designed to reach, and how deeply Hamas must be embedded in the recipient organization.”<sup>295</sup>

To summarize, it seems as if a consensus existed in *Boim III* that where funding was provided directly to Hamas, a causal link between the funding and the terrorist acts carried out by that organization would be assumed, though Judge Wood warns that the donation should be sufficiently substantial to have furthered the terrorist activities.<sup>296</sup> The main distinction between the majority and the dissenting opinions focuses on evaluating cases in which donations only indirectly benefit Hamas. While the majority assumes liability even then, the minority requires a thorough analysis of a causal link and the relevant *mens rea* in order to hold a donor liable for terrorist activities.

In *Abecassis v. Wyatt*,<sup>297</sup> the Court highlighted that the majority approach in *Boim III* could potentially lead to almost limitless liability, by raising the following hypothetical questions:

Could [liability] extend to a man in St. Louis who lacks significant understanding of the OFP or Hussein’s funding of terrorism but who is generally aware that Hamas is a Palestinian terrorist group that targets Israelis, and who fills his car with gasoline that the service station had purchased from a refining company that had purchased it from another company that had paid kickbacks to Hussein to receive its allocation of Iraqi oil?<sup>298</sup>

While the Court in *Abecassis* appreciated that such far-reaching liability was not intended by the *Boim III* majority, it nevertheless pointed out that by removing causation and requiring no more than a *mens rea* of awareness that the final recipient of the funds was a terrorist organization, the principles developed in *Boim III* left the limits of liability wide open.<sup>299</sup>

The *Abecassis* situation is distinguishable from *Boim III* because the payments at issue were made to a regime, not to a terrorist organization.<sup>300</sup> In this case, the defendants, companies, and individuals involved in the oil business purchased oil from Iraq either directly from Hussein’s government or through third parties that purchased from Hussein’s government in violation of the United Nations Oil for Food Program (OFP).<sup>301</sup> The plaintiffs allege that the oil purchased from Iraq included payments in the form of illegal kickbacks to

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294. *Id.*

295. *Id.* at 724.

296. *Id.*

297. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623 (S.D. Tex. 2010).

298. *Id.* at 664.

299. *Id.*

300. *Id.* at 627.

301. *Id.*

Hussein through secret bank accounts in Jordan.<sup>302</sup> These bank accounts allegedly funded reward payments to families of suicide bombers killed while carrying out terrorist attacks. According to the plaintiffs, such payments were important to recruiting terrorists.<sup>303</sup>

Given that the plaintiffs did not suggest that Hussein himself had carried out the terrorist attacks of which they were the victims, the Court held that to succeed with their claim, they would have had to allege, "at a minimum, that each defendant knew that the oil it was buying through the OFP was tied to a kickback to Hussein and that Hussein was using OFP kickback money to fund terrorism that targeted American nationals."<sup>304</sup>

The Court found that the plaintiffs' inferences were too speculative.<sup>305</sup> No factual allegation was presented that the money illegally given to Hussein was paid to the family of terrorists.<sup>306</sup> The kickback could have had multiple uses other than promoting terrorist attacks against the plaintiffs.<sup>307</sup> In fact, one of the news articles cited in the plaintiffs' complaint states that Hussein used the money to "rearm his troops and sustain the luxury that he and his supporters enjoy."<sup>308</sup>

Thus, where the recipient of funds was not directly engaged in the terrorist attacks, the Court required a showing that the money of the defendants, or at least money stemming from the fund into which the defendants had made their payments, found its way to the organization that committed the terrorist attack that harmed the plaintiffs.<sup>309</sup> The Court was not prepared to infer from the fungibility of money that any payment to a third party who supports a terrorist organization renders the funder liable on the basis that his or her money freed up funds the third party could then use to support the terrorist organization.

In 2011, the Court rendered a new decision based on an amended complaint in which the plaintiffs specified their allegations by introducing additional newspaper articles from the relevant period, suggesting that Hussein made reward payments to the families of Palestinian martyrs and generally supported terrorist attacks against Israel.<sup>310</sup> The Court held that the allegations of the kickback scheme, the evidence of Hussein's use of funds to pay families of suicide bombers, and the evidence that such payments were well-known "create a high likelihood" that the money made available to Hussein would be used to

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302. *Id.*

303. *Id.*

304. *Id.* at 665.

305. *Id.* at 644.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 623 (S.D. Tex. 2011).

promote terrorist attacks.<sup>311</sup> The Court reasoned that:

Because money is fungible, even if Hussein had not used the funds given to him by the defendants for terrorism, the use of the kickbacks for a different purpose would have freed money otherwise needed for that purpose and made it available for terrorist activities. . . . like giving a loaded gun to a child, or giving money to Hamas, giving money to a state sponsor of terrorism in knowing violation of strict rules set for transacting business with that country is an act dangerous to human life.<sup>312</sup>

This change in approach was relied on heavily in *Humanitarian Law Project*<sup>313</sup> and *Boim III*.<sup>314</sup> Unlike those two cases, however, the Court in *Abecassis* adopted a proximate cause requirement. Even though it was acknowledged that the link between the plaintiffs' injuries and the defendants was tenuous, it was nevertheless regarded as sufficient.

In the context of its proximate cause analysis, the Court considered the implications of the fact that the money had been made available to a government rather than a terrorist organization.<sup>315</sup> In its previous decision, the Court had emphasized the fact that the Hussein regime could not be compared to the front organizations in *Boim III* that were accused of funneling money to Hamas, because Iraq was a "recognized sovereign nation with a variety of responsibilities and pursuing a variety of interests, with whom American and other companies were encouraged to do business, with restrictions."<sup>316</sup> This seems to suggest that because states carry out a multitude of legitimate functions, even with state sponsors of terrorism, it cannot be assumed that they will use all available funds to finance terrorism. How a sovereign state decides to use its finances might break the chain of causation between the defendant and the terrorist attacks. In the second *Abecassis* decision, the Court returned to the question of differences:

[There are] differences between paying money to a state sponsor of terrorism and paying money to a foreign terrorist organization. Iraq under Hussein was not the same as Hamas or the terrorist organizations in *Humanitarian Law Project* who were "so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Money provided to Iraq was not tainted in the same way as money provided to a designated foreign terrorist organization. Oil companies were permitted and even encouraged to do business with Iraq. But they were restricted to doing so within the bounds of the OFP. The allegations are that the defendants all knowingly bypassed the strict rules of the OFP by agreeing to pay the kickbacks described. The purpose of these kickbacks was clearly to provide money to Hussein for unlimited discretionary use rather than the very

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311. *Id.* at 647-48.

312. *Id.* at 647.

313. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725-26 (2010)

314. *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F. 3d 685 (7th Cir. 2008).

315. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011).

316. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 666 (S.D. Tex. 2010).

limited humanitarian uses permitted for money paid to the OFP escrow account. Given the expanded allegations about Hussein's publicly stated dedication to, and involvement in, attacks on Israel, it was foreseeable that if given off-book money, Hussein would use at least some of it to support terrorist attacks in that country intended and likely to target Americans.<sup>317</sup>

The Court thus put some limits on the analogy with the views promoted in *Humanitarian Law Project* and *Boim III* regarding the fungibility of money and the resulting "freeing up [of] funds" theory in the context of money made available to state sponsors of terrorism. Giving funds to a state sponsor of terrorism only seems to give rise to far-reaching assumption of liability if the money was paid in violation of an existing sanction system. This decision aligns with that in *Rothstein*, another case in which money was given to a state sponsor of terrorism. In this case, Iran, rather than to a terrorist organization directly, and the Court reasoned that restrictions on supporting terrorist organizations did not equally apply to state sponsors of terrorism, because:

"Congressional policy determinations are likely to be quite different with respect to the two entities, as reflected by the fact that 50 U.S.C.App. [section] 2405(j)(1) permits certain transactions with state sponsors of terrorism as long as a valid license is obtained."<sup>318</sup>

Consequently, not every financial loan or donation to a regime, even one that is regarded as a state sponsor of terrorism, will result in liability for terrorist acts financially supported by that regime. Since regimes might pursue a multitude of purposes, many of which are legitimate, there might be good cause to make money available to them. The all-encompassing prohibition of providing financial support to terrorist organizations and the approach to civil liability of funders of terrorism cannot be easily transferred to states. Rather, such far-reaching liability is only triggered by a violation of specific regulations, restrictions or sanctions that were put in place precisely to avoid making funds available to those states outside of confined and strictly controlled circumstances.

While the Court in *Abecassis* mentioned this only in passing, the change in approach might have been triggered in part by the fact that the amended complaint alleged a violation of Section 2332D, which makes it an offense to engage in financial transactions with a country that is designated as a state sponsor of terrorism outside of existing regulations.

## V.

### CONSEQUENCES FOR COMPLICITY LIABILITY FOR FINANCING GROSS HUMAN RIGHTS VIOLATIONS

Turning to the context of funding regimes that commit gross human rights

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317. *Abecassis*, 785 F. Supp. 2d at 649.

318. *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011).



violations, where should courts draw the line between acceptable business practices and activities that make the corporation complicit in these violations? It is clear that merely doing business with regimes does not result in complicity liability.<sup>319</sup> Nor does assisting a regime reflexively equate with facilitating the violations it carries out.<sup>320</sup> Formulated differently, commercial activities, without more, do not give rise to aiding and abetting liability.<sup>321</sup> In the context of ATCA cases for complicity liability, these principles have been understood by some courts to mean that commercial loans are not close enough to the violations committed, and their impact is not direct enough, to satisfy the *actus reus* of aiding and abetting liability in the form of practical assistance that has a substantial effect on the occurring abuses. Thus, the Court in *South African Apartheid Litigation* held that commercial loans and other routine banking services do not result in complicity liability.<sup>322</sup>

In the context of funding terrorism, on the other hand, the courts refused to exempt routine banking services *per se* from liability.<sup>323</sup> In *Almog*, the Court reached such a conclusion applying the ATCA,<sup>324</sup> which suggests that the provision of funds can satisfy the *actus reus* of aiding and abetting liability under the ATCA and thus might have a substantial effect on the gross international law violations carried out by the recipients.<sup>325</sup> It moreover indicates that no reasons inherent in the cause of action under the ATCA point towards a general exclusion of funding from such liability. This means that when determining actions under the ATCA for complicity liability of lenders to regimes that commit gross human rights violations, nothing would prevent the courts from regarding the provision of funding, including routine commercial funding, as meeting the *actus reus* requirement of complicity liability where its

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319. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009).

320. *Id.*; see also *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (GEL), 2008 WL 4378443, at \*4 (S.D.N.Y. Sept. 25, 2008).

321. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1090 (C.D. Cal. 2010).

322. *In re South African Apartheid*, 617 F. Supp. 2d at 269; *Nestle*, 748 F. Supp. 2d at 1099.

323. *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765, 832-34 (S.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 489 (S.D.N.Y. 2010); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007); *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 625 (E.D.N.Y. 2006); *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at \*12 (E.D.N.Y. October 5, 2006). However, some courts suggested that such services did not meet the "substantial assistance" requirements of aiding and abetting liability; See *Strauss*, 2006 WL 2862704 at \*9; *Weiss*, 453 F. Supp. 2d at 621; *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009). For a critical discussion of this approach see *supra* section IV(A).

324. *Almog*, 471 F. Supp. 2d at 291 ("Arab Bank ignores that acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts").

325. Another case where aiding and abetting liability for the provision of funding was not excluded *per se* in an action under the ATCA is that of *Mastafa*, 2008 WL 4378443, will be discussed *infra* in this section.

substantial effect on the commission of these offences can be shown in the individual case.

This is also in line with US case law on complicity liability for the provision of commercial goods and services other than funding, both in the context of litigation under the ATCA<sup>326</sup> and that of criminal aiding and abetting and conspiracy cases.<sup>327</sup> Such cases equally suggest that the commercial nature of a transaction does not in itself result in an exemption from liability.

The courts either explicitly argued that the routine/commercial nature of the transactions was significant primarily when examining the defendant's *mens rea*, because routine transactions might raise less ground for suspicion with regard to the harmful use of the funds provided,<sup>328</sup> or implied such a conclusion.<sup>329</sup> At the same time, they rejected the view that the routine nature of these services means that they do not substantially further terrorism or the commission of other offenses.<sup>330</sup>

*South African Apartheid Litigation* clearly adopts a different approach in exempting the providers of commercial services, including loans, from complicity liability unless they were the direct means through which the

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326. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974, 977 (9th Cir. 2007)

327. *See, e.g.*, *Direct Sales Co. v. United States*, 319 U.S. 703, 709-712 (1943); *United States v. Blankenship*, 970 F.2d 283, 285-86 (7th Cir. 1992); *United States v. Pino-Pérez*, 870 F.2d 1230, 1235 (7th Cir. 1989).

328. *Direct Sales Co.*, 319 US at 711 ("The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise"); *Pino-Pérez*, 870 F.2d at 1235 ("One who sells a small-or for that matter a large-quantity of drugs to a kingpin is not by virtue of the sale alone an aider and abettor. It depends on what he knows and what he wants"); *Weiss*, 453 F. Supp. 2d at 625 ("In holding that there could be no liability on the basis of 'routine banking business' that court did not mean that the provision of basic banking services could never give rise to bank liability. Rather the court relied on the routine nature of the banking services to conclude that the defendant bank had no knowledge of the client's terrorist activities").

329. *Almog*, 471 F. Supp. 2d at 291 ("Given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing 'routine' about the services the Bank is alleged to have provided"); *Corrie*, 403 F. Supp. 2d 1019, 1027, *aff'd on other grounds*; 503 F.3d at 977 ("[o]ne who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture"); *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765, 834 (S.D.N.Y. 2005) ("there can be no bank liability for injuries caused by money routinely passing through the bank. Saudi American Bank is not alleged to have known that anything relating to terrorism was occurring through the services it provided").

330. *See* discussion *supra* sections II(C)(5) and III(A).

principal offense was carried out.<sup>331</sup> To the extent that this approach might be explained by the Court's reliance on the *Ministries* case as the decisive authority on this matter, this case provides a weak basis for exempting the providers of commercial loans from all potential civil complicity liability.<sup>332</sup> Indeed, just as in the US cases in the areas of funding terrorism and criminal complicity on the basis of commercial transactions, Nuremberg case law suggests that the commercial nature of a transaction is primarily relevant in the context of a *mens rea* analysis.<sup>333</sup> Moreover, it does not exclude commercial loans as such from complicity liability.<sup>334</sup>

Consequently, complicity liability should not generally exempt all commercial loans. Instead, it should depend on a thorough analysis of both the *actus reus* and the *mens rea* in every case in which such liability is alleged. An approach that does not exempt *per se* any activities or transactions from liability avoids the consequence that lenders are *ex ante* freed from all complicity liability, and therefore provides legal incentive to employ due diligence in assessing the potential impact their loans might have on gross human rights violations.

Such an exemption would be particularly objectionable in light of the main lesson learned from the funding of terrorism cases, i.e., that money, far from always being harmless, can be a particularly dangerous commodity. While money is neutral in itself, it is an essential prerequisite for an indefinite range of activities that could and would not take place without it. The effect of money, whether beneficial or harmful, does not depend on its inherent quality, but rather on how it is being used by those who receive it.<sup>335</sup> This, however, is also to true for other goods, including those that are considered to be inherently harmful. Even with a product such as the poison gas Zyklon B, the direct and primary cause of resulting harm is its use for detrimental purposes, not the provision of gas by itself. The main difference with money is that an additional act must take place for the harmful result to occur, such as purchasing of the means through

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331. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 259, 264-69 (S.D.N.Y. 2009).

332. See discussion *supra* sections III(A) and III(E)(1).

333. *United States v. Von Weizsacker* ("The Ministries Case"), 14 TRIALS OF WAR CRIMINALS BEFORE THE ERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 853-54 (Nuernberg Military Tribs. 1950) ("even if it were assumed that the defendant Rasche took or played a decisive role in the granting of said applications for loans to the SS it would be difficult to find him guilty of participation in the slave-labor program on that account. The evidence adduced by the prosecution to show knowledge on the part of Rasche as to what was taking place in the SS enterprises with respect to labor is very unconvincing"). See further discussion *supra* section III(E)(1).

334. See discussion *supra* section III(E)(1). In this respect, the acquittal of Rasche under count five, on which the court in the South Africa case primarily relied, is an exception rather than representative of Nuremberg case law on this issue.

335. Rita Roca & Francesca Manta, *Values Added, The Challenge of Integrating Human Rights into the Financial Sector* (The Danish Institute for Human Rights), 2010, at 6.

which the violations can be carried out. However, this does not mean that, for example, financing the purchase of Zyklon B could not be as essential for the killings carried out with this gas than the purchase of the gas itself. That the link is more direct and obvious in the latter case does not mean that it can therefore not also be substantial in the former.

If a case-by-case analysis is required, this raises the question of what link between the money and the violations is necessary for a finding of liability. Here a close look at the case law on funding terrorism might be helpful, as courts have in that context grappled with the issue in depth. Clearly, analogies between funding terrorism and funding gross human rights violations must be approached with caution, given that the legal status of terrorist organizations is not the same as that of a sovereign state. However, both scenarios also have similarities, as they deal with the impact of financial assistance, including routine commercial banking services, on serious crimes committed by their recipients.

The majority of courts in the terrorism cases analyzed above require a showing of proximate cause demonstrating that the funds were a substantial factor in the resulting terrorist activities and that the resulting harm was a reasonably foreseeable consequence of the funding. However, plaintiffs are not required to show that without the particular funding, the acts could not have been carried out.<sup>336</sup> This seems to coincide nicely with the *actus reus* and causation standards accepted *South African Apartheid Litigation*, (i.e., the requirement of an act of practical assistance that needs to have a substantial effect on the commission of the violation, without necessarily being a *conditio sine qua non*).<sup>337</sup>

Nevertheless, Judge Scheindlin deduced from the nature and fungibility of money that loans can never be sufficiently close to the violations to result in complicity liability of the commercial lender,<sup>338</sup> while in the context of funding terrorism, the courts draw the opposite conclusion.<sup>339</sup> This difference might be explained by the fact that even where cases on funding terrorism were argued and decided under the ATCA rather than the ATA, the courts emphasized that their approaches to the standards of liability were influenced by the policy decisions expressed in relevant international instruments as well as the ATA.<sup>340</sup> Liability standards are therefore defined broadly in the terrorism context to give

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336. See, e.g., *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009). See also discussion *supra* section IV(B).

337. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257-58 (S.D.N.Y. 2009).

338. *Id.* at 269.

339. See, for example, *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F. 3d 685, 691 (7th Cir. 2008); *Goldberg*, 660 F. Supp. 2d at 429; *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 492-93 (S.D.N.Y. 2010); *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011).

340. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007).

effect to specific legislative and policy decisions.<sup>341</sup>

Treaties such as the International Convention for the Suppression of the Financing of Terrorism—which reflect the conviction that money is not always neutral and thus might be a particularly dangerous commodity—do not exist with regard to the financing of gross human rights violations. However, the absence of an international convention on this issue only means that states are under no international treaty obligation specifically to tackle the financing of gross human rights violations. It does not follow that funding directed towards such financing is therefore shielded from complicity liability.

The lack of a treaty and specific domestic legislation means, however, that unlike the terrorism cases, courts hearing claims in the area of financing gross human rights violations neither have to, nor can they, derive liability standards by relying on clearly defined policy decisions. Indeed, while the ATA expressly targets the provision of material support in the form of funds and other financial services, this is not the case in ATCA litigation for complicity in gross human rights violations. Courts are left to decide how to apply the general liability standards of the ATCA to cases of financing violations of the law of nations, and whether and to what extent to draw on the principles developed in the context of funding terrorism.

The similarities between the two situations could militate in favor of borrowing the liability standards from the terrorism context. Judge Posner's statement in *Boim III* concerning the significance of civil remedies against the financiers as an effective measure to "cut the terrorists' lifeline,"<sup>342</sup> for example, might equally apply to funders of gross human rights violations. This is emphasized by a powerful quote from the former South African Prime Minister John Voster, who stated that "each bank loan, each new investment is another brick in the wall of our continued existence."<sup>343</sup> Indeed, many regimes that commit gross human rights violations depend on foreign funds in order to finance their policies, and sometimes even for their survival. In his *Study of the impact of foreign economic aid and assistance on respect for human rights in Chile*, Antonio Cassese remarked:

[I]n some cases, the flow of capital goods can help prop up the repressive system, by making it economically viable: in this way, the economic assistance becomes instrumental in maintaining and prolonging in time disregard for civil and political freedoms.<sup>344</sup>

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341. See, e.g., *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at \*18 (E.D.N.Y. October 5, 2006); *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 631-32 (E.D.N.Y. 2006); *Goldberg*, 660 F. Supp. 2d at 429.

342. *Boim III*, 549 F.3d at 691.

343. Complaint at 391, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) available at [www.khulumani.net/attachments/259\\_Khulumani%20Complaint.pdf](http://www.khulumani.net/attachments/259_Khulumani%20Complaint.pdf).

344. U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile*, 19-20, U.N. Doc. E/CN.4/Sub.2/412 (July 20, 1978).

Based on a thorough statistical analysis of the Chilean budget during the first years of the Pinochet dictatorship, Cassese concluded that an adverse effect on human rights might even arise in cases where the donor or lender gave financial assistance with the purpose of promoting the protection of human rights, as such assistance can free up other resources that the primary violator may then use to prolong the repression.<sup>345</sup>

This shows that both the far-reaching effect of funding in general, and the problems raised by the fungibility of money in particular, are not unique to the context of terrorism.<sup>346</sup> Rather, these also arise in the context of providing funds to states that commit gross human rights violations.<sup>347</sup> Indeed, a bank lending money to a government usually cannot control the use of these funds any more than funders who earmark money to terrorist organizations for financing charitable projects. In both scenarios, the effects of monetary contributions on the commission of crimes need to be established in spite of the fungible nature of money.

Despite these similarities, a key difference between the terrorism cases and funding violating regimes is that the former are organizations with criminal purposes. As such, prohibitive action may be taken against them: Their assets can be frozen,<sup>348</sup> membership is often criminalized,<sup>349</sup> and in the United States they might be designated as foreign terrorist organizations.<sup>350</sup> Thus, FTOs clearly stand outside of legal confines. Sovereign states, on the other hand, in principle receive the protection of international law, and the international community recognizes acts of the governments of sovereign states, even where these governments have come into power and/or govern their country by violating domestic law or the use of violence.<sup>351</sup> Moreover, even governments that regularly commit gross human rights violations tend to carry out a multitude of legitimate state functions. It is accordingly more facially suspect to interact with a known terrorist organization than to do business with a state. The former will often be unlawful in itself, while doing business with a rogue state is only unlawful under very narrow circumstances.<sup>352</sup>

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345. *Id.* at 24. See also Isabel Letelier & Michael Moffitt, *Supporting Suppression: Multinational Banks in Chile*, RACE & CLASS, Oct. 1978, at 111.

346. *Boim III*, 549 F.3d at 698-699. See also Strauss, 2006 WL 2862704, at \*18.

347. Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4 at 183-197; Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4. For a similar discussion, on the question of odious debt, see SABINE MICHALOWSKI (2007), *supra* note 5 at 53-54.

348. See, e.g., S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); Council Regulation 881/2002, 2002 O.J. (L 139/9) (EC); Fin. Action Task Force, *International Best Practices – Freezing Terrorist Assets*, (Jun. 23, 2009), available at <http://www.fatf-gafi.org/dataoecd/30/43/34242709.pdf>.

349. This is not the case in the US, but in the U.K., see Terrorism Act 2000, § 11 (Eng.).

350. 8 U.S.C. § 1189(a) (2006).

351. ANTONIO CASSESE, INTERNATIONAL LAW 117-120 (2d ed. 2005).

352. E.g., where the state was designated a state sponsor of terrorism.

However, the case of Hamas shows that the line between terrorist organizations and governments cannot always be drawn neatly. In some circumstances, terrorist organizations might assume what in other contexts would be a state function, e.g., the provision of social welfare services.<sup>353</sup> Moreover, they might come into power and ultimately form the government of a country.<sup>354</sup> Conversely, governments such as that of Iraq under Saddam Hussein can be regarded as state sponsors of terrorism<sup>355</sup> or stand accused of carrying out terrorist attacks.<sup>356</sup> Nevertheless, the discussions in *Abecassis*<sup>357</sup> and *Rothstein*<sup>358</sup> show that in the terrorism context, the courts clearly distinguish terrorist organizations from state sponsors of terrorism and apply different principles when determining the liability of the funder in each case.

*Mastafa* is one of the few cases that has dealt with the issue of complicity liability for making available funds to a state outside of the terrorism context.<sup>359</sup> *Mastafa* provides an interesting case study for a comparison of liability standards because (i) it involved money paid to a state rather than an FTO, (ii) considered liability for gross human rights violations instead of terrorist attacks, and (iii) was decided under the ATCA rather than the ATA. The plaintiffs in *Mastafa* were Kurdish women who alleged that their husbands had been imprisoned, tortured, and killed by the Saddam Hussein regime. They brought a claim against Australian Wheat Board (AWB) and against Banque Nationale De Paris Paribas (BNP), the latter of which is of greatest interest for current purposes.

Just like *Abecassis*, *Mastafa* involved alleged kickbacks paid to Saddam Hussein in the context of the OFP. AWB had sold wheat to Iraq under the OFP and paid fees for "inland transportation" and other service to the Hussein regime as a condition for its continued sales under the OFP. According to the plaintiffs, these payments were in fact "kickbacks," "designed to provide the Hussein

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353. As discussed with regard to Hamas in *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F. 3d 685 (7th Cir. 2008).

354. See Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT'L L. REV. 65 (2007).

355. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 666 (S.D. Tex. 2010).

356. *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (GEL), 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008).

357. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011) ("Iraq under Hussein was not the same as Hamas or the terrorist organizations in *Humanitarian Law Project* who were 'so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.' Money provided to Iraq was not tainted in the same way as money provided to a designated foreign terrorist organization").

358. *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011) ("Congressional policy determinations are likely to be quite different with respect to the two entities, as reflected by the fact that 50 U.S.C. App. § 2405(j)(1) permits certain transactions with state sponsors of terrorism as long as a valid license is obtained").

359. *Mastafa*, 2008 WL 4378443.

regime with hard currency the sanctions otherwise denied it.”<sup>360</sup> To implement the OFP, an escrow account was created in which purchasers of Iraqi oil could deposit payment, while sellers of authorized goods received payment from it, all under the control of the UN Secretary General.<sup>361</sup> That account was administered by BNP. BNP was accused of aiding and abetting the international law violations carried out by Saddam Hussein by disbursing funds from the escrow account to AWB, which used some portion of those funds to pay kickbacks to the Hussein regime.<sup>362</sup> When discussing the liability of BNP, the Court reasoned:

[A]iding the Hussein regime is not the same thing as aiding and abetting its alleged human rights abuses . . . . It is not enough that a defendant provide substantial assistance to a tortfeasor; the “substantial assistance” must also “advance the [tort’s] commission.” . . . providing the Hussein regime with funds — even substantial funds — does not aid and abet its human rights abuses if the money did not advance the commission of the alleged human rights abuses.<sup>363</sup>

Thus, the Court refused to make the broad assumption that all financial support to a regime that commits gross human rights violations automatically has a substantial effect on the violations carried out because it will at least free up funds that can then be dedicated to that purpose. However, it did not require that “the particular funds provided were used to commit the abuses, or that without the funds the Hussein regime would not have been able to commit such abuses, so long as the assistance is ‘a substantial factor in causing the resulting tort.’”<sup>364</sup>

This quote implies that, contrary to the view of the Court in *South African Apartheid Litigation*,<sup>365</sup> the provision of funds to a regime can have a sufficiently substantial effect on the violations it carries out to trigger aiding and abetting liability of the funder. Nevertheless, in *Mastafa* the claim was ultimately rejected. The Court suggested that:

It is unnecessary to decide whether it would suffice, in the present case, for plaintiffs to allege facts that plausibly suggest that the \$220 million in kickbacks “substantially assisted” the regime to commit its human rights abuses by allowing it to maintain power and function as a minimally effective government, as plaintiffs do not specifically allege facts in support of this proposition.<sup>366</sup> Even if AWB’s payments to the Hussein regime did substantially assist in the commission of human rights abuses, plaintiffs fail adequately to allege that BNP knew that the money it disbursed to AWB was being used to make such

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360. *Id.* at \*2.

361. *Id.* at \*1.

362. *Id.* at \*4.

363. *Id.*

364. *Id.*

365. However, even though coming to a different conclusion with regard to the question of funding at 269, the court cited the above *Mastafa* statements with approval, see *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009).

366. *Mastafa*, 2008 WL 4378443 at \*4.



payments.<sup>367</sup>

Thus, the Court dismissed the claim because of insufficient factual allegations to show substantial assistance, and also because the complaint did not adequately establish that BNP had acted with the necessary *mens rea*. As a consequence, the Court did not have to expand on the issue of precisely how it can be shown that “the assistance is ‘a substantial factor in causing the resulting tort.’”<sup>368</sup>

The liability standard applied in *Mastafa* is very similar to the standard governing the proximate cause analysis in most decisions on funding terrorism. This demonstrates the standard’s relevance beyond the terrorism context. However, though courts require a showing of proximate cause in the terrorism context, the terrorism cases often infer the substantial effect of funding on terrorist attacks where money was made available to the terrorist organization that carried out the attacks at issue or front groups for that organization.<sup>369</sup>

Conversely, in the context of funding provided to states, courts have rejected this general inference, even where a state sponsor of terrorism receives money directly. Such rejection is premised on the argument that governments, even those that are widely regarded as “state sponsors of terrorism,” carry out a wide range of legitimate functions.<sup>370</sup> Therefore, it is difficult to sustain that, like FTOs, states are “so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>371</sup> Consequently, where money was provided to such states, courts only applied the “freeing up of funds” theory to causation if the funder violated sanction regimes or other regulations in place to limit access to funds for other than humanitarian purposes.<sup>372</sup> These prohibitions are based on, and put the lender on notice of, the assumption that all funding made in violation of the regulations will be used, either directly or indirectly, for the furtherance of terrorism. To automatically infer that all loans made to a regime finance, or at least have a substantial impact on, the gross human rights violations it carries out, instead of funding legitimate state tasks, would therefore be problematic.

Without simply inferring liability, it is not easy to establish the effect financing has on human rights violations. Just as with other products or transactions, the more directly a loan is linked to the violations committed by the

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367. *Id.* at \*5.

368. *Id.*

369. *See, e.g., In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 492-93 (S.D.N.Y. 2010).

370. *See, e.g., Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 644 (S.D. Tex. 2010); *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011); *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011).

371. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

372. *Abecassis*, 785 F. Supp. 2d at 649; *see also, Rothstein*, 772 F. Supp. 2d at 516.

borrowing regime, the easier it is to establish causation.<sup>373</sup> Where the violation would not have taken place without the loan, the necessary link between a loan and gross human rights violations committed by the borrower is clearly established. However, as the contribution does not need to be a *sine qua non* of the commission of these violations,<sup>374</sup> such a showing is not required. It would also be sufficient to establish that the violations would have taken place differently,<sup>375</sup> for example with less intensity or over a shorter period of time.<sup>376</sup>

A loan can make an important contribution to a gross human rights violation whether or not the money lent to the regime is directly used to finance this violation. It might, for example, indirectly facilitate the violation by adding to the financial resources of the regime or by providing a stabilizing effect on the political position of the regime.<sup>377</sup> The crucial question is how close the link needs to be between the loan and the violation, and how significant the impact of the loan, to conclude that the loan had a substantial effect on the violations carried out against the victims, thereby creating lender responsibility. Where the loan had the direct purpose of financing the violations, for example where money is provided for the purchase of arms to be used in extra-judicial killings, such a link seems obvious, but these cases will be rare. More relevant and much more complicated are the situations in which a loan that is not directly linked to the violations allows the regime to free up resources with which to buy the arms necessary to carry out human rights abuses, or where loans stabilize a regime that commits such violations, thereby intensifying and/or prolonging their occurrence.

Bearing in mind the lesson from the cases on funding terrorism—that the question of how to define the *actus reus* and proximate cause needs to be approached with the consequences of the fungibility of money in mind<sup>378</sup>—it should not be necessary to establish a link between the fund and the specific

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373. See Adam McBeth, *Holding the Purse Strings: The Continuing Evolution of Human Rights Law and the Potential Liability of the Finance Industry for Human Rights Abuses*, 23 NETH. Q. HUM. RTS. 7, 24–25 (2005).

374. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009) (quoting *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 209 (Dec. 10, 1998)).

375. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 688 (May 7, 1997) (“While there is no definition of “substantially”, it is clear from the aforementioned cases that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. This is supported by the foregoing Nürnberg cases where, in virtually every situation, the criminal act most probably would not have occurred *in the same way* had not someone acted in the role that the accused in fact assumed”) (emphasis added) (quoted in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003)); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007). See also *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257–58 (S.D.N.Y. 2009).

376. For a discussion see Sabine Michalowski & Juan Pablo Bohoslavsky, *supra* note 5 at 77.

377. *Id.* at 75–77; see also Shaw W. Scott, *supra* note 4 at 1531–32.

378. See *supra* Section IV(B).

violation committed by the regime to which the funding was provided. This is comparable to the approach of the Court in *South African Apartheid Litigation* with regard to the liability of the automotive and technologies defendants, where no showing of a causal link between a particular military vehicle or customized computer program and the violation suffered by the victim was required to establish liability of the defendant automotive and technology companies.<sup>379</sup> Indeed, such a showing would in most cases be impossible to make and to require it would exclude liability in the vast majority of cases. Rather, it was sufficient that the type of assistance provided could have had a substantial effect on the violations that occurred.

It is admittedly more complicated to determine whether financial assistance has a substantial effect on the commission of an offense than to determine the effects of products that can be the direct means through which the violations are carried out. The most convincing analysis of how to determine whether financial assistance had a causal relationship with the crimes carried out by the recipient of the money is that presented by Judge Rovner in his dissenting opinion in *Boim III*.<sup>380</sup> When determining how to establish causation in the context of funding allegedly made to Hamas, Rovner suggested that, given the dual functions of Hamas as terrorist organization and provider of social welfare services, liability of someone making a financial donation to Hamas for the terrorist attacks it carries out could not simply be inferred.<sup>381</sup> While no link between a specific donation and the particular terrorist offense suffered by the victim needed to be established, it was necessary to show at a minimum a causal link between the support provided to Hamas and the organization's terrorist activities.<sup>382</sup> This could be achieved by carrying out an analysis of all the circumstances of each case in order to determine whether or not funding had a

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379. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 264-69 (S.D.N.Y. 2009).

380. *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F. 3d 685 (7th Cir. 2008).

381. *Id.* at 710. In support of his view, Judge Rovner relied heavily on the majority opinion in *Boim v. Holy Land Found. for Relief and Dev't* ("Boim II"), 511 F. 3d 707 (7th Cir. 2007) which he himself delivered. There the court suggested that even though an assumption that financial support to terrorist organizations might support their terrorist activities could be valid, "the plaintiffs still must offer some proof that permits a finding by a preponderance of the evidence that the defendants' conduct caused terrorist activity that included the shooting of David." *Boim II*, 511 F.3d at 741. The court clarified that "the nature and significance of a defendant's action along with its chronological relationship to the terrorist act that injured the plaintiff would be important considerations in assessing whether the defendant caused the plaintiff's injury . . . the more significant the support provided by a defendant, the more readily one might infer that support was a cause of later terrorist acts." *Boim II*, 511 F.3d at 741-742. To the extent that plaintiffs rely on a "freeing up of funds" theory, the court required a showing that "by providing funding to Hamas's other activities, including the hospitals, schools, and other charitable missions that it sponsors, a donor frees up Hamas resources for, or otherwise makes possible, Hamas's terrorist activities," thus refused to impose liability "without some evidence of a causal link between a defendant's conduct and Boim's murder." *Boim II*, 511 F.3d at 742.

382. *Boim III*, 549 F.3d at 710.

causal effect on the terrorist acts carried out by the organization.<sup>383</sup> Such an assessment would require the expertise of someone “familiar with Hamas’s financial structure, or with the financing of terrorism generally.”<sup>384</sup>

This suggestion of a need for a detailed financial assessment seems feasible for establishing a causal link between money made available to states and gross human rights violations carried out by their governments. In the context of commercial loans, this might in fact be a more suitable liability criterion than in the context of individual donations made to the charitable branches of a terrorist organization. Banks have both the means and the expertise to consider the impact and use made of sovereign loans.<sup>385</sup>

One way to put this into practice would be to apply a holistic analysis to the relationship between financing and human rights. Antonio Cassese suggested this in his report to the UN on the situation in Chile.<sup>386</sup> Although not written with the purpose of developing criteria for complicity liability of financiers, this report nevertheless addresses some of the issues that are of interest here.<sup>387</sup> Cassese argues:

To assess the impact of . . . foreign economic assistance on human rights in Chile it is necessary to consider how this assistance is used, what measures the recipient Government takes in the area covered by the assistance, and, more generally, what kind of economic and social policy it implements . . . All depends on the way the recipient Government allocates its own resources, as well as on the general context within which it utilizes the inflow of foreign resources.<sup>388</sup>

Cassese concluded that “there arises a relationship in which economic assistance often appears instrumental in perpetuating or at least maintaining the current situation of gross violations of human rights”<sup>389</sup> because “the bulk of this assistance helps to strengthen and maintain in power a system which pursues a policy of large-scale violations of these rights.”<sup>390</sup> Even where money is made available for human rights related programs, “[o]ften, the Government uses this assistance to replace national resources, which are diverted to other

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383. *Id.*

384. *Id.*

385. For a discussion see, e.g., Brief for Essex Transition al Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro and others, Juzg. Fed. Civil y Comercial Federal Juzg. Fed., 95.019/2009, “Ibañez Manuel Leandro y otros casos c. Diligencia preliminar contra instituciones financieras no determinadas,” at 82-89, available at <http://www.reports-and-materials.org/Intl-banks-complicity-in-Argentina-Amicus-Curiae-Mar-2010.doc>.

386. U.N. Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile, U.N. Doc. E/CN.4/Sub.2/412 (July 20, 1978).

387. See also Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4.

388. U.N. Doc. E/CN.4/Sub.2/412 at 15.

389. *Id.* at 24.

390. *Id.*

ends, including that of financing the repressive system.”<sup>391</sup> Cassese also states:

[I]n some respects, the flow of capital goods can help prop up the repressive system, by making it economically viable: in this way, the economic assistance becomes instrumental in maintaining and prolonging in time disregard for civil and political freedoms.<sup>392</sup>

To perform an assessment of the economic and political context in which a loan is granted and going to be used is not beyond the tasks that corporations are in a position to carry out. Such evaluations form to some extent part of existing due diligence expectations with regard to assessing the risks involved in banking transactions.<sup>393</sup> These general due diligence standards are complemented by the emerging concept of human rights due diligence, the importance of which was recently articulated by the special representative of the UN Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.<sup>394</sup> The due diligence responsibilities identified include avoiding complicity.<sup>395</sup> A report by the SRSG specifically dedicated to questions of sphere of influence and complicity emphasized that as part of its due diligence responsibilities in the context of avoiding complicity in human rights violations:

[A] company needs to understand the track records of those entities with which it deals in order to assess whether it might contribute to or be associated with harm

391. *Id.*

392. *Id.* at 19-20.

393. These include, for example, the responsibility to Know Your Customer (KYC). This responsibility has largely been developed in the context of money laundering. *See, e.g.*, Fin. Action Task Force, *FATF 40 Recommendations*, Recommendation 5(d), at 5 (Oct. 2003) (suggesting in this context that financial institutions should conduct “ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution’s knowledge of the customer, their business and risk profile, including, where necessary, the source of funds”), available at <http://www.fatf-gafi.org>; *Customer Due Diligence for Banks* (Basel Comm. on Banking Supervision), Oct. 2001, at para. 4 (highlighting the importance of KYC beyond that context: “The Basel Committee’s approach to KYC is from a wider prudential, not just anti-money laundering, perspective. Sound KYC procedures must be seen as a critical element in the effective management of banking risks”) and para. 43 (“even in the absence of such an explicit legal basis in criminal law, it is clearly undesirable, unethical and incompatible with the fit and proper conduct of banking operations to accept or maintain a business relationship if the bank knows or must assume that the funds derive from corruption or misuse of public assets”), available at <http://www.bis.org/publ/bcbs85.pdf>. *See also* Brief for Essex Transitional Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro, *supra* note 385 at 383-88, where these principles are linked to complicity liability for financing gross human rights violations.

394. U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, *Human Rights Council, Principles 17 and 18*, A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

395. *Id.* at Principle 17 (“Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”). *See also* Commentary to Guiding Principle 17.

caused by entities with which it conducts, or is considering conducting business or other activities. This analysis of relationships will include looking at instances where the company might be seen as complicit in abuse caused by others.<sup>396</sup>

While the SRSG's framework deals with corporate human rights due diligence more generally, calls for comprehensive human rights impact assessments in the context of financing are also increasing,<sup>397</sup> manifesting a growing awareness of the importance of the link between financing and human rights violations.<sup>398</sup>

When considering the scope of due diligence in the context of sovereign lending, a country's bad record with regard to human rights violations does not put a government in the same position as a terrorist organization. Accordingly, financing made available to it does not automatically result in complicity liability of the lender. However, the country's record should put the lender on notice that there is a heightened risk that its loans might directly or indirectly facilitate such violations. Where a regime is widely known to commit gross human rights violations, as was the case with South Africa under apartheid,<sup>399</sup> it could be argued that lenders have a heightened due diligence obligation to inquire into the use of the money they are lending with respect to the violations taking place.<sup>400</sup>

To determine whether or not a loan had a substantial effect on gross human rights violations committed by a regime in a case such as South Africa under apartheid, courts should assess the extent to which the regime depended on the loans for financing the violations it carried out. This might include "whether the loans had an effect on the military's budget and expenditures,"<sup>401</sup> or the extent to which the country needed the loans to stay in power. For this, the amount lent to the regime would be clearly important. The combination of the nature of the

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396. U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Dev't, Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, ¶ 22, U.N. Doc. A/HRC/8/16 (May 15, 2008) (by John Ruggie).

397. While this concept is mainly used in the context of project financing, see, e.g., EQUATOR PRINCIPLES, <http://www.equator-principles.com> (last visited Mar. 4, 2012), it is also employed with regard to other banking activities more generally, see, e.g., Rita Roca & Francesca Manta, *supra* note 335.

398. See, e.g., Anita Ramasastry (1998), *supra* note 4; Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4; Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4; Sabine Michalowski & Juan Pablo Bohoslavsky, *supra* note 5; See also Louis A. Pérez & Deborah M. Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C.J. INT'L L. & COM. REG. 699, 701 (2007).

399. Numerous UN resolutions expressed the international community's condemnation of the human rights situation. For an overview see First Amended Complaint at 93-115, *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (No. 03 Civ. 4524).

400. For a discussion of duties to investigate risks where companies have reason to believe that 'their products or services could be misused in order to perpetrate gross human rights abuses' see Int'l Comm'n of Jurists, *supra* note 1, Vol. 3 at 31 (2008).

401. Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4 at 175.

regime and the scale of the loan might give rise to a presumption that these loans had a substantial impact on the policies and acts of that regime, including its commission of gross human rights violations.<sup>402</sup>

However, unlike in terrorism cases, lending to a regime that commits massive human rights violations does not, in itself, give rise to liability. Therefore, a defendant could rebut the presumption of liability if a thorough assessment of the impact of the loan on the spending policy of the government were to show that the money was used for legitimate government purposes. This is, again, similar to the analysis that needs to be carried out with regard to other types of assistance, such as the sale of military vehicles, where the nature of the regime and that of the vehicle might give rise to the assumption that the vehicles would be used for unlawful killings, but it must be open to the defendant corporations to demonstrate that this was not the case.

A final question is to what extent liability can be based on the fact that loans for beneficial purposes might free up funds that will then be used for other purposes. While it is probable that this will be the case in many instances, this should not be a sufficient basis for liability. The arguments developed in the state sponsor of terrorism context are valid here. Sovereign lending is not allowed, but there might be good reasons, such as humanitarian purposes, to supply funding to such states. Indeed, as the discussions surrounding the refusal to provide banking services in Gaza show, it might have human rights implications or even give rise to liability *not* to provide such services where they are essential to avoid a humanitarian crisis.<sup>403</sup>

This addresses the criticism that corporate complicity liability under the ATCA runs counter to the fact that, in many of the relevant cases, not only was no policy of divestment pursued by the United States or other governments, but governmental policies actively encouraged engagement in the relevant countries.<sup>404</sup> Simply doing business with such a state does not trigger complicity liability. Instead, it should depend on a thorough case-by-case analysis of the impact of the act of the corporation on gross human rights violations. Therefore, corporations are free to engage constructively with regimes, even those that commit gross human rights violations on a large scale, as long as they avoid any complicity in these violations. Indeed, complicity liability in the context of financing should not aim to or result in cutting off all states with dubious human rights records from all foreign lending. Rather, it should seek to avoid lending that substantially furthers the international law violations carried out by the regime. This cannot conflict with constructive engagement, as there is nothing

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402. Brief for Essex Transition al Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro, *supra* note 385 at 89; *see also* Sabine Michalowski & Juan Pablo Bohoslavsky, *supra* note 5, at 84-85.

403. *See* Dana Weiss & Ronen Shamir, *Corporate Accountability to Human Rights: The Case of the Gaza Strip*, 24 HARV. HUM. RTS. J. 155 (2011).

404. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).

constructive about complicity in human rights violations.<sup>405</sup> Conversely, constructive engagement cannot give corporations a blank check to be complicit in gross human rights violations carried out by regimes with which they are engaging.<sup>406</sup>

Re-examining the case against the banks in *South African Apartheid Litigation* in light of these considerations, the Court should not have rejected the claims outright. Rather, it should have carried out a detailed analysis of the impact the loans specified in the complaint had on the crimes that injured the plaintiffs. While most of the allegations against the defendant banks do not refer to the financing of particular crimes, such a relationship was not necessary. It would have been sufficient to show that some of the loans went to the security forces, as long as it could be established that these loans had a significant impact on the commission of atrocities by these forces.

The assertions that, without the funding provided by Barclays and UBS, the apartheid regime could neither have maintained control over the civilian population nor maintained and expanded its security forces to the same degree<sup>407</sup> would have required an application of the holistic approach discussed above. Alleging that the defendant banks “directly financed the South African security forces that carried out the most brutal aspects of apartheid,”<sup>408</sup> is not in itself sufficient to show a substantial effect of the loans on the violations carried out by the security forces, but could form the basis of an investigation into the effects of the loans on these violations. In particular, asserting that the loans “supported increased spending on internal security, . . . [and] defense expenditures due to the growing costs of policing the apartheid state”<sup>409</sup> would have merited a further analysis of the impact, if any, the loans had on apartheid crimes.

The liability standards suggested here present a challenge for courts determining complicity liability in the context of financing. Indeed, many specifics of the criteria delimiting liability need to be developed further and refined. However the difficulty of the task is not a reason to exempt from liability those whose loans potentially had an effect on the commission of gross human rights violations or to deprive victims of a remedy, without any investigation. Additionally, the complexity of the assessment needed to link a

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405. Richard L. Herz, *The Liberalising Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 222 (2008).

406. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 298 (2d Cir. 2007) (Hall, J., concurring) (“business imperatives [do not] require a license to assist in violations of international law”).

407. First Amended Complaint at 151, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) *available* [at](http://www.hausfeldllp.com/content_documents/9/KhulumaniClassActionComplai.pdf) [http://www.hausfeldllp.com/content\\_documents/9/KhulumaniClassActionComplai.pdf](http://www.hausfeldllp.com/content_documents/9/KhulumaniClassActionComplai.pdf).

408. *Id.* at 152.

409. *Id.* at 169.



loan with violations suffered by victims is far from unusual in tort cases. Courts must often conduct onerous investigations to determine liability<sup>410</sup> or apply creative approaches to liability to avoid unfair and undesirable results.<sup>411</sup>

One result of the approach suggested in this Article is that the relevance of the commercial or routine nature of a transaction primarily comes to the fore in the analysis of the *mens rea*. To adopt a more inclusive *actus reus* test might have the consequence of shifting the distinction between legitimate and illegitimate activities from the *actus reus* or causation element(s) to the *mens rea* element in the context of complicity liability. This could lend support to current attempts to adopt a more rigid *mens rea* standard and require that the accomplice act with the purpose of bringing about the human rights violations,<sup>412</sup> as opposed to attaching liability where the a donor or lender rendered assistance with knowledge that the violations were likely to occur.<sup>413</sup> Indeed, it has been observed in a different context that laxer *actus reus* standards are frequently combined with tougher *mens rea* standards, and *vice versa*.<sup>414</sup> For example, in the recent *Kiobel* decision, Judge Leval, concurring, highlights that the often-voiced worries of unlimited liability of corporations are unfounded as long as the applicable *mens rea* standard is one of purpose rather than knowledge.<sup>415</sup> This implies, therefore, that these concerns would be warranted if liability were not kept within bounds by a rigid *mens rea* standard.

While a discussion of the *mens rea* is beyond the scope of this Article, it should be noted that the less rigid *mens rea* standard of knowledge is both the

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410. For example in the context of medical malpractice suits which might raise complex causation issues that can only be determined with the help of various experts. *See, e.g.*, *Manning v. King's College Hospital NHS Trust*, [2008] EWHC (QB) 1838. *See also* *Sheeley v. Mem'l Hosp.*, 710 A.2d 161 (R.I. 1998).

411. For example, if the particular nature of a tortfeasor's contribution makes it difficult to determine a causal link to the harm that arose, as happened in cases where a person suffered harm because of exposure to asbestos in the course of his/her employment, but it could not be shown with certainty which employer was responsible for the exposure that caused the illness, courts have shown creativity and determined that it would be sufficient to show that on the balance of probabilities, the act of the defendant materially increased the risk of a known source of harm to which the claimant had been exposed. *See, e.g.*, *Fairchild v. Glenhaven Funeral Servs. Ltd.*, [2002] UKHL 22. For an application of this principle to the situation of funding gross human rights violations, *see* Brief for Essex Transitional Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro, *supra* note 385 at 75.

412. *See* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

413. *Id.* (rejecting what had been the accepted *mens rea* test in the context of ATCA litigation); *See, e.g.*, *Doe v. Unocal*, 395 F.3d 932, 950-51 (9th Cir. 2002); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7, 54 (E.D.N.Y. 2005); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007).

414. Albin Eser, *Individual Criminal Responsibility*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 801 (Antonio Cassese et al. eds., 2002); Christoph Burchard, *supra* note 139 at 938.

415. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 158 (2d Cir. 2010) (Leval, J., concurring in judgment).

standard widely recognized in international law<sup>416</sup> and the appropriate standard for policy reasons.<sup>417</sup>

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416. See, e.g., United States v. Von Weizsacker ("The Ministries Case"), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 622 (Nuernberg Military Tribs. 1950); U.N. War Crimes Comm'n., LAW REP. OF TRIALS OF WAR CRIMINALS (Vol. 1), Case No. 9, The Zyklon B Case, The Trial of Bruno Tesch and Two Others, at 93-103 (1947) at 101; United States v. Flick ("The Flick Case"), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1217 (Nuernberg Military Tribs. 1952); United States v. Krauch ("The I.G. Farben Case"), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1169 (Nuernberg Military Tribs. 1953); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 545 (Sept. 2, 1998); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, 44-46 (June 7, 2001); Prosecutor v. Furundžija, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 245 (Dec. 10, 1998); Prosecutor v. Vasiljević, Case No. IT-98-32-T, 71 (Nov. 29, 2002), *aff'd*, Case No. IT-98-32-A, Appeals Judgment, 102 (Feb. 25, 2004); see also Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, ¶¶ 162-63 (Mar. 24, 2000); Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 678, 692 (May 7, 1997).

417. The recent decision in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) along with the ATCA cases decided prior to the *Talisman* decision of 2009, e.g. *Unocal*, 395 F.3d 932 and *In re "Agent Orange"*, 373 F. Supp. 2d 7 show that courts regard themselves as perfectly capable of distinguishing acceptable business transactions from those that result in liability when the applicable standard of *mens rea* is that of knowledge. For a discussion see also, for example, Wim Huisman & Elies van Slidregt, *Rogue Traders: Dutch Businessmen, International Crimes, and Corporate Complicity*, 8 J. INT. CRIMINAL JUSTICE. 803, 822-23 (2010).

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