

E. Article 4 (Rights of Victims)

Article 4: Conceptual Foundations

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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 on. 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 say, 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.

