The OHCHR Zero Draft Legally Binding Instrument: Fragmentation vs. inclusivity

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It may seem that the OHCHR Zero Draft Legally Binding Instrument is a true champion of coherence at a first glance — seeking to make TNCs responsible against *all* human rights, as the binding glue between specialised and fragmented regimes, e.g. international investment law, environmental law and human rights law.

Article 2.1(b) of the Zero Draft Legally Binding Instrument states, the treaty is "[t]o ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character [...]". This is an access to justice treaty, dissimilar from other access to justice treaties in the sense that it provides a right to individuals against transnational corporations, which is a bold step in itself. Traditionally, treaties that provided access to justice mechanisms were addressed against states. We therefore see a victim-centric mechanism throughout the treaty that is carried out with the state still as an integral part of the treaty through the following illustrative, but non-exhaustive list:

1. Use of languages like:
    a. "State Parties shall guarantee the right of victims" in article 8.2;
    b. "States Parties shall investigate all human rights violations" in article 8.3;
    c. "States shall provide proper and effective legal assistance" in article 8.5;
    d. "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" in article 8.6;
    e. Other languages in article 8;
    f. "State Parties shall ensure in their domestic legislation" in article 9.1;
    g. "State Parties shall ensure that effective national procedures are in place" in article 9.3;
    h. "State Parties shall ensure through their domestic law" in article 10.1; and
    i. "States Parties shall cooperate in good faith" in article 11.1.
2. The language above creates many obligations for states like:

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a. Obligation to not have an unduly restrictive statute of limitations (article 6);
b. Duty to investigate and act against human rights violations (article 8.3);
c. Obligation to allow access to information (article 8.4);
d. Duty to offer legal assistance (article 8.5);
e. Duty to waive litigation costs for needy victims (article 8.6);
f. Duty to protect victims and witnesses (article 8.10); and
g. Obligation to enforce human rights due diligence on transnational corporations (article 9.1).

In fact, this is another novelty of this zero draft is that it *arguably* puts victims at the core. Ruggie's work was criticised on the basis of absence of victim consultation, while he chastised transnational corporations (Davitti).

Against all this we see that the absence of an international court means that the same law that may be applied in so many different courts has a risk of fragmentation in its application (Peters). This is an example of fragmentation of international law in its law-application rather than law-making. While though not directly addressed, fragmentation or deviation from creating a consistent and predictable body of law is discouraged through article 11.10. This is created through allowing a plea for non-enforcement of a judgment if "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." This seems like a derivative principle of *res judicata* but especially applicable and relevant for fragmentation. For a judgment already pronounced, re-examination on merits is impermissible as under article 11.9. To mitigate effects of fragmentation arising from the legally binding instrument itself as regards general international law, conflict clauses have been placed in article 13. Article 13.3 reads, "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." Article 13.5 clarifies that obligations under general international law and international responsibility of states shall not be affected by the treaty, suggesting that this may create a specialised regime in itself.

While, in theory, courts in different jurisdictions can deviate on the same issue with two different parties, the importance of judicial dialogue cannot be understated. As a domestic court applying international law in the modern era, it cannot be immune to international developments on legal issues that may be addressed in courts of different jurisdictions,

especially through strong encouragement of mutual legal assistance in article 11. The persuasive value of foreign judgments cannot be presumed to be zero. As a result, while we observe that this particular structure of enforcement of human rights against transnational corporations may have its pitfalls, some potential benefits have to be appreciated. Most importantly, creation of an international court would be exclusivist in nature because although states may waive costs for downtrodden victims in their domestic courts, it is unlikely that an(other) international fund will be set up for legal assistance to the poor who seeks to approach such an international court or tribunal. Creation of such a fund would entail questions of its permanent secretariat, rules regarding grant of funds and exclusion of grants to counter frivolous litigation, deciding contribution criteria for states etc. While it may seem appealing in theory, it is unlikely to work in practice. Without a fund, victims are likely left to the mercy of NGOs and other forms of sponsorship to take up their cases, essentially setting up an informal pre-screening mechanism by non-state actors, susceptible to lobbying by transnational corporations themselves.

The purpose of this post is, however, not a normative analysis on how one approach is "better" than the other. The post is meant to be food for thought, as both approaches have pertinent merits and demerits. A centralised judicial (or quasi-judicial mechanism) would be extremely important for a clear, cohesive body of law that will have the desirable outcomes where states would not be able to pick and choose, and yet have the problems of excluding downtrodden victims. The domestic court approach in the treaty would be heralded for inclusivity and yet be susceptible to fragmentation and may lead to different jurisprudence in different jurisdictions.

References:

- Davitti D, 'On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence' (2012) 12(3) Hum Rts L Rev 421.
- Peters A, 'The refinement of international law: From fragmentation to regime interaction and politicization' (2017) 15(3) Int'l J Const L 671.