

D. Article 1 (Definitions)

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

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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 give 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.

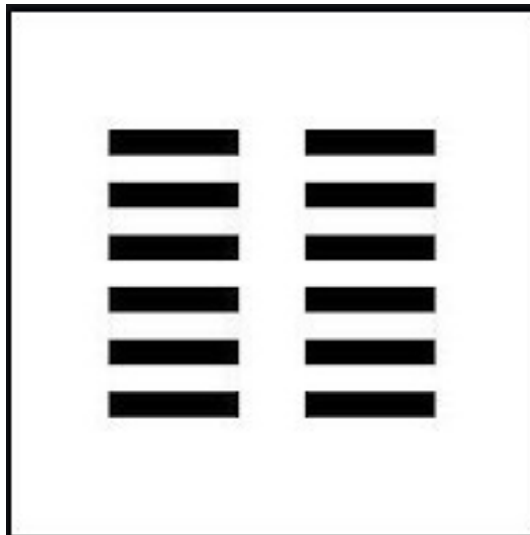
It is with this in mind that one can approach the project of controlling meaning that is Section 1 of the Draft LBI. At its base, a "definitions" or "use of terms" section does more to reveal the underlying ideology the instrument than any portion of a Preamble. At the same time, this section also reveals 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

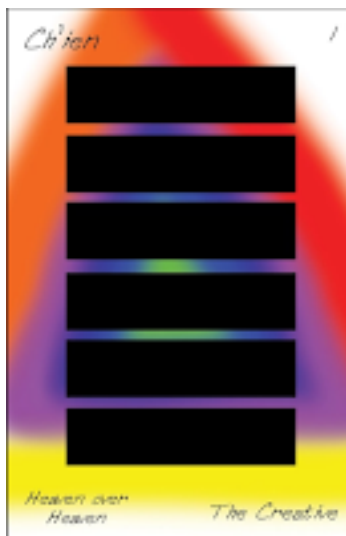
activities of a transnational character; OR (3) their interaction, all the rest becomes irrelevant or bound up in ulterior (political/pragmatic) motive.

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.

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

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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.

