From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth-Century Paradigm of the Law of Nations for the Alien Tort Statute

Martha Lovejoy
Note

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The Alien Tort Statute [ATS], alternately hailed as a "potent weapon for human rights" and a threat to developing nations and American corporate interests alike, was secured a second act by the Supreme Court's 2004 decision in Sosa v. Alvarez-Machain. The Sosa decision confirmed the ATS as actionable, but restricted its application to offenses "comparable to the features of the eighteenth-century paradigms, offenses against ambassadors, violations of safe conduct and piracy, that Congress had in mind when it enacted the ATS." Whether aiding and abetting liability is available under the ATS remains a live issue. This Note analyzes Sosa's historical paradigm, examining whether aiding and abetting liability was available for the archetypical violation of the law of nations: piracy. It concludes that aiding and abetting liability for piracy was available and common in English and American law from the sixteenth century to the eighteenth century. The Note outlines the theories of aiding and abetting piracy and applies those theories to contemporary human rights problems.

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INTRODUCTION

In the Papua New Guinean civil war, the government bombed human targets, burned villages, raped women, and shot civilians to support the security of the largest economic entity in the country, mining company Rio Tinto. Could Rio Tinto be held liable for aiding and abetting human rights abuses in American courts under the Alien Tort Statute (ATS)?

During South Africa's apartheid, companies provided banking services for the government; their oil fueled the military trucks; the cars they produced drove the South African police officers who shot demonstrators on the streets. Companies housed South African government weapons and provided security for high-risk areas.

Is that support sufficient to constitute aiding and abetting violations of the law of nations under the ATS?

Human rights litigators hope so, building ATS cases to bring human rights to the attention of United States-based companies operating in foreign countries. Yet whether plaintiffs can sustain such actions depends on a historical framework set forth by the Supreme Court in 2004. In Sosa v. Alvarez-Machain, the Court instructed lower courts to "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized." Since Sosa, courts and scholars have grappled with the boundaries and content of these "paradigms." The Court intended this restriction to serve a "doorkeeping" function, urging cautious use of the statute. In Sosa, the Court measured the defendant's conduct against the seriousness of piracy, the archetypical Blackstonian international crime.

This Note analyzes the "eighteenth-century paradigm" of the law of nations as prescribed by the Court for the purposes of refining one of the most contested issues in international law today: corporate aiding and abetting liability for human rights abuses. It seeks to accomplish two

1. Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1198 (9th Cir. 2007).
6. See, e.g., Cisneros v. Aragon, 485 F.3d 1226, 1230 (10th Cir. 2007) (rejecting sexual crimes as comparable to the features of the eighteenth-century paradigm); Taveras v. Taveraz, 477 F.3d 767, 772 n.2 (6th Cir. 2007) (plaintiff arguing that “hostage taking” was sufficient to count as an eighteenth-century violation of the law of nations); Mwani v. Bin Laden, 417 F.3d 1, 14 (D.C. Cir. 2005) (holding that the attack on the U.S. Embassy in Kenya was comparable to a classic eighteenth-century violation of the law of nations); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 340-41 (S.D.N.Y. 2005) (describing “the ubiquity of disagreement among courts and commentators regarding the fringes of customary international legal norms.”).
7. Sosa, 542 U.S. at 728-29.
goals. First, by taking a close look at the historical prosecution of piracy, the Note confirms that aiding and abetting violations fit firmly into the eighteenth-century paradigm of the law of nations. Second, the Note uses the framework of the piracy liability to provide guidance into the type of aid that was considered triable in the Founders' era, and the concepts that were at the foundation of liability. Individuals who aided pirates were held liable for three basic types of aid: counsel and procurement of piracy, material aid to pirates, and deriving material benefit from business with pirates. Extent of involvement, duty and profit were all considered relevant to the determination of liability. The Note translates the historical paradigm, using it as a benchmark, as the Sosa court did, to measure the viability of contemporary corporate aiding and abetting liability under the ATS. It argues that the historical filter functions appropriately as a gatekeeping test to let only the strongest aiding and abetting cases proceed.

This Note fills in a gap in the ATS literature by exploring the historical context in greater depth than other articles have, considering English and American cases, proclamations, and statutes from rare book libraries to provide a more complete picture of how the framers viewed aiding and abetting piracy. The Note builds beyond the set of cases and materials generally presented within ATS case law, such as Attorney General William Bradford’s opinion and the case Talbot v. Janson, to analyze the history in greater detail.

The argument proceeds as follows. Part I lays out the jurisprudential background of the ATS and the shift to cases involving corporate liability. This Part will briefly survey the debates over whether corporate aiding and abetting liability is acceptable normatively and legally. It will also show the continuing relevance of the history of aiding and abetting to the current legal debate. Part II describes the history of aiding and abetting applied to violations of the law of nations. It follows the changing jurisdiction over piracy trials from the sixteenth century to the nineteenth century, focusing on the treatment of aiding and abetting. This Part uses early-modern scholarly texts, both from common law sources and international sources to elucidate the concepts of duty, assistance, and profit that were dominant in the eighteenth century. Wherever possible, the history will focus on what sorts of aid were recognized to be aiding and abetting, as well as mens rea and knowledge requirements developed through the doctrines, to provide a view into not just whether aiding and abetting liability existed, but what it meant. Part III interprets the piracy jurisprudence for the purposes of the ATS. It applies the framework elucidated through the history to the Sarei v. Rio Tinto and Khulumani v. Barclay National Bank Ltd. cases, involving corporate collusion in the blockade of Papua New Guinea and business in South Africa respectively, and evaluates whether their claims would stand

10. 3 U.S. (3 Dall.) 133 (1795).
11. 487 F.3d 1193 (9th Cir. 2007).
after the historical test.

I. BACKGROUND TO CORPORATE LIABILITY AND THE ALIEN TORT STATUTE

A. Early Jurisprudence of the Alien Tort Statute: From Attacks on Ambassadors to Corporate Liability

One of the first laws in America, the ATS was enacted by Congress as a method of reassuring foreign countries of American law enforcement capacities at a time when the country was young and anxious about its status as a nation engaged in foreign affairs.\textsuperscript{13} It was passed shortly after a political embarrassment in which the United States found itself without sufficient legal remedies after an attack on a French diplomat.\textsuperscript{14} According to the generally accepted history of the ATS, the United States looked to the Blackstonian definition for individual liability for violations of the law of nations to find a remedy: "The principal offenses . . . are of three kinds: 1. Violations of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy."\textsuperscript{15} The ATS was raised in court only a few recorded times in the years immediately following its passage; these disputes concerned whether courts had jurisdiction to hear a case about the return of a seized ship,\textsuperscript{16} or a suit for the return of slaves seized from a ship.\textsuperscript{17} The Attorney General William Bradford also wrote an opinion that applied the ATS to a case in which American citizens aided a French ship in plundering British property in Sierra Leone.\textsuperscript{18}

After falling into disuse, the ATS reappeared in courts in the 1980 case \textit{Filartiga v. Peña-Irala}. In that case, the sister of a boy tortured to death in
Paraguay sued the Paraguayan torturer in the Eastern District of New York.\textsuperscript{19} Since \textit{Filartiga}, the ATS has served mostly as a human rights statute, granting subject matter jurisdiction to federal courts for the most serious crimes committed against aliens in foreign lands.\textsuperscript{20} ATS litigators have attempted to use the statute against defendants as diverse as the French train operators who collaborated with Nazi forces to carry prisoners to their death\textsuperscript{21} and the Yahoo! Internet service provider for releasing dissidents’ private emails to the Chinese authorities, enabling arrests and torture.\textsuperscript{22}

In its landmark 2004 case, \textit{Sosa v. Alvarez-Machain},\textsuperscript{23} the Supreme Court changed the framework of the debate entirely. In deciding whether the kidnapping and detention inflicted on Alvarez-Machain was sufficient to constitute a violation of the law of nations and establish jurisdiction in the United States District Court, the Court focused squarely on the historical window in which the ATS was passed. Justice Souter, writing for the Court, cited early case law on the definition of the “law of nations” and relied on Emerich de Vattel and William Blackstone to draw the contours of its scope.\textsuperscript{24} Basing the definition on Blackstone’s writing, the Court held that one element of the law of nations was “regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”\textsuperscript{25} Primarily, the opinion looked at English criminal offenses against the law of nations: violation of safe conducts, infringement on the rights of ambassadors, and piracy, saying that “[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.”\textsuperscript{26} The Court then used “Blackstone’s

\textsuperscript{19} 630 F.2d 876 (2d Cir. 1980).
\textsuperscript{20} Personal jurisdiction over the matter must still be granted. Consequently, U.S. courts hear ATS cases either (1) in which the defendant has visited the United States, as in, for example, \textit{Filartiga}, 630 F.2d at 876 and \textit{Doe v. Karadzic}, 70 F.3d 232 (2d Cir. 1995), or (2) in which a defendant is a corporation in the United States, as in, for example, \textit{Presbyterian Church of Sudan v. Talisman Energy}, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003); \textit{Corrie v. Caterpillar, Inc.}, 403 F. Supp. 2d 1019 (W.D. Wash. 2005).
\textsuperscript{21} Abrams v. Societe Nationale des Chemins, 389 F.3d 61 (2d Cir. 2004).
\textsuperscript{22} Amended Complaint for Tort Damages at 1-2, Xiaoning v. Yahoo! Inc., No. C07-02151 CW, (N.D. Cal. filed May 29, 2007). Yahoo! settled this case before reaching the trial stage, after great pressure from Congress. Alex Pham, Yahoo to Pay Chinese Families, L.A. TIMES, Nov. 14, 2007, at C1.
\textsuperscript{23} 542 U.S. 692 (2004).
\textsuperscript{24} Id. at 714-16.
\textsuperscript{25} Id. at 715.
\textsuperscript{26} Id. ATS cases are actions in tort, but draw mostly on international criminal law for its definitions and standards. From \textit{Sosa}’s invocation of Blackstone’s definition of the law of nations to \textit{Khulumani}’s analysis of the international criminal tribunals’ cases, criminal standards remain the primary method for determining liability. This has been the subject of much controversy. See, e.g., Jaykumar A. Menon, \textit{The Alien Tort Statute: Blackstone and Criminal/Tort Law Hybridities}, 4 Jl. INT’L CRIM. JUST. 372 (2006) (exploring U.S. courts’ reliance on criminal standards for use in tort law). I will not rehash these arguments here, but merely signal that in my inquiry I will be drawing from sources in criminal law, torts, and international law to decide whether \textit{Sosa} is being applied correctly, assuming, as Justice Breyer does in his \textit{Sosa} concurrence, that the distinction between criminal and civil law is not so...
three common law offenses"—piracy, offenses against ambassadors, and violations of safe passage—as the benchmark against which to judge the outrageousness of Alvarez-Machain's detention. It held that the detention did not rise to the level of suggesting that the perpetrators were "enemies of the human race" and therefore was not cognizable as a violation of the law of nations.\(^\text{27}\)

While human rights advocates claimed a partial victory in this decision (primarily because of the holding that the ATS was intended to take immediate effect),\(^\text{28}\) the Court also took pains to restrict the statute's jurisdiction to a limited set of claims, defined by the set of violations that would have been familiar to the statute's drafters: "we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."\(^\text{29}\) Post-Sosa, defining what those "historical paradigms" are has become an important test of a viable claim.

Because the ATS provides only subject matter jurisdiction and not personal jurisdiction, the statute has had limited reach against human rights abuses. Though some of the first cases, like Filartiga, brought individual actors to accountability,\(^\text{30}\) it has proven increasingly difficult to gain personal jurisdiction over individual human rights abusers. ATS suits have deterred torturers, warlords and other human rights abusers from travelling to or living in the United States.\(^\text{31}\) Human rights advocates have turned their attention instead to corporations with bases in the United States. However, corporations are rarely the direct agents in human rights abuses. They are not the actors who can carry guns, torture directly, or rape and pillage.

Thus the most important question currently facing ATS litigation has become whether corporations can be held liable for aiding and abetting human rights abuses. Critics argue that these types of lawsuits will have disastrous effects on both American companies abroad and on foreign economies that may wither without American business.\(^\text{32}\)

\(^\text{27}\) Sosa, 542 U.S. at 737-38. Piracy was commonly considered a "hostis humanis generis": an enemy of all mankind. See Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

\(^\text{28}\) Sosa, 542 U.S. at 724.

\(^\text{29}\) Id. at 725.

\(^\text{30}\) See, e.g., Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (ATS trial of a Bosnian war criminal).


of scholars and the business community allege that ATS litigation is pursued by the plaintiffs' bar with motives of financial gain. Other scholars and policy experts frame sovereignty arguments, claiming that the United States is conducting "judicial imperialism" and that it has "in effect established an International Civil Court - a court with jurisdiction to decide cases brought by foreigners arising anywhere in the world, by the light only of its own divination of universal law."

Most important among legal arguments proffered, the ATS defendants and their supporters argue that aiding and abetting should not apply in international law. In the Khulumani South African apartheid case, the defendants wrote in their Memorandum of Law in Support of Defendants' Joint Motion to Dismiss that there is an "absence of authority (let alone consensus) concerning the application of theories of secondary liability to civil claims arising under customary international law." It is for this "absence of authority" that this Note presents its analysis. Parts III and IV of this Note will demonstrate the history of how aiding and abetting has applied to customary international law.

B. Looking to History to Justify Aiding and Abetting Standards for Violations of the Law of Nations

Particularly after Sosa's instruction to focus on the eighteenth-century...
historical context of the law of nations, several courts have attempted to draw the boundaries of this "paradigm." Historical analysis has become one of the primary tools available to the judge to determine the viability of the claim. In Khulumani, Judge Hall supported the application of aiding and abetting liability to violations of the law of nations in a footnote that presented the eighteenth-century conception. He cited the historical sources that had been brought to light at the time of the decision: Talbot v. Janson, Henfield’s Case, the Act of April 30, 1790 criminalizing piracy and Attorney General William Bradford’s opinion condemning Americans who aided French ships in attacking the British. Judge Korman’s dissent directly attacked Hall’s reading of the history in his opinion, calling it "ambiguous at best." He dismissed the two cases as concerning privateers, not pirates, and thus not involving violations of the law of nations. Addressing the Bradford opinion, Judge Korman wrote that it was not clear whether Bradford was addressing primary or secondary liability, as the Americans had directly attacked the British boats.

There has been limited additional analysis of the history of aiding and abetting liability for violations of the law of nations to this point, either in scholarship or in case law. Judge Hall’s footnote incorporates the sources cited in a paragraph in the piece Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in the U.S. Courts by Professor Beth Stephens, one of the most widely cited ATS experts and a human rights advocate. Daniel Diskin’s note, The Historical and Modern Foundations for


39. 3 U.S. (3 DalI.) 133 (1795).

40. 11 F. Cas. 1099 (C.C.D. Pa. 1793).


42. Khulumani, 504 F.3d at 328.

43. Id. at 289. Judge Korman explains, "Talbot's and Henfield's legal problems in these cases derived from the fact that they were United States citizens engaged in acts of war against nations with which the United States was at peace." Khulumani, 504 F.3d at 289. However, Judge Korman’s distinction paints the division between privateer and pirate too definitely. Most sources explain the two as primarily interchangeable. See, e.g., A Proclamation Against the Maintenance of Pirates (1569) (Queen Elizabeth I) (“And for [the pirates'] better defence to escape apprehension, do colourably pretend that they be licenced to serve on the seas, and are not to be accompted culpable as pirates.”) [hereinafter Queen Elizabeth I, Proclamation Against the Maintenance of Pirates] (copy on file with author); JOHN FRANKLIN JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD: ILLUSTRATIVE DOCUMENTS ix (1923) [hereinafter JAMESON, PRIVATEERING AND PIRACY]; ALFRED P. RUBIN, THE LAW OF PIRACY 19-26 (1988); JANICE E. THOMSON, MERCENARIES, PIRATES AND SOVEREIGNS 22-23, 45-46, 69-76, 107-110 (1994) (describing the evolution of piracy and privateering from a "legitimate practice" to outlawry); NEVILLE WILLIAMS, CAPTAINS OUTRAGEOUS: SEVEN CENTURIES OF PIRACY 3-4 (1961).

44. Khulumani, 504 F.3d at 329.

Aiding and Abetting Liability under the Alien Torts Statute, likewise makes an effort to address the history, but it analyzes the sources mentioned in the Stephens article, with an added exploration of William Blackstone. Other articles consider piracy in the context of ATS, but without close examination either of the history or of aiding and abetting. This Note will explore the history of the jurisprudence more deeply, examining the history in treatises, cases, and the strategic writing of statutes in both England and America. The history will address some of the gaps in clarity that Judge Korman identified. By looking systematically at the treatment of aiding and abetting by early American courts and their predecessors, the "paradigm" available to the Founders is colored more vividly.

None of this is to suggest that the courts should be bound to the exact formulation of crimes, accessorail liability and international law as the first Congress faced in their lawmaking. Originalism has its limits and perils. In any legal historical analysis, the connotations of words can be too easily misread, as meanings change. Using foreign texts, the misreadings are multiplied by both translation and time. Furthermore, the Supreme Court in Sosa did not instruct the courts to look for claims exactly as constructed in 1789, but rather those based on "the present-day law of nations" but with "a specificity comparable to the features of the eighteenth-century paradigms." Perhaps the best way to approach the relevant historical question is through what Professor Bernadette Meyler calls "common law originalism." According to Meyler, "[c]ommon law originalism regards the strands of eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as supplying the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively." This view of "flexible originalism" must be a purposely modest one, aimed to rebut those who dismiss aiding and abetting wholesale as outside the first Congress's purpose, and to provide some greater depth to this paradigm against which courts compare the "present day law of nations." The goal is color and legitimacy, not the definitive

47. Eugene Kontorovich, Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute, 80 NOTRE DAME L. REV. 111 (2004) (arguing that piracy is the mold into which the modern ATS offenses must fit and that "modern human rights offenses are not substantially 'comparable' to piracy, the benchmark offense").
48. See Kent, supra note 14, at 853 (describing the dangers inherent in attempting to make claims about eighteenth-century legal provisions).
49. See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 207-08 (1980) (describing the interaction between linguistic and social contexts causing difficulty in originalist understandings: "she cannot assume that a provision adopted one or two hundred years ago has the same meaning as it had for the adopters' society today. She must immerse herself in their society to understand the text as they understood it.").
52. Id. at 558.
guide on the law of nations.

II. HISTORY OF AIDING AND ABETTING VIOLATIONS OF THE LAW OF NATIONS

In order to clarify the eighteenth-century historical paradigm by which Sosa instructed courts to consider their cases and to respond to Judge Korman's and other skeptics' doubts about the history, this Part will survey aiding and abetting liability in English and early American law. The history confirms that aiding and abetting liability for violations of the law of nations was a prime concern of legislators and courts from the fifteenth century in England. This concern was carried to America and prosecuted from the colonial era. In 1790, the American government passed its first law confirming aiding and abetting liability for piracy in U.S. courts. From the fifteenth century through the early nineteenth century, the venues for the prosecution of piracy varied widely. Throughout the changes, the history demonstrates both strong institutional and jurisprudential choices to make aiding and abetting liability available to courts.

A. Theorists in the Eighteenth Century Applied Aiding and Abetting Liability to Violations of the Law of Nations

Theoretical legal texts guided legislators and judges in early modern Europe, Colonial America, and Revolutionary America. These foundational texts support the application of aiding and abetting liability to piracy. Accessorial liability was well established by the eighteenth century in both the common law tradition and in international law. As piracy was tried in both common law courts and in admiralty courts, both traditions are important in establishing how accessories were treated and what kinds of aid were relevant. Whereas common law scholars viewed aiders and abettors as principals to crimes, the natural law scholars drew finer distinctions between what kinds of aid were considered triable. Many of the theorists and the jurisprudence describe three basic categories of assistance: first, counsel and procurement; second, material assistance; third, assistance after the fact, including both comfort of the criminal and profit from criminal activity. Though the standards for mens rea differ, and the rules of conduct change with time, these three basic ideas of accessorial liability persist in various forms.

Each of the theorists considered in this section strongly influenced the Founders and the early American jurisprudence. A diplomat and theologian, Hugo Grotius was heavily cited in early American courts for

54. See infra Part II.B.
55. Grotius was one of the first international law scholars, publishing his treatise De Jure Belli ac Pacis (Rights of War and Peace) in 1625 in France. RENÉE JEFFERY, HUGO GROTIUS IN INTERNATIONAL THOUGHT 1-14 (2006). Grotius's work strongly influenced scholars such as Blackstone who followed. RUBIN, supra note 43, at 36. His treatise was kept widely in colonial libraries, both in its original language and in translation. STEVEN L. SNELL, COURTS OF
natural law principles. German historian and philosopher Samuel Pufendorf wrote foundational pieces that likewise appeared in many colonial libraries and was frequently cited in early American maritime and international cases. Edward Coke heavily influenced the first generation of American lawyers by compiling the first systematic analysis of English law. His work was the most prevalent in early libraries and was cited constantly in early American courts. Building on Coke’s foundation, Matthew Hale, raised to Lord Chief Justice of the King’s Bench in 1671, was a prolific writer who produced many of the most influential works for both English and American legal scholarship and jurisprudence well into the nineteenth century. William Blackstone’s work was extraordinarily influential in the early American legal community. Courts today continue to cite Blackstone, including the Supreme Court in Sosa.

1. Aiding and Abetting Liability in International Law

The international and natural scholars used concepts of duty to ground their theories of accessorial liability. Grotius considered accessorial liability in international law to be compensatory: “besides the person immediately doing an injury, others may be bound also to repair the losses of the suffering party.” Accordingly, Grotius placed a greater share of blame for a crime on an abettor who instigated the crime: “In the scale of implication the first degree applies to those, who by their authority, or other means have compelled or urged any one to the commission of an


56. See, e.g., Waring v. Clarke, 46 U.S. (5 How.) 441, 491 n.4 (1847); Jennings v. Carson, 8 U.S. (4 Cranch) 2, 12 (1807); Harris v. Clark, 3 N.Y. 93, 98 (1849); Dicken v. Johnson, 7 G.A. 484, 492 (1849).

57. Diverse early courts cited Samuel Pufendorf’s work. See, e.g., The Marianna Flora, 24 U.S. (11 Wheat) 1, 7 n.2 (1825); Parks v. City of Boston, 25 Mass. 218, 220 (1829); Tucker v. White, 1 N.J.L. 111, 119 (N.J. 1791); Coates v. Mayor of New York, 7 Cow. 588, 589 (N.Y. Sup. Ct. 1827); see also Smart, supra note 55, at 47 (noting the presence of Pufendorf’s Law of Nature and Nations in several colonial libraries); SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW, supra note 55, at 191-92 & 192 n.245 (noting Pufendorf’s work in original and translation versions in several colonial law libraries).

58. See Charles F. Mullett, Coke and the American Revolution, 38 ECONOMICA 457, 458 (1932) (“Other men of the early seventeenth century had eager readers, but none had the importance of Coke.”).

59. For biographical information, see generally GILBERT BURNET, LIVES OF SIR MATTHEW HALE AND JOHN, EARL OF ROCHESTER (1829). Hale’s treaties were widely cited in early U.S. cases. See, e.g., United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807); United States v. Smith, 27 F.Cas. 1192, 1218 (C.C.D.N.Y.1806); Mitchell v. Warner, 5 Conn. 497 (1825); Jackson v. Fitzsimmons, 10 Wend. 9 (N.Y. 1832).

60. William D. Bader, Some Thoughts on Blackstone, Precedent, and Originalism, 19 VT. L. REV. 5, 6-12 (1994) (noting that Blackstone “was the common law scholar with the most profound influence on shaping the legal thought of the Revolutionary and Founding generations”).


offence.”63 With a focus on authority and position, Grotius reinforced the special duty of those with influence.64

This concept of duty encompassed derivative liability for failure to prevent harm. Grotius wrote of two separate analytical categories for this “failure to prevent harm” liability. The first category he wrote about is “when any person, whose peculiar office it is, neglects either to forbid the commission of an injury, or to assist the injured party.”65 This definition assumes the actor had a supervisory role, or a special duty to “forbid” injury. The second category has a looser definition of duty: “secondly, when the person, who ought to do it, either does not dissuade from the commission of an offence, or passes over in silence what he is bound to make known.”66 In his On the Duty of Man and Citizen According to Natural Law, Pufendorf similarly articulated derivative liability for failure to act: “If one has inflicted loss directly, another man can be held partly responsible for it, because he has contributed to the fact either by positive action, or by failing to do what should be done.”67

Both Grotius and Pufendorf distinguished accessories’ liability by their level of involvement in a crime. Grotius wrote that accessories “if they have been the real occasion of loss to any one, or have abetted the person doing him the injury, are so far implicated in the guilt, as to be liable to full damages, or, at least proportionally to the part they have taken.”68 Pufendorf distinguished accessories by the significance of their contribution: “those persons are held liable to make reparation for a loss who were really the cause of the loss and contributed significantly to the total loss or part of it.”69 Pufendorf phrased this “significant” assistance in terms of both causation and profit: “But a man will not be held liable to make reparation for a loss (even if he has committed some crime in the course of that act), where he did not play any real part in the action which gave rise to the loss, nor caused it to be done, nor profited from it subsequently.”70 Accordingly, Pufendorf advocated proportional restitution based on level of involvement in the crime.71

2. Aiding and Abetting Liability at Common Law

The English common law theorists, in contrast, recognized aiders and abettors to felony crimes, but punished them consistent with principal liability. As Blackstone wrote, “A man may be principal in an offence in

63. Id. at 198.
64. Id. at 197 (“For where is the difference ... between advising an act and approving of it?”).
65. Id.
66. Id.
68. GROTIUS, supra note 62, at 198.
69. PUFENDORF, supra note 67, at 58.
70. Id.
two degrees: A principal, in the first degree, is he that is that is the actor, or absolute perpetrator of the crime; and, in the second degree, he who is present, aiding, and abetting the fact to be done." 72 This tradition gives substance to the understanding of what that aiding and abetting meant in the "eighteenth century paradigm." Each of the three principal English common law theorists recognized accessorial liability both before and after crime.

Aiding and abetting liability was only available at common law for certain types of crimes. According to Hale, "[i]n cases that are criminal but not capital, as in trespass, mayhem, or praemunire, there are no accessories, for all the accessories before are in the same degree as principals . . . ." 73 Under Hale's formulation, the actors who assist in crimes of violence (trespasses) or mayhem are indistinguishable from the primary actors. Likewise, writing in the Third Institutes, Coke laid forth the common law position that in high treason, there are no accessories, but only principals. 74 Coke explained that, under this rule, those receiving felons after a crime were not to be counted as accessories or principals, but that "procurers of such treason" were to be treated as principals. 75

Aiding and abetting liability applied to felony cases. Hale set forth the following standard for accessorial liability: "An accessory [sic] before is he, that being absent at the time of the felony committed doth yet procure, counsel, command, or abet another to commit a felony . . . ." 76 As for the international scholars, the role of counsel and procurement figured strongly in the common law theorists' calculus of liability. 77

The common law theorists also recognized aiding and abetting liability for assistance after a crime, though they required mens rea. According to Coke, "No one can be said to be an accessory after the fact, except he who knows that the Principal had committed the felony and receives and comforts him." 78 Hale defined aiding after the crime as "where a person knowing the felony to be committed by another receives, relieves, comforts or assists the felon." 79 Hale restricted this definition to felony crimes. 80

72. 4 BLACKSTONE, supra note 15, at *34.
73. SIR MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 613 (The Law Book Exchange, Ltd. 2003) (1736), "Praemunire" is essentially treason: the "criminal offense of obeying an authority other than the king." BLACK'S LAW DICTIONARY 1212 (8th ed. 2004), "Trespass" here refers to the English "Writ of Trespass," introduced in the mid-thirteenth century to make offenders liable for crimes of violence such as raids, or assaults. EDWARD JENKINS, A SHORT HISTORY OF ENGLISH LAW 53-55 (1928).
75. Id.
76. HALE, supra note 73, at 615.
77. See also 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 231 (London, MacMillan 1883) ("Those who 'counsel, procure, or command' another to commit a felony are accessories before the fact; those who in any way assist the criminal after his crime with a view to shielding him from justice, are accessories after the fact.").
78. "Nullus dicitur accessorius post feloniam, fed ille qui novit principalem felonium sese, et illum receptavit et confortavit." COKE, supra note 74, at 138.
80. Id.
Like Coke and Hale, Blackstone's definition of aiding after the fact included a strong scienter requirement: "An accessory after the fact may be, where a person, knowing a felony to have been committed, recieves, [sic] relieves, comforts, or assists the felon. Therefore, to make an accessory ex post facto, it is in the first place requisite that he knows of the felony committed." 81


One of the most important treatises on admiralty law from the period recognized the multiple jurisdictions for piracy under liability for aiding and abetting piracy, whether under the laws of admiralty (as in the special commissions) or in the common law courts. Charles Molloy's admiralty treatise *De Jure Maritimo et Navali* was influential among colonial legal scholars and in early American colonial courts. 82 It was widely owned, including by Thomas Jefferson and John Adams, 83 and was cited in courts in Pennsylvania, 84 South Carolina, 85 and New York. 86

Molloy wrote directly on accessorial liability for piracy, distinguishing between liability before common law courts and admiralty courts. Molloy wrote that, in a common law court, all those who aided and abetted pirates were accorded principal status: "If a Pirate at Sea assault a Ship, but by force is prevented from entering her, and in the attempt the Pirate happens to slay a person on the other Ship, they are all Principals in such a Murder, if the Common Law hath jurisdiction over the cause . . . ." 87 In contrast, admiralty law distinguished further between accessories and principals: "but by the Law Marine, if the parties are known, they who gave the wound only shall be principals, and the rest accessories; and where they have cognizance of the principal, the Courts at Common Law will send them their accessory, if he comes before them." 88 Despite the distinctions, aiders and abettors were held liable under both common law and admiralty jurisdictions.

Coke, Blackstone, Hale, Grotius, and Pufendorf provide a background of thinkers highly influential to the early American legal community, 89 but

81. 4 BLACKSTONE, supra note 15, at *37 (citations omitted).
82. See SNELL, supra note 55, at 190-91 & nn.237-38 (2007) (noting that Molloy's treatise was found in several colonial law libraries and cited in several colonial courts); Charles M. Andrews, *Introduction* to RECORDS OF THE VICE-ADMLIRALTY COURT OF RHODE ISLAND 1716-1752, 1, at 15 n.1 (Dorothy S. Towle, ed., 1936) (noting that Molloy's treatise was used in vice-admiralty courts in North Carolina and New York).
83. SNELL, supra note 55, at 191 n.237.
84. United States v. Jones, 26 F. Cas. 653, 655 (C.C.D. Pa. 1813); Moxon v. the Fanny, 17 F. Cas. 942, 943 (D. Pa. 1793).
87. 1 CHARLES MOLLOY, DE JURE MARITIMO ET NAVALI 84 (9th ed. 1767) (1677).
88. Id.
neither they nor the English common law provide a fully definitive guide to American law. As Justice Story wrote in 1829, "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth right. But they brought with them, and adopted only that portion which was applicable to their situation."90 Their theories of aiding and abetting were the foundation on which the first American lawmakers built their theories of accessory liability.

B. Aiding and Abetting Piracy

The piracy jurisprudence is particularly valuable in clarifying how aiding and abetting liability developed because it demonstrates the variety of modes of liability available to lawyers in the Founders’ era. The jurisprudence reveals the institutional choices courts, the English Crown, and the American government made in choosing and refining jurisdiction to correspond with opportunities to prosecute abettors. The prosecution of piracy has a complex and inconsistent history in both England and the first centuries of America.91 The definition of piracy, the courts in which it could be prosecuted, and the standards by which aiding and abetting were judged have each changed frequently. Because of this, many jurisdictional options existed when the ATS was written. At various times piracy was under admiralty jurisdiction92 and common law jurisdiction; at other points, piracy cases were heard only in specially convened commissions.93 Yet, in each of these venues the Crown, courts, and American legislature consistently chose to confirm aiding and abetting liability.

In exploring aiding and abetting liability for piracy, this section will look first at the early standards in England, and then how they were imported and rewritten in colonial and Republican America. It will rely on cases, laws, and proclamations. As before, the cases generally fall into

and Founding generations”); Charles A. Lofgren, Warmaking Under the Constitution: The Original Understanding, 81 YALE L.J. 672, 689 (1972) (“Americans of the revolutionary generation paid considerable attention to a broad range of European and especially English ideas and controversies involving law, government, and international affairs. The works of Hugo Grotius, Samuel Pufendorf, Emmerich de Vattel, and particularly Jean Jacques Burlamaqui were widely read and quoted.”); Michael D. Ramsey, Textualism and War Powers, 69 U. CHI. L. REV. 1543, 1570-71 (2002) (“Grotius was widely read and cited in eighteenth-century America, despite his temporal and physical remoteness.”).


91. For a detailed look at the evolving definitions of piracy from antiquity to early America, see generally RUBIN, supra note 43.

92. See, e.g., AN EXACT NARRATIVE OF THE TRYALS OF THE PYRATES AND ALL THE PROCEEDINGS AT THE LATE GAOL-Delivery of the Admiralty, Held in Old Bayly, on Thursday & Saturday, the 7th and 9th of Jan. 1671 (1671); THE TRYALS OF THE PYRATES, LATELY TAKEN BY HIS BRITANNICK MAJESTY'S SHIP THE SWALLOW 2 (Proceedings were held at the Court of Admiralty, held at Cabo Corso Castle on the Coast of Africa, March 28, 1722).
three categories of aid: (1) counsel and procurement; (2) material assistance; and (3) comfort and profit.

1. Prosecutions for Aiding and Abetting Piracy in Early Modern England

From the early modern period in England, courts and the Crown wrestled with questions of jurisdiction over piracy, the definition of piracy, and whether accessories were indictable in various courts. In 1535 and 1536, Henry VIII's legal advisors drafted the first two English laws addressing piracy.94 Under the statutes' formulation, the crimes of piracy were considered to be common law felonies. Accordingly, common law criminal aiding and abetting liability, as understood in that time, attached to both accessories before and receivers after the crime. The shift to common law jurisdiction over the crimes likewise increased the likelihood of conviction over the civil courts by allowing circumstantial evidence.95

Queen Elizabeth I issued a series of proclamations in the mid-sixteenth century that strengthened aiding and abetting liability for piracy, ordering that the individuals who aid pirates "be adjudged and executed as pirates."96 In a 1569 proclamation "Against the Maintenance of Pirates" the Queen specified two forms of aid that were considered criminal: supply of pirates and purchase of pirate goods. Regarding supply to pirates, the Queen established a standard by which the burden was on the suppliers to verify whether the ships to which they sold were pirate ships: "[F]rom henceforth no maner of person comming from the sea, be suffered to have any vitayle, munition, or any other releefe except it be such as are notoriously known to appartayne to merchantes shippes."97 Regarding the purchase of pirate goods, the Queen condemned purchasing goods


96. Queen Elizabeth I, Proclamation Against the Maintenaunce of Pirates, supra note 43. See also The Fourme of the Proclamations To Be Published in the Port Townes, and Market Townes, or Other Publique Places, within the Limittes of the Commission Geuen by the Queenes Majestie, the first of March, 1571. to Sundry Persons of Credite, for Reformation of Disorders Upon the Sea Coastes (1571) (Queen Elizabeth I) ("And that no subject of her Majestie, nor any other inhabitant of this Realme, do sende or convey any victuals, munitions, or other necessaries to them, or any of them or by any wayes or meanes, directly or indirectly, do traffique with them, or buy any wares, merchandises, or thyngs of them, upon payne of death.") [hereinafter Queen Elizabeth I, Proclamations to Be Published] (copy on file with author).

97. Queen Elizabeth I, Proclamation Against the Maintenaunce of Pirates, supra note 43. In modern English, this translates to: "From henceforth, no person coming from the sea will alloweth any victual, supplies, or any other help, except if they are well known to be of a merchant ship."
before taking proper procedures to verify the origin: "Neither that any person do bye or receave any wares or goodes of any person directly or indirectly comming from the seas, untill the same wares or goodes be brought and landed openly according to the lawes of the Realme." The Queen was thus concerned about both material aid and profit from criminal activity.

By the end of the sixteenth century, the jurisdiction over piracy was again in question. "Oyer and terminer" commissions were convened to hear cases of piracy and pirates' spoils. Some of these commissions held jury trials to adjudicate matters of pirate goods as well as to try individuals on land who had assisted pirates. William Fleetwood’s admiralty treatise from the time period described the battling jurisdiction thus: “Some Accessaries before the offence perpetrated which be Accessaries by the Common Lawes of this Realme, and some Accessaries be made by Statute law, and in Treasons there is noe Accessarie but principall.” Thus, according to Fleetwood, aiding and abetting piracy could be tried under common law, by statute, and as treason. He also wrote that aiders and abettors were variously treated as principals or accessories.

The broad reach of the law and concurrent jurisdiction caused confusion. Sources from 1577 indicate that authorities prosecuted aiders and abettors in that year under statutes, in commissions, and in admiralty courts. Lawyers bringing suit under statutes and the common law drew different pictures of aiding and abetting liability for piracy.

“Her Majesty’s learned Councell in the law” answered questions in 1577 to define aiding and abetting liability for piracy in the piracy commissions. The council explained that one who knowingly “victuals” a pirate is an accessory to piracy, even if he did not share in the spoils. This definition confirmed the commissions’ jurisdiction over aiders and abettors on land. It also removed the requirement of financial gain to meet the standard of accessory, but kept a willfulness component. However, the council determined that those who received pirate goods were not accessories and thus not subject to the felony death sentence, though they could be punished through fines and imprisonment.
In contrast, in the common law context, aiders and abettors before the fact were treated as principals. Another source from 1577 states that “the ayders of pirates with victualls, armor, or any other thinge to committ piracy or spoile are to be punished as the pirates themselves.”106 Canon law lawyers, like civil law lawyers, held that accessories after the fact are not to be punished as pirates but “may be punished arbitrarily.”107 Those who bought pirate goods were required to make restitution to the owners, even if they were unaware of the crime; those who knowingly bought pirate goods “may be otherwise punished as evill doers.”108

From a third 1577 perspective, a court of admiralty investigated aiders and abettors on land who bought goods from a pirate ship and fed and enabled the pirates. In this case, several defendants were accused of buying or helping to transport pirate spoils, and housing and feeding criminals. The records also noted two defendants, Henry Francis and Thomas Clerke, who lodged sick pirates in their houses. Though the disposition of the case is not fully recorded, some defendants were ordered to provide restitution to those who would claim it.109

Pirates and their abettors on land proved to be persistent problems. From the late seventeenth century to the early nineteenth century, the English government issued law after law imposing sanctions on accessories. The first English statute that expressly criminalized acting as an accessory to piracy appeared in 1698.110 This admiralty statute made accessories liable for acts both before and after the crime, and it included receivers of pirate goods within its definition of accessories.111 The statute had a scienter requirement for accessories after the fact, stating that “every Person and Persons, who knowing that such Pirate or Robber has done or committed such Piracy and Robbery, shall on the Land or upon the Sea, receive, entertain or conceal any such Pirate or Robber, or receive or take into his Custody any Ship, Vessel, Goods or Chattells” were guilty under the law.112 In 1717, King George passed a new piracy act, underlining the liability of those who profited from pirate goods: “That where-ever any Person taketh Money or Reward, directly or indirectly, under Pretence or upon Account of helping any Person or Persons to any stolen Goods or

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106. Trinity Hall MS. II Admiralty VI (Nathaniel Lloyd), f. 46v, in Hale and Fleetwood on Admiralty Jurisdiction, supra note 94, at 364-65.
107. Id. at 364.
108. Id.
110. Piracy Act, 1698, 11 Will. 3, c. 7 (Eng.). The law describes the prior statute’s defects: And whereas several evil-disposed Persons, in the Plantations and elsewhere, have contributed very much towards the Increase and Encouragement of Pirates, by setting them forth, and by aiding, abetting, receiving, and concealing them and their Goods, and there being some Defects in the Laws for bringing such evil-disposed Persons to condign Punishment.
111. Id.
112. Id.
Chattels, every such Person" was to be found guilty of a felony. The law provided an exception for receivers who testified against the pirates.

In 1721, piracy had "very much increased," and King George's lawyers wrote a new law criminalizing aiders. The law targeted those who provided provisions and ammunition to pirates, and those who knowingly traded with them afterwards. The law also condemned those who would "consult, combine, confederate or correspond with any Pirate." Under the 1721 law, pirates' accessories were held to be principals and subject to the same punishment as pirates: death, "loss of lands, goods and chattels." Under these two statutes, pirate trials continued to be held in a variety of different courts. The early modern English conception of aiding and abetting piracy laid a foundation for the Colonial American experience: in its earliest years, America controlled piracy using English laws, English institutions and English conceptions of liability.

2. Prosecutions for Aiding and Abetting Piracy in Colonial America

The lack of clarity about jurisdiction over piracy persisted in the American colonies. Pirate trials were held in courts of common law, special admiralty courts (Oyer and Terminer), and in the courts of vice-admiralty. Sometimes pirates were tried before special commissions composed of colonial officials. Occasionally, defendants were sent to England to be tried at the High Court of Admiralty's Court of Oyer and Terminer. The English Piracy Act of 1717 expressly extended jurisdiction over accessories to pirates to the American colonies. Faced with increased piracy, King William III also granted jurisdiction over many...
To that end, the standards applied to aiding and abetting liability were inconsistent. However, whether in common law courts, or in the admiralty courts, aiding and abetting was a continuing concern.

Two Massachusetts cases in which pirates' abettors were tried as principals illustrate early American common law understandings of aiding and abetting. In the 1690 case of Benjamin Blackledge, the ship Good Hope, captained by Colonel Samuell Shrimpton, was overmastered in New England. Shrimpton appears to have been tricked by the pirate Captain Allison; after nearly twelve months of mutual assistance, Captain Allison and his crew seized the ship after deceiving the crew with invitations to drink. According to depositions of the Good Hope crew, Blackledge, one of the Good Hope crewmembers, did not assist Allison in the uprising, but joined him after the seizure, taking arms and helping him escape. For this, Blackledge was taken before a Suffolk County grand jury with the allegations that he did "Conspire, Abett and Joyne" with Captain Allison in taking the Good Hope.125 Blackledge was thus taken to court as an abettor for aiding the pirate's escape.

In Boston in 1724, the Court of Admiralty tried several defendants for aiding and abetting piracy in the seizure of the sloop the Content.126 In addition to trying the primary pirates, the court tried abettors for manning the helm (Isaac Lassen), keeping a journal (Henry Gyles), and working on deck (William Phillips).127 According to testimony, each of these defendants had been kidnapped from another sloop and forced to sail with the pirates. The testimony reveals the standards that were important to determining culpability for aiding piracy. Each of the defendants claimed coercion and denied taking any direct role in acts of piracy. Phillips's leg had been shot by a pirate and cut off.128 Lassen reportedly never took any of the spoils of piracy, except that to keep him clothed when "almost naked." 129 Crewmembers testified that Lassen was never armed and always seemed "to be a forced man." 130 Witnesses testified that the artist Gyles was forced to keep the journal and that he "was always Contriving to get away." 131 Thus, attempts to escape, refusal of spoils and gain, and refusals to give substantive aid to piratical acts were relevant in absolving defendants of aiding pirates. The court held that Gyles and Lassen were
not guilty of piracy, but found Phillips to be guilty.\textsuperscript{132}

Colonial proclamations also mention aiders and abettors of piracy. In 1699, William Penn issued a proclamation directing “all Magistrates and Officers within” the Province of Pennsylvania to apprehend pirates and those “who shall knowingly Harbour any of Them or their Goods, or by any means directly or indirectly Protect them, or shall be Aiding or Assisting to Them to make their Escape or to withdraw themselves from Justice.”\textsuperscript{133} Penn instructed all “the Kings Loving Subjects” to take part in the fight against pirates, particularly requesting that “Keepers of Public Houses . . . have a watchfull Eye” over any strangers and to apprehend them if appropriate.\textsuperscript{134} According to the Penn proclamation, apprehending pirates and their assistants was a public task.

In another 1699 proclamation, John Nansan, Lieutenant Governor of New York, issued a proclamation directing the arrest of a particular pirate, James Gillam.\textsuperscript{135} This proclamation warned any potential aiders and abettors against assisting the pirates. Lieutenant Governor Nansan “Require[d] and Command[ed] all and every Persons whatsoever not to entertain, harbor, comfort, conceal, convey away, or assist in the Conveyance away of [the pirates] . . . on penalty of being prosecuted with the utmost Severities of Law.”\textsuperscript{136}

3. Prosecution of Aiding and Abetting Piracy in the Founders’ Age

Throughout the American Revolutionary period, disputes on the high seas remained in the public eye. In 1775, the Continental Congress wrote a provision recommending that the states create the first fully American admiralty courts to try prize cases and other admiralty matters. The states scrambled to establish courts.\textsuperscript{137} The Articles of Confederation represented the next shift in jurisdiction over piracy. They mention piracy twice: first, allowing states to equip themselves for war if their “State be infested by pirates.”\textsuperscript{138} Second, in Article 9, Congress assigned itself the power of “appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.”\textsuperscript{139} Control over piracy was
clearly of foremost concern to the drafters.

The Constitution gave a broad stroke to admiralty jurisdiction, granting judicial power to the federal government over "all Cases of admiralty and maritime Jurisdiction." However, the Framers did not specify in that grant of jurisdiction which federal courts would hear the maritime cases, waiting until the Judiciary Act of 1789 to clarify further. In the Judiciary Act of 1789, where "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" was granted to federal district courts, the drafters still kept a window of state court jurisdiction: "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The "savings to suitors" clause reserved the right of state courts to hear cases with a common law remedy. Thereafter, federal and state courts had concurrent jurisdiction over piracy.

The year following the ATS's passage, Congress passed a law directly criminalizing aiding and abetting piracy. The April 30, 1790 statute is the first law defining aiding and abetting liability in United States federal history. Section 6 of the statute criminalized concealment of crimes against the law of nations such that "if any person or persons having knowledge of the actual commission of the crime of wilful [sic] murder, or other felony, upon the high seas . . . shall conceal, and not as soon as may be disclose . . . [they] shall be adjudged guilty of misprision of felony." The law also established that it was a crime to conceal piracy or robberies at sea by hiding either the felon or the stolen property. Congress specified punishment for this crime of both imprisonment and a fine. Like Grotius and Pufendorf, the law established a duty of disclosure, even for those without direct involvement in aiding the crimes, and condemned comfort of pirates.

Later, the act addresses liability for direct aiding and abetting of piracy. In language nearly identical to that of Blackstone and Hale, Congress set jurisdiction over aiding and abetting piracy to any who assist pirates either "on land or the seas." Adding to Blackstone and Hale's language in describing the accessory's role, Congress included an express mens rea requirement: "knowingly and wittingly aid and assist, procure, command,

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141. Judiciary Act of 1789, ch. 20, § 9, 1 Stat 73, 77.
142. Id.
143. This "saving to suitors" clause has generated much debate. Professor William R. Casto interprets it to "permit the state courts to exercise concurrent jurisdiction over maritime cases in which a common law remedy traditionally was available. In all other cases, the national courts' admiralty jurisdiction is exclusive." William R. Casto, The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers and Pirates, 37 AM. J. LEGAL HIST. 117, 140-41 (1993).
144. For a thorough explanation of this topic, see SNELL, supra note 55, at 3-4.
145. For an excellent summary of this legal development of aiding and abetting law in the United States, see Judge Learned Hand's opinion in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
146. Act of April 30, 1790 § 6, 1 Stat. 113.
147. Id. § 11.
148. Id. § 10.
counsel or advise any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas...” 149 The law specified that if the aid “shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery... [then it] shall be... adjudged to be accessory to such piracies before the fact.” 150

Similar to Blackstone’s statement of the common law, the law provided that anyone convicted of aiding and abetting before the fact would be sentenced to death, as if they had been a principal.

In 1795, six years after the ATS was passed, Attorney General William Bradford wrote an opinion that asserted that aiding and abetting was directly applicable to cases of piracy. Bradford’s opinion condemned an American citizen’s violation of the law of neutrality, committed on the “high seas.” 151 In this incident, an American slave trader cooperated with a fleet of French privateers to attack Sierra Leone. 152 In the words of Bradford’s decision, “certain American citizens trading to the coast of Africa, on the 28th of September last, voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement.” 153 Bradford, working through the questions of jurisdiction and possible claims, settled that these crimes of attacking foreign ships in peacetime on the high seas were addressable:

there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States. 154

Bradford also wrote that the standard of evidence would not need to be as high as that in a criminal prosecution, stating that “such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose, the difficulty of obtaining redress would not be so great as in a criminal prosecution, where vita voce testimony alone can be received as legal proof.” 155 Thus, from the first years after the ATS was written, American officials interpreted it to reach aiding and abetting liability for violations of the law of nations.

Aiding and abetting for piracy continued to be a concern in federal courts. Justice Story, riding circuit in Rhode Island, presided over a case in 1813 where the defendant was tried for piracy and murder on the high seas. In ruling that the defendant could be held liable for aiding and abetting the murder, Story wrote:

149. Id. § 10.
150. Id. § 9.
152. See Casto, supra note 13, at 503.
154. Id. at 59.
155. Id.
Nor is it necessary, to constitute murder, that the party should himself inflict the mortal wounds. It’s sufficient if he is present, aiding and abetting the act. In common sense and reason, as well as law, the ruffian, who stands by and directs or encourages the bloody deed, is equally guilty with him, who applies the poniard.\textsuperscript{156}

Story’s description of aiding and abetting is direct; he views his aider as “present.” By “direct[ing] or encourag[ing]” the defendant in the act, the aider is “equally guilty with him.” This standard is more than constructive knowledge; here the aider is directly aware of the offense. Story found it “common sense and reason” that those who assist in a violation of the law of nations should be held liable.

Questions about what standard of aiding and abetting to apply to piracy cases continued into the nineteenth century. In 1818, Justice Story sat before another piracy trial in Massachusetts.\textsuperscript{157} In this case, five crewmembers were accused of the murder of Thomas Baynard, the supercargo,\textsuperscript{158} while overpowering the ship Plattsburgh; the indictment was based on the Act of April 30, 1790.\textsuperscript{159} Justice Story’s recitation of the facts described a “confederacy” between five members of the crew. Late on April 21, the crewmembers feigned seeing another ship on the horizon. When second mate Stephen Onion responded, the conspirators attacked him. The mutinous crewmembers threw the captain, the first mate and the supercargo overboard.\textsuperscript{160} In Justice Story’s description, four of the crewmembers “visibly engaged in the scene of action, as avowed confederates.”\textsuperscript{161} The fifth, Nathaniel White, was less directly involved in the violence; according to Story, White “was on deck when the mutiny took place, and assisted, soon after, in the management of the vessel . . . he was present, but not doing any thing, when Baynard was thrown overboard — [and] he went down into the cabin soon after, to drink grog.”\textsuperscript{162} At that after-mutiny drink, the pirates devised plans for the division of spoils and the management of the ship.\textsuperscript{163}

The defense and the prosecution debated fiercely about White’s status as an accessory to piracy. The District Attorney characterized aiding and abetting as “perfectly plain, express and intelligible.”\textsuperscript{164} According to him, the murder on the high seas was criminalized in the Act of April 30, 1790 and “the aiders and abettors are in equal guilty with the immediate agents

\textsuperscript{156} United States v. Ross, 27 F. Cas. 899, 901 (C.C.R.I. 1813).
\textsuperscript{157} The Trial of John Williams, Francis Frederick, John P. Rog, Nils Peterson, and Nathaniel White, on an Indictment for Murder on the High Seas: Before the Circuit Court of the United States, Holden for the District of Massachusetts, at Boston, on the 28th of December, 1818 (1819) [hereinafter The Trial of John Williams].
\textsuperscript{158} Crewmember in charge of the cargo.
\textsuperscript{159} Id. at 79.
\textsuperscript{160} Id. at 85.
\textsuperscript{161} Id. at 85-86.
\textsuperscript{162} Id. at 85.
\textsuperscript{163} Id. at 9.
in the mischief.” The reporter notes that the prosecutor read from several authorities “for the purpose of shewing, that all who are present, aiding or abetting, &c. &c. by word or by deed in the commission of a murder, though not instrumental in the actual perpetration of the deed, are nevertheless to be regarded in the light of principals.” Defense attorney Hooper disagreed. He rebutted the prosecution’s apparent reference to the English statute that made principals and accessories indistinguishable, saying that the Act of April 30, and its associated aiding and abetting standards superseded it. Hooper cited Matthew Hale, Gilbert’s Evidence and other sources for the proposition that “mere presence is not enough” to sustain a conviction of aiding and abetting a felony. In Justice Story’s jury charge, he said that White would be culpable as an aider if he knew beforehand of the mutiny and failed to tell about it. He described the liability in terms of a conspiracy, more broadly than in the Ross case above “whether they were all present at the time of [the] murder, and gave the blows, or assistant in throwing him overboard, or some of them were acting in aid of the general design, in another part of the ship . . . they are all deemed, in law, guilty of the crime.” White was acquitted; the other pirates were convicted and sentenced to death.

As the White case demonstrates, the question is not whether to apply aiding and abetting liability to violations of the law of nations, but how. The defense attorney and the prosecutor sorted through the theories and laws explained above for those most favorable to them. Though the theories of aiding and abetting liability differed and the venue of piracy trials included a variety of courts, one thing is clear: aiding and abetting was always considered to be indictable for piracy.

III. CORPORATE LIABILITY FOR AIDING AND ABETTING IN THE WAKE OF SOSA V. ALVAREZ-MACHAIN: LOOKING FORWARD

A. What the History Demonstrates About Forms of Aid, Duty and Profit

The theorists and the cases are clear: aiding and abetting piracy was recognized in the Founders’ period. Not only was aiding and abetting triable, it had been important to the English Crown, American colonial administrators, the courts in both countries and the American legislature. The English Crown wrote and rewrote statutes and proclamations to confirm that aiding was reachable under England’s laws. The first aiding

165. Id.
166. Id.
167. Id. at 27.
168. THE TRIAL OF JOHN WILLIAMS, supra note 157, at 27.
169. Id. at 86 (“If you believe him to have been a confederate, acting his part in the general design, you are not to acquit him, because his crime may seem to be less heinous, in a moral view, than that of the other prisoners.”).
170. Id. at 87, 91-92.
and abetting statute in America was written to criminalize aiding pirates.

How aiding and abetting was defined is also clearer. The cases, laws and proclamations conform to three categories of aid: (1) counsel or procurement of piracy; (2) material aid of pirates; (3) and comfort of or profit from pirates. How strictly these categories were enforced depended on the venue of the case; common law and international law treated accessories with differing severity.

The common law conception, articulated by Coke, Hale, and Blackstone, was strict: aiders and abettors were to be punished as principals, whether they aided before or after an offense. Molloy confirmed this form of liability for piracy. At common law, mens rea was an important requirement for liability; the crime must have been committed “knowingly.”

Institutionally, this perspective was reinforced by England’s piracy laws of 1698 and 1721, both of which judged aiders of pirates to be pirates themselves. Similarly, in United States v. Ross, Justice Story held that an aider “is equally guilty with” the principal. The prosecutor in the trial of John Williams similarly adopted this position. On the other hand, natural law scholars Grotius and Pufendorf espoused a gradated liability; aiders should make restitution commensurate with their culpability. Grotius likewise assigned accessorial liability to those who gave “counsel, approbation, and assent” or aided directly.

Both Grotius and Pufendorf held that those who failed to prevent harm were also derivatively liable for crimes. Grotius emphasized a theory of duty; those who “ought to know” were to be held more liable. Pufendorf articulated a “substantial assistance” standard, not dissimilar to that articulated by Pregerson and Katzmann in Doe I and Khulumani.

This concept of “duty” is echoed in the American jurisprudence. In the Massachusetts court’s treatment of sailor Isaac Lassen and artist Henry Gyles in their cases, and Nathaniel White in his, the court inquired what the sailor’s duty was and whether the assistance they provided was substantial. In the Trial of John Williams, Justice Story articulated another version of “duty,” holding that if White knew about the piracy and failed to prevent it, he was liable as an aider.

The piracy jurisprudence was split, however, as to whether a defendant needed to have profited from the aid to be liable as an accessory. The Common Law Council in 1577 answered that question negatively, holding that “one who knowingly victuals a pirate is an accessary to the piracy when committed, even if he received no part of the spoils.” In contrast, in the 1726 Boston trial of Isaac Lassen, the lack of financial gain seemed to have been influential to the jury adjudicating fault. The 1717 Piracy act held “That where-ever any Person taketh Money or Reward,
directly or indirectly, under Pretence or upon Account of helping any Person or Persons to any stolen Goods or Chattels, every such Person was guilty of aiding and abetting piracy. Profit from the piracy was thus an influential, but not necessarily dispositive, element of aiding piracy.

B. Measuring Recent ATS Cases Against Sosa's Historical Paradigm

As the Court in Sosa measured Alvarez-Machain's detention against the history of violations of the law of nations, the history of the prosecution of pirates' accessories can serve as the benchmark for evaluating aiding and abetting offenses. The jurisprudence above colors the sorts of aid that was relevant to finding aiding and abetting liability for violations of the law of nations in the Founders' period. This Section examines two recent aiding and abetting cases: Rio Tinto, involving Papua New Guinean government assaults aided by the copper extraction company Rio Tinto, and Khulumani, involving Western businesses' support of South African apartheid. This Section analogizes the allegations in each case to the historical backdrop of piracy.

1. Rio Tinto

Sarei v. Rio Tinto explored whether a copper-mining conglomerate had encouraged and enabled government atrocities against Papua New Guinean [PNG] citizens. The case also dealt with the company's environmental and labor practices. The Rio Tinto group opened a copper mine in the 1960s on the small island of Bougainville off the coast of Papua New Guinea. In addition to causing environmental damage, the company allegedly paid black workers "slave wages" (in the words of the Australian Minister of Labor). However, the company's actions as an aider and abettor of human rights abuses accelerated in 1988 when Bougainville citizens began to protest the island's environmental destruction with sit-ins. When Rio Tinto threatened to withdraw from the country unless the protests were contained, the PNG government responded to the uprisings by sending in military forces, blockading the island to prevent the delivery of food and humanitarian supplies, and raping civilians. Rio Tinto allegedly provided moral and tactical assistance for the government action, as well as physical supplies.

174. Piracy Act, 1717, 4 Geo., c. 11 (Eng.).
175. The Second Circuit in Filartiga v. Pena-Irala used piracy as the same benchmark for evaluating ATS cases, stating that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humanis generis, an enemy of all mankind." 630 F.2d 876, 890 (2d Cir. 1980).
177. Id. at 1123-24.
178. Id. at 1124.
179. Id. at 1124-25.
180. Id. at 1125-26.
181. Id. at 1126.
Many of the crimes in *Rio Tinto*—indiscriminate civilian bombing, rape, and forced labor—rise to the level of universal jurisdiction.\(^{182}\) *Rio Tinto*'s aid fell into the categories this Note outlined above: advice and procurement, material support, and comfort of human rights abusers.

The plaintiffs described *Rio Tinto*'s involvement in the human rights abuses as advice and procurement. Bougainville citizens accused *Rio Tinto* of encouraging the Papua New Guinean government to impose a blockade on rebelling civilians to force them to surrender, which enabled *Rio Tinto* to reopen the copper mine.\(^{183}\) According to the District Court opinion in *Rio Tinto*, a top *Rio Tinto* official purportedly "encouraged continuation of the blockade to 'starve the bastards out some more [so] they [would] come around.'"\(^{184}\) The blockade prevented the Papua New Guinean citizens from receiving food, vaccines or medical aid; thousands died because of the blockade.\(^{185}\) At common law and by international theories, this type of aid—procurement and advice—was considered to be the most serious. As Grotius wrote, "In the scale of implication the first degree applies to those, who by their authority, or other means have compelled or urged any one to the commission of an offence."\(^{186}\) In the piracy jurisprudence, procurement and advice were likewise strongly condemned. In Justice Story’s words, "In common sense and reason, as well as law, the ruffian, who stands by and directs or encourages the bloody deed, is equally guilty with him, who applies the poniard."\(^{187}\) The April 30, 1790 statute likewise specifically condemned counseling and advising pirates.\(^{188}\) Thus applying aiding and abetting in eighteenth-century legal theory and piracy jurisprudence to *Rio Tinto*'s acts of procurement and encouragement, the company would be easily held liable under the law of nations.

In addition to encouragement, *Rio Tinto* was accused of having provided knowing material support, the second category of aid delineated above. According to the plaintiffs, "*Rio Tinto* assisted the PNG military by supplying helicopters and other vehicles, transporting troops to the island, and providing economic assistance."\(^{189}\) This knowing financial and material support is analogous to the before-the-fact material aid category, which was universally held to be aiding and abetting piracy. The English 1698 and 1721 statutes and the Queen’s proclamation directly addressed this type of aid.\(^{190}\) In piracy terms, *Rio Tinto*'s economic support of the

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182. See John Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) (recognizing slavery, rape as violations of the law of nations that are actionable under the ATS).
184. *Id.*
185. *Id.* at 1126-27.
186. GROTIUS, supra note 62, at 198.
187. United States v. Ross, 27 F. Cas. 899, 900 (C.C.R.I. 1813). See also Piracy Act, 1721, 8 Geo., c. 24 (Eng.) (condemning those who “consult, combine, confederate or correspond with any Pirate”).
188. Act of Apr. 30, 1790, § 10.
190. Piracy Act, 1698, 11 Will. 3, c. 7, § 10 (Eng.); Piracy Act, 1721, 8 Geo., c. 24 (Eng.) (criminalizing provision of munitions and food to pirates); Queen Elizabeth I, Proclamation Against the Maintenaunce of Pirates, supra note 43.
Papua New Guinean forces is analogous to victualling: providing material support that enables the pirate to achieve his task.\textsuperscript{191} Rio Tinto's material aid would be considered triable as aiding and abetting violations of the law of nations.

\textit{Rio Tinto} also fits into the historical framework of aiding and abetting piracy in the concept of "spoils."\textsuperscript{192} Rio Tinto hoped to profit from keeping the copper mine open through coercive tactics. When residents opposed the mine, Rio Tinto threatened to take the land without compensation.\textsuperscript{193} Working with Papua Guinea was cheaper than negotiating with a government that would be more scrupulous about human rights.\textsuperscript{194} The choice of a cheaper working partner in effect enabled Rio Tinto to take a share of the spoils from the crime.

Importantly, Rio Tinto had an enormous economic influence on Papua New Guinea. Offering 19.1 percent of their profits to the Papua New Guinean government, the mine allegedly became "a major source of income for PNG and provided [an] incentive for the PNG government to overlook any environmental damage or other atrocities Rio committed."\textsuperscript{195} In countries such as Papua New Guinea, large corporations "can sustain and benefit from conflict and human rights abuse, engender crippling levels of corruption, contribute to the loss of sovereign control over a nation's wealth and undermine social and economic development."\textsuperscript{196} This relationship triggered the duty that Grotius wrote about in terms of accessorial liability. Under Grotius's idea of duty, Rio Tinto had a position of authority that required it to intervene when harm was imminent: aiders were liable "when any person, whose peculiar office it is, neglects either to forbid the commission of an injury, or to assist the injured party."\textsuperscript{197} This idea of a duty to prevent harm was reflected in other areas of the piracy jurisprudence as well; Justice Story found it dispositive whether the sailor John White knowingly failed to report and thus stop the piracy of the \textit{Plattsburgh}.\textsuperscript{198} To the extent that Rio Tinto was aware of the effects of the blockade, the bombings, violence and rapes, they had a duty to the community as a very powerful economic actor and failed to act. In analogy

\begin{footnotes}

\footnote{191. See Trinity Hall MS. II, Admiralty VI (Nathaniel Lloyd), f. 46v, in HALE AND FLEETWOOD ON ADMIRALT \ Y JURISDICTION, \textit{supra} note 94, at 364-65. ("The ayders of pirates with victualls, armor, or any other thinge to committ piracy or spoile are to be punished as the pirates themselves.").}

\footnote{192. Queen Elizabeth I, Proclamation Against the Maintenaunce of Pirates, \textit{supra} note 43.(holding that aiders who profited from piracy were to be tried as accessories).}

\footnote{193. Id. at 1122 ("A group of Bougainvilleans – the Rorovana –were allegedly told that if they did not accept Rio Tinto's offer of $105 per acre and $2 per coconut tree, their land would be taken without compensation.").}

\footnote{194. Id. at 1124.}

\footnote{195. Id.}


\footnote{197. GROTIIJS, \textit{supra} note 62, at 195.}

\footnote{198. \textit{THE TRIAL OF JOHN WILLIAMS}, \textit{supra} note 157, at 86.}
\end{footnotes}
to aiding and abetting violations of the law of nations, Rio Tinto’s failure to act affirmatively to prevent the human rights abuses could support liability for aiding and abetting.

2. Khulumani

The Khulumani facts fit much less cleanly into the piracy mold than those in Rio Tinto. The plaintiffs allege that the defendant companies committed a wide range of crimes in apartheid era South Africa, from merely doing business in the country to actively sheltering the government’s weapons. The allegations are so diverse that the Second Circuit has granted the plaintiffs leave to revise their complaint. The plaintiffs may split the allegations against the defendants into more closely defined categories of aid. For the purposes of this analysis, this Section contrasts the various types of aid that the defendants are alleged to have committed. Some defendants may fit under categories of material support or comfort of human rights abusers. None of the allegations support a finding of aiding under the category of advice or procurement. Other defendants do not fit neatly into the categories of aiding and abetting established by the piracy jurisprudence.

Khulumani’s material support allegations fall into two categories. Certain defendants are alleged to have supported the apartheid regime by doing business with the government. According to the complaint, South African police “shot demonstrators ‘from cars driven by Daimler-Benz engines,’ the regime tracked the whereabouts of African individuals on IBM computers, the military kept its machines in working order with oil supplied by Shell, and the government received needed capital and favorable terms of repayment of loans from defendant bank . . .” Under some views of accessorial liability for piracy, the companies providing the banking, oil, and computers could be read as accessories to the South African government. For example, in both the Queen’s Proclamation and in the view of “Her Majesty’s learned council in the law,” feeding pirates was considered to be aid. The companies who provided the oil and loans could be found to be analogous to this “victualling;” the oil, loans and computers make the regime and its abuses possible.

However, it is not clear that the companies that simply did business with South Africa, had the requisite scienter for aiding and abetting liability. Her Majesty’s council only found liability where an individual knowingly victuals a pirate. Though Queen Elizabeth I had a stricter

201. In re South African Apartheid Litigation, 346 F. Supp. 2d at 545 (citations omitted).
202. Queen Elizabeth I, Proclamations to Be Published, supra note 96, at 1.
203. See HCA 30/3 n.p. Questions to be resolved and answered by the Judges and her Majestyes learned Councell in the Lawe, in HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION, supra note 103, at 363-64.
204. Id. at 363.
standard, forbidding her subjects to give food to anyone not "notoriously known [as] merchants," 205 each of the theorists and the laws likewise insisted on some form of mens rea before finding that accessorial liability could attach. 206 As Pufendorf wrote, an aider was not "liable to make reparation for a loss (even if he has committed some crime in the course of that act), where he did not play any real part in the action which gave rise to the loss, nor caused it to be done, nor profited from it subsequently." 207 The plaintiffs in Khulumani seem to have provided little evidence that the companies knew the uses to which their goods would be put. 208 As the court said in the trial of the pirate John Williams, "mere presence is not enough." 209 Without meeting this substantial assistance standard or without having adequate scienter, the companies who provided loans, oil and computers — the companies who did business of an ordinary sort with the South African government — could not be held liable for aiding and abetting.

On the other hand, another class of defendants in the Khulumani case is alleged to have collaborated with the South African Defense Force to provide defense in areas of "civil unrest and African uprisings." 210 An amicus brief described corporations as having "worked closely with the military in designing the "total strategy" of the apartheid regime." 211 It alleged that companies provided arms and military equipment. 212 Like the provision of the helicopters in Rio Tinto, this kind of material support would meet the scienter requirement for aiding and abetting violations of the law of nations. While providing defense, it is difficult to mistake the purpose for which these materials were offered. Thus, these companies are more similar to the aiders of pirates who knowingly provided ammunition and arms to pirates, 213 and thus could be held liable as accessors to violations of the law of nations.

Analogous to the category of comfort of and profit from pirates, the plaintiffs argued that the defendants aided and abetted the South African regime because they profited from the environment that apartheid fostered. The plaintiffs claim that, at a minimum, labor costs were extremely low because of South Africa's racial policies during apartheid: 214 "To the apartheid regime the bantustan 215 represented nothing more than a

205. Queen Elizabeth I, Proclamations to Be Published, supra note 96, at 1.
206. See, e.g., Act of Apr. 30, 1790, § 10, 1 Stat. 114; 4 BLACKSTONE, COMMENTARIES *37 (citations omitted); COKE, supra note 74, at 138.
207. PUFENDORF, supra note 67, at 58.
208. In re South African Apartheid Litigation, 346 F. Supp. 2d at 544-45 (citations omitted).
209. THE TRIAL OF JOHN WILLIAMS, supra note 157, at 27.
212. Id.
213. Piracy Act, 1721, 8 Geo., c. 24 (Eng.); Queen Elizabeth I, Proclamations to Be Published, supra note 96, at 1.
215. Residents of the black segregated areas.
'reserve army of unemployed' whose sole purpose was to wait for its call to duty 'for the sake of the white economy.'

Is this profit enough to constitute aiding and abetting?

Courts and legislatures in early modern Europe and early America found profit to be influential in measuring accessorial liability. However, mens rea was again important for finding aiding and abetting, even in cases where the defendants profited from doing business with pirates. In the 1698 English piracy statute, those who received pirate goods were only liable if they knew of the piracy. Similarly, in the 1699 Pennsylvania proclamation, William Penn only sought action against those who "knowingly Harbour[ed]" pirates or their goods.

In the 1821 trial of John White, Justice Story reasoned that the fact that White shared in the spoils would not make him an aider to piracy unless he knew of the crime before hand or provided aid during the mutiny. Unless the Khulumani plaintiffs could prove that the defendant companies knew that they were supporting human rights abuses, the fact that they profited from the cheap labor and exploitative economic environment could not be solely dispositive of whether the companies aided and abetted human rights abuses.

Whereas in Rio Tinto the company had an inherent duty because of its dominant economic relationship with the state, the "arms length" relationship of business between the companies and the apartheid regime likely makes the duty to oppose human rights abuses less strong. The plaintiffs in Rio Tinto presented compelling evidence that the company had influence over the state. This influence raised the presumption of aiding and abetting liability. In contrast, the allegations in Khulumani are much more diffuse. At least ten defendants were charged in this consolidated case alone. None of the alleged defendants had the same sort of overwhelming economic interest that Rio Tinto had in the Papua New Guinean copper mines; each of the defendants provided goods or services in a manner that was not specific to South Africa, but rather part of larger global economic enterprises. They could have sold the same computers, oil or loans elsewhere with the same substance. Thus, the duty that they have in relation to the South African government is reduced. Without proof of more knowledge, procurement or knowing material assistance, the Khulumani defendants who engaged in business of an ordinary sort could not be held liable for aiding and abetting violations of the law of nations.

217. See Piracy Act, 1717, 4 Geo., c. 11 (Eng.); HCA 30/3 n.p. Questions to be resolved and answered by the Judges and her Majestyes learned Councell in the Lawe, in HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION, supra note 94, at 363-64; Case of John Rose Archer and Others, in JAMESON, PRIVATEERING AND PIRACY, supra note 43, at 335.
218. Piracy Act, 1698, 11 Will. 3, c. 7 (Eng.). See also Piracy Act, 1717, 4 Geo., c. 11 (Eng.) (finding liability for aiders who knowingly assist pirates).
219. Penn Proclamation, supra note 133, at 1.
220. THE TRIAL OF JOHN WILLIAMS, supra note 157, at 80.
3. Focusing the Piracy Lens

Viewed through the lens of eighteenth-century aiding and abetting liability for violations, the type of assistance that Rio Tinto provided the PNG government—express material aid, counsel, and assent—would likely be considered to be aiding and abetting under courts at that time. The duty Rio Tinto had as the primary economic actor in the country makes aiding and abetting liability likely to attach in this case, as measured against the eighteenth-century paradigm.

It is less clear that the defendants in Khulumani fit the ideas of aiding and abetting that were expressed in the eighteenth-century jurisprudence surrounding the prosecution of piracy. Though some defendants may meet liability through the analogues to providing material aid to pirates, others may fail to meet the mens rea requirements for aiding and abetting that were required in piracy trials. The defendant companies' participation in the crimes in Khulumani was far less direct; instead of providing helicopters to facilitate a blockade, many of the Khulumani defendants provided goods that were not particularized for the kind of harm that the apartheid regime sponsored. Whereas the Rio Tinto government counseled and instigated the PNG government to blockade and bombard civilians, the plaintiffs in Khulumani provided little evidence of direct instigation of human rights abuses. The element of profit remains relevant, but not dispositive in the determination of corporate liability.

In this way, the lens of the eighteenth-century historical paradigm keeps some corporate offenders within scope of liability while excluding others. Though piracy prosecutions encompassed all areas of aid, from counsel and procurement to material aid to comfort and harboring, the scienter component was essential. For corporate actors to be held liable, they must know, or should know, that they are assisting human rights abuses. The image of the aider of pirates is of the public house keeper sheltering a pirate from capture, the munition-maker providing arms to the pirate, or the crewmember standing by when the captain is murdered and taking shares of the spoils. The corporate equivalent is the company that sees the piracy and stands by, that understands that human rights abuses are happening and advises, enables, or shelters those abusers.

Conclusion

The Courts in both Sosa and Filartiga judged the seriousness of the ATS cases against the benchmark of piracy. This Note confirms unequivocally that aiding and abetting was part of that historical paradigm. The courts were eager to try accessories to pirates and the Crown and lawmakers repeatedly rewrote statutes to accommodate those trials. Whether in admiralty law or common law, in special commissions or District Courts, all of which had influence on the Founders, aiders and abettors were held liable for assisting violators of the law of nations.
Yet the eighteenth-century paradigm does work as the restrictive
gateway that the Sosa court intended. The nuances in the kinds of aid
found triable gives restraint to the ATS’s endeavor. Counsel, material aid,
and comforting criminals after the crime were considered to be triable as
aid. By maintaining the eighteenth-century standards of mens rea, by
insisting on the proper relation of duty, and by ensuring that the
defendants’ crimes match the categories of aid relevant to the law of
nations in that period, the courts can remain vigilant gatekeepers.

The ATS continually meets new faces of corporate human rights abuse
enablers. The piracy lens can help the judges focus on the appropriate
standard for aiding and abetting liability. On a deeper level, as pirates
were considered at the Founders’ time to be the “enemies of all mankind,”
we can see ATS suits as carrying on the universalistic task of opposing
mankind’s enemies. Just as public citizens had to keep a “watchful[] Eye”
for pirates in Pennsylvania in the seventeenth century, so must we keep a
close eye on the pirates of our days: human rights abusers and those who
comfort and enable them.

222. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (“[T]he judicial power should be exercised
on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open
to a narrow class of international norms today.”).

223. See, e.g., Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104

224. Penn Proclamation, supra note 133, at 1.