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# Optimizing Liability for Extraterritorial Torts: A Response to Professor Sykes

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# Response: Optimizing Liability for Extraterritorial Torts: A Response to Professor Sykes

CHIMÈNE I. KEITNER\*

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In his article, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, Professor Alan Sykes applies a law-and-economics approach to the questions of whether it makes sense for U.S. courts (1) to be able to exercise adjudicatory jurisdiction over international law violations committed or facilitated by individuals (2) whose actions can be attributed to corporations that are (3) within the personal jurisdiction of U.S. courts.

Professor Sykes has previously studied the question of when and whether corporate shareholders should be held financially responsible for the harmful conduct of corporate agents (question 2 above).<sup>1</sup> Broadly speaking, vicarious liability makes the most sense when shareholders can actually influence corporate behavior.<sup>2</sup> In addition, Professor Sykes has explored the effects of liability for extraterritorial torts on the competitiveness of companies subject to U.S. jurisdiction (question 3 above).<sup>3</sup> His analyses have suggested that differential exposure to liability for companies that are otherwise similarly situated might distort investment decisions and lead to inefficient outcomes.<sup>4</sup> These questions implicate far more than the Alien Tort Statute (ATS).<sup>5</sup> They merit continued and serious study, which Professor Sykes’s most recent contribution will doubtless advance. My brief response focuses on the implications of Professor Sykes’s analysis for the interpretation and application of the ATS, a provision in the

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1. See, e.g., Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, in FOUNDATIONS OF TORT LAW 181 (Saul Levmore ed., 1994); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

2. See generally Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2179–80, 2197–2200, 2205 (2012).

3. Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339 (2008).

4. *Id.* at 349–61.

5. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789).

First Judiciary Act that gives U.S. federal courts adjudicatory jurisdiction over a limited number of international law violations that exhibit a requisite degree of specificity and universal acceptance.<sup>6</sup>

The question from a law-and-economics perspective is: Does enabling plaintiffs to bring suits against corporations under the ATS do more harm than good? Professor Sykes's answer is: It depends. Specifying the conditions under which corporate ATS liability is most likely to deter harmful conduct by corporate agents seems eminently useful to lawmakers who must ultimately decide whether to modify the existing statutory regime and to "cause lawyers" who view ATS litigation as a tool for enforcing human rights norms, deterring harmful conduct, and providing symbolic validation and monetary restitution to victims. Professor Sykes suggests that information regarding the actual deterrent value of ATS cases can also be useful to judges engaged in statutory interpretation; although this might be true, courts are not primarily charged with weighing such policy considerations, and it is far from clear that they are well equipped to do so. In fact, judges often take pains to deny that their decisions are motivated by policy preferences, even when such preferences appear to have played a large role in a given case.<sup>7</sup>

Although the ATS is terse, it is not fundamentally indeterminate. Traditional doctrinal analysis can answer many of the questions that arise in interpreting and applying the ATS, including, in my view, the question of corporate liability.<sup>8</sup> Nevertheless, it is still important to understand the policy implications of particular constructions of the ATS because the ATS remains subject to both judicial interpretation and legislative revision.

Professor Sykes's article offers a framework for analyzing the potential policy implications of various liability regimes for corporations involved in human rights violations outside of the United States. In his assessment, corporate ATS liability will produce the worst outcomes if the following assumptions hold true:

- Companies are fungible, which means that companies subject to ATS liability (and thereby subject to additional costs for collaborating with repressive regimes) will simply be replaced by readily available substitutes willing to aid and abet human rights violations;<sup>9</sup> and

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6. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–31 (2004).

7. See, e.g., Chimène I. Keitner, *The Politics of Corporate Alien Tort Cases*, 2011 PEPP. L. REV. ONLINE 23, 27 (discussing Judge Pierre Leval's dissent from the denial of rehearing by the panel in *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268 (2d. Cir. 2011)).

8. Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 74 (2008) (arguing that the most coherent approach views international law as the source of conduct-regulating rules that trigger federal jurisdiction under the ATS and domestic law as the source of non-conduct-regulating rules).

9. See Sykes, *supra* note 2, at 2200.

- Repressive regimes are more likely to continue violating human rights if they interact with companies from other countries with repressive regimes, so deterring companies subject to U.S. jurisdiction from collaborating with those regimes will actually foster further abuses.<sup>10</sup>

By contrast, a *lack* of corporate ATS liability could be problematic if the following is true:

- Companies will be deterred from conducting operations within the United States by a liability regime that makes extraterritorial torts relatively cheap, thereby creating additional inefficiencies by channeling investment outside of the United States.<sup>11</sup>

In sum, in this view, inefficiencies are most likely to arise when there is *differential* liability for the same conduct engaged in by different actors or in different geographic locations. Viewed in this light, ATS liability appears as one manifestation of the broader problem of differential liability regimes that can inform (or “distort”) investment decisions and encourage forum shopping when litigation ensues.

By examining ATS liability through the lens of these potential inefficiencies, Professor Sykes’s analysis enables us to isolate at least three critiques, which might be called the “failed deterrence” critique, the “competitive disadvantage” critique, and the “inefficient compensation” critique of corporate ATS liability. I address each in turn below.

#### I. THE “FAILED DETERRENCE” CRITIQUE

Professor Sykes indicates that in cases involving corporate aiding and abetting liability, one should ask whether imposing liability provides “an incentive for the aider and abettor to withhold assistance important to the commission of the harmful act” so that “the likelihood or seriousness of the harmful act will be diminished.”<sup>12</sup> In his view, the utility of aiding and abetting liability “is greatest when the purported aider and abetter provides a form of assistance that is either essential to the wrongful act or that makes it significantly easier (cheaper) to perpetrate, *and* when the primary wrongdoer cannot obtain comparable assistance from some other actor who will escape civil liability.”<sup>13</sup> Consequently, in his view, although human rights violations could perhaps be deterred by holding corporations liable for the direct commission or co-perpetration of human rights violations by their agents, aiding and abetting liability will not serve any purpose if repressive regimes can easily find other collaborators.

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10. *See id.* at 2200–02.

11. *See id.* at 2193–97.

12. *Id.* at 2188.

13. *Id.* at 2203.

Professor Sykes's example of *Talisman Energy*<sup>14</sup> actually suggests some potential benefits of ATS liability that might not be fully captured by an economic analysis. Professor Sykes invokes the *Talisman Energy* example as a case of a company from a liberal state abandoning an investment as a result of exposure to ATS liability and being replaced by a company from an illiberal state, with no resulting deterrence of the Sudanese regime's behavior.<sup>15</sup> In my view, using the *Talisman Energy* example for this purpose gives ATS liability both too much credit and too little. It gives ATS liability too much credit because Talisman's divestment from its project in the Sudan appears to have been the result of a much broader divestment campaign that produced, among other things, a credible threat by the U.S. Congress to delist Talisman shares from the New York Stock Exchange.<sup>16</sup> It gives ATS liability too little credit because such liability (and the broader campaign of which the lawsuit against Talisman formed a part) appears to have had a profound impact on Talisman itself, which now prides itself on being a leader in the field of corporate transparency in its other global activities.<sup>17</sup> Thus, although ATS liability did not deter the Sudanese regime's conduct, it does appear to have played some role in reshaping the corporate culture at Talisman Energy.

One might think of this as the difference between specific and general deterrence. Even assuming that the Sudanese government is beyond the power of ATS liability to deter, such liability might be part of a broader set of strategies for promoting internalization of corporate social responsibility norms that have broader effects in reducing the harms caused by various corporate activities, particularly in countries whose own legal and regulatory frameworks are not well equipped to control or avoid those harms. Moreover, ATS jurisprudence has served an important function in articulating norms for corporate behavior that, in turn, can exert a compliance pull even beyond the framework of formal adjudication.<sup>18</sup> These potential benefits should factor into an assessment of the costs and benefits of the current liability regime.

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

15. See Sykes, *supra* note 2, at 2195.

16. See Reg Manhas, *Talisman in Sudan: Impacts of Divestment*, COMPACT QUARTERLY (Mar. 16, 2007), [http://www.enebuilder.net/globalcompact/e\\_article000775162.cfm?x=b11,0,w](http://www.enebuilder.net/globalcompact/e_article000775162.cfm?x=b11,0,w). Nobel Laureate economist Joseph Stiglitz has expressed the view that: "Concern that the expected cost of potential future ATS suits will cause corporations to withdraw from [Less Developed Countries] appears to be little more than hyperbole, lacking empirical support." Brief of Joseph E. Stiglitz as Amicus Curiae in Support of Petitioners at 5, *Mohamad v. Palestinian Authority*, No. 11-88 (Dec. 21, 2011), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs/10-1491\\_petitioner\\_amcu\\_stiglitz.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_stiglitz.authcheckdam.pdf).

17. Manhas, *supra* note 16.

18. U.N. Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 30, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John Ruggie) (characterizing decisions in ATS cases as the "largest body of domestic jurisprudence regarding corporate responsibility for international crimes").

## II. THE “COMPETITIVE DISADVANTAGE” CRITIQUE

The “competitive disadvantage” critique also appears to give the ATS both too much and too little credit. Professor Sykes notes that “[a]llegations of complicity in human rights abuse and similar egregious misconduct can seriously damage corporate reputations, resulting in substantial market penalties from customers or other business partners troubled by such allegations.”<sup>19</sup> Certainly, a lawsuit brought under the ATS might provide a vehicle and vocabulary for the articulation of complaints about alleged corporate misconduct. However, as the *Talisman Energy* example illustrates, there are myriad other channels for such pressures. It is not clear that ATS liability, or lack thereof, actually has a significant marginal effect one way or the other. Moreover, insulating companies from the potentially negative impact on share prices from reputational damage in the name of a level playing field would create other problems because, as Professor Sykes observes, “[w]hen businesses do not pay for the harms that they cause, their costs of doing business are lower than they should be from a social standpoint, resulting in lower prices and an undue expansion of risky activity.”<sup>20</sup>

Differential liability regimes can arise from a number of factors, including the presence or absence of judicial fora for entertaining complaints, differences in applicable substantive law, different pleading requirements and abstention doctrines, and so forth. Over time, ATS liability could become less important as more complainants seek local redress<sup>21</sup> or turn to other fora, including European courts.<sup>22</sup> At the time of writing, the largest award against a corporation for environmental damage (which is not currently actionable under the ATS) came from a court in Ecuador, not the United States.<sup>23</sup> In this sense, the world is becoming increasingly “flat.”<sup>24</sup> The ATS might have been a statute ahead of its time in providing a federal (as opposed to state) forum for adjudicating law of

19. Sykes, *supra* note 2, at 2195.

20. *Id.* at 2184.

21. See, e.g., Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1447 (2011) (examining the problem of “forum shopper’s remorse” in light of the spread of U.S.-style litigation and pro-plaintiff judgments in other countries).

22. For example, Shell initially agreed to settle a class action suit brought in the United Kingdom relating to two oil spills in Nigeria. See Sylvia Pfeifer & Jane Croft, *Shell’s Nigeria Payout Could Top \$400-million*, GLOBE AND MAIL (Aug. 3, 2011, 3:12 PM), <http://www.theglobeandmail.com/report-on-business/international-news/african-and-mideast/article2118618.ece>. When settlement negotiations broke down, the plaintiffs refiled their claims in London’s high court. Jane Croft, *Shell Faces Claim Over Niger Delta Spills*, FINANCIAL TIMES (Mar. 22, 2012, 5:13 PM), <http://www.ft.com/intl/cms/s/0/4132be9e-7423-11e1-9951-00144feab49a.html#axzz1r0bz0kfw>. The 2000 Brussels regulation on jurisdiction has been interpreted by the European Court of Justice as requiring courts to assert jurisdiction over locally domiciled defendants. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383, ¶¶ 23–35.

23. Naomi Mapstone, *Ecuador Court Upholds \$18bn Chevron Ruling*, FINANCIAL TIMES (Jan. 4, 2012, 4:19 AM), <http://www.ft.com/intl/cms/s/0/e2404598-367c-11e1-a3fa-00144feabdc0.html#axzz1nLMG7Ygl>.

24. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

nations violations, but there seems to be little empirical support for the proposition that it unduly burdens companies subject to U.S. jurisdiction with excessive obligations or exposure compared to their non-U.S. counterparts.

### III. THE “INEFFICIENT COMPENSATION” CRITIQUE

It is no doubt true, as law and economics scholars have long observed, that “civil litigation is an extremely expensive mechanism for shifting money around from one person’s pocket to another.”<sup>25</sup> Indeed, ATS cases against individual human rights violators have been particularly inefficient at doing this because many of the damages awards have been unenforceable due to the lack of obtainable assets.<sup>26</sup> As suggested above, these cases have nonetheless played, and continue to play, an important role in providing symbolic vindication to victims, engaging U.S. courts in the process of articulating and enforcing international norms, and—in the case of individual defendants—detering human rights violators from entering and remaining in the United States. Cases against corporate defendants may perform the first two of these functions and may also provide increased opportunities for obtaining compensation. Although other forms of wealth transfer from corporations to the populations adversely affected by their activities would likely be more efficient than ATS liability, the ideal system has yet to be designed and implemented on a global scale. Tort liability should be compared to the existing alternatives.

In sum, although existing agency laws and jurisdictional rules might not be optimal, this is not only—or even primarily—a problem with the ATS. As Professor Sykes indicates, the doctrinal framework for ATS liability is structured to avoid suits that interfere unduly with the conduct of U.S. foreign relations, that seek to hold companies liable for merely “doing business” in a country governed by an unsavory regime, that should more appropriately be heard in another country’s courts, and that do not plead sufficiently specific or universal violations. Absent action by Congress, courts can and should allow the remaining suits to proceed against individual defendants and against the corporate entities on behalf of which those individuals acted.

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25. Sykes, *supra* note 2, at 2181.

26. *E.g.*, *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984) (awarding \$10 million default judgment against a Paraguayan official for torture in Paraguay).