NEW KID ON THE BLOCK: AN INTRODUCTION TO THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION

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I. Introduction

In the medieval European states, *Lex Mercatoria*, literally "Merchant Law," was a prevalent custom, which developed out of the norms and needs of the market and influenced the transborder trade practices among merchants.[1] For redressal of trade-related disputes, arbitration was the popular method and the merchants elected their own judges in the courts of arbitration that they established.[2] These courts developed a reputation for swift resolution of disputes using high moral standards.[3] Non-compliance with practiced norms, or with the arbitral decisions of the courts, would solidify pariah status for the defaulting merchant in the trading community.[4] Gradually, with the introduction of various national (and some international) laws during the nineteenth century, the custom of *Lex Mercatoria* started to fade away.[5] However, its relevance in today's times, where businesses thrive on good relations with other stakeholders in society, demands our attention to work on a similar, more specialized system that transcends national laws and presents a set of private transnational norms.[6]

With an increase in globalization over the past few decades, and the consequent increase in cross-border trade, the states have struggled to efficiently balance trade, flow of capital, foreign in-

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1 *See* Tamara Milenkoviæ-Kerkoviæ, *Origin, Development and Main Features of the New Lex Mercatoria*, 1 Facta Universitatis 87, 88 (1997).

2 *Id.* at 89.

3 *Id.*

4 *See* Claes Cronstedt & Robert C. Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights*, 57 Harv. Int'l L. J. 66, 67 (2016).

5 *Id.*

6 *Id.*

vestments, and the practices of multinational businesses and their associates, including supply chains.[7] The resulting disputes involving these multinational businesses and states have risen exponentially, mainly resulting from international investment laws and treaties, as well as bilateral trade and investment agreements.

Additionally, the implications of the trade activities and conduct of multinational businesses have resulted in an array of human rights abuses in multiple forms. While investor-state disputes originating from investment/trade treaties have been adequately addressed via different modes of dispute resolution—popularly arbitration—the victims of human rights abuses caused by multinational businesses have been afforded no effective remedies.[8]

The popularity of investor-state arbitration has also placed the limelight on some key issues; as a result, investment law has repeatedly been questioned for its non-investment commitments by states and financial investors, as well as non-parties alike.[9] Arbitral tribunals have traditionally shied away from addressing human rights concerns resulting from investor activities and operations,[10] and have chosen to stick to the spirit of the governing treaty or agreement, which seldom provides for human rights protection.[11] The lack of adequate arbitral rules for addressing business and human rights ("BHR") disputes have furthered the challenge in this situation; hence, the need to have a dedicated mechanism in this case.

II. The Hague Rules on Business and Human Rights Arbitration: A Brief Background

The Hague Rules on Business and Human Rights Arbitration (the "Hague Rules") are a set of arbitration rules dealing with Business and Human Rights ("BHR") disputes. The Hague Rules are

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[7] *Id.* at 66.

[8] *Id.*

[9] *See* Clara Reiner & Christoph Schreuer, Human Rights and International Investment Arbitration (2009).

[10] *See* Kathleen Stanaro, *The Evolving Role of Human Rights in International Arbitration*, Am. Rev. Int'l Arb. (Feb. 5, 2019), http://aria.law.columbia.edu/the-evolving-role-of-human-rights-in-international-arbitration/.

[11] *See* Reiner & Schreuer, *supra* note 9. Two important multilateral treaties, North American Free Trade Agreement ("NAFTA") and the Energy Charter Treaty ("ECT") do not bear any mention of human rights. Similarly, their mention is equally absent from several Model Bilateral Investment Treaties ("BITs").

a product of more than five years of research, deliberations, and consultations—with numerous stakeholder—by a Working Group[12] of independent international lawyers that started their work in 2015. In 2017 a Drafting Team[13] was established to work on drafting the Hague Rules. The Hague Rules were officially launched on December 12, 2019 at a ceremony in The Hague.[14] The project was led by the Center of International Legal Cooperation, funded by the City of The Hague, and also supported by the Ministry of Foreign Affairs of the Netherlands.[15]

The discussion around the framework to hold businesses responsible to the international community is a rather new phenomenon, which began with voluntary mechanisms, and the first such initiative was the UN Global Compact.[16] The U.N. Global Compact was launched in 2000 by former U.N. Secretary General, Kofi Annan. Prior to the launch, in his address to the World Economic Forum on January 31, 1999, Secretary General Annan called upon the member states, investors, and business entities, "to embrace, support and enact a set of core values in the areas of human rights, labor standards, and environmental practices."[17] The U.N. Global Compact, which constitutes ten principles, is not legally binding, but rather a voluntary process to which companies can sign up.[18]

In 2003, the U.N. Sub-Commission on Human Rights proposed a draft of "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," (the "2003 Norms").[19] The 2003 Norms were proposed as a more robust framework of human rights obligations on

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12 The members of the Working Group included (in alphabetical order): Claes Cronstedt, Jan Eijsbouts, Steven Ratner, Martijn Scheltema, Robert Thompson, & Katerina Yiannibas.

13 The Drafting Team was chaired by Judge Bruno Simma. The members included: Diane Desierto, Martin Doe Rodriguez, Jan Eijsbouts, Ursula Kriebaum, Pablo Lumerman, Abiola Makinwa, Richard Meerna, Sergio Puig, Steven Ratner, Giorgia Sangiuolo, Martijn Scheltema, Anne van Aaken, and Katerina Yiannibas.

14 *See* CTR. FOR INT'L LEGAL COOPERATION, THE HAGUE RULES ON BUSINESS & HUMAN RIGHTS ARBITRATION 1 (2019), https://www.cilc.nl/cms/wp-content/uploads/2019/06/Summary-Paper-Sounding-Board-Consultation-Round-1-%E2%80%93-Results.pdf.

15 *Id.* at 2.

16 *See* Kabir Duggal & Rekha Rangachari, *International Arbitration Promoting Human Rights: The Hague Rules on Business and Human Rights Arbitration*, 22 ASIAN DISP. REV. 102, 103 (2020).

17 *See* Press Release, U.N. Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, In Address to World Economic Forum in Davos U.N. Press Release SG/SM/6881 (Feb. 1, 1999), https://www.un.org/press/en/1999/19990201.sgsm6881.html.

18 *See* Duggal & Rangachari, *supra* note 16, at 103.

19 *Id.*

corporations. To give effect to the 2003 Norms, the states were mandated to adopt them as a treaty or other legal instrument.[20] Perhaps, owing to this, the 2003 Norms failed to receive any traction from the states, which ultimately concluded that the draft proposal "had no legal standing" and that the U.N. Sub-Commission "should not perform any monitoring function in that regard."[21]

With the 2003 Norms now defunct, the United Nations Commission on Human Rights appointed Professor John Ruggie of the Harvard Kennedy School of Government as a Special Representative for "identifying and clarifying standards of corporate responsibility and accountability with regard to human rights."[22] This later gave birth to the U.N. Guiding Principles on Business and Human Rights (the "UNGP") in 2011. One of the highlights of the UNGP is Section III, which deals with "Access to Remedy." In particular, Principles 30 and 31 discuss the need for non-State-based, non-judicial grievance mechanisms and their effectiveness. This is where the Hague Rules come into play, as they have been envisioned to be one such mechanism.

The UNGP not only influenced the substance of the Hague Rules, but the drafting process as well. Professor Steven Ratner[23] shed some light on the process followed by the Drafting Team. He mentioned that to ensure effectiveness of the Hague Rules in accordance with Principle 31 of the UNGP, the Drafting Team left no stone unturned to elicit as much input as possible from relevant stakeholders. He explained:

> This desire for inclusivity manifested itself in (i) the composition of the DT in terms of the diversity of expertise, regional perspectives, and gender; (ii) the publication of progress reports,

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20 *See* Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: Draft Norms Submitted by the Working Group on the Working Methods and Activities of Transnational Corporations Pursuant to Resolution 2002/8, U.N. ECOSOC, 55th Sess., U.N. Draft E/CN.4/Sub.2/2003/12 (May 30, 2003).

21 *See* Duggal & Rangachari, *supra* note 16, at 104.

22 *See* Press Release, U.N. Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005).

23 Professor Steven R. Ratner is the Bruno Simma Collegiate Professor of Law at Michigan Law, University of Michigan. His teaching and research focus on public international law and a range of disputes involving states, non-state armed groups, individuals, and corporations, including state and corporate duties regarding foreign investment, territorial conflicts, counter-terrorism strategies, ethnic conflict, and accountability for human rights violations. He was a member of the Working Group and the Drafting Team of the Hague Rules. For more information, *see Faculty Biographies*, U. OF MICH. SCH. OF L., https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=sratner (last visited December 24, 2020).

> the Elements paper, and the first draft; (iii) the creation of the Sounding Board, composed of 220 individuals; (iv) outreach during the drafting process via publications, speeches, blog posts, and other efforts by individual members of the DT; and (v) active consideration of all comments received from members of the Sounding Board and others responding to our published materials.[24]

The text of the Hague Rules has its basis in the Arbitration Rules of the United Nations Commission on International Trade Law (as adopted in 2013) ("the UNCITRAL Rules"), with changes as necessary to approach certain issues that are commonplace in the context of BHR disputes.[25] A detailed discussion regarding the key features of the Hague Rules, its similarities or dissimilarities, thereof with the UNCITRAL Rules can be found at a later stage in the paper.

III. Why are the Hague Rules Needed?

International business, as we know it today, recognizes no borders and continues to influence the lives of many people worldwide, either directly or indirectly. According to Duggal and Rangachari, "Business activity overall operates in a duality—capable of improving lives and raising standards of living in parallel with complicity in breaches of human rights."[26] With an increase in globalization over the past few decades, and the consequent increase in cross-border trade, States have struggled to efficiently balance trade, flow of capital, foreign investments and human rights impacts of the practices of multinational businesses and their associates, including supply chains. Thus, the need to have a separate, specialized mechanism for addressing BHR disputes was increasingly felt. These activities have impacted the human rights of people globally in numerous ways, including but not limited to: use of forced labor, child labor or inadequate wages for workers; environmental concerns including deforestation, pollution, and health

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[24] Steven Ratner & Ursula Kriebaum, Introductory Comments, *The Hague Rules on Business and Human Rights Arbitration*, Ctr. for Int'l Legal Coop. (2019), https://www.cilc.nl/cms/wp-content/uploads/2020/02/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_Launch-Report-.pdf.

[25] Ctr. for Int'l Legal Coop., The Hague Rules on Business and Human Rights Arbitration 3 (2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

[26] Duggal & Rangachari, *supra* note 16, at 102.

hazards; depletion of natural resources for economic gains; threat to indigenous communities; and racial, sexual, or gender discrimination against employees.[27]

With an increase in businesses' duties to ensure human rights compliance in supply chains and their overall operations, the need to remedy human rights violations of any sort was strongly advocated. Particularly, after the introduction of the UNGP, the obligations on States, as well as on multinational enterprises, increased manifold. The Principles, among other things, provide that States are obliged to ensure the availability of and access to effective dispute resolution mechanisms, both judicial and non-judicial, to address human rights impacts of trade and business activities.[28]

The Hague Rules have thus been introduced to cope with the barriers that parties encounter while seeking redressal to BHR disputes via the existing mechanism of dispute resolution, mainly national courts.[29] More precisely, these barriers to resolve such cross-border disputes in national courts include: (1) the risk that the competent national court may lack the capacity to deal with complex issues like BHR disputes, (2) the risk of lack of jurisdiction of the national court over a sister-entity or the parent company of an entity responsible for human rights abuse, (3) the prohibitive costs of litigation[30] and (4) the risk of political/economic influence of business corporations on the State.

Drawing from past experiences, it is accurate to say that while they have the means to prosecute international human rights violations, national courts in the host country of the foreign business entity may refrain from doing so for reputational concerns, potential impact on inflow of foreign investments, or lack of incentive.[31] Simply put, it is likely that for State mechanisms, the economic growth of the country (more probable for underdeveloped and developing countries) may take precedence over the human rights

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[27] Brigitta John, *The Hague Rules on Business and Human Rights Arbitration*, GLOB. ARB. NEWS (Apr. 21, 2020), https://globalarbitrationnews.com/the-hague-rules-on-business-and-human-rights-arbitration/.

[28] U.N. Special Representative of the Secretary General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, ¶ 25, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) ("As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.").

[29] Keon-Hyung Ahn & Hee-Cheol Moon, *An Introductory Study on the Draft Hague Rules on Business and Human Rights Arbitration*, 29 J. ARB. STUD. 3, 6 (2019).

[30] *Id.*

[31] Duggal & Rangachari, *supra* note 16 at 103.

protection of the populace.[32] A prime example is the failure of the Nigerian State to effectively implement the decisions of the Federal High Court, as well as the United Nations Environment Programme's ("UNEP") recommendations holding Shell liable for the continuous and systematic oil spills and gas flaring in the Niger Delta region. Consequently, Shell's environmental violations and blatant disregard for the Nigerian people and government (over which it exerted economic and political influence) continued unabashedly for decades.[33]

In BHR cases, a parallel approach by national courts also exists to evade issues concerning international law, as essentially it concerns association between States, and consequently warrants a limited scope of an individual's participation.[34] Illustratively, the U.S. Supreme Court did not establish jurisdiction in *Jesner v. Arab Bank*, stating that a non-U.S. entity cannot be sued in U.S. courts for international law violations.[35]

It is in this regard that BHR arbitration would have two key purposes as summarized in the Commentary to the Preamble to the Hague Rules: (1) It can provide a remedy for those affected by the human rights impacts of business activities in situations when more traditional remedies, such as judicial proceedings, are not available or effective; and (2) Business and human rights arbitration can assist businesses to meet their responsibilities under the U.N. Guiding Principles, both to respect human rights (Pillar II) and to provide a remedy to victims (Pillar III), or under the provisions of the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.[36]

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32 Also, take, for example, the POSCO steel plant case in the Indian state of Odisha. In an attempt to make India a steel superpower, the Odisha government signed an MoU with a South Korean company (POSCO) making it India's largest FDI deal. After acquiring land for the project and displacing 20,000 people off the area by the State, the FDI investment was pulled off due to an amendment in the Mines and Minerals Development and Regulation Act since it put the company in an unfavorable position. The State flagrantly violated the rights of the villagers, caused a disbalance to the ecology, and ruined their livelihood, all in the effort to shelter the foreign company and FDI.

33 Joint Written Statement Submitted by the Europe-Third World Centre (CETIM) and Environmental Rights Action/ Friends of the Earth Nigeria, U.N. Doc. A/HRC/26/NGO/100 (2014).

34 *See* Duggal & Rangachari, *supra* note 16, at 103.

35 138 U.S. 1386 (2018).

36 The Hague Rules on Bus. and Human Rts. Arb., at Commentary to Preamble (Dec. 12, 2019) [hereinafter THE HAGUE RULES].

Thus far, the arbitral tribunals have adopted a conservative approach in addressing the concerns of human rights violations. Illustratively, in *Biloune v. Ghana*,[37] in addition to the commercial claims, the issue of Mr. Biloune's alleged unlawful detention was also raised. The Tribunal held that as far as the question of jurisdiction over the dispute was concerned, its competence was limited to commercial disputes under the contract in question as the Government had agreed to arbitrate only disputes 'in respect of the foreign investment.'[38] Thus, other matters—however compelling—were outside the Tribunal's jurisdiction. It was further concluded that, while the acts alleged to violate the international human rights of Mr. Biloune were relevant in the matter, the Tribunal lacked jurisdiction to address, as an independent cause of action, a claim of violation of human rights.

On the contrary, there have been occasional instances when the arbitral tribunal took a more radical and inquisitorial approach while dealing with the issue. In *Phillip Morris v. Uruguay*,[39] the Tribunal recognized the State's obligations in protecting its citizens' public health by implementing stringent tobacco control laws to discourage the consumption, thereby rightfully advocating for such measures against the commercial interest of the investor. The views of the tribunals in cases like *Al Tamini v. Oman* and *Perenco v. Ecuador* were also similar, and the States' arguments regarding protection of environment and human rights outweighed the investors' commercial interests.[40]

In a similar vein, it also bears noting that arbitration has proven successful in BHR cases in the past. For instance, one example is the collapse of a garment factory in 2013 at Rana Plaza in Dhaka, Bangladesh, which resulted in the deaths of over 1,100 workers and injured more than 2,000 workers who were making garments for international brands.[41] In the aftermath of the incident, a multilateral agreement for the protection of human rights, the "Accord on Fire and Building Safety in Bangladesh" ("the Accord") was signed, which included over 200 global brands, retailers, importers, Bangladeshi labor unions, and Non-Governmental Or-

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[37] Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana, 95 INTL. L. REP. 184, 185–86 (1989–1990).

[38] *Id.* at 203.

[39] Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. Arb/10/7 (2016).

[40] Sheetal Narayanrao Shinde, *Investment and Human Rights: Sensitizing the Arbitration Mechanism to Protect Human Rights in the Host State*, 7 INDIAN J. ARB. L. 45, 54 (2019).

[41] Duggal & Rangachari, *supra* note 16, at 102.

ganizations ("NGO's"), as signatories, and also included a clause to arbitrate (under the mechanism established in the Accord) disputes arising from it.[42] Most notably, two arbitration proceedings were initiated under the Accord for human rights violations by global brands and were later settled by the parties themselves.[43]

Because it is a specialized mechanism, the Hague Rules could be adopted by businesses to enforce their contractual commitments to human rights in the course of their transactions with business partners (e.g., supply chains) or with States. The Hague Rules offer a two-fold benefit: first, providing access to remedy for those affected by business activities, and second, providing a strategy for human rights compliance and risk management strategy to the business enterprises. It is also significant to note that these Rules can serve as an additional tool for the States to fulfill their responsibilities as defined under Pillars I and III of the UNGP.[44]

Irrespective of the traditional approach, international arbitration has the potential to address human rights concerns in many ways. Particularly, when the terms of contract dictate a broader jurisdiction, for example, "jurisdiction over all disputes concerning investments," the tribunals have extensive scope to extend their reach to address human rights concerns rather than shying away.[45] It is in this spirit that the Hague Rules will fill the void and provide much-needed framework and structural support for the parties and tribunals to address BHR concerns with more credibility.

IV. Analysis of the Hague Rules

The Hague Rules present a commendable blend of a variety of literature on BHR disputes like the UNGP, OECD Guidelines, ILO Declaration, as well as sets of arbitration rules like the UNCITRAL Arbitration Rules and the Permanent Court of Arbitration (the "PCA") Environmental Rules. This reflects the extent of research and analysis performed by the Working Group and the Drafting Team in promulgating a one-of-a-kind specialized mechanism to address concerns of human rights violations by business enterprises.

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42 John, *supra* note 27.

43 *Id.*

44 Ctr. for Int'l Legal Coop., *supra* note 25, at 15.

45 Stanaro, *supra* note 10.

As previously mentioned, the Hague Rules are primarily based on the UNCITRAL Rules for the simple fact that the latter is well known and accepted by the international legal and business communities. Like the UNCITRAL Rules, the Hague Rules are not limited in scope and do not impose any constraints regarding the type of parties (both claimant(s) and respondent(s) or the subject-matter of the dispute).[46] These Rules would thus extend to any dispute that the parties would have agreed to resolve by arbitration under the Hague Rules. The broad scope of the Hague Rules means that anybody, including business enterprises, individuals, labor unions, organizations or other parties, could seek redressal for their disputes by arbitration under these Rules.[47] Thus, the Hague Rules permit multiple kinds of proceedings, such as business-to-business ("B2B") cases, victim-to-business ("V2B") cases, interventions by third-party beneficiaries, and amicus curiae interventions.[48] Strikingly, the scope of the Hague Rules also includes individual-investor arbitrations, which, historically, could only be initiated by the investors themselves or the host State.

It also bears noting that given the scope of potential disputes that may be arbitrated under the Hague Rules, the contracting parties may choose to alter certain provisions or opt out of some of them depending upon the needs of their case.[49] Another common feature between the UNCITRAL and the Hague Rules is that neither set out the modalities by which parties may agree to an arbitration under the respective rules. Thus, giving utmost importance to party autonomy in BHR arbitration as well, the Hague Rules allow for parties to establish their consent either before a dispute arises (e.g., in contractual clauses) or after the dispute arises (e.g., in a submission agreement/compromise).[50]

Additionally, the Drafting Team has also introduced some noteworthy modifications which handle the salient BHR issues discussed under the UNGP. Needless to say, these are the features that distinguish the Hague Rules from the other existing arbitration rules, aiming to effectively address issues of human rights violations by multinational enterprises and/or their supply chains. Some of these features are discussed henceforth.

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46 CTR. FOR INT'L LEGAL COOP., *supra* note 25.

47 *Id.*

48 Ratner & Kriebaum, *supra* note 24.

49 THE HAGUE RULES, at Art. 1(1).

50 CTR. FOR INT'L LEGAL COOP., *supra* note 25.

A. *Key Features and Critical Analysis*

1. Inequality of Arms

A common pattern in investor and human rights disputes remains that the former often escapes the liability of human rights abuse by show of power, persuasion, and political reach, while the latter has to face the brunt of such imbalance and lack of access to remedy. The drafting team of the Hague Rules paid special attention to the fact that such disputes often entail power imbalances between the disputing parties. Article 6(c) of the Hague Rules' Preamble states:

> These Rules are based on the Arbitration Rules of the United Nations Commission on International Trade Law (with new article 1, paragraph 4, as adopted in 2013) (the "2013 UNCITRAL Arbitration Rules") with changes in order to reflect . . . (c) The potential imbalance of power that may arise in disputes under these Rules.[51]

A number of Articles of the Hague Rules provide the arbitral tribunal with tools to address "inequality of arms" issues. Some of these are briefly discussed below:

i. Adequate Representation

Article 5 of the Hague Rules deals with the issues of representation and assistance. Clause 2 of the Article further addresses the issue of adequate representation for parties in a dispute. It states:

> Where a party faces barriers to access to remedy, including a lack of awareness of the mechanism, lack of adequate representation, language, literacy, costs, physical location or fears of reprisal, the arbitral tribunal shall, without compromising its independence and impartiality, ensure that such party is given an effective opportunity to present its case in fair and efficient proceedings . . . .[52]

The Article, in line with Principle 31(b)[53] of the UNGP, responds to the potential inequality of arms among the disputing parties that could create a barrier to accessing remedy and may have a negative impact on the overall fairness of the arbitration proceedings, such as the lack of adequate legal representation, high costs,

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[51] THE HAGUE RULES, at Preamble.

[52] *Id.* at Art. 5(2).

[53] U.N. Special Representative of the Secretary General, *supra* note 28.

and fears of reprisal.[54] This may be the case, especially as it relates to V2B cases, where an individual or a group of individuals (e.g., labor unions) may lack adequate economic resources to afford quality legal representation against multinational enterprises with plenty of funds at their disposal. A potential inequality of arms could otherwise prove to be a deterring force for even genuine victims to pursue their claims under the Hague Rules.

In this regard, it may also be worthwhile for the administering institution (if any) or the case repository, for example, the International Bureau of the PCA,[55] to maintain a roster of legal professionals, tribunal secretaries, translators, expert witnesses, among others, who would be willing to provide pro bono services or services at subsidized rates to parties otherwise lacking the means to afford quality services.

ii. Statement of Claim and Further Written Statements

Article 22(4) of the Hague Rules on "Statement of Claim" presents another deviation from the UNCITRAL Rules which accommodates a more efficient redressal of BHR cases. It states: "[T]he statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant or contain references to them."[56]

As explained by Professor Kriebaum,[57] the use of the expression "as far as possible" would allow the arbitral tribunal to take into account the possible economic and power imbalances, while accessing the evidence in the arbitration proceedings. Illustratively, in a situation when the costs involved in obtaining the evidence are overwhelming or when a party is aware that certain documents exist but is unable to obtain them because they are possessed by either the opposing party or a third party, the arbitral tribunal may use its discretion and, under the Rules, it may admit

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54 Ratner & Kriebaum, *supra* note 24.

55 THE HAGUE RULES, at Art. 1.5.

56 *Id.* at Art. 22(4).

57 Professor Ursual Kriebaum is a Professor for Public International Law at the University of Vienna, Department of European, International and Comparative Law. She also acts as consultant for law firms. She has taught international human rights law at the European Masters Programme in Human Rights and Democratization (Venice (Italy), Vienna (Austria)) and at the Vienna School of International Studies (Austria). She has worked in the office of the legal adviser of the Austrian Ministry of Foreign Affairs and was a legal expert on the team of the Austrian Special Envoy for Holocaust Restitution Issues. She was also a delegate to the U.N. Preparatory Committee for an International Criminal Court. She served as an expert in a E.U. Twinning Project on the Improvement of Statement-taking Methods and Rooms in Turkey. She was also a member of the Drafting Team of the Hague Rules.

the statement of claim without the accompanying evidence, which would otherwise be necessary.[58]

Furthermore, Article 27 of the Rules on "further written statements" also enhances the scope of flexibility in the proceedings and vests more procedural control with the arbitral tribunal in BHR disputes.[59] The Article gives the power to the arbitral tribunals to determine which further written statements (in addition to the statement of claim and statement of defense) shall be required to be submitted by the parties and when they must be submitted. Additionally, the tribunal would also have flexibility to set requirements concerning the length and form of such statements, on a case-by-case basis, in order to provide a fair and efficient process for resolving the parties' dispute. The aim remains to encourage the tribunals to proactively manage the written proceedings in an arbitration while ensuring efficiency and equality of arms, without compromising due process.[60]

iii. Evidence

A similar approach is adopted in the provisions concerning evidence and evidentiary procedures, which attempt to "strike a balance among a number of factors with respect to the taking of evidence, notably, fairness, efficiency, cultural appropriateness and rights-compatibility."[61]

In this context, it is pertinent to shed light on the common issues that arise in BHR disputes, which include evidence tampering and potential retaliation against victims or witnesses. In one of the most controversial cases of our time, two French sister-entity companies, Amesys and Nexa, were alleged to be accomplices in human rights violations in Libya and Egypt during their respective civil wars. The surveillance technology companies supplied sophisticated equipment to the governments, which were used in perpetrating war crimes and extreme human rights abuses by tracking, detaining, and torturing dissidents.[62] Despite the international attention that the case garnered, the companies escaped liability for two primary reasons. The first reason can be attributed to the lack of evidence to substantiate the claims made by the human rights

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58 *See* Ratner & Kriebaum, *supra* note 24.

59 *Id.*

60 *Id.*

61 *Id.*

62 Eur. Parliament, Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries 43 (2019), https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf.

groups, the Court's failure to consider the likelihood of the destruction of evidence during conflict, as well as the threat placed upon witnesses and victims—most of whom refused to testify in the case.[63] Secondly, there was a limited scope of liability under the French criminal laws in matters concerning international trade.[64] Ultimately, neither case resulted in an effective remedy to the victims of human rights abuse.

Appreciating the need for customizing evidentiary procedures, the Hague Rules introduced some notable modifications. Article 32 discusses different tools, such as "document production procedures, ability to limit the scope of evidence produced, and the power to sanction non-compliance with orders to produce evidence through adverse inferences or a reversal of the burden of proof,"[65] which the tribunal can use to manage the potential power imbalance (linked to costs or other burdens while obtaining evidence or producing documents) between the parties in terms of access to evidence. Moreover, under Article 32(4), the tribunal is also instructed to take into account the relevant best practices in the field regarding the collection of evidence, while giving overall consideration to crucial aspects like fairness, efficiency, cultural appropriateness, and human rights-compatibility.[66]

Most notably, Article 33(3) provides that witness statements, including the statements made by expert witnesses, may be presented in writing—unless the arbitral tribunal directs otherwise.[67] This flexibility in the evidentiary procedure would not only reduce the economic implications on the parties, but also address the concerns of witness protection in BHR disputes. In this respect, the Hague Rules have attempted to delve into the nitty-gritties of arbitration procedures and tried to fashion it to best address different aspects of disputes involving human rights violations.

iv. Costs

Costs incurred during an arbitration is often the parties' elementary concern. As previously mentioned, it is highly probable that in BHR disputes, the economic imbalance between parties could be significant. Thus, to attempt to address these concerns, the Hague Rules used the provisions on fees and expenses of arbi-

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63 *Id.* at 45.

64 *Id.*

65 *See* Ratner & Kriebaum, *supra* note 24.

66 THE HAGUE RULES, Art. 32(4).

67 *Id.* at Art. 33(3).

trators and allocation of costs to allow arbitral tribunals to take the economic situations of the parties into account.[68] The parties do, however, need to cover the basic costs of the arbitration and for legal representation.[69] As recommended above, the administering institution or the appointing authority could maintain a roster with details of professionals willing to provide their services pro bono or at subsidized rates. Contingency funding or agreement on asymmetric distribution of costs and deposits between the parties could be other alternatives.[70] However, in the absence of sophisticated, well-managed and well-executed legal aid resources, the costs may prove prohibitive in BHR disputes, thereby, defeating the purpose of providing ease of access to remedy.

A bigger concern may still arise from the provision of Article 53 on "Allocation of Costs," which states, "[T]he costs of the arbitration shall in principle be borne by the unsuccessful party or parties . . ."[71]

This provision clearly reflects how the Hague Rules have misunderstood the complexities of BHR disputes, particularly from the victims' perspective.[72] The Rules are likely to trigger the cognitive bias of loss aversion, especially among those victims with meager financial resources at their disposal, thereby deterring genuine claimants from bringing a claim against the multinationals. While the Article provides that the arbitral tribunal could use its discretion to apportion these costs otherwise depending upon the circumstances of the case, there is no clarity about how this discretion will be applied by the tribunals or any manner in which the same could be challenged by the parties if need be.[73]

B. *New Requirements on Arbitrators*

The Hague Rules added Article 11 regarding the selection of arbitrators, imposing the requirement that the presiding arbitrator, in a three-member tribunal, or a sole arbitrator have demonstrated

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[68] *Id.* at Art. 52–4.

[69] *Id.* at Art. 51.

[70] *See* Ratner & Kriebaum, *supra* note 24.

[71] THE HAGUE RULES, Art. 53(1).

[72] Shavana Haythornwaite, *The Hague Rules on Business and Human Rights Arbitration*, KLUWER ARB. BLOG (May 5, 2020), http://arbitrationblog.kluwerarbitration.com/2020/05/05/the-hague-rules-on-business-and-human-rights- arbitration-noteworthy-or-not-worthy-for-victims-of-human-rights-violations/.

[73] *Id.*

expertise in international dispute resolution and in one or more fields relevant to the particular arbitration.[74] The other requirements include: (1) Independence, which among other things is demonstrated by lack of stake or involvement in the dispute. It also mandates that the nationality of the presiding/sole arbitrator should be distinct from that of the parties; and (2) Need for more inclusivity and diversity.[75]

It is plausible that these provisions will address the concerns raised by human rights NGO's in the past, which argue that commercial arbitrators lack the sensitivity, as well as the expertise, to efficiently deal with BHR disputes, thus creating a trust deficit between the victims and the tribunals, as well as a lack of comfort.[76]

Moreover, the Hague Rules include a special Code of Conduct for Arbitrators, inspired by best practices in international arbitration, while heavily relying on the International Bar Association ("IBA") Guidelines.[77] It, however, exceeds the IBA Guidelines in imposing stronger obligations of disclosure on the arbitrators, banning double-hatting involving the same issues, and making it possible for the PCA to create a Code of Conduct Committee to update the Code in order to keep up with the evolving international practices.[78]

C. *Remedy*

The categorical argument remains that the nature of BHR disputes is drastically different from those of commercial disputes. In capturing this essence, one of the most significant features of the Hague Rules is the broad scope of remedy and relief that the arbitral tribunal can grant. Thus, "an award may order monetary compensation and non-monetary relief, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition."[79] This indicative list of non-monetary relief largely reflects the text of the commentary to Principle 25 of the UNGP.[80] Moreover, the provisions also allow the arbitral tribunal to make recommendations for additional redress. With an

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74 *See* Ahn & Moon, *supra* note 29, at 16.
75 *Id.*
76 *Id.*
77 THE HAGUE RULES, at the Code of Conduct.
78 *See* Ratner & Kriebaum, *supra* note 24.
79 THE HAGUE RULES, at Art. 45.
80 *Id.* at Commentary.

array of options available and the possibility of non-monetary relief, one cannot help but notice the potential for increased party involvement in determining the outcome of the dispute or the likelihood of switching to mediation as prescribed under the Hague Rules.[81]

Here, it becomes imperative that the arbitrators pay special attention in rendering the award to be duly recognized and enforced by the competent national courts.[82] For example, enforcement of the arbitral award was refused by the Seoul District Court because the award was not specific enough to be practically executed. However, this decision was later overturned by the Seoul High Court, which upheld the validity of the award despite the challenges in its practical execution.[83] As a lesson from this instance, it would prove worthwhile if a provision for "scrutiny of awards" is added to the Hague Rules (similar to other arbitration rules, including those of the International Court of Arbitration).[84] This would help to ensure that the arbitral award is not couched in broad, ambiguous terms and can be practically enforceable pursuant to the applicable law(s).[85]

In a similar vein, the Hague Rules provide that the arbitral tribunal consider the proportionality and cultural appropriateness of its awards.[86] The provisions mandate that the arbitral tribunal "conduct the proceedings in a manner that provides for a human rights-compatible process in accordance with Guiding Principle 31(f) of the U.N. Guiding Principles."[87] In line with this, under provisions of Article 45(4), the arbitral tribunal must also satisfy that the award is human-rights compatible, and the reasoning of the award must include some discussion of the issue of rights-compatibility.

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81 *Id.* at Art. 56(1), which states, "At any time during the course of the arbitral proceedings, parties may agree in writing to resort negotiation, mediation, conciliation or other facilitation methods to resolve their dispute. In that case, upon the joint request of the parties, the arbitral tribunal shall stay the arbitral proceedings."

82 *See* Ahn & Moon, *supra* note 29 at 18.

83 *Id.*

84 *Id.*; *See also* 2017 Arbitration Rules, INT'L CHAMBER OF COM., art. 34 ("Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may law down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.").

85 *Id.*

86 THE HAGUE CONVENTION, at Commentary to Art. 45.

87 *See* Ratner & Kriebaum, *supra* note 24.

D. *Applicable Law*

The question of the applicable substantive law always remains crucial for legal security and predictability concerning the outcome of an arbitration. Thus, it is important that a set of arbitration rules include provisions on how to identify the applicable substantive law.

In this context, Article 46 of the Hague Rules has adopted the same approach as the UNCITRAL Law. Divided in four steps, these provisions are:

> (1) Paragraph one provides for the possibility of an agreed choice of law, rules of law or standards; (2) Paragraph two contains a default rule of applicable law; (3) Paragraph three allows for an express agreement of the parties for an *ex aequo et bono* decision by the arbitral tribunal; and (4) Paragraph four directs the arbitral tribunal's attention to various additional binding rules that it may draw upon to resolve the dispute.[88]

The objective behind this remains to provide the parties with the broadest possible scope in determining the normative sources from which the applicable law is drawn. For instance, this could include industry-specific standards or supply chain codes of conduct and national or international statutory commitments, both related to business and human-rights.[89] By allowing the parties to agree upon a combination of rules from distinct legal systems or non-national sources, this provision would grant the arbitral tribunal more flexibility in making its decision, as it would not have to operate strictly within the framework of a national legal system (likely the case in commercial arbitrations), which may or may not be conducive to addressing human rights concerns.[90] This is especially significant, as there seems to be an institutional indifference in the investment arbitration pertaining to the direct invocation of issues concerning human rights. For instance, there are no provisions concerning human rights in the Model Bilateral Investment Treaties (the "BITs") of China, France, Germany, the United Kingdom, and the United States.[91]

In the Amesys and Nexa case, it is critical to note that the French courts, bound by the national codified law, were limited in the scope of their jurisdiction over the matters and criminal prose-

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88 *Id.*

89 *See* Ahn & Moon, *supra* note 29, at 19.

90 *Id.*

91 *See* Shinde, *supra* note 40, at 52.

cution. With the flexibility provided by the Hague Rules in this regard, the outcome in similar cases would be contrasting.

E. *Miscellaneous*

1. Emergency Arbitrator

Another highlight of the Hague Rules remains the newly adopted provision on the Emergency Arbitrator system. Article 31 of the Hague Rules states that a party that is in need of urgent interim measures and cannot await the constitution of an arbitral tribunal may submit a request for appointment of an emergency arbitrator to the appointing authority. This provision provides for appointment of an emergency arbitrator "within as short a time as possible, normally within two days from receipt of request."[92]

This provision may prove rewarding in cases of pressing human rights violations where the interim relief sought could be in the form of injunction (e.g., the Shell Niger Delta case), immediate restrictions to stop the business operations, or specific relief. Most notably, the requirements for filing a request for an emergency arbitrator are minimal, straightforward and user-friendly. Notably, however, the provision for emergency arbitration is only a pre-arbitral procedure that provides for an interim award, which may be modified, terminated or annulled by the order of the arbitral tribunal.[93]

2. Transparency

The Hague Rules present notable progress insofar as they contain an innovative and a comprehensive section on transparency. Inspired by numerous ideas of UNCITRAL Transparency Rules, the Hague Rules also provide a new set of default rules that favor transparency of arbitration proceedings in BHR disputes.[94] These provisions may not be required in the context of B2B arbitration where no question of public interest is raised, thereby allowing for the arbitral tribunal's discretion not to apply the transparency rules.[95] To this end, the transparency rules present a well-balanced approach where even though the scope of transparency is broad, certain information is recognized as confidential. Illustratively, key

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92 THE HAGUE RULES, at Art. 31.

93 *Id.*

94 *See* Ratner & Kriebaum, *supra* note 24.

95 *Id.*

documents in a proceeding like the notice of arbitration and arbitral award would fall under the scope of transparency rules,[96] whereas sensitive business information, including information that is confidential under national law, would be not be disclosed.[97] The provisions also provide for public hearings, subject to various exceptions, and for the public information to be stored in a repository, which the Hague Rules designate as the PCA.[98]

With an introduction of these provisions, the Drafting Team has acknowledged and communicated the need for transparency of proceedings where issues of public interest are involved. This would thus reinstate more confidence among the parties to BHR disputes, particularly the victims, and grant more credibility to the overall process.

3. Protection of Parties, Witnesses, etc.

Another exception to the provisions of transparency under Article 42 includes the protection of parties, witnesses or other representatives. Article 18(5) provides for the protection of parties or their representatives in exceptional cases and allows the arbitral tribunal to treat their identities as confidential throughout the proceedings.

Further, Article 33(3) contains provisions for the protection of witnesses or expert witnesses in situations of "genuine fear,"[99] and the burden of proof to demonstrate the same lies on the person or the party seeking protection under this provision.

Under the Hague Rules, the arbitral tribunal can adopt one of the following specific measures to protect identities:

- non-disclosure to the public or to the opposing party of the identity or whereabouts of a witness, representative, etc.;
- expunging names and identifying information from the public record;
- non-disclosure to the public of any records identifying the victim or witness;
- giving of testimony through image or voice altering devices or closed-circuit television; and
- assignment of a pseudonym.[100]

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96 THE HAGUE RULES, at Art. 40.

97 THE HAGUE RULES, at Art. 42.

98 *See* Ratner & Kriebaum, *supra* note 24.

99 THE HAGUE RULES, at Commentary to Art. 33: "The concept of genuine fear should be understood as a subjective fear of harm to the person or their livelihood. A witness may have a 'genuine fear' even if similarly placed witnesses have testified without retaliation against them."

100 *See* Ratner & Kriebaum, *supra* note 24.

These provisions distinguish the Hague Rules from the existing international arbitration mechanism, make them more conducive to the needs of BHR disputes, and reflect the understanding among the Working Group and the Drafting Team of the sensitivity that such matters often entail. This too would encourage the victims of human rights violation to voice their concerns without the fear of retaliation from the "stronger forces" that they may otherwise not venture to oppose. Although well-meaning, with the burden of proving "genuine fear" on the party seeking protection, the whole provision could prove to be counter-productive.

V. Future of the Rules

The Hague Rules, most definitely, deserve commendation for presenting a specialized mechanism to address BHR disputes and promoting discussions around human rights in the international investment regime. Undoubtedly, there will be professionals in the field of human rights, as well as arbitration, who would have their own reservations. At the outset, "it is unlikely that the Hague Rules will in fact even begin to deal with primary obstacles to remedies for human rights violations."[101] To this end, the willingness of multinational enterprises, businesses in the supply chain, and the States (which are often politically driven) to agree to the use of Hague Rules would be an enormous challenge, primarily because of their tendency to prevent access to remedies for the prospective victims of their potential abuses.[102]

Given that the Hague Rules, like other arbitration mechanisms, are consent-based, it is unclear why a multinational enterprise would be willing to arbitrate under these Rules. This seems plausible given past examples in which companies have repeatedly argued against the jurisdiction or liability in host states and have shown a non-amenable approach to approaching human rights concerns and offering to remedy them. While attempting to preserve party autonomy in the arbitration process, the Hague Rules seem to have lost sight of the biggest challenge in BHR disputes.

As pessimistic as it may sound, it is also plausible that the arbitration agreements entered under the Hague Rules may be diluted, opting out of redressal of human rights violations.[103] Thus, it could

101 *See* Haythornwaite, *supra* note 72.
102 *Id.*
103 *Id.*

be well-expected that the Hague Rules, at least in the first few years after coming into force, would deal with B2B disputes only. This undermines the whole spirit of the Hague Rules and sheds light on the fact that specific rights holder issues were not contemplated.[104]

Assuming that the multinational enterprises agree to adopt the Hague Rules, concerns about potential economic power imbalance would continue to pose a big challenge to the individuals seeking redressal under this mechanism. It is particularly in this regard that the Hague Rules have lost coherence with the other, specialized provisions to better administer BHR arbitrations. Unless a robust mechanism is introduced to provide for legal aid, contingency funding, etc., the high costs of arbitrating BHR disputes would continue to deter genuine claimants from bringing claims against the business enterprises.

It is also pertinent to mention that the Hague Rules have attempted to provide glaring procedural autonomy to arbitral tribunals. However, with the lack of a comprehensive set of guidelines for the arbitrators to practice their discretion, the objectives behind these provisions would most likely be defeated. It is thus recommended that an exhaustive guide be introduced for the arbitrators to help them better comprehend their mandate under this specialized mechanism.

On a more optimistic note, it would be fair to say that the states could have a bigger role to play. While companies may resist adoption of the Hague Rules in their commercial contracts, states could insist upon including the Hague Rules arbitration clause in its investment treaties or agreements. As mentioned earlier, the duty of ensuring effective remedy for human rights violations lies with both the businesses and the states. It may also prove worthwhile for states, international trade organizations and even NGO's to set up task forces to better understand the potential loopholes in the effective implementation of the Hague Rules. While the progress of this new, specialized mechanism is likely to be slow and arduous, it is not impossible. Amidst all the speculation and anticipation around the Hague Rules, its effectiveness could only be ascertained with time.

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104 *Id.*

VI. Conclusion

For an investment arbitration mechanism to be truly conducive to human rights, it is important to ensure equal emphasis on sensitization of the arbitration mechanism as well as inclusion of human rights obligations in substantive law.[105] It is pertinent to note that the very objective of the Hague Rules is to overcome the structural and procedural barriers that continue to exist in the corporate law regime. The objective of the Hague Rules is two-fold: to provide fair and effective remedy to the victims whose basic human rights are exploited by the impact of adverse business activities, and to provide a mechanism for the business enterprises to incorporate redressal of potential human rights violations in the course of their principal and ancillary operations.

The Hague Rules, introduced after extensive and elaborate research by exemplary professionals in the field, seem promising on the outset primarily for their intent to cater to the needs of the victims of BHR disputes where effective local and national level judicial mechanisms lack efficiency in dealing with such concerns. However, upon further examination, there appears to be a certain ambiguity in relation to the implementation of the provisions under the rules, such as voluntary application of the rules by the corporates, affordability of litigation costs by the financially weaker parties, the procedural lacuna as to how the tribunals will act in a more proactive manner to ensure inclusivity of the weaker parties for their adequate representation, efficient and fair conduct proceedings, and so on, as mentioned earlier in detail.

Undoubtedly, with the promulgation of the Hague Rules, a largely untouched area of arbitration has been tapped. While the Hague Rules hold much promise, there remains ample scope for improvisation. It is still too soon to comment on their acceptability in the business and legal communities and practical efficiency, something that can only be determined with the passage of time.

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105 *See* Shinde, *supra* note 40, at 59.