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NOTE TO REVIEWERS: This draft is a work in progress and a part of extensive consultations intended to stimulate discussion of the topics surrounding the proposal for an international arbitration tribunal. It is by no means a final document. The drafters invite criticism and suggestions.

AN INTERNATIONAL ARBITRATION TRIBUNAL ON BUSINESS & HUMAN RIGHTS – RESHAPING THE JUDICIARY

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I. Introduction.

For more than half a century, global trade and investment have helped to raise people's standards of living in many parts of the world. However, businesses have also done harm, resulting in increasing calls to hold companies legally accountable for violations of gross human rights abuses. Today, a vigilant press, alert NGOs and the increasing sophistication of victims' organizations, all with access to the Internet, enables close scrutiny of a company's human rights impacts in almost any part of the world. But sadly, justice for most victims is still elusive. In these circumstances, why do nation states often fail to protect their inhabitants? Because the states are often part of the problem. We believe that Mary Robinson, former President of Ireland and 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 mechanisms, 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.*

Since those words were written, accountability for human rights violations has been enhanced by some highly encouraging developments. Two leading examples are the advent of the International Criminal Court and the work of John Ruggie. But there have also been setbacks, such as the recent U.S. Supreme Court decisions in *Kiobel v. Royal Dutch Petroleum* [2] and *Daimler AG v. Bauman,* [3] both of which

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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. Thus, *Kiobel* materially reduces the potential for future use of the ATS by foreign victims.

restricted the availability of U.S. federal courts for victims' lawsuits in cases involving multinational corporations. Overall, there remains much work to be done before it can be said that Ms. Robinson's words no longer ring true.

Although "corporate complicity" in human rights abuses is only a part of the overall problem, it plays an important and visible role. To meet their responsibilities, business enterprises in every industry sector, be it oil, gas, mining, transportation, finance, forestry or any one of a number of other fields, must engage in the kinds of due diligence that John Ruggie's Guiding Principles call for. But, to provide the encouragement needed to ensure that business enterprises take the prescribed steps, there must also be far more accountability for those that do not live up to their responsibilities. It is incumbent upon civil society to vigorously advocate for additional, and more effective, means to provide such accountability.

We have come together to work towards the ultimate goal of the creation of an international tribunal on business and human rights (the "Tribunal").[4] Our preliminary discussions have outlined a number of fundamental parameters. The Tribunal would maintain rosters of highly regarded jurists and attorneys who are familiar with human rights law. The Tribunal would act in a fair and impartial manner.[5] The Tribunal would apply tort/delict principles to cases involving business involvement in human rights abuses throughout the world, irrespective of the locus of the abuses, the nationalities of those involved or whether the

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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] For the present, we are content to refer simply to the "Tribunal." Suggestions for a more fitting title are welcome. One thought is that it should be named after an illustrious individual in the history of the struggle for human rights, such as Raoul Wallenberg.

[5] As Professor Jan Eijsbouts, former General Counsel of Akzo Nobel, 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).

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.[6]

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 [7] 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 disputes 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 a broad effort be undertaken 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.

[6] 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 counterproductive 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 a loss would burden them with the defense costs incurred by business enterprises.

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 permit such arrangements because it would enable plaintiffs of modest means to obtain legal representation.

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

Victims of human rights abuses need to be compensated for their suffering, including personal injury, property destruction and environmental damages. Criminal courts are generally unsuited to provide such compensation. A *civil* court, not a criminal court, is thus the venue to achieve adequate remedies. However, 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 today's civil courts.[8] Suffice it to say, the absence of independent and functional judicial systems in host countries in many parts of the world is a major factor. And civil courts in the home states of multinational business enterprises either lack extraterritorial jurisdiction or the willingness to assert jurisdiction where it may be authorized.[9] Thus, the lack of access to civil courts needs to be addressed.

There are welcome developments on both the legal and practical level that hold great promise for changing this picture over time. But until fair and functional civil courts become universally available, society must create a forum designed to provide swift and affordable justice to all. The Tribunal would be such a forum.

Simply stated: the Tribunal would provide justice where justice is currently lacking using time-tested methods of mediation and arbitration ("ADR"). Even if civil courts were to become available sometime in the not-too-distant future, the

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[8] 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/gwilr/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 NGOs led to the publication of a report on a selection of ten major obstacles. See, Gwynne Skinner, Robert McCorquondale and Olivier de Schutter, "The Third Pillar; Access to Judicial Remedies for Human Rights Violations by Transnational Business," (ICAR, CORE and ECCJ, 2013), available at: http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf.

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

Tribunal would still offer distinct advantages, and thus would serve a continuing and complementary function.

Through the use of ADR, the Tribunal would, in many situations, be more suitable than a civil court for resolving human rights disputes. The Tribunal would offer: (a) the ability of parties throughout the world to avail themselves of its services (no role for the *forum non conveniens* doctrine); (b) streamlined procedures, e.g., simplified discovery procedures, less formal pleadings required, flexibility in the examination of witnesses, and simplified written decisions; and (c) far fewer delays, due to an un-crowded calendar and 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. Additionally, ADR offers substantial cost advantages to both sides. 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 would otherwise be facing formal litigation may see it in their interest to try to resolve disputes through ADR rather than engage in a lengthy and costly trial proceeding.

III. Salient Features of the Tribunal.

The Tribunal would handle disputes involving business involvement in abuses of all human rights that are protected under international law. Although the Tribunal's jurisdiction would extend to human rights disputes of every nature and description, its principal initial focus would likely be on the most serious abuses and those whose resolution would establish the most valuable precedents.

The Tribunal would apply internationally accepted tort/delict principles. Tort/delict law may vary from one country to another, but what is common among all jurisdictions is that one who harms another or damages other's property in an unlawful manner is liable to compensate the injured party. The principle of *lis pendens* (a bar from pursuing the matter in another forum) would apply. And it can be expected that courts would apply the principle of *res judicata* (finality of the decision) should there be an attempt to re-litigate the matter in another court.

The Tribunal, as an expert institution on business and human rights, would contribute to the development of authoritative rulings that clarify the roles and responsibilities of business enterprises when dealing with human rights issues. It would enhance legal certainty and encourage companies to engage in preventative

due diligence efforts. Hence, the Tribunal would significantly influence patterns of business behavior.

Today there are at least three major international bodies concerned with conciliation/mediation [10] and arbitration: the International Commission for Settlement of Investment Disputes ("ICSID"),[11] the United National Commission for International Trade Litigation ("UNCITRAL")[12] and the Arbitration and Mediation Center of the World International Property Organization ("WIPO"). [13] Each of these bodies has developed well-received rules of procedure and other instruments for ensuring fair and impartial mediation and arbitration of

[10] The term "conciliation" as used in the ICSID and UNCITAL documents is synonymous with "mediation."

[11] ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention), with 158 signatories. The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966. Today, ICSID is considered to be the leading international arbitration institution devoted to investor-State dispute settlement. Its procedural rules are available at:
https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

[12] UNCITRAL is an international body formed by General Assembly Resolution 2205 XXI (17 December 1966). It has a governing body consisting of 60 Member States selected from among States Members of the United Nations that represent different legal traditions and levels of economic development. Its arbitration rules are available at:
https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

UNICITRAL's conciliation rules are available at:
https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf

[13] WIPO is a self-funding agency of the United Nations, with 187 member states. Headquartered in Geneva, it is the global forum for intellectual property services, policy, information and cooperation. It was established by the WIPO Convention in 1967 and issued its first arbitration award in 1999. WIPO's arbitration and mediation rules were last updated in 2014. They are available at: http://www.wipo.int/amc/en/arbitration/expedited-rules/newrules.html

international disputes, and thus the experts who are ultimately assembled to draft the Tribunal's own operating rules would have useful templates to consult.[14]

As do ICSID, UNCITRAL and WIPO, the Tribunal would maintain two rosters: one of mediators and one of arbitrators. Only highly respected lawyers and judges with expertise in mediation and/or arbitration, plus a deep familiarity with human rights law, would be eligible for appointment to one or both of these rosters.[15] Rules that are comparable to those of the other international arbitration and mediation services would apply to the selection of mediators and arbitrators to serve on particular matters.

The Tribunal would be available for the parties to make an effort to settle the dispute through mediation if their own direct negotiation has failed. The mediator's role would be to facilitate communications among the parties in an effort to reach a settlement agreement. If this is not successful, the parties could then apply to the Tribunal for the establishment of an arbitration panel that would then proceed to hear the matter and render a final decision.[16]

In an isolated case where a business enterprise that is the subject of allegations that it has participated in human rights abuse refuses to participate, it could serve the public interest to have the Tribunal consider and rule on the matter involved, even though the business enterprise does not respond. 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.

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[14] One issue would be how to deal with "default" cases, i.e., disputes when one of the parties, having initially joined the proceedings, withdraws. Again, the three templates have evolved workable precedents for how the proceedings may nonetheless proceed to a final ruling.

[15] The development of the procedures for selecting the arbitrators and mediators for the rosters of the Tribunal should involve the participation of numerous interested stakeholders, including business interests, so as to ensure that the most eminently qualified jurists and attorneys are drawn from all regions of the world.

[16] The arbitration results would be final, being binding on the parties and enforceable under the New York Convention on the Enforcement of Foreign Arbitral Awards (the "New York Convention"). The New York Convention entered into force on 7 June 1959 (article XII). It provides for the enforcement of arbitration awards internationally among all states parties, of which there are now 28. The New York Convention is available at: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

The Tribunal could render a "default" award, based on whatever trustworthy information is available presented to it. Clearly, the arbitration panel would have to give such information close scrutiny. Even though such a ruling would not be enforceable under the New York Convention (which applies only to consensual arbitration), it would have great moral force. The business enterprise involved would be under pressure to comply with even a nonbinding award of damages, simply in order to satisfy the expectations of society and to protect its own reputation.[17] A default proceeding, by its very nature, would likely involve egregious conduct, which would attract a great deal of attention from the world community. Among other things, the public could take note of its unwillingness to engage or to participate, suggesting that it has something to hide. 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.[18]

IV. Obtaining the Consent of the Disputants to the Use of ADR.

As indicated above, arbitration and mediation require the consent of the parties. Often, consent is expressed in an agreement signed immediately before a dispute is accepted for resolution. It is hoped that the existence of the Tribunal, with its highly regarded expert arbitrators and mediators and the support of a competent secretariat, would make ADR attractive to all concerned and that obtaining their consent would be only a formality.

Plaintiffs/victims would likely be inclined to consent to the use of the Tribunal for a variety of reasons, especially where no other desirable forum is available.

[17] 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."*

[18] 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, in 2013 the European wing of the US-based Robert Kennedy Center 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.

Whether business entities could be expected to consent to the use of the Tribunal as readily may be problematic although many businesses may also find the Tribunal to be acceptable, for reasons discussed below. Additionally, there are various mechanisms to obtain blanket consent to arbitration and mediation in advance of the occurrence of an abuse, also discussed below.

Some business enterprises may see the advantages of the Tribunal and readily consent to its use. For example, business executives have commented that their companies are sometimes attacked with unfounded allegations, which creates a situation that easily gets out of hand and turns into a flood of allegations that are snowballed around the world on the Internet and through other media. Such widespread allegations may be difficult for an enterprise to challenge via a media campaign. In cases where there is substance to the allegations, a business enterprise may recognize the need to address the issues head-on as a way of moving beyond any past misdeeds. Thus, business enterprises may see it in their interest to agree to an ADR proceeding, even one where the Tribunal could issue an award of damages, out of a desire to clear their names as expeditiously as possible, or at least to avoid further harm to their reputations. [19]

Thus, disputants on both sides are likely to be drawn to the use of the Tribunal to avail themselves of its fairness and expeditious proceedings. However, there may be some business enterprises caught up in a human rights dispute for whom the preferred method of dealing with the problem is to exercise all legal and practical means at their disposal (which, in all fairness, they are entitled to do) and to resist any sort of adjudication attempts. The use of the Tribunal is unlikely to appeal to them. However, such a business enterprise could conceivably compound its problems: it could face disapproval for such refusal, along with creating the implication that it has something to hide.

There are various means to obtain the consent of business enterprises prior to the eruption of a dispute. This is a feature commonly found in commercial agreements. National and international financial assistance organizations, such as USAID, the US Overseas Private Investment Corporation, the International Financial Corporation ("IFC"), the International Monetary Fund, etc., could require the use

[19] Reputational damage resulting from accusations of involvement in human rights abuses can be a serious matter, particularly for business enterprises that deal with the public, have shareholders and investors who are sensitive to these matters, or are seeking favors or support from governments or other institutions.

of ADR for resolving human rights disputes that may arise in the course of implementing funded programs. For example, IFC guidelines that now mandate the use of an administrative grievance mechanism could be amended to require disputes that are not settled administratively to be referred to the Tribunal. The use of the Tribunal could also be incorporated into the Equator Principles and other statements of voluntary principles.

Another avenue to explore that could prove to be fruitful would be an affiliation with the OECD. It might be advantageous for the OECD to 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 some of the criticism that has been leveled at the NCP system, the OECD might welcome such a suggestion.[20] The ability of the Tribunal to make binding decisions and to award compensation would greatly enhance the authority of the OECD Guidelines on Multinational Business Enterprises.

Additionally, the Tribunal could become affiliated with various human rights courts, such as the Inter-American Court of Human Rights, the European Court of Human Rights or the African Court on Human and Peoples' Human Rights. These courts could use their leverage in appropriate disputes to see that the parties agreed to submit to their disputes to the Tribunal. This has been referred to as "court-induced" ADR.

Finally, one may envision a circumstance where the government of a home or a host state or an international organization might use its regulatory authority or other leverage over business enterprises to see that a particular human rights dispute, or all such disputes in general, are adjudicated by the Tribunal.[21]

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[20] For example, 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.*"

[21] The UN Guiding Principles embrace this notion:

> States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms. ... These may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes – or involve some combination of these – depending

V. A Call for Action.

We propose to develop a program that stimulates discussions, conferences and exchanges of papers at a professional and academic level. We aim to flesh out the case for the Tribunal (e.g., staffing, use of technology, rules of procedure, etc.). We also want to persuade senior policymakers and the world community at large about its desirability. The work would focus on building support for the Tribunal, targeting the international human rights community, business organizations, states and international organizations.

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 solely upon the efforts of individual nation states to solve the problem over the course of time - would be a mistake, for it would disregard a promising opportunity. Time is of the essence. It is not acceptable for human suffering and environmental and property devastation to continue 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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on the issues concerned, any public interest involved, and the potential needs of the parties. Guiding Principles, Paragraph 27 and its Commentary.