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## The Hague Rules on Third-Party Joinder: A Revised Framework

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# THE HAGUE RULES ON THIRD-PARTY JOINDER: A REVISED FRAMEWORK

*Emma Macfarlane\**

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## INTRODUCTION

In 1956, the multinational corporation Shell discovered oil near the Nigerian village of Oloibiri.<sup>1</sup> This unearthing led to decades of lucrative extractions that earned billions for the global conglomerate.<sup>2</sup> The extraction of oil came at an immense cost to the surrounding communities. In addition to the catastrophic environmental impact that Shell's operations had on villages within close proximity,<sup>3</sup> Shell also worked with the Nigerian government to sustain its operations and suppress community protests.<sup>4</sup> The infamous Ogoni massacre took place in the 1990s. Shell financed Nigerian military operations to overwhelm community opposition against the company.<sup>5</sup> Peaceful protestors were shot, beaten, threatened, and raped with the underlying aim of sustaining Shell's presence and operations in the Ogoni region.<sup>6</sup> Shell's actions eventually came to light. Litigation based on Shell's brash violations of human rights began in the United States in 1996 and continued for thirteen years before the parties reached a settlement of \$15.5 million.<sup>7</sup> The settlement has been commended as a "milestone moment in the movement towards accountability and human rights."<sup>8</sup>

Even two decades ago, the adjudication of claims at the nexus of business and human rights like those of Shell and the Ogoni people would be unusual in any setting besides a traditional courtroom. But within the past five years alone, the idea of arbitral tribunals hearing claims of human rights abuses related to business operations has gained enormous momentum.<sup>9</sup> This culminated in 2019 with the introduction of the Hague Rules on Business and Human Rights Arbitration (the "Hague Rules"). The Hague Rules were developed with an eye to the "peculiarities of disputes concerning human rights violation perpetuated by businesses."<sup>10</sup> They are touted as offering a "new and innovative" option for resolving disputes related to corporate responsibility and as a mechanism to implement the UN Guiding Principles on Business and Human Rights.<sup>11</sup>

1. Amnesty Int'l, *On Trial: Shell in Nigeria*, AI INDEX AFR 44/1698/2020 (Jan. 2020).

2. *Id.*

3. *Id.*

4. *Factsheet: The Case Against Shell*, CTR. CONST. RIGHTS (Mar. 24, 2009), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-case-against-shell>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *See generally*, Maria Laura Izzo, *A Further Step Towards Business and Human Rights Arbitration – The Hague Rules*, KLUWER ARB. BLOG (Sept. 13, 2019) <http://arbitrationblog.kluwerarbitration.com/2019/09/13/a-further-step-towards-business-and-human-rights-arbitration-the-hague-rules/>.

10. *Id.*

11. Lee M. Caplan, Timothy J. Feighery & Jason Rotstein, *New Arbitration Rules for the Resolution of Business and Human Rights Disputes Unveiled*, ARENT FOX (Feb. 7, 2020),

This paper critically assesses the Hague Rules' stance on third-party joinder. Third-party joinder is an important feature in business human rights disputes. It is a mechanism that victims of human rights abuses can use to bring claims against corporate defendants where the victims do not otherwise have an underlying agreement on which to base their claim. Keeping in line with traditional conceptions of commercial arbitration, the Hague Rules are grounded in party consent to arbitrate.<sup>12</sup> Conceptions of consent therefore have an outsized impact on the universe of parties who can bring actions against corporations before arbitral tribunals for human rights abuses. The main objective of this paper is to offer an alternative framework of third-party joinder and consent to achieve a better balance between the interests of claimants alleging human rights abuses and corporate defendants.

Part I traces the rise of arbitral tribunals as fora for business human rights disputes. Part II outlines the procedural shortcomings of third-party joinder in business human rights cases before arbitral tribunals under the Hague Rules. Part III advocates for a new framework to guide arbitral tribunals when assessing whether to allow requests for third-party joinder.

#### I. THE RISE OF ARBITRAL TRIBUNALS AS FORA FOR BUSINESS HUMAN RIGHTS DISPUTES

The UN Guiding Principles on Business and Human Rights (“UNGPs”) were the first major global standard addressing the intersection and impact of global business practices and human rights.<sup>13</sup> The Hague Rules are a set of complementary principles that help effect the UNGPs within commercial arbitration. Section I.A details the history of the UNGPs; Section I.B explores the rise of arbitral tribunals as recognized fora for human rights disputes and weighs their benefits and shortcomings.

##### A. *The UN Guiding Principles on Business and Human Rights*

The UNGPs were drafted in 2011 by UN Special Representative to the Secretary General on business and human rights, John Ruggie.<sup>14</sup> In their original form, the UNGPs were envisioned as a building block for a new international

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<https://www.arentfox.com/perspectives/international-arbitration-dispute-resolution-blog/new-arbitration-rules-the-resolution>.

12. Michiel Coenraads, Sarah Ellington, Tamara Preuss & Ben Sanderson, *Update: The Hague Rules on Business and Human Rights Arbitration*, LEXOLOGY (Feb. 18, 2020), <https://www.lexology.com/library/detail.aspx?g=12d34707-04ed-4d49-a913-bf71476e356f>.

13. See U.N. Human Rights Office of the High Comm’r, OHCHR and Business and Human Rights (2020), <https://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>.

14. John Gerard Ruggie, *The Paradox of Corporate Globalization: Disembedding and Reembedding Governing Norms* 22, (Harvard Kennedy Sch., M-RCBG Working Paper Series No. 2020-01, 2020); *Background & History of the Guiding Principles*, BUS. & HUMAN RIGHTS RESOURCE CTR. (2021), <https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/background-history-of-guiding-principles/>.

treaty which would create binding human rights obligations for states and corporations alike,<sup>15</sup> “regardless of their size, sector, location, ownership, and structure.”<sup>16</sup> The treaty never came to fruition. Instead, at the urging of Ruggie, the UN Human Rights Council (“HRC”) unanimously endorsed the 31 UNGPs in 2011.<sup>17</sup> The HRC’s endorsement was pivotal. In Ruggie’s words, this stamp of approval “elevated the UNGPs beyond pure voluntarism, into the domain of ‘soft law.’”<sup>18</sup>

“Multiperspectival framing” informed the drafting of the UNGPs.<sup>19</sup> The drafters viewed transnational corporate conduct as shaped by public, civil, and corporate governance. The thirty-one principles together act as a conduit to unify these different systems of governance on the matter of business and human rights.<sup>20</sup> Three pillars—“Protect, Respect, and Remedy”—form the backbone of the UNGP framework.<sup>21</sup> The distinct responsibilities of state and corporate actors under each pillar in turn work to enforce the overarching goals of the UNGPs.<sup>22</sup>

Although the UNGPs do not themselves create a cause of action,<sup>23</sup> they have been used as evidence by claimants to support alleged breaches of state and corporate duties. Take, for example, the case of *Araya v. Nevsun Resources, Ltd.* Here, the Supreme Court of British Columbia weighed evidence from Lloyd Lipsett, an expert in human rights assessments,<sup>24</sup> who invoked the defendant corporation’s human rights due diligence obligations under the UNGPs.<sup>25</sup> The court permitted the case to proceed on the grounds that claimant had alleged a bona fide claim of jus cogens violations which was in turn a violation of Canadian national law.<sup>26</sup>

Claimants also rely upon the UNGPs in commercial arbitration.<sup>27</sup> Examples of instances in which the UNGPs are appealed to within private commercial ar-

15. *Id.*

16. Special Rep. of the Sec’y- Gen., Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, at 6, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UN Guiding Principles].

17. Ruggie, *supra* note 14, at 22.

18. *Id.*

19. *Id.*

20. *Id.*

21. UN Guiding Principles, *supra* note 16, at 3.

22. Ruggie, *supra* note 14, at 23.

23. See Laurie E. Abbott, *Integrating the Ruggie Guiding Principles into the International Economic Community*, 5 GEO. MASON J. INT’L COM. L. 261, 263 (2013).

24. Malcolm Rogge, *Nevsun puts Canada’s Corporate Decision Makers in the Human Rights Zone 3* (Corp. Responsibility Initiative, Harvard Kennedy Sch., Working Paper No. 70, 2020).

25. *Araya v. Nevsun Resources, Ltd.*, [2016] BCSC 1856 para. 64 (Can. B. C. Sup. Ct.).

26. See *id.*; see also John F. Sherman III, *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights* 26 (Corp. Resp. Initiative, Harvard Kennedy Sch., Working Paper No. 71, 2020).

27. See Sherman, *supra* note 26, at 34.

bitration are hard to come by due to the confidential nature of arbitral proceedings.<sup>28</sup> But if the more public fora of bilateral investment treaty arbitration tribunals are indicative of deliberations within the private commercial setting, the UNGPs are influential. One well-known example is that of *Urbaser v. Argentina*, a dispute in which a private corporation supplying water and sewage services sued Argentina after the country's implementation of emergency measures allegedly contributed to the company's insolvency.<sup>29</sup> Argentina filed a counterclaim, asserting that the company's failures to provide the requisite level of investment in water and sewage services violated Argentinians' human right to water.<sup>30</sup> Argentina's counterclaim was struck down on the facts.<sup>31</sup> However, by way of reference to the UNGPs, the tribunal noted that "it can no longer be admitted [that] the companies operating internationally are immune from becoming subjects of international law."<sup>32</sup> It further acknowledged that corporate social responsibility in international commerce included commitments to comply with human rights obligations wherever the company had operations.<sup>33</sup>

A second example shows arbitrators in the ICSID tribunal relying on the UNGPs in their reasoning within the case of *Bear Creek Mining Corporation v. Republic of Peru*. Here, a Canadian mining company attempted to invest in the development of a mine on Peruvian territory.<sup>34</sup> Local communities opposed the development of the mine through violent protests; when a new government was elected in 2011, it shuttered the mining project in an effort to quell the unrest.<sup>35</sup> The Canadian company sued for expropriation of its investment and Peru initiated a counterclaim under the bilateral investment treaty.<sup>36</sup> In its deliberations, the tribunal used the UNGPs to support the contention that "international law accepts corporate responsibility as a standard of crucial importance for companies operating in the field of international commerce."<sup>37</sup> The tribunal further noted that companies operating internationally were no longer immune from becoming subjects of international law.<sup>38</sup>

Reliance on the UNGPs by tribunals and claimants alike is indicative of the trend towards using arbitral tribunals as fora for business human rights disputes.

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28. *See id* at 35.

29. *Urbaser S.A. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award ¶¶ 34-38 (Dec. 8, 2016).

30. *Id.*, ¶ 36.

31. *Id.*, ¶ 1234.

32. *Id.*, ¶ 1195.

33. *Id.*

34. Stefanie Shacherer, *Bear Creek v. Peru*, INT'L INST. FOR SUSTAINABLE DEV: KEY CASES FROM THE 2010S 4. (Oct. 2018); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21 (Nov. 30, 2019).

35. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, ¶¶ 401, 405 (Nov. 30, 2019).

36. *Id.*

37. *Id.*

38. *Id.*

Whether these tribunals are adequate sites for the resolution of such disputes, however, is a question that has generated animated discussion from commentators on both sides.

### B. *Arbitral Tribunals as Fora for Human Rights Disputes*

The potential of arbitral tribunals to serve as effective fora for human rights claims is often debated.<sup>39</sup> Let us begin with the benefits: the nature of transnational business makes arbitral tribunals a natural site of dispute resolution between parties. First, they are quick.<sup>40</sup> Even when capable domestic courts are available, arbitral tribunals have the advantage of nimbler adjudicative processes that yield speedier resolutions.<sup>41</sup> Second, the decisions are enforceable worldwide. The New York Convention gives full effect to arbitration awards by obliging its parties to “ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.”<sup>42</sup> Third, it is increasingly customary for contracting parties to consent to arbitration *ex ante* in disputes over transnational corporate contracts.<sup>43</sup> Finally, the omnipresence of commercial arbitration makes the arbitral forum ripe for addressing the intersection of business and human rights.

Not all agree that the benefits of business human rights arbitration outweigh its shortcomings. The Columbia Center on Sustainable Investment is a vocal critic of using arbitral tribunals as a forum to hear business human rights claims.<sup>44</sup> The perceived deficiency that most concerns the Columbia Center is the access-to-remedy problem implicit within business human rights arbitration.<sup>45</sup> The access-to-remedy problem implies two distinct issues: first, arbitration may hinder rather than advance justice in business human rights cases; second, when arbitration *does* provide for a remedy, the paths to relief are

39. See 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! (July 12, 2019), <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/>.

40. See Claes Cronstedt, Jain Eijsbouts, Adrienne Margolis, Martijn Scheltema, Robert C. Thompson, & Steven Ratner, *International Arbitration of Human Rights: A Step Forward*, KLUWER ARB. BLOG (Nov. 16, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/11/16/international-arbitration-business-human-rights-step-forward/>.

41. See E. Norman Veasey, *The Conundrum of the Arbitration vs. Litigation Decision*, A.B.A. (Dec. 15, 2015), [https://www.americanbar.org/groups/business\\_law/publications/blt/2015/12/07\\_veasey/](https://www.americanbar.org/groups/business_law/publications/blt/2015/12/07_veasey/).

42. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

43. Leila Anglade, *The Use of Transnational Rules of Law in International Arbitration*, 38 THE IRISH JURIST 92, 92 (2003).

44. *Business and Human Rights Arbitration*, COLUMBIA CTR. ON SUSTAINABLE INV. (Feb. 21, 2019), <http://ccsi.columbia.edu/2019/02/21/business-and-human-rights-arbitration/>.

45. See Lisa Sachs, Lise Johnson, Kaitlin Cordes, Jesse Coleman, & Brooke Guven, *The Business and Human Rights Arbitration Rule Project: Falling Short of its Access to Justice Objectives*, COLUMBIA CTR. ON SUSTAINABLE INV. 1 (Sept. 2019).

impermissibly narrow.<sup>46</sup> The Columbia Center also expresses concern that the claims of victims of human rights abuses rely on company consent to arbitration and that consent will only be given when there are advantages for the corporate defendant.<sup>47</sup> This in turn implies that consent to defend against a claim in the arbitral forum will only be given when doing so would preclude advantages for the plaintiff bringing the claim.<sup>48</sup>

For business human rights arbitration to succeed, the Columbia Center's concerns must be addressed in full. Business human rights arbitration is a burgeoning field and there is still time to mold the norms surrounding its use. But that window of opportunity is closing. Business human rights arbitration will suffer from a legitimacy crisis if critics continue to view the arbitral tribunal as a playing field tilted in favor of corporate interests.<sup>49</sup> One major initiative to correct this perception is the 2019 Hague Rules on Business and Human Rights. However, the Hague Rules have not themselves been immune to criticism.

The following sections limit their discussion to the Hague Rules' procedures on third-party joinder. Part II addresses the shortcomings of the Hague Rules in this realm and proposes a framework for how the recommended procedures on joinder might be adapted to better address concerns surrounding business human rights arbitration such as those voiced by the Columbia Center.

### III. THE PROCEDURAL SHORTCOMINGS OF THIRD-PARTY JOINDER IN THE HAGUE RULES

In 2019, the Business and Human Rights Arbitration Working Group (the "Drafters") introduced the Hague Rules on Business and Human Rights Arbitration.<sup>50</sup> The Hague Rules are a proposed set of non-binding rules for the arbitration of business and human rights disputes.<sup>51</sup> The creation of the Hague Rules themselves is an acknowledgment of the burgeoning use of arbitral tribunals as a forum to bring claims of human rights violations.

The Hague Rules are comprehensive. They address a wide range of matters, from the preliminary procedural aspects of arbitration, to the nuances of a hearing's transparency, to the award and other costs of arbitration.<sup>52</sup> The Drafters envisioned the Hague Rules as applicable to a range of parties beyond those suing under a contract.<sup>53</sup> The term "business and human rights" is not explicitly

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46. *See id.* at 1–2.

47. *See id.* at 3.

48. *See id.*

49. *See id.* at 6.

50. *See generally* THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION, CTR FOR INT'L LEGAL COOPERATION (Dec. 2019), [https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration\\_CILC-digital-version.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf) [hereinafter *The Hague Rules*].

51. *Id.* at 1.

52. *See generally id.*

53. *Id.* at 3.



defined within the Hague Rules beyond the understanding that the term is “understood at least as broadly as the meaning such terms have under the [UNGPs].”<sup>54</sup> The stated purpose of the Hague Rules includes contributing to the judicial remedy gap in the UNGPs.<sup>55</sup>

Article 19 of the Hague Rules governs third-party joinder and multi-party claims.<sup>56</sup> In their current iteration, the Rules allow “one or more third persons to join in the arbitration as a party provided such person is a party to or a third-party beneficiary of the underlying legal instrument.”<sup>57</sup> Third-party joinder is an essential component of business human rights disputes. Because victims of human rights abuses are not party to an underlying contract, third-party joinder is one way to push through a claim that one would not otherwise be permitted to bring before an arbitral tribunal. This paper contends that the Hague Rules governing third-party joinder are based on too narrow a conception of consent and accord too much deference to individual tribunals to be effective.

#### A. *The Hague Rules on Third-Party Joinder: Explicit Consent and Deference to Individual Tribunals*

##### 1. The Use of Explicit Consent

One of the most salient features of the Hague Rules is their adherence to the understanding of arbitration as a consent-based process.<sup>58</sup> Through model clauses, commentary, and the rules themselves, the provisions encourage actors to be explicit about to whom each party grants arbitration rights.<sup>59</sup> The Hague Rules further contemplate (but do not require) consent to third-party claims.<sup>60</sup>

In their preliminary deliberations, the Drafters considered three possible forms of consent-based models: ex ante contracts; ex post submission agreements; and multilateral independent agreements, such as the rights to arbitrate created under the Bangladesh Accords.<sup>61</sup> The Drafters acknowledged in particular the difficulties that would arise with the inclusion of third-party beneficiary

54. *Id.*

55. See *Launch of the Hague Rules on Business and Human Rights Arbitration*, CTR FOR INT’L LEGAL COOPERATION, <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/> (last visited Mar. 6, 2021).

56. The Hague Rules, *supra* note 50, at 39.

57. *Id.*

58. *Id.* at 3 (“As with all arbitration, proper and informed consent remains the cornerstone of business and human rights arbitration.”).

59. *Id.* at 105–06.

60. *Id.* at 106.

61. Ctr for Int’l Legal Cooperation, *International Arbitration of Business and Human Rights Disputes: Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process*, at 5 (2018), [https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper\\_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE\\_font12.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE_font12.pdf).

principles, noting that “it would be unlikely for a company to offer open consent to an unidentified group of persons, particularly without privity.”<sup>62</sup>

In their final iteration, the Hague Rules address the possibility of multiparty claims and the possibility of joinder, allowing for one or more third parties to join an existing arbitration.<sup>63</sup> The Hague Rules provide two mechanisms for joinder. First, third-party claims may be permitted when the underlying legal instrument in which the arbitration clause is contained grants a right to certain third parties who are “recognized as having an interest in the enforcement of such rights through arbitral proceedings.”<sup>64</sup> Second, the arbitration agreement itself could grant those same third parties the right to join arbitral proceedings.<sup>65</sup> Commentary to the relevant article notes that this provision newly “sets aside the presumption in certain jurisdictions whereby an agreement to arbitrate is construed as a waiver of the right to proceed with class, mass, collective, or multi-party action in any forum, *including in an arbitration brought under that very arbitration agreement.*”<sup>66</sup> However, the requirements for joinder under the Hague Rules are vague and largely left to the discretion of individual tribunals—“[t]he question of whether class, mass, collective, or multi-party procedures are available and appropriate for the particular arbitration is . . . left to be determined by the arbitral tribunal taking into account the particular facts and circumstances of the case.”<sup>67</sup>

## 2. Deference to Individual Tribunals

Because the Hague Rules delegate authority of third-party joinder to individual commercial tribunals, briefly examining the practices of these arbitration tribunals is worthwhile. One of the most common standards for third-party joinder used by tribunals is the so-called *prima facie* test.<sup>68</sup> In this instance, third-party joinder is permitted if the tribunal decides that “at first sight, on the first appearance, or on the face” that an arbitration agreement may exist between parties to a commercial agreement.<sup>69</sup> Non-signatories to an arbitration

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62. Katerina Yiannibas, *The effectiveness of international arbitration to provide remedy for business-related human rights abuses*, ACCOUNTABILITY, INTERNATIONAL BUSINESS OPERATIONS, AND THE LAW (eds. Liesbeth Enneking, Ivo Giesen, Anne-Jetske Schaap, Cedric Ryngaert, François Kristen, & Lucas Roorda, 2019).

63. The Hague Rules, *supra* note 50, at 39.

64. *See id.* at 39; *see also id.* at 41.

65. *Id.*

66. *Id.* at 40 (emphasis added).

67. *Id.*

68. Dongdoo Choi, *Joinder in International Commercial Arbitration*, 35 ARB. INT'L 29, 34–35 (2019) (discussing how the *prima facie* test is used by the ICC, SIAC, HKIAC, and CIETAC among others).

69. *Id.* at 35.

agreement might prevail on this theory on the argument that the facts of the case justify an extension of the contract to the parties in question.<sup>70</sup>

Other tribunals are more flexible. For example, the London Court of International Arbitration (“LCIA”) allows for joinder of any third party upon application to the tribunal.<sup>71</sup> Under LCIA Rules, the tribunal interprets the contracting parties as having delegated power to the tribunal to add other parties to the matter before the tribunal, even *without* the consent of all parties concerned.<sup>72</sup> The Swiss Rules of International Arbitration leave it to the tribunal to decide whether a third-party joinder should be permitted “after consulting with all of the parties” and “taking into account all relevant circumstances.”<sup>73</sup> In a similar vein, the Netherlands Arbitration Institute conditions third-party participation upon having an interest in the outcome of the arbitral proceedings.<sup>74</sup>

### B. *The Requirement of Explicit Consent Undermines the Legitimacy of Business Human Rights Arbitration*

#### 1. Explicit Consent Limits Viable Business Human Rights Cases within Arbitral Tribunals

The formulation of third-party joinder set forth within the Hague Rules does not equip arbitral tribunals with the tools to fulfill the third foundational pillar of the UNGPs: the right to an effective remedy.<sup>75</sup> At bottom, the problem is one of victim access to a procedural remedy. The Hague Rules are founded upon the principle of consent.<sup>76</sup> Although the rules themselves do not comprehensively address the parties’ “modalities” of consent,<sup>77</sup> they indicate that traditional, explicit agreements are optimal, such as *ex ante* contractual clauses or *ex post* submission agreements.<sup>78</sup> The Hague Rules further caution against tribunals relying on “unwarranted presumptions of knowledge and consent” for non-contractual claims in particular.<sup>79</sup>

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70. *Id.*

71. THE LONDON COURT OF INT’L ARB., LCIA ARBITRATION RULES Art. 22.1(viii) (Oct. 1, 2014), [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx).

72. Hilary Heilbron, *Arbitration: Of joinder and jurisdiction*, INT’L COMP. LEGAL GUIDES (Feb. 15, 2016), <https://iclg.com/cdr/arbitration-and-adr/6162-arbitration-of-joinder-and-jurisdiction>.

73. SWISS CHAMBERS’ ARB. INST., SWISS RULES OF INTERNATIONAL ARBITRATION (SWISS RULES) Art. 4(2) (June 2012), [https://www.swissarbitration.org/files/837/Swiss%20Rules%202019/Web%20versions%202019/Arbitration%20Web%202019/Arbitration/SwissRules2012\\_English\\_2019.pdf](https://www.swissarbitration.org/files/837/Swiss%20Rules%202019/Web%20versions%202019/Arbitration%20Web%202019/Arbitration/SwissRules2012_English_2019.pdf).

74. NETHERLANDS ARB. INST., ARBITRATION RULES art. 37(1) (Jan. 1, 2015).

75. UN Guiding Principles, *supra* note 16, at 22.

76. The Hague Rules, *supra* note 50, at 3.

77. *Id.*

78. *Id.*

79. *Id.* at 19.

This approach permits only a small number of business human rights cases to reach the floor of the tribunal. The Hague Rules formulation hinges on one of two scenarios. In the first, an alleged violator of human rights could open itself up to litigation after the violative acts have already been committed; this is a course of action that no known party has taken to date. Alternatively, corporations could contract ahead of time to permit such proceedings. One frequently cited success story is that of the Bangladesh Accord, an agreement created in the aftermath of the Rana Plaza tragedy that binds its multinational corporation signatories to arbitration for human rights disputes.<sup>80</sup> Setting aside the charges of whitewashing and imposition of buyer-controlled liability,<sup>81</sup> one might offer a further critique of the Accord: its unicorn status. Even taking the positive accounts of the Accord's effects at face value,<sup>82</sup> the benefits of the agreement are confined to the garment industry in Bangladesh. This is an incremental subset of the universe of business and human rights cases that might otherwise arise. Conditioning a remedy to human rights abuses upon the alleged violators' explicit consent is not a viable solution for the majority of potential cases, even if explicit party consent is the status quo. In this way, the Hague Rules pay ample attention to the UNGP's "culturally appropriate" mandate and not nearly enough to the direction that the arbitral processes are "rights compatible."<sup>83</sup>

## 2. Explicit Consent Violates the Principle of the Equality of Aims

The requirement of an explicit consent to arbitrate third-party claims of human rights abuses violates the principle of the equality of aims, a maxim by which most arbitral tribunals abide.<sup>84</sup> Scholars have argued that when a third party can lose claims if barred from an arbitral proceeding, joinder should be permitted—even if not all parties consent—as long as all rules of participation are kept equal for all parties.<sup>85</sup> This is a salient point in many instances of hu-

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80. ACCORD ON FIRE & BUILDING SAFETY IN BANGLADESH (May 13, 2013), [https://bangladeshaccord.org/wp-content/uploads/the\\_accord.pdf](https://bangladeshaccord.org/wp-content/uploads/the_accord.pdf) [hereinafter Bangladesh Accord]; see also Suleyman Wellings-Longmore, *Business and Human Rights Arbitration: Widening the net of remedies*, LINKLATERS (Sept. 11, 2019), <https://www.linklaters.com/en-us/insights/blogs/arbitrationlinks/2019/september/business-and-human-rights-arbitration-widening-the-net-of-remedies>.

81. See, e.g., Jaakko Salminen, *The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?*, 66 AM. J. COMPAR. L. 411 (2018).

82. See, e.g., Beryl ter Haar & Maarten Keune, *One Step Forward of More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh*, 30 INT'L J. COMPAR. LAB. L. & INDUS. REL. 5, 24 (2014); Steven Greenhouse & Jim Yardley, *Global Retailers Join Safety Plan for Bangladesh*, N.Y. TIMES (May 13, 2013), <https://www.nytimes.com/2013/05/14/world/asia/bangladeshs-cabinet-approves-changes-to-labor-laws.html>.

83. See UN Guiding Principles, *supra* note 16, at 24, 25.

84. S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 979 (1998).

85. E.g., *id.* at 980.

man rights abuses. Often, allegations of human rights violations occur in areas where “national courts are dysfunctional, corrupt, politically influenced and/or simply unqualified.”<sup>86</sup> Moreover, even when the available national courts are fully functional, claimants’ victories can dangle on the domestic system’s receptivity to transnational tort claims.<sup>87</sup> The possibility of dysfunctional systems and restrictions on national courts’ openness to transnational claims also underpin the reason that contracting themselves parties opt for arbitration. Finally, the equality of aims principle is recognized within the UNGP articles themselves: grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent, and rights-compatible.<sup>88</sup> If an international tribunal is the only viable avenue to obtain redress for victims of human rights violations, it violates the principle of equality of aims along with the UNGPs in refusing to consider the claims. Properly considered, the principle of equality of aims permits third-party joinder for victims of human rights abuses that did not have the occasion to sign on to an arbitral agreement but who were nevertheless affected by its outcome.

There is, however, a limiting principle that one must contend with when applying the equality of aims argument. This comes to light when theory meets practice. The complete vindication of the equality of aims may not be realized in an arbitral setting without losing corporate buy-in for the project of business human rights arbitration altogether. Corporations must have an incentive to arbitrate.<sup>89</sup> Effective procedures governing business human rights claims must not tilt the scale so far towards plaintiff interests that corporate entities lose the incentive to arbitrate altogether. If companies perceive arbitration as a forum for open-ended liability, this could have a chilling effect on business human rights arbitration as a whole.<sup>90</sup> In sum, the Hague Rules can go further in recognizing and upholding the principle of the equality of aims. However, to be effective, any newly proposed framework must take into account these limiting principles that arise from practice.

### 3. Counterarguments: Consent As the Cornerstone of Arbitration

Critics may contend that the principle of equality cannot overcome the cornerstone of international arbitration—“[a]rbitration is always based on a consent agreement between the parties.”<sup>91</sup> However, this statement is better viewed as a platitude grounded in legal fiction rather than a solid foundation of transnational

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86. *The Launch of the Hague Rules on Business and Human Rights Arbitration*, *supra* note 55.

87. Desierto, *supra* note 39.

88. UN Guiding Principles, *supra* note 16, at 33–34.

89. Sachs et al., *supra* note 45, at 2–3.

90. See Isabelle Glimcher, *Arbitration of Human and Labor Rights: The Bangladesh Experience*, 52 N.Y. J. INT’L L. & POL. 231, 259 (2019).

91. U.N. CONF. ON TRADE & DEV.: INT’L CTR. FOR SETTLEMENT OF INV. DISPS., COURSE ON DISP. SETTLEMENT 1 (2003).

arbitration. Interpretations that stretch the traditional bounds of “consent” are increasingly common in arbitration.<sup>92</sup> From alter-ego workarounds for corporations<sup>93</sup> to waivers of consent derived from principles of equitable estoppel,<sup>94</sup> inroads to the “nondiscretionary” precondition of explicit consent are frequent. It is unreasonable to adhere to a strict construction of a consent agreement within the Hague Rules and particularly so when violations of human rights are on the table.

Moreover, one cannot contemplate such arguments in a vacuum. Despite corporations at times holding more economic power than the countries in which they invest, multinational corporations (MNCs) have historically evaded legal human rights obligations.<sup>95</sup> At times, this evasion of responsibility is precisely *because* of their economic power.<sup>96</sup> This power imbalance between plaintiffs and corporate defendants not only arises in cases involving MNCs, but also in corporate defendants whose structure does not reach the level of breadth and power of MNCs. These defendants are nevertheless often in an exceptionally more powerful position in terms of resources and legal capabilities than plaintiffs bringing claims of human rights abuses.<sup>97</sup> Corporations’ legal responsibilities are remarkably limited: even under the UNGPs, an instrument lauded as ground-breaking in the field of business and human rights,<sup>98</sup> corporations are not bound by legal obligations per se. Corporate entities have recurrently taken advantage of this accountability loophole by violating individuals’ human rights with impunity.<sup>99</sup>

With these considerations in mind, international tribunals are both an appropriate and necessary forum to balance the interest of holding human rights abusers accountable against the interests of corporations. Put simply, tribunals should take into account the principle of *equity*—along with the mainstay principle of equality—*vis-à-vis* the admission of human rights claims in arbitral tribunals. This is not to suggest that tribunals give claimants *carte blanche* to bring any number of tangentially-related allegations when a multinational cor-

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92. See Benson Lim & Adriana Uson, *Relooking at Consent in Arbitration*, KLUWER ARB. BLOG (Feb. 12, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/>.

93. See Michael H. Bagot, Jr. & Dana A. Henderson, *Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 TUL. MAR. L.J. 413, 447 (2002).

94. See generally *id.* at 438–47.

95. Maciej {enkiewicz, *Human Rights Violations by Multinational Corporations and UN Initiatives*, 12 REV. INT’L L. & POL. 121, 123–26 (2016).

96. *Id.* at 125.

97. Sachs et al., *supra* note 45, at 1.

98. See John Gerard Ruggie, *The Social Construction of the UN Guiding Principles on Business and Human Rights 1* (Harvard Kennedy Fac. Rsch. Working Paper Series, Working Paper No. RWP17-030, 2017).

99. See generally Davide Fiaschi, Elisa Guiliani, Chiara Macchi, Michelangelo Murano, & Oriana Perrone, *To Abuse or Not to Abuse. This Is the Question.*, (Lab. of Econ. & Mgmt. Working Paper Series, 2011), <https://media.business-humanrights.org/media/documents/abb74e1af66bd041b33926cc93cdb527e0042a24.pdf>.

poration is concerned; as discussed in Section III.B, a number of limiting principles must be imposed on any theory of corporate accountability. But it should inform how tribunals and the Hague Rules themselves weigh the admissibility of human rights violations, particularly when no other viable forum exists in which to bring the claim.

C. *Outsized Deference to Individual Tribunals' Rules Undermines the Legitimacy of Business Human Rights Arbitration*

The second shortcoming of the Hague Rules with respect to third-party joinder in instances of human rights abuses is the flexibility and deference accorded to the tribunals themselves. Major arbitral tribunals have yet to adopt a uniform approach to the admission of third-party claims.<sup>100</sup> Outcomes that vary based on mere geographic convenience proliferate: why should victims of human rights abuses in South Asia receive different treatment simply because their abusers more often opt for arbitration in the SIAC,<sup>101</sup> whereas victims in the Netherlands reap the benefit of the more third-party-friendly NAI rules?<sup>102</sup> This issue is not limited to claims in front of arbitration tribunals; parties bringing actions in regional human rights courts face the same disparate treatment. The claims of victims of human rights abuses should not depend upon the perchance rules of a pre-designated forum. Just as the Hague Rules have successfully formalized previously incongruent arbitral rules, so should they formalize the rules of third-party joinder to allegations of human rights violations within their policies.

The second problem with this construction of third-party joinder looks past principles of predictability to the substantive rules of tribunals themselves and the way such rules are enacted. The Hague Rules are unique in that they are readily adaptable and take into account the specific challenges of arbitrating business and human rights disputes. In contrast to the precise aims of the Hague Rules, the individual rules of arbitral tribunals governing third-party joinder in *all* cases are a blunt instrument to remedy practices surrounding third-party joinder in human rights disputes. Such rules rarely diverge based on subject-matter,<sup>103</sup> and it may not be practicable to lower the bar for consent to third-party joinder for claims outside of the scope of human rights abuses.

Moreover, tribunals' requirements regarding third-party joinder are difficult to overcome for claimants alleging human rights violations. Recall that one of the most common analyses used across tribunals to test the validity of an application for third-party joinder is that of the *prima facie* test.<sup>104</sup> Such a rule, while

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100. See *supra* Section II.A.

101. See Singapore Int'l Arb. Ctr., *Arbitration Rules of the Singapore International Arbitration Centre*, 6<sup>th</sup> ed. (Aug. 1, 2016, <https://www.siac.org.sg/our-rules/rules/siac-rules-2016>).

102. See NETHERLANDS ARB. INST., *supra* note 74, art. 37(1).

103. See, e.g., NETHERLANDS ARB. INST., *supra* note 74.

104. See *supra* Section II.A.

perhaps a sound practice in strict instances of commercial arbitration, is a boon for corporate defendants evading accountability for human rights violations. Except in rare instances—such as when an ex post submission agreement is already in place<sup>105</sup>—MNCs need only prove that no prima facie agreement to arbitrate exists.<sup>106</sup> If a plaintiff's petition for joinder is rejected, all avenues for remedy are not closed off. Tribunal rules such as those of the International Chamber of Commerce permit plaintiffs to take their claims to domestic courts with appropriate jurisdictional powers.<sup>107</sup> However, if the tortious incident took place in an emerging economy with suboptimal judicial infrastructure, this final option will be of little comfort to plaintiffs.

### III. THIRD-PARTY JOINDER AND THE HAGUE RULES: A NEW PROPOSAL

#### A. *Required Characteristics of a Successful Mechanism*

A successful set of rules governing third-party joinder would remedy the deficiencies implicit within the Hague Rules on multiparty claims.<sup>108</sup> A new, successful framework should ensure two results. First, the new rules should cause arbitral tribunals to hear a higher proportion of the existing, viable business human rights claims. This, in turn, will help fulfil the third foundational UNGP pillar of victims' right to an effective remedy.<sup>109</sup> Second, the new rules should take into account the equality of aims principle and permit third-party joinder of human rights claims when appropriate, even when the corporate defendant does not give explicit consent to a third-party's claim. Each of these developments will improve the legitimacy of business human rights arbitration as a whole.

New rules controlling third-party joinder should also mimic the Hague Rules Drafters' intent of carefully balancing parties' legitimate interests.<sup>110</sup> Competing stakeholders include companies, civil society, and the tribunals themselves. Buy-in from companies requires preserving the limiting principle of party consent to arbitrate (although not to the degree outlined by the current iteration of the Hague Rules).<sup>111</sup> Civil society actors will be less inclined to endorse a mechanism perceived as toothless. Therefore, the new rules must in-

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105. See *supra* Section II.B.

106. Choi, *supra* note 68, at 35.

107. William Park, *Challenging Arbitral Jurisdiction: The Role of Institutional Rules 7* (Boston Univ. L. Sch., Public L. & Legal Theory Paper No. 15-40, 2015).

108. See *supra* Section II.B.

109. See UN Guiding Principles, *supra* note 16, at 27.

110. See The Hague Rules, *supra* note 50, art. 1 cmt. 1.

111. See Benson Lim & Adriana Uson, *Relooking at Consent in Arbitration*, KLUWER ARB. BLOG (Feb. 12, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/> (“[M]arginalising consent . . . is inimical to the development of arbitration because it detracts from the fundamentals which made arbitration popular to commercial parties in the first place.”).



clude concrete changes that improve the ability of victims of human rights abuses to bring claims against companies in the arbitral tribunal setting. Perhaps most crucial, tribunals themselves must be willing to apply such rules. The proposed procedures should not stray from the principles at the heart of arbitral tribunal procedures. They must be sufficiently neutral, fair, flexible, efficient, and capable of being tailored to the needs of disparate disputes.<sup>112</sup>

The new set of rules must also meet the “effectiveness criteria for non-judicial grievance mechanisms” contained within the UNGPs.<sup>113</sup> These criteria include legitimacy, transparency, predictability, and accessibility.<sup>114</sup> To effect these goals, the new rules on third-party joinder should be contained within the Hague Rules themselves. The process by which the Hague Rules were developed included multiple rounds of transparent deliberation and consultation with relevant stakeholders.<sup>115</sup> This points to the possibility of similar consultation and revision to the rules in the future. Moreover, should arbitral tribunals endorse and abide by the Hague Rules, housing the new joinder policies within this framework will ensure legitimacy, transparency, and accessibility to the grievance mechanisms for relevant stakeholders.

Substantively, the current iteration of the Hague Rules on third-party joinder falls short on predictability. The flexibility and deference accorded to individual tribunals allows for vastly different results depending on the tribunal hearing the claim. The possibility of different results which vary based on the tribunal hearing the matter is an appealing feature of parties’ freedom to contract in commercial disputes. When applied to human rights claims however, these same features are inimical.<sup>116</sup> Thus, effective rules governing third-party joinder should direct tribunals to apply the Hague Rules in eligible claims asserting human rights abuses, regardless of the individual tribunal’s chosen procedure that might otherwise govern in commercial settings.

### B. *The Proposed Framework*

This Section proposes a framework that arbitral tribunals should adopt when, while presiding over a business dispute, a request is made for third-party joinder alleging human rights abuses. The recommended mechanism is intend-

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112. See Gary Born, *Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30 U. PA. J. INT’L L. 999, 1001–03 (2009).

113. UN Guiding Principles, *supra* note 16, at 26 (Principle 31).

114. *Id.*

115. Abhisar Viyarthi, *Hague Rules on Business Human Rights Arbitration: What Lies Ahead*, AMER. REV. INT’L ARB. (Sept. 28, 2020). See also *Summary Paper on Sounding Board Consultation Round 1*, CTR. FOR INT’L LEGAL COOPERATION (June 2019), <https://www.cilc.nl/cms/wp-content/uploads/2019/06/Summary-Paper-Sounding-Board-Consultation-Round-1-%E2%80%93-93-Results.pdf>; *Public Consultation on Business and Human Rights Arbitration*, CTR. FOR INT’L LEGAL COOP. (June 2019), <https://www.cilc.nl/worldwide-public-consultation-on-the-hague-rules-on-business-and-human-rights-arbitration/>.

116. See *supra* Section II.C.

ed to replace Article 19 of the Hague Rules governing multiparty claims.<sup>117</sup> The framework includes three key provisions: (1) it recognizes the defendant's implied consent to certain third-party claims; (2) it defines, in precise terms, permitted third-party plaintiffs; (3) it guards against the possibility of third-party joinder which may cause corporate double jeopardy; (4) it highlights additional considerations that a tribunal must weigh in instances where the proposed third-party plaintiff is a member of a vulnerable population.

The procedural aspects that follow once third-party joinder is permitted (for example, the right of the third-party to choose arbitrators themselves,<sup>118</sup> or special procedures tribunals may adopt to process large numbers of parties and claims<sup>119</sup>) are left unaddressed within this proposal. The original guidance provided by the Hague Rules on such matters should be assumed to govern if not mentioned otherwise. In line with the principles underlying the Hague Rules, this proposal assumes that parties have the requisite resources to cover the basic costs of arbitration and their own representation (including through options such as legal aid system or contingency funding).<sup>120</sup>

## 1. Consent and Permitted Third-Party Plaintiffs

### a. *Subject Matter Consent*

Party consent to two aspects of arbitration is necessary: subject matter and permitted third-party plaintiffs. The first question of consent pertains to the subject matter at issue. Although exceptions are occasionally made,<sup>121</sup> the traditional governing principle states that arbitrators may only decide upon matters included within the scope of parties' agreements.<sup>122</sup> The new framework on third-party joinder should retain this strict interpretation of consent to preserve corporate buy-in to arbitration. As highlighted by stakeholder commentary during the drafting of the Hague Rules, holding corporations accountable without an explicit breach of contract is one of the most pressing obstacles to addressing human rights violations.<sup>123</sup> Should arbitral tribunals be persuaded to look out-

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117. Cf. The Hague Rules, *supra* note 50, art. 19.

118. See, e.g., João Duarte de Sousa, *Joinder of Third Parties in International Arbitration*, GARRIGUES (Oct. 26, 2020), [https://www.garrigues.com/en\\_GB/new/joinder-third-parties-international-arbitration](https://www.garrigues.com/en_GB/new/joinder-third-parties-international-arbitration).

119. See The Hague Rules, *supra* note 50, art. 19 cmt. 2.

120. See *id.* at 4.

121. See, e.g., Bernard Hanotiau, *Consent to Arbitration: Do we Share a Common Vision?*, 27 ARB. INT'L 539, 552–53 (2011) (summarizing the theory of “consent by conduct” in international arbitration).

122. See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 2 (3d ed. 2017).

123. See Letter from Columbia Ctr. on Sustainable Inv. to Drafting Team of the Hague Rules on Bus. and Hum. Rts. Arb. 13 (Jan. 31, 2019) (on file with the Columbia Center on Sustainable Investment).

side the contractual terms of party agreements for human rights violations, corporations might eschew the arbitral process altogether. Moreover, keeping within the four corners of the contract with respect to subject matter consent does not prohibitively limit actions based on human rights violations. A so-called “new generation” of international investment agreements now takes a positive approach to holding investors accountable for violations of human rights.<sup>124</sup> These agreements include clauses detailing environmental, labor, and human rights standards that must be met over the course of the contract.<sup>125</sup> Outside of the investment agreement context, business enterprises have also begun to introduce human rights provisions into their private commercial contracts since the introduction of the UNGPs in 2011.<sup>126</sup> The Hague Rules should encourage tribunals to read corporations’ contractual commitments to human rights broadly and in light of the UNGPs.

A possible criticism to this proposed conception of party consent is that it impermissibly limits the universe of human rights claims to those that the corporation itself consents to. Critics might also contend that this strict interpretation of subject matter consent does not go far enough so as to bring legitimacy to the project of business human rights arbitration as whole.

Countering both of these points, however, is the underlying balancing principle. Consent may be expanded past the narrow conception envisioned by the Drafters, but not dispensed with entirely. To do otherwise would threaten the viability of business human rights arbitration altogether. Corporate buy-in for the practice would almost certainly deteriorate with the perception of exposure to “open-ended liability.”<sup>127</sup> The current approach strikes a balance by reading corporations’ contractual commitments to human rights objectives broadly while at the same time preserving the core of corporate defendants’ right to consent to the subject matter of the arbitration.

#### b. *A Contraction to the Doctrine of Privity of Contract*

The second question of consent concerns the parties who may bring a claim based upon the arbitration agreement. Here, my proposed framework departs from the principles set forth by the Hague Rules. Individuals that have been

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124. Crina Blatag, *Human Rights and Environmental Disputes in International Arbitration*, KLUWER ARB. BLOG (July 24, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/24/human-rights-and-environmental-disputes-in-international-arbitration/>.

125. Nour Nicolas, *Recent Clauses Pertaining to Environmental, Labor and Human Rights in Investment Agreements: Laudable Success or Disappointing Failure?*, KLUWER ARB. BLOG (July 23, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/07/23/recent-clauses-pertaining-to-environmental-labor-and-human-rights-in-investment-agreements-laudable-success-or-disappointing-failure/>.

126. Antony Crockett, *Human Rights Clauses in Commercial Contracts*, LONDON SCH. ECON. INV. & HUM. RTS. PROJECT (June 4, 2014), <https://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/6667/>.

127. See Glimcher, *supra* note 90, at 259 (quoting PAUL M. BARRETT ET AL., FIVE YEARS AFTER RANA PLAZA: THE WAY FORWARD 11 (2018)).

harm by a breach of the corporation's human rights obligations under the terms of the underlying commercial contract should be permitted to join the arbitration to bring such a claim. In determining a claimant's eligibility for third-party joinder, the tribunal would apply a simple tort-based analysis: the third-party plaintiff's claim would be required to allege that the company breached a duty owed to the plaintiff and that this breach was the direct or proximate cause of the harm that the plaintiff suffered.<sup>128</sup> Most of the tribunal's analysis of this claim will take place during the merits portion of the arbitral proceeding. For purposes of determining third-party joinder, however, two questions must be considered.

First, did the corporate defendant assume this duty? This will be determined by the terms of the corporate defendant's contract upon which the ongoing arbitration is based. The tribunal should analyze this first question without regard to the plaintiff's identity. An example illustrates how this might be applied in practice. In the case of *Lungowe v. Vedanta*, 1800 individuals in Zambia sought damages from a mining company that polluted waterways in Zambia and caused personal injury to community residents.<sup>129</sup> To prevail on third-party joinder before an arbitral tribunal under the new framework, these plaintiffs would need to allege that the underlying investment contract at issue contained a clause binding the company to respect a duty pertaining to human rights and that the company breached that duty. The plaintiffs requesting third-party joinder may prevail on this inquiry even if the duty was not explicitly owed to the third-party plaintiff requesting joinder. In other words, the plaintiffs in the *Lungowe* case would need to prove that the corporation committed itself to a duty to protect human rights; they need not prove that this duty was owed *specifically* to the communities surrounding the Zambian waterways.

The question of whether a duty is sufficiently connected to human rights should be decided in reference to those rights recognized under the UNGPs.<sup>130</sup> On these facts, a third-party claim could be based upon a contractual duty grounded in the right to an adequate standard of living or the right to health. A clause within the agreement that gives rise to third-party joinder in this case might read: "The Contracting Party must take every measure necessary to pro-

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128. Cf. *Negligence*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/negligence> (last visited Mar. 19, 2021).

129. Ruth Cowley & Stuart Neely, *Lungowe v Vedanta Appeal Highlights Important Points Regarding Parent Company Liability*, NORTON ROSE FULBRIGHT (Nov. 2017), <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/bf5c2c71/emlungowe-v-vedantaem-appeal-highlights-important-points-regarding-parent-company-liability>.

130. See generally *The Relationship Between Businesses and Human Rights*, UN GUIDING PRINCIPLES REPORTING FRAMEWORK (July 2015), [https://www.ungpreporting.org/wp-content/uploads/2015/07/UNGPRF\\_businesshumanrightsimpacts.pdf](https://www.ungpreporting.org/wp-content/uploads/2015/07/UNGPRF_businesshumanrightsimpacts.pdf) (outlining certain human rights, brief explanations of those rights, and examples of how businesses might be involved with an impact on that right).

tect human life and health within the scope of its activities undertaken pursuant to this Agreement.”<sup>131</sup>

This adaptation to the Hague Rules on third-party joinder will enable victims of human rights abuses to vindicate their right to an effective remedy to which they are entitled under the UNGPs.<sup>132</sup> At the same time, the adaptation preserves corporations’ right to consent to the subject matter of arbitration. Although this may give rise to the possibility of actions the corporation did not foresee at the outset, this concern is tempered by the second stage of the consent inquiry.

The second relevant question to determine the eligibility of third-party joinder concerns the identity of the plaintiff herself. Is the plaintiff bringing the claim an individual who is directly or proximately harmed by the defendant’s alleged breach? In other words, those directly harmed by the defendant’s breach should be permitted to join the arbitration; family members and other close relatives of those harmed may have a colorable claim based on proximate cause; and NGOs may not bring claims on behalf of individuals under this framework.<sup>133</sup>

Civil society actors may contend that limiting third-party joinder to those directly and proximately injured by corporations’ human rights violations does not go far enough. Critics holding this view may prefer an arrangement akin to the Bangladesh Accords, which went so far as to permit NGOs, labor unions, and injured parties themselves to bring actions against multinational corporations for violations of their duties under the Accords.<sup>134</sup> However, a similarly expansive theory of joinder cannot be as easily transposed onto the Hague Rules. The Bangladesh Accords are unique in that the MNCs explicitly signed a legally binding agreement with NGOs and labor unions consenting to arbitration on specific terms.<sup>135</sup> In contrast, the Hague Rules and third-party joinder are concerned with the rights of individuals who were not party to the underlying agreement. The proposed framework within this Section is permissible under international law: to allow those directly and proximately injured by a corporation’s human rights violations is a right supported by the UNGPs themselves;<sup>136</sup> at minimum, is contemplated by international tribunals;<sup>137</sup> and in

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131. See generally Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements* (Org. for Econ. Coop. and Dev., Working Paper on International Investment 2011/01, 2011), [http://www.oecd.org/daf/inv/investment-policy/WP-2011\\_1.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2011_1.pdf) (providing template language for binding human rights obligations contained in agreements such as Bilateral Investment Treaties).

132. UN Guiding Principles, *supra* note 16, at 22 (Principle 25).

133. Cf. Bangladesh Accord, *supra* note 80, ¶¶ 1–5.

134. See Glimcher, *supra* note 90, at 259, 261.

135. See *id.*

136. See UN Guiding Principles, *supra* note 16, at 13 (Commentary to Principle 11) (Businesses’ responsibility to respect human rights is a “global standard of expected conduct for all business enterprises wherever they operate” and addressing any adverse human rights impact requires mitigation and, where appropriate, remediation).

egregious instances, is permitted by international human rights law.<sup>138</sup> No such right is granted under international law to parties unconnected to the harm itself.

## 2. Refusal of Joinder Claims Causing Corporate Double Jeopardy

In addition to an expansion on the concept of party consent and permitted third-party plaintiffs, the revised Hague Rules on third-party joinder should guard against the possibility of duplicative actions against corporate defendants. The tribunal should not accept a third-party claim that would violate the common law concept of double jeopardy (or its civil law counterpart *ne bis in idem*). This is a necessary addition to the Hague Rules as no existing international framework currently prevents instances of corporate double jeopardy.<sup>139</sup> Two inquiries should be made in determining the admission of a third-party claim. First, has the same human rights claim arising from the same operative facts previously been heard by an arbitral tribunal?<sup>140</sup> If so, the current tribunal should abide by the principles of the New York Convention and view the prior decision as having a *res judicata* effect.<sup>141</sup> The plaintiff should be denied third-party joinder in this instance. If the third-party plaintiff has raised the same claim before a national court and received a judgment, the Hague Rules should contain a strong presumption that the court's judgment is *res judicata*. In order for the tribunal to consider the plaintiff's request for third-party joinder in the case at hand, the plaintiff should bear the burden of proving that the national court's judgment should be set aside and that they should be given the opportunity to relitigate. The analysis for vacating a prior court's judgment may be conducted according to the individual rules of the respective tribunals.

Considerations surrounding double jeopardy are crucial to consider for both the corporate defendant and the third-party plaintiff. On one hand, arbitral tribunals should not become a place for plaintiffs to relitigate claims against which a corporation has successfully defended itself against. On the other hand, arbitral tribunals are often the only neutral, viable judicial forum where plaintiffs alleging human rights abuses have a chance of success. As Hague Rules Drafter Diane Desierto has observed, "the path for international justice for in-

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137. See, e.g., *Bear Creek Mining Corp. v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, ¶ 1195 (Nov. 30, 2017).

138. See G.A. Res. 60/147, annex, 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 (Dec. 16, 2005).

139. Andrew T. Bulovsky, *Promoting Predictability in Business: Solutions for Overlapping Liability in International Anti-Corruption Enforcement*, 40 MICH. J. INT'L L. 549, 551 (2019).

140. See generally Mark Jay Altschuler, *The Res Judicata Implications of Pendent Jurisdiction*, 66 CORNELL L. REV. 608 (1981).

141. See U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, art. III cmt. 12 (2016), [https://newyorkconvention1958.org/pdf/guide/2016\\_Guide\\_on\\_the\\_NY\\_Convention.pdf](https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf) ("Although article III does not expressly provide that arbitral awards have *res judicata* effect, a number of national courts have ruled that it has such a consequence in practice.").

ternational human rights claimants against transnational corporate activities is laden with jurisdictional hurdles, evidentiary burdens, resource disparities, political asymmetries, sociological and situational differences.”<sup>142</sup> The suggested policy strikes a balance between upholding corporations’ international legal rights while taking into account the unique difficulties faced by victims of corporate human rights abuses.

### 3. Additional Considerations When Weighing Third-Party Joinder Claims from Vulnerable Populations Under International Law

The final addition to the new framework on third-party joinder under the Hague Rules concerns the identity of the third-party plaintiff themselves. The Hague Rules should advise arbitral tribunals to take into account the rights that such individuals have under international law when reviewing a third-party joinder request. The tribunals should not look to whether such parties have a claim against the corporate defendant under international law. Rather, the duties owed to such vulnerable populations under international law should be used as a thumb on the scale in favor of permitting the aggrieved plaintiff access to third-party joinder in otherwise ambiguous situations.

An example illustrates how this might be applied in practice. In the case of *Aguas del Tunari v. Republic of Bolivia*, Bolivia awarded a forty-year agreement to a Bolivian company for the exclusive right to provide water in the city of Cochabamba.<sup>143</sup> The contract drew criticism from the local community, and protests that were initially peaceful became violent.<sup>144</sup> Bolivia attempted to privatize the water service and annul the recession agreement; the spurned company submitted a claim for violation of the Bilateral Investment Treaty.<sup>145</sup> Let us imagine there is a third-party indigenous claimant who suffered human rights abuses during the protests and wishes to hold the private company accountable under commitments it made to the protection of local populations in the contract. She submits her claim for joinder, but the tribunal is on the fence as to whether to permit her claim in light of the foregoing consent analysis. Here, the tribunal should be permitted to consider her status as part of a vulnerable group and consider the private company’s contractual commitments through this lens. In recent years, international bodies have endorsed the principle of free, prior and informed consent (“FPIC”) in situations where companies use land occupied by indigenous persons.<sup>146</sup> The arbitral tribunal should be permitted to refer

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142. Desierto, *supra* note 39.

143. Kenneth J. Vandavelde, *Aguas del Tunari, S.A. v. Republic of Bolivia*. ICSID Case No. ARB/02/3. *Jurisdiction*. 20 ICSID Review: *Foreign Investment Law Journal* 450 (2005), 101 AM. J. INT’L L. 179, 179 (2007).

144. *See id.*

145. *Id.*

146. Kathryn Tomlinson, *Indigenous Rights and Extractive Resource Projects: Negotiations Over the Policy and Implementation of FPIC*, 23 INT’L J. HUM. RTS. 880, 881 (2019).

to this international principle when considering whether the claimant has a colorable claim under the terms of the underlying commercial contract.

In such situations, the arbitral tribunal would not be permitted to take into account the discrete characteristics of the individual claimant in determining whether they conform to the category of a vulnerable population. Rather, these determinations should be made by reference to the groups recognized under international law while considering the facts in the underlying dispute. To continue with the above example, one's rights under international conventions as a person with a disability would be less relevant in the facts of the *Aguas del Tunari* case than one's status as an indigenous person.<sup>147</sup> This guidance will prevent otherwise immaterial considerations of one's identity from impermissibly skewing corporate defendant's obligations under the underlying commercial contract.

#### CONCLUSION

The Hague Rules on Business and Human Rights have provoked an international conversation on the viability of business human rights arbitration. They should be viewed as an opportunity to create a forum whereby the rights of corporate defendants might be reconciled with the abilities of victims of human rights abuses to bring their claims. But the Hague Rules are a first draft. We should critique the rules and build upon their ingenuity with better, more considered principles as we learn from time and experience. Third-party joinder is one realm that the Hague Rules has left open for improvement. In modifying and building upon the current structure, the third-party joinder mechanism has the capacity to both legitimize and advance business human rights arbitration as a whole.

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147. In this case, one's status as an indigenous person is more relevant to the facts of the *Aguas del Tunari* case because of the FPIC principle which has no parallel application to persons with disabilities.



