



# **Business and Human Rights: Enhancing Accountability and Access to Remedy**

**Project 2: Roles and Responsibilities of Interested States**

**OHCHR Working Paper #2**

**State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases (2000-2015)**

**April 2015**

## **1. Introduction**

### **1.1 Background to study**

This short study of amicus curiae briefs filed by States and State agencies in Alien Tort Statute (“ATS”) cases was carried out during April 2015 as part of preparatory work for the OHCHR’s “Accountability and Remedy Project”. The OHCHR’s Accountability and Remedy Project comprises six distinct, but interrelated, projects and will run until June 2016.<sup>1</sup> At that point, OHCHR will report the outputs and recommendations from the initiative to the United Nations Human Rights Council, as requested in Human Rights Council resolution A/HRC/RES/26/22.<sup>2</sup>

The six projects that comprise the OHCHR’s Accountability and Remedy Project have been selected because of their strategic value and potential to improve accountability from a practical, victim-centred perspective.<sup>3</sup>

Project 2 of the Accountability and Remedy Project is entitled “Roles and responsibilities of interested States”. This project will explore current and developing State practices and attitudes with respect to the appropriate use of extraterritorial jurisdiction and domestic measures with extraterritorial implications in cases of allegations of business involvement in severe human rights abuses. It will result in “good practice” guidance for States in relation to the management of cross-border cases and explore possible models of international and bilateral cooperation.

### **1.2 Aims of study**

In a number of ATS cases, States and State agencies have intervened in the litigation by way of letter, declaration or (most commonly) amicus curiae brief, expressing views about the appropriate limits of jurisdiction in the particular case, or more generally as a matter of policy. The aim of this study was to review as many of these interventions as possible and to consider what these interventions tell us about current and developing State practice with respect to the use of extraterritorial jurisdiction in cases involving allegations of business involvement in severe human rights abuses. In particular:

- (a) What are the main arguments used for and against the use of extraterritorial jurisdiction in human rights cases?
- (b) How do these arguments differ from arguments for and against extraterritorial jurisdiction in other regulatory areas?
- (c) To what extent is there already consensus between States as to the circumstances in which the use of extraterritorial jurisdiction should

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<sup>1</sup> Further information about the OHCHR’s Accountability and Remedy project can be found at <http://business-humanrights.org/en/ohchr-accountability-and-remedy-project>.

<sup>2</sup> The text of this resolution is available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/22](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/22).

<sup>3</sup> More information about the content and aims of these six projects can be found at [http://business-humanrights.org/en/ohchr-accountability-and-remedy-project/content-timeline-and-process#prgm\\_work](http://business-humanrights.org/en/ohchr-accountability-and-remedy-project/content-timeline-and-process#prgm_work).

- be prohibited, tolerated or encouraged in human rights cases and the limits that should be observed?; and
- (d) What do States view as the best safeguards against “excessive” claims of extraterritorial jurisdiction and how best can jurisdictional conflicts be resolved?

### **1.3 How the study findings will be used**

The findings of this preliminary study will be used to help inform preparations for, and give practical context to, interactive workshop discussions on the cross-border regulatory and enforcement issues and challenges posed by business involvement in severe human rights abuses. These discussions are scheduled to take place in the latter half of 2015. The aims of these workshops will be as follows:

- to clarify the legal and practical problems that can arise in cross-border cases;
- to understand the ways in which existing views of roles and responsibilities are likely to shape State responses;
- drawing from experience in other regulatory fields, to consider ways that States can work together cooperatively to address the challenges that arise in cross-border cases;
- to test and give participants the opportunity to react to different possible models of international cooperation; and
- to identify the possible elements of a principled basis for appropriate action in relation to jurisdictional matters.<sup>4</sup>

### **1.4 Methodology**

Westlaw US online databases were consulted in relation to 44 ATS-based cases and class actions initiated between 1996 and the present. Each of the cases in this sample group concerned claims against business enterprises for remedies for harm arising from alleged business involvement in severe human rights abuses. Of these, amicus briefs and other submissions relating to the extraterritorial scope of ATS were found to have been filed in 10 separate cases. Copies of the relevant briefs and submissions were obtained from Westlaw, internet searches, and other internal and external sources.<sup>5</sup> These briefs and submissions (which numbered around 30) were then reviewed and arguments for and against extraterritorial jurisdiction, and case-specific comments and concerns, were also noted. The table below shows the frequency with which different States and regional organisations have responded to ATS litigation using this method (in descending numerical order), and the spread of jurisdictions reflected in the study. Further

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<sup>4</sup> For more information about the planned programme of work for Project 2 (“Roles and responsibilities of interested States”) specifically, see <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyWorkPlans.pdf>.

<sup>5</sup> The authors would like to acknowledge the assistance of Mr Andrew Sanger and Ms Lesley Dingle of the University of Cambridge.

information about the number and dates of filings in each case and the content of State submissions can be found in Annex 1.

It is recognised that these amicus curiae briefs and other interventions were filed and made in a legal context that predates the Supreme Court’s 2013 decision in *Kiobel v Royal Dutch Petroleum*. However, this does not diminish the significance of these documents as evidence of developing State practice and attitudes with respect to the use of extraterritorial jurisdiction in human rights cases.

**Table 1: Number of interventions, by State and regional organisation**

**Note:** Of the interventions noted below, a number were jointly made. United Kingdom and Australia have made joint submissions on three occasions. United Kingdom and Netherlands have made joint submissions on two occasions, and United Kingdom and Germany have made a joint submission on one occasion.

State (or regional group of States)	Number of interventions
United States	13
United Kingdom	7
Australia	3
South Africa	3
Netherlands	2
Germany	2
Ecuador	2
Papua New Guinea	2
Argentina	1
Colombia	1
European Union	1
Switzerland	1

## 1.5 Scope and disclaimer

The main aim of this study is to gather information about State practice and State attitudes towards the use of extraterritorial jurisdiction for the purposes of future work. As such, neither the study nor the OHCHR takes any position as to the legal, factual or policy merits of any specific arguments for or against extraterritorial jurisdiction, whether in specific cases or generally. As discussed above, the aim is to gain a better understanding of general themes and positions to help inform future interactive discussions with government representatives, for the purposes of the Accountability and Remedy Project.

## 2. Discussion

### 2.1 What are the main arguments for and against the use of extraterritorial jurisdiction in human rights cases against companies that have been raised in amicus briefs filed by States and State agencies in ATS cases?

Of the approximately 30 submissions reviewed, only one submission (Argentina, June 2012, filed in *Kiobel v Royal Dutch Petroleum*) was unequivocally in favour of the expansive use of extraterritorial jurisdiction in human rights cases. This submission by Argentina put forward two main arguments; one policy-based and one legal. First, it is argued that the line of authorities dating back to the *Filartiga* case<sup>6</sup> has had a significant impact in terms of ending the impunity of human rights abusers<sup>7</sup> and, second, that this is not a case of one country seeking to impose its rules on another, because of the universal nature of the substantive norms that the ATS seeks to protect.

A further intervention (Ecuador, December 2001, filed in *Aguinda v Texaco*) relating to the application of Ecuadorian laws governing tort recovery can also be interpreted as support for the use of United States extraterritorial civil jurisdiction in that case.

The remainder of amicus curiae briefs and other interventions reviewed in this study express concern (in some cases “grave concern”) about the apparent willingness of some courts to assert jurisdiction over foreign (i.e. non-US) defendants in respect of foreign (i.e. non-US) activities. Particular criticism and concern appears to be reserved for assertions of jurisdiction in the so-called “F-cubed” cases (i.e. foreign plaintiff, bringing a claim against a foreign defendant in respect of foreign activities).

The submissions of the United States tend to focus on the foreign policy implications of assertions of extraterritorial jurisdiction in individual cases,

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<sup>6</sup> *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir. 2003). This was a landmark case, which first drew attention to the potential of the ATS as a means of holding individuals accountable for human rights abuses taking place outside the United States.

<sup>7</sup> See p. 3 of Amicus Brief, Argentina, filed 13 June 2012, “*Filartiga* represented a step against impunity when no other remedies were available, and its loss as a precedent would undermine the international system for the protection of human rights that the foreign policy of the Argentine Republic seeks to uphold”.

whereas the submissions of other States (notably States of domicile of defendant companies, such as the United Kingdom, Germany, Netherlands and Australia) focus to a greater extent on the international law position, querying whether such assertions of jurisdiction are compliant with established international law principles. In addition, this group of “home States” for the defendant companies in various cases have raised concerns about the problems of legal uncertainty for companies, adverse impacts on international trade and commerce, the inefficiencies associated with litigation elsewhere than in the “territorial State”<sup>8</sup> and the impacts that United States extraterritorial jurisdiction may have, in the longer term, on legal development in States with the closest territorial connection to the dispute, and especially developing States.

South Africa and Papua New Guinea (two of the very small group of “territorial” States that have made interventions in ATS cases) have both raised concerns about the implications of the litigation for their own post-conflict strategies. For instance, in a Declaration filed by South Africa in the case of *In Re Apartheid Litigation (Khulumani)* in 2003, the South African Minister for Justice and Constitutional Development argued that it was “*unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our Constitution of the promotion of national reconciliation*”.<sup>9</sup>

The arguments against the use of extraterritorial jurisdiction that have been employed in the State amicus briefs filed in ATS cases can be divided under four main headings:

- Legal objections (international and domestic);
- Foreign policy objections;
- Economic and legal development objections; and
- Commercial and practical objections.

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<sup>8</sup> i.e. the State in whose territory the abuses are alleged to have taken place.

<sup>9</sup> However, note that the concerns expressed by the South African government in this Declaration were later withdrawn following the dismissal of “doing business” claims in the class action. See further n. 51 below and accompanying text. The United States analogised from this case in its brief submitted in September 2006 in the case of *Sarei v Rio Tinto*, arguing that “the peace agreement ending the ten-year Bougainville conflict contains its own reconciliation provisions and provides immunity for certain conflict-related behaviour ... A court in the United States is not well-positioned to evaluate what effect adjudication of claims such as those asserted here may have on a foreign sovereign’s efforts to resolve conflicts”, see p. 14. See also Papua New Guinea, Letter from Ambassador Mrs Susan Jacobs, October 2001 in connection with the case of *Sarei v Rio Tinto*, the contents of which are summarised in Annex 1.

### 2.1.1 Legal objections (international and domestic)

In support of arguments in favour of the application of a “presumption against extraterritoriality” it is frequently argued in the amicus briefs submitted by the United States that the ATS was never intended to apply extraterritorially.<sup>10</sup> The claim is made based on arguments about the original motivations behind the ATS and the legal conditions and needs prevailing at the time.

The briefs that have been submitted by the United Kingdom (jointly in a series of cases with Australia, Netherlands and Germany, see further Annex 1) have repeatedly made the argument that extraterritorial application of the ATS in cases “with little or no connection with the United States” would be contrary to international law.<sup>11</sup> It is further argued, in a series of briefs submitted by the United Kingdom (jointly with other States),<sup>12</sup> and by the United States<sup>13</sup> and other States,<sup>14</sup> that the extension of extraterritorial jurisdiction in some cases, particularly in cases concerning the conduct of a foreign government, could be viewed as an infringement of the territorial State’s sovereignty.

The existence of “universal civil jurisdiction”<sup>15</sup> is disputed in a number of the State briefs filed in ATS cases.<sup>16</sup> However, the amicus curiae brief submitted by the European Commission in the case of *Kiobel v Royal Dutch Petroleum* in June 2012 suggests that there may be some support for the idea of universal civil jurisdiction within the European Union.<sup>17</sup>

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<sup>10</sup> See for instance the amicus brief submitted by the United States (September, 2006) in *Sarei v Rio Tinto*, pp. 10-12. See also amicus brief submitted by the United States (May, 2007) in the case of *Presbyterian Church of Sudan v Talisman*, pp. 6-9.

<sup>11</sup> See for example, the joint brief submitted by the United Kingdom and Australia (December 2011) in the case of *Sarei v Rio Tinto*, pp. 2-3. See also joint brief submitted by the United Kingdom and Netherlands (June, 2012) in *Kiobel v Royal Dutch Petroleum*, p. 2.

<sup>12</sup> See, for instance the joint brief filed by the United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011) and the joint brief filed by the United Kingdom and Netherlands in *Kiobel v Royal Dutch Petroleum* (February, 2012) and the letter from the United Kingdom Embassy which appears as Appendix B to the brief filed by the United States in *In Re Apartheid Litigation* (October, 2008).

<sup>13</sup> See, for instance, the briefs filed by the United States in *Sarei v Rio Tinto* (September, 2006) and in *In Re Apartheid Litigation* (October, 2008).

<sup>14</sup> See, for instance, the brief filed by Germany in *Kiobel v Royal Dutch Petroleum* (February, 2012)

<sup>15</sup> i.e. extraterritorial subject-matter jurisdiction in civil (or “private law”) cases arising from a limited range of international crimes in respect of which there would be universal criminal jurisdiction. “Universality” is an established basis of extraterritorial criminal jurisdiction under international law, under which States may prosecute offenders in the absence of a territorial link between the case and the forum State in respect of a very limited range of particularly serious offences deemed so repugnant that all States are said to have an interest in their prevention and punishment. See further n. 40 below and accompanying text.

<sup>16</sup> See the joint brief of the United Kingdom and Australia in *Sarei v RTZ*, December 2011, p. 8, and the joint brief submitted by the United Kingdom and the Netherlands (June 2012) in *Kiobel v Royal Dutch Shell*, pp. 12-13. See also intervention of Switzerland in *In Re Apartheid Litigation*, shown as Appendix C to the amicus curiae brief submitted by the United States in October 2008. The arguments of the Swiss Government are summarised at Annex 1 to this study.

<sup>17</sup> Brief of the European Commission on behalf of the European Union (June, 2012) filed in *Kiobel v Royal Dutch Petroleum*, pp. 17-18. See further discussion at p. 11 below.

## 2.1.2 Foreign policy objections

The United States has raised foreign policy objections to the use of extraterritorial jurisdiction in a number of ATS cases.<sup>18</sup> These objections are generally couched in terms of warnings about the possible adverse implications of extraterritorial litigation for diplomatic relations and the realisation of foreign policy strategies. Concerns have been expressed about the possible closing off of foreign policy options, including that of economic engagement.<sup>19</sup> Cases where plaintiffs seek to rely on theories of “aiding and abetting” to hold defendant companies responsible for human rights abuses perpetrated by foreign governments appear to raise particular foreign policy concerns. As it was put in the Supplemental brief filed by the United States *Doe v Unocal* in 2004, “[i]t would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-à-vis its own citizens.”<sup>20</sup> Later, in the same brief, it is argued that “[a]dopting aiding and abetting liability under the ATS would trigger a wide range of ATS actions where plaintiffs seek to challenge the conduct of foreign nations – conduct that could otherwise be immune under the Foreign Sovereign Immunities Act”.<sup>21</sup>

A number of State briefs warn of the potential of “unintended clashes” between the laws of the United States and the laws of other States, should the ATS be extended extraterritorially. This, it is argued, justifies the legal “presumption against extraterritoriality”, discussed above,<sup>22</sup> or the exercise of “international comity”. In addition, a number of States warn of the impact that jurisdictional conflicts provoked by the ATS could have on future cooperation on economic and security matters. For instance, the United States argued in a brief submitted in the case of *Doe v Unocal*:

*“Experience has shown that aiding and abetting law suits often trigger foreign government protests, both from the nations where the alleged abuses occurred, and, in cases against foreign corporations, from the nations where the corporations are based or incorporated (and therefore regulated). This can and already has led to a lack of cooperation on important foreign policy objectives”.*<sup>23</sup>

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<sup>18</sup> See Table at Annex 1. See *Doe v Unocal* (US, May 2003 and August 2004),

<sup>19</sup> A fairly standard, and often repeated summing up of the position can be found in the amicus brief submitted by the United States in May 2007 in *Presbyterian Church of Sudan v Talisman*, in which it is argued that civil aiding and abetting liability for ATS claims would create “uncertainty that would interfere with the ability of the U.S. Government to employ its full range of foreign policy options when interacting with regimes whose policies, including domestic policies, the United States would like to influence. In some circumstances, U.S. Government policy may be to broadly prohibit trade and investment with another country. But in other cases, the Government may determine that commercial interaction is desirable in encouraging reform and gaining leverage”, at p. 19.

<sup>20</sup> Supplemental brief filed by the United States *Doe v Unocal* (August, 2004)

<sup>21</sup> *Ibid*, at p. 15. See also brief submitted by the United States (October, 2008) in *In Re Apartheid Litigation*, pp. 14-15.

<sup>22</sup> See, for instance the Supplemental brief filed by the United States *Doe v Unocal* (August, 2004), p. 5.

<sup>23</sup> Brief submitted by the United States in *Doe v Unocal* (August, 2004), p. 16.



### 2.1.3 Economic and legal development objections

A series of amicus briefs filed in ATS cases have raised concerns about the impact of assertions of extraterritorial civil jurisdiction in human rights cases on future economic and legal development, especially in less developed counties or countries whose citizens have suffered from abusive regimes in the past.

**Economic development:** Concerns about economic development tend to centre on the impacts that “excessive” assertions of extraterritorial jurisdiction may have on trade and investment. As noted above, a number of briefs (and especially those from the United States) expressed concern about the different ways in which ATS may pose difficulties for the implementation of domestic policies relating to foreign economic engagement.<sup>24</sup> Several briefs argue further that ATS may have adverse economic impacts in the longer term. The United States makes the argument in a brief filed in *In Re Apartheid Litigation* as follows:

*“As the President recently said in his address to the United Nations, “In the long run, the best way to lift people out of poverty is through trade and investment ... Open markets ignite growth, encourage investment, increase transparency, strengthen the rule of law, and help countries help themselves”...[quote ends] ... Civil aiding and abetting liability would, however, have a deterrent effect on the free flow of trade and investment, because it would create uncertainty for those operating in countries where abuses might occur.”*<sup>25</sup>

The submission then quotes from a letter from the Ambassador of the United Kingdom to the US Secretary of State:

*“As foreign governments have noted in protest, the prospect of costly litigation under so expansive a theory “may hinder global investment in developing countries, where it is most needed, and inhibit efforts by the international community to encourage positive changes in developing countries”.*<sup>26</sup>

The intervention by the South African government in the same case provides a territorial State’s perspective:

*“The government’s policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal. Government’s policies of reconstruction have largely depended on forging constructive business partnerships”.*<sup>27</sup>

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<sup>24</sup> See n. 18 above.

<sup>25</sup> Brief submitted by the United States in *In Re Apartheid Litigation* (February, 2008), p. 20.

<sup>26</sup> *Ibid*, Appendix B, p. 5a,

<sup>27</sup> See the Declaration by the Minister for Justice and Constitutional Development, Dr P.M. Maduna (June, 2003) in *In Re Apartheid Litigation (Khulumani)*, annexed to the joint brief of the United Kingdom and Netherlands submitted in the case of *Kiobel v Royal Dutch Petroleum* (June, 2012), pp. 10a-13a.

One brief submitted by the United States in *Bauman v DaimlerChrysler* also considers the economic impacts of very flexible rules on establishing personal jurisdiction over foreign companies for the United States as “forum State”:

*“From an economic perspective, the inability to predict the jurisdictional consequences of commercial investment or activity may be a disincentive to that activity ... [the] ... uncertain threat of litigation in United States, especially for conduct with no significant connection to the United States, could ... discourage foreign commercial enterprises from establishing channels for the distribution of their goods and services in the United States, or otherwise making investments in the United States.”*<sup>28</sup>

**Legal development:** Concerns about the impacts on legal development are summed up in the following excerpt from a joint submission made by the United Kingdom and Netherlands in *Kiobel v Royal Dutch Petroleum*:

*“... in many circumstances, international human rights law imposes a positive obligation on States to regulate corporations within their territory so they are prevented from committing human rights abuses against individuals or other private parties. This is not just a legal technicality: the Governments are concerned that, by allowing ATS claims with little nexus with the U.S., some States might be given reason to down-play or even ignore their own responsibilities for implementing their human rights law obligations. They will also come under less pressure to provide a remedy for, and indeed prevent, abuses, if plaintiffs have resource to redress elsewhere.”*<sup>29</sup>

The European Union, in an intervention made in the same case in June 2012, argues that “[a]s opposed to “remote justice”, such “in-country justice” may be more likely to inspire accountability in the afflicted nation, and, where needed, to generate remedial reforms.”<sup>30</sup> The brief submitted by Germany in the same case in February 2012 makes a similar point, arguing that adverse pronouncements by one State on the quality of justice in another State can become “self-fulfilling”.<sup>31</sup>

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<sup>28</sup> See brief submitted by the United States in *Bauman v Daimler Chrysler* (June, 2013), p. 2.

<sup>29</sup> See joint submission of United Kingdom and Netherlands in *Kiobel v Royal Dutch Petroleum* (June, 2012), p. 35. See also the joint submission of the United Kingdom and Australia in *Sarei v Rio Tinto*, (December, 2011) in which the United Kingdom and Australia argued that to allow suits “by foreign nationals under a U.S. law for conduct abroad ... could ... serve to interfere and complicate efforts within the territorial State to bring about redress for civil wrongs before domestic courts”, p. 8. However, note that the concerns expressed by the South African government in this Declaration were later withdrawn following the dismissal of “doing business” claims in the class action. See further n. 51 below and accompanying text.

<sup>30</sup> Brief submitted by the European Commission on behalf of the European Union (June, 2012), p. 33.

<sup>31</sup> See amicus brief submitted by Germany in *Kiobel v Rio Tinto* (February, 2012), p. 13 quoting *Monegasque de Reassurances S.A.M. (Monde Re) v NAK Naftogaz of Ukraine* 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001).

#### 2.1.4 Commercial and practical objections

A number of States (notably the United States and the “home States” of the defendant companies in specific cases) have objected to the use of extraterritorial jurisdiction on the basis of the difficulties and expense associated with the litigation,<sup>32</sup> the problems associated with gathering and presenting evidence from outside the forum State,<sup>33</sup> the lack of efficiency of extraterritorial litigation, the excessive burden placed in the United States courts,<sup>34</sup> and issues of legal uncertainty and general “unfairness”.<sup>35</sup> These objections have obvious links with the concerns about the potential economic impacts of ATS litigation discussed above. A smaller number of briefs also raised the issue of “forum shopping”,<sup>36</sup> and the difficulties of enforcing judgments in cases where jurisdiction is disputed.<sup>37</sup>

#### 2.2 How do these arguments differ from arguments for and against extraterritorial jurisdiction in other regulatory areas?

The review of briefs submitted in ATS cases suggest that, as far as the use of extraterritorial jurisdiction to enforce human rights norms is concerned, a split in opinion is developing. The first standpoint, epitomised by the interventions of the United Kingdom, would not appear to treat human rights–related litigation as a special case. Instead, the arguments against extraterritoriality that have been employed in other areas, such as in relation to securities and competition law, are applied equally to ATS cases. For instance, in the joint submission by the United Kingdom and the Netherlands in *Kiobel v Royal Dutch Petroleum*, the Governments note that they, along with Ireland, have previously filed a joint amicus brief “detailing similar concerns on the exercise of extraterritorial antitrust jurisdiction by the U.S” in the case of *F. Hoffman-La Roche v Empagran S.A.* (an antitrust case). The joint brief then goes on to note that the views expressed in the brief “echoes the views expressed by other governments in ATS, antitrust and securities cases before this Court – including the Governments of Australia, Belgium, Canada, France, Germany and Japan”, citing, in addition to ATS cases and the case of *F. Hoffman-La*

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<sup>32</sup> See joint brief of the United Kingdom and the Netherlands in *Kiobel v Royal Dutch Petroleum*, (June, 2012), p. 27.

<sup>33</sup> *Ibid*, p. 32.

<sup>34</sup> See brief submitted by the United States in *Doe v Unocal* (August, 2004); joint brief submitted by the United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011); brief submitted by Germany in *Kiobel v Royal Dutch Petroleum* (February, 2012).

<sup>35</sup> See brief submitted by the United States in *Doe v Unocal* (August, 2004); joint brief submitted by the United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011); brief submitted by Germany in *Kiobel v Royal Dutch Petroleum* (February, 2012); brief submitted by the United States in *In Re Apartheid Litigation* (February, 2008); Letter from the Ambassador of the United Kingdom to the US Secretary of State, 30 January 2008 (re *In Re Apartheid Litigation*); Aide Memoire of the Government of Switzerland, December 2007 (re *In Re Apartheid Litigation*); Application for leave to participate in Oral Argument, United States, August, 2013.

<sup>36</sup> See joint brief submitted by the United Kingdom and the Netherlands in *Kiobel v Royal Dutch Petroleum* (June, 2012), pp. 27-29; joint brief submitted by the United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011).

<sup>37</sup> See the brief submitted by the United States in *Bauman v DaimlerChrysler* (June, 2013), p. 2.

*Roche v Empagran S.A.*, the controversial so-called “F-cubed” securities case, *Morrison v National Australian Bank Ltd.* The amicus briefs filed by “home States” of defendant companies (and the United Kingdom in particular) do not appear to entertain the possibility that human rights cases (as opposed to other regulatory areas) may give rise to any special considerations, require any special treatment, or be subject to special jurisdictional rules. On the contrary, in a joint submission by the United Kingdom and Australia in the case of *Sarei v Rio Tinto*, the Governments argue that approaches to extraterritoriality in human rights cases are being distorted by a “psychological problem”:

*“The human rights dimensions of these ATS cases seem to have resulted in more of a downplaying of the jurisdictional constraints of international law in comparison to the class action complaints that allege more traditional business wrongs committed internationally (as in antitrust and securities areas)”*.<sup>38</sup>

At the same time, a very different line of argument has been developed in a smaller number of briefs. This alternative approach is that cases involving allegations of severe human rights abuses do indeed require a special set of jurisdictional rules. The brief submitted by Argentina in *Kiobel v Royal Dutch Petroleum* (and also, though to a lesser extent, the European Union, see further below) suggests that in civil claims for redress for “universally accepted well-defined violations of international law”, domestic courts should have considerably more latitude to assert jurisdiction over foreign defendants and activities than in other areas. It is argued in the 2012 brief submitted by Argentina in *Kiobel v Royal Dutch Petroleum* that:

*“[u]nlike transitory tort scenarios where a court may be tempted to apply its own law to events arising abroad, the Alien Tort Statutes and accompanying federal common law as enunciated in Sosa do not involve issues of the United States projecting its law abroad. The substantive International Law norms that Sosa would have U.S. courts apply are already universal in nature and have been incorporated into the domestic law of most countries.”*<sup>39</sup>

In its own intervention in the same case, the European Commission (on behalf of the European Union) puts forward a theory of universal civil jurisdiction which, by virtue of an application of the “universality” principle, would give States greater latitude to use extraterritorial civil jurisdiction in relation to a limited group of egregious human rights violations, than would exist in other regulatory areas governed by domestic law:

*“The exercise of universal civil jurisdiction is less established in international law than its criminal counterpart [footnote omitted]. Nonetheless, the assertion of universal civil jurisdiction is consistent with international law if confined by the limits in place for universal criminal jurisdiction. Accordingly,*

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<sup>38</sup> Joint brief submitted by the United Kingdom and Australia in the case of *Sarei v Rio Tinto* (December, 2011).

<sup>39</sup> Brief of Argentina submitted in *Kiobel v Royal Dutch Petroleum* (June, 2012).

*an ATS action based on universal jurisdiction should operate solely to provide civil remedies to the victims of repugnant criminal acts of universal concern”.*<sup>40</sup>

The EU brief continues:

*“This application of the ATS is consistent with the growing recognition in the international community that an effective remedy for repugnant crimes in violation of fundamental human rights includes, as an essential component, civil reparations to the victims”.*<sup>41</sup>

In summary, the amicus briefs submitted in ATS cases seem to diverge in two different directions in relation to extraterritorial jurisdiction in cases of severe human rights abuses. One line of argument is that ATS cases are subject to the same rules on extraterritorial jurisdiction as other regulatory areas. However, an alternative view is that severe human rights cases are indeed a special case, to which special considerations apply, by virtue of the heinous nature of abuses, the interests of the entire international community in the prevention and punishment of such abuses and the access to remedy imperatives, at least as far as international crimes such as torture, genocide and war crimes are concerned.

In addition, it has been argued in at least one State amicus brief<sup>42</sup> that, as the substantive legal standards are universal in nature, enforcement in relation to defendants or activities outside the forum State does not actually amount to an attempt to impose domestic rules extraterritorially. For this reason, extraterritorial application of “universal” human rights standards can be distinguished from other forms of extraterritorial regulation which are used to promote and protect purely national interests. However, other submissions raise potential difficulties with this line of argument. The 2004 brief submitted by the United States in *Doe v Unocal* rejects the idea that the US courts, in taking jurisdiction in ATS cases, would be giving effect to international (rather than domestic) law:

*“although the substantive norm to be applied is drawn from international law or treaty, any cause of action recognised by a federal court is one devised as a matter of federal common law, i.e. the law of the United States. The question, thus, becomes whether the challenged conduct should be subject to a cause of action under – and thus governed by – U.S. law. In this case, the aiding and abetting claim asserted against defendants turns upon the abusive treatment of the Burmese people by their military government. It would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-à-vis its own citizens in its own territory, and all the more so for a federal court to do so as a matter of common law-making power”.*<sup>43</sup>

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<sup>40</sup> Brief of the European Commission on behalf of the European Union (June, 2012) filed in *Kiobel v Royal Dutch Petroleum*, pp. 17-18

<sup>41</sup> *Ibid*, p. 18.

<sup>42</sup> See submission of Argentina in *Kiobel v Royal Dutch Petroleum* (June, 2012). See further discussion at p. 4 above.

<sup>43</sup> Brief submitted by the United States in *Doe v Unocal*, (August, 2004), p. 4.

The difficulty alluded to in this submission is that although international law may supply the substantive norms against which a defendant's conduct is to be judged, the cause of action, procedural issues, and rules governing sanctions and appropriate compensation and methods of enforcement will necessarily be supplied by domestic law, meaning that the potential for jurisdictional conflict may still exist.

The methods that may be employed by States to help reduce the potential for, and severity of, jurisdictional conflicts are discussed further at section 2.4 below.

### **2.3 To what extent is there already consensus between States as to the circumstances in which the use of extraterritorial jurisdiction should be prohibited, tolerated or encouraged in human rights cases and the limits that should be observed?**

It is clear from the review of the amicus briefs carried out for the purposes of this study that some extraterritorial cases give more concern to States than others. The type of case that gives particular concern, and for which, it is said, the highest degree of "caution" is required, is that which (i) involves foreign plaintiffs, foreign defendants and foreign activity (the so-called "F-cubed" case), where there is little in the way of factual nexus to the United States and (ii) raises issues of foreign government conduct towards its own citizens.

As will be discussed further below (see section 2.4), a number of States (the United States, the United Kingdom, Australia and Netherlands), as well as the European Commission on behalf of the European Union, have argued in favour of an "exhaustion of remedies" requirement, whereby claimants would have to be able to demonstrate that there were no effective remedies available in States having a closer factual nexus with the claim (such as the territorial State)<sup>44</sup> before the United States could assert subject-matter jurisdiction pursuant to the ATS.

The flipside of this argument is that, in cases where the claimants could establish that he or she had indeed exhausted all other remedies, then an exercise of extraterritorial jurisdiction would potentially be justifiable and, presumably, tolerated by other States. This would seem a reasonable inference from the arguments made in the joint briefs of the United Kingdom and Australia in *Sarei v Rio Tinto*<sup>45</sup> and the United Kingdom and Netherlands in *Kiobel v Royal Dutch Petroleum*.<sup>46</sup> However, the extent to which a factual nexus between the forum State and the claim would still be required as a threshold matter is not entirely clear.<sup>47</sup>

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<sup>44</sup> In the joint brief submitted by the United Kingdom and Netherlands in *Kiobel v Royal Dutch Petroleum* (June 2012), it is suggested that "superior access to evidence and/or the presence of nationals or residents as defendants within its jurisdiction" would amount to a "closer factual nexus" (at p. 34).

<sup>45</sup> December, 2011

<sup>46</sup> June, 2012.

<sup>47</sup> In the joint brief submitted by the United Kingdom and Australia in *Sarei v Rio Tinto*, the Governments at first submit (at p. 17) that "the application of the "exhaustion of local remedies" principle becomes relevant (as an additional principle) in an ATS case where the

The briefs of Argentina and European Union in *Kiobel v Royal Dutch Petroleum* suggest that, in cases that raise allegations that amount to international crimes, the United States (and indeed other States that wish to exercise jurisdiction on this basis) would have more latitude. On the permissibility of assertions of “universal civil jurisdiction”, the EU brief argues:

*“To the extent that such apprehensions existed, they have since been allayed in significant part by this Court’s decision in Sosa which restricted the farcically expansive ATS to comply with substantive norms of international law [footnote omitted] ... Recognition that universal civil jurisdiction under the ATS extends only where consistent with universal criminal jurisdiction would further align the ATS’s private tort remedies with the international interests that underlie the universality principle. Moreover, the constraints on prescriptive jurisdiction imposed by international law will be supplemented by other doctrines available to United States courts in determining whether it is appropriate to adjudicate a particular extraterritorial case, including personal jurisdiction, comity, forum non conveniens, the political question doctrine, and sovereign immunity [footnote omitted].”<sup>48</sup>*

The EU brief ends this part of the argument with the following assessment:

*“Extraterritorial applications of the ATS under the universal jurisdiction principle are therefore likely to encounter relatively little resistance in the international community. Notably, as far as the European Commission is aware, not a single State appears to have objected to the United States’ exercise of jurisdiction over the extraterritorial ATS claim brought in Filartiga, by an alien against an alien, for the universally condemned crime of official torture, which had occurred in a foreign country. Nor, apparently, as far as the European Commission is aware, has any State objected to the enactment of the TVPA, which on its face provides universal jurisdiction over civil claims based on the crimes of official torture and extrajudicial killing [footnote omitted]. These exercises of universal jurisdiction are consistent with international law and have not engendered opposition.”<sup>49</sup>*

It is relevant to note, in the context of these arguments, that the South African Government, having previously vigorously opposed the class actions

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District Court has found that the ATS claims both (i) have sufficient factual nexus to the United States to satisfy the minimum public international limits on the exercise of domestic jurisdiction by U.S. courts and (ii) fall within the narrow class of international wrongs foreseen by this Court in *Sosa*. However, the Governments then go on to suggest (at p. 18) that “the “exhaustion” principle should be applied more stringently when there is little or no factual nexus between the claims and the United States”.

<sup>48</sup> Ibid, p. 21. The use of these doctrines to help resolve jurisdictional conflicts is discussed further at section 2.4 below.

<sup>49</sup> Ibid, pp. 22-23. On the other hand, note that earlier in the submission, the European Commission recalls the remarks of the International Court of Justice in *The Arrest Warrant Case* 2002 I.C.J. at 77, that “the beginnings of a very broad form of extraterritorial jurisdiction [i.e. in the United States application of the ATS] ... had not attracted the approbation of States generally”.

encompassed in *In Re Apartheid Litigation*,<sup>50</sup> subsequently wrote to the Court, after the dismissal of a large number of claims based on “doing business” in South Africa during the apartheid era, to withdraw its objections. The Minister of Justice and Constitutional Development wrote as follows:

*“The remaining claims are based on aiding and abetting very serious crimes, such as torture, extra judicial killing committed in violation of international law by the apartheid regime. The Court in dismissing the claims based solely on the fact that corporations merely did business with the apartheid government also addressed some of the concerns which the Government of the Republic of South Africa had. ... The Government of South Africa, having considered carefully the judgment of the United States District Court, Southern District of New York is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law”.*<sup>51</sup>

Based on the State amicus briefs and other interventions reviewed in the course of this study, Fig 1 below is an attempt to plot where various kinds of cases may sit on a spectrum of possible legal and policy responses to exercises of extraterritorial jurisdiction, from “prohibited” at one extreme to “required” at the other. As can be seen, this study did not uncover any evidence of State practice to suggest that there may be human rights cases in relation to which the exercise of extraterritorial jurisdiction is required, or even encouraged. However, there are a number of other possible scenarios that fall elsewhere on the spectrum, between “prohibited” and “tolerated”.

This diagram has been prepared for discussion purposes. It does not in any way represent OHCHR’s views as to the legality or desirability (or otherwise) of exercises of extraterritorial jurisdiction in different scenarios, or of the criteria that should be applied to determine legality. Also, as only a small number of States have intervened in ATS cases to date, this cannot be taken to represent the views of the wider international community. Further investigation will be needed to ascertain the extent to which it might reflect a broader international consensus. (See further the discussion at Part 3 below).

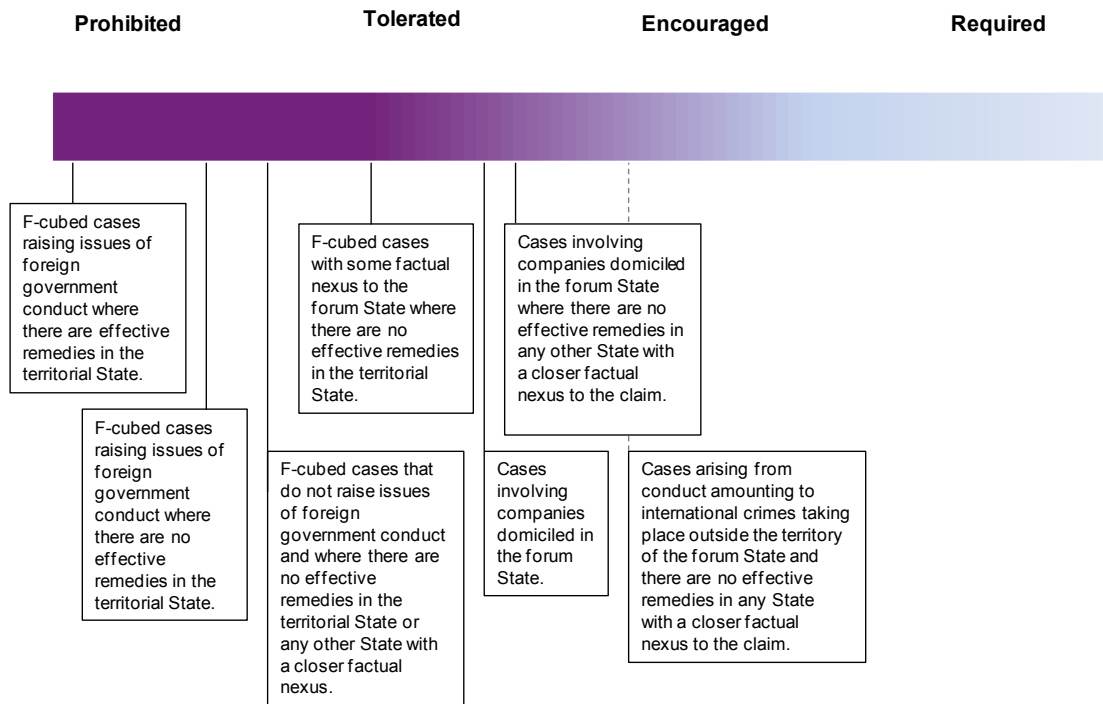
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<sup>50</sup> See n. 9 above, and accompanying text.

<sup>51</sup> Letter from Jeffrey Thamsanqa Radebe MP, Minister of Justice and Constitutional Development of the Republic of South Africa, September 2009, to the Honourable Judge Shira A. Scheindlin, United States District Court.



**Fig 1: An illustration of the possible spectrum of State attitudes to exercises of extraterritorial jurisdiction in different scenarios, as indicated by the content of State interventions in ATS cases to date.**



## 2.4 What do States view as the best safeguards against “excessive” claims of extraterritorial jurisdiction and how can jurisdictional conflicts best be resolved?

The amicus curiae briefs filed by States and State agencies recommend a number of approaches to help guard against “excessive” claims of extraterritorial jurisdiction and to help resolve jurisdictional conflicts. The approaches that are most frequently referred to or recommended in these briefs are judicial restraint, “exhaustion of local remedies” and judicial deference to the expressed needs and wishes of the executive branch of government (often referred to as the doctrine of “political question”). As will be clear from the discussion below, there are interrelationships between these various approaches.

**Judicial restraint (“caution” and “comity”):** A number of State submissions speak of the need for courts to exercise restraint in certain cases. The submissions of the United States in successive cases invoke the judgement of the US Supreme Court in *Sosa v Alvarez-Machain* to argue for caution and “a restrained concept of the discretion” in exercising extraterritorial jurisdiction in ATS cases. In these submissions, as noted above,<sup>52</sup> particular “caution” is urged in relation to cases where there is little in the way of factual nexus between the claim and the forum state and where the claim calls into question

<sup>52</sup> See discussion at p. 6 above.

the conduct of foreign governments in relation to their own citizens.<sup>53</sup> This caution is often described and justified in these interventions as an aspect of the doctrine of “international comity” under which States are expected to weigh up the competing public policy interests of different States in the matter and decline jurisdiction where another State appears to have a greater interest in the matter and an exercise of extraterritorial jurisdiction in the circumstances seems inappropriate. Another, related, manifestation of the doctrine of “international comity” is the principle of statutory interpretation applied by the US courts known as the “presumption against extraterritoriality”. In virtually all of the United States submissions on jurisdictional matters reviewed for the purposes of this study, it is argued that the “presumption against extraterritoriality” should be applied.

Comparing the various State submissions, a possible difference of emphasis can be observed between the submissions of the United States on the one hand, and “home State” submissions (i.e. submissions by home states of corporate defendants) on the other. While the United States submissions have tended to emphasise the doctrine of “international comity” (and related principles) as reasons to exercise judicial restraint, the home State submissions tend to start from the position that assertions of extraterritorial jurisdiction in the circumstances are *prima facie* contrary to international law. The submissions by the United Kingdom have consistently taken this line.<sup>54</sup>

**Exhaustion of local remedies:** In a series of more recent interventions in ATS cases by “home States” of corporate defendants, the authors seek to develop a doctrine of exhaustion of local remedies in relation to the exercise of extraterritorial jurisdiction in ATS cases, whereby jurisdiction would not be taken by the US courts in cases where there was little or no factual nexus to the United States unless the claimant could show that there were in fact no effective remedies in any state with a closer factual nexus to the case.<sup>55</sup> It is argued that such a rule would be consistent with, and an appropriate means of achieving, the goal of “international comity”.<sup>56</sup>

The principle of “exhaustion of local remedies” is well established in international law. Under this principle, a person whose rights have been violated is asked to first make use of domestic law mechanisms to seek redress before referring the matter to an international organisation, committee, arbitration process or other court or tribunal. In other words,

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<sup>53</sup> See for instance the submission of the United States in *Doe v Unocal* (August, 2004), at pp. 3-7. See also submissions of the United States in *In Re Apartheid Litigation* (October, 2008) at pp. 14-1, *Mujica v Occidental Petroleum* (March, 2006), at pp. 16-20 and *Corrie v Caterpillar* (August, 2006), at p. 6.

<sup>54</sup> See note 11 above and accompanying text.

<sup>55</sup> See joint submission of United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011); submission made by Germany in *Kiobel v Royal Dutch Petroleum* (February, 2012); joint submission of the United Kingdom and the Netherlands in *Kiobel v Royal Dutch Petroleum* (June, 2012).

<sup>56</sup> See submission of Germany in *Kiobel v Royal Dutch Petroleum* (February, 2012), pp. 3-4. See also the submission of the United States in *Sarei v Rio Tinto* (September, 2006), pp. 27-28 and the joint submission of the United Kingdom and the Netherlands in *Kiobel v Royal Dutch Petroleum* (June, 2012), p 33-34.

access to remedies at international level should only be a last resort and only after all potentially relevant and effective domestic possibilities have been exhausted. However, it is clear from the State interventions in ATS cases that some States would wish to see this doctrine extended to help resolve jurisdictional conflicts at domestic level in cases purportedly based in violations of international human rights standards. For instance, in the joint submission by the United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011) it is argued that:

*“The principle of “exhaustion of local remedies” in international law, like the presumption against extraterritorial effects, is based on respect for the different choices that different sovereigns may make on how to resolve disputes within their own jurisdiction. The International Court of Justice has emphasized that “[t]he rules that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law” ... [citations omitted]... The Governments’ basic position is that, if the U.S. courts are to be permitted, as a matter of domestic common law, to create substantive liability based on some infringements of the “law of nations”, then U.S. law ought to require compliance with the procedural preconditions mandated by international law before adjudicating the question of whether the “law of nations” violation has occurred”.*<sup>57</sup>

While several States have argued in favour of an exhaustion of remedies requirement in ATS cases, there are a number of difficult issues to do with the implementation and application of such a principle that are not fully explored in these submissions. One threshold issue, not thoroughly or consistently analysed in these submissions, is whether an “exhaustion” principle would give courts the ability to take jurisdiction in any case (including a case in which there was no factual nexus between the claim and the forum State) or whether the principle only comes into play once a (minimal) factual nexus is established. As noted above, the joint submission by the United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011) is not clear on this question.<sup>58</sup> The same submission also suggests that the exhaustion requirement be more “stringently applied” the weaker the factual nexus between the case and the forum State, without explaining what this more “stringent” application would involve in practice.

The second group of issues that are not fully explored concern the matters that a claimant would have to establish in order to show that there were no effective remedies in other jurisdictions, including the definition of “effective remedies” and the standards of proof and the appropriate allocation of burdens of proof at different stages of the proceedings. Thirdly, insufficient attention is given to the relationship between a principle of “exhaustion” and other, existing (but differing) domestic law jurisdictional principles such as *forum non conveniens*. In jurisdictions where doctrines such as *forum non conveniens* are recognised, fuller consideration needs to be given to the implications of an “exhaustion” requirement for specific types of cases,

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<sup>57</sup> Joint submission of the United Kingdom and Australia in *Sarei v Rio Tinto* (December, 2011), pp. 16-17.

<sup>58</sup> See n. 46 above.

especially in cases where the subject matter involves several different (or alternative) causes of action (e.g. conventional tort-based causes of action in addition to causes of action drawn from alleged violations of international standards). Finally, the submissions do not address the complexities and special considerations that may arise in cases that raise the possibility of jurisdiction based on “universality”.<sup>59</sup>

***Foreign policy considerations and “political question”***.<sup>60</sup> A number of submissions (and indeed most of the submissions by the United States in various cases) argue that in cases with foreign policy implications, it is necessary for the courts to take account of the views of the executive branch and decline jurisdiction if there is a risk that the judicial approach could be at odds with the foreign policy of the forum State. As it was put in the case of *Corrie v Caterpillar*:

*“The United States has a strong interest in ensuring that it speaks with one voice on matters of foreign policy and that a court not interfere unduly with the FMF [i.e. Foreign Military Financing] program, a critical element in the conduct of U.S. foreign relations”*.<sup>61</sup>

A recurring theme of these submissions is that the human rights performance of foreign governments is indeed a “political question”, engagement on which is the responsibility of the executive branch of government. In its May 2003 submission in *Doe v Unocal*, the United States argues:

*“Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation’s foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles ... it is the function of the political branches, not the courts, to respond (as the U.S. Government actively is) [in relation to human rights abuses in Burma, citation omitted] ... to bring about change in such situations.”*<sup>62</sup>

Subsequently, in the case of *Mujica v Occidental Petroleum*, the United States argued that the very fact of the claim, as well as its subject-matter, potentially undermined US foreign policy aims and interests:

*“The State Department explained that the United States’ foreign policy is to encourage other countries to establish “responsible legal mechanisms for*

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<sup>59</sup> Although see comments above about what the State amicus briefs may reveal about possible differences in approach between States on the question of universal civil jurisdiction. See notes 15-17 above and accompanying text.

<sup>60</sup> Under the doctrine of “political question”, courts are directed to refuse to pronounce on matters which are political (rather than legal) and which are constitutionally required to be dealt with by another branch of Government.

<sup>61</sup> Submission of the United States in *Corrie v Caterpillar* (August, 2006), “Introduction and summary of argument”, para. 1.

<sup>62</sup> Submission of the United States in *Doe v Unocal* (May 2003), p. 4.

addressing and resolving alleged human rights abuses ... [citation omitted] ... Permitting “[d]uplicative proceedings in the U.S. Courts second-guessing the actions of the Colombian government and its military officials and the findings of Colombian courts” could harm our bilateral relationship and suggest that our Government does not recognize the legitimacy of Colombian judicial institutions”.<sup>63</sup>

**Sovereign immunity:** This study has focussed on ATS cases involving corporate defendants. The liability of State entities is governed by international law rules on “sovereign immunity”. In the U.S, the position is regulated by the Foreign Sovereign Immunities Act of 1976. However, as noted above, concerns have been expressed about the possibility that the “aiding and abetting” liability under ATS will mean that courts will be obliged to pronounce on matters that would otherwise be outside the scope of judicial scrutiny by virtue of the 1976 legislation.<sup>64</sup>

**Other relevant legal doctrines:** There is occasional mention of other doctrines that are relevant to resolving jurisdictional conflicts and respect for the principle of “international comity”. For instance, the submission by the European Union in *Kiobel v Royal Dutch Petroleum* mentions a range of potential constraints on extraterritorial jurisdiction in its discussion of “universal civil jurisdiction”, including the doctrine of *forum non conveniens*.<sup>65</sup>

The potential for jurisdictional conflicts can also be reduced through application of “choice of law” rules. “Choice of law” rules are essentially domestic law rules that determine which domestic law regime should apply to determine a dispute with a cross-border element. Because the ATS invokes international human rights standards, the issue of “choice of law” is not much raised in the submissions on ATS cases. However, the choice of law position in relation to State law claims is discussed in a 2006 United States submission in the case of *Mujica v Occidental Petroleum and Airscan*, in which it is argued that Colombian law would be applied to determine those claims.<sup>66</sup>

**International cooperation:** In their two joint submissions made in *Kiobel v Royal Dutch Petroleum*, the United Kingdom and Netherlands argue for greater international cooperation in relation to human rights protection:

*“The Governments’ policy is that companies should behave with respect for the human rights of people in the countries where they do business ... [citation omitted] ... They also believe that the most fair and effective way to achieve progress in this area is through multilateral agreement on standards,*

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<sup>63</sup> Submission of the United States in *Mujica v Occidental Petroleum and Airscan* (March 2006)

<sup>64</sup> See n. 21 above and accompanying text.

<sup>65</sup> The doctrine of *forum non conveniens* tends to be confined to common law States and essentially is a basis on which courts can decline jurisdiction in favour of a more convenient forum for the case elsewhere. For further discussion in relation to the context in which the doctrine was raised, see further n. 47 above and accompanying text.

<sup>66</sup> Submission of the United States in *Mujica v Occidental Petroleum and Airscan* (March, 2006), pp. 30-31.

*achieved through multilateral cooperation with other States, and then on effective implementation of those standards.”<sup>67</sup>*

Similarly, in a subsequent intervention in the same case, the two Governments state that:

*“protection against human rights abuses can be more fairly and effectively achieved by seeking international consensus and cooperation through treaties than by resort to private civil litigation in distant courts”.<sup>68</sup>*

### **3. Issues to explore further in the course of the OHCHR Accountability and Remedy Project (and specifically Project 2)**

The review of amicus curiae briefs filed by States and State entities in ATS cases sheds some light on current and developing positions of States to the use of extraterritorial jurisdiction in different human rights cases. However, only a small minority of States have intervened in ATS cases in this way and one State (the United States) has availed itself of this opportunity on far many more occasions than any other. Therefore, further work will be required to establish whether or not the views expressed in these interventions reflect a wider consensus. It should also be recognised that these briefs cover several decades, and that views and attitudes within a State may have shifted, especially where administrations have changed.

The review of amicus curiae briefs also highlights several areas of uncertainty and possible differences of approach between States in relation to key issues such as “universal civil jurisdiction”, the applicability of a doctrine of “exhaustion of legal remedies”, the extent to which a factual nexus is required between the claim and the forum State for the courts of the forum State to be able to exercise jurisdiction at all and, finally, the extent to which the nature and severity of the abuse may have a bearing on the way that jurisdictional rules are applied.

This preliminary study raises a number of questions which would be useful to explore further with representatives of Governments in the course of the Accountability and Remedy Project, and specifically Project 2 (“Roles and responsibilities of interested States”). Suggestions for future work and inquiry are set out in the Box on the next page.

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<sup>67</sup> Joint submission of United Kingdom and Netherlands in *Kiobel v Royal Petroleum* (February, 2012), para. 1.

<sup>68</sup> Joint submission of United Kingdom and Netherlands in *Kiobel v Royal Petroleum* (June, 2012), p. 34.

**Possible issues to explore with representatives of Governments in the course of interactive sessions planned for Project 2 (“Roles and responsibilities of interested States”)**

1. Is there such a thing as “universal civil jurisdiction” for conduct amounting to international crimes? What is its scope? Even if not yet recognised as a matter of international law, is this a developing concept?
2. Might assertions of jurisdiction based on “universality” still carry the risk of jurisdictional and policy conflict (e.g. in terms of how norms are enforced, sanctions etc). If so, does this give rise to concerns? How great are these? What methods could be used to resolve such conflicts? Do these methods respond adequately to cases involving allegations of conduct that may amount to international crimes? If not, what adjustments might be necessary?
3. Are the international law rules on extraterritorial jurisdiction the same for cases involving allegations of business involvement in severe human rights abuses as for other regulatory areas (such as antitrust, securities law and bribery)? If not, how do they differ? If so, should they be? What special considerations might apply? Are cases concerning allegations of involvements in international crimes a special case (refer to question 1 above re “universal civil jurisdiction”)? If so, what principles regarding the use of extraterritorial jurisdiction should govern?
4. In cases involving allegations of “aiding and abetting” human rights abuses of foreign governments, how can the rights of victims to access to remedy be reconciled with respect for the international law principles relating to sovereign immunity?
5. Should exhaustion of legal remedies (i.e. in States with a closer factual nexus to the case) be a legal requirement? How would such a requirement work in practice? When would the requirement apply? How would “effective remedies” be defined? How would the burden of proof regarding the existence (or not) of alternative effective remedies be allocated as between claimants and defendant? How would such a requirement interface with other doctrines and techniques used to resolve jurisdictional conflicts (such as “comity”, *forum non conveniens*, and choice of law rules)? How would such a principle be reconciled with the concept of “universal civil jurisdiction” (refer to question 1 above).
6. Does Fig 1 above represent the current state of international consensus as regards the use of extraterritorial jurisdiction in human rights cases? If not, what changes and/or additions should be made?
7. To what extent could concerns about legal uncertainty relating to the use of extraterritorial jurisdiction (raised in many State amicus briefs) be alleviated with greater clarity about underlying standards (e.g. regarding tests for of corporate liability, see Accountability and Remedy Project 1)?
8. How can the immediate need for greater access to justice for victims of severe human rights abuses be reconciled with the longer term need for greater “local justice” and “in-territory” legal development?
9. To what extent could concerns about access to evidence and witnesses and enforcement of judgments in extraterritorial cases be overcome through international cooperation? What form should this international cooperation take? What features should it contain?