Emancipating the Mind in the New Era

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Commentary on the U.N. Inter-Governmental Working Group (Geneva) 2019 Draft "Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Corporations and Other Business Enterprises" (Textual and Conceptual Analysis)

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Emancipating the Mind in the New Era
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Foreword

The New Draft of the "Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Corporations and Other Business Enterprises"; Responding to the Call for Comments.

CPE-Treaty Project Working Group
Larry Catá Backer
Flora Sapio

It is always exciting to engage in the production of nostalgia. That is even more the case when the production is for a worthy cause. And there is probably no worthier cause to my mind than the project to robustly embed a strict sensitivity to human rights norms within the operations of economic enterprises, or broadly, within the cultures of economic activity however undertaken.

Even as political, social, and economic power fragment along new and ever more complex lines, many well-intentioned, sophisticated, and thoughtful people remain committed to a view of the world that has not only disappeared--except as to the wisps of its form that still serve as a means organizing factions--but that is being recast in ways we can hardly understand. In a world in which law is being transformed into data with consequences, where enterprises increasingly govern their production chains through regulatory contract, where administrative discretion carries more weight in the public and private sector than the rules with respect to which they are rarely held to account, and where the boundaries between the public and private interventions of state and non-state institutions have become blurred (to put it mildly), *it is hard to generate much more than a pedantic excitement over the efforts to finally (and three quarters of a century late) develop a* ***gloriously antiquarian instrument for a civilization whose ghosts can only haunt us now***.

We speak, of course, of the new Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities Corporations and Other Business Enterprises,*[1] released on 16 July 2019 by the Open-ended Intergovernmental Working Group (OEIGWG)

1 *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft*, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

Chairmanship. The Draft LBI will serve as the basis for negotiation to be held during the fifth Session of the OEIGWG, from 14 to 18 October 2019.[2]

Still, this is a worthy exercise (as I have suggested before,[3] not so much for its stated objectives, but for the principles and perspectives they may generate to contribute to the next generation of structural governance instruments that will have top be developed over the course of the next decade. To that end, a study of this Draft LBI is both worthy and important — not just out of respect for those worthy people whose vision is therein articulated, but also for the value that its insights and failings contribute toward the useful end of embedding principles and expectations grounded in human rights within all economic activities. ***It will be useful, in that respect to compare this Draft to the Zero Draft that circulated last year*.**[4]

Lastly, serious study may be helpful to the members of the OEIGWG as they approach their consideration of this draft in October 2019. OEIGWG will *officially and publicly* consider the Draft Legally Binding Instrument at its next meeting in October 2019. It might aid the OEIGWG and their advisors, including those charged with the drafting and defending of the Draft Legally Binding Instrument to receive thoughtful commentary by stakeholders and other interested parties. In its *Note Verbale regarding the release of the revised draft legally binding instrument*, the Chairmanship of the Working Group noted that:

> The Chairmanship will convene informal consultations with Governments, regional groups, intergovernmental organizations, United Nations mechanisms, civil society, and other relevant stakeholders, before the fifth session of the OEIGWG, including on an updated program of work, in accordance with additional information to be announced in due course.[5]

The Coalition for Peace and Ethics, as a member of that large group of interested stakeholders is making its views known to the OEIGWG through this Special Issue of *The CPE Bulletin*. The analysis contained herein focusses both on close textual reading, and on

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2 On the activities of the OEIGWG see United Nations Human Rights Council, *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights,* available at https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

3 Larry Catá Backer, *Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All*, 38 FORDHAM INT'L L.J. 457 (2015); *Considering a Treaty on Corporations and Human Rights: Mostly Failures But with a Glimmer of Success* (August 28, 2015). Available at SSRN: https://ssrn.com/abstract=2652804 *Pragmatism Without Principle?: How a Comprehensive Treaty on Business and Human Rights Ought to Be Framed, Why It Can't, and the Dangers of the Pragmatic Turn in Treaty Crafting* (February 18, 2016); *Building a Treaty on Business and Human Rights: Context and Contours* (Surya Deva, David Bilchitz et al., eds)., Forthcoming. Available at SSRN: https://ssrn.com/abstract=2734399; S*haping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights*, 42 2 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW 417 (2016).

4 See Appendix.

5 Note 4-7-156/2019, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/NV_Ecuador_RevisedDraft_LBI.pdf

drawing out the larger conceptual issues and challenges that the present draft presents. In the process, the CPE-Treaty Project Working Group hopes to provide a basis for further fruitful discussion of this specific project, and more generally, to advance thinking about the roe of treaties in the construction of a regulatory universe the object of which is to center human rights and sustainability factors in economic decision making.

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Introduction

Framing an Analysis of the 2019 Draft Legally Binding Instrument

CPE-Treaty Project Working Group
Larry Catá Backer
Flora Sapio

This Introduction is divided into two parts, each of which includes the brief framing thoughts of members of the CPE Treaty Project Team. The first is provided by Flora Sapio ("The Victims of the Draft Legally Binding Instrument"), and the second is provided by Larry Catá Backer ("The Instrumentalism of the Instrument and the Taming of Transnationalism"). Bot5h are meant to help situate the analysis that follows in a more transparent way. Each suggests that though there may be very little quarrel with the normative objectives of the Draft Legally Binding Instrument (Draft LBI), that sympathy for broad normative goals ought not to blind to the challenges posed by the text of the raft DLBI with respect to its translation of those norms into legal principles, standards, and tests.

A. The Victims of the Draft Legally Binding Instrument

Flora Sapio

The Draft LBI is a victim-centered treaty. A 'victim-centered' treaty is a treaty that, in principle, bestows on 'victims' a measure of autonomy far greater than they currently have. It is a treaty that, in principle, empowers victims by making them into an autonomous actor in international law. 'Victims' would thus exist and operate on the same moral level as state-based actors. But, under international law, the definition of victims is still somewhat fragmented. At least four different definitions of victims exist.[1] Aside from their common essential elements, these definitions:

> (1) have been constructed with reference to the actual harm suffered by direct victims (but also secondary and indirect victims, collectives, groups, organizations and institutions) as a result of a specific conduct of state or non-state actors;
>
> (2) are *context-specific*. The causal relation between the perpetration of an act and the infliction of an actual harm is not sufficient to produce the status of victim. That status is acquired if the act causing direct or indirect harm falls within any of the categories created by relevant instruments. These categories are those of domestic criminal legislation; crimes under the jurisdiction of the ICC; *gross violations* of international human rights law, *serious violations* of international humanitarian law, and acts of terrorism.

The contextual nature of the status of victims might play against the emergence of the figure of 'victim' in international justice. If the status of victim may be acquired only when the harm committed against a person falls within specific parameters, and if these parameters are narrower than those determining who can otherwise accede to the status of victim, then the figure of 'victim' remains somehow peripheral to international justice, and indirectly to domestic justice as well.

A possible response to this state of things would be multiplying the categories of conduct that can produce the status of 'victim'. If it continued for a sufficient time, this endeavor would gradually broaden the criteria that can result in the status of 'victim', until

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1 See Section III, INTERNATIONAL CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE (2nd ed., 2013); UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the General Assembly, 29 November 1985, A/RES/40/34, available at https://www.refworld.org/docid/3b00f2275b.html; UN General Assembly, *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,* adopted by the General Assembly, 16 December 2005, A/RES/60/147, available at https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx; African Commission on Human and Peoples' Rights, *Resolution on the Protection of Human Rights Defenders In Africa*, 4 June 2004, #69, available at: https://www.refworld.org/docid/5194a0c84.htm

the point when the overlap between the concept of 'victim' and that of 'human person' would be total.

The Revised Draft of the Legally Binding Instrument moves toward this direction. In its preamble, the Draft LBI reaffirms the fundamental dignity and worth of the 'human person', and stresses "the right of every person to be entitled to a social and international order in which their rights and freedom can be fully realized".[2] The preamble also expresses the desire to "contribute to the development of international law, international humanitarian law, and international human rights law".[3]

These statements of principle reveal not just a concern about victims, but also the existence of a broader global trend. One that the Draft LBI embodies, and that is geared towards re-adjusting the equilibrium between State, Market, and perhaps society. This broader trend is visible in how the Draft LBI attempts to regulate the activities of private businesses. But even more so in how the Draft treats 'victims.' The attribution of the status of 'victims' to individuals has to be read within the broader relation the Draft LBI establishes between the State, and those non-State entities who enjoy the *de facto* power to harm the State's own subjects. That relation is beyond negotiation, as it represents one of the fundamental assumptions of the Draft LBI. In the meantime, subjects of the State are qualified not as 'citizens' or 'human beings' — words bearing very different connotations — but as potential 'victims'. The Draft LBI defines 'victims' as follows:

> "Victims" shall mean any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violations or abuse as defined in Article 1 paragraph 2 below. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim.[4]

This definition is modelled after the Basic Principles of Justice for Victims of Crime and Abuse of Power,[5] and it preserves all the essential elements of existing notions of victims. The Draft LBI however enriches the definition of victims of at least three elements which seem to be new.

The first one of them is the introduction of *mere allegations of harm* as sufficient to produce the status of 'victim', under the moral framework of international law. But perhaps not under the legal framework of signatory states, where a notion of 'victim' may not enjoy the same moral weight it has in international law, or it may not even exist.

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2 Preamble, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Revised Draft*, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

3 *Ibid*.

4 Art. 1(1), *ibid*.

5 *Supra*, at footnote 1.

The second one is the *subordination of the status of indirect or secondary victim to considerations about 'appropriateness', and to provisions in the domestic law* of the states that will ratify the LBI in a future. The fact the status of 'victims' can be accessed only if domestic law so allows should not be seen as defeating the goals of the Draft LBI. The goals of the Draft LBI are extremely important, but their achievement seems to depend only on the State.

The third one is the emphasis placed on the rights to personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, at least if compared to economic rights, and the right to development. Under Article 1, a human rights violation occurs also when a person suffers an economic loss resulting from the behavior of a business enterprise. Under the Preamble to the Draft LBI, human rights are indivisible. Yet, article 3 does not acknowledge the rights of victims to receive an adequate compensation for their work. Neither does it acknowledge the existence of discrimination in the enjoyment of economic rights based on race, nationality, gender, sexual orientation, religion, or other attributes of individuals. This point raises the question of whether the State, given its claims to represent the sole legitimate regulatory order, has also a duty to guarantee the material well-being of its subjects.

Having set all those principles and definitions that may shape how the treaty will work in practice, the Draft LBI moves on to state its own goals. Once the Draft LBI will be ratified by the minimum number of states, the interpretation of these goals and the very notion of human rights will be constrained by the definitions provided in Article 1, the intent emerging from Resolution 26/9 and the preparatory works on the Draft LBI, the reservations states will express, by domestic legislation, the availability of financial resources, the status of national legal systems, and so on.

The focus on victims, the goals stated by Article 2, and the 'spirit' of the Draft LBI remain however important. They are important because they send a precise signal about the shifting balance of power between the State and the Market, and indirectly society. This shift in the balance of power between State and Market might be a broader trend, the Draft LBI being only a specific instance of such a shift. Moreover, the treaty still exists *only as a potentiality*.

The idea that the State ought to regulate business conduct has been challenged in the past on various grounds. The State was never, is not, and it will never be the one and only existing regulatory order. More than an ideologically-driven claim, this is a statement based on empirical reality. The network of global regulation sees the existence of multiple centers, each one of which claims the mantle of primacy and autonomy over any other center of regulation. At a 12-months distance from the release of the Zero Draft, the Draft LBI however continues to be a document drafted from the standpoint of the State. This is a fact, that cannot simply be dismissed as not being 'in line' with the reality of global regulation. It is also a core premised of the Draft LBI, one without which the Draft treaty would have no reason to exist.

The State's claim to the uniqueness, or even the per-eminence of its regulatory order over any other system of regulation is definitely not supported by empirical reality. But attempts to shift existing equilibrium in one's favor need not be 'in line' with empirical reality. Or even with theory. *They just need to be*. After all, if global regulation is made by competing centers of power, it seems all too natural for any center of power to try and prevail over any other center. The only possible alternative would be cooperation among autonomous centers of regulation – in the same fashion as conceived by the United National Guiding Principles on Business and Human Rights (UNGPs).[6] The Draft LBI however seems to exclude this possibility. In its preamble, the Draft LBI represents the UNGPs as belonging to a **bygone era** of international law:

> Noting the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework **have played** (…)[7]

The UNGPs continue to exist. As a soft-law document, they can be used outside of the State-to-State system of regulation. Their existence is entirely autonomous from the will of any particular state, or aggregate thereof. The UNGPs belong to private and State-owned enterprises, to those States and those persons who decide to embrace them in order to make them become alive. To the Draft LBI, the UNGPs however seem to have exhausted their function.

The Draft LBI's claim about the UNGPs need not be relevant to what happens in the real world. Multinational corporations and some states will continue to endorse and implement the UNGPs. Some states will not, given they prefer a different type of instrument. None of the elements, or even the claims in the Draft LBI needs to be factually true or entirely operational in practice, because the importance of the Draft LBI goes beyond the letter of the draft treaty.

The drafting of the first legally binding instrument to regulate the conduct of businesses seems to suggest how an attempt to roll back a globalization driven by private actors is under way. The State, the Market, and society are at least by some portrayed as systems of governance that are entirely distinct. Yet, from the perspective of the Draft LBI, 'victims' are not the creators and enforcers of an autonomous order of self-regulation, one made by 'victims' to protect the interests of other 'victims' without relying on State's financial aid. By the same logic, businesses cannot be the creators and enforcers of autonomous systems of regulation, because all powers of regulation belong to the State and the State only.

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6 U.N. Guiding Principles for Business and Human Rights (Geneva and New York: United Nations, 2011) available at https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf .

7 Preamble, *supra*, at footnote 2.

Beyond the Draft, there lies the claim that the State ought to determine how private businesses behave, and also regulate the sphere of society. Such a claim to the power to regulate these autonomous spheres of human activities implies how, from the Draft LBI's standpoint, a neat separation between State and Market ought not to exist. And if such a separation exists in practice, then it should be partially blurred by allowing the State to intervene there where the State deems fit. This writing of mine should not be read as the formulation of any moral judgment on this perspective, but as a mere description of some of the deeper implications emerging from the text of the Draft LBI.

The ability to realize the vision of a State that can effectively regulate private businesses, and redress the wrongs suffered by 'victims' will depend on the equilibrium between the forces of public administration, private economic activity, and society, as such an equilibrium will shaped by domestic and global relations. The Draft LBI signals the existence of a diversity of viewpoints on the best way in which relations between State, Market and the rest should be organized. It is because of this reason that the drafting process remains worth watching.

B. The Instrumentalism of the Instrument and the Taming of Transnationalism
Larry Catá Backer

This is, on initial consideration, a most extraordinary *instrument*--for such is the name it has been chosen for it by those who are its creators. Yet that appears to be a good choice--not because the diplomatic *pungent word swamp* that produced it required the term, but precisely because the term suits it well. As one considers the object in all of its complexities, lacunae and aggressive interventions, one ought to keep at the forefront the notion of the this "legally binding in international law" object as instrument. But to what end is it meant to serve as instrument? That is also resplendently on display across the length of the document--it is, of course, *the transnational as an object of danger,* of subtlety, of deception, and of state threatening potential, whose power must be regulated (and eventually domesticated (here in the sense of coming within the enclosures of states). Taken together, one might then approach the study of this Draft Legally Binding Instrument from the core premise that it is an instrument forged by our modern Hephaestus to be used to tame that wild but useful engine that is transnational economic activity.

These brief comments are meant only to situate both the instrumentalism of the treaty project, and the relationship of that instrumentalism to the object of bringing the transnational back into the orbit of the state.

Instrumentalism: An instrument is both object and action. An instrument is both a means to an ends, and the device forged to those ends. An instrument has no moral center. It is no more than the tool which, when wielded by an being with agency, acquires, by that connection, whatever morals, norms, purposes, and objectives that are to be delivered through the instrument to its object. Instruments are empty vessels in that sense--and yet they are quite potent. What passes for content are actually the clever contours of forms which have been (sometimes) painstakingly conceived to serve the object for which it was created.

Gerard David teaches us this visually with his "Christ Nailed to the Cross (1481; London, National Gallery). Hammer and nails are carefully crafted. But to what ends? What

is the normative significance of either? To understand that one must shift one's gaze from the instrument to its wielder. And in this case that may require reading through and beyond, rather than within the text of the Draft Legally Binding Instrument itself. This is not a code. This is not a self-reflexive instrument designed to create a self-referencing system of norms capable of auto-execution by its own operation. The

instrument is a hammer inviting us to seek our nails--as they define it, to be sure--but as we might also be permitted to define them. And why limit the power of the hammer to the interaction with nails? Might a skull not work as well--if, for our nominative construct, disastrously? Here one confronts both the power and the weakness of the instrument--as such. The hermeneutics of the Draft Legally Binding Instrument, will, in coming posts, suggest the malleability of this form of text. In the process it may also expose the politics of those who believe, in drafting this instrument this way, that they might achieve the impossible--the fusion of hammer with its wielder.

Transnationalism: If John Ruggie played the role of Prometheus, then the UN Guiding Principles served as the memorialization of the great secret that he taught mortals (non-state actors), which he had stolen from the gods (the states and their monopoly power system). That secret was that the state was useful but not essential to the production of governance through which communities could organize themselves. The secret—that regulation and its structures, as well as its normative foundations, could exist outside the state—provided a basis for the emergence of transnational regulatory governance structures in which the state was de-centered. But it also provided an important space within which the state could deeply embed itself in governance as part of the production of human management rules that extended well beyond its borders into the territories of global production.

It is indeed, the Second Pillar that, more than any other part of the UN Guiding Principles, has vexed those Gods form whom the power of regulation thus appeared stolen and made available to those who might use it either internally (regulatory contract governance within production chain structures) or externally (regulatory governance through global or sub-global supra-national markets). A robust societal sphere--much less such a sphere organized through markets in which individual decision making might substitute for the guiding hand of vanguards organized within states--could only be rejected as unworkable or dangerous. Dangerous, certainly to state power. And yes, dangerous as well to those who appeared to drive its normative development and who might themselves fall "victim" (aahh that word again) to abuse by this new set of societal masters. But unworkable?

This societal sphere could be subsumed within a broad cluster of objectionable developments of the last quarter century which in the aggregate appeared to de-center the state as a political, economic, and societal space. To bring these back to the control (at least formally) of the state, *it was necessary to fight transnationalism with internationalism*. At least that might be understood to be one way of thinking about things. And, as well about the nature of the instrument to be used for those ends. The problem with transnationalism wasn't so much that it crossed borders, but that it made borders meaningless.

Internationalism could use the framework (and indeed, the Draft Legally Binding Instrument would work better as a framework agreement rather than as what is now purported to be) of international principles and instruments to domesticate the transnational elements of production by positing internationalism as the instrument to be used to bring such activities back within the State by permitting a contextualization of

international human rights fractured to the tastes and expectations of the domestic legal orders among which it was to be divvied up. But that would serve both as the ultimate rejection of the fundamental premises of the UNGP's 2nd Pillar,[8] as well as the means through which transnationalism's character could be transformed from an exogenous element (exogenous to the state) to another element of endogenous State power.

8 U.N. Guiding Principles for Business and Human Rights, supra Note 6.

C. Preamble

Preamble: Inputs Taken into Account and Rejected.
Flora Sapio

Preamble; Analysis of Principles, Context, and Textual Analysis.
Larry Catá Backer

Preamble; Reflections on Content.
Flora Sapio

C. Preamble

Preamble; Inputs Taken into Account and Rejected

Flora Sapio

On July 16, 2019, the Chairmanship of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights released the *Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities Corporations and Other Business Enterprises* (Draft LBI).

The Draft LBI will be subject to further substantive negotiations, to be held during the Fifth Session of the OEIGWG, scheduled from 18 to 19 October 2019, in Geneva. This document is the result of the Fourth Session of the OEIGWG, held in October 2018, and of three open informal consultations, that took place in June 2019.[1] No documentation has been released yet on the specific content of the inputs presented at each one of these consultations. However, the June 2019 consultations were considered "as a complement"[2] to the inputs provided during the Fourth Session.

This short article is based on the documentation available for the Fourth Session,[3] on the Zero Draft of the DLBI, and on the Revised Draft published in July 2019. Its goal is providing an example of how the informal consultations impacted the wording and content of the Draf LBI. The respective role inputs provided during the Fourth Session played *vis à vis* the June 2019 consultation is illustrated through the examination of Article 1 of the Draft LBI. Readers interested in knowing how the CPE came to its conclusions as to the effective inclusion (or exclusion) of certain inputs can consult the more than 200 files available on the OEIGWG website, documenting the Fourth Session.

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1 *Themes for the Intersessional Open Consultations on the Implementation of Human Rights Council Resolution 26/9*, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/ThemesIntersessionalConsultations.pdf

2 Note 4-7-156/2019, 16 July 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/NV_Ecuador_RevisedDraft_LBI.pdf

3 United Nations Human Rights Council, *Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, available at https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx

Article 1. Preamble

The State Parties to this ***(Legally Binding Instrument)*****,**

1. Recalling **the principles and purposes of the Charter of the United Nations.**

2. Recalling also **the nine core international human rights instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labor Organization;**

3. Recalling further **the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, and the UN Declaration on the Rights of Indigenous Peoples, as well as other internationally agreed human rights-relevant declarations;**

4. Reaffirming **the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;**

5. Stressing **the right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realized consistent with the purposes and principles of the United Nations as stated in the Universal Declaration of Human Rights;**

6. *Reaffirming* that all human rights are universal, indivisible, interdependent and inter-related;

7. *Upholding* **the right of** every person **to have an effective** and equal access to justice **and remedy** in case of violations **of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;**

8*. Stressing* that the **primary obligation** to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law;

9. *Recalling* the **United Nations** Charter articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and

observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion;

10. Upholding **the principles of sovereign equality, peaceful settlement of disputes, and maintenance of the territorial integrity and political independence of States as set out in Article 2 of the United Nations Charter;**

11. Acknowledging **that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;**

12. *Underlining* that all business enterprises, regardless of their size, sector, operational context, ownership and structure **have the responsibility to** respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur; **as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;**

13. Emphasizing **that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises;**

14. Recognizing **the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities;**

15. Taking into account **all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to human rights, and all relevant previous Human Rights Council resolutions, including in particular Resolution 26/9;**

16. Noting **the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework have played in that regard;**

17. Noting **also the ILO 190 Convention concerning the elimination of violence and harassment in the world of Work;**

18. *Desiring* to contribute to the development of international law, **international humanitarian law** and international human rights law in this field;

Hereby agree as follows: . . . .

Inputs received *not included* in the LDBI:

1. APWLP and AWID
2. Azerbaijan [3, revision of paragraph
3. FIAN
4. The Holy See

5. International Association of Democratic Lawyers [trade and investment treaties]
6. Layla Hughes, Center for International Environmental Law [reference to CEDAW]
7. Mexico [jurisdiction]
8. Peru [States' committment to UDHR]
9. Russian Federation [delete reference to Resolution 26/9]

Inputs received included in the Revised Draft:

1. Al-Haq [human rights defenders]
2. Azerbaijan [10: principles of sovereignty and territorial integrity; 18, international humanitarian law]
3. China [1, principles and purposes of the UN Charter; 11, positive role of enterprises in development; 15, Resolution 26/9]
4. ESCR-net [human rights defenders]
5. FIDH [human rights defenders]
6. Human Rights Treaties Branch, OHCHR (Bradford Smith) [Preamble should be free-standing]
7. International Association of Democratic Lawyers [Preamble should be free-standing]
8. International Organization of Employers [12, direct international obligations for businesses]
9. Justiça Global [human rights defenders]
10. Layla Hughes, Center for International Environmental Law [gender equality]
11. LHR [human rights defenders]
12. Mexico [Preamble should be free-standing]
13. Namibia [Preamble should be free-standing]
14. Peru [7, 18, international humanitarian law]
15. Russian Federation [reference to principles of non-discrimination, participation and inclusion, and self-determination deleted]
16. SOMO [human rights defenders]

C. Preamble

Preamble; Textual Analysis

Larry Catá Backer

> Preambles are funny things.
>
> Both bilateral and multilateral treaties may contain a preamble enumerating the contracting States involved in their conclusion. A treaty's preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty. Generally a preamble consists of a sequence of secondary clauses (*considérants*) that commence with words such as 'Recognizing', 'Recalling', 'Mindful', 'Emphasizing', 'Conscious of', etc. The preamble may also incorporate the parties' motivations.[1]
>
> A recent law student Comment nicely raised the issue of Preambles:
>
> In light of treaties' longstanding structure and the relatively recent emphasis on standardizing and codifying treaty practice, it is surprising that the ubiquitous preamble has received so little attention. Historical evidence suggests that the treaty preamble may be as old as the treaty itself. Ye the leading treatises on treaty practice and interpretation rarely devote a lengthy section to — and sometimes contain no index entry for — this seemingly obligatory element of any treaty. Meanwhile, the only full-length academic work to focus on the question of treaty preambles and their effects is a French-language doctoral thesis published in 1941, decades before the drafting of the VCLT [Vienna Convention on the Law of Treaties]. Importantly, this inattention does not result from some universal agreement as to preambles' relevance or lack thereof; on the contrary, treaty preambles appear to be a continuing source of confusion and uncertainty, specifically as regards their role in treaty interpretation.* * * Do treaty preambles in fact matter?[2]

The *Comment* argues that the answer must be in the affirmative. Contrary to the propositions on display in the New START debate, there is quite simply no basis for a broad statement that preambles, by their very nature, are legally inconsequential. Customary international law, as embodied in the VCLT, supports this conclusion — although it does not

1 Makane Moïse Mbengue, *Preambles*, in OXFORD PUBLIC INTERNATIONAL LAW (2016).
2 Max H. Hulme, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. (2015): 1281.

provide clear guidance. Nevertheless, in practice, preambles are a frequent subject of discussion among treaty makers, parties to disputes, and adjudicators alike. This state of affairs naturally raises an additional query: To what extent do treaty preambles matter?

This provides an excellent starting point for a discussion of the Preamble to the Draft LBI. While there are those (especially among leading academics in places like the United States) who argue that preambles are legally inconsequential, and while constitutional jurisprudence in some states (e.g., France) would vest preambles with substantive effect, what emerges recently has been a preference for giving Preambles some weight. That weight can be as light as the discretionary use of Preambles to help resolve ambiguities in the meaning or application of the text of a treaty. It can be as heavy as incorporating into the Preamble into the binding text of the treaty along with the text (and preambles) of each and every document referenced in the Preamble itself, and thus incorporated by that reference into the text of the treaty itself. Each of these approaches might have their adherents.

The question, however, need not be resolved here. Yet to raise the question suggests one of the initial ambiguities of the Draft LBI — the role of the Preamble in the body of the treaty. Whatever the answer, though, what will be clear is that the Preamble will be given some effect by some individuals and institutions, in some way in whatever fora the issue may arise. And that is the problem, of course. Before one even gets to the text of the Draft LBI then, one is faced with the relationship between Preamble and text — and one find no answer, either in international law nor in the text of the Draft LBI itself. Of course, it would be possible to remedy this easily — the drafters of the Draft LBI could have been explicit, providing somewhere in the text of the document what the drafters intention. At this point it might not even matter what the choice is — from incorporating the Preamble into the text of the treaty, to permitting (but not requiring) that the Preamble, the documents referenced in the Preamble, or both, be used to inform the text of the Draft LBI.

But the Draft LBI does not do that. Instead, in its journey form the Zero Draft, what the Draft LBI does do is to layer the preamble with the burden of substantially ore cross references detached form purpose. That this is a common practice in treaty writing does not make that any more excusable — as if the cultural or discursive habits or practiced ambiguities of that self-reflexive class of elite treaty writers ought to drive the forms in which treaty take. But that is, effectively, what the drafters of the Draft LBI serve the rest of us — a dish served cold and burdened by the habits and practices of a class of treaty writers that ought not to be worthy of any deference — and certainly that ought to be open to a more robust criticism.

Beyond that, it is worth considering way in which the treaty drafters decided to layer the Preamble with its secondary clauses (*considérants*). I consider these one at a time.[3]

3 For a description of what is new and what was carried over from the Zero Draft, see, infra, Flora Sapio, *What Changed from the Zero Draft--A Side by Side Comparison*.

Article 1. Preamble

The State Parties to this ***(Legally Binding Instrument)*****,**

1. ***Recalling*** **the principles and purposes of the Charter of the United Nations.**

   [COMMENT: A general recollection of the principles and purposes of the UN Charter at first blush appears both innocuous and unnecessary to the extent that all international instruments necessarily recall the UN Charter. What makes this considérant interesting is the recollection of "principles and purposes" none of which is free from contradiction or hermeneutics that is dependent on the political starting points of reference of the interpretant. But that is the point.]

2. ***Recalling also*** **the nine core international human rights instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labor Organization;**

   [COMMENT: Like the prior recollection this one is meant to provide some interpretive context to the text that follows. What they might have meant to say is that the text of the treaty ought to be interpreted in light of, and to further, the instruments identified. But again, that is the problem. First they did not say that; and second they could not say that, especially since, including reservations, most states have not embraced all of these documents without reservation and few have developed the capability to align their understanding of those instruments they have incorporated into their domestic legal orders. But no matter, the recollection, to the extent it might be used by an international mechanism, might effectively impose such instruments indirectly through action on the DLBI.]

3. ***Recalling further*** **the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, and the UN Declaration on the Rights of Indigenous Peoples, as well as other internationally agreed human rights-relevant declarations;**

   [COMMENT: These are also common recollections in this field. At its most ambitious, it might seek to embed those principles even against those who view the declarations as legally irrelevant--by inviting the use of the documents as a means of hermeneutics, indirect incorporation might be achieved. Bravo--and not for the first time. And, of course, it would have violated a taboo among the self-referencing class of people in charge of these things to have not recalled but to have suggested that interpretation be undertaken in the spirit of and with reference to these documents. That they did not is not just a matter of culture, but a means of masking (a permitted form of veiling (but is it deceitful?) except among that rarified class of treaty writers rather than those who must rely on its terms in their daily lives)].

4. ***Reaffirming*** **the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;**

   [COMMENT: The reaffirmation here is actually an acknowledgement of the fundamental requirement of balancing among principles both in the construction of the DLBI and its application. But not just a balancing, but the grudging acknowledgement of hierarchy. At the top of that hierarchy is the affirmation of a fundamental principal of the UN Charter--the superior position of the state and its sovereign authority against which universal principles of fundamental human rights and dignity ought to be balanced. Now here is something that someone seeking to interpret the DLBI can sink their teeth into--but the resulting taste may sicken. It reaffirms the fracture of international law through state context as long as each state can affirm that, true to their respective constitutional order, it has embraced fundamental principles of human rights and dignity. Clearly that was not the intent--the intent was to tightly bind states (and their domestic legal orders) to a superior international legal order, but if that superior legal order is in fact grounded in the superiority of the state, then we come back indirectly to balancing state sovereignty against internationalization of human rights.]

5. ***Stressing*** **the right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realized consistent with the purposes and principles of the United Nations as stated in the Universal Declaration of Human Rights;**

   [COMMENT: Stressing something is always useful--it goes to intent, certainly. But it also suggests the extent to which what is stressed out to be weighed as a against some other thing that perhaps ought to be given less weight. In this case what is stressed might actually be inconsistent with what was recalled in the first four considérants of the Preamble. But that is not out of the ordinary. It does however contribute toward the zero summing of the considérants in aggregate. That may be the object, however, that is to provide a hodgepodge of statements in the Preamble that sum to zero, but each of which will assuage parties with otherwise incompatible motivations or world views to agree to the terms of the text, while preserving their ability to apply the document in potentially wildly different and inconsistent ways.]

6. *Reaffirming* that all human rights are universal, indivisible, interdependent and inter-related;

   [COMMENT: There ought not to be a person who could possibility object to this re-affirmation. However, standing alone it is not clear what it may mean. Still, it is comforting to remind all parties of what ought to be the starting point of the substance of the text. And yet---the Preamble in paragraph 4 went to the trouble of

reminding its readers that though human rights may be universal, indivisible, etc., they must be balanced against the obligations arising from treaty, etc.]

7. *Upholding* **the right of** every person **to have an effective** and equal access to justice **and remedy** in case of violations **of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;**

   [COMMENT: The first half of this considérant is wholly unobjectionable; every person ought to have a remedy and equal access to justice for violation of rights. The problem comes with the rest. In the absence of an international court with universal jurisdiction, and the enforceable obligation of state judiciaries to honor determinations of those bodies (or alternatively of the incorporation of international law into the domestic legal order of states and the vesting of jurisdiction in their judicial apparatus) there is yet no legal space for the vindication of INTERNATIONAL human rights or humanitarian law (without leave of the state). To the extent that this effort at "upholding" seeks to assume that international law is both autonomous and superior to domestic legal orders and reaches directly to individuals in states, then there are at least some very powerful state actors that continue, quite passionately, to reject this position.]

8. *Stressing* that the **primary obligation** to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law;

   [COMMENT: The disconnect between ¶¶ 7 and 8 is striking. Having just stressed the autonomy of international law, it is odd to speak immediately thereafter of the primary obligation of states. Oh, wait. . . unless the object is to ensure that like provinces in a unitary state, the role of states with respect to international law is to receive and apply international law as from a superior and binding source. As aspiration, this is quite acceptable. But as a basis for interpretation less so; and as a means of furthering the work of creating from these repeated declarations some basis for arguing that they might create customary international law, is utopian at best. But stranger things have happened. Still, the lack of clarity is regrettable.]

9. *Recalling* the **United Nations** Charter articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion;

   [COMMENET: One moves here from the generalized recollection of ¶ 1 to a quite specific reminder of this ¶ 9. It is meant to do a couple of things (at least) though of course in ways that lack clarity but conform to the discursive style of the political class

comfortable with these little games and ambiguities. First it is meant to provide encouragement for international cooperation--and thus overcome the fracture inherent in the international level of the state system). Second, it might be a gentle reminder that the sort of discrimination still so common in many places (and increasingly political sport in mature liberal democracies like the United States) ought to be avoided. Worthy but likely to be balanced against contextually embedded constitutional orders.]

10. ***Upholding*** **the principles of sovereign equality, peaceful settlement of disputes, and maintenance of the territorial integrity and political independence of States as set out in Article 2 of the United Nations Charter;**

    [COMMENT: This "upholding" considérant provides a necessary balancing to the recollection of ¶ 9, and the aspirational expressions of ¶¶ 7-8. But these expressions are the usual incantations of developing states and a variation of it is now the basis for internationalism with Chinese characteristics. It may be that this is the sort of language designed to make those states happy. And that is nice. But the realities of their relations among each other and with other states (e.g., OECD states and the larger Marxist-Leninist states) belie what is effectively a nice but aspirational expression that, ironically will get i the way of the internationalism of the text of the DLBI].

11. ***Acknowledging*** **that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;**

    [COMMENT: This is very nice, and at best a transitional expression (i.e., it is meant to serve as a statement the expression of which is necessary to make considérant No. 12 (which follows) plausible. Actually, all institutions with control of the means of production, of resources, or of delegated political authority have the same capacity as business enterprises--indeed, organized religion has an even greater power in some places to achieve the sustainable development described here. But that is not the point. The DLBI is meant to target one of this set of no state actors, and thus the need to single them out here. It also echoes that marvelous discursive theatre that has provided so much fodder for discussion among developing states, academics and policy people with certain political and ideological leanings, and traditional Marxist Leninist (especially the heirs of the old Soviet) system.]

12. *Underlining* that all business enterprises, regardless of their size, sector, operational context, ownership and structure **have the responsibility to** respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur; **as well**

as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;

[COMMENT: It is reassuring to see even this oblique reference to the UN Guiding Principles for Business and Human Rights] Pillar 2; it is less heartening to note the reference is indeed not merely oblique (has the UNGP become that which may not be named, the Lord Voldemort of the business and human rights universe?). Still it must eb recognized that there are a lot of people in that universe with axes to grind, and it is only fair that some of that grinding occur amongst the considérants. Still. And of course, there is purpose to this effort--the object of this considérant is to seek to normalize a potentially broader version of the UNGP's second Pillar.].

13. ***Emphasizing*** **that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises,**

[COMMENT: It must be understood that there is a specific purpose to this considérant within the context of the DLBI--to embed civil society within the processes of business respect for and state duty to protect human rights. That ought to be applauded. It might have been useful, though to emphasize civil society's role not just with respect to business responsibility but also with respect to state duty. And, indeed, the failures of the role of the state in protecting civil society, including human rights defenders, remains the dirty semi-secret exposed by the limits of this "emphasis" for which a strong condemnation ought to be in order.]

14. ***Recognizing*** **the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities,**

[COMMENT: This recognition had been long overdue, and is unexceptional in many respects. Recognition of distinctive and disproportionate effect, and of the need for that perspective in interpretation is fair enough. It is also fair enough to list those groups with respect to which this recognition is to be directed. It may be worth thinking about the dangers of building hierarchies of needs among people, and it may be important to understand that these relationships of need may change over time as group privileging changes in response to social changes. That may not be built in Preamble considérant but it ought to be embedded in the interpretive context of the text.]

15. ***Taking into account*** **all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to**

human rights, and all relevant previous Human Rights Council resolutions, including in particular Resolution 26/9;

[COMMENT: Of course, one ought to take into account in the interpretation and organization of the DLBI the resolutions that gave life to the project. As for the rest, one moves into troubled waters. Taking into account "all the work undertaken by the CHR and the HRC" is designed in part to resurrect the Norms, or at least its normative discourse, and to sideline the UNGPs (to the extet their visions and structures are incompatible That may not sit well with some and may be rejected by others even as some states (and their enforcement organs) embrace the notion. Moreover, the "taking into account" fails to take into account the incoherence of this ¶ 15 with the thrust of ¶¶ 11-12. It does remind one of the Zero Draft's insistence that though all enterprises have human rights responsibilities only transnational enterprises have responsibilities that count.]

16. ***Noting*** **the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework have played in that regard;**

[COMMENT: One can only admire the remarkably elegant way in which the UNGP have been sidelined in the DLBI. THAT is what one really "notes" in this "noting" considérant. But that was to be expected given the thrust of HRC Resolution 26/9. But there are serious consequences, especially if this is taken by the courts applying the DLBI as an invitation to sideline or ignore the UNGP in its application of the Treaty. In addition, such a reading may also invite the reverse consequence, that is that the DLBI itself will be treated as irrelevant for purposes of the firther development of the UNGP. That is hardly the sort of convergence that had been at the heart of the project of developing global consensus on the management of the human rights effects of economic activity.]

17. ***Noting*** **also the ILO 190 Convention concerning the elimination of violence and harassment in the world of Work;**

[COMMENT: This "noting" may serve a useful purpose though again the problem of coherence always lurks in the background.]

Desiring to contribute to the development of international law, **international humanitarian law** and international human rights law in this field;

* * *

Where does that leave the Preamble? What is its purpose? How do the considérants further those objectives?

Nothing in the Preamble makes any of that clear. It provides very little that may be consistently useful for interpreting the text, and self-serving expressions of the viewpoints of the drafters ought to be irrelevant in the context of the text of a legal document that must be able to "speak" for itself. All of that is a pity. There is much in the Preamble that is laudable and potentially useful. It ought not be lost. But it is also unremarkable. For all the effort, the result will be what the result tends to be with respect to many of these preambles: it may not be worth the effort that went into its drafting. Perhaps that is all that one could hope for given the cultures of treaty drafting embraced by the DLBI's protagonists--they are prisoners of the logic of the international institutions into which they have poured this project. But the result does not bode well for the final product, at least to the extent that the text of the DLBI also reflects the discursive style and contradictions built into the Preamble.

C. Preamble

Preamble; Reflections on Content

Flora Sapio

The Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises is a document that adopts a logic and approach fundamentally different from those that inspired the UNGPs. John Ruggie's UNGPs attempted to bridge notions of fidelity to principles with the pressing need to put into practice[1] a framework that could help reduce human rights abuses in the context of business activities.

Ruggie's approach of "principled pragmatism" perhaps derived from the existence of a divide between the black letter of international conventions, and the realities on the ground. And it embodied some of the intellectual and policy reactions provoked by the existence of such a divide. Ruggie's approach also signaled that two different perspectives exist about which tools are most effective in protecting human rights in the context of business. The divide between promoters of approaches based on soft law, and those who instead prefer hard international law is a real divide.

The divide between the UNGPs and the Draft LBI. Personal opinions about the approach that the Draft LBI embodies can be stated, but they should not prevail over a consideration of the Draft LBI based on the logic and the goals of this document. The Draft LBI must stand or fall on its own text

By now, it is all too clear that the Draft Legally Binding Instrument represents the views of those who prefer approaches primarily based on hard law. It is also clear how, from that perspective, the Revised Draft is generally speaking better than the Zero Draft. The Draft LBI, however, does more than embodying a consensus on the need to adopt hard law approaches to human rights protection in the context of business. It also attempts to bring to a state of unity a legal regime of human rights protection that is in a state of deep fragmentation. In other words: human rights protection is compartmentalized. Some categories of rights are prioritized over others, and a 'hierarchy of merit' among those persons who suffer human rights abuses risks being created. If human rights really are universal, interdependent, indivisible, and inter-related, then no rights ought to receive

1 United Nations Office of the High Commissioner for Human Rights, *Principled pragmatism – the way forward for business and human rights*, June 7 2010, available at https://www.ohchr.org/EN/NewsEvents/Pages/PrincipledpragmatismBusinessHR.aspx

more consideration or a better protection than other rights. If all human beings are morally equal, then no group should be singled out among all those who suffer abuses, and receive a greater attention.

The Draft LBI attempts to achieve all these goals by stressing notions of "principle" without the "pragmatism". It promotes a different, more idealistic worldview than the worldview espoused by Ruggie. Yet, the Draft LBI has the potential to reach its own goals. That those goals may be difficult to translate into practice is perhaps not relevant to a discussion of this document. Worldviews based on abstract principles are best evaluated and discussed based on their own internal coherence, rather than on the impact they might have on the real world.

To best reach its own goals, the Draft LBI has to maintain conceptual and logical coherence with the approach to regulation it embodies, and with its own premises. It is from this perspective that comments on the Preamble are provided, in red, below relevant paragraphs.

Preamble

1. The State Parties to this (Legally Binding Instrument),

2. Recalling the principles and purposes of the Charter of the United Nations.

3. Recalling also the nine core international human rights instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labor Organization;

4. Recalling further the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, and the UN Declaration on the Rights of Indigenous Peoples, as well as other internationally agreed human rights-relevant declarations;

5. Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;

6. Stressing the right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realized consistent with the purposes and principles of the United Nations as stated in the Universal Declaration of Human Rights;

7. Reaffirming that all human rights are universal, indivisible, interdependent and inter-related;

[COMMENT: This sentence could be moved to the first paragraph of the Preamble, because it is the core premise of international human rights law and humanitarian law.]

Upholding the right of every person to have an effective and equal access to justice and remedy in case of violations of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;

8. Stressing that the primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law;

[COMMENT: This paragraph could be deleted, because it duplicates the content of the UNGPs. The obligation of States to respect, fulfill and promote human rights is antecedent to the drafting and endorsement of the UNGPs. Attempting to reconcile the perspective of the UNGPs with that of the LBI therefore is not really necessary, because the State's human rights obligations exist independently from that document.]

9. Recalling the United Nations Charter articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion;

10. Upholding the principles of sovereign equality, peaceful settlement of disputes, and maintenance of the territorial integrity and political independence of States as set out in Article 2 of the United Nations Charter;

11. Acknowledging that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;

[COMMENT: Under the approach of the LBI, business enterprises are not actors in international law. Only State and civil society are. Neither are business enterprises seen as entities capable of self-regulation. If business enterprises are unable to regulate themselves, there is no reason why their ability to foster the achievement of sustainable development has to be stated in the Preamble. An alternative more coherent with the spirit of the DLBI would be acknowledging the State's primary role in inducing all business enterprises – public and private, foreign and domestic – to fulfill the sustainable development goals set by the State.]

12. Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their

own activities and addressing such impacts when they occur; as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;

[COMMENT: If one is not an autonomous actor in international law, then one has no responsibility to respect all human rights based on their own autonomous choice or volition. Such is the viewpoint embraced by the Draft LBI. Therefore, inclusion of a paragraph modelled the UNGPs — a document based on an entirely different logic – may not be necessary. What may be useful to the LBI would be a statement in favor of the State's obligation to impose human rights responsibilities on all enterprises, and monitor and assess enterprises compliance. The UNGPs and the LBI can continue to exist in parallel. They embody two distinct approaches to regulation, therefore there is no need for any of these to instruments to prevail over or be incorporated into the other one.]

13. Emphasizing that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises,

14. Recognizing the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities, The disproportionate impact of certain human rights abuses on women, girls, children, persons with disabilities etc. is a sad reality.

[COMMENT: However, human rights are indivisible. The holders of human rights cannot be classified into discrete categories. In so doing, the risk is that of overlooking abuses suffered by persons who belong to the groups not mentioned in the preamble: males, adults, able-bodies persons, elder women, persons who do not belong to indigenous groups, persons who live in the same country where they were born, and so on.]

15. Taking into account all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to human rights, and all relevant previous Human Rights Council resolutions, including in particular Resolution 26/9.

16. Noting the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework have played in that regard;

[COMMENT: The UNGPs are a soft law instrument, that will continue to exist and be used by States, enterprises and individuals. This paragraph seems to relegate the existence of the UNGPs to the past.]

17. Noting also the ILO 190 Convention concerning the elimination of violence and harassment in the world of Work;

18. Desiring to contribute to the development of international law, international humanitarian law and international human rights law in this field;

D. Section 1 of the Draft Legally Binding Instrument (Definitions; Statement of Purpose; and Scope)

Article 1 (Definitions)

Changes from the Zero Draft in Article 1.
Flora Sapio

On the Victimization of International Law and the Ethos of the Treaty Project in Article 1.
Larry Catá Backer
Comment; Flora Sapio

Textual Analysis of the Definitions in Article 1.
Larry Catá Backer

Article 2 (Statement of Purpose)

Concept and Context in Article 2.
Flora Sapio

Textual Analysis Article 2.
Larry Catá Backer

Article 3 (Scope)

Textual Analysis of Article 3.
Flora Sapio

Textual Analysis in the Shadow of the Zero Draft in Article 3.
Larry Catá Backer

D. Article 1 (Definitions)

Changes from the Zero Draft in Article 1

Flora Sapio

Article 1. Definitions [revisions from Zero Draft in **BOLD]**

1. "victims" shall mean any person **or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse as defined in Article 1 paragraph 2 below. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim.**

2. "Human rights violation or abuse" shall mean any harm committed by a State or a business enterprise or non-State actor, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.

3. "Business activities" means any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means.

4. "Contractual relationship" refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State.

5. "Regional international organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this (Legally Binding Instrument).

Comment

Article 1 now provides a definition of “victims”, “human rights violations of abuse”, “business activities”, “contractual relationship”, and “regional international organizations”. In the Zero Draft, definitions were set by Article 4. This article was amended, and saw the addition of a paragraph providing a different definition of ‘business activities’, and one defining ‘contractual relationships’. The fifth paragraph of Article 1 was moved over from Article 15 of the Zero Draft. During the Fourth Sessions of the OEIGWG, various suggestions on the amendment of what is now article 1 were made. None of them seems to have been adopted during the revision of this article.

The definition of victims adopted by the LBI was carried over from 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 with the following changes The Zero Draft bestowed the status of 'victim' on persons harmed by acts or omissions in the context of transnational business activities, on their family, their dependants, and on those who assisted them. The definition of victims was broadened, because according to the Basic Principles it included only those affected by "gross violations of international human rights law", or "serious violations of international law". A simple allegation of having suffered harm was sufficient to acquire the status of 'victim', while under the Basic Principles this status could be acquired only if an actual harm had occurred.

The Revised Draft has instead tied the status of victims to the suffering of human rights violations and abuses, or to allegations about such a suffering. The harm that can be inflicted is no longer a generic "harm" as in the Zero Draft. The Revised Draft has defined harm as "human rights violation of abuse". This is a broad concept, including any harm arising from commissive or omissive acts in the context of business activities. Before, the subjects who could cause harm were not specified. Harm could just occur "in the context of business activities of a transnational character". Now, the agents of harm have been defined as the State, business enterprises, and non-State actors.

The definition of "business activities" is no longer limited to the for-profit activities of multinational corporations. It now includes all types of economic activities, such as — it seems — not for profit activities, and activities of enterprises operating exclusively on the domestic market. This change has allowed to overcome the restrictions initially set by the footnote in Resolution 26/9 [2].

Paragraph 4 of Article 1 introduces the notion of "contractual relationship". A definition of "contractual relationship" was absent from the Zero Draft, which mentioned such a relationship in passing only in Article 9.2(f). This definition is important, because it allows to hold each member in a supply chain responsible for the harm it has caused, or for allegations of such a harm.

The definition of "regional international organizations" has been carried over from the Zero Draft without changes.

The provisional result is an instrument with the ambition to provide remedies to all violations of human rights committed by transnational but also by domestic enterprises, by the State, and by non-State actors throughout a supply chain. This instrument is, as its name says, "legally binding". The legally binding nature of this document depends not on the words used for its name (*Legally Binding Instrument...*), but on whether the document will obtain the minimum number of ratifications required to enter into force. In other words, despite all good intentions, the LBI still maintains the "voluntaristic" approach of the UNGPs. This is the first and most important constraint within which the LBI will have to operate in a future. This constraint depends on the very decision to regulate businesses through hard law, and to use national states and regional organizations as a proxy (or a substitute) for self-regulation by enterprises. Given this decision, other constraints may be posed by the reservations States will inevitably express, given how the LBI attempts to regulate also small and medium sized domestic enterprises, and their contractual relationships with MNCs.

Then, there is the question of states' capacity to effectively regulate private businesses. Some of the states involved in negotiations may have such a capacity, due to their adoption of sophisticated data- and algorithm-driven modes of governance. It is however doubtful that such a capacity exists throughout the Global South, or that it can be built from scratch within a reasonable time-span through international development cooperation.

A last point concerns not only the state's capacity to regulate non-state actors, but most importantly the point of whether the state ought to regulate autonomous actors broadly understood. This is an important contradiction in the LBI: do actors who are not the state include domestic and global civil society organizations, religious groups, aid agencies, popular protest movements, and independent media organizations? If the LBI admits of the possibility for the state to regulate these non-state actors, then Article 1 needs to be further amended to be fully coherent with existing resolutions on civil society space.

* * *

Inputs <u>not included</u> in the Revised Draft:

1. Argentina [definition of victims should be narrower]
2. David Bilchitz, University of Johannesburg [definition of business activity; addition of a new provision titled General Principles of International Law]
3. China [definition of business activities; definition of victims should be more precise than the one provided 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]
4. Olivier De Schutter, Professor, University of Louvain [definition of business activity]
5. FIAN [definition of victims; definition of business activity]

6. FIDH FIAN [definition of business activity]
7. Friends of the Earth International [definition of business activity]
8. India [definition of victims, and environmental rights; definition of business activity]
9. International Organization of Employers [definition of business activity]
10. Mexico [definition of victims – allegations of harm]
11. Peru [environmental rights]
12. South Africa [definition of victims; definition of business activity]
13. South Center [definition of business activity]

Inputs included **in the Revised Draft:**
none

Inputs not available on the OHCHR website:

Written comments by **Sandra Ratjen, Franscicans International** and **Kinda Mohamadieh, South Centre**

> [1] V. Victims of gross violations of international human rights law and serious violations of international humanitarian law
>
> 8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
>
> 9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.
>
> [2] "Other business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.

D. Article 1 (Definitions)

On the Victimization of International Law and the Ethos of the Treaty Project in Article 1

Larry Catá Backer

Comments; Flora Sapio

Definitions came late to the law--at least when one takes the long view. But it is an essential semiotic exercise in the sense that the treaty wrests control of the meaning of its terms from the reader and brings it back into itself. It is not for nothing that some treaties (for example the Vienna Convention on the Law of Treaties) prefers the imperative ("Use of Terms") than the more passive ("Definitions"). More accurately perhaps, it brings the control of meaning back to those who drafted and approved the text. That "bringing back" is also contingent. It is, for example, subject to reservations and the vagaries of transposition into the domestic legal orders of states, and of course to the hermeneutics of the courts into which the application of treaties among contentious parties is assigned. But the ability to control the meaning of words is always contingent on the fundamental difficulties of the nature of language--one must use words to define words--but that merely compounds ambiguity and possibility.

A complete control of the meaning of words--or more accurately their use in the contexts for which they have been crafted to serve some instrumental purpose--is impossible. These basic notions go to the heart of the choice of opening image--now well worth considering again--which is the reality depicted, substance or reflection or does reflection also have a substance and thus that both are incapable of fully reflecting the other. The failure to recognize this produces the usual fundamental semiotic failures that haunt most text meant to project legal meaning.[1]

Still, the temptation to control meaning, to impose what appears to be a precise definition to terms, and in that process to embed them with the ideologies and principles backed into the words through which "meaning" is imparted, is too tempting to resist. And if course, such efforts tend to be rewarded with at least limited success for a limited period of time. Yet definitions--or better put legal obligations to interpret words within a particular ideology or with specific purpose or intent, may effectively constrain hermeneutics even if it

1 JAN BROEKMAN AND LARRY CATÁ BACKER, LAWYERS MAKING MEANING: THE SEMIOTICS OF LAW IN LEGAL EDUCATION II (Dordrecht, Neth.: Springer Science + Business Media, 2013).

can't suppress it. These efforts, however, are also eventually doomed--by time and the passing of the communities which have come together to enforce a specific view and meaning universe. It is not just that communities of shared meaning that gve rise to these definitions tend to eventually die off or otherwise be replaced, but that the context in which such meaning could be imposed as plausible changes enough to produce contradiction or to make meaning irrelevant. In these inevitable changes--time and context--that time brings, in which original meaning and intent will be corrupted.

The semiotics of "Definition" or "Use of Terms" sections, then, points to the ideologies of meaning with which a text is to be understood. If the drafters are really lucky, it also constrains the discretion of those with authority to implement it (lawmaking authority), enforce it (executive authority) and to apply it to concrete disputes (remedial authority). It does more than that: there is a psychology to semiotics. What the Definition section ultimately provides is a window onto the psychological drivers of text producers. Lawyers call that intent; social scientists call it politics or economics; but Nietzsche might have been right to suggest that at its base the thirst to control meaning is in itself an expression of the psychology of those seeking to impose their will through the mechanics of law in a context driven by politics.

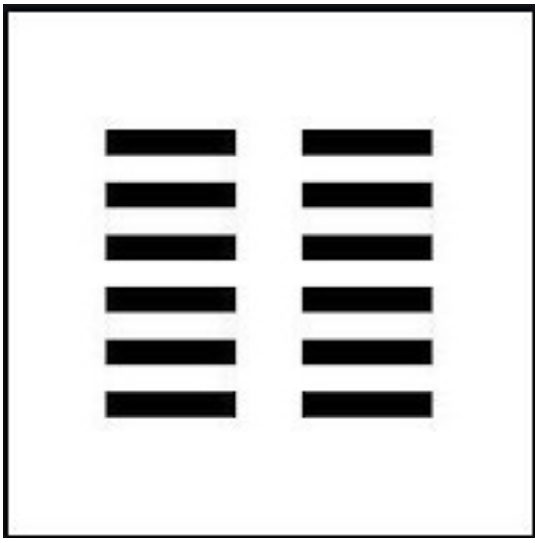
It is with this in mind that one can approach the project of controlling meaning that is Section 1 of the Draft LBI. At its base, a "definitions" or "use of terms" section does more to reveal the underlying ideology the instrument than any portion of a Preamble. At the same time, this section also reveals the political or normative objectives at the core of the project around which the instrument is wrapped. To identify key terms is, in a sense, to expose the politics and intent of those drafting the instrument.

The Definitions section of the Draft LBI has been modified in part from the Zero Draft. It has more than doubled in size to include five terms rather than the original two. And of the original two terms, only one of the terms--"victims"--can be found in both the Zero Draft and the Draft LBI. Another "business activities" is now only half of the term that was constructed for it in the Zero Draft (e.g., "business activities of a transnational character").

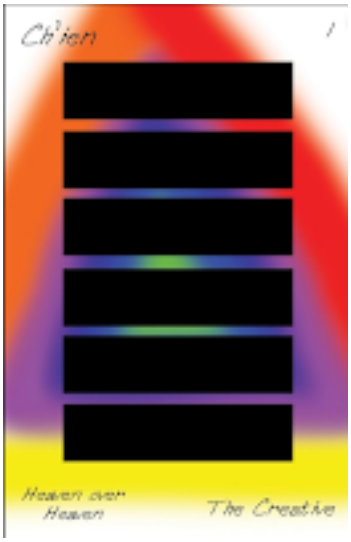
These modifications suggest an evolution of sorts. To gauge its quality one must start from a baseline--the definition Section of the Zero Draft and consider its semiotic psychology. The Zero Draft definition section was thin by comparison to similar documents. But that thinness provides a clearer evaluation. *There was no fluff here--one is transported to the meaning core of the Zero Draft itself. And at that core one finds but two concepts: "victims," and "business activities of a transnational character."* There one has the essence of the Zero Draft built into the only two concepts over which a tight control of meaning was worth the effort. These are not isolated concepts but rather two core realities, the relationships among which was the fundamental objective of the Zero Draft. Beyond these there is a world of supporting meaning, of the structures that support the construction of these concepts and that serve to create the walls of the universe within which they operate. But that is all these peripheral concepts do; in the absence of a relationship to (1) victim OR (2) business

activities of a transnational character; OR (3) their interaction, all the rest becomes irrelevant or bound up in ulterior (political/pragmatic) motive.

And what of the fundamental character of the terms "victim" and of "business activities of a transnational character? At one level they represent the unity of the active and the passive elements of a self-referencing unit, leaving only the means and consequences of their connection for articulation (the function of the rest of the Zero Draft).



"Victim" is a static and passive construct. It reflects the constitution of a legal subject onto which things happen, but with respect to which there is no possibility of volition. That passive construction of the object labelled "victim" extends not just to the violation of their person (community, etc.), an action undertaken by others, but also to remedy, undertaken on their behalf. Their only volitional act would be to object to actions causing harm and to assent to remedial action undertaken for them by a constellation of actors operating under authority of the elaborated text that is the stuff of the Zero Draft. Metaphorically (the language that lawyers sometimes employ, but usually not in this way), "victim" is the essence of the ying of the Zero Draft universe; it is symbolized by the iChing 2nd Hexagram K'un (the receptive or earth).



"Business activities of a transnational character" provides the inverse dynamic and active construct. It reflects the constitution of movement that requires identification of both the force that moves, and the instrument by which movement can be generated. The text of the Zero Draft then can be reduced to the effort to first identify force and object, and then to direct its path and exact penalties for deviation from the path constructed. The model is actually quite simple once one can contextualize the details of this project that consume most of the pages of the Zero Draft. The active construct extends not just to its instrument (the "business of a transnational character") but also to its "activities."

This object is the personification of volition, of the active principle which then thrusts itself onto the passive element of the unifying self-reflexive dynamic. What the Zero Draft then fusses with is a politics of the construction of this active force, and once done, of the effects of its projections onto the passive object "victim" around which the cages of containment (the Zero

Draft) is to be built. Simple--but full of details that muddy its application (perhaps because all stakeholders like the core principles but act to protect their own strategic and normative interests). To complete the metaphor, "business activities of a transnational character represent the yang of the Zero Draft universe; the active principle of the Hexagram Ch'ien (the creative force of heaven).

The Draft LBI retains this core foundation from the Zero Draft in large respect. The "Victim" retains its passive and dependent character. As a legal category it strips otherwise rights bearing individuals of their autonomy, of their volition, and renders them the object onto whom harm can be projected and to whom remediation must be directed. By others. But the Draft LBI enriches the conceptual universe it creates through its Article 1 Definition Section.

First, both the unity of the concepts "victim" and "business activity of a transnational character" have been broken up.

"Victim" is now presented in two parts. The first constructs the personality of the "victim;" the second constructs the nature of the harm that triggers the mechanisms of the Draft LBI. this construction of the nature of the harm is now separately developed within a definition proffered for the term "human rights violation or abuse." But that term serves a dual purpose. On the one hand it is descriptive and goes to the quality of the harm to be measured against the bodies of "victims." On the other it provides a form for the activities of the class of NOT "victims," now reduced to the term "business activities," which will trigger the conclusion that a "harm" has been caused that triggers the consequences developed in the Draft LBI.

The Zero Draft's "business activities of a transnational character" has also been split in two. As mentioned above, one part focuses on the volitional acts that cause harm, now constructed as "business activities." That term does retain a directional element, it specifies that the activities is undertaken by a specific class of NOT victims--"a natural or legal person." But that provides little by way of construction of the class of NOT Victim that is vested both with volition, but also with volition that can be projected onto the passive victim that results in harm (as defined in the Draft LBI). To fill that gap, the Draft LBI proffers a definition for "contractual relationships" around which the Draft LBI seeks construct that class of natural or legal persons capable of exerting force, that is the instruments of business activities, that can produce "human rights violations or abuse" that registers on the bodies of "victims."

Second, the Draft LBI adds a third party--the "regional integration organization." It is meant to be a quite specific organism--a sovereignty sucking device that serves as a nexus point for managing the relationships between business activity and victims. It also serves as an aspirational construct--an amalgamation of sovereignty that can serve as the active voice of passive victims. It is a single purpose organism--to exercise sovereign obligations under the DRAFT LBI perhaps without the bother of seeking to embed its compulsions within the

domestic legal orders of states, but which can then internationalize the operational structures of the Draft LBI . This is particularly interesting for its suggestion that, like the UN Guiding Principles to the Draft LBI, the state might well serve as a transitional way station in the longer term project of internationalizing the frameworks within which the self-reflexive binary between passive victim and active business can be operated.

Third, the core relationship between the activities of business as the activating principal, and the effects on victims as the passive principal remains unchanged from the Zero Draft. But now the consequential principal--the remedial principal--is more clearly expressed as a function of another active agent, not business but *the state*, and ultimately the "regional integration organization." The function of definition is now complete. The Draft LBI has defined itself by identifying and aligning its key elements. What makes this more interesting, of course, is its alignment with current trends in the West to create public bureaucracies overseeing private enterprise rule making, surveillance and disciplinary systems. In the United States, for example, the rise of "sex bureaucracies,"[2] provide an analogous structures, structures in which private enterprises are governmentalized and overseen by a public bureaucracy that acts to advance its own interests and in the process to wrest agency from the people the bureaucracy was established to protect.

In the process it has exposed its ideology. This is an ideology that is grounded in certain presumptions. One is the centrality of victims and their constitution as passive actors. Another is the substantial invisibility of the autonomous personality of the rights holder. They appear to exist only when human rights harm converts them from autonomous actor to passive victim, and by that operation also renders their volition forfeit. Yet another is that business activity produces human rights harm. That is a critical presumption that has long been haunting the rhetoric of certain elements of global civil society. Whatever its merits, it serves as a powerful element in shaping the ideology from out of which much of the detail to follow in the Draft LBI is shaped.

Still another is the suspicion of the social sphere and markets. These appear to generate human rights harms by providing the space within which it is possible to engage in activities that produce harm. And the last is the stubborn premise that the only business activity that causes harm worth worrying about is business activity with a transnational character. This is also carried over from the Zero Draft. As will be expanded elsewhere, the line drawing is essentially nonsensical--that is it is fundamentally political. But it has a more pernicious effect--it unravels the otherwise tightly constructed self-referencing system victim-business activity-state, by its decision that though all business decisions may cause human rights harms, only those of a transnational character will move the state to protect the victim.

In the next section the definitions will be briefly examined in more detail for their sense and the issues of legal interpretation they may present.

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2 Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, CALIFORNIA LAW REVIEW 104:881 (2016).

Comments
Flora Sapio

Every vehicle of behavioral norms, whether it is a written text such as the DRAFT LBI, an oral text, administrative decision-making, or even a symbol such as a road sign, is part of an hermeneutical project. An hermeneutics of multiplicity and inclusion can be imagined only under certain very restrictive conditions. By their own nature, the majority of hermeneutical projects delimit the field within which interpretation is possible. The ideal field of operations of the hermeneutical project incarnated by the LBI is the entire system of global governance. But, given the constraints within which the LBI is taking shape, that hermeneutical project may remain distant from the realities it tries to change.

Is international law an embodiment of natural law, or just a product of a consensus among stakeholders?

If international law is effectively a codified manifestation of natural law, then one of its central principles is that of individual volition. International law therefore should always recognize and protect the free will of individual human beings and their inherent equality, included when concepts and definitions are created ex novo (or derived from the eternal principles of natural law). The concept of victims is an established concept in international law, and one that needs to be further developed.[3] The LBI has the further development of international law among its goals. As it exists now, the concept of victim was not introduced and advocated for by those who have suffered abuses of their rights, but by stakeholders other than them. In creating that concept, a specific status was created for individuals, and attributed to them. It is not clear that individuals who have been defined as 'victims' are aware of having been made the object of such a designation. Would they agree to see themselves as 'victims'? If it is argued that persons who suffer human rights abuses have an imperfect awareness of their rights, and they therefore need to be educated about the notion of 'victims' and why this notion is good for them, then their ability to choose voluntarily is questioned. If international law instead is a codified expression of the consensus among stakeholders, the problems about:

(a) the volition individuals who have suffered human rights abuses, and

(b) the nature of the relation between their volition and the volition of other stakeholders (i.e, hierarchical, egalitarian, hybrid, etc.) remains.

Entire sectors of the economy of countries in the Global South and in parts of the Global North are based on transnational and domestic supply chains. Abuses and violation of human rights can exist in symbiosis with them. A domestic agricultural company receives orders from overseas, and subcontracts agricultural production to an undocumented migrant, and

3 See, e.g., Carlos Fernández de Casavedante Romani, *International Law of Victims*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 14: 219-272 (A. von Bogdandy and R. Wolfrum, eds., 2010).

in so doing abuses his human rights because it violates all relevant legislation. The undocumented migrant assembles enslaved, undocumented agricultural workers to fulfill the order he has received. Is the boss of these enslaved, undocumented workers a 'business', a 'victim', or a 'perpetrator'? By adopting the binary logic of 'businesses versus victims' the DRAFT LBI does not enable the making of this and other difficult distinctions. Yet, in real-world situations of poverty and destitution, these are the most common scenarios.

D. Article 1 (Definitions)

Textual Analysis of the Definitions in Article 1

Larry Catá Backer

The preceding essay of this Special Issue [1] considered the extent to which the Definition Section of the DLBI could speak to the overall ethos of the DLBI project. The object was to interrogate the text for its normative insights, as well as to extract from that section a semiotic psychology of and its importance for extracting the structures within which authentic meaning will be exhumed by courts and others. This essay briefly considers each of the five defined terms in their legal context.

A. Victims

1. The Draft LBI departs from the original definition of the term in the Zero Draft in an odd way. The Zero Draft speaks in the active tense with respect to the individuals defined as victims and the event that transforms them from individual or collective to the legal status of victim for purposes of the instrument: "persons who individually or collectively alleges to have suffered harm." One could read this as retaining at least a bit of agency in the individual turned victim. The Draft LBI rewrites this in a more passive voice: "person or group of persons who individually or collectively have suffered or alleged to have suffered" a human rights violation also defined in Article 1. The change is interesting in the way it seems to affirm that the agency of the individual is unnecessary to transform him or her into a victim. That this is meant to strip the individual of agency is clear. The only question is to determine where that agency has been transferred. That is not apparent from the text of this definition but becomes clearer later in the text of the Draft LBI.

The stripping of agency of those that the law wishes to protect, and its transfer usually to an instrumentality of the state, is not unique to the Draft LBI. It has become a hallmark of the way in which U.S. political bodies have stripped women of agency in the context of alleged partner abuse.[2] As a consequences, the "victim" is no longer really necessary either for the assertion of rights (now undertaken by others) or for remedy (which is now transformed into a focus on the wrongdoer). By centering the victim in this way, the law will essentially marginalize her—or at least cast her to the side. She is reduced to the precipitating event

1 Larry Catá Backer, On the Victimization of International Law and the Ethos of the Treaty Project in Article 1, supra.

2 Jeannie Suk, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009).

that then invokes a machinery of discipline undertaken in the relationships between activities undertaken by business enterprises and the law-state.

2. "Suffered" or "alleged to have suffered" is the legal trigger that transforms an individual or collective from a rights bearer—who is a matter of indifference in the Draft LBI—to a victim around which the obligations of the Draft LBI are developed. As such these terms are important. Yet their meaning can be elusive.

> (A) It is not clear when a "suffering" has occurred. It is possible that the term can be treated like the term breach in contract—permitting anticipatory triggering in anticipation of suffering. It is also unclear whether knowledge of the suffering is necessary.
>
> (B) If knowledge is necessary, does the person or collective "victim" have to have that knowledge, or is it enough for knowledge to be held by the business activity that produced the "suffering", or even an instrumentality of the state, or a civil society organization operating for the welfare of the individual or collective (even when without the knowledge o consent of those individuals or collective). There is nothing in the definition that requires an intimate connection between knowledge of suffering and those who have been made to suffer.
>
> (C) That produces another legal issue touching on the necessity that the individual or collective understand that the action that produces suffering is actually suffering. What the state or civil society actors view as a suffering might not be understood as such by its "victims".
>
> (D) Related is the need to understand the nature and extent of the harm suffered. This is related ultimately to remedy. There have been cases where advocates and victims have not seen the suffering (and its remedy) in the same way. If victims have agency, their view ought to be given weight. But the shift of agency to the state or others also may deprive the victim of control (or even a say) in these issues—which may then be controlled by the state or others "who know better."
>
> (E) The extent of suffering necessary to constitute a victim is also unspecified. Some courts might read into the definition a need for a material suffering; others might permit even an allegation of nominal suffering.
>
> (F) Lastly, to what extent is each member of a collective "victim" to have suffered in the same or in a materially similar way? Is membership in the group sufficient to trigger victimhood or, like class action or multiparty litigation in some jurisdictions, is proof of membership and proof of suffering required for every member of the class? Of course, when one speaks to responsibility in the societal sphere, or when one seeks to develop a framework for lawmaking, none of this is necessary. But legal duty carries with it the baggage of judicial protection of process rights, and the limitations and customs of the judicial function. Here the Draft LBI provides instead the

> opportunity for corruption in the form of strategic interventions in states to mold their legal systems in ways that may produce advantages for litigants. It might follow, then, that these complexities make whatever emerges as law less accessible to "victims" and "victims" more dependent on states or elites groups for any hope of effective access to remedy.

3. Lastly, "in the context of" requires some analysis. The intent of the drafters could be surmised to extend the meaning) or the consequential effects) of business activity as far as possible. But how far is possible may be substantially affected by the willingness of a domestic legal order to follow a trail of consequences or effects. Most states limit this trail of effects, some severely. At best, the resulting disjunctions encourage both forum shopping and political agitation for law reform. Perhaps the Drafters had both in mind. If that is the case, then one can understand the Draft LBI as more a political call for action than as the expression of any particular solicitude for victims. Indeed, victims here appear to more a means to a political ends grounded in the control of the narrative and effect of law—not by victims but by those factions in political communities with a specific vision for how to order things and a taste for control. That is fair enough; but it makes taking the principled "higher road" a little less plausible.

B. Human Rights Violation or Abuse

1. The definition was meant to cast a wide a net as possible. To constitute a human rights violation or abuse, it is only necessary to cause harm to an individual or collective. Any harm, it seems. That is not interesting—though it serves, at its limit to create an identity between legal harm and human rights harm. The consequences is that it becomes impossible to find anything in law that is not a human rights harm or abuse—as long as it causes harm to an individual or collective sufficient in form and character to transform that individual or collective into a victim.

2. The only limiting element, then, is NOT found in the nature or character of the harm, but rather in the precipitating cause. To transform law into human rights, which then transforms breaches of rights into harms that in turn transform individuals or collectives into victims and thus activating the obligations of the Draft LBI, it is necessary that the harm (i) occur "through acts or omissions in the context of business activities" AND that (ii) that such harm be committed by "a State, a business enterprise, or Non-State actor."

With respect to the first of the limiting elements of what acts can constitute human rights violations or abuse:

> (A) What is interesting here is the legal leaps required to define legal harm by the character its cause. Here one encounters a class of human rights violations as broad as the law but as narrow as the willingness of courts to cabin the scope of activities deemed to be "in the context" of business activities. But context is not causation—though it is not clear whether courts are invited to transpose the law of causation into

the determination of the character of the harm necessary to constitute a victim to trigger the application of the Draft LBI.

(B) Yet more curious still is the absence of a limitation of the harm principle by a principle of legality. To constitute a human rights violation or abuse, it is not necessary to cause a harm recognized as such in law. The definition moves beyond the limits of legal rights to the realm of harm. It transforms a harm principle into an action with legal consequences irrespective of the framework within which legal rights and protections may be organized under a domestic legal order. That is fair, as far as international law may be concerned; but it may find substantial resistance by national judiciaries charged with the protection of the integrity of their own legal orders as framed by national constitutions and constitutional principles.

(C) Beyond that hiccup, any harm, whether recognized as a harm for which a right to redress exists in law or not is capable of being a human rights harm or abuse as long as a harm has been caused. It is not clear whether extra-legal harms are covered. It is also not clear whether domestic laws that provide exculpation or affirmative defenses apply here. And it is not clear whether they should.

With respect to the second of the limiting elements of acts that can constitute human rights violations or abuse:

(A) It is not clear what the drafters had in mind by creating a list that effectively includes everyone on Earth. Let us consider the phrase "a State, business enterprise, or Non-State actor" at its broadest. First, any limitation in one of the terms (say, for instance, "state" is overcome by the breadth of one of the other terms. Consider Amnesty International. While it is not a state or a business enterprise, it may operate such an enterprise through its contractual relations (the business of operating a non-governmental organization including labor, procurement, property ownership, suppliers, and the like). Even if Amnesty's business enterprise are not transnational it may be a non-State Actor. Indeed, any individual or group which are wholly or partly independent of a sovereign state or state might be subsumed within the definition of Non-State Actor—*even a victim, individually or collectively*.

(B) The only question, then, is whether such individual collective or organization is a state or business enterprise actor. That categorization may be important if only with respect to the "get out of jail feature" of such definitions—*sovereign immunity*. Unless the Draft LBI itself constitutes an act of waiver, the result is might be perverse where as a result neither states nor their enterprises might otherwise be subject to either jurisdiction or liability. At its limit, it is hard to see how even entities or individuals who act pursuant to state authority may be subject either to jurisdiction or to the imposition of remedy, though violating or abusing human rights. States have for the most part waived sovereign immunity over a specific set of claims—commercial activities being the most well-known. But even the boundaries of that waiver are murky in some jurisdictions. In any case, and especially where the state sector is large

> and extends well beyond economic or commercial activities to activities the state defines as sovereign then the definition provides small comfort—appearing to include actors and acts which effectively are excluded even by operation of the Draft LBI in its legal ecology. That is particularly the case in those jurisdictions in which economic activity is viewed as a sovereign prerogative.

3. There is nothing in the definition that considers the role of intent. If a human rights harm or abuse is triggered by activity, the question about a necessary intent to do harm also arises. The definition is silent on this point. It is possible to read into the definition a variety of different results—and it is likely that in the aggregates courts will choose them all. At one extreme, courts can interpret the definition to make intent irrelevant—it is the act or effect rather than the intent that is central. At the other extreme, courts may limit the scope to acts or omissions undertaken with actual knowledge. And in between it is possible to construct tests based on negligence, recklessness or other levels of knowledge-intent.

4. The definition describes the character of the harm that is sufficient in the broadest terms. This is not unreasonable given the intent of the drafters. Harm includes substantial impairment of rights, which is the first time that the word rights makes an appearance. But here rights may refer to legal rights, social rights, rights under soft law, rights recognized within a domestic legal order or rights recognized by a home state and applied in the host state, etc. None of this is clear. But at the same time, it creates cognitive dissonance. We move form effects (harm) to rights imperceptibly. The legal effects of this are unclear.

C. Business Activities

1. This is one of the more crucial definitions because its scope determines the scope of harms that in turn determine the extent to which an individual or collective can become victims and thus worthy of of architecture of the Draft LBI. There are two key terms.

> (A) The first is "economic activity." Economic activity includes but is not limited to "productive o commercial activity." At first blush it is hard to imagine any sort of organized activity that is not either commercial or productive. That begs the question: buy whose measure s an activity deemed either? Your productive activity after all may in my eyes be deemed unproductive. . .and if "I" am the state. . . well. But certainly, the drafters could not have meant that. They must have meant activity that is customarily understood as producing profit. But that is not entirely clear, and one would have to engage in a laborious exercise in exegesis to get there. If a court was of a mind to be more expansive, nothing it he definition would preclude it including the work of religious organizations, or even of large transnational civil society organization—Amnesty International, Oxfam and the like, within this meaning.
>
> (B) The second is "transnational corporations or other business enterprises." This term, of course, has had a long and tortured history. It is neither free from ambiguity, nor from fierce disagreement over its meaning and legitimacy. All of this is intimated in the Preamble, which appears content to incorporate that long and unsettled fueled

into the heart of the definition of a key term. That is not helpful. What would be helpful is to acknowledge the power of global production chains, to recognize that such chains connect localities across borders, that the hierarchies of control affect the relationships among networks of individuals and enterprises engaged in coordinated production, and that at any point in this chain a human rights harm can occur. It is with that set of acknowledgment and recognition that an allocation of responsibilities can be assigned and justified.

(C) But that was not the path taken; and its rejection is made clear here nicely embedded in what otherwise appears to be an innocuous corner of a definitions section. Instead the old tired nationalist refrains from battles now several generations old and hardly relevant anymore except as politically effective rhetorical tropes continues to make itself felt in this definition—it is based on a failed notion that developed and hosts states are passive non volitional actors (the origins of the definition of victim appears again here in another guise) who must be protected against the rapaciousness of developed states (the only political actors with volition) by an even stronger "international law-community" to which sovereign authority and will must be ceded. In this context both the passive (victimized) developing state and its economic instrumentalities, public and private, are effectively presumed to be victims without capacity. The result—a waiver of responsibility for their own acts that cause human rights harm or abuse. BUT these are presumptions which ought to be resisted as both implausible and hypocritical. All states have volition, as do all categories of rights holders. All ought to be responsible for their actions to the extent of their capacities. To insulate a part of global production as the Draft LBI attempts here produces a dissonance that weakens the moral value of the instrument as well as weakens its coherence and ultimately its ability to serve as an instrument to meet its own objective—with respect to the "victims" it purports to serve.

(D) It might be possible to argue that the term "transnational corporations and other business enterprise" could be read to include business enterprises that are not transnational. Perhaps. But that is a strained reading in light of the history of the term. Moreover, it flies in the face of an ordinary reading of the phrase, which could be interpreted as covering transnational corporations AND other (transnational) business enterprises. This is the more natural reading, especially given the attention to the definition of the term "contractual relations" that follows.

2. The commercial or productive activities of States, transnational corporations and other business enterprises, and Non-State actors may be undertaken by natural or legal persons. That is clear enough. What is less clear is whether such persons are themselves also considered harm producers (and then subject to legal responsibility or duty) in their own right. It is not clear whether the definition imports (wittingly or not) notions of *respondeat superior* or master-servant obligations through this definition. To the extent that these natural or legal persons were required to act by the power of another, ought they to be absolved of responsibility? To what extent does this definition contribute to interpretations of responsibility down the hierarchy of operations that produce harm through business

activity. That remains unclear but will be explore further in discussion of later provisions.

D. Contractual Relationship

1. One of the great legal issues of the 21st century has been to align the structures of law to those of economic realities in the face of the transformations in production that have resulted from the development of globalization. The issue affects in the most profound manner the alignment of production chains with the economic collectives that together are the critical factors in management of clusters of economic activity that align production from its incipient to final stages. Fundamentally the problem centers on the fact that, in law, there is no such thing as a transnational corporation. Domestic legal orders have defined and constituted a host of economic organs to which private individuals and collectives have access: corporations, partnerships, LLC, LLP, benefit corporations, and the list goes on and on to suit the legal cultures of the legislating state. Some state have sought to align clusters of enterprises for purposes of imposing liability in certain respects, for example Germany. But these have not proven to be powerful vehicles for aligning economic realities to legal structures.

The UNGPs sought to work around this through the construction of a vigorous and autonomous societal sector with its own system of responsibilities running parallel to that of the public sector and its legal constructs. The Draft LBI seeks to do this in a more roundabout way, by defining a new organ of responsibility in the form of a reified creature made up of a network of relationships aligned in a way that it is possible to discern a coherent and singular (broadly understood) purpose from which it is possible to construct a site for the imposition of responsibility. Fair enough. The idea that a multinational is itself essentially a nexus of relationships is well known in the literature. But it is a jurisprudential concept; it is not yet a legal concept. To that end, constructing this creature requires more than the legerdemain of a complex set of interlocking definitions. These will, in the end crash against the enterprise jurisprudence of most domestic legal orders. The fracture may well upend the utility of the Draft LBI as a device for identifying and assigning responsibility for a set of harms that affect rights holders otherwise with substantially little recourse—the worthiest ideal in the Draft LBI.

2. These effects become more pronounced in the body of the Draft LBI as they are applied strategically to extend the ambit of liability through and beyond the enterprise. These will be discussed in future posts. For now it is important to consider the normative effect of this effort at definition. To the extent it seeks to contribute to the transformation of the law of enterprises, it is unlikely that this treaty is the best place for that debate or those changes. But sometimes one may not choose the sites on which one will battle. This may be one of those times. Still, sometimes strategic retreat is in the long-term interest of a cause fighting on multiple fronts.

E. Regional International Organizations

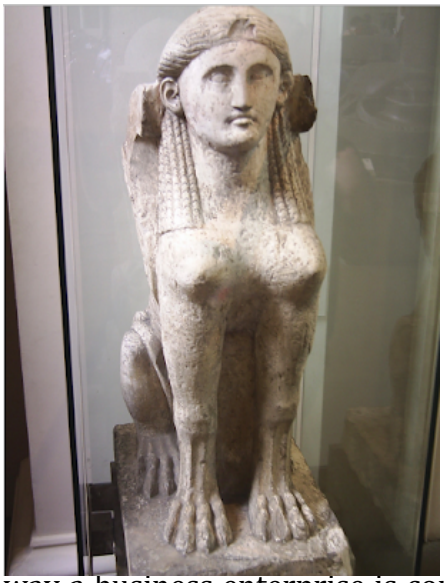
1. This is both a definition and an encouragement. The encouragement is of course refined in the body of the Draft LBI. Its most interesting aspect is its notion of states transferring competence. The Draft LBI was careful enough not to use the word sovereignty. This reflects notions of contingent delegation that is sometimes possible from out of a constitutional order; though as has been repeated in the history of the European Union, sometimes it is a delegation that requires substantial Constitutional court jurisprudential development, and sometimes it requires constitutional change. The extent to which that may be necessary. of course, will contribute to the success or failure of the device. But it does not otherwise affect the character of this organ.

2. Otherwise, it reflects a perhaps healthy acknowledgment that there not be substantial unity of jurisprudence or implementation of Treaty norms and responsibilities across regions (however they are defined or constructed). But regionalism is better than fracture along national lines. More importantly it may represent a transitional stage toward global disciplinary structures. Yet its utility may be more important in the context of a framework agreement rather than a Draft LBI. That is a fundamental problem treated in later essays in this special issue.

3. A last point: it is not clear whether these "regional international organizations ought to count as state actors for purposes of the definition of human rights violations ot abuse. Certainly, if these are organizations to which states delegate competence, the responsibility attached to that competence ought to follow the delegation. This is not made clear, however. And it is not likely to be imposed without opposition. Of course, to the extent that sovereign immunity shields, that shield could be extended as well.

* * *

Where does that leave us even before we undertake an analysis of the substantive provisions of the Draft LBI? At a minimum these definitions teach us that an individual becomes of interest to the Draft LBI when he, she or they are transformed from individuals with rights into "victims". To become a "victim" (and thus of interest to the Draft LBI) the individual or collective must suffer, allege or have alleged a "suffering." That "suffering" must be connected to a "human rights violation or abuse." Also "victimhood" can be extended, when the state declares it to be so, to some but not all persons with whom the "victim" has a relationship. A "human rights violation or abuse," in turn, is a harm. But not just any harm. It must be a harm that is caused (the extent of causation remaining mysterious) by one of three identified actors—States, business enterprises (a term unknown in the domestic law of many jurisdictions), or non-state actors. But the concept is further limited because the harm caused by these actors must also be undertaken "in the context of business activities."



Harm is further defined as having to be "against" any person or group (the extent of an intent requirement implied remaining substantially undeveloped and problematic) and exhibit certain characteristics. The term "business activity", central to the concept of "human rights violation or abuse" and a necessary predicate to the construction of a "victim," is in turn defined as "any economic activity" but only when undertaken by "a transnational corporation or other business enterprise" (transnational remaining undefined). The term "any economic activity" is itself further defined as including "productive or commercial activity" (though it is not clear what remains outside of these categories in the realm of human activity) which must be undertaken by someone (e.g., a "natural or legal person"). Beyond that we understand that contractual relationships may affect the way a business enterprise is constituted. And we further understand that States may lend their authority to public regional international organizations. One is now ready to delve into the substance of the Draft LBI.

D. Article 2 (Purpose)

Concept and Context in Article 2

Flora Sapio

> **Article 2. Statement of purpose**
>
> **1. The purpose of this (Legally Binding Instrument) is:**
>
> **a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities;**
>
> **b. To prevent the occurrence of such violations and abuses and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities;**

"To prevent the occurrence of such violations and abuses": Here the DLBI reinstates the principle of prevention, without resolving the ambiguities and ambivalence introduced by the language of Article 1. The treaty operates pre-emptively, also when an actual harm has not been caused yet. To trigger the pre-emptive operation of the treaty, the mere allegation of a potential future harm seems to be sufficient. The language of Article 1 allows such an allegation to be made without the knowledge of the persons who, in a future, may (or may not) suffer harm. Limited to this treaty, the principle of prevention may be invoked or else used by States, NGOs, individuals, collective entities such as social movements against one or more of these actors and entities. The treaty enables potential scenarios where the principle of prevention can be used to achieve goals other than human rights protection.

"To ensure effective access to justice and remedy": access to justice and access to remedy have substantive and procedural aspects. Different actors may place the emphasis on the aspects that are more useful to reaching their own goals and objectives. It can be expected that some actors will stress the procedural aspects of access to justice and access to remedy, while others will place the emphasis on their substantive aspects. The questions remain of what justice measures and remedies are effective and when; how effectiveness is defined,

measured, and assessed, and whether it is possible to argue that a causal relation exists between:

a) variables that pertain to the governance system of signatory states
b) the choice to sign or not sign the treaty
c) the public, private or hybrid nature of certain remedial mechanisms
d) judicial and non-judicial mechanisms

and the concept of effectiveness. We may witness the emergence of different conceptions of effectiveness, and of different metrics elaborated by public and private, domestic and transnational actors.

c. To promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses.

From discussions held at the Fourth Session, it is clear how a shared understanding about international cooperation has not been reached yet. In the absence of such a consensus among stakeholders, Article 2.c may remain dead letter. In any case, this paragraph allows to delay implementation of the treaty on grounds that signatory states possess a limited capacity. But, Article 2.c can also encourage a variety of cooperation and capacity building initiatives. A result may be a healthy competition among donors. Articles 1 and 2 (as well as other articles in the treaty) can however be interpreted and used to limit such competition.

D. Article 2 (Purpose)

Textual Analysis of Article 2

Larry Catá Backer

The objects and purposes of treaties constitute an area much invoked but stubbornly ambiguous. A 2010 article on the issue stated by noting the problem of the object and purpose of treaties:

> The phrase "object and purpose" is used relatively frequently in the law of treaties, and the phrase's meaning could be decisive in resolving multiple current international law controversies. Yet, object and purpose is a term of art without a workable definition. Broadly speaking, it refers to a treaty's essential goals, as if a treaty's text could be boiled down to a concentrated broth—the essence of a treaty.1 Beyond this general idea, scholars have failed to create a definition with adequate clarity and detail to serve lawyers who must apply the term in practice.[1]

The authors note the utility of object and purpose clauses in a treaty as a safeguard against incoherence (but then the Preamble might serve a similar purpose—though its authority would be an object of contention). They offer a sensible ecology within which object and purpose can be extracted and perhaps usefully applied: text, guidance in ICJ opinions, the context of its use in the Vienna Convention; and the comfort of extracting interpretive certainty form state practice. This seems right but provides less comfort than one might have wanted.

A treaty's objects and purposes need not be separately listed, but they much be discernible somehow form the text. In a well-known 1952 case[2] the International Court of Justice distinguished between a treaty's object (more specific goals) and its purpose (equated with a generalized intention) but consensus now treats them as a unitary concept. And of course, one tends to start the hunt for objects and purposes by examining the text. It follows that some expression of objects and purposes might be helpful for the interpretation of the treaty but that like everything else—the road from text to interpretation is hardly ever

1 David S. Jonas and Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 3 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 565 (2010).

2 RESERVATIONS TO CONVENTION ON PREVENTION AND PUNISHMENT OF CRIME OF GENOCIDE, ADVISORY OPINION, 1951 I.C.J. 15, 23 (May 28).

certain. It is also helpful, less directly, in managing the illegitimacy of the inevitable reservations that will be made to the final text by states.

Like the Zero Draft, the Draft LBI seeks to short circuit the traps of ambiguity by providing a text of purpose. This, it is imagined ought to align with the implications of the Preamble—though that is not made clear in the text of either draft. Moreover, the curious decision to avoid referencing the Preamble in the text of the purpose provision could give rise to an otherwise unnecessary ambiguity. Interpretation and constraining reservations, then, are at the heart of the construction of this "Statement of Purpose"—or at least ought to be. To that end, the better text is one that directly connects purpose to the core interpretive issues that may arise under the treaty, and that clearly structure the space within which reservations may be tolerated. That is hardly ever the case in Treaty drafting; and it is not the case here.

The Purposes section of the Draft LBI has not changed much in form, but substantially in content, from its original iteration in the Zero Draft. Originally, the Zero Draft Statement of Purpose was divided into 3 Parts:

> Article 2. Statement of purpose
>
> 1. The purpose of this Convention is to:
> a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities of transnational character;
> b. To ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character, and to prevent the occurrence of such violations;
> c. To advance international cooperation with a view towards fulfilling States' obligations under international human rights law;

The Draft LBI retains the form and much of the language but with some important changes.

> Article 2. Statement of purpose
>
> 1. The purpose of this (Legally Binding Instrument) is:
> a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities;
> b. To prevent the occurrence of such violations and abuses, and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities;
> c. To promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses.

Let's consider the text of each of the three purpose provisions (as modified).

Article 2(1)(a)

Article 2(1) speaks to "strengthening." It is not clear what strengthening means except as a metaphor—to make stronger as in "more effective", buttressing, fortifying, bolstering, or consolidating is one way to approach that term, but so is to equate strengthening with comprehensiveness. Yet these are all very different terms. It is not clear that each word used is to include all other possible synonyms that may be extracted from any Thesaurus of one's choosing. But one gets the point. . . generally. Also possible is a meaning grounded in notions of making its object less susceptible to evasion. Perhaps it is meant to mean all three. That can only be tested either in litigation (to the extent the issue ever arises) or in contests between actors in the course of application.

An examination of the focus of the "strengthening" function may aid in understanding the meaning of these terms and thus the purpose declared. Three things are being strengthened. They are the qualities of "respecting" (valuing, recognizing and the like), of "promoting" (stimulating, supporting, upholding and the like) and of "fulfilling" (achieving, realizing and the like). So, the purpose is to fortify or bolster acts of valuing or recognizing, acts of stimulating *something*. That "something" is *"human rights"—a curiously undefined term*! There may be a simple answer—this was a drafting error and that what was meant to be written was "human rights violations and harms". That would produce a parallel use of the term throughout Article 2 and match the use in Article 1.

Sadly, that was not what was written. But not just any old human rights—only human rights "in the context of business activities." One knows from Article 1 that human rights violations or abuse is defined as harm suffered by a "victim" but only "int he context of a business activity." We also know that "business activities" are defined as economic activities of transnational entities engaged in commercial or productive activity. What one has, then, is precisely the definition (with all of its warts) put forward in the Zero Draft. What appears changed has not changed at all. And what remains only partially defined—human rights—remains embedded in its effects (harms) perpetrated by a transnational organ engaged in productive or commercial activity.

Article 2(1)(b)

Article 2(1)(b) has two sub-parts. The first is focused on prevention; the second is focused on access to justice and remedy. The difference with the Zero Draft is essentially that the ordering of the two sub-parts has been flipped. But is there more? The section that focuses on prevention, lamentably enough, is a bit sloppy in an unnecessary way. The purpose of the Treaty is in this part to prevent the occurrence of "such violations and abuses." What that "such" is is not mentioned. It is likely that what was meant was prevent the occurrence of human rights violations or abuses in line with the Definition in Art. 1(2). But one has to infer that; the text is of little help. The problem here is that when the order of

the sub-parts was reverse the English usage was not corrected. Thus, a purpose of the treaty is to prevent human rights violations or abuse—as that term is defined and limited in Article 1(2).

Another purpose is "to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities." At first blush, the two sub-parts appear incompatible. A reasonable reading, however, suggests a conditional relationship which was made clearer by flipping the two sub-parts as originally drafted in the Zero Draft. The Treaty, then, means to prevent, but where prevention fails to ensure effective access to justice and remedy. Though both justice and remedy are undefined, it is clear they point to different things. Justice is a thin reed on which to hang a treaty.

First all treaties must be read as furthering access to justice principles, but second justice notions, at least since the time of the Institutes has been a heavily contextual, relational and collective concept, the assurance of which promises fracture along cultural and systemic lines. This is not unexpected, but the underlining of a willingness to tolerate quite divergent meanings of justice may then weaken any effort to read uniformity into the other abstract purpose concepts in Article 2. Access to remedy, on the other hand, is contentious in a different way. Access to justice has always been ideologically contingent. Access under Leninist principles of state organization is quite distinct from principles and a consensus about the meaning of access to remedy in liberal democratic states. Access to justice and access to remedy assurances are limited, of course, to "victims" as defined in Article 1(1) to the extent it arises in the context of "human rights violations and abuses (Article 1(2) that are themselves the product of business activities (Article 1(3)).

Article 2(1)(c)

Article 2(1)(c) is the most changed form the Zero Draft. And it is changed in the most lamentable way. But the change is also felicitous in the sense that it clarifies an underlying object and purpose. For if interpretation is itself based on intent evidenced by changes in the text from one version to the other then it is clear that the intent of the Draft LBI is *to take the state out of the Treaty.* Where the Zero Draft spoke to the advancement of "international cooperation with a view towards fulfilling States' obligations under international human rights law" (note that here "law" springs up effectively for the first time with no relation to the definition of key terms). In the Draft LBI there is no more reference to state obligation. That has disappeared. In the place of the Zero Draft's "advancement" is the Draft LBI's "promotion and strengthening". In the place of the Zero Draft's "fulfillment of state obligations under international human rights law" is the Draft LBI's more benign and far less direct "promotion and strengthening of international cooperate to prevent human rights violations and abuses". *Two things disappear from the Draft LBI statement of purpose—first, the state; and second, law*. What replaces these is a substantial restatement of Article 2(1)(b) reference to access to justice and remedy to victims of human rights violations and abuses.

The circularity, with a hole in the middle, reduces the value of this section even as it redirects its energies. There is purpose to this cyclonic movement—and it may be found in the reference to "regional integration association" in Art. 1(5). Though tenuous, it is possible to see in the change and in the language now employed a purpose *to nudge state responsibility from states,* and to in the process make them peripheral agents of international human rights (one cannot say law here because the reach goes far beyond the narrow confines of international law to a generalized harm principle with a remedial mechanism as the essence of access to justice). In their place Article 2, however obliquely, would nudge states to transfer competence over international access to justice and remedy to an international organization exercising collectively sovereign authority in an international institutional structure. But that is likely a step too far.

* * *

Where does that leave the Draft LBI and its interpretive universe?

First, it is clear that a purpose of the Draft LBI is to strengthen (a term whose meaning is protean enough to cause worry in its legal sense) human rights in the context (again a word that cultivates ambiguity) of business activities. Business activities, of course is defined (and focused (limited?) in Article 1. But human *rights* is *NOT defined* in Article 1. What *is* defined is the term "human rights *violations and abuse*" in a way that results in the creation of a harm principle. *implicitly rejecting a rights principle*. But there is no reference to human rights *law* (which it appears would limit the scope of the Draft LBI but which may be irrelevant for its legal effect which in any case would be confined to the legal obligations of those burdened with responsibility under the treaty. The irrelevance comes form the impossibility is using a reference to human rights as a generalized class of harms to effectively transpose either into international law or the national law of state parties these principles or approaches as *law*. In any case, what is to be strengthened is the "respect, promotion, protection and fulfillment" of this class of human *rights* in the context of business activities. Can one read this purpose to extend to human rights violations and abuse? And to against whom is this purpose to be applied?

Second, the purpose of the Draft LBI is to ensure prevention, and in the absence of prevention, access to justice and remedy for human rights violations and abuses. This raises the question about the relationship between human rights in Art. 2(1)(a) and human rights violations and abuses in Art. 2(1)(b). The former speaks to normative (not inevitably legally applicable) elements undefined. The latter speaks to acts that produce a harm that either ought to be prevented or otherwise with respect to which access to justice and remedy ought to be available.

Third, a purpose of the Draft LBI is to promote and strengthen international cooperation. Gone is the purpose of fulfilling state obligations under international human rights law. Apparently even this mild truism was too much of a purpose burden for the Draft LBI to bear. If so, then it is not clear only whom such a burden is to fall. The answer may well

be that the Draft LBI is to mind its own business with respect to that issue. And thus the purpose section also serves as an anti-purpose statutes. What the Draft LBI is NOT to undertake (nor should it be interpreted as an implied undertaking) is the purpose of strengthening state duty to fulfill their legal obligations under international law. In this context it is not clear whether or to what extent the principles of UNGP Pillar 1 survive a transposition to this treaty. And if it merely provides a treaty basis for the UNGP 2nd Pillar, has it undertaken the provision to states of powers they already have?

At the same time, this is not a criticism of the purpose provision—there is more frustration than critique here. The triple objective—protect, prevent and promote—has been at the center of efforts to develop foundational principles for developing not just rules but cultures of engagement in economic activity that bring the human back into the calculation of the worth of economic activity. At its broadest, the Treaty represents another step, and a tentative one at that, in moving forward a project legalization of only certain classes of harm incurred. Yet the purpose provision is neither specifically tailored to the task at hand—the construction of a viable legal basis for allocating liability for well-defined classes of conduct among groups of actors—all tightly connected to the core norms to be advanced. Not that Article 2 is badly done. As it is written, however, it provided relatively little useful guidance to courts seeking to interpret national transposition of treaty obligations; nor does it connect in meaningful ways to the specific provisions that follow, and particularly Articles 4, 5 and 6. This failure to connect and the consequential extent to which one might use this Article 2 strategically to broaden or narrow obligations otherwise imposed by the normative provisions of the Draft LBI.

D. Article 3 (Scope)

Textual Analysis of Article 3

Flora Sapio

Article 3 ought to be read, especially against the possibilities posed by Article 2 provisions. Article 2 sought to define the objectives against which the substantive provisions of the Treaty are to be read. Article 3 instead sketches out the extent to which these objectives ought to reach.

> **1. This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.**

"except as stated otherwise": any legal document creates its own "world", and so does the Draft LBI. The "world" of the Draft LBI is a world populated by those entities that fit the definitions provided by Article 1. This world should ideally be coherent with all the other "worlds" created by other guidelines on corporate social responsibility and by other documents on business and human rights.

Here instead we have a first caveat. In these words of Article 3 many will see a mixed or else a hybrid approach to regulation. And there is no doubt that the intent behind the wording of Article 3 was adopting an approach that would allow the state to respect, protect, fulfill and promote human rights throughout supply and value chains. Given the different viewpoints that existed about the effects on national economies of a more stringent regulation (at least in theory) of domestic enterprises, the solution adopted by Article 3 is the best one.

While the wording of Article 3 is useful in that embodies a broad consensus among stakeholders, the article can lend the side to various interpretations, and it allows for unintended uses.

It is possible to say that, in the world of the Draft LBI, human rights obligations apply to all business activities. But, they apply to some business activities more than to others. And they also apply to some business activities, but not to others. The criterion to determine whether a business activity is to be more heavily regulated is whether the activity is "of a transnational character".

In other words, business activities more heavily regulated are those conducted by foreign enterprises, while those conducted by domestic enterprises seem to occupy a residual place in Article 3.

"including particularly but not limited to": here Article 3.1 creates a second exception. The real world is a world in which supply chains stretch from one continent to another. In the world of the LBI, the supply chain connecting hundreds of domestic and foreign enterprises do not exist. Neither it seems easy to adopt an interpretation that would read Article 3.1 as including all of these entities.

The treaty targets business activities of a transnational character. They are a particular target ("including particularly") but they are not the only one ("but not limited to"). There are other targets beyond foreign businesses. Presumably, these targets are domestic enterprises – both those included in global supply and value chains, and those that exist outside of them.

Yet article 3.2 — a new paragraph — only defines "business activit[ies] of a transnational character:

> **2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if:**
>
> > **a) it is undertaken in more than one national jurisdiction or State; or**
> > **b) It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State;**
> > c) **It is undertaken in one State but has substantial effect in another State**

To understand this definition and its potential, it is necessary to go back to the commentary on Article 1:

"*If a court was of a mind to be more expansive, nothing it he definition would preclude it including the work of religious organizations, or even of large transnational civil society organization — Amnesty International, Oxfam and the like" within the meaning of "business activity"*.

What is potentially true for Amnesty International is also true for government-organized NGOs, international friendship associations, clubs and associations established on one's national territory by citizens of another country, and generally speaking any entity that produces *something.* That "something" may be shoes, cars, an intangible product such as information, or anything else. As long as a relationship that can be constructed in terms of

domestic legislation or administrative regulation on labor, insurance, immigration, health, taxation, etc. exists, the State has a duty to protect the unknowing victims from abuses. Any activity that violates non-binding industry standards can be qualified as a human rights violation, as long as those standards maintain a relation no matter how remote to the Universal Declaration of Human Rights. And, if not present, those relations can be derived through textual exegesis of all relevant documents.

The duty of the State to protect citizens from abuses – whether these abuses are real ones or aptly constructed by the State - exists also if the entity does not maintain any kind of contractual relationship inside of the territory of a State. At least, Article 3.2(d) makes this interpretation possible. A transnational business activity can be

d) (...) undertaken in one State but ha[ve] substantial effect in another State

Article 3.2(d) opens up a hypothetical scenario where the most diverse allegations may be made against any foreign for-profit or not-for-profit entity, but also individuals. What is a "substantial effect"? And when does a business activity in State A causes "substantial effects" in State B?

The answers to these questions will depend on the interpretive abilities of States, on their skillful use of data and projections, on their ability to mobilize the domestic public opinion in support of their position.

A brief example may better illustrate this point.

Italy is a state that is not playing a role in the negotiation of this treaty. Therefore, it serves only as an example. In our example, Italy could attempt to use the Draft LBI against a variety of foreign entities. Or even individuals. As long as those individuals are engaged in an activity that produces *something*.

The existence of a contractual relation between any foreign entity and a domestic physical or legal person would not be necessary to invoke the Draft LBI. In principle, the foreign entity may conduct its activities anywhere in the world. What is necessary is that those activities fit the broad definitions of Article 1. And that the political, economic, international or domestic interest of Italy can be pursued also by accusing the foreign entity of a human rights violation.

While using the Draft LBI *in this way*, the country could at the same time express its reservation on Article 3.1, and exclude its small and medium-sized enterprises from the scope of the treaty. Alternatively, a promise could be made to withdraw reservations about Article 3.1, but only when small and medium-sized enterprises will have built a sufficient awareness and capacity. After all, the Draft LBI does apply to all enterprises. But, it applies "particularly" to foreign entities.

The Draft LBI, as Article 3.3 says, covers "all human rights". This creates further opportunities to pick those parts of the treaty that are useful to oneself, and leave out the rest. And to choose those allegations that will produce the most sensationalistic impact on the global and the domestic public opinion.

3. This (Legally Binding Instrument) shall cover all human rights and those rights recognized under domestic law

D. Article 3 (Scope)

Textual Analysis of Article 3 in the Shadow of the Zero Draft

Larry Catá Backer

> ZERO DRAFT
>
> Article 3. Scope
>
> 1.This Convention shall apply to human rights violations in the context of any business activities of a transnational character.
>
> 2.This Convention shall coverall international human rights and those rights recognized under domestic law.
>
> * * *
>
> Article 3. Scope
>
> 1. This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.
>
> 2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if: (a) It is undertaken in more than one national jurisdiction or State; or (b) It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or(c) It is undertaken in one State but has substantial effect in another State.
>
> 3. This (Legally Binding Instrument) shall cover all human rights.
>
> * * *

At first glance, the scope section of the Draft LBI appears much changed from the Zero Draft. And, indeed, reading Article 3 in isolation suggests that at its broadest, one can read the Draft LBI as applying to all business activities whatever its character. Some have

suggested that one of the great advances in the Draft LBI was its expand its scope to include all business activities. Carlos Lopez, for example, writes: "Among the most important changes operated in the revised draft is that it affirms that the scope of the proposed treaty encompasses all business enterprises, not just transnational companies, while still adding emphasis to businesses with transnational activities."[1]

But that optimistic conclusion is hard to square with the text of Article 3. A close reading reveals ambiguities that suggest that while the deck chairs have been moved around, the treaty "ship" might not have changed its "Zero Draft" course.

The deck chairs, of course, are the provisions on definition (Article 1) and statement of purpose (Article 2). Reading Article 3 in isolation When one speaks to definition, one generally refers to the meaning of words that are essential for the construction of the scope and purpose of a governing document. When one speaks to purpose, one generally refers to objects or ends to be attained. In contrast, when one speaks to scope, one generally refers to the extent of responsibility given the constraints of purpose/objectives, and the meaning of the terms that themselves contribute to the understanding of the extent and character of responsibility.

Section 1 does indeed provide that the Draft LBI "shall apply (...) to all business activities" But this broad statement is constrained in several ways First, this broad application is narrowed by any exception "stated otherwise." Second, the scope rule can only be as broad as the definition of "business activities" which itself looks to the transnational character of the source of activity (i.e., the transnational corporation or other business enterprise". Third, it is not clear how the scope rules modify either the sense of the meaning of the term "transnational corporations and other business enterprises" or how that may affect the application of the general principle of the scope rule (that it applies to all business activities) in relation to the scope principles embedded in the definition of "contractual relationship" in Article 1(4). Let us consider some of the implications.

First, the role of the exception clause, and its interpretive effects remain unclear in a number of important respects. First, it is not clear what is meant by "stated otherwise" either with respect to where that statement otherwise is located, and the extent to which that exception is subject to limitation. At its narrowest, perhaps, it was meant to refer to exceptions contained in the text of the Draft LBI itself, and then only to the extent the exception significantly aligned with the Draft LBI purpose. But that is not how the text is written.

But a broader reading would suggest the legitimacy of exceptions in other contexts. Thus, for example, it is possible that a state party could narrow the scope of Article 3 through treaty reservations. It is also possible to conceive of such reservation as limiting the scope of

1 Carlos López, *The Revised Draft of a Treaty on Business and Human Rights: A Big Leap Forward*, OPINIO JURIS, 15 Aug. 2019, available at https://opiniojuris.org/2019/08/15/the-revised-draft-of-a-treaty-on-business-and-human-rights-a-big-leap-forward/

the Draft LBI to only activities undertaken by one entity within the chain of "contractual relationships" (Art. 1(4)) that together constitutes a transnational enterprise. The only counter arguments available would be that such reservation would either run counter to definitional floors and /or undermine the purpose and objectives of the Draft LBI. Neither argument might be strong enough to give confidence. First, the definition of business activities retains its focus on the transnational character of "corporations and other business enterprises" (Art. 1(3)). Second, the purpose provisions of Article 2 are structured around the definition of "business activities" in Article 1(3). Third, the text's special emphasis ("including particularly but not limited to those of a transnational character") might suggest a greater tolerance for narrowing "all."

Broadest still would be a reading that permitted the exception to be written in to the domestic legal orders of state parties without regard to the treaty itself. That might make sense, especially since it echoes the constitutional role of international law within the domestic "higher law" of some important states. But it also suggests that, if the exception clause is read this broadly, that the scope of the Draft LBI, will vary from jurisdiction to jurisdiction in ways that cannot be managed through the treaty. The only constraint would be by application of Article 2 and the purpose and objectives provisions (read perhaps together with the Preamble and the definitions of Article 1). But that would require the development of a jurisprudence of fundamental treaty principles or at least the development of consensus in state practice., both of which would be risky and long term projects.

In addition, a substantial narrowing of the general rule of Article 3(1) might be written into the operational rules of those "regional integration organizations" defined in Article 1(5). That would not be inconsistent with the purposes of the Draft LBI, especially with reference to Article 2(c) ("the promotion of international cooperation").

But perhaps more curious than the language of the "exception clause" itself in Article 3(1) is the definition of transnational character" in Article 3(2). First, it is not clear why the definition of "transnational character" was placed here rather than in Article 1. Second, it is not clear what effect the insistence that the definition applies only for the "purpose of paragraph 1 of this Article." Both its emphasis and placement appear to undercut the argument that the "transnational character" of both business activities and of those who engage in them remains at the center of the treaty. Conversely, it suggests a tolerance but not a commitment to the principle that the treaty applies to all business activity whatever its form, source, context.

It is unclear why this definitional provision is inserted as Article 3(2), when it might have been better to place it in the Definition Section (Article 1). The choice of placement can be important. Placement in Article 1 suggests that the definition applies to the term anywhere in the text of the Treaty. In contrast it might be possible to suggest that definitions in Article 3 apply only within Article 3. It is also unclear why the definition is commanded to apply only for the "purpose of paragraph 1 of this Article [3]." One way of reading that is to assume that this definition is meant to inform the scope of the Draft LBI directly, and the rest

of the Treaty indirectly whenever the term "transnational character" is invoked. A more cynical reading would suggest that the drafters sought to have their cake and eat it too. By setting up Articles 3(1) and (2) in this way they could produce a formal expression of broad scope, and then include a mechanics, coupled with a black letter intent, to focus "particularly" (the language of Article 3(1) on business activities of a "transnational character." That would preserve the intent of the much criticized Zero Draft, but now cloaked behind the maze of complex legal text.

Bravo!

In any case, the definition is somewhat circular. Article 3/2) seeks to define the transnational character of business activity, by reference to the locus of activity. But "business activity" is itself dependent on the transnational character of the corporation or other business enterprise engaged in commercial or productive activity. In a sense, then, the transnational character of the *enterprise* is determined by the transnational character of its *activities*, but the transnational character of business activities is determined by the transnational character of the enterprise.

Lastly, Article 3(3) declaration of the legal scope (if that is what it purports to be) of the Draft LBI does little to resolve the core issue that has plagued the UNGPs and this treaty making project—the legal effects of human rights within the structures of traditional international law principles within which this Draft LBI project is deeply embedded. The drafters appear to want it both ways. On the one hand they want to deeply embed a new and improved UNGPs Second Pillar corporate responsibility framework within the structures of traditional international law. At the same time, they insist on bending the practice and approaches of international law to suit their ideological objectives of effecting deep cultural and societal changes through law but without adhering to the processes by which law acquires its legitimacy. This at its worst is normative transformation that effectively rejects the Rechtsstaat[2] process principles at the heart of rule of law and the democratic sovereignty of national constitutional orders.

Let us try to unpack this a little. Article 3(3) declares that the Draft LBI "shall cover all human rights." Curiously the term "human rights" is left undefined. The Treaty goes to some lengths to define "human rights violation or abuse" in Article 1(2) but not human rights itself. The curiosity comes form the dissonance between this statement in Article 3(3)—which appears to attempt scope human rights within its legal normative context—and the definition of human rights violations and abuses, which appears to develop a perhaps sounder *harm principle* basis as the touchstone for business activity responsibility. The deliberate ambiguity of the Article 3(3) statement does little to clarify or resolve this dissonance.

2 Trevor R.S. Allan, *Rule of law (Rechtsstaat)*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (1998), available at https://www.rep.routledge.com/articles/thematic/rule-of-law-rechtsstaat/v-1

Why dissonance? If Article 1(2) introduces a (salutary) harm principle at the heart of emerging international human rights *law*, then the traditional structures of human rights law making (in the form of international treaties to the extent they have found their way into the domestic legal order of states) assumes a secondary and perhaps complementary role. That is, traditional human rights law as text-based pronouncements shifts in function from creating rights, to describing the context in which harm can give rise to liability. But the central element, for purposes of behavior management, is the harm itself (or at least the possibility of harm). That approach is consonant with the move toward cultures of compliance and risk management around which global consensus is emerging.

Yet the ambiguity of the term "human rights" stands in the way of interpretation. The drafters deliberately did not use the term human rights law. They chose to avoid that term for obvious reasons—to have focused on legal standards defeats an aim set out in the preamble—to legalize an entire multi-generational cluster of hard and soft law, declarations, pronouncements and the like—without the bother and constraints of international law. But that, of course, is impossible. National judicial organs are rarely empowered to entertain claims that are not grounded in law recognized in accordance with the constitutional traditions of the state in which these judicial organs assert authority. Vague declarations or statements in treaties are hardly the stuff of law. And to the extent they may produce a legal obligation—on states—against which (if the constitutional order permits) a judicial organ might to able to compel compliance, they do not provide the basis for legal action.

On the other hand, such non-legal or international legalities might inform a national judicial organ in the exercise of its authority to provide a remedy against harm by elaborating conditions and policies from which harm may be discerned. While this is not without its own limitations, it at least provides something more traditionally workable. That may be all that the Treaty furthers—an international poy of ideas from which national courts may draw to suit their needs. But that produces no net contribution from the Treaty. In this case it might have been better to establish an international organ to deliver non-binding interpretations of the Treaty for the use of courts than the system actually put in place. Here, again, the model of the European Court of Justice (absent its mandatory character if necessary) might have served the Treaty drafters better.

That does not appear to be the intent here. Instead, what appears to have been created is a way in which the Treaty itself could avoid that contentious issue (what human rights are legally cognizable (actionable) under the treaty?), and its companion issue (can the Draft LBI be a vehicle for transforming declarations and other non-legal actions at the international level into duties with legal effect?) The most reasonable interpretation, however, may be the least satisfying to the Draft LBI drafters. Article 3(3) permits a state to incorporate by reference into its domestic legal order all human rights related statements, declarations, law, etc., to the extent identified in the Treaty Preamble.

At its broadest this incorporation would extend (and modify to the extent incompatible) any constitutional constraints on that effort. This would then have the effect

of constructing Article 3(3) to operate in parallel to Article 3(1) with respect to scope. But that causes the same challenge already noted in Article 3(1) flexible scope provision. States may, if they choose, read Article 3(3) this way: "This (Legally Binding Instrument) shall cover all human rights as and to the extent they have been incorporated into the laws of (State) and are not otherwise incompatible with its Constitutional provisions." That provides a far narrower scope to the Treaty. It also continues the pattern of treaty writing that appears to produce uniformity but actually invites substantial and potentially incompatible fracture. We end where we start—a global order in which states can do as they please, provided they adhere to the forms of the treaty to which (subject to reservations) they have become parties.

E. Section 2 of the Draft Legally Binding Instrument (Victims; Prevention; Legal Liability; Jurisdiction; Statute of Limitations; Choice of Law; Mutual Legal Assistance)

Article 4: General Analysis of Framework and Structure.
Larry Catá Backer

Article 4: Conceptual Foundations.
Flora Sapio

Article 4: A Granular Textual Analysis.
Flora Sapio

Flavors of the Month Rarely Outlast their Novelty: A Close Examination of Article 4 and the Construction of the Victim as a Legal Category.
Larry Catá Backer

Article 5: A Partial Legalization of the UN Guiding Principles Corporate Responsibility to Respect Human Rights Pillar—Textual and Conceptual Analysis.
Larry Catá Backer

Article 5: From Text to Concept and Politics.
Flora Sapio

The Genesis of Articles 6 – 12
Flora Sapio

Article 6: A Conceptual Analysis of the Conundrums of Legal Liability.
Larry Catá Backer

Article 6: Section by Section Legal Analysis and Treaty Misalignments.
Larry Catá Backer

Articles 7-9: The Substantive Consequences of Boilerplate, a Textual Analysis.
Larry Catá Backer

Article 10 (Mutual Legal Assistance): Smoke and Mirrors?
Larry Catá Backer

E. Article 4 (Rights of Victims)

Article 4: General Analysis of Framework and Structure

Larry Catá Backer[1]

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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[1] All pictures © Larry Catá Backer 2019.

[2] In addition to this essay see infra Flora Sapio, *Article 4: Conceptual Foundations and Granular Textual Analsis*; 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 intimation 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 14then 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.

Article4, 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 ion 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.

E. Article 4 (Rights of Victims)

Article 4: Conceptual Foundations

Flora Sapio[1]

This essay is the second of a four part examination of one of the central elements of the Draft Legally Binding Instrument (DLBI)--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.

In theory, everyone ought to be treated with humanity and respect for their dignity. Everyone ought to enjoy a right to fair, effective, prompt, non-discriminatory access to justice, and to the entire panoply of substantive and procedural rights. That is true regardless of whether a person has suffered harm or not. By devoting Article 4 to a separate category of rights and rights-holders, the DLBI can produce the unintended effect of restricting the scope of these and other rights.

The title of Article 4 of the LBI is "Rights of Victims". Having defined who "victims" are in Article 1, Article 4 establishes an attributive relation between "rights" and "victims". Before exploring other aspects of Article 4, it is important to understand what is the attributive relation that the title of Article 4 establishes, and the logical and interpretive opportunities and constraints this attributive relation introduces.

The subject of the attributive relation are "victims". Victims are persons who have been harmed by a crime, or by any other action. The word "victim" however carries other connotations — those of passivity and helplessness — that can conflict with notions of the autonomy of individual human beings. These connotations exist side by side with the meaning of "victims" as "persons who have been harmed". They cannot be eliminated from this word. *Yet, these two meanings of the word "victim" are detachable*. One can be a victim because she was subject to harm. But, one can also be portrayed as a victim by those with a vested interest in constructing such a representation. One can choose to don the mantle of "victim" because, in this way, she can

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get what she wants at little or no effort. These meanings exist above and beyond the definition adopted by the DLBI. They will shape how the DLBI will be used, or taken advantage of.

The object of the attributive relations are "rights". If some rights are "of victims", then those rights *belong to* or *are possessed by* victims. Alternatively, *some rights originate from the condition of being a victim.* "Victim" is an autonomous status in international law. All persons enjoy the same rights. When a person suffers a crime, she should be acknowledged as someone who has suffered a crime, be protected, receive assistance, obtain justice, compensation or restoration, etc. These rights exist for everyone, regardless of whether a person has suffered harm. They are always there to be claimed at the appropriate moment. They cannot be attributed *ex post* to any sub-group of human beings, which is what the choice of the word "victims" does.

The entitlement to the rights acknowledged by the DLBI then *seems to depend on something else than the minimum common denominator of being a human (having the body of a human being).* Human rights are no longer an attribute of human beings, but a combination of discrete statuses, some of which can originate from harm, or even from mere allegations. If this was the intention behind the choice of the title for this article, then the rights listed by Article 4 *would not exist in the context of business*, until the very moment when they would be "triggered" by those who can prove a violation has occurred. Or by those who can reach a sufficiently broad audience, claiming that a violation has occurred. Allegations may, in principle, be made by NGOs, but also by States, supranational organizations, movements, or even business enterprises. Each one of these actors may, at the same time, be the object of allegations made against them, by anyone who could credibly speak on behalf of "victims".

In any case, creating an attributive relation between "rights" and "victims" produces the following logical consequences:

a) the rights listed by Article 4 need not exist in those States, businesses, territories and circumstances where no violations of human rights allegedly occur during economic activity. In the absence of violations of rights, there are no "victims". And if there are no victims, the rights attached to them are not needed.

b) the rights listed by Article 4 do not exist for those persons who, due to the most diverse reasons, suffer an actual harm, but cannot enjoy the status of "victims."

c) the "rights of victims", and possible remedies to their violation, are of very limited or no concern to business enterprises, given how the DLBI "speaks" to the State and to "victims."

d) in the "world" created by the DLBI, all those rights not listed by Article 4 seem to be of secondary importance to "victims."

Article 4 builds on Article 8 of the Zero Draft. Earlier commentaries to Article 8 observed how the article did not consider enterprise-based and multi-stakeholder grievance mechanisms. The entire burden for remedying the harm caused by enterprises was instead shifted to the State. In fact, article 8 focused for the post part on the remedial obligations of the state. That trend has persisted in Article 4 of the Revised Draft. This article however contains a longer catalog of human rights.

A. Paragraph 1

The goal of article 4 is avoiding that those harmed by corporations are further harmed by the State when they seek justice. Therefore, one would expect Article 4 to contain only a list of those rights the State needs in order to fulfill its remedial obligations. The article instead opens with a declaration of principle, that perhaps could have found a better place in the Preamble:

> [Paragraph 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.

This is a proposition anyone would agree with. But, paragraph 1 does not specify who shall treat victims of human rights with respect, etc. This might be a duty of the State, given 8 out of 16 paragraphs in this article list existing obligations of the State. But, it might be a duty of business enterprises. The goal of Article 4 is avoiding re-victimization. But re-victimization can occur at the hands of business enterprises as well. Another possibility is that victims be further victimized by individual persons who are not connected to the State, or to enterprises. For instance, victim that tried to obtain justice by describing their plight on social media may be easily made a target of cyber harassment.

Retaliation by business enterprise, cyber harassment by private citizens, and other possible abuses may have an impact on the persons' willingness and/or ability to seek a remedy. But, if these forms of violence do not occur during the remedial process, or if they do not involve State actors, it seems, then they are perhaps not relevant to Article 4.

B. Paragraph 2

In any case, Paragraph 2 states that:

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

This paragraph attributes different substantive rights to victims. In the absence of these rights, a person is unable to seek remedy. By the logic of paragraph 2 if a victim has not yet been killed or maimed by agents of a business enterprise; if it is not held captive; if it is allowed to exit the sweatshop then she enjoys some of the rights that enable access to justice.

But a person who has already been harmed by a corporation should also:

> (1) be able to publicly speak against her employer, without fear of losing her job or life;
> (2) be able to organize strikes, demonstrations, sit-ins; to occupy factories, shops, government buildings, railroads, highways, etc.
> (3) be able to organize groups and/or associations.

In the "world" of the Draft LBI, all these rights are essential to enjoy access to remedy.

Unfortunately, the ability to access to legal advice and to seek remedy is often curtailed by the lack of the economic means. Also, the violation of rights by enterprises usually starts with a violation of the economic rights of persons. Those who seek work at textile sweatshops perhaps do so because they cannot access better employment opportunities. Those who depend for their livelihood on their salary and have no other sources of income may enjoy the right to freedom of speak, association, etc. in the abstract. In the real world, acting upon those rights easily leads to losing one's means of support. And yet access to justice costs money. Economic rights are not among the rights listed under Article 4.

Paragraph 12(c) grants to victims only those economic rights that are strictly necessary to *"avoid unnecessary costs or delays for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards."* Providing judicial and non-judicial remedies costs money to the state. Therefore, it is in the State's own interest to avoid "unnecessary costs". Delays reduce the quality of domestic judicial systems, with all the consequences that this implies. Paragraph 12.c might be more concerned about maintaining the efficiency and the quality of domestic judicial systems, and non-judicial remedies, than the rights of "victims".

Paragraph 13 instead grants to victims only the measure of rights that is needed to commence proceedings:

> *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.

Paragraph 13 begins by stating the intention that persons who are unable to pay the administrative costs of judicial and non-judicial state-based remedies, and are unable to pay "other costs" shall be entitled to commence proceedings. This article does not specify what the "other costs" are. Yet, in order to commence and continue proceedings, a victim who may be without means of livelihood would have to support herself first. A person who is facing eviction, for instance, perhaps has more stringent concerns than starting proceedings against the enterprises that fired her. Presumably, the "other costs" in Paragraph 13 refer to lawyers' fees, transportation fees, and so no. But, this is not specified in the article.

It can be imagined, based on Article 13 Paragraph 7, that the eligible costs will be covered by the International Fund for Victims. The fund should solve the problems of obtaining legal aid, and financial aid for all the costs involved in bringing legal action against a multinational corporation.

The Fund, however, will be established X years after the entry into force of the Legally Binding Instruments. The Funds will also be regulated by provisions defined by the Conference of State Parties.

Despite the good intentions stated by Paragraph 13, and by Article 13 Paragraph 7 of the Revised Draft, it seems that those who have suffered an economic harm at the hands of multinationals, and do not have the economic means needed to: participate to strikes, protests, demonstrations, organize unions and associations, disseminate their ideas etc. will enjoy a portion of their economic rights only if and when the Conference of State Parties will be up and running.

C. Paragraph 3

Paragraph 3 instead focuses on a different sub-set of rights: "*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.*"

These rights are not only attributed to victims, but also to their representatives, to their families, and to witnesses. Based on the definitions contained in Section I of the Revised Draft, "representatives" may refer to:

(1) legal counsel chosen by the victim;

(2) legal counsel provided by the State, or by a non-governmental organization;

(3) legal counsel provided (or paid) by a business enterprise as part of the enterprises' corporate social responsibility programs;

> (4) a person who speaks and acts on behalf of a "victims", regardless of whether the victim agrees to be represented by such an agent, or the "victim" is aware that someone else is speaking and acting on her behalf.

"Witnesses" may in principle refer to those who have seen an abuse as the abuse was taking place, and to those who have a third-hand knowledge of the abuse. The notion of witnesses therefore may also include the management, the employees of a multinational corporations. But also sub-contractors, or persons with a direct or indirect stake in invoking privacy rights for second motives.

Regardless of the different roles these parties would play in enabling the "victim" to obtain justice, they all enjoy equal rights. The right to privacy could allow to:

> (1) speak and act on behalf of a "victim" anonymously, online, offline, and through all media of communication;
>
> (2) disclose videos of the "victim" being beaten or otherwise abused, without the knowledge of the victim;
>
> (3) refuse to disclose information to the media, or to other parties, on grounds that the victim does not consent to disclosure, or that the information is private information of those who "represent" the victim or have witnessed an abuse

Needless to day, legislation about privacy is not homogeneous across legal systems. Notions of privacy shaped by culture, religion etc. widely different across countries. In the absence of a definition of what "private information" is and given the gaps between legal definitions and cultural perceptions of "privacy", this paragraph may produce unforeseeable results.

D. Paragraph 5

Sometimes the procedural aspects of access to remedy can lead to restricting the scope of rights. Or even to prioritizing some categories of rights over others. This is the case of economic rights, that have been discussed above. Sometimes, the procedural aspects of access to justice and remedy can become laden with values. This is the case, for instance, of the adjectives used in Paragraph 5, to qualify how access to justice and how remedies ought to be:

> *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.

Jurisprudence exists about the meaning of the words "fair", "effective", "prompt", "adequate", and "non-discriminatory". Here the Legally Binding Instrument introduces a link between itself and "international law. That link has been established with regard to the meaning of the adjective listed in the first sentence of Paragraph 5. But not elsewhere in Article 4.

Paragraph 5b, for instance, does not contain a connection between itself and the "polluter pays" principle. The making of that connection would have been useful to specify who should cover the expenses for environmental remediation and ecological restoration.

Also "environmental remediation" and "ecological restoration" may be entirely different measures, in practice. "Ecological restoration" refers to bringing back a natural environment to its original condition. But there is a tipping point past which a natural environment can no longer be brought back to how it once was. The Revised Draft foresees this possibility, that is indicated by the words "where applicable". The applicability of restoration measures versus remediation will be decided based on national policy, and law. Environmental remediation may include various measures and possibilities. The only possibilities that come to attention of Revised Draft, however, are those of paying for relocating victims, and providing them with a different set of community facilities. Relocation, whether agreed to by victims or not, may also be understood as a synonym for "environmental remediation."

Centuries ago, the philosopher Isaac Luria observed how the separation of the essential unity of the world could produce a game of appearances and illusion. In our modern world, attempts to regulate the activity of a single, complex system – the multinational corporation – by fragmenting that system into discrete components and actors might produce confusion and uncertainty. Articles 1 to 3 of the Revised Draft of the LBI perform part of this fragmentation by setting the interpretive boundaries of the Treaty. But it is in Section II of the Treaty that the actual separation of the First Pillar of the UNGPs from the rest of that document occurs.

E. Article 4 (Rights of Victims)

Flavors of the Month Rarely Outlast their Novelty: A Granular Examination of Article 4 and the Construction of the Victim as a Legal Category

Larry Catá Backer[1]

A "flavor of the month" has come to mean a thing or idea that is intensely popular but only for a short period of time, and then fades back to the obscurity form which it emerged for a moment. Law and policy also has its constant parade of flavors of the month—especially among those who drive both. The essence of the baseline premises of Article 4 (Rights of Victims) might be understood as a flavor of the month, especially in the sense of its objectification of certain rights holders reconstituted as "victims." The arc of intensity around an object that may well fade from favor serves as the starting point for this examination.

The Coalition for Peace and Ethics BHR Treaty Project has been spending a considerable time focusing on the "victim" in the Draft Legally Binding Instrument (Draft LBI). There is good reason. The "victim" (not any rights holder) is the ideological centerpiece of the Draft LBI. Indeed, in a large sense, the Draft LBI is not about human rights, but about the victim's relationship to human rights, now understood as a relation between a victim and harm. As much as the chattering classes might wish to wave this away through the legerdemain of academic discourse and a resort to the usual populist (clothed in the pretensions of the academic) slogans that have been used to drive the human rights project for the last generation, there is no escaping the victim in this Draft LBI. Victims. after all, have been *defined as any person or group that has suffered a human rights violation or abuse*, which, in turn, is *defined as any harm caused in the context of business activities* (including impairment of human rights). And business activities are defined as *any economic activity*--although in this case one caused only by transnational corporations and other

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business enterprises. The victim, then, is the object of any harm arising from the economic activities of transnational corporations (now all transformed into human rights harms or abuses).

But Article 4 is not about the "rights of victims", despite its title, to the extent that it means to specify those rights which the Draft LBI is meant to single out for protection, that is those rights, the breach of which transforms a person or group into a victim (and thus refining the "harm" principle of the definitions in Article 1). Rather it concerns the protections afforded victims once so transformed. And like the process of extracting normative principles from definitions, the process of vesting victims with rights (again *rights that vest post harm*) also carries with it textual and principled challenges. A still larger problem (though one with respect to which legal systems have some considerable experience) is that these significant rights are conferred on people and groups who have alleged but not yet prevailed on their claims of harm. That gives rise to the presumption that the allegation alone is sufficient to give rise to additional rights (which presumably fall away from the allegations are either satisfied, disproven or otherwise resolved).

What follows is a brief set of suggestions of the character of those challenges embedded in the 16 paragraphs that make up the catalogue of victim post harm rights. The text rich with ambiguity well beyond the possibility of capture in this short essay. The object here is more limited; these general comments provide the gist of the drafting challenges for the Draft LBI drafting core group with a text that remains stubbornly resistant to straightforward service.

A. Paragraph 1

One starts with drafting basics. The term "Victims of human rights violations" does not correspond to the terms that the Draft LBI took the trouble of defining in Article 1. One expects that this is a ministerial drafting glitch. But once adopted, a glitch becomes a cause of jurisprudence interpretation. And here the possibilities are substantial, especially if somehow a victim of human rights violations includes a class of persons or groups in addition to (or a subset of) victims of human rights violations or abuse. A small matter, certainly, but not for litigators.

Sadly, the terms "humanity" and respect for their dignity and human rights" are not defined. It is not clear what these are meant to mean. And more importantly it is not clear whether these create rights beyond those afforded to people within the constitutional traditions and principles of adhering states. On the one hand, every state will argue that they already do so—and that the current bickering is about differences in context and the meaning of terms on the basis of the core principles of domestic political-economic orders. On the other hand, the effort to write these in might tempt a court (or a litigant) to argue that they point to a set of rights beyond national constitutional principle. These perhaps reside in international law, or somewhat more problematically form a legal perspective, in international norms (declarations, soft law and the like). Perhaps it resides in private international law principles, but then that would invert the traditional hierarchies of law

within a domestic legal order. *As framework principle the statement works well — but not as law*.

B. Paragraph 2

Here the problem of post-harm versus pre-harm rights becomes much more apparent. One assumes that given the construction of Article 4 that these guarantees are to be accorded only to victims and only after, in effect, the victims (in order to become one) has asserted the suffering of a harm caused by economic activity. But that makes for odd reading. It suggests that there is no duty to guarantee such rights before an individual or group is harmed. And more importantly, perhaps, that post harm groups are entitled to rights traditionally reserved for individuals in many constitutional orders. To extend individual rights to groups without democratic action is itself a breach of the human rights to state and democratic integrity which ought not to be usurped by end running national democratic constitutional processes through treaty making. None of this was intended, to be sure, but the language itself permits such readings —and worse. *Again, as framework principle this language works well —as law it does not.* And even as framework principle it requires some textual revision —especially to make it clear in the text (rather than in the intent of people whose intentions will carry no weight once the text becomes authoritative) that, at a minimum, the guarantees are meant to extend these basic constitutional (and human) rights to individuals especially during the course of their efforts to vindicate their rights (or in the language of the treaty to seek a remedy for harms suffered from human rights violations or abuses).

C. Paragraph 3

It is not clear what was intended beyond the annunciation of yet another framework principle. Protection from unlawful interference states the obvious, and it adds little to the duty of states to force them to declare that they will do what they are constitutionally burdened with doing. What is more intriguing is the reference to retaliation. Here the Draft LBI means to transpose a concept of private law into the public law complex that is state based remedy. But there are problems. First it is not clear against whom is the victim protected from retaliation; there are some likely suspects — the state, the harming transnational corporation, or people or institutions under their direction or control. But the object of the law should not be to make people guess as to its scope. And yet that is what Paragraph 3 requires. Moreover, it is not clear whether intimidation and retaliation are meant to be extended only to the extent that the domestic law of a jurisdiction defines and applies these principles (somewhere); or whether there is meant to be a uniform interpretation of the terms. And yet here the Draft LBI missed an opportunity to provide an important definition.

D. Paragraph 4

This paragraph is particularly difficult and requires some breaking down to discern its object beyond the collection of key terms arranged like ink blots on a Rorschach test. First, Paragraph 4 confers victims with a specific benefit (arguably not necessarily available to other rights holders until they suffer the sort of harm that triggers Draft LBI obligations). That benefit is "special consideration and care" directed toward the avoidance of "re-victimization in the course of proceedings." This is laudable as framework principle, but somewhat murky as law. For one, the terms may have no meaning within the law of a domestic legal order. If that is the case, then, meaning might have to be supplied by international organs — but that meaning itself might be constrained by its plausibility under the constraints of national constitutional traditions.

For another it suggest, though it does not make clear, that such special consideration includes what must be understood as a state duty to conform their law in some interesting though not necessarily obvious ways. These include making a mechanism like a protective order available against economic and state entities — including orders compelling positive action. But the paragraph need not be read that way — it can be reduced to a direction that the judicial and prosecutorial machinery be sensitive to the position of treaty victims. For another "substantive gender equality" and "equal and fair access to justice" does not necessarily mean the same thing in different states. But that is well known. So either Treaty drafters are happy to embrace difference (and the possibility that such terms will be defined to favor economic enterprises in those states mindful of their role in national stability), or more troubling they understand that such states' autonomy will be reduced in fact by a vigorous program of extraterritorial jurisdiction asserted by powerful states culturally in step with the ideologies and pretensions of the treaty drafters and their communities.

E. Paragraph 5

This paragraph has the very salutatory purpose of embellishing the reference to equal and fair access to justice of Paragraph 4. It internationalizes the terms as well as the forms of remedies. One can agree or not, but at least one has here something a court (and litigants) can hold on to. The real question in better written provisions like this one is whether (and this might have been an idea worth considering) the basic principles of European Union law with respect to directives (direct effect and the like) ought to apply to provisions of this sort. Here the treaty drafters missed an important opportunity to broaden the influence of the EU jurisprudence model in an area where it would have made some sense.

F. Paragraph 6

Access to information is fundamental, and this works as a framework principle. Again, the problem is that either this is read within the procedural rules and principles of a domestic legal order (and those differ substantially), or there is an attempt at internationalization and uniformity at some level. But the later would have required something like the draft toward

precision in Paragraph 5 rather than the more abstract language used. This language gives victims nothing they did not have before.

Perhaps this might have been embedded in Paragraph 4 ("special consideration"), or it might have been rewritten to specify the nature and extent of information — one might expect relevant to their claims. But as US litigation over Rule 26 of the Federal Rules of Civil Procedure[2] have evidenced, access to information can be broadly or narrowly construed and that depends both on text and the principled context in which those questions are considered by a court. Much more to the point, "relevant" is probably the least likely word to have been chosen to fulfill the broad rights intent of Article 4, and there is no guarantee that a court would read either Article 4 of this Paragraph broadly. Yet that is precisely what the drafters appear to be banking on, unless they are banking on the certainty that the draft will be made more acceptable if ideological enemies see in its ambiguous text enough room to take the treaty in the direction they want.

G. Paragraph 7

This Paragraph starts with an oblique reference (on part perhaps) to Article 36 of the Vienna Convention on Consular Relations but doesn't bother to specify points of international law that might be hardened in particular ways to further the aims of the Draf LBI.

Article 36 of the Vienna Convention provides that when a foreign national is “arrested or committed to prison or to custody pending trial or is detained in any other manner,” appropriate authorities within the receiving State must inform him “without delay” of his right to have his native country’s local consular office notified of his detention. With the detained national’s permission, a consular officer from his country may then “converse and correspond with him and ... arrange for his legal representation”[3] Article 36(2) provides that these rights “shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”

But then it seeks to use that as a touchstone for a much broader (though positive) catalogue of duty. Here the language gets in the way. It would have been more useful to write this in ways that would have been unacceptable but necessary — by imposing these directly as obligations of the state (e.g., "the state shall amend its laws to ensure that victims shall have access. . . . ") enforceable against it and its representatives.

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2 On the amendment see, e.g., Margaret L. Weissbrod, *Sanctions under Amended Rule 26--Scalpel or Meat-ax —The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 OHIO ST. LJ 183 (1985); Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806 (1981).

3 *Vienna Convention on Consular Relations* (596 UNTS 261, TIAS 6820, 21 UST 77).

H. Paragraph 8

This deals more directly with the reform of the law of civil procedure in the courts of the state in which a victim seeks remedy for harm cognizable under the treaty, even though the treaty cannot confer such rights directly in many cases, or under domestic law that has been modified to conform to treaty obligation. It is not clear whether it also requires a state to commit to the development of state based non judicial remedies where those do not yet exits, or whether, in the absence of such a mechanism the victim may seek to transfer the action to a state with that remedial mechanism.

But paragraph 8 also deepens the passive reflexivity built into the "victim" concept by detaching the remedial right from the body of the person or group on which it was inflicted. Usually this is the pattern in cases where the state can assert the old royal prerogative and stands as *parens patriae* for its "children" since acts against them are treated as acts against the body of the sovereign. In the United States this device has been expanding in recent years as the state has taken for itself and from "victims" the rights to assert claims in antitrust (competition) law, securities law and other areas beyond the criminal law. But here the royal prerogative is delegated to anyone who meets the fairly open-ended criteria for representation ("unless that person can justify acting on their behalf"). It is not clear that such a rule is currently widely accepted (when exercised by some one other than a guardian or conservator) or that state will not reserve against this even if they accede to the Treaty.

I. Paragraph 9

This paragraph is directed toward civil society. Again, it works better as a framework treaty principle than as law. It is meant to introduce a (legal?) concept of "enabling environment" for a class of persons and organizations otherwise not defined except by reference to their objectives ("promote and defend human rights and the environment"). Virtually everyone on earth can make a claim that they fall within this definition. But that was clearly not intended — yet there is no legally useful standard that a court could use (much less an official in public or private institution) to determine who falls within this category and who does not.

J. Paragraph 10

This is an odd provision. It is odd because it is unmoored. If remedial rights are private rights asserted by a victim against an economic entity with respect to harm, then as a private litigation the role of the state is usually limited to the provision of a safe and effective judicial mechanism. And yet here there is an open-ended commitment for state investigation. This might imply that all such judicial or remedial actions also trigger some sort of administrative action, or prosecutorial action under a criminal law But that is a question left to national courts, depending on the extent to which this provision is actually transposed into municipal law.

In either case neither an administrative rule structure nor a criminal structure is described. The paragraph is abstract int he sense of providing a principle but no legal basis for its implementation. Again, here one is in the realm of the drafting of a framework Treaty rather that an instrument of international law (except as principle) of any utility for the objectives to which it is pointed. It is also not clear how states can take action against an individual within its jurisdiction under international law unless that law has been domesticated, and domesticated in a form in which it can be applied as law. I am reminded here again of EU jurisprudence with respect to direct effect[4] in which one of the constraints was the determination that the directive was written in a way that required no further textual action to put it in the traditional form of statute. Here one is nowhere near that standard.

K. Paragraph 11

This paragraph ought to be read in tandem with Paragraph 6. And yet there is a missed opportunity to have drafted them in parallel. Paragraph 6 is written in the nebulous passive tense — suggesting an unattached and unspecified obligation with respect to a principle. This paragraph points to the state. But it is limited to "facilitation" of access rather than the production of information. More important is the limitation of the obligation "in a manner consistent with their domestic law."

L. Paragraph 12

This is a rather long provision that fleshes out the meaning of effective legal assistance. There is some redundancy (for example, Paragraph 12(a) and paragraphs 6 and 11). Paragraph 12(b) speaks to the guarantee of a right to be heard, but it is not clear what that means — to give testimony, to speak, to be present or the like, and in any case is again constrained by the legal traditions of the state in which the proceedings are hosted. Paragraph 12(c) is murky and contextual ("avoidance of unnecessary cost or delay). That means one thing to a large transnational corporation; it means something entirely different to "victims" and it has a different sense in New York and in Papua New Guinea. That may well be a natural reading, but the resulting strategic use of place may work against the intent of at least some of the drafters. Paragraph 12(e) is likely the most helpful, but the burden of proving poverty may be difficult to meet. More importantly, it says nothing about the obligations of NGOs and others who bring actions on behalf of victims. That is a drafting gap that is significant.

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4 Michael John Garcia, VIENNA CONVENTION ON CONSULAR RELATIONS: OVERVIEW OF U.S. IMPLEMENTATION AND INTERNATIONAL COURT OF JUSTICE (ICJ) INTERPRETATION OF CONSULAR NOTIFICATION REQUIREMENTS, CRS REPORT TO CONGRESS (May 17, 2004). See, e.g., *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.

M. Paragraph 13

Inexplicably, the focus of Paragraph 12(e) continues in Paragraph 13. They might have been better placed together but that is a drafting choice and perhaps of little interpretive effect. But the real problem of Paragraph 13 is the tension between its first and second sentences. The first sentence suggests that administrative costs are no barrier, but the second sentence suggests mechanisms for (discretionary) waiver. It seems that it might have been better to have insisted that such fees and costs are waived subject to some sort of means test, or that the state might waive these in its discretion subject to constraints. And the obligation to assist victims in sentence 2 appears to imply that the barrier might still exist (contra sentence 1) if the assistance proves inadequate.

N. Paragraph 14

This section goes to enforcement of remedies. The issue of enforcement of foreign judgments has been contentious for a long time even in the less controversial areas of tort and contract. In many cases international law has begun to manage this area. The question here is the extent to which the provisions of this Treaty will mesh within this well-developed system for the management of remedies enforcement in a transnational context. But more interesting is the issue of domestic judgments. Here there ought to be a role for Paragraph 12(c) (fees and costs), but the provision is silent on the connection. And indeed, it is silent on the issue of the costs of enforcement. That is a pity.

O. Paragraph 15

This provision also appears to relate to those who are the active protectors of the passive "victim" — a group already treated to some extent in Paragraphs 8 and 12. It might have been meant to write in protections for human rights defenders into the Treaty. That is laudable but this is hardly the way to go about it. That is because here the object is the protection and conferral of rights to victims. And in this context the rights acquired by "persons, groups and organizations that promote and defend human rights and the environment" ought to be related to their defense of victims in the specific circumstances of the Treaty. But read broadly the paragraph appears to try to do something more. One way to read this is that the Treaty means to confer on these human rights defenders all of the rights of victims without the bother of suffering human rights violations or abuses. On the other hand, they certainly become victims when those harms occur. But the only rights protected--beside those of Article 4, are those related to human rights harms (article 1) against which they are already protected.

P. Paragraph 16

The value of this Paragraph is its clarity — as far as it goes. The difficulty is the broad discretion that it permits (a "where needed" standard does not inspire confidence in the ability of the instrument to meet its objectives). The other difficulty is the way in which what appears to be given (the reversal of burdens of proof) are themselves taken back ("subject to domestic law"). Moreover, leaving this to the discretion of the court is itself problematic. Lastly, such a possibility may well be impossible under the constitutional principles of several states. Beyond that, the idea of reversals of burdens of proof is intriguing. There might have been more plausible alternatives (e.g., shifting some elements of claims from the plaintiff to defendants as affirmative defenses). But these are unexplored.

E. Article 5 (Prevention)

Article 5 (Prevention); A Partial Legalization of the UN Guiding Principles Corporate Responsibility to Respect Human Rights Pillar—Textual and Conceptual Analysis.

Larry Catá Backer

Article 5 of the Draft LBI is a curious oasis in an environment in which the focus of attention has been on the construction of a legal subject--the victim--and a remedial structure around the notion of actionable harm. The curiosity goes both to its form and content. It goes as well to its relationships with other key provisions of the Draft LBI--all of which are left to conjecture (or better put, to the vagaries of litigation and the post hoc complaining of the academic classes and civil society dissatisfied with ruling that might not go their way). From a strategic and political point of view the curiosity springs from what appears to be an effort to shoehorn the guts of the UN Guiding Principles Second Pillar[1] hallmark, its human rights due diligence framework, within the structures of the Draft LBI.

But let's start at the beginning. Article 5 speaks to "prevention." The etymology of the word tell us much about its psychology (or at least what the Draft LBI's drafters had in mind).

> mid-15c., "action of stopping an event or practice," from Middle French *prévention* and directly from Late Latin *praeventionem* (nominative *praeventio*) "action of anticipating," noun of action from past-participle stem of praevenire (see prevent).[2]

Where Article 2 spoke to "purpose" (strengthen, prevent, promote), Article 3 spoke to "scope" (business activity playing coquette to that roguish element--transnational character, covering "all human rights"), and Article 4 spoke to victim's rights (special rights and special consideration for individuals whose allegation of harm from human rights

1 U.N. GUIDING PRINCIPLES FOR BUSINESS AND HUMAN RIGHTS ¶¶ 11-24 (New York and Geneva, United Nations, 2011).

2 Prevention, ONLINE ETYMOLOGY DICTIONARY, available https://www.etymonline.com/word/prevention.

violations or abuse catapults them into the status of victim and thus eligible for its Article 4 privileges), Article 5 turns its attention to *victim maker*s.

Article 5 then creates an almost poetic oppositional binary. The Draft LBI's purpose and scope are broad; victims are beneficiaries of special consideration and positive rights that are triggered by the allegation of harm suffering, which they are encouraged to advance. In contrast, *victim makers* are to be stopped. They are to be stopped from engaging in certain practices; they are to be stopped from certain decisions or transactions. This stopping and avoiding is meant to occur *before the fact* — Article 5 imposes a framework grounded in anticipation rather than in remediation (that comes later). This single word — prevention — when correctly understood in its cultural-historical context tells one much about the framing and development of the 6 paragraphs that follow. Yet that is not quite true, for what follows then strip's away the broad scope of the overtones of the title of the Article in ways that mirror both the weakness of the Draft LBI's drafting and the politically questionable constraints on its scope and application. what follows

These greatest of these lacunae: *victim makers* do not include the state nor other actors who might engage in economic activities (an enormous irony equaled only by the hole in the treaty that lacuna represents). Instead, and in a rather sloppy way (in part because it appears to play fast and lose with the discipline of the definitions crafted for Article 1) Article 5 speaks to "business enterprises" (§1) and to "persons conducting business activities" (§2); but it also speaks of "commercial and other vested interests of persons conducting business activities" (§ 5). And, drawing from the quite limiting scope of the definitions of business activities and contractual relations. These make it clear that the principal focus of the Draft LBI are the commercial activities of private parties — the state and other institutions whatever their connection with economic activities get a pass.

That this fundamentally weakens the treaty in a world in which states are increasingly engaged in commercial activities, and always engaged in economic activities, and other institutions also affect the lives of those around them in ways quite intimately connected with the spirit of "human rights" (we will get to the knotty problem of definition later), ought to give substantial pause. But the cynic would not have qualms; for them it might merely conform that the object of the treaty is to advance the interests of those who wrote it against the groups these might consider their political, economic, social or cultural enemies. This hardly inspires confidence, and reduces the likelihood of legitimacy of any final product. In this respect Article 5 seems to pain the Draft LBI as a sort of perverse time machine sucking its reader back into that maelstrom which was the New International Economic Order.

The second, the elephant in the room that is Article 5, is the UNGPs, whose human Rights Due Diligence forms the core of Paragraph 2, and whose focus on prevention and mitigation infuses the rest. And yet, neither reference nor connection is to be found in Article 5. The Draft LBI is not the first instrument that borrows form the UNGPs. Indeed, that honor might well go to the OECD's Guidelines for Multinational Enterprises — but there the connection was positive and transparent. States have begun to use some or all of the

concepts around human rights due diligence, and its Second Pillar related concepts of prevention, mitigation and transparency in their own CSR law making. In February 2019, for example, the German Federal Ministry for Economic Cooperation and Development was reported to have drafted a law on mandatory human rights due diligence for German companies and their supply chains.[3] *The issue is not one of vanity. It is one of interpretation and of regulatory coherence.* Here the problem of interpretation is acute — especially for an instrument that purports to be law not policy or framework. A court faced with the obvious would have to decide: is Article 5 written (a) against the UNGPs; (2) in a way that is meant to incorporate only some of its terms; (3) to draw on the UNGP sfor interpretation and gap filling; or (4) without reference to the UNGPs, their rich history and their interpretive baselines?

That takes us to a brief consideration of each of the sections that make up Article 5.

Paragraph 1

Paragraph 1 is fairly straightforward. It provides:

> State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.

Paragraph 1 is written in the style of a European Union directive but without the enforcement heft behind it. It speaks to a duty undertaken; certainly, a legally binding duty — binding on state parties. But it creates no direct rights on which people (including the Draft LBI's "victims") may effectively rely on ass law within the courts of the state sin which they might seek to vindicate their rights (pre or post harm). There is nothing wrong with that, to be sure. But it does not advance a legal regime.

That advancement is further hobbled by the terms of the duty undertaken in Paragraph 1. The obligation is vague; that obligation is overly broad and sloppy in a way that invites bad implementation (and worse hermeneutics) by courts less well versed in the "in group" speak that characterizes much of Article 5. The evaluative standard ("regulate effectively") is desperately in search of a measure. But the scope of the "regulate effectively" standard is over-broad. It reaches to "the activities of business enterprises within their territories." They must have meant those activities related to the harms actionable under the Treaty. But that is not what exactly what they wrote. In defense of this provision, of course, one can point to the last sentence of Paragraph 1 which appears to cabin the duty to legislate to "persons conducting business activities. . . . to respect human rights and prevent human

3 *German Development Ministry drafts law on mandatory human rights due diligence for German companies*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, available at https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies (Oct. 1, 2019)

rights violations or abuses." There is a further constraint touching on the limits of the territorial or jurisdictional reach of the legislating state, but for many states that is hardly a constraint. But what, as a matter of law does it mean (measured by conduct) to "respect human rights." Of course, the shadow of the UNGPs hangs heavy over these words. But there is no reference to the UNGPs. A court is left to surmise. As are we. Respect is an important operational framework; it works far less well as a legal standard that can be enforced in a predictable and consistent way.

Paragraph 2

Here we have the short version of the more nuanced and sophisticated approach to human rights due diligence elegantly set out in the UNGPs (Paragraphs 16-21). The Draft LBI version suffers form a number of weaknesses that substantially erode the good intentions of its drafting. First, to use the expression "human rights due diligence" without either a definition or a cross reference to the UNGPs creates a term of art detached from its history and meaning *outside the text of the treaty*. At worst it is an act of arrogance — the use of a term that "insiders" are well aware of but that outsiders are not. That backfires when the outsider is a court or a legislature. Without an anchor in the UNGPs or in something else, the term "human rights due diligence" can be whatever it is a legislature conjectures. Second, the five-point truncated version of the UNGPs human rights due diligence (Art. 5 Paragraphs(a)-(d)) presents, art worst, an invitation to deviate from the development and application of the UNGPs framework, That produces a potential for dissonance (two standards by the same name) and potentially incompatible standards. Not that the abbreviated human rights due diligence framework is necessarily bad. It is just (1) too late and (2) unhelpful in light of the development of the identical concept and its increased traction in a related (and unmentioned) document. On the plus side, the paragraph appears to permit some wide variation in legally binding human rights due diligence practices. That is good for sovereignty and context; it is quite the opposite of coherence and effectiveness. Here is a place where a multi-state compact would be in order. And yet there is no encouragement here in a document otherwise full of encouragements.

Beyond that some small points. A standard of prevention (Paragraph 2(b)) is unreasonable. One might take steps to prevent, and one might be liable where prevention fails and harm occurs. But to write the standard in this way might invite an interpretation that suggests punishment for the failure to prevent in itself in addition to the provision of remedy to those harmed by the failure. That would be unfortunate, but it is a plausible reading fo the provision as written. In addition, Paragraph 2(d) is unfortunately disconnected from its own human rights constraints. Surely the intention of communication is not meant to override the rights of individuals to privacy and to the protection of privacy by business. But this is not made clear. Again a legal document requires precision of the sort missing here. As a framework principle, of course, this works tolerably well.

Paragraph 3

This paragraph is meant t flesh of the Draft LBI human rights due diligence provisions by highlighting those specific forms and practices of human rights due diligence that ought to be presumptively included. Each of these suffer from the problem of over generalization create wide spaces for variations that may effectively undo the effectiveness of the provisions. Section 3(a) for example speaks to impact analysis, but does not set either a floor for uniform standards or a means of making such standards otherwise transposable. It invites, in a perverse way, a competition among states either to develop the most effective standards for environmental and human rights protection, or for states in need of investment, the opposite. That leaves us exactly where we are today in the absence of a treaty.

Section 3(b) suffers from standards that are unenforceable in the absence of the development of measurable standards or an acceptance of arbitrary decision making. This is particularly a problem when the legally applicable terms include things like “meaningful" (otherwise undefined) or "potentially affected" or "special attention." The terms are effectively meaningless as legal terms without further definition. And none appears forthcoming in the Draft LBI. But someone will give these terms meaning, and it is likely that the meanings given may not always please (e.g. conform to the objectives or intent) of the drafters. Section 3(d) is useful, though more useful integrated into Section 2. Its limitation to contractual relations which involve business activities of a transnational character is unfortunate and unnecessarily limiting.

Lastly Paragraph 3(e) has its heart int he right place. It is just that it never manages to get that heart to beat. A reference to "enhanced human rights due diligence" is not helpful. If the treaty drafters want enhanced human rights due diligence they should not cast a spell — that is essentially the operative effect of the section as written. They should spell out what exactly these enhancements ought to be. Certainly the drafters are capable of this when they are of a mind (Section 3 itself is evidence of that). But here thew lack of specificity works against the value of the Treaty in an area where effectiveness is vital. A pity.

Paragraph 4

Again, the spectre of the UNGPs hangs heavy over this Section. It is a pity that the rich development of meaning in that effort does not appear to carry over. Even if one might be permitted to do so, it is also possible to read into this Section the possibility of rejecting the UNGPs approach in these matters and the substitution of something else. And again, the section suffers from lack of specificity precisely where it needs to be more pointed. Strategically, perhaps, a murky provision is one more likely to be acceptable. But it will be acceptable precisely because it implies no real burden.

The inclusion of the limitation on access (which is at variance with the provisions of Article 4 on access by victim support institutions — or at least could be read as inconsistent), "procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law" appears at odds within an Article the purpose of which is to burst through the limitations of domestic law by obligating states to rewrite them. That was not what the drafters likely intended, but the door to this effect has been opened by the text

Paragraph 5

This paragraph moves from the adoption of legal measures, to the formulation of policy. At one level it is meant to avoid regulatory capture. But there is little to suggest that capture by other sis any less bad. Indeed, the phrase used is interesting — "to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character". There is a world of prejudgment in this turn of phrase. It is true that business will promote its own interests, but it is not always wise to presume that this interest is at odds with the public interest.

Moreover, it is not clear why those interests ought to be marginalized in the face of other members of the polity also pursuing their own (selfish) interests. This is a fundamental issue of politics in liberal democratic states that remains both troubling and unresolved. More interesting still is the problem of conforming this duty to the legally binding duty of states under their investment treaties. Even more interesting is the issue of the pursuit of business interests when it is a state instrumentality that is pursuing those interests. If there is a convergence of public and commercial policy in the behaviors of state owned enterprises, then it becomes harder to distinguish private enterprises form the interests of others who have access to and are stakeholder sin domestic political processes.

Paragraph 6

This is one of my favorite "back door" provisions. Having gone to the process of expanding the reach of business activities to cover those of domestic firms in traditional host states (Art. 1 Paragraph 3), this Paragraph 6 of Article 5 provides a means by which a state can again exclude these firms form the reach of the treaty through the enactment of provisions in ways that they might conclude would "provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens." Clearly that is not what it is formally meant to do. The paragraph well implemented goes to financial incentives and capacity building, and contextually relevant waivers to ease these firms into a compliance culture. Yet that is not what Paragraph 6 says. Again, the principal failing of the drafting of Article 5 appears here again. Moreover, in the absence of this necessary specificity that cements intent, it is quite plausible to interpret that provision as permitting this sort of waiver.

E. Article 5 (Prevention)

Article 5 (Prevention); From Text to Concept and Politics.

Flora Sapio

Article 5 in the Draft LBI has a stated goal that goes beyond mandatory human rights due diligence. This article has the goal to intervene in the delicate dynamics of state-market interaction. It solves decades of political and academic debates about the merits of different theories of state-market relations by adding a sentence absent from the Zero Draft:

"State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction."

Unregulated markets are more a theoretical construct than a reality. So are fully regulated markets. The first sentence in Article 5 seems to ignore this reality, and instead creates the obligations for State Party not only to regulate the most important actors on private markets — business enterprises. But also to regulate them effectively. According to the logic of this article, the elements of human rights due diligence are no longer limited to identification, prevention, mitigation and communication.

Article 5 is entitled "Prevention", and this may give the idea that the drafters of the LBI conceived of human rights due diligence mostly in terms of prevention – leaving out the elements of identification, mitigation and communication. But in reality, Article 5 tries to broaden the idea of human rights due diligence well beyond these elements. To it, human rights due diligence requires a successful regulation of the activities of business enterprises as a whole.

Which results can make regulation "effective" in reality is an entirely different question, that will have to be answered by those who will have to apply the LBI, or to monitor its implementation?

After imposing on its potential signatories the obligation to shift the equilibria of their domestic and transnational economic policies in favor of the state, article 5 goes on mandate the inclusion in domestic legislation of an obligation to respect human rights and to prevent human rights violations and abuses. This is a generic obligation, that in my opinion should not be confused with human rights due diligence. That is, Paragraph 1 of article 5 only

requires state parties to adopt a specific model of state-market relations, and to include in their legislation a broad and generic obligation for persons conducting business activities to respect human rights.

Mandatory human rights due diligence obligations are distinct from this obligation. Human rights due diligence is only mentioned in Paragraph 2. Also, human rights due diligence measures are qualified as something that shall be adopted "for the purpose of Paragraph 1". These measures exist "for the purpose" of Paragraph 1. Is the purpose of Paragraph 1 the introduction of mandatory due diligence obligations in domestic legislation? No, it is not. That was the purpose of Paragraph of article 5 of the Zero Draft, that stated:

1. State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties' territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities

Article 9 is not entitled "Mandatory human rights due diligence", but "Prevention". As I have explained, Paragraph 1 does not mention the concept of human rights due diligence. That concept is mentioned only in Paragraph 2. Paragraph 2 is modeled after the UNGPs, but with the following differences:

(a) the Draft LBI ignores the concept of supply chains. Instead, it adopts the concept of "contractual relationships", leaving the concrete definition of what "contractual relationships" are to national states.
(b) The Draft LBI uses the narrower concept of "human rights violations or abuses", according to the definition already discussed in this blog post series. This concept also rests on the disjunctive conjunction "or", which creates the following alternatives: either you identify human rights violations, or you focus on abuses. Once the focus on this component of human rights due diligence has been chosen, the state has the further option to decide to focus on business activities, or on contractual relationships. The wording of Paragraph 2.a poses two sets of alternatives, which is always useful to fragment human rights due diligence obligation to the point when they become meaningless

The rests of Paragraph 2 may use a different language, but that does not matter. Prevention, mitigation and communication can occur only after adverse human rights impacts have been identified. If a business does not know what adverse human rights impacts are taking place, that business cannot prevent or mitigate them, or even "communicate".

If the identification of human rights impact is selective, prevention, mitigation and communication strategies will be selective too.

Paragraph 3 just enables a further fragmentation of mandatory human rights due diligence. This Paragraph contains a menu of measures that may facilitate the work of

domestic legislators. After all, Paragraph 3 provides a convenient legislative model, that may just be transplanted into domestic legal systems with little concerns for questions as whether this model will take roots, and if so how.

So, under the current wording of the Draft LBI human rights due diligence may well become a "paper tiger". Unless, of course, domestic states are strong enough to be able to use mandatory due diligence obligations for ends that go beyond the management of markets.

Paragraph 4 may produce interesting results in the institutions of signatory states. On the one hand, states may simply decide to attribute National Action Points the task to implement the Draft LBI rather than the UNGPs. The UNGPs would then soon become dead letter. But, on the other hand, states may see Paragraph 4 as an additional opportunity to distribute resources to domestic interest groups. States may decide to create domestic agencies parallel to NAPs. If the Draft LBI and the UNGPs are not two competing documents, but instead they complement each other, then two different bureaucracies are needed to ensure the best possible level of human rights protection.

Paragraph 5 poses states the obligation to protect implementation of the Draft LBI from domestic and foreign corporate interests. This Paragraph starts from the assumption that the state and corporations are holders of diverging interests, that they are competing actors. Paragraph 5 may work well in those contexts where the state sees foreign corporations as adversaries. But if the state sees domestic and/or foreign corporations as allies, then it is doubtful that it will not take the interest of entrepreneurial groups into account. This latter logic, after all, has been embraced by Paragraph 6 too. So why would the state act differently?

Paragraph 6 demolishes the edifice of mandatory human rights due diligence as follows:

State Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.

First, **this Paragraph conceives of mandatory human rights due diligence as a "burden"** that the state places on enterprises, **rather than as a legal duty of enterprises**. This "burden" is furthermore **"undue"**. This choice of wording perhaps reveals how the Revised Draft really conceives of human rights due diligence. According to the wording of Paragraph 6, human rights due diligence is an undue additional burden. At least for small and medium-sized enterprises. But, presumably, also for multinational corporations that decide to adopt the form of a small and medium size enterprise to take advantage of "incentives and other measures to facilitate compliance."

Second, it is not clear what the "incentives and other measures" that should facilitate compliance by SMEs are. One can imagine that the state may decide to provide direct and

indirect monetary and non-monetary incentives, such as fiscal exemptions etc. to SMEs. But those states where SMEs are one of the key constituencies may prefer to launch capacity building initiatives, perhaps funded by the International Fund for Victims. In the meantime, states may decide to use "other measures" and just exempt SMEs from human rights due diligence obligations for as long as it will be necessary.

E. Article 6 (Legal Liability)

Article 6 (Legal Liability); A Conceptual Analysis of the Conundrums of "Legal" Liability.

Larry Catá Backer[1]

Article 6, like Article 5, appear to have been drafted in the shadow of the UNGPs and more precisely the UNGPs' Second Pillar. Article 5 focused on human rights due diligence; now translated (and perhaps narrowed) into a facility for state regulated compliance and risk mitigation. Article 6 makes a more pronounced incision—it moves from Article 5's legalization of the modalities of the UNGPs Second Pillar corporate responsibility, to the dismantling of corporate responsibility itself as a concept, and in the process brushes away in its entirety the whole edifice of governmentalization beyond the state.

It is in this sense among the most reactionary of the provisions of the Drat LBI; and not just reactionary but from the "progressive" standpoint that serves as its justification, it is also counterrevolutionary in its essence. It would effectively sweep aside the core principles of societal governance through markets that over the last thirty years made it even possible to grasp the notion of corporate responsibility and to make it a governable object of regulation. Perhaps despite their best conventional intentions, the drafters of the LBI had a brilliant insight that poked its head out ever so tentatively in Article 1. That insight could be reduced to the following—all economic activity are expressions of human rights in action; that is all human activity inevitably touches on human rights (and responsibilities). Human rights (and inversely the responsibility to observe them) serve as the core principle of governance and the central purpose of government. It then followed that harms caused to people (and others) in the context of economic activity ought to be prevented, and if not prevented, then mitigated (both touching on a compliance/administrative regulatory function), and if not mitigated, then remedied (a judicial role).

Yet the drafters then appear to have lost their way. Perhaps they were trapped by their history or politics. The body of the Treaty is springing of that trap. It walls create the barriers that effectively reduce this transformative idea in the body of the text by the constraints of the transnational, by its limitation to economic actors, by its insistence on

human rights listings and by its conflation of administrative-compliance and judicial-remedial functions in ways that neither reflect the realities of government nor those of public or private governance. So, in the place of self-reflective compliance in Article 5, one is treated to an abbreviated version of human rights due diligence detached from its normative sources and developed in a way that creates incentives toward regulatory incoherence across territories. And in place of the societal sphere through which it is possible to develop regimes of self-reflexive governmentalized economic commercial institutions (whether owned by private or public persons) Article 6 offers little more than the false hope of a set of promises to legalize specific principles and objectives articulated in international instruments in an instrument that by its fundamental nature itself invites both a rejection of the premise or a waiver of its specific mandates.

But in the process of legalizing in Article 6, what is defined in Article 1 as "human rights violations and abuses" it reduces its scope through a listing exercise that shifts the emphasis of protection from "harms" to "rules." Consider that Article 1 Paragraph 2 defines human rights violation or abuse as a (1) harm (2) committed by a state or business enterprise (3) through acts or omissions (4) in the context of business activities (5) against any person or group of persons (6) which harm could be measured in specified ways to include injury emotional suffering economic loss or substantial impairment of human rights. Article 6 then (with some redundancies) imposes on states a duty to construct a comprehensive and adequate system of legal liability around that definition but does this in a way that might then be understood to be limited by its own provisions in Paragraphs 2-9.

That approach effectively changes the character of the definition from one grounded in harm to one grounded in violation of a set of quite specific provisions which, by their listing also acquire the character of international law binding when appropriately transposed (subject to state reservation). That leaves one with the possibility that the human rights referenced in Article 1 (economic activities that cause harm) are actually reduced to a subset of those harms defined by the provisions referenced in Article 6. That, in turn, creates a dissonance with the scope provisions of Article 3 Paragraph 3 ("This legally binding instrument shall cover all human rights"). Though in fairness, the scope provision provides no grounding—it can as easily reference all legally mandatory provisions that are styled "human rights" or all harm that impacts humans. Within Article 3's studied vagueness stand two potentially distinct ways of approaching the solidification of obligation (to which legal liability may be attached). On the one hand we have a harm principle and on the other a rights principle.

The Treaty is indifferent to the resolution of this potential tension, and that can only produce bad law. And, indeed, it is possible to see in this the tragedy of the transformation of law from tool to fetish. By making a fetish of the law of human rights, the drafters reduced the value of human rights as a basis for framing the remedial rights of individuals (protection from harm in economic activities) and for using law as a powerful (framework) tool for organizing markets and regulatory bases for compliance, prevention, and mitigation. This was underscored recently by John Ruggie himself, for, writing to clarify the issue of the amenability of the UNGPs human rights due diligence principles to legalization suggested

that there was nothing in the UNPGs themselves that suggested that states were unable to legalize human rights due diligence, or portions thereof, to suit the legislatively expressed desires of states. Professor Ruggie noted, in response to a position taken by business elements in the context of the Swiss Responsibly Business Initiative, that "there is no inconsistency in states adopting measures that require businesses to meet their responsibility to respect human rights through legislation."[2]

Yet merely because a state has the power to legalize human rights due diligence it does not necessarily follow either that they should use it, or that they ought to use it to fashion a particular legislative product within the vacuum in which states sometimes appear to believe that their domestic legal orders exist. What might in some quarters be viewed as a positive or even necessary progression,[3] others may conclude may pose substantial risks to the development of coherence in those regulatory gap spaces that gave rise to the need for measures such as the UNGPs in the first place. These possibilities of state augmented incoherence, now rife in this Treaty draft at virtually every point in its drafting, is the encouragement or indifference to the creation of potentially distinctive (and ultimately incoherent) silos of human rights due diligence practice across production chains.

We have considered some of the conceptual issues of Draft LBI Article 6 (Legal Liability). There is a tension between Article 3 (scope), Article 1 (definitions) and Article 6. That tension arises from the very large gap left by the failure to define "human rights" and the law to which it refers. Article 3 reminds us of a broad scope but in in search of definition. Article 1 defines human rights violations and abuses but not the content of those human rights which may be violated or abused. We had suggested a generalized harm standard tied to economic activity. But Article 6 appears to lead in a different direction. Though it does not purpose to define "human rights" it effectively creates a universe of meaning by quite specifically focusing on a list of rights with respect to which states are obligated to construct legal liability.

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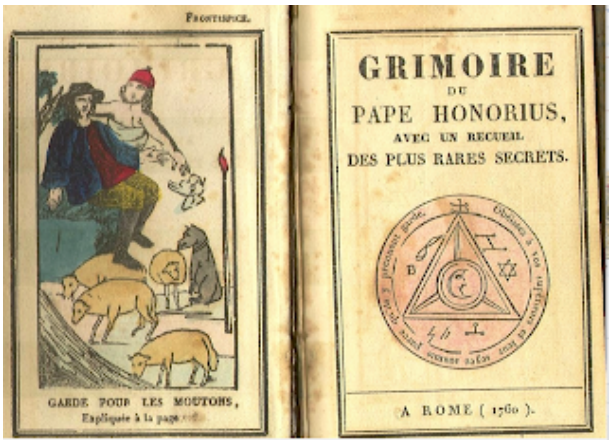
2 John G. Ruggie, *Letter to Ms. Saskia Wilkes and Mr. Johannes Blankenbach*, Sept. 19, 2019, available at https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf

3 John G. Ruggie, *The New Normal of Human Rights Due Diligence*, translated and reproduced in *John Ruggie Weighs In on Swiss Debate on Mandatory Human Rights Due Diligence: Our Chair John Ruggie writes in a leading Swiss newspaper about the importance of the Swiss Parliament's current consideration of a proposal to require human rights due diligence by Swiss business,* SHIFT, March 22, 2018, available at https://www.shiftproject.org/news/john-ruggie-weighs-in-on-swiss-debate-on-mandatory-human-rights-due-diligence/ Ruggie notes:

> Switzerland would not be alone by undertaking progressive change in this space; indeed, it risks falling behind. Anti-slavery legislation has been adopted in a number of jurisdictions, ranging from California to the UK. France has adopted a "due vigilance" law. Canada has just established the office of ombudsperson with authority to compel witnesses and documentation from Canadian companies operating overseas that have been accused of human rights violations. The new German government, as part of its coalition agreement, will require companies to have human rights due diligence measures in place if, by 2020, fewer than half of German companies with more than 500 employees have not adopted them. The European Commission is examining corporate governance rules, requiring boards of directors to adopt and disclose their sustainability strategy, including appropriate due diligence throughout their supply chains. This list is not exhaustive, but it does underscore the new normal of human rights due diligence by firms.



These form part of the larger challenge for the Draft LBI—to actually provide the draft of a legal document, rather than a framework document, from out of which the harder work of legal drafting may be undertaken. If that is the case, then there is no "law" in Article 6—there is merely a recipe book for the project of law making. But it is a recipe in which the key ingredients have been badly sorted. An examination of the seven paragraphs that make up the article might provide arguments to support the conclusion that there is no "law" here; or it might suggest instead that there is sufficient for its purpose—to direct adhering states in their duty to draft law. Yet if that is the case—that Article 6 is indeed a legal grimoire (and that would not be unusual), it is a grimoire with a tremendous flexibility, and thus a greater likelihood of producing the sort of incoherence between domestic legal orders that started the process of internationalizing this project in the 1970s in the first place. Except, this time the incoherence would have been directed by the very drive toward internationalization which was meant to have avoided that result.

In the shadow of Article 3's scope provision, and Article 1's definition of violation and abuse grounded in contextually defined harm caused by a quite specific class of actors, it is possible to understand both the psychology of Article 6, and the way that its nine sections then undermine the project of expanding the legal liability of an identified class of actors for the harms that are caused by their economic activities. We take those provisions one at a time.

Paragraph 1

Paragraph 1 is short but potentially potent. It provides: "State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.

Let's try to read that as law.

The text is addressed (as should all of these provisions) to state parties. It speaks to the legislative obligations of state parties. Treaty provisions like this are always problematic. They write into law a tension between the authority of the state to bind itself (under international law) to do or not do certain things, a promise made to other states, and their ability to deliver on these promises. This is especially the case in liberal democratic states where it is sometimes the case that those political actors with the power to commit a state to international obligations may not have an equal ability to control the internal that are themselves beyond their power to promise. Of course, states have done this all the time through a variety of treaties. That, of course, has never been a problem for international law. And courts have rejected arguments based on constitutional or political impediment (effectively the problem when the polity rejects the action of its representative organs which may have lawfully committed the state to international obligations). From this perspective any objection on these grounds appears frivolous, and a matter asked and answered over a generation ago.

But the object of this treaty, one would hope, is not the production of yet another elegantly drafted document whose form is impeccable, but which is functionally impossible to apply. And, indeed, Paragraph 1 raises the crucial and practical issue of implementation. The failure to conform its domestic law to meet its international obligations might, in certain cases, give rise to liability, and may open the door to action by other state parties—but in the end it does little to compel a state to breach its own constitutional orders ensure that legislation is enacted to suit its treaty obligations. Thus, typical of this type of treaty, the provision of Paragraph 1 is directed to a formal analysis and interpretation—states have formally agreed to a program of legal and constitutional reform (the later when necessary). More likely provisions like this one will produce the usual herd of reservations. Where reservations become impossible, withdrawal may become a viable option. Thus, in the end, what this provision buys is a formal "optics" and the certainty that many states will be unable to comply.

Beyond that the provision includes the usual problems of principles-based drafting. The terms "comprehensive and legally adequate" are difficult to translate into legal standards. And certainly, they are impossible to translate into legal standards that may be applied with reasonable similarity everywhere. Moreover, the term "legal liability for human rights violations or abuses in the context of business activities" is itself troublesome.

First, it is not clear what sort of legal liability is intended. Does this refer to criminal or civil. Later parts of the Treaty suggest that the drafters were indifferent. But that is also a bit of a problem—certainly form the perspective of the creation of a more uniform approach to liability; and in the process to reduce the inevitable exploitation of difference strategically by enterprises and lawyers.

Second, the term is itself misleading in the context of the definition of "human rights violations or abuse." What appears to be meant is that a certain class of harms that are the product of human rights violations and abuse are actionable. But then this suggests that the extent of the scope of actionable human rights related harms is smaller than the extent of the definition of the harm itself. And that then appears to run counter to the scope provisions of Article 3. This was probably not intended, but the language trips over itself across at least three different provisions. At a minimum, though, it suggests that the Treaty does not contemplate that all human rights violations or abuse will be actionable.

Third, the reference to "comprehensive and adequate" does not solve the problem. The reference to comprehensive and adequate can as easily reference those harms made actionable, as it might refer to the scope of the obligation to extend "actionability" to a full range of harms. But that is also conjecture. And it is not a good beginning for a treaty to invite this level of conjecture.

Paragraph 2

This provision appears straightforward: "Liability of legal persons shall be without prejudice to the liability of natural persons." And yet the provision belies challenges. In many jurisdictions, complex systems of law, administrative regulation, and guidance on the exercise of administrative discretion tends to substantially constrain the ability of a state to treat legal and natural persons in a similar way. To the extent that the provision is read to mandate that equivalence, it will require substantial changes to administrative practice, to the authority of prosecutors to determine whether individuals or corporations or both will be charged, to settled notions of corporate liability, and of master-servant rules. Not that these changes may not be worth the effort. Many of the legal doctrines are worth reconsideration. But this is hardly the way to open the door to that task. Moreover, in some states, some of these issues may touch on core issues of governance, and of the nature of the political-economic system. For criminal and civil jurisdiction that may arise form statute and administrative regulation, the effect on such systems of guidance and practice remains mysterious. And treaties ought not to be in the habit of cultivating mystery.

Moreover, beyond issues of state practice in charging or regulating natural and legal persons in the context of complex enterprise organization, the provision also suggests the potential for challenging the core principle of corporate law—asset partitioning. While academics enjoy criticizing the concept—neither legislatures nor courts appear to have moved toward the reconsideration of a principle now at least a century old in many places. Indeed, even courts that have been willing to consider liability across enterprises have been careful to distinguish concepts of direct involvement in a specific set of liability tinged acts from the concept of veil piercing. But this provision might be read more broadly still—to the extent it also suggests a principle of joint and several liability in a corporate context, the provision will be problematic, especially if courts are invited to use this provision as the gateway.

Paragraph 3

This provision, "Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts," means well. It is useful as a guide to legislation. And it serves a useful purpose—to avoid reducing the scope of liability by making the power to remedy harms against individuals a finding of criminal culpability for actions brought by the state. On the other hand, it is not clear why the state ought not to have the power to determine whether it, rather than individuals, ought to reserve to themselves the power to bring actions for human rights wrongs—with the obligation to make recovery available in accordance with a fair legally binding standard. It may also be legitimate for the state to keep all recovery under certain circumstances with the obligation to use t for the public good. There is precedent, even in developed state domestic legal orders for both approaches. The provision assumes a particular form of domestic legal order both for liability and remedy. Yet it offers no reason fro such a restriction, nor does it make its ideological choices explicit, preferring instead to embed them in provisions like this one.

Paragraph 4

This is an interesting provision, with many of the same sorts of challenges already noted with earlier provisions.

> States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.

First, it is not clear what is meant by "legal and other measures." To the extent it references non-state nob-judicial mechanisms that is to be praised. Yet one is unsure because there is nothing in the text that directs the reader in any particular direction.

Second, the lofty phrase "effective, proportionate, and dissuasive sanctions and reparations" also may create challenges. Principal among these are a a cluster of issues around "dissuasive sanctions." In some jurisdictions, the issue, in the context of punitive damages, has been constitutionally managed. In others, the idea of punitive damages is viewed as against public policy. Moreover, there is great controversy about awarding an individual damages that are meant to punish an offender rather than to compensate a rights holder. Those perhaps ought to revert to the state. But none of this ever makes it way to the text of the provision. It is not clear that this principle is either free from controversy, interpretive ambiguity or a strong foundation in principles of procedural and substantive fairness, at least at a societal level.

Third, the last phrase is unclear since at best it is redundant, and at worst it invites courts to read a further constraint into the provision.

Paragraph 5

Here the treaty transposes ancient concepts of surety and guaranty, usually imposed by law (and sometimes contract) on bailors, fiduciaries, trustees and the like, to (effectively) all business enterprises.

> State Parties may require natural or legal persons engaged in business activities to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation

That it is discretionary does not tale away from its potential scope. The economic effects of such a procedure, of course, is unlikely to favor developing states. And the 1970s and 1980s is littered with examples of the disastrous economic effects of provisions designed to significantly increase the cost of operation—especially to indigenous enterprise. But that is politics—the treaty just makes such regimes possible (though of course they were possible under the domestic orders of most states without the treaty too. And that is fair.

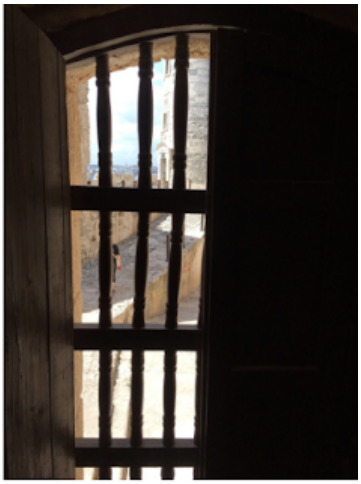
Paragraph 6

This is an important provision, and one that is meant to solve the problem of collective liability along a production chain where the control relationships are not grounded in ownership.

> States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.

Fair enough; the "control or supervise" and the "foreseeable risk" standards are not new. They do point in quite different directions. And to the extent that they implicate (common law) tort standards, they pose a problems of transposition to civil law jurisdictions. Moreover, standards based on foreseeability raise issues of causation that are themselves at

the heart of a debate about standards for tort liability especially in the context of climate change.[4] There are additional curiosities here as well which are worth considering.



First, contractual relationships are defined in Article 1(4) to include virtually every sort of relationship between entities, including those generally covered by rules of joint liability in the context of ownership relationships. So it not clear how one reads Article 1(4) together with this Article 6(6).

Second, that issue becomes more complicated when one considers that the extent of inter-contractual relationship liability is further constrained by a thresh hold standard of "sufficient control and supervision" plus causation, or foreseeability. The constant repetitions of the trigger phrases business activity becomes a distracting fetish, especially since its inclusion has already been framed in Article 1. At some point in this provision one begins to question the value of Article 1, or the difficulties of interpretation posed by the use of key terms within terms in the ways used here. A cleaner drafting would solve that problem.

Third, "regardless of where the activity took place" works well as a principal of harm to which liability may attach. However it leaves unanswered the question of jurisdiction. That will be answered later in the Treaty, presumably. A cross reference at this point would be helpful.

Paragraph 7

This is the longest of the provisions in Article 6, but ironically the one that requires the smallest set of observations. Paragraph 7 effectively compels a state party to "ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the . . . criminal offences" listed. This is followed by a list of 11 sometimes specific provisions and sometimes generic classes of offenses. The only real comment worth making here is that there is likely to be a (sometimes irresistible) tendency top read Article 6 (1) and (7) together to produce a conclusion that the meaning of " comprehensive and adequate system of legal liability" in Article 6(1) is defined in total (at least for purposes of treaty compliance) by the list of offenses in Article 6(7).

It is unlikely that this is what the drafters meant. But the law of a Treaty is embodied in its text, not in the objectives and desires of those who put pen to paper (or today typed words onto a word processing program). While there are some jurisdictions whose jurisprudence embeds the "law" in the objectives and principles of its drafters, in most the

[4] See, e.g., Jane Stapleton, *Scientific and Legal Approaches to Causation,* in CAUSATION IN LAW AND MEDICINE (Ian Freckleton, ed, Hampshire: Ashgate Publishing) 14; .

text is the law, and that produces some difficulties here where the text itself may be read in ways that might, form one perspective anyway, undo its intent. And in any case this increases the likelihood of substantial differences interpretation (and application across domestic legal orders). In this sense the Treaty does much, as drafted, to encourage an ordered anarchy.

And a last point, one that applies equally to Paragraphs 8 and 9. it is not clear how these provisions will apply either to State Owned Enterprises, or to the people they employ. More importantly, it says nothing about either the liability of the state, where the state itself effectively controls the enterprise. Nor does it have much to say about the liability of individuals within the state apparatus who are active principles in the violations listed.

Paragraph 8

This paragraph again inadvertently creates difficulties because of its drafting. It provides: "Such liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have committed the offenses."

First "such liability" appears to reference back to Article 6(7). But that is not made clear. It is as possible to read this as relating to Article 6(3). Perhaps it is meant to supplement both. One does not know and courts are invited to guess. Assuming this is meant to supplement Article 6(7), then it suggests that the provisions in have a particular character that must be transposed into domestic law. And, given that rigid categorization (as inherently criminal or civil), the state is permitted to draft analogous legislation to criminalize the conduct that is apparently meant to produce a codex of civil liability under Article 6(7).

Second, it appears that the object of this is to ensure at least some minimum legal basis for civil liability that in turn would provide the basis for remedial recovery by harmed individuals. That is fair. Yet in doing so one might ask whether such recovery is now limited to those bases; one might ask whether it forecloses other means of recovery that might have predated the treaty; and it might raise the question of pre-emption—whether the treaty now limits recovery strictly to the bases described in Article 6(7).

Paragraph 9

Again, one encounters a provision whose intent is good but the drafting of which raises interpretive issues. Paragraph 9 provides:

> State Parties shall provide measures under domestic law to establish legal liability for natural or legal persons conducting business activities, including those of a transnational character, for acts that constitute attempt, participation or complicity in a criminal offense in accordance with Article 6 (7) and criminal offences as defined by their domestic law.

A first reading causes confusion. Article 6(8) suggested the civil character of the harms defined in Article 6(7). But Article 6(9) suggests that the offenses described in Article 7(7) may be criminal in nature without reference to the possibility of dual character (and the implied need to preserve a civil liability space for those offenses) as specified in Article 6(8). The result is confusion; confusion about the relationship and meaning of Articles 6(7)-(9) when read together.

Second, the scope of the application of the provision beyond its own terms is not clear. The reference to domestic law in this context is ambiguous. On the other hand what appears to be attempted is to induce states to include in their criminal law predicate crimes of complicity, participation and attempt. That is fair. Though why the limitation "as defined by their domestic law" in this provision and not in others is curious. A court might either be inclined to see in the inclusion a permission to deviate here in ways not permitted in other parts of the Treaty. Or it may read this phrase into every section of the treaty.

Third, this provision brings to the foreground the issue of the application of these rules to both SOEs and to state officials who may well be instrumental in directing the actions that cause the sort of harm for which liability arises under Article 6. Paragraph 9 also foregrounds the inverse of the usual problem—enterprise complicity in state violation of actionable human rights. Here it is possible to impose on states a duty to bring both civil and criminal proceedings against state officials who are themselves complicit in liability producing activities of enterprises. Yet, again, there is nothing here from which such liability can be based, especially where such an effort brings us (and the Treaty) back to the issue of sovereign immunity.

What does "Legal Liability" mean in a world in which regulatory governance and markets sometimes have far more reach than the law of any state? What if, indeed, law becomes fused with administrative practice?; it might then reduce itself to sets of privileges and restrictions that follow from systems of rating performance based on systems. These then shift the modalities of managing populations from law to rankings based systems that in turn center the project of data driven governance. That in turn transforms law into the means through which the demand for a constant stream of data might be satisfied. The realities of regulation may well leave Article 6 and its quaint focus on old fashioned law based structures far behind.[5]

5 Larry Catá Backer, *Next Generation Law: Data-Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China*, LAW &: SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 28(1):123-172 (2018).

E. Articles 7-9 (Jurisdiction; Statute of Limitations; and Choice of Law Provisions)

Articles 7-9 and the Importance of Technical Foundations for Access to Justice Objectives--Jurisdiction, Statutes of Limitation, and Choice of Law.

Larry Catá Backer

Articles 7, 8, and 9 provide a set of technical provisions necessary to ensure access to justice, at least access to state based judicial mechanisms. One may put aside for the moment the question of the wisdom of centering state based judicial mechanism as the primary vehicle for vindicating rights or remediating actionable wrongs. And, indeed, as Article 5, suggests, there is a space (though one in further need of development) for a compliance and remediation vehicle that avoids entanglement with national court systems. But having committed to national judiciaries, it is then necessary to make such commitment both effective and available.

Those issues tend to devolve into contests among the powerful. For those contests, the vagaries of politics might serve as an efficient way of delineating access. However, where, as here, one is dealing with substantially unequal relations between those parties likely to be causing harm and those experiencing such harm, it is necessary for the legislative community to serve in a more proactively *parens patriae* role.

One might then usefully read the provisions of Article 7 (jurisdiction), Article 8 (statutes of limitation), and Article 8 (choice of law) in that light. These provisions, as a whole, work as they were likely intended. Yet that intent raises in some respects certain normative issues, as well as issues of compatibility with domestic legal and constitutional systems that are worth addressing, if only briefly.

A. Article 7

Article 7 focuses on jurisdiction, usually understood in two senses. First it references the power of the court over the parties. That is essential if the judgment of the court is to have any real effect. The second touches on authority over the claim—that is whether the court has the authority to hear the claims even if it has a power over the individuals. Article 7 is drafted to cover both.

> *Article 7. Adjudicative Jurisdiction*
>
> l. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:
>
> a. such acts or omissions occurred; or b. the victims are domiciled; or c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.
>
> 2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its: a. place of incorporation; or b. statutory seat; or c. central administration; or d. substantial business interests.

This provision goes to the power of a particular court to hear a claim that litigants attempt to bring before it. The rule is fairly conventional. First, it appears to vest all courts of all states parties with substantive jurisdiction over claims brought under the Treaty. That raises the issue of the extent of those claims, and more importantly, of their identification. That task is not made easier by the way the Treaty provisions are drafted. But it also will be complicated where states embed causes of action that derive from the Treaty (or which were already enacted before the Treaty) in their general law. There may be some litigation around the rules for identifying municipal law to which these provisions apply.

More conventionally, perhaps, it gives the victim the choice among reasonable alternatives. One assumes that national rules with respect to venue and transfer of jurisdiction apply, as do rules of *forum non conveniens*. The usual issues apply with respect to complex transactions (e.g., it is not clear that an act occurs were it is felt or where the decision to engage in the act is made, etc.). These are also likely to be resolved in accordance with national law (but see discussion of Article 9 with respect to the process-substance split).

Section 2 is designed to extend the jurisdiction of courts to all entities along a production chain, without regard to its legal construction. Here the extent of the amenability to suit will likely be determined to some extent (at least at the outer edges) by the way in

which Article 1 Paragraph 4 is interpreted. That is fair, but likely to encounter resistance (and treaty reservations) among states where a well developed law of general and specific jurisdiction may run counter to the some of the results of applying Paragraph 2 liberally.

There is a potential issue here, one involving the application of this provision to persons who bring claims on behalf of "victims." There may be good arguments for extending the reach of Article 7 in that direction; but the draft is silent.

B. Article 8

A right is only as good as the time period provided to seek remedy. But here, domestic legal orders have tended to face a tension between broad authority to vindicate substantive rights and the promotion of fairness to those against whom claims may be made. On the one hand, where there is a policy determination that certain rights are important, and that they merit a broad set of incentives pointed toward their vindication, substantial space is accorded the rights holder in determining when to bring the claim. This is particularly important where individuals have few resources and may not be immediately aware of either the extent of their rights or the occurrence (or full manifestation) of the harm suffered.

And yet, there is an equally important set of policy objectives that center on the promotion of societal peace and harmony. These produce a set of principles grounded on the sense that a litigant ought not to unduly delay bringing a claim. That, in turn, springs from a principle that society ought to impose on individuals an obligation to protect their interests in ways that are efficient (in terms of preserving judicial resources and ensuring that all parties are able to access the resources they need to protect their respective interests). This is especially the case respecting evidence (witnesses die or become unavailable, documents may be lost, memory may become less reliable, etc.).

None of this is problematic in itself, and it is usually possible through open and transparent engagement to determine a reasonable period of time, usually backed by broad public consensus, during which an individual may make a claim. The same applies to the construction of reasonable rules respecting important elements such as the expectations of discovery of harm, and the control of abuse (e.g., willful blindness or deliberate concealment, etc.).

And yet, beyond the bad conduct of litigants, statutes of limitation themselves may be written to favor one set of parties over others. It is thus not uncommon for legislatures who do not have the political will to eliminate a cause of action (disfavored actions), to substantially reduce its effect by crafting very short limitations periods. These have the effect of foreclosing the possibility of remedy for all but the most well prepared (potential) claimants and works injustice, at its extreme, against potential claimants who have few resources and little legal knowledge. Likewise, for favored causes of action the legislature may substantially lengthen a limitations period. This helps claimants but at the expense of potential defendants. That cost comes in two principal forms. The first has already been

mentioned—the difficulty of preserving evidence the longer the statutory period is extended. These second is economic and compliance oriented—the longer the limitations period, the greater the cost of preserving documents and other evidence against the possibility of litigation. That, in turn, may produce greater incentives toward the maintenance of compliance bureaucracies that may themselves become intrusive (and human rights problematic) and are expensive.

More important, in this respect, it is necessary to read Article 8, together with prevention rules under Article 5 in order to better assess the nature of the consequential obligations that a statute of limitations regime may impose on an enterprise. Not that this is either good or bad. Rather, one must understand the consequences of policy decisions beyond the confines of what looks like a technical provision to understand the sometimes profound effect it may have on operations. That effect is compounded when its character may also be determined by other (substantive) provisions of the Draft LBI.

With that in mind, let us consider what Article 8 actually provides:

> Article 8. Statute of limitations
>
> 1. The State Parties to the present (Legally Binding Instrument) undertake to adopt, in accordance with their domestic law, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole.
>
> 2. Domestic statutes of limitations for violations that do not constitute the most serious crimes of concern to the international community as a whole, including those time limitations applicable to civil claims and other procedures shall allow a reasonable period of time for the investigation and prosecution of the violation, particularly in cases where the violations occurred in another State.

The provision is divided into two parts. The first part, memorialized as Art. 8 § 1, purports to eliminate statutes of limitation for a class of harms therein defined. We get to that shortly. But first, it is important to note that the Treaty obligation to eliminate statutes of limitation entirely may be incompatible with either human dignity or due process principles embedded in the constitutional orders of some states. To the extent that it seeks to provide maximum opportunity to claimants but without considering the effects on potential defendants, it may require either some substantial justification (*because Paragraph 1 itself might well constitute a fundamental human rights breach*), or some sort of explicit protection for the rights of parties against whom such claims are made. Here, one encounters in its most basic form the fundamental clash between the laudable objective of preserving claims and the equally laudable objective of preserving a rule of law based set of procedures for the fair adjudication of claims.

This requires both discussion, and the acceptance that the line drawn may vary considerably among jurisdictions. But that is where the problem comes in. For Paragraph 1 clearly contemplates these wide variations ("undertake to adopt, in accordance with their domestic law"). If that is the case, then it is important to consider the rationale. Most of these will eventually lead to the conclusion that Article 8 Paragraph 8 is meant to maximize strategic and political forum shopping along global production chains. If that is the case, one might ask whether that, in turn, either promotes good faith treaty drafting, or whether as a matter of policy this is the sort of result that one ought to desire.

Indeed, when this section is combined with the possibilities inherent in a broadly interpreted Article 7, the strategic possibilities of forum shopping become clear: as long as at least one state within the set of jurisdictions that may be able to hear a claim eliminates statutes of limitations to the extent permitted under Article 8 Paragraph 1, then it doesn't really matter that the others have not. That may mean that interested stakeholders with political influence might mobilize their political resources to target some but not all states along a liability chain to achieve a desired result. Of course, the issue of enforcement remains a live one—some states may refuse to enforce judgments rendered under these circumstances. But that is abridge that the Draft LBI crosses later.

That lead to the ultimate substantive aim of Paragraph 1, the elimination of statutes of limitation for the ”prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole." It is useful first to point out a *drafting weakness*—one that could be exploited by a court worth a mind to indulge in interpreting a provision against its drafters: it is possible to read this part of the provision as applying to ALL violations of international human rights law; but that it only applies to violations of international humanitarian law "which constitute the most serious crimes of concern to the international community as a whole." That is unlikely what was meant. But one lives or dies by the way one writes rather than the intent with which text was written—at least in some jurisdictions.

Second, the substantive provisions include an implied limitation. The statute of limitations provisions apply only to those harms made actionable under the provision of the Draft LBI. That, in turn, requires a return to the issues raised in Article 6. And it also invites a set of quite specific reservations by states. Otherwise, and unlikely, the statute of limitations provisions could be read as broadening the scope of the Draft LBI. More importantly, it may cause some internal dissonance. This will be felt most acutely where two individuals suffer the same harm, but one falling within the substantive scope of the Treaty and the other not. That is possible, of course, because of the leeway permitted states in complying with their substantive obligations under Articles 5 and 6, as they might, potentially be interpreted.

Third, the definition of "most serious crimes of concern to the international community as a whole" is left to the imagination of courts, the constitutional traditions of

states, and the discretionary choices made by administrators. Here was a chance lost to define a term that required some guidance to courts. One can understand the reluctance. The Treaty drafters probably believe that the task of defining human rights—and especially the project of socializing populations into specific narratives of valuation of rights—is an uncompleted task. To define, in this case would be to freeze. The freezing would not affect merely a listing, but also a narrative of valuation (that is of what is "most serious." But that strategic political choice produces legal weakness (and among the most cynical more fodder for political action.

If Section 1 appears aggressive, Section 2 of Article 8 is positively accommodating. It provides merely a request that statutes of limitation be reasonable. As nice as this may sound to states, this does little to further either a project of harmonization, or to further the construction of a jurisprudence system that does not encourage forum shopping—and thus that does not magnify the importance of Article 7 in conjunction with an ability to influence the law making process of states. Here, certainly, would have been a useful place to constrain political choice. One need not have set specific limitations periods—but certainly the Treaty should have (and could have) developed ranges of statutory limitations period that could be deemed reasonable. They could have created a set of statutory maxima coupled with a presumption that could be overcome under certain specified conditions. They did neither. That is a pity.

C. Article 9

If Article 7 directs litigants to specific courts (or empowers courts to hear cases), then Article 9 provides the formula for determining the law to apply in a particular case. Of course, had the Treaty harmonized all law under its terms, the choice would have been easy—all state parties would be required to direct their courts to apply the law of the Treaty in any relevant litigation. And that, certainly, is the general intent of Article 9 Paragraph 1.

But the Treaty is riddled with riddled with exception and margins of appreciation. The project of using the Treaty as a source of law—as a uniform source of interpreting and applying rules for legal liability to use its own language—that now became an impossible project. And thus the Treaty Drafters had no choice but to revert to one of the more complex and arcane areas of law—that of choice of law. This choice makes sense for Lawyers and well-resourced human rights defenders. But it continues a process now well embedded in this Treaty, to strip rights holders of any agency opr power to evaluate (much less assert) their rights. I*n a sense, the Treaty as drafted continues the process of victimizing those whose rights have been breached and who have suffered harm by erecting a system that is fit only for well-trained lawyers well versed with elite jurisprudence*.

Article 9 is drafted in a fairly straightforward way:

Article 9. Applicable law

1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, including any rules of such law relating to conflict of laws .

2. All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance with domestic law, be governed by the law of another State where:

a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the victim is domiciled; or c) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.

3. The (Legally Binding Instrument) does not prejudge the recognition and protection of any rights of victims that may be provided under applicable domestic law.

First, as has now became clear, there is actually very little that is "specifically regulated in the " Draft LBI. As such the general rule of Paragraph 1 becomes its own mockery. Instead, the driving legal element of Paragraph 1 is what follows, that domestic law of substance and procedure of the court *before which the claim is made* applies. National law is probably to be applied to determine which applies where any or all are plausible. Yet the text itself provides little direction.

Moreover, this general rule is itself subject to a larger exception. Here is precisely where the heart of the choice of rule provision may be found. With respect to the substance of human rights law (whatever that is—and that indeed may be defined differently pursuit to the law of different states) relevant to claims, then a different law may apply. What law? Either the law of the place where the acts occurred, or the law of the domicile of the plaintiff (but only where that plaintiff qualifies under the definition of "victim") or the substantive law of the domicile of any of the defendants.

Note that the procedural law of the state where the court sits always applies. Where the difference between process and substance can be complicated (for example in the jurisprudence of the United States), that may produce results where what appears t be process in State A may well be understood and applied as substance in State B. It is not clear whether the law of the state of the sitting court, or the law of the state from which substantive law is drawn is to be used to determine whether an issue is either procedural or substantive for purposes of Article 9.

* * *

It is useful to note that there are some areas where these provisions do not align well with other portions of the Treaty. I have pointed out one above. There is another. Article 4 Paragraph 15 extends some protections to human rights defenders. Yet their interests are nowhere found in Articles 7-9. Moreover, Article 4 Paragraph 8 provides that others (usually it is assumed human rights defenders) can bring claims on behalf of "victims." Left open is the question of whether any of the limitations or directions of Articles 7 through 9 apply to them or are otherwise modified where a claim is brought on behalf of a "victim". Most likely they ought not. But one might be able to make a case that the rules of jurisdiction might be extended to the domicile of human rights defenders bringing claims, for example.

Lastly, it should be underlined that this essay suggests that these small and technical lawyer's points complicate litigation and at the same time make the entire legal edifice of rights protection that much more remote from the "victims" is ostensibly designed to serve. They also can substantially impede the objectives of the Treaty's substantive provisions. Yet they tend to be viewed narrowly for strategic purposes or otherwise as "boilerplate." One final thought: these provisions are not neutral in text or effect. One ought to ask oneself, then, with each of these provisions, whose interests these provisions really serve—directly or indirectly.

E. Article 10 (Mutual Legal Assistance)

Article 10 (Mutual Legal Assistance)—Smoke and Mirrors?

Larry Catá Backer

Article 10 is a necessary, though to some extent like Article s7-9, technical provision, whose many parts are meant to make more effective the access to justice where claims and litigants span several states and legal systems. It's core objectives are nicely stated in § 1:

> States Parties shall afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial and other proceedings in relation to claims covered by this (Legally Binding Instrument), including access to information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations.

"Widest possible" is both a term of scope that suggests broad application, but also carries with it contextually (e.g., territoriality) relevant constraints. Thus the words "widest" and "possible" can both work with one another to amplify their effect--or they can work to negate each other (e.g., the "possible" may be quite narrow indeed). At a minimum this continues the pattern of this Treaty in encouraging the developing of distinctive and potentially non align able standards in crucial aspects of access to justice areas. The result will be a less useful set of mechanisms--except for lawyers who will work hard to develop mechanisms for using these dissonances strategically.

And of course, this adds to the concern that having started as a mechanism to expand the ability if "victims" to vindicate their rights against harms suffered, the Treaty actually is yet another plaything for elite players who have resources and are technically incapacitated. Victims are not the only losers--but also key human rights defenders from developing states., or with small organizations will also have a passive role against that of the "big" players in the field. In a sense, this is, like globalization has been accused of being, a tool for the preservation and perhaps enhancement of the power of the big power players --well connected--in this field.

Whatever the outcome, the succeeding sections seek to develop the rules within which it might indeed be possible to develop a broadly scoped regimen of mutual assistance. Section 2 is directed to states.

> The requested State Party shall inform the requesting State Party, as soon as possible, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

The section appears to exist in a vacuum. And yet it is (or ought to be) intimately connected with now ancient and well developed systems for inter-judicial assistance already in operation among many states. But if that is the case, it is not clear what § 2 adds to what states already do.

There is a textual curiosity. Section 2 appears to apply only to "additional information or documents need to support the request for assistance." But the referent is not clear. Most likely the reference is to documents and information in addition to those identified in ¶ 3. Or perhaps they are limited to the sorts of documents and information listed in § 3 (which by the terms of the chapeau to §3 is not to operate as a closed set), beyond which additional information may be requested under ¶ 2. Litigation, once a national transposition is actually undertaken and applied, may sort this out. But equally important, it is not clear whether or to what extent this section modifies the existing mechanisms and agreements among states for judicial cooperation, including treaty-based cooperation regimes.

Section 3 then identifies, or at least arranges into categories, the sorts of information and documents that are subject to the mutual assistance provisions.

> a. Taking evidence or statements from persons;
> b. Effecting service of judicial documents;
> c. Executing searches and seizures;
> d. Examining objects and sites;
> e. Providing information, evidentiary items and expert evaluations;
> f. Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
> g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
> h. Facilitating the voluntary appearance of persons in the requesting State Party;
> 1. Facilitating the freezing and recovery of assets;

> j. Assistance to, and protection of, victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to international legal requirements including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment;
>
> k. Assistance in regard to the application of domestic law;
>
> l. Any other type of assistance that is not contrary to the domestic law of the requested State Party.

Some of these are quite contentious. For example, the duty for states to provide (rather than facilitate the provision) of expert evaluations (§ 3(e)) may be problematic in some jurisdictions. Likewise, the execution of searches and seizures (3(c)) may be beyond the power of a state (for example within a federal system in which the federal government has limited authority. And several are at the heart of issues of human rights and human rights disjunctions between states. For example, the obligation in § 3(l) respecting the freezing and recovery of assets may be subject to constitutional limitations and more importantly may require a substantial sensitivity where the request may be a sham, or otherwise may further requested state complicity in actions that might themselves amount to violations of human rights by the requesting state.

Lastly sub-section (l) poses interesting interpretive issues. It provides for other types of assistance that are "not contrary to the domestic law of the requested State Party." But it is not clear whether this means that states have obligated themselves to modify their domestic laws to the extent that they may be contrary to the provisions of § 3(a) – (k) OR whether it means that all of the obligations of § 3(a)-(l) are available only to the extent that they are not otherwise contrary to domestic law.

Section 4 (sic 2) touches on the sharing, without prior request, of

> information relating to criminal offences covered under this (Legally Binding Instrument) to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this (Legally Binding Instrument)

To some extent this material may be covered under existing international arrangements and it is not clear the extent to which this Treat y is meant to supplement or where inconsistent supersede those international (and otherwise binding) arrangements. This is neither the first nor last treaty whose provisions are weakened precisely because its authors drafted ion the assumption that the Treaty exists in a vacuum rather than as an additional intervention in a complex already well populated world of binding agreements (and law) among states.

Section 5 (sic 3), touches on the possibilities of "bilateral or multilateral agreements or arrangements whereby, in relation to matters that are subject of investigations, prosecutions or judicial proceedings under this (Legally Binding Instrument), the competent authorities concerned may establish joint investigative bodies." Note that joint investigative bodies are not the same thing as joint judicial bodies. Note further that an opportunity was lost to create joint state based non-judicial remedial mechanisms. Note lastly that there is nothing in the treaty that would prevent the creation of either or anything else states may find in their collective best interest.

The provision, then, is both meant to signal that such joint investigation committees are mechanisms that are encouraged (though it might have been more fruitful to just come out and say that) and to encourage more informal functionally equivalent mechanisms. Also noted is the last sentence of this provision which really ought to have been addressed in Article 2 or 3 of the Treaty with appropriate derogations, but which instead finds itself here, adding little to a section that deals with the already accorded right of states to reach such agreements among themselves as they like. The same, of course, might be said for § 6 (sic 4) which recognizes a reality that underlines the commitments of states throughout the Treaty.

Section 7 (sic 5) speaks to implementation. But that provision, like the others, is likely subject to the principle already remarked in § 6 (sic 4). Section 8 (sic 6) is more interesting to the extent it is read broadly to provide that states in which requests are made under Article 3 are also required to provide the requesting state with the legal assistance necessary to make and fulfill that request. To some extent this is not a bad idea, especially where the requesti9ng state is poor, lacks capacity or is otherwise not ale to fully take advantage of the possibilities in the Treaty, On the other hand, one is dealing with the obligations directed to states—neither to enterprise litigants or to "victim" litigants. Here there might be confusion, and the provisions of Article 4 might have been redrafted to deal with that (on a state obligation to provide legal assistance to "victims" otherwise unable to meet the financial burden of protecting their rights or requiring the loss from harms that are made actionable under the Treaty.

Sections 9-10 (sic 7-8) speaks to recognition of judgments. Again, the same caution: these provisions either are meant to supersede Treaty and constitutional limitations already in place. Or they are to be read in light of those constraints. Either way the Treaty does no one a favor by failing to make that clear. As it stands the provisions can only be read as aspirational. The provision limiting the re-opening of the merits of a foreign judgment should be unremarkable. However, courts are unlikely to give up their authority to determine whether enforcement conforms to national public policy or constitutional limits as those are understood. That is taken up in Section 10 (sic 10). They include grounds of claim preclusion, violation of national due process rules ("the defendant was not given reasonable notice and a fair opportunity to present his or her case"), and a listing of traditional public policy exceptions well known to many judicial systems. However, these exceptions may be applied only on the request of a defendant. They do not appear to be permitted to be raised by a court *sua sponte*. Second, it is not clear what sort of proof would be required to be shown in

order to prevail. It is likely that each state would provide its own rules for burdens of persuasion.

Lastly, Sections 11 and 12 (sic 9-10) are to be read together. The first speaks to refusals of mutual legal assistance. The second touches on permitted reasons to decline to render mutual assistance.

Refusals are permitted under two circumstances—the first fairly narrowly tailored ("if the violation to which the request relates is not covered by this (Legally Binding Instrument)"), the second as broad as a large black hole in space ("if it would be contrary to the legal system of the requested State Party"). Both bases of refusal raise issues. The first goes to the scope of the Treaty. But as it is now clear from a reading of Article 2, scope is itself a function of national willingness to extend the protections of the Treaty in municipal law. The provision of § 11 (sic 9) might be read as limiting the refusal to the broadest theoretical extension of the scope of the Treaty.

Yet that broad interpretation might not be appealing to states the judicial authority of which may be limited to the domestic legal order as it is, not as it might be. Second, the right of refusal if compliance would be contrary to municipal law is particularly troublesome—if one is seeking to limit the right to refuse mutual legal assistance. The problem is obvious from the text itself—a state can refuse to comply simply by enacting legislation that forbid compliance. In effect, this small exception effectively voids the rule—but only if the state takes positive measures to make it so. Another way of thinking of this provision is that it effectively transforms Article 10 as an opt-in provision. Of course, that was not what was meant. The idea appears, from a more sympathetic reading of text, to focus solely on the rules relating to domestic law of mutual legal assistance. But that, in effect, is the point. Assistance is a function of the extent to which a state party transposes the Treaty.

One leaves Article 10 hardly better off than one ente4red. What appeared to be a strong policy objective structured around an implementation structure that could be transposed into national law had, by the end, turned into a model of a provision that might be adopted or rejected in accordance with the needs and strategic objectives of a state. Article 10, then, exists only as and to the extent it is not "contrary to the legal systems of the requested State Party."

F. From Section 2 to Section 3 of the Draft Legally Binding Instrument (International Cooperation; Mutual Legal Assistance; Dispute Settlement; Implementation)

Articles 11 (International Cooperation) and 12 (Consistency with International Law) With a Nod to Article 16 (Dispute Resolution): Technical Provisions With Normative Punch
Larry Catá Backer

The Devil is in the Implementation: Article 14 as a Mirror Reflecting the Strength of Vision and Challenges of Realization of the Draft LBI
Larry Catá Backer

F. Articles 6 – 12

The Genesis of Articles 6 - 12

Flora Sapio

This essay briefly sketches out the genesis of Articles 6 – 12 of the Draft LBI, using inputs provided during the Fourth Session of the OEIWG, which were previously summarized by this author.[1]

A. Article 6 – Legal Liability

Article 6 was drafted on the basis of Article 10 of the Zero Draft.[2] The topic of legal liability was discussed together with those of mutual legal assistance, and international cooperation, and their discussion took three hours. Following the discussion, Article 10 of the Zero Draft was completely rewritten. The first paragraph of Article 6 is a new addition to the Draft LBI. This paragraph seems to be based on suggestions that were made by members of the United Nations Working Group on Business and Human Rights. Those suggestions concerned the ability of rights holders to be able to seek, obtain and enforce a broad array of remedied, having deterrent, preventive and redressive elements. The inclusion of wording about administrative liability was suggested by members of the United Nations Working Group on Business and Human Rights.

During discussions on this article, some states observed how liability for legal persons does not exist in their domestic legal systems, and how the inclusion of liability for legal persons in a future treaty would be an obstacle to their choice to ratify the new treaty. Also, an earlier version of this article did not impose liability on parent companies for violations committed by their subsidiaries. This gap attracted the concerns of mostly academic experts, practitioners, and a minority of the states that submitted their comments on the Zero Draft.

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1 See *Commentary by States, Civil Society and Other Actors on the Zero Draft*, THE COALITION FOR PEACE AND ETHICS, available at https://www.thecpe.org/projects/research-projects/treaty-project-project-on-the-effort-to-elaborate-an-international-instrument-on-business-and-human-rights/commentary-by-states-civil-society-and-other-actors-on-the-zero-draft-2018/

2 See *infra*, Flora Sapio, What Changed from the Zero Draft--A Side by Side Comparison.

Originally, this article contained a provision on the reversal of the burden of proof. Members of the United Nations Working Group on Business and Human Rights, and some states, expressed their doubts on this provision, which is now absent from the Draft LBI. Wording about effective, proportionate and dissuasive sanctions was carried over from the Zero Draft, even though some states observed how this wording would present an obstacle to their ratification of the future treaty.

The provision about the incorporation or implementation of universal jurisdiction over human rights is absent from the Draft LBI. During discussions on the Zero Draft, doubts about universal jurisdiction were expressed by the majority of states. Instead, Paragraph 7 of this article contains a long list of international conventions, which may have been included in an attempt to circumvent the doubts expressed by states.

B. Article 7 – Adjudicative Jurisdiction

Article 7 is based on article 5 of the Zero Draft.[3] Compared to its previous version, this article underwent little changes. Article 7 qualifies the jurisdiction as an "adjudicative jurisdiction", adding clarity to the title of the 2018 version of this article — which was "jurisdiction" — but also narrowing down the scope of the power of the future treaty. The renaming of this article may have been induced by the comments submitted by some academic experts, who observed how the Zero Draft was attempting to codify a type of jurisdiction that was adjudicative, rather than prescriptive or executive.

In consultations that were held on the Zero Draft, the majority of states expressed doubts and reservations about the need to introduce the concept of universal jurisdiction in the future treaty. As a consequence, wording that created an obligation for states to include provisions about universal jurisdiction for human rights violations in their domestic law was eliminated from the Draft LBI. However, Article 7 tries to re-introduce universal jurisdiction from the backdoor, by attributing jurisdiction on human rights violations covered by the Draft LBI to courts in the state where victims are domiciled. Wording about jurisdiction being vested in the courts of the state where victims are domiciled were added in 2019, despite the doubts voiced by the majority of states about the earlier version of his article. Several states involved in the consultation also observed how the wording used by this article may have provoked conflicts of jurisdiction.

Paragraph 2 of Article 7 defines the notion of "domicile" of multinational corporations. While in 2018 the notion of "domicile" included the place where a corporation had a "subsidiary, agency, instrumentality, branch, representative office or the like", now the concept of "domicile" as it exists in the Draft LBI has been narrowed down, because this paragraph was deleted from the Zero Draft.

3 Ibid.

This article no longer includes a clause that may have allowed third parties to submit claims on behalf of individuals or groups, even in the absence of any form of consent on their part. This clause was deleted following the suggestion of some states, that observed how it could have legitimized the making of various kinds of claims, which could have been in conflict with domestic legislation, or entirely spurious.

C. Article 8 – Statute of Limitations

The 2018 version of this article contained rules about statutes of limitations for "violations of international human rights law which constitute crimes under international law", and for "other types of violations", included civil claims. Under that version, statutes of limitation would not apply to crimes under international law, and they should not be "unduly restrictive" for other types of violations, included those committed abroad. The goal of the 2018 version of Article 8 seems to have been allowing a sufficient period of time to investigate crimes committed by multi-national corporations, and also crimes that may have occurred abroad.

This article was not well received. The main points of criticism expressed by experts concerned the non-binding nature of its language, its vagueness, and the lack of clarity of the scope of the statute of limitation in civil and administrative cases. States criticized the use of the words "crimes under international law", observing how no definition exists for the concept of crimes under international law in the context of business and human rights. States also observed how no consensus exists on statutes of limitation for violations that are not crimes against humanity or war crimes.

Following these comments, Paragraph 1 was amended by substituting the notion of "crimes under international law" with the notion of "all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole". The vague wording about an "adequate period of time" for investigation and prosecution of violation was replaced by wording about "a reasonable period of time", and language about violations "occurred abroad" was replaced by the words "violations occurred in another state."

D. Article 9 – Applicable Law

The 2018 version of Article 9 allowed "victims" to request that the law of the host state of transnational corporations (but also physical persons) be applied in claims "victims" brought before local courts. This provision was contained in Paragraph 2, which was the "core" — so to speak — of this article. The Draft LBI may purport to be a "victims-centred" treaty, and yet it no longer allows "victims" to request the application of substantive legislation of the host state. From the point of view of a nation-state, the request to apply foreign legislation in criminal cases is simply unacceptable. From the very moment of its conception, the LBI was a treaty premised on the idea of the nation-state as the central actor in international economic relations. This was a core premise of the Zero Draft, and it is still one of the core premises of the Revised Draft.

Unsurprisingly, the majority of the states that submitted their comments on the Zero Draft were against the use of foreign criminal legislation in their domestic courts. States simply acted coherent with their nature and with their goals as autonomous actors. And so Article 9 of the Draft LBI allows states to apply foreign legislation in criminal cases, subject to their domestic legislation. Paragraph 2 further specifies the three conditions where domestic courts may apply foreign legislation. Nothing in these three conditions seems to prohibit administrative organs and agencies, individuals, or State-owned multinational corporations, to request that foreign legislation be used: (a) against their domestic competitors; (b) against multinational corporations headquartered outside the state.

E. Article 10 – Mutual Legal Assistance

In discussing Article 10, members of the UN Working Group on Business and Human Rights observed how they way in which this article dealt with the recognition and enforcement of foreign judgments was unclear. The relevant paragraph of Article 10, however, was not amended following this observation. Instead, a clause was added to Paragraph 8, allowing states to refuse the enforcement of foreign judgments in all those cases where such judgments would prejudice their sovereignty, security, public order or other essential interest.

States instead expressed a different position on this article, observing how the introduction of universal jurisdiction in national law would infringe their sovereignty, pose additional needs for technical assistance, and generally speaking result in an excessive burden, particularly for developing countries. Reactions voiced by states seem to have induced the amendment already described.

F. Article 11 – International Cooperation

This article was modified through the addition of a paragraph introducing the obligations, for state parties, to cooperate in good faith to allow the implementation of commitments under the new treaty, and the fulfillment of its purposes. This article attracted only three comments from states, all of which expressed appreciation towards international cooperation initiatives.

G. Article 12 – Consistency with International Law

The 2018 version of this article contained a paragraph (Paragraph 7) posing states the obligation to avoid conflicts between trade and investment agreements, and the Draft LBI. There seemed to be a strong consensus among states that their trade and investment policies could not be subordinated to the future treaty. Generally speaking, the treaty was seen as a document that could not affect existing rules of international law, and that might have introduced an unbalance between development and human rights. States therefore suggested that the Draft LBI refers to existing norms on the law of treaties, taking into

consideration various interest and concerns – included those related to the re-negotiation of all existing bilateral investment agreements.

As a result of the positions expressed by states, wording about the "existing and future trade and investment agreements" was replaced by a broader and much more generic reference to "any bilateral or multilateral agreements, including regional or sub-regional agreements", touching on issues relevant to the future treaty. Also, in response to concerns that the future treaty would prevail over other sources of international law, a paragraph was added, specifying that provisions in the future treaty will not affect the rights and obligations of states under international law.

F. Articles 11 – 12, and 16 (International Cooperation; Consistency with International Law; and Dispute Resolution

Articles 11 (International Cooperation) and 12 (Consistency with International Law) With a Nod to Article 16 (Dispute Resolution): Technical Provisions With Normative Punch

Larry Catá Backer

The last two Articles in Section 2 of the Draft LBI consist of two provisions common to international agreements. The first, Article 11, in its two paragraphs touches on international cooperation, but beyond those referenced in the mutual legal cooperation treated in Article 10. The second, Article 12, in its six paragraphs, touches on the relationship between the Draft LBI, international law and municipal legal orders through and after the transposition process.

Article 11

Article 11 Paragraph 1 obligates States Parties to "cooperate in good faith to enable the implementation of commitments under this (Legally Binding Instrument) and the fulfillment of the purposes of this (Legally Binding Instrument)." That obligation might be read together with Article 16 (Settlement of Disputes) which obligates State Parties to settle their disputes "by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute." (Article 16(1)). Article 16(2) then specifies only two alternatives (subject, no doubt to reservation). These include submission to the Court of Justice, or to arbitration or both. If both are chosen, then Article 16(3) provides a suggestion about the hierarchy of choice. Together these raise a number of interesting issues.

1. A small drafting issue—Article 11(2) speaks to settlement of disputes to enable commitments under the Treaty *and* the fulfillment of its purposes. Read literally it might suggest that disputes about cooperation might be limited to (and dispute resolution modalities might be activated only when) situations or events in which both predicates are satisfied. Yet that may not make much sense, especially in light of Articles 2 and 3 on scope

and purpose. But there it is and for risk averse lawyers who might prefer to avoid an interpretive trap of unknown consequences, these small drafting points might pack consequences well above their perceived "value" to the core objectives of the Treaty.

2. Cooperation under the Treaty is limited to State Parties. Yet in this victim centered document, and one that also seeks to extend a protective shield to certain human rights defenders, Article 11 might have been a useful place to extend reciprocal rights to cooperation among all key affected parties. That would harmonize the principles inherent in Articles 4-6, and would realize in a useful way the scope and purpose provisions of Articles 2 and 3. Cooperation is central to the objectives of prevention, mitigation and remediation; and state duties under the Treaty will be impossible to implement through a strict top down traditional approach. The objection, that this is a treaty directed to states has surface appeal.

And yet, there is no impediment for treaties to extend to non-State parties some of the benefits of the Treaty document itself, even if it would be undertaken in the context of direct state duty or within an obligation to provide for such rights within municipal law. And, indeed, it is hard to miss that Article 11(2) encourages cooperation "in partnership with relevant international and regional organizations and civil society." Each of them—along with victims (Article 4) ought to be able to proactively participate in the management of duty in Paragraph 11, at least to the extent duty (to write this into municipal law or to act by direct operation of the Treaty) can be extracted from its text.

3. Article 11 Paragraph 2 purports to frame the scope of the cooperation contemplated in Paragraph 1. At its heart are three areas of cooperation:

> a. promoting effective technical cooperation and capacity-building among policy makers, operators and users of domestic, regional and international grievance mechanisms;
> b. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present (Legally Binding Instrument);
> c. Facilitating cooperation in research and studies on the challenges and good practices and experiences for preventing violations of human rights in the context of business activities, including those of a transitional character.

Like Article 11(1), Article 11(2) might be best read together with Article 13 and its establishment of something that might begin to function like a secretariat. That is useful. Yet by placing this here and without a cross reference to Article 13, the Treaty runs the risk of being read as limiting cooperation to the universe of activities that fall within those specified in Article 11(2)(a) – (c).

Article 12

Article 12 serves, as do these sorts of provisions elsewhere, for the expression of the ideology of state supremacy in international law contextually framed by the needs that the treaty is meant to serve. It is in that context that Article 12(1) appears booth ordinary and

unremarkable. It is also, as ordinary and unremarkable, quite amenable to infiltration by the traditional modalities of international law that makes extraterritorial application of the law of states with a mind to project their law in that way.

Article 12(2) is written in the form of an exception to Article 12(1):

> Notwithstanding art 7.1, nothing in this (Legally Binding Instrument) entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

It is not exactly clear what this means. One way of reading it to provide a waiver of the principle of sovereign integrity by allowing extraterritorial interventions when the host or receiving state consents. Another way of reading this text is that it applies only to that (undefined) class of activities that fall within a definition of "exercise of jurisdiction" and the "performance of functions that are reserved" to a host state by its own law. In that context, the application of Article 16 again becomes interesting. Thus, it might suggest that were Projecting State A to seek to project itself through law or control activities in Host State B, might Host State B find itself subject to dispute resolution under Article 16 (and especially the choices under Article 16(2), were it to enact blocking legislation. That would be an odd result under Article 12(1) but plausible. If that blocking legislation is deemed contrary to the Treaty but its invalidity be deemed contrary to the constitutional values of Host State B what result?

Article 12(3) characterizes the principles of the Draft LBI and its obligations as a minimum that can be altered to impose greater duty under the conditions specified in that question. Of course, the triggering standard — "more conducive to the respect, promotion, protection and fulfillment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims of human rights violations and abuses in the context of business activities"—invites incoherence in interpretation among jurisdictions. But this Draft LBI has already evidenced a substantial toleration of such dissonance in the service of permitting at least some (key influence driving) state to "do it right" as that might have been understood by the drafters. But guarantees are hard to make in the field of politics, and harder to make good where the burden is on a judiciary to help make it so.

Article 12(4) is yet another textual orphan in this Draft LBI. It provides that "The provisions of this (Legally Binding Instrument) shall be applied in conformity with agreements or arrangements on the mutual recognition and enforcement of judgments in force between State Parties." Its provisions might have been more usefully placed at Article 10. Alternatively, a cross reference might have been useful. In any case, the provisions will be limited to the extent that such instruments are binding on the relevant states. It is likely that the drafters had certain key agreements in mind—referenced, of course in Article 10. Yet Article 10 might be read as effectively modifying them, so absent some harmonization, this provision creates an issue of interpretation.

Lastly Article 12(6) sets out the interpretation provisions of the Draft LBI. It consists of two parts woven together with the always dangerous-for-textual-interpretation connector "and". States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.

The first part is unremarkable. It imposes a reasonable obligation to ensure coherence among legal instruments. The proof is in the implementation, of course; but it always is. And it must be read in its temporal and essentially temporary sense. These sorts of provisions last only as long as the cumulative obligations to which they refer are not, in turn, superseded by a later in time legal instrument. This is also well known—to the elites who will be expected to operate this system for the benefit of those for whom it is written but who would be essentially incapable of making sense of its layers of complexity.

The second part also unremarkable but perhaps more interesting. It can be read in one of two ways. The first and more conventional way would be grounded in the essential constraining function of the word "and" between "compatible" and "shall." That would require only that subsequent agreements should be developed in accordance with and interpreted in conformity to the understandings in the Draft LBI. That is an imperative that, as mentioned before, is only as binding as the will of the States Parties to remain committed to the Treaty. Just as a prior legislature may not bind future legislatures, this provision is unlikely to be useful as a means of disciplining future action. It is of course necessary to interpret this provision in light of the limitations of Article 15 on the applicability of protocols, but the approach adopted in the Draft LBI is also unremarkable.

But it may also be possible to interpret the provision as permitting an action under Article 16 against states which, taking advantage of their authority to enter into these multilateral and regional agreements, do so in ways that might run contrary to the Draft LBI. In that event the provision could be quite potent. Lastly, and more as an aside, one might also be tempted to pull the language "interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols" out of its context to suggest to courts the baseline for interpreting domestic law applications or transpositions of the state obligations under the Draft LBI—also potentially litigable under Article 16.

* * *

Where does that leave the individual seeking, in good faith, to apply the Treaty against the constitutional traditions of states within an intertwined system of production that crosses borders without regard to the resulting conflicts among the "niceties" of legal (sub)systems? First it leaves all litigants and other actors substantially in the same place they were before the Treaty—national and international law transposed into domestic legal orders poses a complex issue for states which have either been ignored or resolved in potentially incompatible ways. Second, it constructs dispute resolution as a marginal actor but one with potent possibility. Dispute resolution lurks around the edges like a brown

recluse spider—deadly but with broken webs built within dark and moist recesses of closets. And always there is ambiguity built into a text that already concedes too much fracture. Third, compatibility merely makes it possible for groups of states to develop regional approaches to the Treaty. These might then be used to untangle global relations among the emerging global trading systems—the Chinese Belt and Road Initiative States, and the U.S. America First system. Beyond these centers of emerging empire the rest of the global political community will either have to choose sides, or they will have to subject themselves to simultaneously applied legal systems on their territories. In effect, the Treaty ensures the loss of sovereignty and sovereign power over domestic legal orders by ensuring that weaker states will effectively have to cede substantive control over that portion of production chains subject to the control of the home states of apex enterprises within production chains. And the "victim" there is only the quite cold comfort that they too much cede autonomy to those who have the capacity and resources to vindicate rights on their behalf. It is to them that the victim will be beholden—and not just beholden, but obliged to conform to the expectations that they will inevitably impose. It is in those relationships that law will effectively be made well outside the shadow of the Draft LBI.

F. Article 14 (Implementation)

The Devil is in the Implementation: Article 14 as a Mirror Reflecting the Strength of Vision and Challenges of Realization of the Draft LBI

Larry Catá Backer[1]

Article 14 of the Draft LBI ostensibly treats the ordinary issues of implementation. And it does so in an equally ostensibly conventional way. And yet, as in other portions of the necessary "boilerplate" of this Draft LBI, these technical provisions contain potentially consequential effects on the way that the Treaty is actually constructed and applied on the ground to a host of the unsuspecting.

The text of Article 14 is broken up into five parts, each of which is pointed in quite different direction. Its bricolage suggests both the larger issues of organization in the Treaty draft, and the effort to use these sorts of provisions for conceptual clean up. In both respects the Treaty draft comes up short. And that is quite lamentable.

Let us first consider the text:

Article 14. Implementation

1. State Parties shall take all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure effective implementation of this (Legally Binding Instrument).

1 All pictures © Larry Catà Backer 2019 or otherwise are in the public domain.

> 2. Each State Party shall furnish copies of its laws and regulations that give effect to this (Legally Binding Instrument) and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations, which shall be made publicly available.
>
> 3. Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.
>
> 4. In implementing this (Legally Binding Instrument), State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.
>
> 5. The application and interpretation of these Articles shall be consistent with international human rights law and international humanitarian law and shall be without any discrimination of any kind or on any ground, without exception.

Even a cursory glance at these provisions suggests the way that Article 14 serves as an accurate mirror reflecting both the strength of visions and the challenges of realization that ultimately describe the entire enterprise of this draft. One gets a better sense of this (and generally of the flabbiness of international treaty writing as a vehicle for the objectives of the drafters in this case) by reflecting briefly on each one of the five paragraphs of Article 14.

Paragraph 1

Paragraph 1 is drafted in the form of a "necessary steps" provision. Had it been written in the conventional form it would have been unremarkable. But it contains two small textual oddities that are worth a closer examination.

The first appears to broaden of the scope of the "necessary steps" provision to include "administrative or other action." That raises interesting issues. On the one hand, as written the provision might impose on states a duty of regulatory and policy coherence. That would be welcome whether or not the Treaty is actually ever realized. But to the extent is becomes explicit here, then again it might acquire teeth through Article 16 — but only as long as some state is willing to demand such coherence by others, and only if the court is willing to read the provision that way. Of course, of that if what the drafters meant they might have been more explicit. Playing interpretive excavation games — the usual sport around treaties — does no one any favor.

The second and perhaps more acute oddity is the insertion in the list of "necessary steps" — almost in passing — a reference to "adequate monitoring mechanisms." Monitoring is the most intrusive and least realized elephant in the room that is the Draft LBI. It appears in several places in the Draft. Article 5 (Prevention) speaks to monitoring with respect to state duties to develop a municipal law that imposes on all persons conducting business activities an obligation to monitor human rights impacts (Article 5(2)(c), though as already discussed in ways that remain deeply undefined. It also imposes on states a similar legislative duty to impose on persons engaged in business activities a duty to communicate with and account to stakeholders respecting among other things policies and measures adopted to monitor any actual or potential human rights violations or abuses (Article 5(2)(d), and again on the basis of terms that may defy coherent application across legal systems.

Beyond Article 5 — and an imposition of monitoring requirements on persons engaged in business activities, the Draft LBI is silent with respect to monitoring by states (onto which such burdens appear light indeed) except here in Article 14(1), and again merely in passing. For a Treaty built on the foundations of the critical importance of monitoring for prevention, mitigation and remedy, it seems odd indeed that except for this provision the Treaty appears indifferent to any composition of a duty on states to more precisely monitor compliance and to monitor their own behavior either with respect to their Treaty duties or with respect to their own independent obligations under international law and norms. That is an enormous hole. It is a hole perhaps large enough to allow passage for state owned enterprises, state affiliated economic actors, and state finance and development mechanisms. The result would substantially weaken the Treaty.

This silence with respect to monitoring speaks to a silence with respect to accountability that ought to cause some concern. In the rush to use states as a vehicle for the imposition of obligation on enterprises and others engaged in business activities — and to oblige them to monitor and to be held to account — the Treaty provides precious little by way of mechanisms for state accountability. This is certainly worrisome with respect to the effectiveness of the mechanics of the Treaty itself and the success of its implementation. More importantly, it appears to create a potentially important gap in a context in which states are not merely regulators but also sovereign participants in business activities. Accountability ought to be at the center of the Treaty — it remains at the periphery, not just with respect to economic actors, but also with respect to the state as well.[2]

Paragraph 2

2 For a discussion of accountability see Larry Catá Backer, *Unpacking Accountability in Business and Human Rights: The Multinational Enterprise, the State, and the International Community* in ACCOUNTABILITY AND INTERNATIONAL BUSINESS ORGANIZATIONS:PROVIDING JUSTICE FOR CORPORATE VIOLATIONS OF HUMAN RIGHTS,LABOR,AND ENVIRONMENTAL STANDARDS (Liesbeth Enneking, et al., eds. Routledge, forthcoming 2019) also available at SSRN: https://ssrn.com/abstract=3163242 or http://dx.doi.org/10.2139/ssrn.3163242.

This paragraph is interesting for its omission that rather than for its text. It imposes an obligation of transparency on states; and it expands that transparency by the creation of a central repository for "laws and regulations that give effect to this (Legally Binding Instrument) and of any subsequent changes to such laws and regulations or a description thereof." That is to be welcomed.

But if transparency is the goal, one must ask to whom it is directed. If it is directed to the international business and human rights governing classes then this provision works well. But if it is meant to empower people who might potentially fall into the legal category of "victim" — and if those victims are members of traditionally marginalized sectors of a local society (women, indigenous people, the poor and illiterate) then it is not clear how this provision could possibly contribute to the core objectives of the Draft LBI and especially its Articles 3-5. Indeed, as written, the provisions merely enhances the power of elite international actors (including elite human rights defenders) to act for a large class of people who are themselves invested with rights and protected from harm but now in ways that are beyond their capacity to act autonomously for themselves.

What might have helped? Here are a few suggestions: (1) a requirement that all such provisions or descriptions be published in local languages (however there may be many that do not constitute an official language of a state); (2) that where it is likely that people cannot read that alternative means of furnishing the information be provided; (3) that special measures be undertaken for specially-abled people traditionally excluded from transparency schemes (the deaf, the blind, etc.); (4) that the state reports annually on efforts to ensure that its rules are effectively communicated to all people; (5) that people be given an effective right to engage with state authorities in the development and enactment of any such measures and that the state be required to report on the effectiveness of such engagement; and (6) that the Human Rights Council annually prepares a report on the compliance by all signatories with the provisions of the Treaty.

Paragraph 3

This paragraph correctly draws attention to the special circumstances in what the Treaty calls (but fails to define) as "conflict-affected areas." As written the paragraph appears to serve more as a"feel good" provision than as something that can, by its own terms, have any effect. Let me suggest some of the issues. First, the broadness of the term dissipates its impact. Certain areas of Chicago, USA can as easily be considered conflict affected areas because of murder and violence rates comparable to those of the most conflict intense provinces in the Congo. A definition would avoid strategic misuse of the term and its obligations. Second, and more importantly, the special obligations imposed require a substantially greater amount of state capacity and resources to actually implement, and implement well. Yet conflict affected areas tend to exist in their worst forms precisely in those states that lack capacity and resources. And, indeed, conflict affected areas tend to exist in those territories in which state authority is at its weakest.

In that context, the development of elaborate special obligations can have little impact. Certainly such states will happily write such rules into their systems. And that is where it will end. More likely, these states will serve as the analogue to individuals categorized as "victim" and lose to some extent their sovereign capacity. Extraterritorial projections of state authority from other places, or the expectation of the governmentalization of enterprises with resources available form elsewhere may be a tempting way to meet the implementation gap. But these ought to prove worrisome. The worry arises from the willingness of globally floating elites to manage the effects and realities of state sovereignty and move actors around to meet substantive requirements without a careful (and accountable) consideration of the embrace of sovereign equality (Article 12(1)).

Lastly, it is worth noting that this sort of provision is only as effective as the monitoring and reporting mechanisms that are built into them. In the absence of both transparency and accountability, this provision will likely be dead letter (except for academics and policy makers who will continue to earn their living pointing out these obvious consequences in context). And yet all one is left with is the high minded ideal with any sort of mechanics for its effective implementation and operation. Much more thought is required here.[3]

Paragraph 4

Paragraph 4 serves the valuable purpose, like that of Paragraph 3, of focusing on special needs populations. In this case the focus is on marginalized populations, as defined in the paragraph. Yet the drafting might raise some issues. It directs states to "address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities."

First a couple of commas, strategically placed might have improved the readability of the section and acknowledged that there are two obligations specified ("specific impacts on" and "giving special attention to"). These are or can be quite distinct obligations. But it is hard to tease that out form the terse language used here. Second, while the provisions might be understood as bringing remedial parity to all affected groups, care will have to be taken to prevent the Treaty from becoming driven solely by the focus on the identified groups. That can have a pernicious consequence if as a result the state law based obligations ignore other groups (on the "it is enough if we focus Treaty obligations solely on the identified groups and treat all others under a different set of standards"). Second, this sort of provision, like Paragraph 23, requires strong mechanisms for transparency and accountability. Their absence has the potential to turn this provision, too, into a "feel good" effort with no real effect.

3 For a discussion see Larry Catá Backer, *Corporate Social Responsibility in Weak Governance Zones,* SANTA CLARA LAW REVIEW 14(1):297-332 (2016) also available at SSRN: https://ssrn.com/abstract=2561113 or http://dx.doi.org/10.2139/ssrn.2561113).

Paragraph 5

This last provision is also unremarkable, but also the least likely to be actually implemented. But it also raises two difficulties.

The first touches on the first part of the sentence: it memorializes an approach to the jurisprudence and legal effect of international law that does not reflect (and indeed is rejected) by several important states, and more importantly by their constitutional orders as enforced by their judiciaries. In the face of that difficulty, it is not clear what this declaration does to advance the ability of states to use this Treaty to advance the scope and purpose rules of Articles 2 and 3. At best, this sort of provision will be read within the constitutional and regional traditions of states. The European Court of Justice will likely read this with substantially different eyes than the US Supreme Court. And the Supreme People's Court of China will likely approach the issue of the internationalization of Chinese law from yet a different and likely much more narrow perspective. Now the question that follows is whether such differences can constitute either breaches of the Treaty or disputes cognizable under Article 16. The question is interesting but unlikely to be pressed. And that is a pity.

The second touches on the end of the sentence: "and shall be without any discrimination of any kind or on any ground, without exception." Again, the sentiment is lofty. A reference to the relevant conventions against discrimination as a baseline might have been useful. Otherwise the terms are free floating and will acquire meaning(s) only within the constitutional traditions of states. But that gets the Treaty effort nowhere. If that is the case there was no point to actually including its terms in Paragraph 5. So what does it add? That remains mysterious. First it suggests an aspirational standard—again the head of the question of the Treaty as a framework document rather than a Treaty comes back to the foreground. Second, if applied literally, then it imperils the sentiments of Article 14(3) and (4) to the extent they are meant to permit affirmative responses. That is not what was meant, but it certainly within the plausible range of interpretation to use this section to limit the ability to use Articles 14(3) and (4) to provide affirmative protections for traditionally marginalized grounds. As usual in Treaty writing, even the best intentions can produce unintended textual and interpretive consequences.

G. From Commentary to Redrafting; Implications and Insights

Going Forward and Looking Back; On the Focus and Utility of this Commentary
CPE-Treaty Project Working Group
Larry Catá Backer and Flora Sapio

What Changed from the Zero Draft--A Side by Side Comparison.
Flora Sapio

G. Summing Up

Going Forward and Looking Back; On the Focus and Utility of this Commentary

CPE-Treaty Project Working Group
Larry Catá Backer
Flora Sapio

The Coalition for Peace and Ethics Treaty Project Working Group holds the efforts of the Open Ended Inter-Governmental Working Group in great esteem. It admires the work and skill required to bring this treaty project forward to the place where one finds it today. The CPE-Treaty Project Working Group that the surest sign of respect for projects of this kind is to take them seriously. That requires something more than brief eclogues indicating support or opposition to its terms. We believe the Treaty project is a serious endeavor and deserves serious, and honest, engagement. We leave the politics of drafting and enactment to others. Our role is to take the Treaty as given—as a complex set of mandatory commands directed to states to make substantial alternations to their legal and constitutional orders in the face of what is perceived to be an important objective of legislation across national territories—the coherent regulation of economic activity with human rights effects. This the Treaty drafters have endeavored to do.

Our greatest regret has been that, given a mandate that is in its own way now largely out of date, neither the Treaty nor its drafters sought to more robustly interlink human rights and sustainability issues. We have come a long way from the time when human rights and environmental issues were considered separate fields, relatively unrelated. We have come even farther form the time that one could imagine human rights uncoupled in the most fundamental way from both bio-diversity and climate change. Indeed, traditional environmental concerns are difficult to separate from the larger context in which they now operate—sustainability. Bio-diversity, climate change, and all in a feedback loop affected and being affected by human activities. It is our hope that the next draft of the Treaty will contain SUBSTANTIAL revisions to move toward a more integrated approach that reflect these connections.

With these thoughts and reservations, the Coalition for Peace and Ethics is pleased to release this summary of the Special Issue of the CPE Bulletin on the Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Corporations and Other Business Enterprises (Draft LBI).

On 14 July 2014, the Human Rights Council created an Open-Ended Intergovernmental Working Group (OEIGWG) on Transnational Corporations and Other Business Enterprises with respect to human rights (OEIGWG). According to Resolution 26/9, the Working Group has the mandate to: “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business

enterprises." The Human Rights Council also decided that the first two sessions of the OEIGWG would be dedicated to conducting constructive deliberations on the content, scope, nature, and form of the future Treaty. Following the third session, a Zero Draft of a Legally Binding Instrument (LBI) on Transnational Corporations (TNCs) and Other Business Enterprises (OBEs) was prepared by Ecuador. In July 2018 the Ministry of Corporate Affairs of India released the draft for public comments. The Zero Draft of the Legally Binding Instrument (and a zero draft of an optional protocol to the binding instrument) formed the basis for a first round of substantive negotiations, held in Geneva from 15 to 19 October 2018. On 16 July 2019, a Revised Draft was released. This Revised Draft will serve as the basis for negotiation to be held during the Fifth Session of the OEIGWG, from 14 to 18 October 2019.

The Coalition for Peace and Ethics, as a member of that large group of interested stakeholders is pleased to make its views known to the OEIGWG. The analysis contained in the Special Issue focusses both on close textual reading, and on drawing out the larger conceptual issues and challenges that the Revised Draft presents. These issues and challenges can be summarized as follows:

1. The LBI Does Not Reflect the Views of Victims, Civil Society and Human Rights Defenders

Even though the Draft LBI is a "victims-centered" treaty, victims of human rights abuses, and more generally speaking the NGOs who represent them, played little or no role in shaping the Draft LBI. Several NGOs submitted written and oral contributions on the LBI. But, our analysis of textual changes proves how the Zero Draft was amended in response to the opinions and concerns advanced by states. The views expressed by academics and civil society organizations were side-lined or outrightly ignored. The document that will serve as the basis for negotiations to be held in October 2019 therefore reflects the views of state actors. That document is not representative of the views advanced by civil society, human rights defenders, and members of the academia.

2. The LBI Does Not Reflect the Views of Business and Industry Associations

Private entrepreneurship is a source of wealth and development for individuals and societies. Markets make man free. By providing equal opportunities to everyone, markets enable social mobility and contribute to creating societies premised on the value of justice. Industry associations expressed their views on the Draft LBI on several occasions, and yet the document that will be discussed in October 2019 did not take their views into account.

3. The LBI Does Not Reflect the Views of Religious Groups and Communities, Indigenous Peoples, Ethic Minorities, and Local Communities

Acknowledging the dignity and equality of man in practice rather than just in words, protecting the environment through one's deeds are values shared by all religious confessions and movements. Not all religious confessions had an opportunity to voice their views on the Draft LBI. Those who did attempted to defend the values of human dignity and respect for nature. The views they expressed, however, are not reflected in the Draft LBI. The same observations can be made for indigenous peoples, persons belonging to ethnic minorities, or to local communities.

4. The LBI Does Not Reflects the Views of Labour

Labour has undergone radical changes in the last 30 years. In both developing and developed countries, precarious forms of employment have become the norm. In the majority of developed and developing countries, individual entrepreneurship and education can no longer guarantee a moderately prosperous lifestyle, employment security, or the enjoyment of economic, social, and cultural rights. All those who fill permanent job needs, while being denied the same rights enjoyed by permanent employees did not have an opportunity to express their views on the Draft LBI.

5. The LBI Does Not Build on The 30-Years Peaceful Struggle to Improve Economic, Social, and Cultural Rights

The peaceful struggle to improve economic, social and cultural rights for everyone began over 30 years ago. Ideas of corporate social responsibility first, and business and human rights next, relied on the assumption that all actors in economic systems are autonomous. And that they have the ability to make choices and decisions that are good for themselves, and at the same time create prosperity for everyone. This is a truth that has been amply proved by practice. The Draft LBI, however, goes against this truth, and it attempts to turn back history to a time when the state was the one and only actor in the economic system.

6. The LBI encourages regulatory fracture

The most significant challenge of the LBI is the struggle to produce a document that embeds structures of coherence in the management of the behaviors that cause harm that may be connected with violations of human rights AND sustainability. There are too many sections that require careful redrafting even if solely for the purpose of aligning purpose to text. In other sections, the sacrifice of coherence in approach is a high price to pay for what might be viewed as pre-negotiated concessions for acceptance. Lastly, the Treaty and the sort of changes to domestic legal orders it encourages does little to bring law back down to the people most in need of its protection. This remains a space for elites—transnational actors to whom are entrusted the protection and operation of systems for the benefit of others. And that is the greatest potential tragedy of all—a document that purports to center “victims” effectively marginalizes victims by creating a document that could not be more remote from their everyday and effectives lives.- And that may be the greatest offense to human rights that proceeds from this project. It is hoped that these challenges may be met—perhaps by transforming this project onto an effort to draft effective framework principles. But only time will tell. it has made of victims twice over.

G. What Changed From the Zero Draft A Side by Side Comparison

Flora Sapio

Article 1. Preamble	**Preamble**
The State Parties to this Convention,	*The State Parties to this* ***(Legally Binding Instrument)*****,**
Stressing that all human rights are universal, indivisible, interdependent and inter-related;	***Recalling*** **the principles and purposes of the Charter of the United Nations.**
Upholding that every person has the right to equal and effective access to justice and remedies in case of risk or harm decisive for the enjoyment of their rights;	***Recalling also*** **the nine core international human rights instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labor Organization;**
Recognizing the rules of international law and international human rights law with respect to the international responsibility of States;	***Recalling further*** **the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, and the UN Declaration on the Rights of Indigenous Peoples, as well as other internationally agreed human rights-relevant declarations;**
Stressing that the obligations and primary responsibility to promote, respect protect and fulfill human rights and fundamental freedoms lie with	

the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law;	***Reaffirming* the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;**
Recalling the UN Charter articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion;	***Stressing* the right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realized consistent with the purposes and principles of the United Nations as stated in the Universal Declaration of Human Rights;**
Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure shall respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur;	*Reaffirming* that all human rights are universal, indivisible, interdependent and inter-related;
Upholding the principles of non-discrimination, participation and inclusion, and self-determination;	*Upholding* **the right of** every person **to have an effective** and equal access to justice **and remedy** in case of violations **of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;**
Desiring to contribute to the development of international law and international human rights law in this field;	*Stressing* that the **primary obligation** to respect, protect, fulfill and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law;
Pursuing the fulfillment of the mandate established by the Human Rights Council Resolution 26/9;	*Recalling* the **United Nations** Charter articles 55 and 56 on international cooperation, including in particular with regard to universal respect for,
Hereby agree as follows:	

	and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion; ***Upholding*** **the principles of sovereign equality, peaceful settlement of disputes, and maintenance of the territorial integrity and political independence of States as set out in Article 2 of the United Nations Charter;** ***Acknowledging*** **that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;** *Underlining* that all business enterprises, regardless of their size, sector, operational context, ownership and structure **have the responsibility to** respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur; **as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;** ***Emphasizing*** **that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises,** ***Recognizing*** **the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children,**

	indigenous peoples, persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities, ***Taking into account*** **all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to human rights, and all relevant previous Human Rights Council resolutions, including in particular Resolution 26/9** ***Noting*** **the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework have played in that regard;** ***Noting*** **also the ILO 190 Convention concerning the elimination of violence and harassment in the world of Work;** *Desiring* to contribute to the development of international law, international humanitarian law and international human rights law in this field; *Hereby agree as follows:*
	Section I
Article 4. Definitions. 1. "Victims" shall mean persons who individually or collectively alleged to have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights,	**Article 1. Definitions.** **1.** "Victims" shall mean any person **or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse as defined in Article 1**

including environmental rights, through acts or omissions in the context of business activities of a transnational character. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. 2. "Business activities of a transnational character" shall mean any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions.	**paragraph 2 below. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim.** **2. "Human rights violation or abuse" shall mean any harm committed by a State or a business enterprise or non-State actor, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.** **3. "Business activities" means any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means.** **4. "Contractual relationship" refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State.** 5. "Regional international organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this (Legally Binding Instrument).
Article 2. Statement of purpose	**Article 2. Statement of purpose**

1. The purpose of this Convention is to: a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities of transnational character; b. To ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character, and to prevent the occurrence of such violations; c. To advance international cooperation with a view towards fulfilling States' obligations under international human rights law;	1. The purpose of this **(Legally Binding Instrument)** is to: a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities ~~of transnational character;~~ b. **To prevent the occurrence of such violations and abuses** and to ensure effective access to justice and remedy for victims of human rights violations **and abuses** in the context of ~~business activities~~ of transnational character; c. To **promote and strengthen** international cooperation **to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses.**
Article 3. Scope 1. This Convention shall apply to human rights violations in the context of any business activities of a transnational character. 2. This Convention shall cover all international human rights and those rights recognized under domestic law.	**Article 3. Scope** **1.** This (Legally Binding Instrument) shall apply, **except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.** **2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if:** **a) it is undertaken in more than one national jurisdiction or State; or** **b) It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State;** **c) It is undertaken in one State but has substantial effect in another State**

	3. This (Legally Binding Instrument) shall cover all human rights ~~and those rights recognized under domestic law.~~
	Section II
Article 8. Rights of Victims	**Article 4. Rights of Victims**
1. Victims shall have the right to fair, effective and prompt access to justice and remedies in accordance with international law. Such remedies shall include, but shall not be limited to:	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.
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.	2. **Victims shall be guaranteed** the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement.
2. State Parties shall guarantee the right of victims, individually or as a group, to present claims to their Courts, and shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this Convention in order to allow for victim's access to adequate, timely and effective remedies.	**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.
3. States Parties shall investigate all human rights violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those natural or legal persons allegedly responsible, in accordance with domestic and international law.	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.**
4. Victims shall be guaranteed appropriate access to information relevant to the pursuit of remedies. State parties shall ensure that their domestic	**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:**

laws and Courts do not unduly limit such right, and facilitate access to information through international cooperation, as set out in this Convention, and in line with confidentiality rules under domestic law. 5. States shall provide proper and effective legal assistance to victims throughout the legal process, including by: a. Informing victims of their procedural rights and the scope, timing and progress of their claims in an opportune and adequate manner; b. Guaranteeing the rights of victims to be heard in all stages of proceedings without prejudice to the accused and consistent with the relevant domestic law; c. Avoiding unnecessary formalities, costs or delay for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards to victims; 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 full consultation with the victims, taking into consideration the economic resources available to the victim, the complexity and length of the issues involved proceedings. In no case shall victims be required to reimburse any legal expenses of the other party to the claim. 6. Inability to cover administrative and other costs shall not be a barrier to commencing proceedings in accordance with this Convention. States shall assist victims in overcoming such barriers, including through waiving costs where needed. States shall not require victims to provide a warranty as a condition for commencing proceedings.	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 appropriate 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**

7. States Parties shall establish an International Fund for Victims covered under this Convention, to provide legal and financial aid to victims. This Fund shall be established at most after (X) years of the entry into force of this Convention. The Conference of Parties shall define and establish the relevant provisions for the functioning of the Fund. 8. States shall provide effective mechanisms for the enforcement of remedies, including national or foreign judgements, in accordance with the present Convention, domestic law and international legal obligations. 9. 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. 10. Victims 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. 11. States shall protect victims, their representatives, families and witnesses from any unlawful interference with their privacy and from intimidation, and retaliation, before, during and after any proceedings have been instituted. 12. States shall guarantee the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement of victims, their representatives, families and victims.	**environment, so that they are able to act free from threat, restriction and insecurity.** 10. States Parties shall investigate all human rights abuses promptly, thoroughly and impartially and, where appropriate, take action against those natural or legal persons allegedly 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.** States 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 ~~without prejudice to the accused~~ and consistent with the ~~relevant~~ domestic law; c. Avoiding unnecessary ~~formalities~~, costs or delay for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards ~~to victims~~; 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 full consultation with the victims, taking into consideration the economic resources available to the victim, the complexity and length of the issues involved proceedings.

13. 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.	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. States shall provide effective mechanisms for the enforcement of remedies **for violations of human rights,** including **through prompt execution of** national or foreign judgments **and 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 recognized 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.
Article 9. Prevention 1. State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties' territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such business activities, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities. 2. Due diligence referred to above under Article 7.1 shall include, but shall not be necessarily limited to: a. Monitoring the human rights impact of its business activities including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services. b. Identify and assess any actual or potential human rights violations that may arise through their own activities including that of their subsidiaries and of entities under their direct or indirect control or directly linked to its operations, products or services. c. Prevent human rights violations within the context of its business activities, including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services, including through financial contribution where needed. d. Reporting publicly and periodically on non-financial matters, including at a minimum environmental and human rights matters, including policies, risks, outcomes and indicators. The requirement to disclose this	**Article 5. Prevention** **1. State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.** **2. For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities including those of a transnational character, to undertake human rights due diligence as follows:** **a.** Identify and assess any actual or potential human rights violations **or abuses** that may arise **from their own business activities, or from their contractual relationships;** b. **Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, included those under their contractual relationships;** c. Monitoring the human rights impact of **their** business activities including **those under their contractual relationships;** **d. Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships.** **3. Measures referred to under the immediately preceding paragraph**

information should be subject to an assessment of the severity of the potential impacts on the individuals and communities concerned, not to a consideration of their materiality to the financial interests of the business or its shareholders. e. Undertaking pre and post environmental and human rights impact assessments covering its activities and that of its subsidiaries and entities under its control, and integrating the findings across relevant internal functions and processes and taking appropriate action. f. Reflecting the requirements in paragraphs a. to e. above in all contractual relationships which involve business activities of transnational character. g. Carrying out meaningful consultations with groups whose human rights are potentially affected by the business activities and other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons. h. Due diligence may require establishing and maintaining financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation. 3. State Parties shall ensure that effective national procedures are in place to enforce compliance with the obligations laid down under this article, and that those procedures are available to all natural and and legal persons having a legitimate interest, in accordance with national law, in ensuring that the article is respected. 4. Failure to comply with due diligence duties under this article shall	shall include but shall not be limited to: a. Undertaking ~~pre and post~~ environmental and human rights impact assessments **in relation to** its activities **and those under their contractual relationships,** integrating **the results of such assessments into** relevant internal functions and processes, and taking appropriate actions. b. Carrying out meaningful consultations with groups whose human rights **can** potentially affected by the business activities and **with** other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons **and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable**. c. Reporting publicly and periodically on non-financial matters, ~~including at a minimum environmental and human rights matters,~~ including policies, risks, outcomes and indicators **on human rights, environment and labour standards concerning the conduct of their business activities, including those of their contractual relationships**. d. **Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed.** e. **adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and**

result in commensurate liability and compensation in accordance with the articles of this Convention. 5. States Parties may elect to exempt certain small and medium-sized undertakings from the purview of selected obligations under this article with the aim of not causing undue additional administrative burdens.	**services;** **4. State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights resulting from the size, nature, context of any risk associated with the business activities, including those of a transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law.** **5. In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument) State Parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities, including those of a transnational character, in accordance with domestic law.** 6. **State Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.**
Article 10. Legal Liability 1. State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities	**Article 6. Legal Liability** **1. State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including**

of transnational character. Such liability shall be subject to effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions. Liability of legal persons shall be without prejudice to the liability of natural persons.	**those of a transnational character.**
	2. Liability of legal persons shall be without prejudice to the liability of natural persons.
2. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same actor.	3. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same **acts.**
3. Where a person with business activities of a transnational character is found liable for reparation to a victim, such party shall provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.	**4. State Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.**
4. Subject to domestic law, courts asserting jurisdiction under this Convention may require, where needed, reversal of the burden of proof for the purpose of fulfilling the victim's access to justice.	5. **State Parties** may require establishing and maintaining financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation.
Civil Liability	
5. State Parties shall provide for a comprehensive regime of civil liability for violations of human rights undertaken in the context of business activities and for fair, adequate and prompt compensation.	6. **State Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of a transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.**
6. All persons with business activities of a transnational character shall be liable for harm caused by violations of human rights arising in the context of their business activities, including throughout their operations: a. to the extent it exercises control over the operations, or b. to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection	**7. Subject to their domestic law, State Parties shall ensure that their**

between its conduct and the wrong suffered by the victim, or c. to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity. 7. Civil liability of legal persons shall be independent from any criminal procedure against that entity. *Criminal liability* 8. State Parties shall provide measures under domestic law to establish criminal liability for all persons with business activities of a transnational character that intentionally, whether directly or through intermediaries, commit human rights violations that amount to a criminal offense, including crimes recognized under international law, international human rights instruments, or domestic legislation. Such criminal liability for human rights violations that amount to a criminal offense, shall apply to principals, accomplices and accessories, as may be defined by domestic law. 9. Criminal liability of legal persons shall be without prejudice to the criminal liability of the natural persons who have committed the offenses. 10. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. 11. Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to crimes.	**domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offenses:** **a. War crimes, crimes against humanity and genocide as defined in articles 6, 7 and 8 of the Rome Statute for the International Criminal Court;** **b. Torture, cruel, inhuman or degrading treatment, as defined in article 1 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment;** **c. Enforced disappearance, as defined in articles 7 and 25 of the International Convention for the Protection of All Persons from Enforced Disappearance;** **d. extrajudicial execution, as defined in Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;** **e. Forced labour as defined in article 2.1 of the ILO Forced Labour Convention 1930 and article 1 of the Abolition of Forced Labour Convention 1957** **f. The use of child soldiers, as defined in article 3 of the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999** **g. Forced eviction, as defined in the Basic Principles and Guidelines on Development based evictions and displacement;** **h. slavery and slavery-like offenses;** **i. Forced displacement of people;** **j. Human trafficking, including sexual exploitation;** **k. Sexual and gender-based violence.** **8. Such liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have**

12. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions or other administrative sanctions, for acts covered under the previous two paragraphs.	**committed the offenses.** **9. State Parties shall provide measures under domestic law to establish legal liability for natural or legal persons conducting business activities, including those of a transnational character, for acts that constitute attempt, participation or complicity in a criminal offense in accordance with Article 6 (7) and criminal offenses as defined by their domestic law.**
Article 5. Jurisdiction 1. Jurisdiction, with respect to actions brought by an individual or group of individuals, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this Convention, shall vest in the court of the State where: a. such acts or omissions occurred or; b. the Court of the State where the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions are domiciled. 2. A legal person or association of natural or legal persons is considered domiciled at the place where it has its: a. statutory seat, or b. central administration, or c. substantial business interest, or d. subsidiary, agency, instrumentality, branch, representative office or the like.	**Article 7. Adjudicative Jurisdiction** 1. Jurisdiction, with respect to actions brought by an individual or group of individuals, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this **(Legally Binding Instrument)**, shall vest in the court of the State where: a. such acts or omissions occurred or; b. **the victims are domiciled;** c. ~~the Court of the State where~~ the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions **in the context of business activities, included those of a transnational character,** are domiciled. 2. **A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its:** **a. place of incorporation; or** **b. statutory seat; or**

3. Where a claim is submitted on behalf of an individual or group of individuals, this shall be with their consent unless the claimant can justify acting on their behalf without consent.	**c. central administration; or** **d. substantial business interests**
Article 6. Statute of limitations	**Article 8. Statute of Limitations**
1. Statutes of limitations shall not apply to violations of international human rights law which constitute crimes under international law. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive and shall allow an adequate period of time for the investigation and prosecution of the violation, particularly in cases where the violations occurred abroad.	**1. The State Parties to the present (Legally Binding Instrument) undertake to adopt, in accordance with their domestic law, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole**. 2. Domestic statutes of limitations for ~~other types of~~ violations that do not constitute **the most serious crimes of concern to the international community as a whole**, including those time limitations applicable to civil claims and other procedures, **shall allow a reasonable period of time for the investigation and prosecution of the violation,** particularly in cases where the violations occurred **in another State.**
Article 7. Applicable law	**Article 9. Applicable law**
1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the Convention shall be governed by the law of that court, including any rules of such law relating to conflict of laws. 2. At the request of victims, all matters of substance regarding human rights law relevant to claims before the competent court may be governed	1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the **(Legally Binding Instrument)** shall be governed by the law of that court, including any rules of such law relating to conflict of laws. 2. All matters of substance regarding human rights law relevant to claims

by the law of another Party where the involved person with business activities of a transnational character is domiciled. The competent court may request for mutual legal assistance as referred to under Article 11 of this Convention. 3. The Convention does not prejudge the recognition and protection of any rights of victims that may be provided under applicable domestic law.	before the competent court may, **in accordance with domestic law,** be governed by the law of another **State** where: a. **the acts or omissions that resulted in violations of human rights covered under this (Legally Binding Instrument) have occurred; or** b. **the victim is domiciled; or** **c. the natural or legal persons alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled**. 3. The **(Legally Binding Instrument)** does not prejudge the recognition and protection of any rights of victims that may be provided under applicable domestic law.
Article 11. Mutual Legal Assistance 1. States Parties shall cooperate in good faith to enable the implementation of commitments under this Convention and the fulfillment of the purposes of this Convention. 2. States Parties shall afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial proceedings in relation to the cases covered by this Convention, including access to information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations covered under this Convention. The requested Party shall inform the requesting Party, as soon as possible, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. The requesting State Party may require that the requested State Party keep confidential the fact and	**Article 10. Mutual Legal Assistance** 1. States Parties shall afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial proceedings in relation to **claims** covered by this (**Legally Binding Instrument)** including access to information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations ~~covered under this Convention.~~ 2. The requested **State** Party shall inform the requesting **State** Party, as soon as possible, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

substance of the request, except to the extent necessary to execute the request. 3. Mutual legal assistance under this Convention is understood to include, but is not limited to: a. Taking evidence or statements from persons; b. Effecting service of judicial documents; c. Executing searches and seizures; d. Examining objects and sites; e. Providing information, evidentiary items and expert evaluations; f. Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; h. Facilitating the voluntary appearance of persons in the requesting State Party; i. Facilitating the freezing and recovery of assets; j. Assistance to, and protection of, victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to international legal requirements including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment; k. Assistance in regard to application and interpretation of human rights law; l. Any other type of assistance that is not contrary to the domestic law of the requested State Party. 4. Without prejudice to domestic law, the competent authorities of a State	3. Mutual legal assistance under this **(Legally Binding Instrument)** is understood to include, but is not limited to: a. Taking evidence or statements from persons; b. Effecting service of judicial documents; c. Executing searches and seizures; d. Examining objects and sites; e. Providing information, evidentiary items and expert evaluations; f. Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; h. Facilitating the voluntary appearance of persons in the requesting State Party; i. Facilitating the freezing and recovery of assets; j. Assistance to, and protection of, victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to international legal requirements including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment; k. Assistance in regard **to the application of domestic law;** l. Any other type of assistance that is not contrary to the domestic law of the requested State Party. 2. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal **offenses** covered under this **(Legally Binding Instrument)** to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully

Party may, without prior request, transmit information relating to criminal matters covered under this Convention to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention. The transmission of information shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information.	concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this **(Legally Binding Instrument)**. The transmission **and exchange** of information shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information.
5. States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are subject of investigations, prosecutions or judicial proceedings under this Convention, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place, is fully respected.	3. States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are subject of investigations, prosecutions or judicial proceedings under this **(Legally Binding Instrument)**, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place, is fully respected.
6. States Parties shall carry out their obligations under the previous Article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in a way not contrary to domestic law.	4. States Parties shall carry out their obligations under the previous Article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in a way not contrary to domestic law.
7. In accordance with domestic systems, each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.	5. I~~n accordance with domestic systems, each~~ State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.
	6. State Parties shall provide judicial assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations covered under this **(Legally Binding Instrument)**.

8. State Parties shall provide judicial assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations covered under this Convention.	
9. Any judgement of a court having jurisdiction in accordance with this Convention which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized and enforced in any Party as soon as the formalities required in that Party have been completed, whereby formalities should not be more onerous and fees and charges should not be higher than those required for the enforcement of domestic judgments and shall not permit the re-opening of the merits of the case.	7. Any judgment of a court having jurisdiction in accordance with this **(Legally Binding Instrument)** which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized and enforced in any **State** Party as soon as the formalities required in that **State** Party have been completed, whereby formalities should not be more onerous and fees and charges should not be higher than those required for the enforcement of domestic judgments and shall not permit the re-opening of the merits of the case.
10. Recognition and enforcement may be refused, at the request of the defendant, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that (a) the defendant was not given reasonable notice and a fair opportunity to present his or her case; (b) where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or (c) where the judgement is contrary to the public policy of the Party in which its recognition is sought.	8. Recognition and enforcement may be refused, at the request of the defendant, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that (a) the defendant was not given reasonable notice and a fair opportunity to present his or her case; (b) where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or (c) where the judgement is **likly to prejudice the sovereignty, security, ordre public or other essential interests of the Party in which its recognition is sought**.
11. Mutual legal assistance under this article may be refused by a State Party if the violation to which the request relates is not covered by this Convention or if it would be contrary to the legal system of the requested State Party.	9. Mutual legal assistance under this article may be refused by a State Party if the violation to which the request relates is not covered by this **(Legally Binding Instrument)** or if it would be contrary to the legal system of the requested State Party.
12. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.	10. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this **(Legally Binding Instrument)** on the

	grounds **that the request is considered to involve fiscal matters or** bank secrecy.
Article 12. International Cooperation 1. State Parties recognize the importance of international cooperation and its promotion for the realization of the purpose of the present Convention and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society. Such measures could include, but are not limited to: a. promote effective technical cooperation and capacity-building among policy makers, operators and users of domestic, regional and international remedial mechanism, b. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present convention, c. Facilitating cooperation in research and studies on the best practices and experiences for preventing violations of human rights in the context of business activities of transitional character.	**Article 11. International Cooperation** 1. State Parties **shall cooperate in good faith to enable the implementation of commitments under this (Legally Binding Instrument) and the fulfilment of the purposes of this (Legally Binding Instrument).** **2. State Parties** recognize the importance of international cooperation and its promotion for the realization of the purpose of the present **(Legally Binding Instrument)** and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society. Such measures could include, but are not limited to: a. promot**ing** effective technical cooperation and capacity-building among policy makers, operators and users of domestic, regional and international **grievance** mechanisms; b. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present **(Legally Binding Instrument);** c. Facilitating cooperation in research and studies on **the challenges and the good practices** and experiences for preventing violations of human rights in the context of business activities of transitional character.
Article 13. Consistency with International Law	**Article 12. Consistency with International Law**

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.	1. States Parties shall carry out their obligations under this **(Legally Binding Instrument)** in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.	2. **Notwithstanding art. 7.1,** nothing in this **(Legally Binding Instrument)** entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.
3. Nothing in these articles shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law, including the obligations under any other treaty that governs or will govern, in whole or in part, mutual legal assistance.	3. **Nothing in the present (Legally Binding Instrument) shall affect any provisions that are more conducive to the respect, promotion, protection and fulfillment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims of human rights violations and abuses in the context of business activities which may be contained:** **a. In the domestic legislation of a State Party; or** **b. In any other regional or international, treaty or agreement in force for that State.**
4. The provisions of this Convention shall be applied in conformity with agreements or arrangements on the mutual recognition and enforcement of judgements in force between Parties.	4. The provisions of this **(Legally Binding Instrument)** shall be applied in conformity with agreements or arrangements on the mutual recognition and enforcement of judgements in force between Parties.
5. This Convention shall not affect the rights and obligations of the Parties under the rules of general international law with respect to the international responsibility of States.	
6. States Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, shall not contain any provisions that conflict with the implementation of this Convention and shall ensure upholding human rights in the context of	

business activities by parties benefiting from such agreements. 7. States Parties agree that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under this Convention, notwithstanding other conflicting rules of conflict resolution arising from customary international law or from existing trade and investment agreements.	5. **This (Legally Binding Instrument) shall not affect the rights and obligations of the State Parties under the rules of general international law with respect to the international responsibility of States.** **6.States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.**
	Section III
Article 14. Institutional Arrangements Committee 1. There shall be a Committee established in accordance with the following procedures: a. The Committee shall consist, at the time of entry into force of the present Convention, (12) experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen	**Article 13. Institutional Arrangements** **Committee** 1. There shall be a Committee established in accordance with the following procedures: a. The Committee shall consist, at the time of entry into force of the present **(Legally Binding Instrument)**, (12) experts. After an additional sixty ratifications or accessions to the **(Legally Binding Instrument)**, the

members. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence in the field of human rights, public international law or other relevant fields, who shall serve in their personal capacity.	membership of the Committee shall increase by six members, attaining a maximum number of eighteen members. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence in the field of human rights, public international law or other relevant fields, who shall serve in their personal capacity.
b. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution, the differences among legal systems, gender balanced representation.	b. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution, the differences among legal systems, gender balanced representation **and ensuring that elected experts are not engaged, directly or indirectly, in any activity which might adversely affect the purpose of this (Legally Binding Instrument).**
c. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties, they shall be elected for a term of 4 years. Each State Party may nominate one person from among its own nationals. Elections of the members of the Committee shall be held at the Conference of States Parties by majority present and voting. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.	c. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. They shall be elected for a term of 4 years **and can be re-elected for another term**. Each State Party may nominate one person from among its own nationals. Elections of the members of the Committee shall be held at the Conference of States Parties by majority present and voting. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
d. The initial election shall be held no later than six months after the date of the entry into force of this Convention. The term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in this article.	d. The initial election shall be held no later than six months after the date of the entry into force of this **(Legally Binding Instrument**). The term of six of the members elected at the first election shall expire at the end of
e. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated	

him or her shall appoint another expert from among its nationals to serve for the remainder of his or her term, subject to the approval of the majority of the States Parties.	two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in this article.
f. The Committee shall establish its own rules of procedure and elect its officers for a term of two years. They may be re-elected.	e. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him or her shall appoint another expert from among its nationals to serve for the remainder of his or her term, subject to the approval of the majority of the States Parties.
g. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.	f. The Committee shall establish its own rules of procedure and elect its officers for a term of two years. They may be re-elected.
h. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.	g. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this **(Legally Binding Instrument**). The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
2. States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.	h. With the approval of the General Assembly, the members of the Committee established under the present **(Legally Binding Instrument**) shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.
3. The Secretary-General of the United Nations shall transmit the reports to all States Parties.	2. States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this **(Legally Binding Instrument**), within one year after the entry into force of the **(Legally Binding Instrument**) for the State Party concerned. Thereafter the States

4. The Committee shall have the following functions: a. Make general comments on the understanding and implementation of the Convention based on the examination of reports and information received from the States Parties and other stakeholders. b. Consider and provide concluding observations and recommendations on reports submitted by State Parties as it may consider appropriate and forward these to the State Party concerned that may respond with any observations it chooses to the Committee. The Committee may, at its discretion, decide to include this suggestions and general recommendations in the report of the Committee together with comments, if any, from States Parties. c. Provide support to the State Parties in the compilation and communication of information required for the implementation of the provisions of the Convention d. Submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations. e. The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the present Treaty. Conference of States Parties 5. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the Convention, including any further development needed towards fulfilling	Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request. 3. The Secretary-General of the United Nations shall transmit the reports to all States Parties. 4. The Committee shall have the following functions: a. Make general comments on the understanding and implementation of the **(Legally Binding Instrument**) based on the examination of reports and information received from the States Parties and other stakeholders. b. Consider and provide concluding observations and recommendations on reports submitted by State Parties as it may consider appropriate and forward these to the State Party concerned that may respond with any observations it chooses to the Committee. The Committee may, at its discretion, decide to include this suggestions and general recommendations in the report of the Committee together with comments, if any, from States Parties. c. Provide support to the State Parties in the compilation and communication of information required for the implementation of the provisions of the **(Legally Binding Instrument**) d. Submit an annual report on its activities under this **(Legally Binding Instrument**) to the States Parties and to the General Assembly of the United Nations. e. [The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues

its purposes. 6. No later than six months after the entry into force of the present Convention, the Conference of the States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General	relating to the present **(Legally Binding Instrument**)]. Conference of States Parties 5. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the **(Legally Binding Instrument**), including any further development needed towards fulfilling its purposes. 6. No later than six months after the entry into force of the present **(Legally Binding Instrument**), the Conference of the States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General **biennally or upon the decision of the Conference of State Parties.** **International Fund for Victims** **7. State Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims. This Fund shall be established at most after (X) years of the entry into fore of this (Legally Binding Instrument). The Conference of Parties shall define and establish the relevant provisions for the functioning of the Fund.**
Article 15. Final Provisions Implementation 1. States shall take all necessary legislative, administrative or other action	**Article 14. Implementation** 1. State **Parties** shall take all necessary legislative, administrative or other

including the establishment of adequate monitoring mechanisms to ensure effective implementation of this Convention.	action including the establishment of adequate monitoring mechanisms to ensure effective implementation of this **(Legally Binding Instrument)**
2. Each State Party shall furnish copies of its laws and regulations that give effect to this Convention and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations, which shall be made publicly available.	2. Each State Party shall furnish copies of its laws and regulations that give effect to this **(Legally Binding Instrument)** and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations, which shall be made publicly available.
3. In policies and actions pursuant to this Convention, Parties shall act to protect these policies and actions from commercial and other vested interests of the [business sector] in accordance with national law.	3. ~~In policies and actions pursuant to this Convention, Parties shall act to protect these policies and actions from commercial and other vested interests of the [business sector] in accordance with national law~~.
4. Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.	4. Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.
5. In implementing this agreement, State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.	5. In implementing this **(Legally Binding Instrument)**, State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.
6. The application and interpretation of these articles shall be consistent with international human rights law and international humanitarian law and shall be without any discrimination of any kind or on any ground, without exception.	6. The application and interpretation of these articles shall be consistent with international human rights law and international humanitarian law and shall be without any discrimination of any kind or on any ground, without exception.

	Article 15. Relation with protocols 1. **This (Legally Binding Instrument) may be supplemented by one or more protocols.** **2. In order to become a Party to a protocol, a State or a regional integration organization must also be a Party to this (Legally Binding Instrument).** **3. A State Party to this (Legally Binding Instrument) is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.** **4. Any protocol to this (Legally Binding Instrument) shall be interpreted together with this (Legally Binding Instrument), taking into account the purpose of that protocol.**
	Article 16. Settlement of Disputes **1. If a dispute arises between two or more State Parties about the interpretation or application of this (Legally Binding Instrument), they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.** **2. When signing, ratifying, accepting, approving or acceding to this (Legally Binding Instrument), or at any time thereafter, a State Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this article, it accepts one**

	or both of the following means of dispute settlement as compulsory in relation to any State Party accepting the same obligation: **a. Submission of the dispute to the International Court of Justice;** **b. Arbitration in accordance with the procedure and organization mutually agreed by both State Parties.** **3. If the State Parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this article, the dispute may be submitted only to the International Court of Justice, unless the State Parties agree otherwise.**
Article 15. Final Provisions (...) Signature 8. The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of (date). Consent to be bound 9. The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention. Regional integration organizations	**Article 17. Signature, Ratification, Acceptance, Approval and Acession** 1. The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of (date). 2. The present **(Legally Binding Instrument)** shall be subject to ratification, **acceptance or approval** by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the **(Legally Binding Instrument)**. 3. This **(Legally Binding Instrument)** shall apply to regional integration organizations within the limits of their competence; subsequently they shall inform the depositary of any substantial modification in the extent of their competence. ~~For the purposes of paragraph 17, and paragraphs 22 and 23 of this article, any instrument deposited by these organizations shall not be counted.~~ Such organizations may exercise their right to vote in

10. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. 11. This Convention shall apply to regional integration organizations within the limits of their competence; subsequently they shall inform the depositary of any substantial modification in the extent of their competence. For the purposes of paragraph 17, and paragraphs 22 and 23 of this article, any instrument deposited by these organizations shall not be counted. Such organizations may exercise their right to vote in the Conference of States Parties with a number of votes equal to the number of their member States that are Parties to this Convention. Such right to vote shall not be exercise if any of its member States exercises its right, and vice versa.	the Conference of States Parties with a number of votes equal to the number of their member States that are Parties to this **(Legally Binding Instrument)**. Such right to vote shall not be exercise if any of its member States exercises its right, and vice versa.
Article 15. Final Provisions (…) Entry into force 12. The present Convention shall enter into force on the thirtieth day after the deposit of the [---] instrument of ratification or accession. 13. For each State or regional integration organization ratifying, formally confirming or acceding to the Convention after the deposit of the ---- such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.	**Article 18. Entry into Force** 1. The present **(Legally Binding Instrument)** shall enter into force on the thirtieth day after the deposit of the [---] instrument of ratification or accession. 2. For each State or regional integration organization ratifying, formally confirming or acceding to the **(Legally Binding Instrument)** after the deposit of the ---- such instrument, the **(Legally Binding Instrument)** shall enter into force on the thirtieth day after the deposit of its own such instrument.

(...)	
Article 15. Final Provisions (…) Amendments 16. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favor a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favor such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting in the Conference of the Parties shall be submitted by the Secretary-General to all States Parties for acceptance. 17. An amendment adopted and approved in accordance with paragraph 15 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it. 18. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 15 of this	**Article 19. Amendments** 1. Any State Party may propose an amendment to the present **(Legally Binding Instrument)** and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favor a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favor such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting in the Conference of the Parties shall be submitted by the Secretary-General to all States Parties for acceptance. 2. An amendment adopted and approved in accordance with ~~paragraph 15 of~~ this Article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it. 3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with ~~paragraph 15 of~~ this Article which relates exclusively to the establishment of the Committee or its functions, and the Conference of States Parties shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at

article which relates exclusively to the establishment of the Committee or its functions, and the Conference of States Parties shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. (...)	the date of adoption of the amendment.
Article 15. Final Provisions (…) Reservations 14. Reservations incompatible with the object and purpose of the present Convention shall not be permitted. 15. Reservations may be withdrawn at any time. (...)	**Article 20. Reservations** 1. Reservations incompatible with the object and purpose of the present **(Legally Binding Instrument)** shall not be permitted. 12. Reservations may be withdrawn at any time.
Article 15. Final Provisions (…) Denunciation 19. A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.	**Article 21. Denunciation** 1. A State Party may denounce the present **(Legally Binding Instrument)** by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

(...)	
Article 15. Final Provisions (…) Depositary 7. The Secretary-General of the United Nations shall be the depositary of the present Convention. (…) Authentic texts 20. The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic. 21. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.	**Article 22. Depositary and Languages** **1.** The Secretary-General of the United Nations shall be the depositary of the present **(Legally Binding Treaty)**. 2. The Arabic, Chinese, English, French, Russian and Spanish texts of the present **(Legally Binding Treaty)** shall be equally authentic. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present **(Legally Binding Instrument)**.

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