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**International tribunal on business & human rights - reshaping the judiciary**

On 17 April 2013 the US Supreme Court issued its decision in the *Kiobel v. Royal Dutch Petroleum* ruling that the Alien Tort Statute no longer applies extraterritorially. This 1789 Statute allowed litigation in the US for gross human rights abuses committed in other countries (such litigations have involved e.g. Unocal, Chevron, Shell, Texaco, ExxonMobil, Coca Cola, UBS, Credit Suisse, JP Morgan, Barclays, Polo Ralph Lauren, GAP, Nike, Tommy Hilfiger, General Motors, IBM). The Supreme Court judges threw out the suit, which accused Royal Dutch Petroleum of facilitating torture and execution in Nigeria. The court’s majority said that the Alien Tort Statute does not apply to conduct beyond US borders where neither of the parties have connection with the US. This ruling will reduce the possibilities for victims of gross human rights abuse to seek justice in the US and elsewhere.

The younger generations care more about human rights than my generation. That is my experience. They wonder why perpetrators of heinous human rights violations cannot be brought to justice. The following thoughts are about creating a form of extraterritorial jurisdiction on business & human rights with the use of media platforms of today - and with the help of those who have the long term interest to fight inequality and abuses - our youth.

Mary Robinson, former United Nations High Commissioner for Human Rights, stated 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”. Her statement was a devastating criticism of the enforcement of international human rights law. Yet today, the world is still awash with atrocities.

This memo presents some ideas on how to make effective use of existing legislations including customary international law to combat the most serious human rights violations as well as environmental and property devastation. I will focus on the corporate sector, which on a daily basis, justly or unjustly, is accused of causing human suffering. One contributing reason is that multinational corporations’ increasing power is creating an imbalance in society, which gives rise to suspicion and even anger among people (more than 40% of European citizens believe that companies have a negative influence - *European Commission, Flash Eurobarometer 363, April 2013*). Society needs a forum, which swiftly is able come up with an answer to the question: under what conditions can companies be held accountable for violations of gross human rights abuses committed in countries with dysfunctional judicial and enforcement systems?

1) Access to effective remedies for human rights abuses is in itself an internationally recognized human right. International law has developed a doctrine of universal jurisdiction, which says that trials for gross violations of human rights may be heard in courts throughout the world if the defendant cannot be brought to justice in the country where the violations were committed. But this doctrine is not respected - the judiciary is
dysfunctional and corporate impunity is widespread. Victims of human rights abuse have in practice few avenues to seek justice.

This memo does not contemplate the avenue for victims to seek justice through national or international criminal courts (the International Criminal Court, which does not have jurisdiction over legal entities, has brought only ten cases into the trial process since it came into being 2002 and has convicted only one person). The victims, in the first place, need compensation for human suffering and environmental and property destruction by corporations. A civil court is thus the best venue, not a criminal court, to achieve remedy for the victims. However, jurisdiction for civil cases is 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.

Efforts to litigate human rights cases in host states, i.e. the developing countries where the harm occurred, have recently increased. However, these lawsuits still remain rare due to many obstacles in host states, including jurisdictional barriers, financial and other resource constraints, inexperienced judges and a weak rule of law. Civil lawsuits are expensive affairs and can go on almost forever. Large corporations have the resources to employ teams of top lawyers – while the victims do not.

A few developed countries, including the UK, USA, France, Germany and The Netherlands, have heard a few lawsuits against companies for alleged abuses occurring in other countries. The US Alien Tort Statute was perhaps the most spectacular legislation to adjudicate egregious breaches of international human rights law. However, as mentioned above, the US Supreme Court recently stated that this Act generally would not apply to conduct beyond US borders. This decision will severely curtail lawsuits in human rights abuses in the US and also abroad. Hence, if the US declines to hear claims for compensations brought by victims of distant genocides, courts of other nations would have an excuse not to assume such ‘unwelcome’ burden.

There are multiple reasons for a national court to decline to hear foreign human rights suits. One is that many countries do not allow the possibility to try cases that pertain to foreign jurisdictions. Furthermore, ‘home’ governments (where companies are headquartered) simply do not wish to constrain their companies in their operations abroad. Host states often oppose such transnational litigation as an infringement on their sovereignty and may seek to retaliate.

Other barriers to accessing judicial remedies include the well established legal concepts such as legal personality, i.e. the question of whether the ‘corporate veil’ between parents companies and their subsidiaries can be lifted or not. It could therefore take decades of continued impunity before we can expect the judiciary to catch up with reality and to provide a fair treatment of the poor and vulnerable.

There is another venue available for complainants – the OECD National Contact Points (NCP). Governments of each of the 34 OECD countries shall set up an NCP to further the effectiveness of the OECD Guidelines for Multinational Enterprises by undertaking
promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines. The NCP procedure is not designed as a legal procedure providing sufficient guarantees for fair trial. It is presented to the public as a mediation procedure. If mediation fails then the NCP would make a determination on compliance with the Guidelines. It will, however, not recommend any compensation to the victims. There is no standard practice as to how the NCP deals with complaints. Some NCPs have insufficient capacity, knowledge or experience to deal with claims in a responsible and objective manner. Not even within the EU do NCPs have a standardized practice for dealing with Guideline breaches.

2) Let’s go 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. 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 Kimberly 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 nation politics.

3) New Lex Mercatoria could also be the mother of an effective judiciary, able to swiftly resolve disputes concerning business & human rights. I have the following suggestion.

To create an international tribunal on business & human rights (the “Tribunal”), which would offer extraterritorial jurisdiction to try if a corporation is liable for committing, or being complicit in, the most heinous human rights violations amounting to international
crimes, including genocide, slavery, human trafficking, forced labor, torture and some crimes against humanity.

The Tribunal would consist of three professional arbitrators. Rules comparable to those on international arbitration would apply. Each party shall nominate one arbitrator. If a party fails to nominate an arbitrator, the Tribunal’s secretariat shall make the appointment. The two nominated arbitrators would then appoint the third arbitrator who will act as president of the Tribunal. A number of associate lawyers from preeminent law firms with human rights practice would be appointed by the Tribunal to be observers of the arbitration proceedings. They would form a panel, which communicates these proceedings to the general public through traditional and social media. Engaging associate lawyers would also serve as an educational experience for new generations of business & human rights experts.

The Tribunal would de facto have no nationality and thus avoid generating disputes between sovereigns. The Tribunal would also be impartial; “...ideally, 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.” (Prof. Jan Eijsbouts, Corporate responsibility, beyond voluntarism - Regulatory options to reinforce the license to operate, 2011). Further, the Tribunal would allow itself to lift the corporate veil and in fact apply the Enterprise Liability theory on corporate groups; “...the management board of the parent company is supposed to be in control of those operations of the subsidiaries of the group that may affect the fundamental rights of third parties.” (ibid. Eijsbouts - who proposes to align current corporate group law approaches with economic reality).

4) A foundation would house the Tribunal’s secretariat. Its digital headquarters would be in the form of a web-platform, offering all the functionality needed to receive and process claims and rebuts, as well as to run awareness campaigns through connected social networks. All data would be securely stored on the web platform social media. Ongoing cases would be made public and the proceedings continuously reported on through the web platform (Facebook, Youtube, Twitter) as well as specialist sites such as change.org and avaaz.org. This would allow interested parties to easily follow and engage.

5) In my opinion the corporate sector has not fully understood that changes in society, technology and human behaviour have propelled a generation in search of social justice. Oxford University recently conducted a study, which 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.

No doubt society is moving towards a cultural change, to a ‘network society’, with no trust in leaders. The corporate sector with its vast power will be even more exposed to
widespread criticism. The Tribunal, as an autonomous and impartial institution, would therefore be beneficial to corporations. Corporations would have a forum to swiftly rebut accusations of human rights violations to prove that they have not committed, or been complicit in such crimes. Regrettably, NGOs sometimes attack corporations with unfounded accusations. Other NGOs often then publicly support the accusations without verifying their accuracy. 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. The Tribunal’s work would discourage such behaviour, helping brand’s reputation. Further, its work would level the playing field in relation to less ethically concerned corporations. 

Importantly, the Tribunal as an expert institution on business & human rights would, contrary to national courts and NCPs, contribute to the development of an authoritative case law. The Tribunal would clarify when corporations 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. 

6) When an issue has arisen the Tribunal would carry out an initial assessment before accepting the case in order to avoid unsubstantiated claims (e.g. with the sole aim of naming and shaming). If it decides that the issues raised do not merit further consideration it would make a statement publicly available. 

If the Tribunal finds that human rights abuse may have taken place a mediation process to establish compensation would then commence upon agreement of the parties. Where the dispute cannot be settled, the Tribunal would render an award or, as the case may be, a declaratory opinion. If a party is unwilling to engage or to participate in good faith, the Tribunal could render a ‘default award’ based on whatever (trustworthy) information is available (and if necessary with the assistance of NGOs or local research teams). The Tribunal would strive to conclude the proceedings within a reasonably short timeframe, if possible within six month. The Tribunal would also strive to prevent any delay that would increase legal or other costs for the parties or that have any other negative effect. 

The Tribunal would be able to take steps to protect the identity of any person or preserve the confidentiality of any sensitive business information, if disclosure thereof would be detrimental to such person or business. 

7) An award by the Tribunal would not be enforceable in a legal sense, but that is not the point. Corporations are prepared to swallow high compensations to victims, but losing their reputation could be a disaster (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."). The ‘non-legal’ enforcement can become a threat to intangible business assets, which are vigilantly guarded. 

The Tribunal would be an avenue to activate public opinion with facts and legal
considerations. If the Tribunal approves the plaintiff's claim on damages, the corporation would likely choose to pay in order to satisfy the expectations of society and to protect its own reputation. Even if the violating company were not sensitive to naming and shaming, digital human rights campaigners could take alternative action e.g. kick off protests wherever the company and its partners or customers operates.

8) The Tribunal, developed out of the needs of society could for the time being be an effective tool to combat widespread violation of gross human rights and impunity. At present society cannot address even the worst types of business related human rights abuses, which could go without any redress of any kind. Making the Tribunal a reality could be a tall order. In this initial stage there are of course many weak spots to be addressed. 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.

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Hopefully this memo will contribute to a creative discussion in society.

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