

E. Article 4 (Rights of Victims)

Article 4: General Analysis of Framework and Structure

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This essay is the first of a three part examination of one of the central elements of the Draft Legally Binding Instrument (Draft LBI)--Article 4 (Rights of Victims). These include its terms, its underlying ambitions, ideologies, and the feasibility of its gasp, given the constraints within which its authors are necessarily made to work.²

Section II of the Draft Legally Binding Instrument (Draft LBI) forms its centerpiece. It consists of a number of sections built around individuals who have assumed the status of "victim" for purposes of the operational provisions of the Draft LBI. Article 4 focuses on the "victim." Building on the definition of "victim" as a particular class of person, it specifies the legal environment in which the victim's harm is to be understood, and the context on which it might be remedies. Article 5 shifts the gaze from an object, the "victim," to an action--"prevention." Victims are the passive object of events (things happen to them); they are the subject of remedy and justice. But they are immobile points of the convergence of obligation and remedy. The law of this Draft LBI is *not directed to them* (though crafted *for them*).

The real object of the Draft LBI are those who the power to act; and more specifically those identified with the power to transform ordinary persons to groups "victims." The exercise of this power to transform carries with it the ability to prevent. The power to prevent falls to business enterprises under the guidance of the state. Article 6 then shifts again from the enterprise to the state, which is required to adjust its domestic legal order to embed legal liability for actions that fall under the definition of human rights harms or abuse. Article 7 then moves from law to the courts. It frames an obligation to center remedy in the judicial mechanisms of states. Article 8 considers the longevity of the availability of remedy for human rights harms and abuses. Article 9 focuses on lawyer's work--choice of law.

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² In addition to this essay see *infra* Flora Sapio, *Article 4: Conceptual Foundations and Granular Textual Analysis*; and Larry Catá Backer, *Flavors of the Month Rarely Outlast their Novelty: A Close Examination of Article 4 and the Construction of the Victim as a Legal Category*.

While Article 1 set the stage for the construction of the “victim” as a special category of legal object, Article 4 then fleshes out the characteristics of that object. Not all individuals (or legal persons) can be a victim. But all victims share common traits that are grounded in a set of relations between the “victim,” business activity, and the state. One is now heavily embedded within a traditional system in which “victim's” have little to say and are at their most effective when they can be deployed as “being” in some respect that triggers liability among those assigned to bear it. Indeed, by Article 9, it is apparent that the highest and best use of a victim is to be the object of a human rights harm or abuse--the consequences of which are then assumed by a host of the “usual suspect” stakeholders on behalf of the “victim” and perhaps for the greater glory of the system created.



Articles 10-12 round out the more technical elements of this construction. Article 10 focuses on “mutual legal assistance.” These worthy provisions make it possible for the system to operate despite the constraints of class, place, and wealth of “victims.” But at the same time, it affirms the effective transfer of authority over the management of human rights harms and abuses--their characterization and control of their consequences--to those charged with the operation of this system. Article 11 encourages international cooperation to ensure the integrity of the system. The focus of those provisions are then necessarily focused on the judicial mechanisms of mitigation and remedy, with a space available for cooperation in prevention. Article 12 then seeks to square the circle. Having started by declaring the state at the center of the universe of law and rights making, it then

commits states to nod, if ever so gently, in the direction of what its title declares to be a consistency with international law, now to be understood with a certain amount of irony.

For all of its scope (and here “scope” ought to be read against the aspirations of Article 3 of the Treaty), Article 4 does tend to revolve around its “victims” without whom the elaboration that follows would be wasted. Much of what Articles 5-12 implement find their initial scope and expression in Article 4. It is worth considering then, before one looks closely at each of its sub sections, to consider the way that Article 4 is itself constructed. That consideration exposes, to some extent the psychology of Article 4 and the underlying ideology to which it gives expression.

The first several sections provides a form of "bill of rights" applicable to victims. Section 1 speaks to a baseline standard of treatment for victims (treated with humanity), which is then refined by reference to dignity and human rights with a focus on safety and privacy. Section 2 then refines the general standard of Section 1 by declaring a guarantee of certain fundamental rights.

Section 3 then expands the protections afforded victims to their families and to witnesses. These rights are to be protected by the state. At this point one wonders, of course, who then is to protect the rights and undertake the duties specified in Sections 1-2. But it is likely that these duties, too, fall to the state. While rights may be vested in the legal category "victim," duty falls to those with capacity—the state and the enterprise, and the human rights defenders, all of which are accorded power in relation to the remediation (and prevention) of harms that might befall an individual and thus transform him or her into "victim."



Section 4 then turns to secondary human rights harms and abuses--*by the state*. The point here to avoid a second victimization during the course of proceedings. Of course, it is not the state that might produce the secondary victimization (the intimidation might well be that an angry defendant might be the cause); but the state bears responsibility for the success of these efforts. Section 5, though, does *focus on state duty*. Here the duty extends to fair trial and adequate remedy timely delivered (assuming of course that those advancing claims for the victim prevail). In the process it describes a scope of remedial measures that ought to be in state judicial toolkits. Lastly, Section 6 is meant to guarantee access to information.



Section 7 then moves from the basic framework and protections of a state based judicial remedy, to the protections of victims by their own governments. That, of course, assumes that home state might have an interest (there is little here to suggest a duty to protect one's own citizens), Section 8 then returns to the context of the state based remedy, in this case to state based non judicial remedy and the protections of victims in choosing forums.

With section 9 Article 4 turns its attention to political rights of those managing victim's travels through the maze of state-based remedies. States need to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend

human rights and the environment. Section 10 moves from the guarantee of non-governmental actors to engage in the process of victim harvesting and promotion, to the obligation of the state to investigate whatever might be uncovered. Section 11 emphasizes international cooperation in the facilitation of information gathering. Section 12 provides a five-part catalogue of effective legal assistance. Lastly, Section 13 imposes on states a duty to aid victims unable to afford the administrative costs of litigation.

Section 14 then provides for effective remedy and Section 15 for recognition of remedy awards "to recognize, protect and promote all the rights recognized in this (Legally Binding Instrument) to persons, groups and organizations that promote and defend human rights and the environment."

And finally, Section 16 of Article 4 provides for a reversal of burdens of proof on access to justice and remedy principles, but only to the extent otherwise permitted by domestic law.

Article 4, then, provides a broad scope framework for the protection of the rights of victims, once an individual becomes a victim. That is, once "any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse" (Art. 1(1)). Thus, the rights in Article 4 have little to do with the obligations that give rise to remedy. Rather *it is meant to provide a second order rights context for seeking remedy* for human rights harms and abuses (however these may be defined, as we discussed earlier in the context of Article 1)). As such, Article 4 is only invoked once an individual or group has been recast as a victim--but not before. The object is to get the victim from the point at which he or she suffers a remedial harm to the point where the individual might realize remedy.

In the process, the Draft LBI attempts a fairly interesting rewriting of legal frameworks. There is a bit of hyper-constitutionalization, and rights segmentation in some readings of the constitution of Article 4. Victims are to be accorded rights and protections that are special and that extend to their families and witnesses in ways that other harms are not. It is this bifurcation of rights that provides Article 4 with its greatest challenge and its most interesting window on a hierarchy of harm that seeks to place internationally defined (and managed) harms above others embedded in the domestic legal orders of states. To that end it also seeks to guarantee a place within process rights that is distinct from that accorded to others. We take this up in the succeeding posts.

Section II

Article 4. Rights of Victims

1. Victims of human rights violations shall be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured.

2. Victims shall be guaranteed the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement.

3. Victims, their representatives, families and witnesses shall be protected by the State Party from any unlawful interference against their privacy and from intimidation, and retaliation, before, during and after any proceedings have been instituted.

4. Victims shall have the right to benefit from special consideration and care to avoid re-victimization in the course of proceedings for access to justice and remedies, including through appropriate protective and support services that ensures substantive gender equality and equal and fair access to justice.

5. Victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:

- a. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims;
- b. Environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.

6. Victims shall be guaranteed access to information relevant to the pursuit of remedies.

7. Victims shall have access to appropriate diplomatic and consular means, as needed, to ensure that they can exercise their right to access justice and remedies, including but not limited to, access to information required to bring a claim, legal aid and information on the location and competence of the courts and the way in which proceedings are commenced or defended before those courts.

8. Victims shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties. Where a claim is submitted by a person on behalf of victims, this shall be with their consent, unless that person can justify acting on their behalf. State Parties shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victim's access to adequate, timely and effective remedies.

9.State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to act free from threat, restriction and insecurity.

10.State Parties shall investigate all human rights violations and abuses effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural or legal persons found responsible, in accordance with domestic and international law.

11.State Parties shall ensure that their domestic laws and courts facilitate access to information through international cooperation, as set out in this (Legally Binding Instrument), and in a manner consistent with their domestic law.

12.State Parties shall provide proper and effective legal assistance to victims throughout the legal process, including by:

- a. Making information available to victims of their rights and the status of their claims in an appropriate and adequate manner;
- b. Guaranteeing the rights of victims to be heard in all stages of proceedings as consistent with their domestic law;
- c. Avoiding unnecessary costs or delays for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards;
- d. Providing assistance with all procedural requirements for the presentation of a claim and the start and continuation of proceedings in the courts of that State Party. The State Party concerned shall determine the need for legal assistance, in consultation with the victims, taking into consideration the economic resources available to the victim, the complexity and length of the issues involved in the proceedings.
- e. In no case shall victims that have been granted the appropriate remedy to redress the violation be required to reimburse any legal expenses of the other party to the claim. In the event that the claim failed to obtain appropriate redress or relief as a remedy, the alleged victim shall not be liable for such reimbursement if such alleged victim demonstrates that such reimbursement cannot be made due to the lack or insufficiency of economic resources on the part of the alleged victim.

13. Inability to cover administrative and other costs shall not be a barrier to commencing proceedings in accordance with this (Legally Binding Instrument). State Parties shall assist victims in overcoming such barriers,

including through waiving costs where needed. State Parties shall not require victims to provide a warranty as a condition for commencing proceedings.

14.State Parties shall provide effective mechanisms for the enforcement of remedies for violations of human rights, including through prompt execution of national or foreign judgements or awards, in accordance with the present (Legally Binding Instrument), domestic law and international legal obligations.

15. State Parties shall take adequate and effective measures to recognize, protect and promote all the rights recognised in this (Legally Binding Instrument) to persons, groups and organizations that promote and defend human rights and the environment.

16. Subject to domestic law, courts asserting jurisdiction under this (Legally Binding Instrument) may require, where needed, reversal of the burden of proof, for the purpose of fulfilling the victim's access to justice and remedies.

