

SCHOLARLY ARTICLE

The Potential of Arbitration as Effective Remedy in Business and Human Rights: Will the Hague Rules be Enough?

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Abstract

The area of business and human rights (BHR) has a gap in its means to effectively remedy human rights violations. In pursuit of implementing the third pillar of the UN Guiding Principles on Business and Human Rights, which focuses on providing an effective remedy to rightsholders affected by corporate human rights violations, it has been proposed to utilize arbitration as a new platform to deal with such violations. The Drafting Team that instigated this initiative has prepared a set of procedural rules for BHR arbitration, called the Hague Rules. The Rules were officially launched on 12 December 2019. These arbitral rules are tailored to the specific needs of settling human rights disputes. In this article, the general idea of BHR arbitration will be analysed and assessed in light of the normative concept of ‘effective’ remedy, using the Hague Rules as a focus point. This article will discuss not only what the Hague Rules would introduce to the general concept of BHR arbitration, but also what limitations might still remain in securing an effective remedy.

Keywords: arbitration; business and human rights; effective remedy; Hague Rules; UNGPs

I. Introduction

‘Go ahead, try and accuse us...’¹ This was the response received by a government authority in Mabende, in the Democratic Republic of Congo, when this person went to the site of a Chinese non-ferrous metal mining corporation to express concern about reports of human rights violations and environmental damages, but was refused access.² The quote is also the title of a report that was published by a Congolese environmental civil society organization at the end of 2018.³ The report documents how the activities of this Chinese corporation have caused loss of land⁴ and pollution of water from the river and wells,⁵ and how the process of procurement of minerals has been accompanied by numerous human rights violations.⁶

The quote has particular symbolic value within the context of the business and human rights (BHR) field. The exploitation of the weak state structures in Congo by this Chinese

¹ PremiCongo, *Human Rights Violations by Chinese Mining Companies in the Democratic Republic of Congo: The Case of China Nonferrous Metal Mining Co. in Mabende* (Lubumbashi: November 2018) 12.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*, 28.

⁵ *Ibid.*, 32

⁶ *Ibid.*, 10–11.

corporation, and its obvious awareness that any real risk of accountability is non-existent, perfectly depicts the gap that is still very present in the BHR field. The affected rightsholders – whether it be pastoralists whose waters have been polluted, forest dwellers whose forests have been cut down, or indigenous peoples whose lands have been dispossessed – often encounter unsurmountable barriers that prevent them from being able to assert their rights and hold transnational corporations to account.⁷ These can be practical barriers of a financial, geographic, linguistic, logistical or gender-specific nature, or legal barriers caused by jurisdictional hurdles, doctrinal obstacles or dysfunctional judicial systems.⁸ Ultimately, impunity remains almost unavoidable in a lot of cases like this. A central question, therefore, in the BHR field is: how to effectively give voice to those rendered voiceless?

One of the avenues currently being explored to expand the remedial landscape for affected rightsholders has been that of BHR arbitration. The most recent development therein has been the drafting of a set of arbitration rules specifically tailored to be used in BHR disputes. The Hague Rules on Business and Human Rights Arbitration (Hague Rules), which were officially launched on 12 December 2019, aim to provide a neutral forum for specialized dispute resolution, which can accommodate both business to business (B2B) as well as victim to business (V2B) disputes.⁹ The Hague Rules modify the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) to reflect the unique nature of the interests involved in BHR disputes.¹⁰ To find a careful balance between various concerns of rightsholders and the beneficial features of the arbitral mechanism, the Hague Rules were developed through an interactive process between members of the Business and Human Rights Arbitration Drafting Team (Drafting Team) and various stakeholders.¹¹ Some of the areas touched upon, for example, were the requirement of accessibility versus the growing criticism about inefficiency and costliness, the concern for greater transparency versus the aura of confidentiality, the aim for fair proceedings versus the obvious inequality of arms between the parties in dispute, and the need for effective enforcement versus the potential inarbitrability of human rights awards. Whether BHR arbitration under the Hague Rules will, ultimately, be able to provide an effective remedy for affected rightsholders will depend on its success in addressing these competing considerations.

As the most prominent initiative in the larger human rights arbitration debate, it will be relevant to evaluate how and whether the Drafting Team has sufficiently addressed these concerns. Therefore, the central question that this article will attempt to answer is whether the Hague Rules are capable of offering an ‘effective’ remedy to rightsholders affected by the activities of transnational corporations. The contribution of this article will lie in providing a realistic view of what BHR arbitration under the Hague Rules can offer these rightsholders in their pursuit for justice. Given the structural nature of some of the (predominantly) practical obstacles that affected rightsholders face (e.g., lack of financial and political bargaining power), it is unlikely that a set of procedural rules designed to enable human

⁷ Lorenzo Cotula, ‘Rethinking Investment Law From the Ground Up: Extractivism, Human Rights and Investment Treaties’ *Investment Treaty News* (23 March 2021), <https://www.iisd.org/itn/en/2021/03/23/rethinking-investment-law-from-the-ground-up-extractivism-human-rights-and-investment-treaties-lorenzo-cotula/> (accessed 10 June 2021).

⁸ The United States Institute of Peace, *Guiding Principles for Stabilization and Reconstruction* (Washington DC: USIP Press, 2009) 86–92.

⁹ The Drafting Team of the Hague Rules on Business and Human Rights Arbitration, *The Hague Rules on Business and Human Rights Arbitration, International Arbitration of Business and Human Rights Disputes: Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process* (The Hague: CILC, 2018) 4.

¹⁰ *Ibid.*

¹¹ *Ibid.*

rights arbitration, although a welcome addition to the current remedial landscape, will be able to adequately meet the standards of an effective remedy for rightsholders.

The article will begin with a discussion on arbitration as a dispute resolution mechanism and what circumstances brought about the idea of BHR arbitration. Subsequently, I will touch upon the right to an 'effective' remedy and its centrality within the road to empowerment for those rightsholders. Thereafter, I will discuss not only what the right to an effective remedy requires under international human rights law, but also how its enjoyment is lacking in practice. Finally, this article will introduce the concept of BHR arbitration under the Hague Rules as a means to address the remedy gap and provide a critical analysis of the Rules' viability in establishing an effective remedy for rightsholders.

II. The Development of Arbitration towards Human Rights Law

Arbitration as a dispute resolution mechanism has a long-standing history of helping to fortify the rule of law, with evidence showing an established arbitral system as early as 500 BC in Ancient Greece.¹² Whether it has been as a means to resolve disputes between private parties, disputes involving states concerning boundaries, or disputes related to family law, property law or commercial transactions, arbitration has deep roots across a wide range of contexts.¹³ The allure of the arbitral mechanism is that it offers an alternative form of dispute resolution that can be used instead of the government-run court system. Much like litigation, the arbitral procedure is binding, adjudicative and subject to legal rules. However, by contrast, arbitration has also traditionally been perceived to be confidential, flexible, speedy and inexpensive. In addition to that, arbitration is a creature of contract. It permits the parties to the dispute considerable latitude to design the proceedings. Among other features, the parties have a say not only in the composition of the tribunal and where it has its seat, but also about how the proceedings are conducted and what the applicable rules are to resolve the dispute.

In recent decades, the arbitral mechanism has witnessed unprecedented successes in international commercial and investment contracts. This can largely be attributed to the introduction of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the advance of arbitration-friendly national legislative efforts in the 1980s, as the arbitral process had become more flexible and autonomous, and the awards could practically be enforced worldwide.¹⁴ In our fast-paced and market-oriented world order, the international arbitral mechanism, with its inherently suitable features, was subsequently developed into a highly sophisticated system that became the method of choice for international commercial disputes. However, this increased enthusiasm thereby also fundamentally altered the approach to the arbitral process.¹⁵ After all, arbitration progressively became a valuable tool to accelerate further the globalization process.

Particularly, international investment arbitration, as an important instrument for protecting foreign investments, became known as 'a growth industry'.¹⁶ This is arguably evidenced by the exponential increase in the number of bilateral investment treaties (BITs)

¹² David W Rivkin, 'The Impact of International Arbitration on the Rule of Law – The 2012 Clayton Utz/University of Sydney International Arbitration Lecture' (2013) 29:3 *Arbitration International* 328, 341.

¹³ *Ibid.*

¹⁴ Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' (2011) 28:2 *Journal of International Arbitration* 93.

¹⁵ *Ibid.*, 90.

¹⁶ Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60:3 *The International and Comparative Law Quarterly* 574.

and the subsequent proliferation of commercial disputes that were submitted to arbitration.¹⁷ The investment regime has been traditionally centred on providing foreign investors with a strong legal protection in the host state to safeguard their legitimate expectations, thus ensuring that an investment-friendly climate would continue.¹⁸ Besides the opportunity to bring a direct claim against the host state before an arbitral tribunal, foreign investors have been protected under BITs by standards such as the guarantee of fair and equitable treatment, the guarantee of full protection and security, and the guarantee of most-favoured-nation treatment.¹⁹ These special guarantees had historically been perceived as a necessary means to protect the capital flow from developed countries to importing developing countries.²⁰ The first BITs, after all, emerged during a time when the relationship between these countries was affected by post-colonial struggles.²¹ The fear of unfair treatment and expropriation by former colonies, therefore, played an important role in the decision to maximize the legal protection of foreign investors.²²

Nonetheless, this rationale, which had justified such an arbitration mechanism in the past, is now progressively recognized as being akin to ‘a horse that has bolted from the barn’.²³ Although initially designed to compensate for the perceived impotence of foreign investors in their relation with the local sovereign and its potentially arbitrary rules, the international investment arbitration regime has now largely gained the reputation of having provided investors with a disproportionately one-sided tool to force host states into submission.²⁴ Contemporary critique has thereby partly centred on the issue that foreign investors have been able to employ the investment arbitration system as an end in itself.²⁵ The system also enables foreign investors to challenge a host state’s human rights-inspired actions or policies, when these arguably devalued their investment.²⁶ Given the duration and expenses of these proceedings, host states may experience such claims as a sword of Damocles hanging over their head, ultimately being dissuaded from regulating in the public interest.²⁷ This neglect for public interest concerns by the international investment arbitration system extends to its (in)ability to give due recognition to the interests of those affected by the investment.²⁸ Despite arbitrators often being tasked with balancing human rights protection against investor interests, confidentiality and ineffective participation by affected rightsholders has been the norm.²⁹ Although these views were

¹⁷ United Nations Conference on Trade and Development, ‘International Investment Agreements Navigator’, <https://investmentpolicy.unctad.org/international-investment-agreements> (accessed 18 June 2021).

¹⁸ Rudolf Dolzer and Christoph Schreuer (eds.), *Principles of International Investment Law* (2nd edn) (Oxford: Oxford University Press, 2012) 79.

¹⁹ *Ibid.*, 13.

²⁰ Lorenzo Cotula, ‘Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law’ (2015) 11:2 *International Journal of Law in Context* 117.

²¹ *Ibid.*

²² Thomas Schultz and Cédric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study’ (2015) 25:4 *European Journal of International Law* 1152.

²³ Anthea Roberts, ‘Incremental Systemic, and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112:3 *American Journal of International Law* 410.

²⁴ Horatia Muir Watt, ‘The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal: The Missing Link’ in Walter Mattli and Thomas Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford: Oxford University Press, 2014) 218.

²⁵ *Ibid.*

²⁶ Simma, note 16, 580.

²⁷ *Ibid.*

²⁸ Watt, note 24, 220.

²⁹ Nicholas J Diamond, ‘ISDS Reform and Advancing All Generations of Human Rights’, *Kluwer Arbitration Blog* (17 June 2020), <http://arbitrationblog.kluwerarbitration.com/2020/06/17/isds-reform-and-advancing-all-generations-of-human-rights/> (accessed 14 December 2020).

initially being put forward by mostly scholars and civil society organizations, they progressively also came to be reflected within the position of several states, sparking a number of reform efforts.³⁰

In order to address the negative impact of the international investment arbitration regime, calls in recent years have increasingly been heard to place access to justice for affected rightsholders more prominently on the agenda.³¹ This development has essentially forced the arbitration community to go into a dialogue with the BHR field, specifically in order to think about how to more effectively accommodate the rights and interests of affected rightsholders through the arbitral mechanism. This dialogue has not only helped generate relevant experiences and lessons for the idea of BHR arbitration, but also, ultimately, paved the way for the Hague Rules.

In addition to the experience provided by the investor-state dispute settlement (ISDS) regime, the momentum needed to explore and pursue this new remedial option had also been created by two notable developments in the BHR field, namely: the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the experiences gained with conducting BHR arbitration as a result of the two arbitrations under the aegis of the Permanent Court of Arbitration (PCA) that were raised by IndustriALL Global and UNI Global, pursuant to the Bangladesh Accord on Fire and Building Safety (Accord).

The UNGPs have arguably been the most influential contribution in identifying how we should structure our current approach towards business-related human rights abuses. The core of the UNGPs lies with the 'Protect, Respect and Remedy' framework. This framework rests on three pillars: (1) the state's duty to protect against human rights abuse by third parties, (2) the corporate responsibility to respect human rights, and (3) access to remedy.³² The third pillar acknowledges that, despite the best efforts of states and corporations, business-related human rights abuses may still happen. Therefore, those that are affected should be able to seek redress through effective remedies. The principles of the third pillar, just as the other pillars, do not establish new law, but clarify already existing standards.³³ However, a crucial contribution lies in the fact that these principles address the right to an effective remedy in light of the inherent complexities in the BHR sphere.

The second notable development was introduced by the Accord in 2013. This document was established in the aftermath of the Rana Plaza building collapse in Bangladesh on 24 April 2013, which involved the death of more than 1,000 people and over 2,000 injured.³⁴ The Accord constitutes a legally binding agreement between global brands, retailers and trade unions meant to improve human rights standards and worker safety in the Bangladeshi garment industry.³⁵ It provides a dispute settlement mechanism with the option of appeal through a binding arbitration process.³⁶ In 2016, two PCA arbitrations were initiated by global labour unions (IndustriALL Global and UNI Global), who claimed that

³⁰ UN General Assembly, 'Human Rights-Compatible International Investment Agreements – Note by the Secretary-General', A/76/238 (27 July 2021) paras 29–51; Roberts, *note 23*, 410.

³¹ See, e.g., Columbia Center on Sustainable Investment, 'Impacts of the International Investment Regime on Access to Justice: Roundtable Outcome Document' (New York: CCSI, 2018).

³² *Ibid*, para 6.

³³ *Ibid*, para 14.

³⁴ Antoine Duval, 'International Arbitration of Business and Human Rights Disputes: Part 3 – Case Study of the Accord on Fire and Building Safety in Bangladesh's Binding Arbitration Process – By Catherine Dunmore', *Doing Business Right Blog* (18 December 2017), <https://www.asser.nl/DoingBusinessRight/Blog/post/international-arbitration-of-business-and-human-rights-disputes-part-3-case-study-of-the-accord-on-fire-and-building-safety-in-bangladesh-s-binding-arbitration-process> (accessed 20 June 2021).

³⁵ Transition Accord on Fire and Building Safety in Bangladesh 2018 (21 June 2017), <https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf> (accessed 20 June 2021).

³⁶ *Ibid*, art 3.

two leading fashion brands were not acting in compliance with the Accord. Although both cases ended in a settlement, the tribunal in the initial stages had to deliberate on the competing private and public interest involved and also address the demands for confidentiality and transparency.³⁷ These cases thus brought to light several challenges which would arise as a result of BHR arbitration's hybrid nature. Nonetheless, the Accord was hailed as a turning point in the debate on the potential of arbitration to provide an effective remedy in BHR disputes.³⁸

III. A BHR Victim's Perspective on Effective Remedy

What exactly does 'the right to an effective remedy' require under international human rights law? And, with these requirements in mind, how do we understand the local realities of affected rightsholders and the obstacles they encounter in obtaining justice? This section will try to provide an answer to these questions. Not only will this effort help us to gain a better understanding of the position of the BHR rightsholders, but it will also allow us to outline elements of the right to an effective remedy, which could then be employed to test the suitability of arbitration under the Hague Rules to address business-related human rights abuses.

First of all, a distinction should firstly be made between the procedural and substantive components of an effective remedy. Although some human rights documents, like the European Convention on Human Rights (ECHR), have incorporated these components in separate provisions (Articles 13 and 41 of the ECHR, respectively), it is generally accepted that an effective remedy necessarily implies a right to substantive remedy.³⁹ The procedural remedy encompasses the process by which access is provided to competent authorities (courts of law, tribunals, administrative agencies, etc.) that consider and decide upon claims of alleged human rights violations.⁴⁰ The substantive remedy is concerned with the form of reparation that is provided at the end of that process, of course if a violation has been established.⁴¹

As to the elements that determine the effectiveness of these two components, this section will aim to give a comprehensive, but not an exhaustive, interpretation by centering the discussion on three foundational standards: accessibility, the fair trial guarantees and the concept of 'effective' reparation. The reason for selecting these three standards is because together they can arguably capture most of the constitutive elements of the right to an effective remedy, pertaining to both the quality of the process as well as the outcome.⁴² The aspect of accessibility is often mentioned in the same breath as the fair trial guarantees, which encapsulates an undefined number of procedural guarantees that aim to ensure the proper administration of justice from the

³⁷ *IndustriALL Global Union and UNI Global Union v Respondent*, PCA Case. No 2016-36 & 37, Procedural Order No. 2, Decision on Admissibility Objection and Directions on Confidentiality and Transparency (4 September 2017) 93–97.

³⁸ Cherie Blair, Ema Vidak-Gojkovic and Marie- Anaïs Meudic-Role, 'The Medium is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration' (2018) 35:4 *Journal of International Arbitration* 392.

³⁹ UN Human Rights Committee, 'General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16.

⁴⁰ Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn) (Oxford: Oxford University Press, 2005) 7.

⁴¹ *Ibid.*

⁴² See, e.g., *McFarlane v Ireland*, App. No. 31333/06, ECtHR (10 September 2010), para 114. In this case, the ECtHR incorporated all three standards in its interpretation of an 'effective' remedy by stating: 'the proposed remedies constituted effective remedies which were available to the applicant in theory and in practice, that is to say, that they were accessible, capable of providing redress and offered reasonable prospects of success'.

outset.⁴³ However, given that the other procedural guarantees are rendered meaningless without the right of access and considering the exceptional relevance of the particular gateway function of this right to the position of affected rightsholders in the BHR field, this right is discussed below separately.⁴⁴

Accessibility

In their pursuit to find justice, rightsholders affected by corporate human rights abuse face insurmountable hurdles to even attain access to a remedy. The right to access recognizes that a rightsholder should have the genuine possibility to institute proceedings before a remedial mechanism.⁴⁵ Part of ensuring the ‘effectiveness’ of that remedy is addressing the obstacles, whether legal, practical or otherwise, that make the mechanism inaccessible to the point that it would reduce the very essence of this right. At its core lies, therefore, the requirement that a remedy be informed by ‘the experiences, perspectives, interests and opinions of the rightsholders’.⁴⁶

A rough distinction can thereby be made between obstacles that are of a structural nature and those that are considered as more operational obstacles.⁴⁷ ‘Structural obstacles’ are those that are caused by ‘the very nature of societal organization’.⁴⁸ In the case of rightsholders, it is often their legally, financially and politically disadvantaged position, compared with the corporate entity responsible, which can decisively obstruct the opportunity to bring a claim. Besides the fact that corporations are usually far more resilient to deal with the costs of litigation than rightsholders are, the bewildering complexity of some corporate structures and the inability to obtain information to build a successful claim are also inter-related and frequently mentioned issues that will debilitate anyone motivated to seek justice.⁴⁹ These structural obstacles are not necessarily the result of a faulty remedial mechanism, but are nonetheless recurring problems for those mechanisms and will have to be resolved to secure an effective remedy for all.

The operational obstacles are the obstacles that are caused by the inefficiency and ineffectiveness of the administration of the remedy mechanism.⁵⁰ This means that, as opposed to structural obstacles, their potential obstructive effects are solely caused by judicial practices and they stay within the realm of the mechanism. With regard to affected rightsholders, specifically seeking extraterritorial action, think for instance of short limitation periods to bring a claim forward, the application of the *forum non conveniens* doctrine,⁵¹ the sheer costliness of cross-border litigation and the restrictions on pursuing

⁴³ *Golder v The UK*, App. No. 4451/70, ECtHR (21 February 1975), para 36.

⁴⁴ See, e.g., Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (London: Amnesty International, 2014).

⁴⁵ *Golder v The UK*, note 43.

⁴⁶ UN General Assembly, ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises’, A/72/162 (18 July 2017), para 20.

⁴⁷ Martin Abregu, ‘Barricades or Obstacles: The Challenges of Access to Justice’ in Rudolf V Van Puymbroeck (ed.), *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (Washington DC: World Bank Publications, 2001) 57.

⁴⁸ *Ibid.*

⁴⁹ Amnesty International, note 44, 113.

⁵⁰ Abregu, note 47, 57.

⁵¹ Although a number of these civil procedural rules can certainly act as a hurdle to affected rightsholders, they do often exercise an important function in the administration of justice. Take, for example, the discretionary *forum non conveniens* doctrine, which allows domestic courts to dismiss a civil case with a transnational element when another, more suitable forum is available, and when accepting jurisdiction would, for instance, otherwise mean

class or collective action.⁵² The list is long and while we now largely understand these obstacles, we have yet to find a way to circumvent their potential obstructive effects, if applied in an excessively formalistic manner.

Fair Trial Guarantees

Although the unquestionable significance of the right to a fair trial is recognized in a number of international human rights documents, its exact features remain complex and dynamic. Their nature, therefore, makes it difficult to formulate a comprehensive definition.⁵³ Nevertheless, there still seems to be a broad consensus on the intrinsic elements. These elements can roughly be categorized as either belonging to the institutional or the procedural dimension of the right to a fair trial.⁵⁴

The institutional dimension establishes a normative standard regarding the fundamental qualities which judicial bodies need to possess. Most importantly, this standard demands the mechanism and its judicial officers to be competent, independent and impartial.⁵⁵ In essence, a remedy meeting the fair trial criteria has procedures in place to ensure that the judicial office is free from direct or indirect influence from whomever governments, parties to the proceedings, third parties, etc. and is able to distance itself from any actual or perceived bias.⁵⁶ In their search for justice, affected rightsholders may often be deprived of these assurances in the remedies that are available to them. For instance, in the host state, where the abuse occurred, they may face a justice system that is under-developed or where the judiciary is plagued by corruption.⁵⁷ Furthermore, specifically with regard to more vulnerable groups, like indigenous peoples or women, a fair trial may even be harder to obtain, due to obstacles such as systemic discrimination.⁵⁸

The procedural dimension requires that safeguards be put in place to guarantee the quality of the proceedings themselves. Despite all the numerous different requirements pertaining to the fairness of the proceedings, there are two core features that ought to be mentioned: the adversarial principle and the equality of arms.⁵⁹ Together they encapsulate

inconveniencing the parties and/or the judicial system, thereby balancing the private and public interests involved. This function bears particular relevance in light of the exponential growth in transnational litigation claims.

⁵² See Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (2012), chapter 4, <https://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticlawremedies.pdf> (accessed 20 February 2019).

⁵³ Ana Koprivica, 'Right to a Fair Trial in Civil Law Cases' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: Oxford University Press, 2018) 5.

⁵⁴ *Ibid.*, 8.

⁵⁵ European Convention of Human Rights, art 6(1); International Covenant on Civil and Political Rights, art 14(1).

⁵⁶ OSCE Office for Democratic Institutions and Human Rights, *Legal Digest of International Fair Trial Rights* (Warsaw: OSCE Office for Democratic Institutions and Human Rights 2012) 56–65.

⁵⁷ EU Directorate-General for External Policies of the Union, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', EP/EXPO/B/DROI/FWC/2013-08/Lot4/07 (February 2019) 15; Gwynne Skinner et al, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (December 2013) 2, http://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-_access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf (accessed 5 January 2019).

⁵⁸ Cathal M Doyle, *Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy – Case Studies from Africa, Asia and Latin America* (Chiang Mai: AIPP, Almaciga & IWGIA, 2015) 33.

⁵⁹ *Yves Morael v France*, Communication No. 207/1986, UN Doc Supp. No. 40 (A/44/40) at 210 (1989), para 9.3; *Kress v France*, App. No. 39594/98, ECtHR (7 June 2001), paras 72 and 76.

most of the circumstances that pertain to the application of the fairness standard.⁶⁰ Therefore, they have numerous implications that can hardly be discussed exhaustively here.⁶¹ Securing these two features entails that at all stages of the proceedings there must be a reasonably fair balance between the parties, thereby enabling them to present their case on an equal footing without any appearance of arbitrariness.⁶² From the perspective of a BHR victim, being able to obtain a remedial mechanism that provides a level playing field is near impossible. Besides the fact that there is an immense disparity in financial means and available information between the parties, the high evidentiary thresholds often employed by courts and the undeveloped legal standards necessary to assign liability to a controlling corporate entity can also be decisive obstacles that render the right to a fair trial an illusion.⁶³

Effective Reparation

An authoritative depiction of what the right to effective reparation should encapsulate is offered by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles), adopted in 2005 by the General Assembly.⁶⁴ The Basic Principles stipulate that the various forms of reparation may include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁵ If possible, the victim should be returned to the original situation before the human rights breach, also known as *restitutio integrum*.⁶⁶ However, as the consequences of human rights violations are often by their nature irreparable, the rights of the victim should be restored and repaired to the fullest extent.⁶⁷ In ordinary litigation⁶⁸ as well as in non-judicial complaint proceedings,⁶⁹ reparation may often only encompass monetary compensation. This compensation may frequently be entirely insufficient, not only due to a potentially low settlement, but also due to an excessively long and costly process of accessing the share.⁷⁰

That brings us to the final element encompassed by the right to reparation, the enforceability of decisions.⁷¹ A remedial mechanism that does not possess the means to

⁶⁰ Ola J Settem, Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings – With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency (Cham: Springer International Publishing Switzerland 2016) 119.

⁶¹ *Ibid*, 67.

⁶² *Ibid*, 68, 71 and 119.

⁶³ Amnesty International, *note 44*, 118–122.

⁶⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2005).

⁶⁵ *Ibid*, para 18.

⁶⁶ *Ibid*, para 19.

⁶⁷ Commission on Human Rights, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr Theo van Boven, Special Rapporteur', E/CN.4/Sub.2/1993/8 (July 1993), para 131.

⁶⁸ Zerk, *note 52*, 61.

⁶⁹ European Union Agency for Fundamental Rights, *Business and Human Rights – Access to Remedy* (Vienna: FRA, 6 October 2020) 43.

⁷⁰ Amnesty International, *note 44*, 50.

⁷¹ International Covenant on Civil and Political Rights, art 2(3)(c); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle C; *Hornsby v Greece*, Judgment of 19 March 1997, ECtHR, Reports 1997-II, para 40.

enforce its decisions evidently lacks effectiveness.⁷² The absence of enforceability would not only weaken the mechanism's capacity to offer protection, but also weaken its legitimacy and authority. Furthermore, for a victim seeking justice, winning the case would also just constitute a hollow victory if there would be no opportunity to claim it.

IV. The Practical Impact of the Hague Rules

In addressing the BHR remedy gap, out-of-the-box-thinking is undoubtedly a pre-requisite to finding a solution. With the Hague Rules, the Drafting Team has demonstrated what forms this pursuit might take by utilizing the international arbitration mechanism in a relatively unfamiliar context. The Hague Rules are a new set of arbitral procedural rules, which parties can choose to adopt if they have agreed to refer their dispute to arbitration. The Hague Rules mirror to a large extent the UNCITRAL Arbitration Rules and UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. However, because the UNCITRAL Rules are not meant for human rights disputes, the Drafting Team has introduced some deviations from the original provisions to specifically suit BHR arbitration.⁷³ Ultimately, the aim of the Drafting Team was to 'lower barriers to access to remedy' and thereby contribute to the implementation of the third pillar of the UNGPs.⁷⁴

As rightfully pointed out by Desierto, a member of the Drafting Team: 'The (BHR arbitration) question has to be reframed away from "why international arbitration?", to "why not also international arbitration?"'.⁷⁵ As BHR arbitration would play a complementary role to other State-based judicial and non-judicial grievance mechanisms, which will collectively pursue the ideal of an 'effective' remedy, the focus should indeed be on value addition. Nonetheless, arguably one of the most important elements of providing an effective remedy for affected rightsholders and subsequently the success of the Hague Rules will be that those rightsholders are convinced that the remedy is meant for them. Being transparent about only the opportunities is therefore not enough to serve their needs. To have a realistic perspective on this new remedial avenue for rightsholders, it is also necessary to create awareness of its potential limitations and ambiguities. Towards that aim, this paper will provide a critical assessment of the Hague Rules, specifically through the lens of the right to an effective remedy, as understood under international human rights law. Although the Hague Rules are not just designed for V2B disputes and can also be used for B2B disputes, I will solely focus on their viability regarding the former.

Accessibility

As discussed in the previous part, affected rightsholders face numerous hurdles, either due to their societal position or due to the deficits within the remedial systems that are available to them. Can the Hague Rules adequately address such hurdles? Towards that aim, the first aspect that I will discuss is the ability of the Hague Rules to compensate for the

⁷² Inter-American Court of Human Rights, *Judicial Guarantees in States of Emergency* (arts. 27(2), 25 and 8 American Convention on Human Rights, Advisory Opinion OC-9/87 (6 October 1987), Series A No. 8, para 24.

⁷³ The Hague Rules on Business and Human rights Arbitration 2019 (officially launched on 12 December 2019) 3, https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (accessed 20 December 2019).

⁷⁴ *Ibid.*, 4.

⁷⁵ Diane Desierto, 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration', *EJIL: Talk!* (12 July 2019), <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/> (accessed 11 November 2019).

disadvantaged position of affected rightsholders, specifically to guarantee that they have an actual possibility to make a claim. After that, I will address whether the Hague Rules have been able to find an endogenous solution to the features inherent within the arbitral mechanism itself that are able to hinder BHR victims' access to justice.

Who are the Affected Rightsholders?

To determine what roadblocks affected rightsholders may (or may not) encounter in their search for justice through human rights arbitration under the Hague Rules, it might help to draw a rough picture of who the rightsholders are. This will not only allow us to better appreciate the position of the rightsholders and their relation to the relevant corporate entity, but also provide us with a context in which to place the analysis of the Hague Rules. According to the EU Agency for Fundamental Rights, three broad categories of affected rightsholders may be identified: consumers, local population and workers.⁷⁶ Within these three categories, there are sub-categories that are prone to be more vulnerable to the transgressions of corporate entities. One may, for example, think of elderly people encountering consumer fraud through online shopping, indigenous communities having to leave their ancestral domains due to mining-related projects and migrant workers in the agriculture or construction sector being severely exploited. The circumstances that they face and the violations that they encounter will be widely divergent, but they all represent the realities that rightsholders face in seeking redress. Can human rights arbitration, as offered through the Hague Rules, be an avenue for them to find such redress?

The scales of justice will hardly ever be balanced in these circumstances. This often already manifests itself at the stage of rightsholders being unaware of their rights and the remedies that are available to them. After all, rightsholders that are subjected to extreme injustices, largely reside in countries where the rule of law is particularly fragile and the feelings of fear and distrust towards the system are constant.⁷⁷ It is therefore likely that these rightsholders will not always perceive their grievance from a rights-based perspective, let alone have a sufficient understanding of what it means to exercise those rights. In these circumstances, it is safe to assume that they will often also lack the knowledge on what judicial and non-judicial mechanism are available. This educational gap will certainly hamper the utility of the Hague Rules, as most rightsholders will be oblivious to their existence. In order for those rightsholders to actually reap the rewards of an expanded mechanism of remedies, one of the pre-requisites will be that the victim's right to have access to justice is not hollowed out by a lack of legal awareness. Therefore, devising a strategy to raise awareness at the grassroots level will be necessary to begin with. As van Aaken noted during the launch of the Hague Rules, 'the gospel needs to be taken to the streets'.⁷⁸ No doubt, states will be a key player in this pursuit.

Cost and Efficiency

Assuming that the affected rightsholders can find their way towards human rights arbitration, what are the relevant steps for them to be able to gain access to this remedial mechanism? One of the more prominent considerations will be whether they would be able

⁷⁶ European Union Agency for Fundamental Rights, *note 69*, 29.

⁷⁷ See Center on International Cooperation, *Justice for All - The Task Force on Justice: Final Report* (New York: Center on International Cooperation, 2019) 31-38.

⁷⁸ Center for International Legal Cooperation, 'The Hague Rules on Business and Human Rights Arbitration - Report: Launch Symposium of The Hague Rules on Business and Human Rights Arbitration' (The Hague: CILC, 2019) 17.

to make a transnational case financially sustainable over a potentially long period of time. The introductory note within the Hague Rules clarifies:

arbitration under these Rules is meant to be employed where it is reasonable to presume that all parties have a minimum of resources at their disposal to cover the basic costs of the arbitration and their own representation, either by themselves or through a 'legal aid' system, contingency funding or an agreement on the asymmetric distribution of costs and deposits between the parties.⁷⁹

Because affected rightsholders may be without sufficient resources, they would need to rely on the resilience of the system for financial and legal assistance, not only to cover (part of) the litigation costs, but also to offset the obvious disparity in means between the parties. This is venturing into uncharted waters for arbitration, as it remains to be seen whether the available schemes will allow transnational human rights proceedings to be financially viable. As a result, an important role will be accorded to civil society organizations, lawyers working *pro bono* and third-party funders to provide financial and procedural assistance. The issue of funding, therefore, remains a major source of scepticism under the Hague Rules.⁸⁰

To address those concerns, the Hague Rules introduce several provisions that could help make the proceedings more cost-efficient, whereby the arbitral tribunal especially is given an important role. For example, they allow for the establishment of an expedited procedure,⁸¹ grant specific tools for all involved to control the expenditures⁸² and provide the tribunal with the discretion to adopt a more appropriate apportionment of the costs despite the Rules in principle applying the 'loser pays' rule.⁸³ Only time will tell whether these modified provisions will enhance the practical accessibility of the proceedings for rightsholders. Nonetheless, the Hague Rules emphasize that the tribunal carries a heavy responsibility in that respect.

Consent

Another relevant consideration for affected rightsholders looking to raise a claim against a corporation is whether this corporation will agree to take their dispute to an arbitral tribunal. As arbitration is a creature of contract, all parties must have consented to resolve human rights dispute through such means. Consent under the Hague Rules can be obtained through an arbitration agreement within a contract that had been entered into prior to the dispute (*ex ante*), or through a so-called compromise (or submission agreement) between the parties after the dispute has arisen (*ex post*).⁸⁴ Although the latter is uncommon, creative ways can be found to agree to arbitrate despite the lack of a contractual agreement. A good example thereof would be the Bangladesh Accord, where

⁷⁹ Hague Rules, note 73, Introductory Note, 4.

⁸⁰ See, e.g., Shavana Haythornthwaite, 'The Hague Rules on Business and Human Rights Arbitration: Noteworthy or Not Worthy for Victims of Human Right Violations?' *Kluwer Arbitration Blog* (5 May 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/ (accessed 5 December 2020); Ylli Dautaj, 'Roll Out the Red Carpet: The Hague Rules on Business and Human Rights Arbitration are Finally Here!', *Kluwer Arbitration Blog* (December 26, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/12/26/roll-out-the-red-carpet-the-hague-rules-on-business-and-human-rights-arbitration-are-finally-here/> (accessed 5 December 2020).

⁸¹ Hague Rules, note 73, art 57 and commentary.

⁸² *Ibid*, art 52(1) and commentary.

⁸³ This rule ultimately requires the losing party to pay the legal costs of the winning party.

⁸⁴ Hague Rules, note 73, Introductory Note, 3.

the consent was incorporated into a multilateral agreement for the protection of workers' health and safety.⁸⁵ The introduction of the third-party beneficiary principle is an innovative method through which affected rightsholders can join the arbitral proceedings by relying on a pre-existing contract, while not being privy to that contract.⁸⁶ There are two different instances mentioned by the Hague Rules where this doctrine applies: when a contractual clause, part of a pre-existing contract between business parties, provides a right to recourse to arbitration for third parties, or if the arbitration agreement itself foresees such a right.⁸⁷ As to the latter, the Hague Rules provide a sample model clause that parties may choose to incorporate in their agreement.⁸⁸

Consequently, there are various ways imaginable through which consent can be obtained to submit a V2B dispute to arbitration. However, whether corporations will actually be willing to subject themselves to such proceedings and give the necessary consent still remains a contentious point of debate. After all, part of the reason why remedial barriers for rightsholders exist have been the efforts of corporations to put those barriers there.⁸⁹ It seems, therefore, justified to question why corporations would entertain the thought of being voluntarily scrutinized on the subject of their transgressions before a tribunal, and if they are willing to do so, to be a little cynical about their actual intentions. That being said, with regard to the former concern, there are indeed multiple advantages for corporations to arbitrate BHR disputes. With the changing expectations of the international community on human rights protection, multinationals and their extraterritorial activities are increasingly placed under a magnifying glass. If used as intended, arbitration could not only help control and prevent the occurrence of human rights abuse throughout their supply chains, but also provide a neutral and efficient avenue to address claims and resolve their disputes. This way they avoid or mitigate reputational damage and keep their social licence to operate abroad, all while showcasing their efforts to meet their responsibilities under the UNGPs.

Although corporations might have incentives to pursue human rights arbitration, in order to gain practical relevance, it is still crucial that the project of the Hague Rules is effectively marketed with corporations as well as other stakeholders. This would, for one, require states to get fully on board. States play a major role in ensuring that a coherent domestic policy is conducted. If corporations would at all be confronted with a more robust BHR framework and domestic court system in the host state, the incentive for corporations to consent to human rights arbitration would certainly grow, as it would offer an overall more attractive alternative.⁹⁰ Moreover, states could be an important source of funding and an authoritative advocacy for the Hague Rules to generate further support. For example, one of the means that states possess, which could certainly create awareness of the Hague Rules and also potentially facilitate their implementation throughout corporate supply chains, is public procurement. With 12 per cent of the gross domestic product being spent on public procurement in OECD countries, the state wields a crucial regulatory instrument through which it is able to define the global market.⁹¹ In addition,

⁸⁵ The Accord on Fire and Building Safety in Bangladesh, note 35, art 3.

⁸⁶ Hague Rules, note 73, art 19 and commentary.

⁸⁷ Ibid.

⁸⁸ Ibid, Annex – Model clauses, 106–107.

⁸⁹ Rolf H Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2016), 27:5 *European Business Law Review* 671; Skinner, note 57, 6 and 7–9.

⁹⁰ Abhisar Vidyarthi, 'Hague Rules on Business and Human Rights Arbitration: What Lies Ahead?' (28 September 2020), <http://aria.law.columbia.edu/hague-rules-on-business-and-human-rights-arbitration-what-lies-ahead/?cn-reloaded=1> (accessed 5 December 2020)

⁹¹ Organization for Economic Co-operation and Development, 'Public Procurement', <http://www.oecd.org/vu-nl.idm.oclc.org/governance/public-procurement/> (accessed 20 November 2020).

international procurement frameworks are increasingly providing regulatory space for social considerations within the different stages of the procurement process.⁹² For example, it might eventually be imaginable that states make the adoption of the Hague Rules a part of their award criteria, which they commonly employ when selecting a tender.⁹³ Although the space is still rather limited, if this trend of reform progresses, it might enable governments to more efficiently ‘leverage’ their purchasing power towards securing human rights compliance from the corporations that they do business with.

Fair Trial Rights

So far we have sketched a picture of some of the hurdles that affected rightsholders might encounter when pursuing access to human rights arbitration under the Hague Rules. Many of such hurdles are intrinsically related to poverty. We know that there may be a gap between rightsholders and corporations as to their experience in laying claim to their rights, that there may be a mismatch in terms of their political bargaining power and financial resources, that there may be disparity as to their ability to find (and afford) legal counselling and expert opinions and that there may be an inequality with regard to their position to access the information necessary to build a case.

The Hague Rules seek to provide a meaningful remedial mechanism that can significantly level the playing field to address the structural unevenness that arises in a V2B dispute, while still being able to appeal to the corporations’ commercial interests. This is an incredibly difficult balance to find, particularly as rightsholders will always end up on the losing side if that scale tips one way or the other.

In this section, I will analyse the changes the Hague Rules have tried to make to pursue such an equilibrium and how, from a practical perspective, these changes might affect the position of BHR victims trying to raise a claim. The different features introduced by the Drafting Team are critically analysed to assess whether they would be able to overcome obstacles to rightsholders’ access to justice. The analysis is formulated around two questions which reflected some of the more pressing concerns that were voiced surrounding the publication of the Hague Rules.

A Remedy Meant for Affected Rightsholders?

Regardless of whether rightsholders have encountered challenges due to the power of entrenched interests and pervasive corruption, or whether an accumulation of financial and procedural hurdles obstructed their search for justice, they are undoubtedly left with a feeling of disempowerment and scepticism. This by-product of the remedy gap, which is a hurdle to access of justice in itself, should be addressed through a mechanism that enjoys public confidence and is able to adequately meet the legal needs of affected rightsholders. In case of human rights arbitration under the Hague Rules, there are a number of uncertainties that make those that are invested in the subject somewhat hesitant about whether to believe that this mechanism would actually be able to generate such confidence.⁹⁴ Besides the fact that there are some general legitimacy concerns surrounding arbitration, largely centering

⁹² Organization for Economic Co-operation and Development, ‘Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation’ (Paris: OECD, 2019) 11.

⁹³ Olga Martin-Ortega and Claire Methven O’Brien, *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Cheltenham: Edward Elgar Publishing, 2019) 4–5.

⁹⁴ See, e.g., CCSI, note 31.

on the perceived bias of arbitrators within ISDS,⁹⁵ there are some specific doubts about its suitability in dealing with human rights disputes and about whether the mechanism could be fair to rightsholders.⁹⁶

With regard to the more general concerns that have transposed from the legitimacy crisis within investor-state arbitration, it should be emphasized that arbitration is a neutral model for settling disputes. This model can be tailored to a variety of contexts and is capable of settling a wide range of disputes. Therefore, the idea of arbitration is inherently indefinable, particularly because it means something different to different people.⁹⁷ That being said, despite there being no factual basis to presume structural bias within the arbitral mechanism, the lack of confidence which is generated by such claims, could undermine the Hague Rules' practical impact. The Drafting Team has, therefore, carefully tried to address such concerns by adopting several safeguards that attempt to guarantee the impartiality and independence of the tribunal.⁹⁸ For instance, under the Hague Rules, the Permanent Court of Arbitration (PCA) would in principle act as the appointing authority. Given its experience in establishing specialized panels of arbitrators, the PCA would be able to provide the parties with access to arbitrators that possess expertise in the area of BHR and that enjoy a reputation of integrity.⁹⁹ In addition to providing for a procedure to challenge arbitrators¹⁰⁰ and an opportunity for various transparency measures intended to strengthen the legitimacy of the proceedings, the Hague Rules also incorporate a Code of Conduct, which sets out a far-reaching duty of disclosure and certain ethical guidelines.¹⁰¹ Consequently, it would at least seem that human rights arbitration under the Hague Rules can sufficiently distance itself from being tainted by the suspicions of bias.

When it comes to the concerns about the suitability of arbitration as a means to deal with human rights disputes, there are some very promising procedural aspects present within the Hague Rules which could convince those seeking justice that they are accommodated and empowered in their search. The flexibility of arbitration is arguably the most important asset in that regard. For instance, the fact that the arbitral mechanism is not geographically bound, and the tribunal may, thus, be seated within the jurisdiction where the abuse happened, allows for better dialogue with entities relevant to the dispute, such as affected communities, workers' groups and representative of host country governments. Such distinct knowledge may be relevant to adequately navigate the existing tensions between the stakeholders and, ultimately, provide for a more meaningful response.¹⁰² Towards the aim of strengthening the legitimacy of human rights arbitration under the Hague Rules, this opportunity for local level reach and engagement may establish a sense of public trust and a better social connection.

⁹⁵ See Malcolm Langford, Daniel Behn and Laura Letourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does it Matter?', *ISDS Academic Forum Working Group 7 Paper* (15 March 2019), https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf (accessed 15 April 2019).

⁹⁶ Haythornthwaite, note 80.

⁹⁷ Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press 2013) 3.

⁹⁸ See, e.g., Hague Rules, note 73, art 11 and commentary

⁹⁹ Juan Jose Alvarez Rubio and Katerina Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (1st edn) (London: Routledge, 2017) 109

¹⁰⁰ Hague Rules, note 73, arts 12–14.

¹⁰¹ *Ibid.*, Code of Conduct, 96–97.

¹⁰² May Miller-Dawkins, Kate Macdonald and Shelley Marshall, 'Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms' (2016), http://corporateaccountability.squarespace.com/s/NJM01_beyond-effectiveness-criteria.pdf (accessed 13 December 2020) 35–36.

Furthermore, in addition to the fact that the tribunal may find better traction at the local level due to its undefined seat, the flexibility of arbitration would also allow for the proceedings to be shaped in a more culturally appropriate manner. Article 18 of the Hague Rules specifically underscores this feature of human rights arbitration, noting that the tribunal shall use its discretion to facilitate appropriate proceedings. Although little further guidance is provided as to how and when the tribunal should employ this discretion, the ability to design the proceedings to accord due recognition and weight to cultural identities may foster a greater sense of ownership and control over the proceedings by rightsholders. After all, a culture's choice about how to deal with its past, might be determined by its distinct cultural context.¹⁰³ Giving the arbitral tribunal sufficient space to integrate such cultural identities, might be imperative to a full realization of their rights, particularly, for example, with regard to indigenous peoples' rights.¹⁰⁴ Consequently, the legitimacy of human rights arbitration under the Hague Rules will also certainly be enhanced by its sensitivity towards the spiritual, cultural and social values of the rightsholders that seek justice.

Is Equal Standing Attainable?

For those that are marginalized and under-privileged, finding a judicial or non-judicial mechanism that reflects their realities and enables them to adequately assert their interests is generally a forlorn hope. One of the more pressing inadequacies is that existing mechanisms are generally unable to take into account and address the inherent power asymmetries between rightsholders and corporations.¹⁰⁵ As a result, throughout the different stages of the proceedings, corporations are allowed to have an edge, whether legally, politically and/or financially. Although arbitration under the Hague Rules thoroughly addresses the inevitability of such an advantage in V2B disputes, some still voice doubts about the practical impact that such measures will have to actually establish equal standing.¹⁰⁶ Within these doubts lies a sense of distrust towards the corporate entities that would choose to arbitrate V2B disputes under the Hague Rules.¹⁰⁷ They fear that corporations may still be able to employ their inherent edge to the detriment of BHR victims, particularly through features that are inherent to the arbitral mechanism itself.

One of the features that defines the essence of the arbitral mechanism is the high party autonomy that is accorded to the parties to agree upon the substantive laws and procedures applicable to their proceedings. This feature thereby allows the parties the discretion to modify or opt-out of certain provisions to best suit their needs. Such flexibility will generally be one of the most important incentives for rightsholders to consider arbitrating their dispute, as it theoretically enables them to overcome various practical and procedural hurdles. However, it also subjects them to a risk of market failure. After all, the liberalistic process which the principle of party autonomy carves out envisions the arbitration agreement to be a product of evenly matched parties in terms of bargaining power.¹⁰⁸ While this notion may, therefore, be suitable for commercial disputes between equally

¹⁰³ Kora Andrieu, 'Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm' (2010), 41:5 *Security Dialogue* 555.

¹⁰⁴ Dalee Sambo Dorough, 'Indigenous Peoples and the Right to Remedy: The Need for a Distinct Cultural Context' in Doyle (ed.), note 58, 13.

¹⁰⁵ FRA, note 69, 91.

¹⁰⁶ See, e.g., Haythornthwaite, note 80.

¹⁰⁷ See CCSI, note 31, 3–4.

¹⁰⁸ Xandra Kramer and Eris Themeli, 'The Party Autonomy Paradigm: European and Global Developments on Choice of Forum' in V Lazic and S Stuij (eds.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme* (The Hague: TMC Asser Press, 2017) 27.

strong corporate parties, it seems inappropriate in the context of human rights disputes and appears to ignore the room left open for exploitation by opportunistic parties. When rightsholders suffer from imperfect information, they may agree to conditions that can, ultimately, have different implications than they initially were able to perceive.

Another feature that is foundational to international arbitration is the concept of arbitral discretion. It essentially entails that the tribunal is granted the power to make a judgement call when the relevant procedural rules (explicitly or implicitly) permit such discretionary authority or when the tribunal identifies a lacuna.¹⁰⁹ Throughout the Hague Rules and the annexed Code of Conduct, a reliance on this concept is noticeable regarding the provisions that are intended to level the playing field between the parties. Various references are made to the tribunal's responsibility towards establishing fair and efficient proceedings, but also towards compensating for particular burdens or obstacles faced by the parties.¹¹⁰ The Hague Rules provide more specific guidance for the tribunal in the Commentary (for instance, in Article 30 on the adoption of interim measures), thereby clarifying what steps the tribunal can take within its discretion. The Rules also envisage that the tribunal will be guided by best practices relating to international arbitration, but also to the human rights context, taking into account the hybrid-nature of the proceedings.¹¹¹ Nonetheless, often it is still undetermined how the tribunal in practice will actually use its discretion. Therefore, the Hague Rules also leave undetermined whether some of the innovations in the BHR arbitration rules will actually be sufficient to facilitate competition on equal terms.

This lack of clarity will not only leave victim-claimants in a vulnerable position, but also potentially expose them to the risk of unequal treatment. Two short examples might illustrate such a risk. First, regarding legal representation, besides the obvious cost aspect which already limits the pool of available lawyers, this pool diminishes even more when including factors like aptitude, willingness and above all expertise in this specialized area of law and international arbitration. The absence of legal representation will of course constitute a considerable handicap. Under Article 5(2) of the Hague Rules, the tribunal would have the discretion to intervene in these circumstances. However, it is unclear how exactly and by what means the tribunal should address such a handicap. This is still the case, although the Drafting Team has to a certain extent successfully reformulated this provision in comparison with the one in the draft Hague Rules. In the final Hague Rules, the provision includes a much lower threshold for the arbitral tribunal to use its discretion ('where a party faces barriers to access to remedy' instead of a cumulative set of requirements on the part of the party) and a much more result-orientated position as to using that discretion ('shall ensure' instead of 'shall endeavor to ensure'). Nonetheless, besides generally suggesting that more proactive and inquisitorial procedures could be adopted, no further guidance is given as to how the tribunal can actually provide an effective opportunity for the party without legal representation to present its case.

Second, Article 53 of the Hague Rules establishes that the default position in terms of costs allocation would be to apply the loser pays principle.¹¹² The tribunal can, using its discretion, deviate from this position if the result would be an unreasonable outcome.¹¹³ However, once again, besides the fact that the procedural rules refrain from explaining how

¹⁰⁹ Inna Uchkunova, 'Arbitral, Not Arbitrary - Part 1: Limits to Arbitral Discretion in ICSID Arbitration', *Kluwer Arbitration Blog* (29 January 2013), <http://arbitrationblog.kluwerarbitration.com/2013/01/29/arbitral-not-arbitrary-part-i-limits-to-arbitral-discretion-in-icsid-arbitration/> (accessed 27 December 2020).

¹¹⁰ See, e.g., Hague Rules, note 73, arts 10, 32 and 33(2) and commentary.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, art 53 and commentary.

¹¹³ *Ibid.*

this discretion is to be used except for listing some circumstances that could guide the tribunal, there is no clear opportunity to challenge the decisions made under this provision.

Consequently, in both cases, the equitable position of the victim-claimant would be well-served, if the Hague Rules provided more structure to the considerable amount of discretion granted to the arbitral tribunal. By providing the arbitral tribunal with clear and specific guidance on how to effectively facilitate equality of arms, not only would the tribunal feel more empowered to utilize its discretion, most likely in a more consistent manner, but would also provide the victim-claimant with a sense of certainty that a fair balance is guaranteed.

Effective Reparation

Under the current remedial landscape, reparation often lacks the depth and breadth needed to actually do justice to affected rightsholders. The impact that human rights arbitration under the Hague Rules will, therefore, have in practice, will certainly be contingent upon the space these Rules offer the tribunal to adopt a victim-centred approach in determining reparation. Given the highly contextual nature of reparation, a BHR tribunal should thereby possess various tools to award comprehensive redress. In essence, the tribunal cannot be tied down if the aim is to award reparation that is appropriate and proportional to the gravity of the harm suffered and to the underlying circumstances. Furthermore, it will be crucial to the overall effectiveness of BHR arbitration that the ‘victorious’ victim-claimant be assured of compliance with the award produced. Both elements will be discussed here.

A Satisfactory Reparation

In acknowledging the need for BHR arbitration to provide more extensive forms of reparation, Article 45(2) of the Hague Rules states that an award may order both monetary and non-monetary relief.¹¹⁴ The forms that relief under the Hague Rules may take include restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition. This illustrative list is based on Principle 25 of the UNGPs.¹¹⁵ Moreover, the same provision empowers an arbitration tribunal to adopt recommendations. Although these recommendations will be non-binding, they would broaden the scope of measures capable of providing satisfaction.¹¹⁶ Consequently, by means of Article 45(2), the Hague Rules would indeed introduce a solid basis for the arbitral tribunal to exercise remedial creativeness.

In determining the boundaries of these reparatory tools, the tribunal must seek what it will take to provide affected rightsholders with adequate and meaningful redress. Towards that aim, the arbitral tribunal may gain inspiration from the transitional justice movement and its philosophy on providing reparation. Although the transitional justice approach goes way beyond solely the aspect of reparation, it seeks to aid those affected by grave injustices to confront and restore their past abuse, thereby trying to accommodate both their need for accountability, but also for reconciliation, as they will eventually need to move on.¹¹⁷ This philosophy greatly relies on finding a balance between the value of looking both forwards and backwards.¹¹⁸ It is reflected in the manner through which reparatory tools are

¹¹⁴ *Ibid.*, art 45(2) and commentary.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ UN Secretary General, ‘Guidance Note of the Secretary-General: United Nations Approach to Transitional’ (March 2010) 2, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 27 December 2020).

¹¹⁸ Andrieu, *note* 103, 538.

employed to rebuild hope and trust through, for instance, public apologies, public memorials, reburials of victims and initiatives to educate society or preserve historical memory.¹¹⁹ Particularly interesting for the BHR context would also be the ideas that transitional justice puts forward on providing redress for harm suffered by communities and societies, such as through the establishment of collective reparations.¹²⁰ After all, a sole focus on individualized reparations will not be sufficient when a tribunal is faced with cases that would, for instance, require the reparation of damages caused by the dispossession of indigenous lands. In some cases, a point of reconciliation for those indigenous peoples might only be reached through reparatory tools that aim to restore their collective dignity and cultural integrity.¹²¹ Therefore, in establishing a holistic approach towards providing reparation, human rights arbitration under the Hague Rules might be well served by employing a similar people-centred philosophy.

Enforcement of the Award

BHR victims pursuing human rights arbitration under the Hague Rules would benefit from the fact that under the New York Convention, 157 state parties are bound to recognize foreign awards.¹²² A victim-claimant could thus potentially seek enforcement in multiple domestic courts throughout the world. However, one of the issues that might hinder this beneficial feature is the arbitrability of human rights claims.¹²³ Whether the award is arbitrable at the enforcement stage depends on the national jurisdiction and its applicable law.¹²⁴ Some jurisdictions may exclude particular issues from being arbitrated in order to reserve them for judgment by national courts.¹²⁵ As a result, there is a risk that states will consider an award rendered under the Hague Rules to be non-arbitrable, which may particularly arise in those states that still show reluctance towards holding corporations accountable for their transgressions or pursuing the implementation of the UNGPs.¹²⁶ Although this is again outside of the scope of what can be regulated by the Hague Rules, it might hamper their practical impact as to provide rightsholders with an effective remedy. Ultimately it will require a state-by-state analysis. However, as stated earlier, it will be mostly crucial that the idea of the Hague Rules is effectively marketed with states, as sufficient state support, also at this stage of the proceedings, could greatly enhance the overall effectiveness.

Another related concern pertains to the scope of application of the New York Convention. Around 50 state parties have made use of the reservation option provided in Article 1(3) of the New York Convention.¹²⁷ This provision allows state parties to limit the application of the Convention to 'differences arising out of legal relationships, whether contractual or not, which are considered commercial under its national law'. Regarding the states that have made use of this reservation, the question of course arises if BHR arbitration can be

¹¹⁹ UN Secretary General, note 117, 8–9.

¹²⁰ Leigh A Payne et al, 'Can A Treaty on Business and Human Rights Help Achieve Transitional Justice Goals?', 1:1 *Homa Publica – International Journal on Human Rights and Business* 116.

¹²¹ Dorough, note 104.

¹²² UN Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted on 10 June 1958, entered into force on 7 June 1959), art 3.

¹²³ 'Arbitrability' refers to the legal capacity of a particular dispute to be settled by arbitration.

¹²⁴ UN Conference on Trade and Development, 'Course on Dispute Settlement – Module 5.7. International Commercial Arbitration Recognition and Enforcement of Arbitral Awards: The New York Convention', UNCTAD/EDM/Misc.232/Add.37 (12 December 2003) 21.

¹²⁵ *Ibid.*, 37.

¹²⁶ Vidyarthi, note 90.

¹²⁷ New York Arbitration Convention, 'Contracting States', <http://www.newyorkconvention.org/countries> (accessed 25 May 2019).

considered ‘commercial’. In response to this concern, the Hague Rules have incorporated Article 1(2), which provides that whenever parties agree to arbitrate under the Hague Rules, their dispute shall be considered to have arisen out of commercial relationship.¹²⁸ This provision obviously is unable to bind state parties to the New York Convention to such an interpretation of ‘commerciality’, which means that BHR awards could still be excluded.¹²⁹ The incorporation of Article 1(2) may still be relevant from a procedural perspective, as it explicitly gives voice to the intentions of the parties.¹³⁰ It prevents the losing party from arguing that BHR awards should not be enforced because the relevant state has adopted the reservation under the New York Convention.¹³¹ Nonetheless, while Article 1(2) might prevent parties from trying to throw up roadblocks by using the concept of ‘commerciality’, when it comes to national courts throwing up similar roadblocks, the Drafting Team is still merely able to express hope that the courts will use their discretion to the benefit of effective enforcement of BHR awards.¹³²

V. Conclusion

Satisfying the requirements derived from the concept of ‘effective’ remedy forces a judicial mechanism to recognize values like equality, humility and human dignity. These values have arguably been foreign to the international arbitration mechanism. Emphasis has rather been placed on speed, privacy and power. The Hague Rules have provided one of the most recent attempts at making these values nonetheless co-exist.

The Drafting Team has drafted the first concretized example of how BHR arbitration might possibly be designed. The Hague Rules introduce several innovations to the UNCITRAL Rules to facilitate proceedings suitable for dealing with the sensitive and complex nature of human rights cases. In this article, the focus has mostly been on the use of these procedural rules in V2B disputes. Besides envisioning a myriad of actors being able to commence and join the arbitral proceedings, the Hague Rules take significant steps towards making arbitration more human rights-friendly, such as through recognizing the need to find a balance between transparency and confidentiality measures, enabling the tribunal to pay due regard to the disparities between the parties and allowing the possibility to award extensive reparatory measures to the victorious claimant.

Nonetheless, the Hague Rules will not always be able to address the obstacles that reside beyond the procedural dimension in which they operate. The obstructive effects caused by poverty, structural power imbalances and uncooperative states, essentially circumstances lying at the heart of the remedy gap, will pose a lot of the same challenges they do the rest of the remedial landscape. Therefore, the practical impact that the Hague Rules will have on providing an effective remedy will partly depend on whether sufficient support for them could be generated among states, corporations, third party funders and, of course, rightsholders. Yet, they constitute a promising first step towards BHR arbitration as an ‘effective’ remedy for rightsholders of business-related human rights abuse.

Conflicts of interest. The author declares none.

¹²⁸ Hague Rules, note 73, art 1(2) and commentary.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.