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AN INTERNATIONAL ARBITRATION TRIBUNAL ON BUSINESS AND HUMAN RIGHTS

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I. Introduction.

International crimes on a massive scale are being reported on a daily basis, as witness the recent news from Syria, the Central African Republic, North Korea and South Sudan. The perpetrators act with impunity; remedies are virtually non-existent for the victims. We believe that Mary Robinson, former President of Ireland as well as former United Nations High Commissioner for Human Rights, correctly summed up the situation in 1998:

*Count up the results of fifty years of human rights mechanism, thirty years of multibillion dollar development programs and endless high level rhetoric and the general impact is quite underwhelming . . . this is a failure of implementation on a scale that shames us all.*

In spite of all of the admittedly positive developments since 1998, her words continue to ring true today as valid and devastating criticism of the overall state of enforcement of international human rights law. The international human rights community is particularly concerned about the involvement of business enterprises in many egregious crimes. Such crimes could be avoided if the perpetrators did not have the “support” of business enterprises, such as weapon dealers and suppliers of other materials and expertise used in the current conflicts. This “corporate complicity” in international crimes is rarely punished. Business sectors, such as oil and gas, mining, finance and forestry, wield great influence and have severely harmed vulnerable people in some of their operations. The recent U.S. Supreme Court decisions in *Kiobel v. Royal Dutch Petroleum* and *Daimler AG v.*

Following his retirement in 1999, he has been active in human rights research and writing. He is the co-author of two of the articles mentioned in footnote 7, below.

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*2 133 S. Ct. 1659 (2013).* The Supreme Court held that the federal Alien Tort Statute (“ATS”) does not apply extraterritorially, i.e., to events occurring outside of the territorial United States. Under this holding, the vast majority of cases previously brought under the ATS would not have been allowed. *Kiobel* drastically reduces the potential for justice for human rights abuses.
Bauman represent two significant backward steps in the search for international justice involving business and human rights.

We have come together to work towards the ultimate goal of the creation of an international arbitration tribunal on business and human rights (the “Tribunal”). Our preliminary discussions have outlined a number of fundamental parameters. The Tribunal, while unaffiliated with any governmental organization, would maintain a roster of highly regarded jurists and attorneys who are familiar with human rights law. The Tribunal would act in a fair and impartial manner. The Tribunal would apply tort principles to cases involving business involvement in human rights abuses throughout the world, irrespective of the locus of the crimes, the nationalities of those involved or whether the perpetrators are legal or natural persons (corporations or individual business executives). In appropriate cases, the Tribunal would have the authority to award compensation. A secretariat would support the Tribunal. Modern technology would enable the Tribunal to carry out its functions worldwide. Funding for the Tribunal’s own operations would come from foundations and other donors.

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3 No. 11–965. Argued October 15, 2013—Decided January 14, 2014. The Court held that a federal lawsuit could not be filed against a corporation that conducts only a small amount of its total worldwide business in the state where a particular court sits.

4 As Professor Jan Eijsbouts stated when accepting the appointment of Extraordinary Professor of Corporate Social Responsibility at the Faculty of Law, Maastricht University:

[I]deally, these cases should in my opinion neither be tried in court in the home state of the multinational nor in the host state against the multinational. In both cases the court could be prejudiced against the foreign party in the case.

Professor Jan Eijsbouts, “Corporate Responsibility, Beyond Voluntarism - Regulatory Options to Reinforce the License to Operate” (2011).

5 Regarding the parties’ own expenses for legal fees and costs, there are limited options. In some jurisdictions, parties bear their own costs; in others, fee shifting is allowed, whereby the winners’ fees and costs are paid by the losers. It would seem to be counter-productive to allow fee shifting in the case of the Tribunal, since it would discourage plaintiffs of modest means from participating, due to the risk that they could lose the case and be burdened by the defense costs incurred by business corporations.

Additionally, unless there is a statutory prohibition against the use of contingency fees that would be applicable to the Tribunal, it would seem desirable, and in the interests of justice, to
The Tribunal would likely have wide-ranging subject matter jurisdiction, covering not only the grave abuses that form the core crimes under the Rome Statute of the International Criminal Court but also all other internationally-recognized human rights, such as, but not limited to, those contained within the International Convention on Civil and Political Rights and the various international labor conventions. The Tribunal could use its discretion as to which particular matters it would accept, adopting standards to govern the acceptance process, such as the merits of the claim, the gravity of the abuse and the extent of the injuries, the need to resolve controversial legal issues, and the potential importance of the outcome as a precedent for the future.

This draft memorandum proposes that we organize a broad effort to establish the Tribunal. This draft is intended to provide the framework for further discussions that hopefully will lead to an overall agreement on the dimensions of an approach towards that goal. Comments are welcome from all.

II. The Case for the Tribunal.

Simply stated: the Tribunal would provide justice where justice is currently lacking. There are numerous reasons that are all too familiar to the international human rights community as to why serious human rights abuses involving business enterprises are not being addressed in existing courts. Suffice it to say, the permit such arrangements because it would enable plaintiffs of modest means to obtain legal representation.

6 The Rome Statute of the International Criminal Court contains a list of four international crimes, some set out in great detail, these are aggression (not yet entered into force), genocide, war crimes and crimes against humanity.

7 Several recent publications have extensively discussed obstacles to international justice. See, for example, Robert C. Thompson, Anita Ramasastry, and Mark B. Taylor, “Translating Unocal: The Expanding Web of Liability for International Crimes,” 40 George Washington International Law Review 841 (2009), available at: http://docs.law.gwu.edu/ stdg/gwirlr/PDFs/40-4/40-4-1-Thompson.pdf. This article compiled a list of several dozen specific practical and legal obstacles, based on survey responses from human rights lawyers in sixteen countries. This article was followed up by a more extensive discussion of many of those obstacles in: Mark B. Taylor, Robert C. Thompson and Anita Ramasastry, “Overcoming Obstacles to Justice; Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses,” (Fafo 2010), available at: http://www.fafo.no/pub/rapp/20165/20165.pdf. The UN Guiding Principles on Business and Human Rights lists a number of legal and practical obstacles in the Commentary to Paragraph 26. Most recently, a study performed for a coalition of international human rights
The absence of independent and functional judicial systems in many parts of the world is a major factor. It is also true that in-court litigation is prohibitively expensive for most plaintiffs/victims, whereas defendants, especially multinational corporations, have the economic advantage. A third major factor is that civil courts either lack extraterritorial jurisdiction or the willingness to assert jurisdiction where it may be authorized. The victims, in the first place, need compensation for human suffering, including personal injury and environmental and property destruction. A civil court, not a criminal court, is thus the best venue to achieve a remedy for the victims. However, jurisdiction for civil cases is typically based on territoriality and nationality. Hence, civil courts are in principle not available for civil claims by foreign nationals against other foreign nationals for conduct abroad that do not have sufficiently close connection with the forum state. The problem for victims is therefore to find competent and reliable civil courts. To overcome these obstacles, society must have a forum designed to provide swift and affordable justice to all. The Tribunal would be the answer.

The Tribunal would employ arbitration and mediation, both being methods of alternate dispute resolution (“ADR”). The Tribunal would maintain a roster of highly respected arbitrators with expertise in human rights law. Rules that are comparable to those on international arbitration would apply to the selection of arbitrators from the roster to serve on particular matters. The parties could agree to use either a single arbitrator or a panel of three arbitrators. If three arbitrators are to be used, each party could nominate one arbitrator and the two thus selected would agree on a third, who would preside over the panel.


8 Viz., the two recent U.S. Supreme Court cases, see, fns. 2, 3, supra.

9 The development of the specific procedures for recruiting and selecting the arbitrators and mediators for the roster of the Tribunal should involve the participation of numerous interested stakeholders so as to ensure the selection of eminently qualified jurists and attorneys who are drawn from all regions of the world.

10 If a party fails to nominate an arbitrator, or if the two selected arbitrators are unable to agree on the selection of a third arbitrator, then the Tribunal’s secretariat would make the selection.
The arbitration panel would make an initial effort to settle the matter through mediation. This would involve the use of a third party neutral person, selected from among the arbitrators on the roster, by joint agreement of the parties, with the concurrence of the panel of arbitrators. The mediator’s role would be to facilitate communications among the parties in an effort to reach an agreement. If this is not successful, then the Tribunal would proceed to hear the matter and render a final decision or, as the case may be, an advisory or declaratory opinion.

The advantages that ADR has over in-court litigation stem largely from: (a) the ability of parties throughout the world to avail themselves of its services; (b) the less formal procedure used, e.g., simplified discovery procedures, less formal pleadings required, flexibility in the examination of witnesses, and simplified written decisions; and (c) the availability of the arbitrators to work on a relatively dedicated basis, instead of spreading themselves among various competing cases and numerous different legal fields, as is the case with judges in most civil courts. Fairness to both parties would be assured through, among other features, the use of widely accepted methods of selecting the arbitrators and mediators. Thus, parties that are contemplating formal litigation may see it in their interest to try to resolve the matter through ADR before engaging in a lengthy and costly trial proceeding.

Arbitration and mediation may at present occur only with the consent of the parties, usually found in a signed arbitration agreement. The New York Convention will then apply, with its legal enforcement mechanism that calls for enforcement of arbitration awards throughout most of the countries in the world. It is hoped that the existence of the Tribunal, with highly regarded expert arbitrators, that is supported by a competent secretariat, would make ADR attractive to all concerned.

Where no judicial forum is available, or the only available forum, for whatever reason, is generally viewed as unlikely to act with competency or fairness, the plaintiffs/victims would naturally be inclined to consent to ADR, since it would be the only remaining means available to obtain justice.

However, for the accused, especially for transnational corporations, one must approach the matter of obtaining consent from other angles. Some corporations may prefer to avoid any sort of proceedings, and thus would simply stonewall the accusers or else resort to extensive public relations campaigns to counter the
accusations. Business executives have been heard to complain that human rights NGOs sometimes attack corporations with unfounded accusations, leading other NGOs to then publicly support the accusations without verifying their accuracy. The executives then go on to say that the situation easily gets out of hand and turns into a flood of allegations that are snowballed around the world on the Internet and in the media, and are difficult for the enterprise to rebut. In view of such circumstances, business enterprises may see the virtues of agreeing to an ADR proceeding, even one where the Tribunal could issue an award of damages, entirely out of a desire to clear their names or at least to avoid further harm to their reputations. Thus the Tribunal’s work could be viewed by a business as a way to expeditiously rectify the situation. Another feature of the Tribunal’s work that might appeal to business enterprises that maintain high ethical and legal standards is that the Tribunal could serve to level the playing field so that all business enterprises, even “rogue” companies, would be held to the same standards.

Another route to the Tribunal could be the use of advance consent, i.e., consent obtained prior to the eruption of a dispute, such as from a clause inserted into a development agreement or a covenant in an international loan or grant agreement. And one may envision a circumstance where the government of a home or a host state or an international organization with great leverage over a business corporation might insist on having a dispute adjudicated by the Tribunal (perhaps under threat of government intervention in the matter). In setting up the

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11 The business community in general has shown deep reluctance to enter into human rights proceedings: they have bitterly contested most cases filed in court and have lobbied extensively for the repeal or weakening of laws that allow court access to plaintiffs/victims. The establishment of the Tribunal is one way to foster a more constructive approach within the business community.

12 Reputational damage resulting from accusations of involvement in human rights crimes can be a serious matter, particularly for corporations who deal with the public or who are seeking governmental favors. Given the use of “naming and shaming” tactics on the part of NGOs and others who take the part of victims in these disputes, the refusal of a business corporation to agree to adjudicate a matter before the Tribunal could in itself lead to further reputational loss.

13 We could suggest to the OECD that it integrate the Tribunal into the National Contact Points (“NCP”) system. At least some NCPs already urge parties to a specific instance to seek mediation of their dispute. It would be a reasonable next step to authorize the NCPs to suggest that the parties to a dispute make use of a qualified arbitration tribunal, such as the Tribunal. Given the criticism that has been leveled at the NCP system, the OECD might welcome such a suggestion. The NCP procedure is not designed as a legal procedure providing sufficient guarantees for fair trial. It does not recommend any compensation to the victims. There is no
Tribunal, we could also pay attention to various ways to advance the consent issue. Whichever angle is used, the existence of the Tribunal, with its reputation standard practice as to how the NCP deals with complaints. John Ruggie said at a presentation in Madrid in May 2013 when the subject of NCPs came up “... if that process says that the company was in violation of the guidelines, what happens? Nothing. That company can go next day and apply for investment insurance and export credit from the same government. Absolutely absurd.” Although some NCPs, such as that in the United Kingdom, appear to be taking a forceful and effective approach to their responsibilities, other NCPs have insufficient capacity, knowledge or experience to deal with claims in a responsible and objective manner. The NCP system in general could be more focused and procedurally regularized within all participating OECD members if it is to fully serve its vital role in dealing with human rights matters. Many of the concerns just mentioned could be addressed through the use of the Tribunal. One could envision, for example, that the OECD could mandate the use of ADR by all NCPs to resolve the questions of whether a business entity has engaged in prohibited conduct or has conducted adequate due diligence as mandated by the revised OECD Guidelines for Multinational Enterprises.

14 For example, we could work to see that the UN Guiding Principles for Business and Human Rights are interpreted to specifically embrace ADR pursuant to its “third leg,” provision of access to remedy (the other two “legs” being the duty of states to protect, and the responsibility of business enterprises to respect, human rights). That “leg” urges that “States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms.” The commentary to Paragraph 2 states:

These may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties.

The Guiding Principles do not explicitly assert in so many words that states have a duty to mandate the use of ADR. However, our project could seek to obtain a general recognition that ADR services should be established and funded by states as part of their responsibilities under the Guiding Principles.

We could also urge national and international financial assistance organizations, such as USAID, the US Overseas Private Investment Corporation, the International Financial Corporation, the International Monetary Fund, etc., to mandate the use of ADR for resolving disputes involving any human rights abuses arising under their programs. We already know that grievance mechanism is required under IFC guidelines; whether these would be satisfactory to potential victims and their representatives should be explored. If they are not, then we could urge the adoption of an ADR mechanism as one alternative. ADR could be also incorporated into the Equator Principles and other statement of voluntary principles.

State governments that employ development agreements with foreign investors could mandate the use of ADR for human rights disputes arising throughout the life of funded projects.
for fair and swift justice, would help to tip the scales in favor of giving consent.

In an isolated case where a business enterprise that has been accused of participating in an international crime flouts the Tribunal and refuses to participate in good faith, it would serve the public interest to have the Tribunal consider and rule on the matter involved, even though the accused party withholds its consent. Would the Tribunal be an effective forum for victims to seek an *ex parte* ruling in a particularly egregious case? Although this might seem to be somewhat anomalous in the context of an arbitration tribunal, the concept has certain merits.

The Tribunal could render a “default” award, based on whatever trustworthy information is available to it, such as evidence proffered by NGOs or local research teams, or gathered by the Tribunal staff. Even though such a ruling would not be enforceable, particularly under the New York Convention (which applies only where the arbitration is pursuant to an *agreement*), such a ruling would have great moral force. The business enterprise involved would be under pressure to pay even a nonbinding award of damages, simply in order to satisfy the expectations of society and to protect its own reputation. If an accused party to an international crime is unwilling to engage or to participate in good faith, the public could take note and thus its refusal to participate may be seen as an admission of guilt. In today’s realm of social media, where online activists are able to cause extensive harm to a business enterprise’s reputation through effective campaigning, companies might take very seriously indeed the possibility of an adverse decision.

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15 When Warren Buffet took over as an interim chairman of Salomon Brothers after the Treasury auction scandal in New York 1991 he told the assembled personnel: “Lose money for the firm, I will be very understanding; lose a shred of reputation for the firm, I will be ruthless.”

16 Oxford University conducted a study, “Social Media in Protest: Study Finds ‘Recruiters’ and ‘Spreaders’” (Sept. 2011), that found that a small group of influential and determined social network users trigger chains of messages reaching a huge number of people. These *spreaders* would call for action by putting the spotlight on companies that are alleged to be complicit in abuses as well as repressive governments. Further, the European wing of the US based Robert Kennedy Centre for Justice and Human Rights this year set up an international training institute in Florence, Italy, to teach online tactics for human rights campaigners and arming them with the latest tools of digital ammunition.
A default proceeding, which would be open to the public, would likely involve notorious and egregious atrocities of a nature that would attract a great deal of attention from the world community. The Tribunal should be prepared to deal with the interested press, human rights NGOs, business associations and others. Since the advent of the Tribunal itself would likely have attracted widespread interest within the legal and human rights communities, it also seems likely that there will be a high level of interest among law students and junior associates in law firms to participate in some fashion the Tribunal’s work. Law firms who have formal pro bono programs could be invited to send their junior associates to the Tribunal to work in various capacities, which would greatly augment the Tribunal’s resources. The Tribunal could appoint a group of rapporteurs from among those attorneys. Their role would be to report to the outside world on events taking place during the proceedings, using both traditional and social media. This would in an invaluable educational experience for new generations of business and human rights lawyers.

In a default proceeding, a stream of unopposed adverse information coming out of the Tribunal about a business enterprise’s conduct could lead the press, activists and political authorities to respond in ways that would affect the business and reputation of the defaulting business enterprise. For example, an organized consumer boycott of an enterprise’s retail products is a foreseeable event. Thus, the default proceeding would serve as an effective deterrent to future violations of international law by other enterprises that generally vigilantly guard their reputations, their government relations and other valuable assets.

In all of its proceedings, the Tribunal would apply internationally accepted tort/delict principles, which are based on the premise that the victim of a crime should be able to sue the criminal for damages. The Tribunal’s legal interpretations would establish norms for society at large and there would be a new era of accountability for infractions. Importantly, the Tribunal as an expert

17 The Tribunal would accept jurisdiction when the defendant is alleged to have committed a tort in violation of international law. Tort law may vary from one country to another, but what is common among jurisdictions is that one who injures another or damages other’s property will simply be liable to compensate the party that suffered. In situations where victims have one set of human rights claims arising under international law and another set of ordinary tort/delict claims (based on the same circumstances) that arise under state law, the Tribunal should be able to handle both sets of claims in the same proceeding, so as to avoid the burdensome necessity for multiple proceedings to resolve the overall matter.
institution on business and human rights would contribute to the development of an authoritative case law. The Tribunal would clarify when business enterprises can be held accountable for their involvement with other actors in gross human rights abuses. It would enhance legal certainty and encourage companies in their due diligence work to prevent themselves from being complicit. Hence, the Tribunal would significantly influence patterns of behavior in society, raising expectations as to what is acceptable conduct and preventing the repetition of particular conduct by the corporation held liable, as well as by other corporations who find themselves in similar situations. The Tribunal’s decisions would contribute to an emerging set of norms that might be aptly called a “New Lex Mercatoria,” since they resemble the “Lex Mercatoria” that arose in early Western society when customary law began to be enforced by non-state and state tribunals alike.18 New Lex Mercatoria is the mother of a number of initiatives, such as the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, the Kimberley Process Initiative (conflict diamonds), the Extractive Industries Transparency Initiative and the Equator Principles (framework for determining, assessing and managing environmental and social risk in project finance). These initiatives represent examples of self-regulation, norms or soft laws that have been established after pressure from society at large. Hence, New Lex Mercatoria is now growing worldwide with minimal intervention by

18 Let’s look back to the medieval city-states in Europe, where the merchants traded across borders. Perhaps we can learn something from their legal system. The merchants were organized in guilds, often with considerable power. Their trade practices developed out of the needs of the market and created norms through custom. These norms were Lex Mercatoria, the “law merchant.” The merchants had their own courts and elected their own judges. Using common sense and high moral standards these courts swiftly settled trade disputes. A merchant who violated these norms could lose his livelihood by being expelled from a guild. It was all about reputation.

Ultimately these practices crystallized into different national laws during the 19th century and Lex Mercatoria faded away. History shows how practices evolve into norms, which in turn evolve into soft law, which then eventually crystallizes into hard law. In the 1980’s globalization gathered momentum and the role of nation states began diminishing, with states becoming increasingly unable to efficiently regulate the ever-growing cross border trade and flow of capital. We are therefore now witnessing the emergence of international trade rules outside national laws. It is called New Lex Mercatoria. There are many new elements in New Lex Mercatoria. The ancient Lex Mercatoria was the merchants’ internal affair. New Lex Mercatoria is wider. Businesses today must have good relations with other stakeholders in society. Public opinion pushes the expansion of New Lex Mercatoria by increasingly naming and shaming businesses that are claimed to be violating human rights.
national politics. *New Lex Mercatoria* could also be the mother of an effective judiciary, able to swiftly resolve disputes concerning business and human rights. Prof Gunther Teubner, holds that: “The difference between a highly globalized economy and weakly globalized politics, presses for the emergence of a global law that has no legislation, no political constitution, no politically ordered hierarchy ...”

Although the Tribunal’s jurisdiction would extend to human rights matters of every nature and description that arise in any part of the world, as stated earlier its principal initial focus would likely be on the most serious abuses and those that would establish the most valuable precedents.

III. A Call for Action

We propose that we begin at once to develop and implement a program that aims at stimulating discussions, conferences and exchanges of papers at a professional and academic level, i.e., to flesh out the case for the Tribunal’s attributes (e.g., staffing, use of technology, rules of procedure, etc.) and then go on to educate others as to its desirability, both at a senior policy level and among the world community at large. The audience for this work would be the international human rights community, business organizations, states and international organizations. The work would focus primarily on building support for the Tribunal itself.

Making the Tribunal a reality could be a tall order. We acknowledge that there are many challenges associated with such an ambitious undertaking. But the alternative - to rely on nation states to solve the problem in the near future - is feckless. Time is of the essence. It is not acceptable that human suffering and environmental and property devastation continues to plague the poor and vulnerable for decades to come. In our rapidly changing society the legal machinery must keep pace - we must find cutting-edge solutions. Our commitment is premised upon the shared conviction that the goal merits the effort.

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