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Who Is to Blame? (and What Is to Be Done?)

LIABILITY OF SECONDARY ACTORS UNDER FEDERAL SECURITIES LAWS AND THE ALIEN TORT CLAIMS ACT

I. INTRODUCTION

Large-scale wrongs that inflict injuries on millions are rarely the doings of a single person or entity but instead often involve the participation of multiple secondary actors.¹ A cable-box supplier enters into a series of forged deals with a telecommunications company allowing the company to overstate its revenue and thus mislead the investing public about its financial health.² An American automaker sells custom-made military trucks to the government of apartheid-era South Africa, which the government uses to terrorize the country's black majority.³ In both of these cases the underlying wrong—securities fraud and genocide—would be actionable under a federal statute. Section 10(b) of the Securities Exchange Act of 1934 (“Section 10(b)”) prohibits corporations from making fraudulent statements to the investing public,⁴ while the Alien Tort Claims Act (“ATCA”) allows U.S. federal courts to hear civil suits brought by victims of human rights abuses and other international crimes.⁵ But whereas these federal statutes successfully target the underlying illegal conduct itself, they fail to specify which actors can be held accountable for the particular offense. Instead, the task

¹ Secondary actors are parties that did not themselves commit the underlying wrong but, through their conduct, contributed to and ultimately made possible the commission of the wrong. See, e.g., Mark Harden, *U.S. High Court Moves “Secondary Actors” Off Main Stage*, DENVER BUS. J., Jan. 25, 2008, available at <http://www.bizjournals.com/denver/stories/2008/01/28/story14.html> (describing secondary actors in the securities litigation context as “third parties, such as accountants, banks, law firms and suppliers, with business ties to accused companies . . . [who] secretly help[] the companies defraud their investors”); cf. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 459 (3d ed. 2001) (“The ‘primary party’ is the person who personally commits the . . . offense. . . . Any person who is *not* the primary party, but who is associated with him in commission of an offense is a ‘secondary party.’”); Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L.J. 247, 247 (2008) (“Secondary liability is liability that is imposed upon a defendant who did not directly commit the wrongdoing at issue, but whom the law nonetheless holds responsible for the injuries caused.”).

² See generally *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

³ See generally *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

⁴ 15 U.S.C. § 78j (2006).

⁵ 28 U.S.C. § 1350 (2006).

of defining the scope of liability with regard to secondary actors is left to the courts.⁶

In the securities fraud context, the Supreme Court has taken a restrictive position, ruling in its 1994 decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*⁷ that Section 10(b) did not permit a private cause of action for aiding and abetting—a type of secondary actor liability.⁸ That decision, however, did not entirely foreclose liability of secondary actors under Section 10(b) because plaintiffs developed legal theories that allowed them to stretch the limits of primary liability to reach certain non-primary actors.⁹ More recently, the Supreme Court further narrowed Section 10(b) liability for secondary actors holding in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*¹⁰ that a secondary actor was only liable for securities fraud if plaintiffs could show that their damages were a direct result of the secondary actor's conduct itself, rather than the overall fraudulent scheme.¹¹

In contrast, the Supreme Court did not speak on the scope of liability under ATCA until 2004, and even then the Court did not directly address the issue of secondary actor liability.¹² Most lower courts that have faced the issue have assumed that ATCA allows aiding-and-abetting liability.¹³ Thus, in 2007, the Second Circuit Court of Appeals in *Khulumani v. Barclay National Bank Ltd.*¹⁴ reversed the dismissal of ATCA claims brought by victims of the South African apartheid regime against a number of U.S. and foreign corporations, alleging that the corporations aided and abetted the regime's numerous atrocities by supplying industrial, technological, and financial resources to the South African government.¹⁵ But the Appeal Court's split opinion and extensive dicta highlighted the numerous problems with allowing aiding-and-abetting liability under ATCA, such as the absence of a clear standard for aiding and abetting in the context of international law violations, as well as public policy concerns over holding corporations accountable merely for doing business with oppressive regimes.¹⁶ Therefore, in the long run, the future of secondary actor liability under ATCA remains uncertain.

Central Bank and *Stoneridge* on the one hand and *Khulumani* on the other, although addressing two very different areas of law, share a

⁶ See *infra* Part V (discussing the role of federal courts in interpreting the scope of Section 10(b) and ATCA).

⁷ 511 U.S. 164 (1994).

⁸ *Id.* at 191.

⁹ See *infra* text accompanying notes 90-98.

¹⁰ 128 S. Ct. 761 (2008).

¹¹ *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770 (2008).

¹² See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

¹³ See *infra* note 128 and accompanying text.

¹⁴ 504 F.3d 254 (2d Cir. 2007) (per curiam).

¹⁵ *Id.* at 260.

¹⁶ See *infra* Part IV.

common set of questions: When is one entity responsible for the harm caused by another? Does the same law that proscribes a particular type of wrongdoing govern the conduct of all parties that contribute to the wrongdoing? What is the difference between the liability of a primary and a secondary actor? As a result, these cases provide a unique opportunity to examine and compare the limits of liability of secondary actors in the securities fraud and international human rights contexts.

By analyzing the more mature and developed jurisprudence on secondary actor liability under Section 10(b), this Note attempts to derive lessons for, and predict the future of, corporate accountability under ATCA. Part II of the Note introduces the concept of aiding-and-abetting in the general context of secondary actor liability. This Part shows that, despite its deep historical roots, the doctrine of aiding-and-abetting liability, especially in the civil context, lacks clarity and consistency, which often puts it in the center of politically-charged debate about corporate accountability. Part III examines the evolution of secondary actor liability in Section 10(b) claims from *Central Bank* to *Stoneridge* and discusses how the Supreme Court has, over time, limited plaintiffs' ability to sue secondary actors for securities fraud.

Part IV analyzes aiding-and-abetting liability in the context of ATCA claims, and, in particular, takes a close look at the *Khulumani* decision, whose split opinion suggests a trend towards a more restrictive construction of ATCA. Finally, Part V argues that while aiding-and-abetting liability under ATCA was tentatively upheld in *Khulumani*, it will likely be eliminated by the Supreme Court when the issue comes before it. This Part demonstrates that the same reasoning that led the Supreme Court to strike down aiding-and-abetting liability under Section 10(b) in *Central Bank* will control the question of aiding-and-abetting liability under ATCA. However, this restriction of ATCA's scope will not entirely foreclose claims against corporations that contribute to human rights abuses and other international crimes, as, just like in securities fraud suits, plaintiffs will be able to reinvent primary liability to reach secondary actors, and will also develop alternative legal theories for recovery and corporate accountability.

II. AIDING AND ABETTING AS A SUBSET OF SECONDARY ACTOR LIABILITY

The problem of secondary actor liability under the Securities Exchange Act and ATCA, and the subset issue of liability for aiding and abetting, stems to a large extent from the doctrinal confusion surrounding these concepts and their relationship to primary liability. Aiding and abetting is a typical way in which a secondary actor can contribute to the

underlying offense.¹⁷ Whether aiding and abetting gives rise to primary or secondary liability, however, remains doctrinally unsettled and practically controversial.

Aiding and abetting is usually associated with accessorial liability¹⁸ and often serves as a “shorthand term . . . [that] connotes some lesser actor—not the individual who commits the offense—but the individual who offers assistance to the primary actor.”¹⁹ In the securities fraud context, for example, aiding and abetting is used as an antonym to primary liability.²⁰ But the long history of the term suggests a more complicated and fluid relationship between aiding and abetting and primary liability.

A. *Aiding-and-Abetting Liability in the Criminal Context*

In his *History of the English Laws*, William Blackstone distinguished between principal and accessory (or secondary) criminal culpability.²¹ In turn, he divided principal culpability into first and second degrees.²² According to Blackstone, “[a] principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree he is who is present, *aiding and abetting* the fact to be done.”²³ Thus, Blackstone categorized aiding and abetting as part of primary, not secondary liability.

Similarly, a federal statute that codified criminal aiding-and-abetting liability in 1909²⁴ makes anyone who “commits an offense against the United States or *aids, abets, counsels, commands, induces or procures its commission . . . punishable as a principal.*”²⁵ Significantly, the original language of the statute simply stated that one who aids or

¹⁷ Other ways in which a secondary actor may contribute to the offense include participation in a criminal enterprise or conspiracy, instigation, and procurement. See Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT’L L. & POL. 39, 39 (2005-06).

¹⁸ See DRESSLER, *supra* note 1, at 459 (“[A] person may be held accountable for the conduct of another person if he assists the other in committing an offense. Liability of this nature is called ‘accomplice’ or ‘accessory’ liability.”).

¹⁹ Adam Harris Kurland, *To “Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense”: A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 86 (2005).

²⁰ Thus, under *Central Bank*, plaintiffs cannot sue aiders and abettors under Section 10(b) of the Securities Exchange Act because the Act has been interpreted to impose only primary liability. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994); see *infra* Part III.B.

²¹ WILLIAM C. SPRAGUE, BLACKSTONE’S COMMENTARIES ABRIDGED 437 (Callaghan & Co. 9th ed. 1915) (1892).

²² *Id.* (“A man may be *principal* in an offence in two degrees.”).

²³ *Id.* at 437-38 (emphasis added) (explaining that presence, for purposes of defining principal culpability, may be actual physical or constructive).

²⁴ Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1088 (1909) (current version at 18 U.S.C. § 2(a) (2006)).

²⁵ 18 U.S.C. § 2(a) (2006) (emphasis added).

abets a federal crime “is a principal.”²⁶ However, a 1951 amendment changed the formulation to “is punishable as a principal” to “eliminate all doubt that in the cases of offenses whose prohibition is directed at members of specified classes . . . [an aider and abettor] who is not himself a member of that class may nonetheless be punished as a principal.”²⁷

Thus, the doctrine of criminal aiding and abetting, from which civil aiding and abetting originates,²⁸ is not entirely clear on whether aiders and abettors are liable as primary or secondary offenders. From a theoretical point of view, this is due to the fact that aiding and abetting, and secondary actor liability more generally, is premised on the common law concept of concerted action.²⁹ Under this concept, one who participates in concerted conduct on behalf of another or a group is jointly and severally liable for the actions of the entire group and of each individual member.³⁰ In a sense, then, a secondary actor whose conduct falls under the legal standard for concerted action becomes the primary actor.

In practice, this doctrinal confusion leads to a lack of consensus among courts regarding the applicable standard that defines criminal aiding and abetting.³¹ For example, courts disagree on the requisite mens rea element for proving aiding and abetting.³² Some courts, guided by the principle of equal moral blameworthiness underlying the doctrine, consider aiding and abetting a specific intent offense and require that the aider and abettor intend that the primary actor commit the underlying crime.³³ Yet other courts routinely apply the lower knowledge standard, which only requires that the aider and abettor be aware of the underlying

²⁶ § 332, 35 Stat. at 1152 (emphasis added).

²⁷ Kurland, *supra* note 19, at 90.

²⁸ Christine L. Eid, Comment, *Lawyer Liability for Aiding and Abetting Squeeze-Outs*, 34 WM. MITCHELL L. REV. 1177, 1180 (2008); *see also* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994).

²⁹ Eid, *supra* note 28, at 1180.

³⁰ *Id.* at 1180.

³¹ Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer under Federal Law*, 70 FORDHAM L. REV. 1341, 1344, 1351 (2002) (“[T]he current status of the law on the aider and abettor’s mental state is . . . best described today as in a state of chaos”); *see also* Kurland, *supra* note 19, at 85 (“Federal aiding and abetting law, which has been spinning out of control for quite some time, has now spun totally out of control.”).

³² Judge Learned Hand famously formulated the mens rea standard by requiring that an aider and abettor “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

³³ *See, e.g., United States v. Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997) (“To sustain a conviction for aiding and abetting, the evidence must show that the defendant ‘specifically intended to facilitate the commission of [the principal’s] crimes’”) (alteration in original); *United States v. Scotti* 47 F.3d 1237, 1240-41, 1244 (2d Cir. 1995) (holding that a mortgage broker who assisted in an extortionist loan scheme by arranging mortgage refinancing for the victim was liable as an aider and abettor only if he acted with “the specific intent that his act . . . bring about the underlying crime” (quoting *United States v. Aiello*, 864 F.2d 257, 262-63 (2d Cir. 1988))).

offense.³⁴ Likewise, there is no agreement among courts regarding how to treat the actus reus element of criminal aiding and abetting, in particular whether it is necessary to show that the secondary actor's conduct was the but-for cause of the harm.³⁵ In practice, this uneven application of the doctrine often leads to unfair results.³⁶

B. *Aiding-and-Abetting Liability in the Civil Context*

In the civil context, the doctrine of aiding-and-abetting liability suffers from even more uncertainty than in the criminal field. There are several reasons for this. First, in contrast to the criminal context, Congress has not enacted a federal civil aiding-and-abetting statute.³⁷ As a result, federal courts are left entirely to their own devices in defining the standard for civil aiding and abetting.³⁸ Although the *Restatement (Second) of Torts* made an attempt at bringing some uniformity to the field,³⁹ the Restatement's definition of aiding and abetting has not enjoyed wide acceptance among courts.⁴⁰

Second, although civil aiding-and-abetting liability, in the form of concerted action, has a long history,⁴¹ the doctrine is substantially less developed than its criminal counterpart. Remaining relatively obscure for

³⁴ See, e.g., *United States v. Ortega*, 44 F.3d 505, 508 (7th Cir. 1995) ("One who, knowing the criminal nature of another's act, deliberately renders what he knows to be active aid in the carrying out of the act is . . . an aider and abettor even if there is no evidence that he wants the act to succeed . . .") (emphasis added); see also Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000) ("For decades, the American courts and legislatures have debated whether knowledge or 'true purpose' should be the required mens rea for accomplice liability.").

³⁵ Weisberg, *supra* note 34, at 228-30.

³⁶ For example, requiring specific intent for aiding and abetting a "knowledge crime" such as loan sharking, seems anomalous since "[f]or the very same crime, the principal can be guilty when acting with knowledge or general intent, while the aider and abettor would not be guilty unless acting with the more culpable mental state of purposeful intent." Weiss, *supra* note 31, at 1378. On the other hand, since aiders and abettors are "punishable as . . . principal[s]," 18 U.S.C. § 2 (2006), it seems unfair to punish someone who merely knew about, but did not intend the commission of the underlying offense. *Id.* at 1344 (providing examples of factual scenarios that lead to such a result); see also Kurland, *supra* note 19, at 85.

³⁷ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994).

³⁸ Nathan Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 249 (2005) ("There is no clearly defined test for civil aiding and abetting liability because courts apply different tests and often obfuscate their analyses.").

³⁹ Section 876 of the Restatement provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." RESTATEMENT (SECOND) OF TORTS § 876 (1979).

⁴⁰ Combs, *supra* note 38, at 254-58.

⁴¹ Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135, 1138 (2006) (writing that the concept of civil aiding-and-abetting liability in English law goes back at least 400 years and has been cited in American cases since the mid-nineteenth century).

decades,⁴² civil aiding and abetting first gained prominence in the context of securities litigation.⁴³ However, after the Supreme Court in *Central Bank* expressly eliminated a private cause of action for aiding and abetting federal securities fraud, the words “aid” and “abet” became taboo among plaintiffs’ lawyers. Thus, after *Central Bank*, the plaintiffs’ bar was forced to resort to expressions, such as “a scheme to defraud,” to describe conduct that would have previously been characterized as aiding and abetting.⁴⁴ Recently though, the doctrine of aiding and abetting has been increasingly invoked in new contexts, such as professional malpractice, human rights violations, and terrorism.⁴⁵

Finally, civil aiding-and-abetting liability—a tort doctrine—frequently attaches to criminal conduct, which gives rise to additional problems. Although tort and penal law share a common origin and perform overlapping functions,⁴⁶ applying tort standards to criminal acts can be problematic and lead to unfair outcomes. For example, a party charged with civilly aiding and abetting a crime will be defending against a less stringent tort standard and yet may face extremely large monetary penalties and societal condemnation, which normally only attaches to criminal convictions.⁴⁷ As a result, the doctrine of civil aiding and abetting remains on shaky conceptual grounds and uneven in application.⁴⁸

Because of its potential to serve as a wide net against an unlimited number of third parties and its lack of clear standards, enforcement of the doctrine of civil aiding and abetting is often politically charged. Recently, in addition to securities litigation and ATCA suits, the doctrine has been applied in contexts that involve such diverse and controversial subjects as free speech, war on terror, and liability of lawyers for aiding and abetting their clients’ breach of duty. For instance, in *Boim v. Quranic Literacy Institute*,⁴⁹ a circuit court

⁴² Combs, *supra* note 38, at 246; *see also* Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983) (noting that the application of the doctrine was “largely confined to isolated acts of adolescents in rural society”).

⁴³ Combs, *supra* note 38, at 246 n.6, 263.

⁴⁴ Stephen Taub, *Aiding and Abetting Gets More Attention*, COMPLIANCE WEEK, May 22, 2007, available at <http://www.complianceweek.com/article/3359/aiding-and-abetting-gets-more-attention> (describing plaintiffs’ attempts to look “for other ways around” aiding and abetting, including sometimes relabeling the conduct as “scheme to defraud”); *see infra* notes 90-92 and accompanying text.

⁴⁵ Mason, *supra* note 41, at 1135.

⁴⁶ Combs, *supra* note 38, at 250 (“Conceptually speaking, both criminal and tort law are concerned with identifying and sanctioning wrongful conduct . . .”).

⁴⁷ *See* Mason, *supra* note 41, at 1146-63 (discussing the legal standards applied when imposing civil aiding-and-abetting liability for criminal offenses).

⁴⁸ Combs, *supra* note 38, at 248-49 (While “the theory of civil liability for aiding and abetting is claiming a position of new importance in the law of torts . . . , [it] remains underdeveloped.”).

⁴⁹ 291 F.3d 1000, 1021 (7th Cir. 2002), *vacated and reh’g granted en banc*, *Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707 (7th Cir. 2007); *see also infra* notes 229-234 and accompanying text (discussing the rehearing decision).

upheld a tort action filed by the parents of an American teenager killed by the Palestinian militant group Hamas against several Muslim non-profit organizations, alleging that the organizations aided and abetted an act of terrorism by donating money to Hamas.⁵⁰ In *Rice v. Paladin Enterprises, Inc.*,⁵¹ another circuit court upheld an aiding-and-abetting action brought by the family of a murder victim against the author of “Hit Man,” an instructional manual for contract killers.⁵²

These examples show that the doctrine of aiding-and-abetting liability has evolved from its humble beginnings, as simply a type of accomplice liability, into a separate and elaborate cause of action implicating issues of social policy. Yet in spite of the attention it gets, the doctrine lacks clarity and consistency. The next Part further illustrates the doctrine’s ambiguity and controversial policy implications by showing how the Supreme Court has restricted its application in the context of Section 10(b) litigation, and how plaintiffs have responded by reinventing secondary actor liability as a form of primary liability.

III. SECONDARY ACTOR LIABILITY UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT: FROM *CENTRAL BANK* TO *STONERIDGE*

The last two decades have seen the doctrine of secondary actor liability in the securities fraud context evolve from the relatively permissive regime that allowed aiding-and-abetting liability for secondary actors to a more restrictive one that required private Section 10(b) plaintiffs to plead all elements of a primary offense even against secondary defendants. A brief overview of the Section 10(b) jurisprudence helps better understand this evolution.

A. Overview of Section 10(b) Claims

Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934 to address abuses in the securities markets, exposed by the 1929 Wall Street stock crash and the ensuing Great

⁵⁰ For an analysis of political issues affecting cases like *Boim*, see John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 529-30 (2008) (“Although lawsuits against private sponsors of international terrorism appear to be a straightforward pursuit of justice, these cases have quickly evolved into a Byzantine game of complicated legal and political maneuvering—not only among some of the nation’s preeminent law firms, but also between Congress, the judiciary, and the executive branch.”) (footnote omitted).

⁵¹ 128 F.3d 233, 249-50 (4th Cir. 1997).

⁵² See Andrianna D. Kastanek, Comment, *From Hit Man to a Military Takeover of New York City: The Evolving Effects of Rice v. Paladin Enterprises on Internet Censorship*, 99 NW. U.L. REV. 383, 383 (2004) (analyzing the decision’s negative effects on freedom of speech on the Internet).

Depression.⁵³ The 1933 Act regulates initial public offerings of securities and the 1934 Act concerns secondary market trading.⁵⁴ The Acts contain several express rights of action.⁵⁵ In addition, courts have found implied rights of action in the terms of sections 10(b) and 14(a) of the 1934 Act.⁵⁶

Section 10(b) of the 1934 Act provides that:

It shall be unlawful for any person, directly or indirectly, [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.⁵⁷

The Act also authorizes the Securities and Exchange Commission (SEC) to adopt rules implementing the provisions of Section 10(b).⁵⁸ Under this mandate, the SEC promulgated Rule 10b-5, which makes it unlawful for any person, “in connection with the purchase or sale of any security” to:

(a) . . . employ any device, scheme, or artifice to defraud, (b) . . . make any untrue statement [or omission] of a material fact . . . or (c) . . . engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.⁵⁹

Together, Section 10(b) and Rule 10b-5 have given rise to two basic theories of liability for securities fraud. Under one theory, based on the language in subsection (b) of Rule 10b-5 and often referred to as the “misstatement” theory, shareholders can sue a person or entity that has made a material misstatement (or, in some circumstances, an omission) to the investing public. Typical defendants under this theory include corporate officers and directors, who sign false or misleading financial reports filed with the SEC or make untrue statements to the press, the corporation itself, which is vicariously liable for the conduct of its officers and directors, and the accounting firms that issue audit opinions falsely certifying the accuracy of the company’s statements.⁶⁰

Under the second theory, grounded in Rule 10b-5’s subsections (a) and (c) and known as the “scheme to defraud” theory, a plaintiff can

⁵³ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994).

⁵⁴ See Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77bbbb (2006)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78nn (2006)).

⁵⁵ See, e.g., 15 U.S.C. § 77k (imposing liability on filers of false registration statements).

⁵⁶ *Cent. Bank of Denver*, 511 U.S. at 171.

⁵⁷ 15 U.S.C. § 78j.

⁵⁸ *Id.*

⁵⁹ 17 C.F.R. § 240.10b-5 (2008). Rule 10b-5, however, only reaches conduct already proscribed by Section 10(b). *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768 (2008).

⁶⁰ Andrew M. Edison, *Stoneridge v. Scientific-Atlanta: “Scheme Liability” in the High Court*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash., D.C.), Oct. 5, 2007, at 2, available at <http://www.wlf.org/upload/10-05-07edison.pdf> (describing a typical Section 10(b) claim against a primary actor).

pursue a cause of action against a defendant who engages in any deceptive conduct, including a manipulative act or a fraudulent scheme.⁶¹ This type of claim is frequently asserted against secondary actors, such as the corporation's business partners, underwriters, and outside auditors who, although they do not make public statements to the market in connection with the corporation's securities, enter into fraudulent arrangements with the corporation as part of the overall deceptive scheme.⁶²

In addition to proving the actus reus element of the fraud, which can be either in the form of a misstatement or a deceptive act as part of a scheme to defraud, the plaintiff must prove that the defendant acted with scienter,⁶³ and that the plaintiff's loss had a proximate relation to the substantive conduct or statement. This relation, in turn, must be proven by showing that (1) the plaintiff relied on the fraudulent statement or deceptive conduct in purchasing the corporation's shares, and (2) the statement or conduct directly caused the plaintiff's economic loss.

In sum, whether the plaintiff is predicating her claim on the "misstatement," or on the "scheme to defraud" theory, the plaintiff must prove (1) the actus reus, (2) scienter, (3) reliance, and (4) causation. A plaintiff who adequately pleads all of the above elements⁶⁴ will state a claim for primary liability under Section 10(b), whether the defendant is a primary or a secondary actor.⁶⁵

B. Central Bank and the Rejection of Aiding-and-Abetting Liability Under Section 10(b)

Plaintiffs rarely invoked the "scheme to defraud" theory in their suits until 1994.⁶⁶ Prior to 1994, it was not necessary to plead every element of Section 10(b) as to each defendant in order to reach a

⁶¹ *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 328-29 (S.D.N.Y. 2004).

⁶² *See, e.g., Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007); *In re Global Crossing*, 322 F. Supp. 2d at 324-25.

⁶³ Scienter, in the securities fraud context, refers to a state of mind "embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). It has also been interpreted to encompass extreme recklessness. Kurtis A. Kemper, Annotation, *What Constitutes Recklessness Sufficient to Show Necessary Element of Scienter in Civil Action for Damages Under § 10(b) of Securities Exchange Act of 1934 (15 U.S.C.A. § 78j(b)) and Rule 10b-5 of the Securities and Exchange Commission*, 49 A.L.R. Fed. 392 (2009).

⁶⁴ Allegations sounding in fraud must be pled with particularity. FED. R. CIV. P. 9(b). Because a securities fraud case that meets the heightened pleading standard will most likely settle before trial, most cases focus on the plaintiff's burden of stating a viable claim, rather than proving the allegations.

⁶⁵ *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773-74, 764 (2008) ("[T]he implied right of action in § 10(b) continues to cover secondary actors who commit primary violations" but "the conduct of a secondary actor must . . . satisfy each of the elements or preconditions for § 10(b) liability" to assert a primary violation.)

⁶⁶ Matthew L. Mustokoff, "Scheme" Liability for Financial Institutions Under Rule 10-5, INSIGHTS: THE CORPORATE & SECURITIES LAW ADVISOR, Nov. 2005, [http://www.weil.com/wgm/cwgmhomep.nsf/Files/MustokoffArticle1/\\$file/MustokoffArticle1.pdf](http://www.weil.com/wgm/cwgmhomep.nsf/Files/MustokoffArticle1/$file/MustokoffArticle1.pdf).

secondary actor. Instead, plaintiffs followed the “path of least resistance” by alleging that a primary actor, e.g., the corporation, made a material misstatement or omission to the public regarding the corporation’s financial health, and a secondary actor, e.g., the corporation’s underwriter, aided and abetted the making of that misstatement or omission.⁶⁷ Thus, as to the secondary actor, plaintiffs did not have to plead scienter, reliance, and causation. Rather, it was enough to satisfy the applicable aiding-and-abetting standard, such as substantial assistance with knowledge of the fraud.

This situation changed in 1994 when the Supreme Court handed down its decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*⁶⁸ The decision, which surprised many in the legal community,⁶⁹ held that the implied cause of action under Section 10(b) did not reach aiders and abettors.⁷⁰

In *Central Bank*, the plaintiff bought \$2.1 million worth of bonds issued by a Colorado Springs public authority.⁷¹ The bonds were secured by landowner assessment liens on property owned by the authority and tied to the property’s value. Defendant Central Bank acted as indenture trustee for the bond issue.⁷² During the closing of the bond sale, Central Bank learned that due to declines in land values in Colorado Springs, the assessment lien valuation completed earlier that year may have no longer reflected the current value of the land.⁷³ Despite this knowledge, Central Bank failed to order a new valuation, and the authority went ahead with the bond sale.⁷⁴ Within months of the closing, the authority defaulted on the bonds.⁷⁵ Plaintiff brought a Section 10(b) suit naming the authority as a primary defendant and Central Bank as a secondary defendant.⁷⁶ Plaintiff alleged that Central Bank aided and abetted the wrongful bond sale by recklessly failing to order a new valuation of the lien, when it had reason to believe that the old valuation was inadequate.⁷⁷

The Supreme Court disagreed, affirming summary judgment for Central Bank on the grounds that private civil liability under Section 10(b) did not extend to those who merely aided or abetted a practice

⁶⁷ *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 497 (S.D.N.Y. 2005).

⁶⁸ 511 U.S. 164 (1994).

⁶⁹ See, e.g., Linda Greenhouse, *High Court Ruling Sharply Curbs Suits on Securities Fraud*, N.Y. TIMES, Apr. 20, 1994, at D8 (reporting that “[t]he Supreme Court, sweeping aside years of lower court precedents as well as a longstanding policy of the Securities and Exchange Commission, . . . sharply limited lawsuits that charge accountants and other outside professionals with taking part indirectly in a securities fraud”).

⁷⁰ *Cent. Bank of Denver*, 511 U.S. at 191.

⁷¹ *Id.* at 167-68.

⁷² *Id.* at 167.

⁷³ *Id.* at 167-68.

⁷⁴ *Id.*

⁷⁵ *Id.* at 168.

⁷⁶ *Id.*

⁷⁷ *Id.*

prohibited by the statute.⁷⁸ The Court determined that “when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”⁷⁹ Instead, the text of the statute determined the scope of liability, and the absence of any reference to aiding and abetting in Section 10(b) was controlling.⁸⁰ The Court contrasted Congress’s silence regarding aiding and abetting in the Securities Exchange Act to its express provision for such remedy in other contexts.⁸¹

Further, the Court stated that even if it were to look beyond the statutory language, it would find that Congress in 1934 did not intend for Section 10(b) to reach aiders and abettors.⁸² First, the Court reasoned that since none of the Act’s express causes of action mentioned aiding-and-abetting liability, Congress likely did not intend to provide for such liability in Section 10(b)’s implied cause of action either.⁸³ Second, the Court rejected the plaintiff’s proposition that aiding-and-abetting liability was implied in every statutorily created private right of action because the doctrine “was ‘well established in both civil and criminal actions by 1934’” and Congress “legislated with an understanding of general principles of tort law.”⁸⁴ The Court disagreed with the plaintiffs’ reasoning, instead finding that the doctrine of civil aiding and abetting was “at best uncertain in application” and not very well developed.⁸⁵ Moreover, the fact that Congress never enacted a “general civil aiding and abetting statute” also weighed against accepting the broad presumption in favor of implying aiding-and-abetting liability in every action.⁸⁶

Finally, the Court found that there were policy considerations for restricting the scope of Section 10(b) to primary violations.⁸⁷ These included the uncertainty of the standard regarding aiding-and-abetting liability, the highly fact-sensitive nature of any inquiry into such liability, and the resultant potential for excessive litigation.⁸⁸ Although conceding

⁷⁸ *Id.* at 191-92.

⁷⁹ *Id.* at 182.

⁸⁰ *Id.* at 173.

⁸¹ *Id.* at 176 (“Congress knew how to impose aiding and abetting liability when it chose to do so.” (citing 18 U.S.C. § 2 and 7 U.S.C. § 192(g) as examples of statutes that expressly provided for aiding and abetting)).

⁸² *Id.* at 178.

⁸³ *Id.* at 179.

⁸⁴ *Id.* at 181 (quoting Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Respondents at 10, *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994)).

⁸⁵ *Id.* at 181-82 (noting that, until the proliferation of securities suits, aiding and abetting was “‘largely confined to isolated acts of adolescents in rural society’” (quoting Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983))).

⁸⁶ *Id.* at 182.

⁸⁷ *See id.* at 188-90.

⁸⁸ *Id.* at 188-89.

that “competing policy arguments in favor of aiding-and-abetting liability can also be advanced,” the Court found that these arguments were not sufficient to override the text of the statute.⁸⁹

C. *Testing the Limits of Primary Liability for Secondary Actors After Central Bank*

While expressly striking down aiding-and-abetting liability as a cause of action under Section 10(b), the Supreme Court in *Central Bank*, nevertheless stated that “[t]he absence of § 10(b) aiding-and-abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts.”⁹⁰ Secondary actors could still be liable as primary violators in securities fraud, as long as the plaintiff adequately pleaded all elements of a Section 10(b) claim as to the secondary actor.⁹¹ Thus, although plaintiffs could no longer follow the “path of least resistance” by invoking aiding and abetting, they could still reach secondary actors by alleging that a secondary actor (1) engaged in some type of deceptive conduct, which was part of the primary actor’s overall scheme to defraud the investing public; (2) the secondary actor acted with scienter; (3) the plaintiff bought shares in reliance on the fraudulent information; and (4) the plaintiff suffered an economic loss as a direct result of this reliance.⁹²

Acknowledging the difficulty of proving individual reliance by each plaintiff on a false public statement, the Supreme Court had in prior opinions adopted two presumptions of reliance. First, under the duty-to-disclose presumption, stemming from the Supreme Court’s decision in *Affiliated Ute Citizens of Utah v. United States*,⁹³ where a defendant owes a plaintiff a duty of full disclosure but omits material information, plaintiff’s reliance on the wrongful omission is presumed.⁹⁴ Second, under the fraud-on-the-market presumption, first articulated in *Basic Inc. v. Levinson*,⁹⁵ a plaintiff is presumed to rely on information disseminated in an efficient securities market.⁹⁶

In the years following *Central Bank*, plaintiffs were able to invoke one of these presumptions to satisfy the reliance requirement as to

⁸⁹ *Id.* at 189-90.

⁹⁰ *Id.* at 191.

⁹¹ *Id.*

⁹² See *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1047 (9th Cir. 2006) (discussing the elements of Section 10(b) liability), *judgment vacated*, 128 S. Ct. 1119 (2008), *opinion vacated*, 519 F.3d 1041 (9th Cir. 2008).

⁹³ 406 U.S. 128 (1972).

⁹⁴ *Id.* at 152-53.

⁹⁵ 485 U.S. 224 (1988).

⁹⁶ *Id.* at 241-47. This presumption is based on the premise that in mature securities markets, like the public exchanges in the U.S., the price of a security “reflects all publicly available information, and, hence, any material misrepresentations.” *Id.* at 246. “Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.” *Id.* at 241-42 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160 (3d Cir. 1986)).

both primary and secondary defendants. The reasoning was that plaintiffs' reliance on the primary actor's false statements could be imputed to the secondary actors because the secondary actors' conduct was part of the same fraudulent scheme that created the false statements in the first place.⁹⁷ Thus, to plead secondary actor liability, all plaintiffs had to do was show that they had constructively relied on the primary defendant's misstatements, suffering an economic loss as a result, and that the secondary defendant, through its misconduct, had helped bring about the misstatements.⁹⁸

D. Further Tightening of the Standard Under *Stoneridge*

In 2008, the Supreme Court's decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*⁹⁹ once again altered the landscape of secondary actor liability in securities fraud litigation. This time, the Court turned its attention to the issue of proving reliance and causation with regard to secondary actors. In *Stoneridge*, the plaintiffs alleged that Charter, a telecommunications company, engaged in a variety of fraudulent accounting practices to artificially inflate its stock price.¹⁰⁰ One such practice, known as round-tripping, consisted of improperly recording revenue from certain barter transactions with third-party suppliers.¹⁰¹ Scientific-Atlanta and Motorola provided Charter with digital cable converter (set-top) boxes.¹⁰² Charter agreed to overpay the suppliers \$20 for each set-top box with the understanding that they would pay Charter back by purchasing unnecessary advertising from it.¹⁰³ This arrangement enabled Charter to inflate its revenue and operating cash flow by approximately \$17 million.¹⁰⁴ To conceal the fraud from its auditors, Charter convinced the suppliers to prepare forged

⁹⁷ See *Simpson*, 452 F.3d at 1051 ("The requirement of reliance is satisfied [as to the secondary actor] if the introduction of misleading statements into the securities market was the intended end result of a scheme to misrepresent revenue.") (dismissing plaintiffs' claim against the secondary defendant on other grounds); see also Joanna B. Apolinsky, *Is There Any Viability to Scheme Liability for Secondary Actors After Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.?* (2008) (unpublished paper at 12), available at http://works.bepress.com/joanna_apolinsky/1 ("[A]lthough reliance [was] still a required element in the plaintiff's case, the proof requirement thereof [was] significantly relaxed in these contexts.").

⁹⁸ Of course, plaintiffs still had to show that the secondary defendant acted with scienter. Since secondary actors were now only liable for primary violations, they had to have acted with the same state of mind as the primary actors to be held accountable under Section 10(b). Pleading scienter, therefore, became the biggest hurdle for plaintiffs in stating a claim against secondary actors. The scienter requirement also served as a safeguard against meritless suits or overexpansion of the universe of potential defendants. See, e.g., *Simpson*, 452 F.3d at 1049 (explaining that focusing on the inquiry into "the deceptive nature of the [secondary] defendant's own conduct ensure[d] that only primary violators . . . [were] held liable under the Act").

⁹⁹ 128 S. Ct. 761 (2008).

¹⁰⁰ *Id.* at 766.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 767.

documentation for the transactions, including letters to Charter falsely justifying the \$20 increase in set-top box price by rising production costs.¹⁰⁵ The suppliers also backdated the advertisement agreements to make it appear as though the barter transactions were independent of each other.¹⁰⁶

When the truth about Charter's accounting fraud emerged and Charter's stock price plummeted, investors brought a Section 10(b) suit against both Charter and the suppliers.¹⁰⁷ The plaintiffs alleged that Charter made false and misleading statements to the public through its SEC filings, which contained the inflated earnings numbers.¹⁰⁸ As for the suppliers, the plaintiffs averred that they engaged in fraudulent transactions with Charter, while knowingly or recklessly disregarding "Charter's intention to use the transactions to inflate its revenues and [knowing] the resulting financial statements issued by Charter would be relied upon by . . . investors."¹⁰⁹

The Supreme Court affirmed the dismissal of the complaint against the suppliers for failure to state a claim, holding that Section 10(b) does not provide for a private cause of action against a party who participated in another's fraudulent scheme, but on whose conduct investors did not rely.¹¹⁰ Citing its decision in *Central Bank*, the Court reiterated the premise that only primary violations of Section 10(b) are subject to private suits and a plaintiff seeking to recover against a secondary actor in a securities fraud action must prove every element of the primary violation, including reliance.¹¹¹ According to the Court, "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action" and a "predicate for liability" because it provides the "requisite causal connection between a defendant's [acts] and a plaintiff's injury."¹¹² Since the suppliers in this case neither made a public statement, nor violated a duty to disclose to the Charter investors, the Court reasoned that plaintiffs could not have relied on the suppliers' actions in making their investment decisions.¹¹³ In other words, the suppliers' fraudulent conduct could not be said to have caused the investors' injury.

Significantly, the Court expressly rejected the proposition that a secondary actor's participation in the overall fraudulent scheme provided the necessary causal link between the actor's conduct and the investors'

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 766.

¹⁰⁸ *Id.* at 767.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 767-69.

¹¹¹ *Id.* at 768.

¹¹² *Id.* at 769 (quoting *Basic v. Levinson*, 485 U.S. 224, 243 (1988)).

¹¹³ *Id.*

injury.¹¹⁴ According to the plaintiffs, the suppliers' intentional or reckless participation in Charter's fraudulent scheme warranted a presumption of reliance because Charter's public financial statements were "a natural and expected consequence" of the suppliers' deceptive conduct.¹¹⁵ The Court read the plaintiffs' argument as proposing a general rule that "in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect."¹¹⁶

The majority declined to adopt this rule and instead embarked on an inquiry as to "whether [the suppliers'] acts were immediate or remote to the injury."¹¹⁷ The Court concluded that the suppliers' acts of deception were "too remote to satisfy the requirement of reliance" because it was Charter who reported fraudulent earnings in its financial statements, and "nothing [the suppliers] did made it necessary or inevitable for Charter to record the transactions as it did."¹¹⁸ This part of the majority's opinion led the dissent to criticize the Court for having in effect adopted a new "super-causation" requirement for proving reliance,¹¹⁹ and for failing, at the least, to remand the case to the lower court to determine whether the plaintiffs alleged enough facts to plead reliance.¹²⁰ In the dissent's view, the majority "ha[d] it backwards" when it interpreted the *Basic* fraud-on-the-market presumption to control the kind of conduct that can "cause" investor loss.¹²¹ According to the dissent, the purpose of the *Basic* presumption was to help plaintiffs who cannot show individual reliance on the fraudulent information.¹²² The presumption did not dictate what kind of conduct by the defendant could cause the plaintiff injury.¹²³ Thus, following the dissent's logic, it would be enough for investors to prove reliance by (1) demonstrating that a secondary defendant's conduct had proximately caused false information to reach the market, and (2) invoking the fraud-on-the-market presumption to show that the false information was the basis for the plaintiffs' investment decision.

The majority also refused to expand the scope of liability under Section 10(b) to reach any secondary actors who committed a deceptive act in the process of facilitating the primary defendant's fraudulent

¹¹⁴ *Id.* at 770.

¹¹⁵ *Id.* The Court summarized plaintiffs' logic as follows: "[H]ad respondents not assisted Charter, Charter's auditor would not have been fooled, and the financial statement[s] would have been a more accurate reflection of Charter's financial condition." *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 774 (Stevens, J., dissenting).

¹²⁰ *Id.* at 775-76.

¹²¹ *Id.* at 776.

¹²² *Id.*

¹²³ *Id.*

scheme.¹²⁴ While recognizing that the suppliers' conduct may be culpable under state common law fraud rules, the Court reiterated that Section 10(b) "does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way."¹²⁵ Such an expansion, in the Court's opinion, would effectively revive aiding-and-abetting liability under Section 10(b), something it decisively struck down in *Central Bank*.¹²⁶ In addition, the practical implication of such an expansion would be to "rais[e] the costs of doing business" in the U.S. because every market participant, whether it trades public securities or not, could become subject to frivolous and extortionary law suits.¹²⁷

Stoneridge, thus, completed the process of narrowing the scope of secondary actor liability under Section 10(b) of the Securities Exchange Act, begun by *Central Bank*. Until 1994, shareholders could sue their issuers for fraudulently failing to disclose truthful information about the issuer's financial health, and could simultaneously assert Section 10(b) claims against third parties that assisted, or aided and abetted, the failure. After *Central Bank*, plaintiffs could no longer plead aiding-and-abetting liability under Section 10(b), but they could still successfully sue certain secondary actors for conduct that contributed to the overall deception of the shareholders. *Stoneridge* further limited the scope of secondary actor liability by requiring plaintiffs to show a direct connection between the secondary actor's wrongful conduct and the deception, so that plaintiffs can be said to have relied on the secondary actor's conduct in making their investment decisions. The following Part shows how the recent South African apartheid litigation foreshadows a similar trend towards the narrowing of the secondary actor liability in the context of ATCA claims.

IV. *KHULUMANI V. BARCLAY* AND AIDING-AND-ABETTING LIABILITY UNDER ATCA

In contrast to the securities context, the Supreme Court has not addressed the issue of aiding-and-abetting liability under ATCA. To date, most lower courts to consider the issue have assumed that ATCA reaches aiders and abettors,¹²⁸ much like how courts had assumed the existence of aiding-and-abetting liability under Section 10(b) prior to *Central Bank*. However, the recent dismissal by a district court of an aiding-and-abetting claim in a complaint filed by victims of the South

¹²⁴ *Id.* at 770-71 (majority opinion).

¹²⁵ *Id.* at 771.

¹²⁶ *Id.*

¹²⁷ *Id.* at 772.

¹²⁸ BETH STEPHENS ET AL, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 268-70 (2d ed. 2008); *see, e.g.*, *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202-03 (9th Cir. 2007); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004).

African apartheid¹²⁹ suggested a new trend. Moreover, the Second Circuit's split decision in *Khulumani v. Barclay National Bank Ltd.*, although reinstating the complaint, demonstrates that the days of aiding-and-abetting liability under ATCA may be numbered.

A. *History and Overview of ATCA*

ATCA provides in full that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹³⁰ Adopted by the First Congress in 1789, the Act was rarely invoked until the 1980s when it gained prominence as a means for victims of international human rights abuses to claim redress in U.S. courts.¹³¹ In *Filartiga v. Pena-Irala*,¹³² the first modern-era decision to uphold an action under ATCA, the Second Circuit held that a district court could exercise jurisdiction over a wrongful death claim brought by a citizen of Paraguay against a Paraguayan police officer who tortured and killed the plaintiff's teenage son.¹³³ After examining several sources of international law, the court concluded that government-sponsored torture constituted a violation of “the law of nations” within the meaning of ATCA, thus setting the precedent for later suits brought under the Act.¹³⁴ Importantly, the court interpreted the term “law of nations” to include not just international law norms that existed in 1789, but also modern international law.¹³⁵

Over the next two decades, however, courts struggled to resolve “complex and controversial questions regarding the meaning and scope of ATCA.”¹³⁶ The Supreme Court addressed some of these issues in 2004 in *Sosa v. Alvarez-Machain*.¹³⁷ In *Sosa*, the plaintiff was a Mexican citizen who was abducted and forcibly brought to the U.S. to stand trial in a criminal case.¹³⁸ The abduction was carried out by a group of Mexican operatives acting on orders of the U.S. Drug Enforcement Administration.¹³⁹ The plaintiff subsequently sued one of the Mexican

¹²⁹ See *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 549-50 (S.D.N.Y. 2004), *aff'd in part, vacated in part and remanded by* *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

¹³⁰ 28 U.S.C. § 1350 (2006).

¹³¹ Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 211 (2008).

¹³² 630 F.2d 876 (1980).

¹³³ *Id.* at 878.

¹³⁴ *Id.* at 884.

¹³⁵ See Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 806 (2005).

¹³⁶ *Flores v. So. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003).

¹³⁷ 542 U.S. 692 (2004).

¹³⁸ *Id.* at 697-98.

¹³⁹ *Id.*

operatives under ATCA, alleging arbitrary arrest and forced detention in violation of international law.¹⁴⁰ Although recognizing that ATCA authorized district courts to hear tort claims arising from certain violations of contemporary international law,¹⁴¹ the Supreme Court nevertheless dismissed the plaintiff's complaint finding that it fell outside ATCA's scope.¹⁴² In an effort to delineate the scope, the Court held that "the law of nations" in the modern sense is comprised only of international norms that are "accepted by the civilized world and defined with a specificity" comparable to the acceptance and specificity that defined "the historical paradigms familiar when [ATCA] was enacted."¹⁴³ Applying this stringent standard to the plaintiff's claim, the *Sosa* Court concluded that the claim was not actionable under ATCA because a one-time illegal detention for a single day did not violate any norm that rose to the status of the law of nations.¹⁴⁴

B. Khulumani v. Barclay

1. Factual and Procedural Background

The Second Circuit's decision in *Khulumani v. Barclay National Bank Ltd.* arose from a series of actions consolidated at the district court level as *In re South African Apartheid Litigation*.¹⁴⁵ The actions were filed by several groups of plaintiffs on behalf of millions of victims of the apartheid regime, a system that existed in South Africa between 1948 and at least 1991, whereby the country's white minority dominated, oppressed, and exploited the majority black population.¹⁴⁶ Under the system, the South African government restricted blacks to certain areas of the country, where they remained "in a state of near-enslavement."¹⁴⁷ To keep the black population in obedience, the government authorities frequently cracked down on popular uprisings and used terror tactics,

¹⁴⁰ *Id.* at 698-99.

¹⁴¹ *Id.* at 720, 724.

¹⁴² *Id.* at 725.

¹⁴³ *Id.* at 724-25, 732 (offering as examples of such paradigms familiar in the late 18th century: "violation[s] of safe conducts, infringement of the rights of ambassadors, and piracy"). In elaborating the standard, the Court repeatedly emphasized ATCA's limited reach. *Id.* at 720 ("Congress intended [ATCA] to furnish jurisdiction for a relatively modest set of actions . . ."). "[ATCA] was meant to underwrite litigation of a narrow set of common law actions . . ." *Id.* at 721. "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *Id.* at 732 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)) (internal quotation marks omitted).

¹⁴⁴ *Id.* at 738.

¹⁴⁵ *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *aff'd in part, vacated in part and remanded by* *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

¹⁴⁶ *See id.* at 543 & n.7.

¹⁴⁷ *Id.* at 543-44.

including summary executions and imprisonment, violence against children, sexual abuse, and torture.¹⁴⁸

The suits named as defendants approximately fifty U.S. and foreign corporations.¹⁴⁹ The plaintiffs alleged, *inter alia*, that the corporations, all of whom did business in South Africa during the apartheid years, aided and abetted the regime's atrocities by supplying resources, such as oil, technology and capital, to the South African government, which used the resources in part "to further its policies of oppression and persecution of the African majority."¹⁵⁰

The District Court dismissed the plaintiffs' claim finding that, even assuming the South African government's alleged conduct constituted a violation of the law of nations within the meaning of ATCA, aiding and abetting such conduct is not actionable under ATCA. The Court reached this conclusion by determining that aiding and abetting is not itself a violation of a sufficiently definite and universally accepted norm of international customary law and thus did not fit *Sosa's* definition of the law of nations.¹⁵¹ In particular, the District Court refused to recognize as customary international law the rulings by the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively), and the Apartheid Convention, all of which recognized aiding-and-abetting liability for crimes against humanity.¹⁵² The District Court reasoned that, in contrast to the instant apartheid suits, the ICTY and ICTR dealt with criminal rather than civil matters.¹⁵³ As for the Apartheid Convention, it was not a universally accepted source of international law because it was not ratified by several major world powers, including the United States.¹⁵⁴

The District Court further declined to find that ATCA itself recognized aiding-and-abetting liability, reasoning that under the Supreme Court's decision in *Central Bank*, a civil statute should not be interpreted to authorize a cause of action against aiders and abettors unless Congress expressly provided for such liability.¹⁵⁵ The District Court found the rule of *Central Bank* and the policies behind it particularly relevant to the present case because ATCA, like Section

¹⁴⁸ *Id.* at 544.

¹⁴⁹ *Id.* at 542-43. The list of defendants included such household names as Barclays, Bristol-Myers, Citigroup, Coca-Cola, DaimlerChrysler, Ford, General Electric, General Motors, IBM, Nestle, Shell Oil, Xerox, and others. *Id.*

¹⁵⁰ *Id.* at 544-45. Specific examples of defendants' products which the government used to commit its atrocities included cars outfitted with Daimler-Benz engines used in police raids, IBM computers used to monitor the black population, and electrical fences, watchtowers and armed personnel used to protect industrial facilities against civil unrest. *Id.* at 545.

¹⁵¹ *Id.* at 543, 549.

¹⁵² *Id.* at 550.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (citing *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-82 (1994)).

10(b) of the Securities Exchange Act, governs an area that is “ripe for non-meritorious and blunderbuss suits.” Additionally, it is the “Court’s duty to engage in ‘vigilant doorkeeping,’” by not allowing “innovative interpretations” of ATCA.¹⁵⁶ Having found that there is no private cause of action for aiding and abetting under the ATCA, the District Court dismissed the plaintiffs’ claims for lack of jurisdiction.¹⁵⁷

2. The Second Circuit’s Split Decision

Plaintiffs in *In re South African Apartheid Litigation* appealed the District Court’s dismissal of their complaints. On appeal, in *Khulumani v. Barclay National Bank Ltd.*,¹⁵⁸ the Second Circuit vacated the dismissal to the extent it related to the plaintiffs’ aiding-and-abetting claims.¹⁵⁹ In a 2-to-1 decision, the majority—Judges Hall and Katzmann—held that the District Court erred in concluding that ATCA did not provide for federal jurisdiction over claims alleging aiding and abetting violations of customary international law.¹⁶⁰

Significantly, though, while agreeing that ATCA permitted aiding and abetting claims, the majority disagreed over the standard for stating such claims. Judge Hall concluded that the standard should be found in domestic federal common law.¹⁶¹ Contrarily, Judge Katzmann opined that the standard was governed by international customary law.¹⁶² The third member of the panel, U.S. District Court Judge Korman, sitting by designation, dissented in the judgment, citing among many other grounds for dismissing the case his position that ATCA did not provide for aiding-and-abetting liability.¹⁶³ However, he concurred in part with Judge Katzmann’s opinion, finding that the latter’s choice of international customary law represented “an emerging consensus” for determining the standard for aiding-and-abetting liability, which the plaintiffs in any case could not meet as a matter of law.¹⁶⁴ These disagreements among the Judges highlight the current lack of a clear standard defining secondary actor liability under ATCA, and forecast the uncertain future of such claims.

¹⁵⁶ *Id.* at 550-51 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004)).

¹⁵⁷ *Id.* at 543.

¹⁵⁸ *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam), *aff’d*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

¹⁵⁹ *Id.* at 264.

¹⁶⁰ *Id.* at 260.

¹⁶¹ *Id.* at 287-88 (Hall, J., concurring).

¹⁶² *Id.* at 268 (Katzmann, J., concurring).

¹⁶³ *Id.* at 320-21 (Korman, J., concurring in part and dissenting in part).

¹⁶⁴ *Id.* at 293, 333.

a. Judge Hall's Opinion

While recognizing that customary international law governed primary liability under ATCA,¹⁶⁵ Judge Hall concluded that a federal court should derive a standard for secondary liability from domestic federal common law.¹⁶⁶ Judge Hall reasoned that while international customary law could be relied on to provide a set of substantive principles, it was “unnecessary and implausible” to expect a consensus among different legal systems with regard to specific causes of action recognized by their respective courts.¹⁶⁷ Therefore, it was up to the federal common law to fill the “interstice” created by the lack of conformity among international legal norms on various ancillary issues, such as secondary liability.¹⁶⁸

Having selected federal common law as the appropriate source for defining civil aiding-and-abetting liability, Judge Hall ruled that section 876 of the *Restatement (Second) of Torts*, which defines third-party liability, was the proper standard for aiding-and-abetting liability in the context of ATCA.¹⁶⁹ Under Judge Hall's standard, then, a person aids and abets a violation of customary international law when that person provides another with substantial assistance with actual or constructive knowledge that the other will use the assistance to commit a violation of customary international law.¹⁷⁰ In conclusion, Judge Hall suggested that the plaintiffs' allegations, although not particularly specific, were sufficient to state a claim under this standard.¹⁷¹

b. Judge Katzmann's Opinion

In contrast to Judge Hall, Judge Katzmann held in his opinion that courts must look at international law in determining whether a plaintiff can state a claim for aiding and abetting a violation of the law of nations.¹⁷² Judge Katzmann determined that the scope of liability under ATCA was intertwined with the scope of the courts' jurisdictional power under the Act.¹⁷³ According to Judge Katzmann, the limited scope of the jurisdictional power is best guarded against overextensions by “requiring that the specific conduct allegedly committed by the defendants sued

¹⁶⁵ For example, genocide is defined in the 1951 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), and crimes against humanity are described by the Charter of the International Military Tribunal (the Nuremberg Tribunal). *Id.* at 285-86 & n.2, 3 (Hall, J., concurring).

¹⁶⁶ *Id.* at 284-86.

¹⁶⁷ *Id.* at 286.

¹⁶⁸ *Id.* at 287.

¹⁶⁹ *Id.* at 288.

¹⁷⁰ *Id.* at 288-89.

¹⁷¹ *Id.* at 291.

¹⁷² *Id.* at 268 (Katzmann, J., concurring).

¹⁷³ *Id.* at 269.

represents a violation of international law.”¹⁷⁴ In support of this argument, Judge Katzmman relied on dictum from *Sosa*, which referred to the hypothetical question of “whether international law extends the scope of liability” for a violation of the law of nations to private (as opposed to state) actors.¹⁷⁵ Judge Katzmman reasoned that the question of whether liability for a violation of a particular norm reaches aiders and abettors is analogous to the *Sosa* Court’s hypothetical, and is therefore similarly governed by international law.¹⁷⁶

Judge Katzmman also carefully distinguished between the roles of federal common law and international law in recognizing specific causes of action under ATCA.¹⁷⁷ While federal common law controls the question of what remedies are available for violations of international norms, the law of nations defines the scope of a particular violation and determines whether a federal court has the power to hear the suit in the first place.¹⁷⁸

Having determined that the question of aiding-and-abetting liability is governed by international common law, Judge Katzmman held that aiding and abetting is actionable under ATCA because States universally recognize, on a legal and moral level, “the individual responsibility of a defendant who aids and abets a violation of international law.”¹⁷⁹ After reviewing the history of international criminal law norms, Judge Katzmman discerned a core definition of aiding-and-abetting liability that is sufficiently well-defined and widely accepted to command “the same level of consensus as the 18th-century crimes identified . . . in *Sosa*,” and thus should be recognized as the modern law of nations.¹⁸⁰ Under this definition, a defendant aids and abets a violation of a norm of international common law, when the defendant “(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.”¹⁸¹

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 269-70.

¹⁷⁹ *Id.* at 270.

¹⁸⁰ *Id.* at 276-77 & n.12. Judge Katzmman pointed out that individual responsibility of persons who aid and abet the perpetration of such crimes as genocide, slavery, torture and apartheid, has been recognized by numerous international treaties, and other international legal norms, in the second half of the twentieth century. *Id.* at 273-74. For example, aiding-and-abetting liability was expressly recognized by the statutes establishing the ICTY and the ICTR, which imposed liability on any person “who planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation or execution” of a crime within the Tribunals’ jurisdictions. *Id.* at 274 (citing Statute of the International Tribunal for the Former Yugoslavia, art. 7, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 6, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994)) (internal quotation marks omitted).

¹⁸¹ *Id.* at 277 & n.12.

Judge Katzmann argued that this formulation of aiding-and-abetting liability finds reflection in a long tradition of international criminal norms.¹⁸² For example, the London Charter, which established the International Military Tribunal at Nuremberg to address Nazi war crimes and which has been recognized by federal courts and legal scholars as an authoritative source of international law,¹⁸³ extended liability for certain war crimes to “accomplices participating in the formulation or execution of a common plan or conspiracy.”¹⁸⁴ More recently, liability for aiding and abetting violations of international law was codified in the Rome Statute of the International Criminal Court (“Rome Statute”), which provides, *inter alia*, that a defendant is guilty of a crime if the defendant, “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission.”¹⁸⁵

Judge Katzmann further rejected Judge Hall’s contention that reliance on international criminal law norms is not justified when formulating a standard for aiding and abetting in a civil case.¹⁸⁶ Judge Katzmann explained that, first, “international law does not maintain the kind of hermetic seal between criminal and civil law that the district court sought to impose” and, second, prior case law “has consistently relied on criminal law norms in establishing the content of customary international law for purposes of ATCA.”¹⁸⁷

c. Judge Korman’s Opinion

In contrast to the majority, Judge Korman rejected the proposition that the scope of ATCA necessarily extended to aiding-and-abetting liability.¹⁸⁸ He would therefore affirm the District Court’s dismissal of the plaintiffs’ claims against the secondary defendants.¹⁸⁹ Nevertheless, similar to Judge Katzmann, Judge Korman opined that, should ATCA be read to allow aiding-and-abetting liability, the standard for pleading such liability must be defined by norms of international common law.¹⁹⁰ However, unlike Judge Katzmann, Judge Korman concluded that it is not enough to simply show that international

¹⁸² *Id.* at 271.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 272 (quoting Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, E.A.S. 472) (internal quotation marks omitted).

¹⁸⁵ *Id.* at 275 (quoting Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90). The Rome Statute also makes a defendant liable for contributing to the commission of a crime “by a group of persons acting with a common purpose.” *Id.* (quoting Rome Statute of the International Criminal Court, *supra*, at art. 25(3)(d), 2187 U.N.T.S. 90). This type of liability, unlike aiding and abetting, does not require intent to facilitate the commission of the crime; knowledge of the intent of the group is enough. *Id.*

¹⁸⁶ *Id.* at 270 n.5.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 320-21 (Korman, J., concurring in part and dissenting in part).

¹⁸⁹ *Id.* at 337.

¹⁹⁰ *Id.* at 331.

common law recognizes aiding-and-abetting liability in general. Instead, a plaintiff states a claim for aiding and abetting an international crime under ATCA only by invoking a norm of international law that establishes such liability for the particular underlying crime.¹⁹¹ In support of his proposition, Judge Korman relied on the language in *Sosa*, which “require[s] a norm-by-norm analysis to determine whether ‘international law extends the scope of liability for a violation of a *given* norm’” by a secondary actor.¹⁹²

Thus, while Judge Korman agreed with Judge Katzmann that the Rome Statute’s definition of aiding and abetting certain crimes against humanity represented “an emerging consensus”¹⁹³ regarding the standard for pleading aiding-and-abetting liability, no such definition existed at the time of the apartheid, and therefore plaintiffs could not state a claim against the defendants.¹⁹⁴ In reaching his conclusion that the recognition of aiding-and-abetting liability in the context of genocide postdated the collapse of the apartheid government, Judge Korman provided his own interpretation of the development of post-World War II international law, different from those of the other two panel members. Thus, Judge Korman cited a judgment rendered by the Nuremberg Tribunal, which acquitted a banker accused of having authorized loans to German businesses, in spite of the banker’s knowledge that those businesses employed slave labor.¹⁹⁵ Further, Judge Korman questioned Judge Hall’s conclusion that historical sources from the First Congress era indicated that “liability for aiding and abetting international law violations was contemplated under ATCA” by its drafters.¹⁹⁶

¹⁹¹ *Id.*

¹⁹² *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)).

¹⁹³ *Id.* at 293. In particular, Judge Korman noted that the Statute has been signed by the vast majority of democracies and is consistent with the U.S. domestic law. *Id.* at 333. Interestingly, the U.S. is one of few industrialized countries that have not signed the Rome Statute, but neither Judge Korman nor Judge Katzmann appeared to take issue with this. *See id.* at 276 n.9 (Katzmann, J., concurring) (contending that the United States’ refusal to sign the Statute is “unrelated to any concern over the definition of aiding-and-abetting”).

¹⁹⁴ *Id.* at 333 (Korman, J., concurring in part and dissenting in part). Failure of the law of nations at the time of the apartheid to recognize liability for aiding and abetting the kinds of human rights abuses alleged by plaintiffs was only one of the grounds on which Judge Korman would affirm the District Court’s dismissal of the complaint. The other two grounds were public policy reasons which, according to Judge Korman, should compel the District Court to defer to the positions of the United State and South African governments and decline to exercise jurisdiction, *id.* at 295-311, and failure of international law, as it existed at the time of the apartheid, to recognize corporate liability for violations of human rights, *id.* at 311, 321-26.

¹⁹⁵ *Id.* at 292 (citing *United States v. von Weizsaecker*, 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* 308, 622 (William S. Hein & Co., 1997) (1949)) (holding that knowingly providing financing for an enterprise that used slave labor is not a violation of international law).

¹⁹⁶ *Id.* at 328-29 (finding a 1795 opinion by Attorney General William Bradford, which suggested that British subjects could seek redress in a U.S. court under ATCA against Americans who “voluntarily joined, conducted, aided, and abetted a French fleet in attacking [a British] settlement,” ambiguous as to whether the defendants would be subject to primary or secondary liability) (quoting 1 Op. Att’y. Gen. 57 (1795)).

Finally, Judge Korman rejected the contention that aiding-and-abetting liability under ATCA can be presumed from the general availability and understanding of this cause of action in the late 18th century.¹⁹⁷ He opined that such a contention is inconsistent with the Supreme Court's decision in *Central Bank*, which held that courts must not automatically infer aiding-and-abetting liability from a statutorily created cause of action that did not expressly provide for such liability.¹⁹⁸ According to Judge Korman, the fact that "the same Congress that enacted ATCA, without reference to [aiding-and-abetting] liability, explicitly made it a crime to aid-and-abet acts of piracy"¹⁹⁹ demonstrated Congress's intent not to create aiding-and-abetting liability under ATCA.²⁰⁰ Therefore, Judge Korman concluded that the complaint should be dismissed because liability for the civil wrongs alleged by the plaintiffs was neither contemplated by the framers of ATCA, nor grounded in an international law norm that was in existence during the apartheid regime.²⁰¹

The Second Circuit's split decision in *Khulumani*, therefore, demonstrates the complexity of the issues underlying the problem of holding secondary actors accountable for human rights abuses under ATCA. The decision failed to elucidate a single standard for pleading aiding-and-abetting liability under the Act.²⁰² Moreover, Judge Korman's dissent suggested a new trend towards a narrower construction of ATCA's scope and away from allowing plaintiffs to recover from parties that did not themselves commit human rights abuses, but merely aided and abetted their commission. As discussed in the following Part, this trend echoes the evolution of secondary actor liability under Section 10(b) of the Securities Exchange Act.

V. COMPARING SECONDARY ACTOR LIABILITY UNDER ATCA AND SECTION 10(B)

As demonstrated in Parts III and IV of this Note, suits filed under ATCA and Section 10(b) of the Securities Exchange Act often concern the common problem of extending liability beyond primary

¹⁹⁷ *Id.* at 326.

¹⁹⁸ *Id.* at 326-27 (citing *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182 (1994)); see also *supra* Part III.B for a detailed discussion of *Central Bank*.

¹⁹⁹ *Khulumani*, 504 F.3d at 327. Judge Hall's opinion cited this prohibition against aiding and abetting piracy—a quintessential violation of the law of nations—as evidence that Congress intended aiders and abettors to be liable under ATCA. *Id.* at 288 & n.5 (Hall, J., concurring).

²⁰⁰ *Id.* at 327 (Korman, J., concurring in part and dissenting in part) (“[T]he First Congress ‘knew how to impose aiding and abetting liability when it chose to do so’”) (quoting *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 174 (1994)).

²⁰¹ *Id.* at 326.

²⁰² See *In re South African Apartheid Litig.*, Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524, 2009 WL 960078, at *11 (S.D.N.Y. Apr. 8, 2009) (stating that “the division of opinion between the [Judges] left [district courts] without a standard to apply or even a decision concerning the source of law from which . . . [to] derive a standard”).

wrongdoers to third parties whose conduct was instrumental in the perpetration of the wrong. In both cases, the resolution of the problem must turn on the interpretation of the scope of liability under the respective federal Act. Therefore, comparing the two Acts and analyzing the reasons for the Supreme Court's restrictive interpretation of Section 10(b)'s scope may shed light on the future of secondary actor liability under ATCA. This part will show that, although, given the history of Section 10(b) jurisprudence, the Supreme Court is likely to adopt a similarly narrow approach to defining the scope of ATCA, this will not entirely preclude plaintiffs from holding culpable secondary actors accountable for violations of international law.

A. *In the Future, the Supreme Court Is Likely to Eliminate Aiding-and-Abetting Liability Under ATCA*

After the Second Circuit in *Khulumani* upheld the possibility of an aiding-and-abetting claim under ATCA and reversed the district court's dismissal of the complaint, the defendants sought reversal by the Supreme Court. In May 2008, the Supreme Court denied the *Khulumani* defendants' certiorari petition because the Court failed to reach a quorum.²⁰³ As a result, the issue of aiding-and-abetting liability under ATCA remains unresolved by the nation's highest court.²⁰⁴ However, should the opportunity present itself again in the future, the Supreme

²⁰³ Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008); see also Tony Mauro, *Supreme Court Recusals Hit Home in Controversial Apartheid Suit*, LEGAL TIMES, May 13, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202421335045>.

²⁰⁴ The motions to dismiss by the various defendants have since been adjudicated by the district court on remand. On April 8, 2009, the district court granted in part and denied in part the motions. *In re South African Apartheid Litig.*, Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524, 2009 WL 960078, at *1 (S.D.N.Y. Apr. 8, 2009). Adopting a common-sense approach, district court Judge Shira Scheindlin looked at the "quality of the assistance provided to the primary violator." *Id.* at *12. According to Judge Scheindlin, merely "doing business" with a perpetrator or funding its activities does not rise to the level of aiding and abetting. *Id.* However, providing goods "specifically designed" to enable the perpetrator to carry out its crimes may constitute aiding and abetting. *Id.* Applying these guidelines, Judge Scheindlin, first, dismissed aiding-and-abetting claims against Barclays and UBS, which allegedly provided loans to the South African government and bought army bonds, thus financing the apartheid regime. *Id.* at *20. Second, Judge Scheindlin upheld claims against defendants Daimler, Ford, and GM, alleging that the auto-makers sold specialized military vehicles to the South African army and police forces, which were then used for suppressing uprisings, *id.* at *16, and allowed its personnel to carry out the arrests and interrogations of dissidents on behalf of the South African government, *id.* at *15. The judge, however, dismissed, with leave to amend, those claims that merely alleged that the auto-makers sold passenger cars and ordinary commercial trucks to the government, without evidence of "military customization or similar features that link [the vehicles] to an illegal use." *Id.* at *18. Finally, the judge upheld claims against defendants IBM and Fujitsu alleging that the technology companies developed and sold to the South African government special software and hardware for processing and monitoring the country's black population, *id.* at *16, *19, but dismissed those claims that merely asserted that the technology companies sold ordinary computers to government agencies, including the Department of Prisons, while knowing that the prisons practiced illegal detentions and torture, *id.* at *19.

Court is likely to rule that ATCA does not allow aiding-and-abetting liability.²⁰⁵

1. The *Central Bank* Analytical Framework

In considering whether to adopt an interpretation of ATCA that allows for aiding-and-abetting liability, the Supreme Court will be bound by the analytical framework of statutory interpretation it set forth in *Central Bank*. The application of *Central Bank*'s reasoning has not been limited to securities litigation and will be equally applicable in the context of an ATCA claim.²⁰⁶ The applicability of the Central Bank statutory interpretation analysis to ATCA is not changed by the fact that *Central Bank* interpreted the availability of an implied private right of action in a statute,²⁰⁷ whereas ATCA is jurisdictional in nature and does not create a cause of action, express or implied.²⁰⁸ The difference between a jurisdictional statute and one that creates a cause of action is that the latter gives a party substantive grounds for recovery in court, whereas the former merely allows a court to use its discretion in deciding whether to hear a case brought before it.²⁰⁹ This says nothing, however, about how courts should construe the statute in exercising their discretionary powers. Because federal courts derive their jurisdiction from Congress in the first place, "Congress, and not the courts . . . possesses the power to define the scope of the court's jurisdiction."²¹⁰ Therefore, there is no analytical difference between interpreting the scope of a congressionally-created cause of action and the scope of a

²⁰⁵ In doing so, the Supreme Court will go against lower courts' precedent. But the Supreme Court did exactly that in *Central Bank*. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 192 (1994) (Stevens, J., dissenting) (criticizing the majority for eliminating aiding and abetting under Section 10(b), even though "[i]n hundreds of judicial and administrative proceedings in every Circuit in the federal system, the courts and the SEC have concluded that aiders and abettors are subject to liability under § 10(b)"); Linda Greenhouse, *High Court Ruling Sharply Curbs Suits on Securities Fraud*, N.Y. TIMES, Apr. 20, 1994, at D8 (reporting that the Supreme Court in *Central Bank* "swe[pt] aside years of lower court precedents as well as a longstanding policy of the Securities and Exchange Commission").

²⁰⁶ See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 193 (2005) (Thomas, J., dissenting) (finding that "[t]he . . . reasons [set forth in *Central Bank*] militate equally against extending the implied cause of action [for gender discrimination] under Title IX to retaliation claims); see also *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 688 (7th Cir. 2008) (applying *Central Bank*'s reasoning to determine the scope of a counterterrorism statute because "nothing in [the Court's] holding turns on particular features of [securities] laws").

²⁰⁷ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 171 (1994).

²⁰⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

²⁰⁹ Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 676 (2005) ("Jurisdictional grants empower courts to hear and resolve cases brought before them by parties; substantive causes of action grant parties permission to bring those cases before the court.").

²¹⁰ *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 266 (2d Cir. 2007) (Katzmann, J., concurring), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

jurisdictional statute.²¹¹ Moreover, courts have previously rejected attempts to distinguish *Central Bank* on the basis of the particular cause of action it involved.²¹² Consequently, Central Bank will control the Supreme Court's interpretation of the scope of ATCA.

In deciding whether ATCA's scope includes aiding-and-abetting liability, the Court will follow a three-step approach employed in *Central Bank* for analyzing the scope of liability under Section 10(b). In *Central Bank*, the Court first examined the language of the statute to decide whether Section 10(b) could be said to prohibit aiding and abetting.²¹³ Second, the Court considered whether such prohibition could be implied from the congressional intent at the time of Section 10(b)'s enactment.²¹⁴ Finally, the Court weighed policy reasons for and against expanding Section 10(b)'s liability to reach aiders and abettors.²¹⁵

2. Statutory Language

Consistent with the *Central Bank* framework, in deciding whether ATCA reaches aiders and abettors, the Supreme Court will be compelled to first look at ATCA's language. Statutory language is controlling with respect to determining the scope of liability under an act of Congress.²¹⁶ In *Central Bank*, the Supreme Court found the absence of any reference to aiding and abetting in the text of Section 10(b) of the Securities Exchange Act to be dispositive of the issue of whether the Section reached aiders and abettors.²¹⁷

In the years since *Central Bank*, courts have followed the same rationale in refusing to expand the scope of liability under other federal statutes. For example, in *Freeman v. DirecTV, Inc.*,²¹⁸ the Ninth Circuit held that liability under the Electronic Communications Privacy Act (ECPA) did not extend to aiders and abettors.²¹⁹ ECPA prohibits any "person or entity providing an electronic communication service to the public [from] knowingly divulg[ing] to any person or entity the contents

²¹¹ See *id.* at 266 n.2 (suggesting that "because federal courts have only the jurisdiction granted to them by Congress, their exercise of common-law discretion is better viewed as creating a cause of action than jurisdiction") (internal citations and quotation marks omitted).

²¹² See *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (noting that *Central Bank*'s reasoning is not limited to statutes that create an implied private right of action, because the holding in the case applied to suits by non-private parties as well).

²¹³ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994).

²¹⁴ *Id.* at 178, 180-81.

²¹⁵ *Id.* at 188.

²¹⁶ *Id.* at 173. Statutory language is "[t]he starting point in every case involving construction of a statute." *Id.* (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197) (alteration in original).

²¹⁷ *Id.* at 175 (noting that "the language of Section 10(b) does not in terms mention aiding and abetting" (quoting Brief for Security and Exchange Commission as Amicus Curiae at 8, 511 U.S. 164 (1994) (No. 92-854)) (internal quotation marks omitted)).

²¹⁸ 457 F.3d 1001 (9th Cir. 2006).

²¹⁹ *Id.* at 1002.

of a communication while in electronic storage by that service.”²²⁰ The statute further authorizes a private cause of action against anyone who intentionally or knowingly “engage[s]” in the prohibited conduct.²²¹

The plaintiffs in *Freeman* were internet users who participated in online message boards dedicated to pirating satellite television signals.²²² The content of the message boards became subject to a separate, unrelated dispute involving DirecTV, a provider of satellite television.²²³ The *Freeman* plaintiffs alleged that DirecTV violated ECPA by aiding and abetting the internet provider in the unauthorized disclosure of the message board communications to third parties.²²⁴ In rejecting the plaintiffs’ theory of liability, the court stated that it was bound by a statute’s plain language unless it would lead to an unreasonable result.²²⁵ The court reasoned that since the text of ECPA made no reference to aiding-and-abetting liability, such liability was beyond the statute’s scope.²²⁶ The plaintiffs argued that aiding-and-abetting liability was available within a reasonable construction of ECPA’s plain language, because the statute expressly authorized suits against those who “engage[]” in the prohibited conduct.²²⁷ The court disagreed, finding that, viewed in the textual context of the statute as a whole, the word “engage[]” could not be read so broadly as to include aiding and abetting.²²⁸

Similarly, in *Boim v. Holy Land Foundation for Relief and Development*,²²⁹ the Seventh Circuit held that a federal statute that provides a private cause of action to any U.S. national who was “injured . . . by reason of an act of international terrorism”²³⁰ did not authorize suits against aiders and abettors of terrorism.²³¹ In *Boim*, parents of an American teenager killed in Israel by Hamas militants sued several U.S. Muslim non-profit organizations alleging that the non-profit organizations assisted international terrorism by providing financial

²²⁰ 18 U.S.C. § 2702(a)(1) (2006).

²²¹ *Id.* § 2707(a).

²²² *Freeman*, 457 F.3d at 1003.

²²³ *Id.* at 1002-03.

²²⁴ *Id.* at 1003. Plaintiffs could not sue DirecTV as a primary violator of the ECPA because the TV company was not a provider of the internet service that stored the message board communications. *Id.* at 1004. Thus, the court was limited to deciding whether DirecTV could be held liable as a secondary actor. *Id.*

²²⁵ *Id.* at 1004-05 (“The starting point of [a statute’s] interpretation . . . is always its language.”).

²²⁶ *Id.* at 1005.

²²⁷ *Id.*; see 18 U.S.C. § 2707(a) (2006).

²²⁸ *Freeman*, 457 F.3d at 1005.

²²⁹ 549 F.3d 685 (7th Cir. 2008).

²³⁰ 18 U.S.C. § 2333(a). Section 2333(a) was originally enacted as part of the Anti-Terrorism Act of 1990, and reenacted two years later as part of the Federal Courts Administration Act of 1992, under the title “Terrorism Civil Remedy.” See Seth N. Stratton, Note, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 30 n.19 (2004).

²³¹ *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 688-90 (7th Cir. 2008).

support to Hamas.²³² In rejecting that part of the plaintiff's rationale, the court reasoned that, under *Central Bank*, the statute's failure to mention aiding and abetting or other types of secondary liability meant such liability does not exist.²³³ Since ATCA, like ECPA and the counterterrorism provision in *Boim*, does not mention aiding and abetting, the Supreme Court will have to conclude that the Act's express language does not authorize aiding-and-abetting liability.²³⁴

3. Congressional Intent to Create an Implied Right of Action

Having reached that conclusion, however, the Supreme Court will proceed to the second step of the *Central Bank* analysis to determine whether, given Congress's intent, a private right of action against aiders and abettors should be implied under ATCA.²³⁵ On the one hand, a legislature's failure to provide expressly for aiding-and-abetting liability under a statute is evidence that the legislature did not intend to incorporate such liability into the statute.²³⁶ This is especially true when the legislature expressly authorizes aiding-and-abetting liability in other contexts.²³⁷ On the other hand, evidence that Congress was generally

²³² *Id.* at 688. Hamas, also known as Islamic Resistance Movement, is a Palestinian religious and political group that is designated as a Foreign Terrorist Organization by the U.S. Government. See Garry W. Jenkins, *Soft Power, Strategic Security, and International Philanthropy*, 85 N.C. L. REV. 773, 817 n.186 (2007); Council on Foreign Relations, Background: Hamas, <http://www.cfr.org/publication/8968> (last visited on Apr. 15, 2009); U.S. Dep't of State, Office of the Coordinator for Counterterrorism, Fact Sheet: Foreign Terrorist Organizations (Apr. 8, 2008), <http://www.state.gov/s/ct/rls/fs/08/103392.htm>.

²³³ *Boim*, 549 F.3d at 689 (“[S]tatutory silence on the subject of secondary liability means there is none . . .”). *Boim* was an *en banc* rehearing of a prior panel decision, *Boim v. Quranic Literacy Institute*, which had concluded that liability under Section 2333(a) did extend to aiders and abettors. *Id.* at 688; see *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1021 (7th Cir. 2002). The panel in the original *Boim I* suit acknowledged the significance of the *Central Bank* rationale in interpreting the scope of liability under a federal statute. *Boim I*, 291 F.3d at 1017-19. However, the panel distinguished *Central Bank*, finding that extending liability under Section 2333(a) to aiders and abettors was justified given the legislative intent and the policies behind the counterterrorism laws. *Id.* at 1019.

²³⁴ See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 326 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (criticizing as erroneous and contrary to precedent, an “assumption that, even though ATCA does not by its terms encompass aiding-and-abetting liability, it should be construed as if it contains such language”), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

²³⁵ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 178 (1994); see also *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1103 (1991) (“[T]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.”) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979)).

²³⁶ *Cent. Bank of Denver*, 511 U.S. at 177 (“If . . . Congress intended to impose aiding and abetting liability, we presume it would have used the words ‘aid’ and ‘abet’ in the statutory text. But it did not.”); see also *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1006 (9th Cir. 2006) (“There is no explicit provision in §§ 2702 and 2707 or anywhere else in the ECPA, providing for secondary liability. Accordingly, it is reasonable to conclude that Congress knew what it was doing by not including such claims.”).

²³⁷ *Cent. Bank of Denver*, 511 U.S. at 184 (Congress's special provision for liability of “controlling person[s]” under Section 20 of the Securities Exchange Act shows that “[w]hen Congress wished to create such [secondary] liability, it had little trouble doing so.”) (citing *Pinter v.*

aware of aiding-and-abetting liability and that the doctrine was well-established at the time of the statute's enactment, does not, in and of itself, warrant a presumption that Congress intended to implicitly incorporate aiding-and-abetting liability into every federal law.²³⁸

Further, courts both before and after *Central Bank*, have warned against interpreting legislative intent in a way that creates new causes of action.²³⁹ In *Central Bank*, the Court expressed a concern over reading aiding-and-abetting liability into Section 10(b)'s prohibition against fraudulent statements.²⁴⁰ The Court's reason for the concern was that doing so would expose to liability those who do not, whether directly or indirectly, engage in conduct prohibited by the statute.²⁴¹ This, according to the Court, would allow a plaintiff to successfully sue a defendant under Section 10(b) without satisfying all elements of liability critical to recovery, e.g. reliance.²⁴² The Court refused to impute to the legislature an intention to create such an "anomalous" result.²⁴³

Four of the Supreme Court's nine Justices subscribed to the same rationale in interpreting the scope of liability under another federal statute in *Jackson v. Birmingham Board of Education*.²⁴⁴ In *Jackson*, a school coach of a girls' basketball team sued his school under Title IX of the Education Amendments of 1972, which prohibit in-school discrimination on the basis sex.²⁴⁵ The coach alleged that he was a victim of sex discrimination because, after he had complained to his supervisors about disparate treatment of the girls' team, the school retaliated against him by removing him from his coach position.²⁴⁶ While the majority in *Jackson* upheld the plaintiff's claim, the dissenting Justices argued against expanding liability under Title IX to encompass retaliation. The dissent analogized the case with *Central Bank* and reasoned that similar to aiding and abetting claims under Section 10(b), claims based merely on retaliation would lack elements required for prevailing on a claim of discrimination, because retaliation can take place without

Dahl, 486 U.S. 622, 650 (1988)) (alterations in original). "Congress knew how to impose aiding and abetting liability when it chose to do so." *Cent. Bank of Denver*, 511 U.S. at 176.

²³⁸ *Id.* at 180-81. The Supreme Court also questioned the extent to which civil aiding-and-abetting liability was an established doctrine in the 1930s, or even is today, noting that "Congress has not enacted a general civil aiding and abetting statute" and that the doctrine's application in common law is infrequent and uncertain. *Id.* at 181-82.

²³⁹ See, e.g., *Va. Bankshares, Inc.*, 501 U.S. at 1102 ("[T]he breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended."); *Freeman*, 457 F.3d at 1006 ("When a statute is precise about who . . . can be liable courts should not implicitly read secondary liability into the statute.") (alteration in original) (internal quotation marks omitted).

²⁴⁰ *Cent. Bank of Denver*, 511 U.S. at 176.

²⁴¹ *Id.* ("[A]iding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.")

²⁴² *Id.* at 180.

²⁴³ *Id.*

²⁴⁴ 544 U.S. 167 (2005).

²⁴⁵ *Id.* at 171.

²⁴⁶ *Id.* at 171-72.

discrimination.²⁴⁷ Such interpretation of the statute, in the dissent's opinion, would ignore Congress's intent because it would effectively read a completely new cause of action into the statute.²⁴⁸

For the same reason, the Supreme Court will likely decline to read aiding and abetting into ATCA by implication. ATCA makes no mention of aiding-and-abetting liability or similar types of secondary liability. Yet just a year after enacting ATCA, Congress passed a law prohibiting piracy and other similar acts of hostility against the United States, and expressly made liable those who "knowingly and wittingly aid and assist, procure, command, counsel or advise" the commission of such acts.²⁴⁹ Thus, the Supreme Court, consistent with its reasoning in *Central Bank*, will likely conclude that the 1st Congress "knew how to impose aiding-and-abetting liability when it chose to do so,"²⁵⁰ and that Congress's failure to provide for aiding-and-abetting liability in ATCA shows lack of intent to do so.²⁵¹ Moreover, the Supreme Court is unlikely to agree with Judge Hall's characterization in *Khulumani* that "the Founding Generation . . . understood that ATCA encompassed aiding and abetting."²⁵² Regardless of the particular merits of Judge Hall's characterization, the doctrine of aiding-and-abetting liability was undoubtedly less developed in the 1780s than in the 1930s.²⁵³ Accordingly, the Supreme Court will probably refuse to impute to the 1st Congress a broadly defined intent to attach aiding-and-abetting liability to all of its legislative acts, just like it refused to impute such intent to the 73d Congress in *Central Bank*.

Further, the Supreme Court will likely be reluctant to read Congress's intent in a way that would expand the scope of ATCA's

²⁴⁷ *Id.* at 194 (Thomas, J., dissenting).

²⁴⁸ *Id.* ("[B]y recognizing [the plaintiff's] claim, the majority creates an entirely new cause of action . . ."); *cf.* *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 689-90 (7th Cir. 2008) (arguing, along the same lines, that implying secondary liability in section 2333(a) of the Terrorism Civil Remedy statute would impermissibly expand the statute's scope by "enlarg[ing] the federal courts' extraterritorial jurisdiction").

²⁴⁹ Act of April 30, 1790, ch. 9, §§ 9, 10, 1 Stat. 112, 114 (1790).

²⁵⁰ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994).

²⁵¹ *See also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 326-27 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) ("[T]he same Congress that enacted the ATCA, without reference to aiding-and-abetting liability, explicitly made it a crime to aid-and-abet acts of piracy, a violation of the law of nations."), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

²⁵² *Id.* at 288 n.5 (Hall, J., concurring). In support of this proposition, Judge Hall cited, *inter alia*, a 1795 opinion by Attorney General Bradford, which appears to state that liability under ATCA could attach to U.S. citizens who "voluntarily joined, conducted, aided, and abetted a French fleet in attacking" a British settlement in West Africa. *Id.*; 1 Op. Att'y Gen. 57, 57-59 (1795). Judge Korman, however, rebutted Judge Hall's reading of the opinion, finding it ambiguous as to whether the Attorney General referred to primary or secondary liability. *Khulumani*, 504 F.3d at 329 (Korman, J., concurring in part and dissenting in part).

²⁵³ The doctrine of aiding-and-abetting liability originates in criminal law. *Eid*, *supra* note 28, at 1180; *see also Cent. Bank of Denver*, 511 U.S. at 181. But Congress did not codify criminal aiding and abetting until 1902, long after the passage of ATCA. *See* 60 Cong. Ch. 321, 35 Stat. 1088 (1909).

liability to reach aiders and abettors because doing so could create “an entirely new cause of action”²⁵⁴ lacking elements required under ATCA. Currently, ATCA, as explained in *Sosa*, only permits claims for a violation of an international norm that is “accepted by the civilized world and defined with a specificity comparable to” the acceptance and specificity enjoyed by “the historical paradigms” of the late 17th century.²⁵⁵ Given the uncertainty surrounding the doctrine of aiding-and-abetting liability, and the standard by which it should be defined,²⁵⁶ expanding the scope of ATCA could expose to liability those who, while aiding and abetting an international crime, do not themselves violate a universally accepted and sufficiently well-defined norm of international law. The Supreme Court is unlikely to accept a statutory interpretation that could lead to such a result.

4. Public Policy Considerations

Finally, having reached the last step of its analytical framework, the Supreme Court is equally likely to reject aiding-and-abetting liability under ATCA on public policy grounds. Although not an independent basis for statutory interpretation, public policy considerations may be used to buttress the Court’s decision not to expand the scope of ATCA.²⁵⁷ Policy review is especially appropriate where, as in ATCA’s case, there is scant direct evidence of congressional intent.²⁵⁸

Similar sets of conflicting policy considerations permeate the subject of secondary actor liability in the securities fraud and ATCA litigation contexts. Before *Central Bank*, the main arguments in favor of attaching secondary liability to aiders and abettors were deterrence and fairness.²⁵⁹ After *Central Bank*, plaintiffs have similarly argued that holding culpable secondary actors liable under Section 10(b) is necessary

²⁵⁴ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 195 (2005) (Thomas, J., dissenting).

²⁵⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 732 (2004); *see also supra* note 116 and accompanying text.

²⁵⁶ *Cf.* Judge Katzmann’s and Judge Hall’s divergent definitions for aiding and abetting in *Khulumani*, *supra* Part IV.B.2.

²⁵⁷ *Cent. Bank of Denver*, 511 U.S. at 188 (“Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent they may help to show that adherence to the text and structure would lead to a result ‘so bizarre’ that Congress could not have intended it.”).

²⁵⁸ *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104-05 (1991) (stating that where a right of action was originally inferred from a statute in the absence of “conclusive guidance” from the legislature, courts may “look[] to policy reasons for deciding where the outer limits of the right should lie”).

²⁵⁹ *See Cent. Bank of Denver*, 511 U.S. at 188 (paraphrasing an amicus party’s argument that “the aiding and abetting cause of action deters secondary actors from contributing to fraudulent activities and ensures that defrauded plaintiffs are made whole”).

as a deterrent against fraud on the securities markets,²⁶⁰ and is consistent with the notion that no act of deliberate fraud should go unpunished.²⁶¹

At the same time, many arguments have been advanced against exposing secondary actors to liability under Section 10(b). Thus, in *Central Bank*, the Supreme Court noted the uncertainty surrounding the standard for determining aiding-and-abetting liability as a factor against extending Section 10(b)'s reach.²⁶² First, the court reasoned that this uncertainty in the rules would tend to protract litigation and increase the cost of defense. As a result, many secondary actors, including those with valid defenses, would be forced to settle rather than litigate. This, in turn, would result in the proliferation of strike suits, and other meritless litigation. Finally, in the Court's opinion, excessive and extortionate litigation would send ripples throughout the securities markets, raising the cost of doing business in the United States.²⁶³ These costs would ultimately be passed on to investors, whom the Securities Exchange Act is supposed to protect.²⁶⁴

In *Stoneridge*, the Supreme Court also used public policy analysis to further narrow the scope of Section 10(b) liability to exclude "scheme liability."²⁶⁵ In particular, the Court emphasized the existence of alternative remedies that can both serve as a deterrent to fraud and provide recovery to injured investors. Thus, the court pointed out that secondary actors who engage in fraud remain subject to criminal laws,²⁶⁶ state anti-fraud statutes,²⁶⁷ and civil actions brought by the SEC.²⁶⁸

Critics of ATCA have set forth remarkably similar arguments in favor of restricting its scope to exclude aiding-and-abetting liability. In *In re South African Apartheid Litigation*, Judge Sprizzo characterized ATCA litigation as "an area that is . . . ripe for non-meritorious and blunderbuss suits."²⁶⁹ Critics also often underscore the vexatious nature

²⁶⁰ See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 778 n.10 (2008) (Stevens, J., dissenting) ("[T]he availability of private rights of action . . . provide[s] a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws.").

²⁶¹ *Stoneridge*, 128 S. Ct. at 782 ("Congress enacted § 10(b) with the understanding that . . . every wrong would have a remedy."); Apolinsky, *supra* note 97, at 2 (suggesting as one rationale for holding secondary actors accountable under Section 10(b) "to punish as many wrongdoers as possible who participated in the scheme").

²⁶² *Cent. Bank of Denver*, 511 U.S. at 188.

²⁶³ *Id.* at 189.

²⁶⁴ *Id.*

²⁶⁵ *Stoneridge*, 128 S. Ct. at 770, 772-73.

²⁶⁶ *Id.* at 773 ("[C]riminal penalties are a strong deterrent.").

²⁶⁷ *Id.* (noting that "some state securities laws permit state authorities to seek fines and restitution from aiders and abettors").

²⁶⁸ *Id.* (stating that since 2002, the SEC recovered approximately \$10 billion for the benefit of investors harmed by fraud). The SEC is authorized to sue aiders and abettors of securities fraud under the Private Securities Litigation Reform Act (PSLRA). See 15 U.S.C. § 78t(e) (2006).

²⁶⁹ *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004), *aff'd in part and denied in part*, *Khulmani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

of ATCA litigation by pointing to the extraordinarily large amounts demanded by the plaintiffs.²⁷⁰

In *Khulumani*, Judge Korman cited other public policy grounds for restricting the scope of liability under ATCA to primary violations. He noted that allowing suits against companies that do business with oppressive regimes would have a “chilling effect” on foreign direct investment in those countries.²⁷¹ Additionally, Judge Korman pointed to the efforts of the modern South African government to provide restitution and other forms of relief to victims of the apartheid as more appropriate domestic alternatives to suits in the U.S.²⁷² Critics have also advanced other alternatives to suits under ATCA, such as government sanctions²⁷³ and the creation of an internationally enforceable code of corporate conduct.²⁷⁴ Given the similarity between these concerns and those expressed over securities fraud suits, the Supreme Court is likely to weigh public policy considerations against expanding the scope of ATCA.

Thus, when the Supreme Court has the opportunity again to review the scope of ATCA, it will likely rule that the Act does not permit aiding-and-abetting liability, just like the Court eliminated aiding-and-abetting liability under Section 10(b) of the Securities Exchange Act in *Central Bank*. Applying *Central Bank's* analytical framework, the Court will likely find that ATCA's silence on the matter, Congress's failure to provide for aiding-and-abetting liability under the Act in spite of its familiarity with the doctrine, and strong policy considerations, all weigh against expanding the scope of ATCA to reach aiders and abettors.

B. Elimination of Aiding-and-Abetting Liability Under ATCA Will Not Mean the End of Corporate Accountability for Human Rights Abuses

The issue of aiding-and-abetting liability under ATCA is of great concern for plaintiffs' lawyers and human rights advocates, and the Supreme Court's potential rejection of this theory of liability is likely to

²⁷⁰ For example, the plaintiffs in *In re South African Apartheid Litigation* demanded over \$40 billion in damages. *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 546.

²⁷¹ *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 297 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008). *But see Herz*, *supra* note 131, at 209-10 (arguing that the availability of aiding-and-abetting liability actually encourages investment by promoting corporate responsibility and “constructive engagement”).

²⁷² *Khulumani*, 504 F.3d at 297, 301.

²⁷³ *See Ivan Poullaos, The Nature of the Beast: Using the Alien Torts Claims Act to Combat International Human Rights Violations*, 80 WASH. U. L.Q. 327, 354 (2002) (addressing the shortcomings of this alternative).

²⁷⁴ *Pia Zara Thadhani, Regulating Corporate Human Rights Abuses: Is Unocal the Answer?*, 42 WM. & MARY L. REV. 619, 622 (2000).

be viewed as a setback for victims of human rights abuses.²⁷⁵ An interpretation of ATCA that eliminates aiding-and-abetting liability will close off the “path of least resistance” for asserting claims of human rights violations against corporations.²⁷⁶ However, upon a closer look, it becomes clear that the concerns may be exaggerated. In light of the resilience of claims against secondary actors in the securities fraud context after *Central Bank* and *Stoneridge*, and the availability of several alternative remedies, the loss of aiding-and-abetting liability in the ATCA plaintiffs’ litigation playbook is similarly unlikely to have a substantial negative impact on the ability of victims of human rights abuses to recover from corporate wrongdoers.

First, the proliferation of the Section 10(b) litigation in the years following *Central Bank*,²⁷⁷ including many successful claims against secondary actors,²⁷⁸ suggests that ATCA plaintiffs will also continue to bring successful claims against secondary actors under the primary liability theory. When the Supreme Court handed down its decision in *Central Bank*, it was initially viewed as a victory for the business community.²⁷⁹ However, it soon became clear that *Central Bank* did not present a serious bar to meritorious claims against culpable secondary actors. Grasping onto the Court’s assurance that a secondary actor “may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability . . . are met,” plaintiffs’ lawyers were able to shift the focus from asserting aiding and abetting to pleading primary violations by secondary actors.²⁸⁰

²⁷⁵ See Anthony J. Sebok, *More on the Second Circuit’s Recent, Significant Decision Regarding Two Suits Involving the Alien Tort Claims Act: Part Two in a Two-Part Series*, FINDLAW, Nov. 6, 2007, <http://writ.news.findlaw.com/sebok/20071106.html> (“[A]iding and abetting under the ATCA has become a very important topic, since it is the primary theory of liability that allows human rights lawyers to sue corporations.”).

²⁷⁶ Cf. *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 497-98 (S.D.N.Y. 2005) (stating that, prior to *Central Bank*, aiding-and-abetting liability provided a “path of least resistance” for plaintiffs seeking to hold liable multiple corporate actors engaged in a common deceptive scheme).

²⁷⁷ For example, plaintiffs filed 111 suits in 1996, 173 in 1997, and 242 in 1998, eventually leveling at approximately 192 suits per year. Cornerstone Research, *Litigation Activity Indices*, <http://securities.cornerstone.com/Research/litigation.htm> (last visited January 29, 2009).

²⁷⁸ See *supra* Part III.C.

²⁷⁹ Thom Weidlich, *Professionals Still at Risk: Plaintiffs’ Bar Shifts Gears to Revise Claims in Central Bank’s Wake*, NAT’L L.J., July 18, 1994, at A4.

²⁸⁰ *Id.* (reporting that most complaints had either already alleged primary liability against secondary actors in addition to aiding and abetting, or can be easily amended to do so after *Central Bank* because “[t]he conduct is no different from the conduct [the plaintiffs] were attacking before”). Amending often did not present much of a challenge, since many of the stronger claims against secondary actors were based on facts that were sufficient to plead the elements of primary liability. *Id.* (“That the plaintiffs now must prove direct fraud does not necessarily mean they need to prove different facts; the two theories are often alleged on the same facts.”); see *id.* (“Your case is going to fly or not depending on what kind of direct involvement the [secondary actor] had in getting securities sold. It’s always going to come down to what did the [secondary actor] know, when did [she] know it and what did [she] do with the knowledge.”) (quoting a plaintiff’s lawyer) (internal quotation marks omitted); see also *supra* notes 90-98 and accompanying text (discussing the use of “scheme liability” to test the limits of primary liability).

Even the Supreme Court's more restrictive decision in *Stoneridge* did not entirely foreclose secondary actor liability from the securities fraud context.²⁸¹ For example, the decision left the door open to claims against secondary actors whose conduct is not "too remote to satisfy the reliance requirement."²⁸² In addition, claims against secondary actors whose conduct was not "in the ordinary course" of a business relationship with the primary defendant, but rather directly affected the market for securities, will also likely be sustained under *Stoneridge*.²⁸³

Similarly, in the event the Supreme Court refuses to recognize aiding-and-abetting liability under ATCA, plaintiffs will still be able to bring meritorious claims against secondary actors by alleging *primary* violations of international law. Just as in the securities fraud context the focus of the claims shifted to proving scienter and reliance, the focus of ATCA claims against corporations complicit in human rights abuses will shift to proving intent and causation.²⁸⁴ Claims that involve a corporation merely "doing business in countries with repressive regimes"²⁸⁵ may have to fall by the wayside, just like Section 10(b) claims grounded in the "ordinary course" of the defendant's business. But stronger claims with a closer link between the company's actions and the human rights abuse, will probably survive.

Judge Scheindlin's recent on-remand decision in *In Re South African Apartheid Litigation*²⁸⁶ illustrates the often illusory line between primary and secondary liability. Although ruling from the tentatively-upheld position that ATCA allows aiding-and-abetting liability, Judge Scheindlin nevertheless focused her analysis of the individual claims on the closeness of the "causal connection" between the secondary defendant's conduct and the underlying crime, on the one hand,²⁸⁷ and on the secondary defendant's state of mind, on the other hand²⁸⁸—both factors that determine a defendant's *primary* liability for the wrong.

²⁸¹ Robert Schwinger & Eric Twiste, *Stoneridge: Not the End of the Road*, Securities Law 360, Jan. 18, 2008 ("[I]t still remains to be seen whether the ever-creative securities fraud bar will be able to find ways to recharacterize their cases against secondary actors so as to be able to keep them viable even under the strictures laid down in *Stoneridge*.").

²⁸² *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770 (2008).

²⁸³ *Id.* at 774 (stating that the plaintiffs did not meet the Section 10(b) reliance requirement because the secondary actors "were acting in concert with Charter in the ordinary course as suppliers" and their round-tripping arrangements "took place in the marketplace for goods and services, not in the investment sphere").

²⁸⁴ To paraphrase the lawyer interviewed in the National Law Journal article, each "case is going to fly or not depending on what kind of direct involvement the [complicit corporation] had in [committing the particular human rights violation]. It's always going to come down to what did the [corporation] know, when did [the corporation] know it and what did [the corporation] do with the knowledge." Weidlich, *supra* note 279 (internal quotation marks omitted).

²⁸⁵ *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 289 (2d Cir. 2007) (Hall, J., concurring), *aff'd*, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

²⁸⁶ Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524, 2009 WL 960078 (S.D.N.Y. Apr. 8, 2009).

²⁸⁷ *Id.* at *12.

²⁸⁸ *Id.* at *13-*15.

Thus, Judge Scheindlin upheld aiding-and-abetting genocide claims against car manufacturers that supplied the South African military with custom-made armed vehicles and authorized its own security personnel to carry out arrests and interrogations on behalf of the police²⁸⁹—conduct that would probably also rise to the level of a primary offense. At the same time, Judge Scheindlin dismissed several claims predicated on the corporate defendants' less culpable acts, such as providing loans to the South African government²⁹⁰ or selling computers to government agencies,²⁹¹ thus dispelling the misguided fear that ATCA potentially exposes to liability anyone who “does business” with a rogue State.

The second reason why human rights advocates should not fear the Supreme Court's likely abandonment of aiding-and-abetting liability under ATCA is the availability of several viable alternative theories for recovery from corporate defendants. In the Section 10(b) context, actions by the SEC, which are not subject to the *Central Bank* and *Stoneridge* restrictions, have recovered billions of dollars for the benefit of defrauded investors.²⁹² In the ATCA context, as an alternative to aiding and abetting, victims can recover from corporations on the theories of conspiracy, joint criminal enterprise, instigation, and procurement.²⁹³

Finally, abandoning aiding-and-abetting liability will eliminate redundancies in the structure of ATCA claims. As in the securities fraud context, the same conduct can often be characterized either as aiding and abetting or as a direct violation. For example, in *Boim v. Holy Land Foundation for Relief & Development*, Judge Posner declined to recognize aiding-and-abetting liability under the federal Terrorism Civil Remedy statute, but instead imposed liability on the defendants through a “chain of incorporations by reference” of several statutory definitions.²⁹⁴ He found that although the statute did not prohibit aiding and abetting an act of international terrorism, providing financial assistance to a foreign terrorist organization may sometimes itself constitute “international terrorism” under the statute's definition of the term.²⁹⁵

Similarly, Judge Korman's opinion in *Khulumani* proposes a standard for aiding and abetting that makes the doctrine obsolete in the context of ATCA claims. According to Judge Korman, to plead aiding

²⁸⁹ *Id.* at *15-*16; *see also* note 204.

²⁹⁰ *In re South African Apartheid Litig.*, 2009 WL 960078, at *20; *see also* note 204.

²⁹¹ *In re South African Apartheid Litig.*, 2009 WL 960078, at *19; *see also* note 204.

²⁹² *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 773 (2008); *see supra* note 267 and accompanying text.

²⁹³ *See Herz, supra* note 131, at 216-17 (“Aiding and abetting is not the only form of liability that is or should be available to hold accountable corporations intimately involved in gross violations of universally recognized human rights.”); Maassarani, *supra* note 17, at 39 (noting that “aiding and abetting liability is threatened by a number of doctrinal and political challenges that counsel for a ready alternative”).

²⁹⁴ *Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 690 (7th Cir. 2008); *see supra* notes 229-234 and accompanying text.

²⁹⁵ *Boim*, 549 F.3d at 690.

and abetting, a plaintiff has to show that the defendant violated a universal international norm that extends aiding-and-abetting liability to the particular underlying international law offense giving rise to the suit.²⁹⁶ Under this standard then, one who aids and abets a violation of an international legal norm will also necessarily violate a universal international law himself, and thus become liable as a primary actor under ATCA. Eliminating such redundancies in the structure of the claims may actually benefit the cause of human rights advocacy by removing confusion from the courts, streamlining litigation, and shifting the focus to the issues of culpability and causation.

Thus, although a decision by the Supreme Court that limits the scope of ATCA to exclude aiding-and-abetting liability will eliminate one possible theory of recovery, it will not deprive deserving plaintiffs of relief. Instead, it will bring the courts' adjudication of ATCA claims in line with the related and more mature securities fraud jurisprudence. By doing so, it will screen out the weakest claims against corporate actors whose participation in human rights abuses is only attenuated, without at the same time denying plaintiffs the opportunity to assert stronger claims against secondary actors for primary violations, or to pursue alternative routes of redress.

VI. CONCLUSION

Holding secondary actors (in particular, corporations) accountable for their indirect participation in serious misconduct, remains a continuing concern for victims of securities fraud and human rights abuses alike. In a globalized world market, corporate players have the capacity to inflict serious harm on vast numbers of people without necessarily assuming the role of the primary perpetrator. Yet the doctrine of secondary liability is underdeveloped, poorly defined, and excessively politicized.²⁹⁷ In the context of securities litigation, since 1994, the Supreme Court has taken a course towards restricting the doctrine's application in Section 10(b) suits, first eliminating the lynchpin of secondary actor liability—aiding-and-abetting—in *Central Bank*, and then further narrowing the scope of this type of liability in *Stoneridge*.²⁹⁸ The doctrine, however, has been remarkably resilient to the Court's narrowing, and secondary actors continue to be held liable under Section 10(b).²⁹⁹ Consistent with its own precedent, the Supreme Court will likely similarly restrict secondary liability under ATCA in the near future, as foreshadowed by the Second Circuit's divided opinion in *Khulumani*. Yet the resilience of secondary actor suits under Section 10(b) suggests

²⁹⁶ *Khulumani*, 504 F.3d at 327, 331; see *supra* notes 190-192 and accompanying text.

²⁹⁷ See *supra* Part I.

²⁹⁸ See *supra* Parts III.B and III.D.

²⁹⁹ See *supra* Part III.C; *supra* notes 277-283 and accompanying text.

that secondary actor liability will likewise survive in the context of ATCA claims. Although it may have to shed the somewhat antiquated theory of aiding and abetting along the way, secondary actor liability under ATCA will continue to provide relief for victims of human rights abuse around the world.

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