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;
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> (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.