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

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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.