C. Preamble

Preamble; Textual Analysis

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> Preambles are funny things.
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> Both bilateral and multilateral treaties may contain a preamble enumerating the contracting States involved in their conclusion. A treaty's preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty. Generally a preamble consists of a sequence of secondary clauses (*considérants*) that commence with words such as 'Recognizing', 'Recalling', 'Mindful', 'Emphasizing', 'Conscious of', etc. The preamble may also incorporate the parties' motivations.[1]
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> A recent law student Comment nicely raised the issue of Preambles:
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> In light of treaties' longstanding structure and the relatively recent emphasis on standardizing and codifying treaty practice, it is surprising that the ubiquitous preamble has received so little attention. Historical evidence suggests that the treaty preamble may be as old as the treaty itself. Ye the leading treatises on treaty practice and interpretation rarely devote a lengthy section to — and sometimes contain no index entry for — this seemingly obligatory element of any treaty. Meanwhile, the only full-length academic work to focus on the question of treaty preambles and their effects is a French-language doctoral thesis published in 1941, decades before the drafting of the VCLT [Vienna Convention on the Law of Treaties]. Importantly, this inattention does not result from some universal agreement as to preambles' relevance or lack thereof; on the contrary, treaty preambles appear to be a continuing source of confusion and uncertainty, specifically as regards their role in treaty interpretation.* * * Do treaty preambles in fact matter?[2]

The *Comment* argues that the answer must be in the affirmative. Contrary to the propositions on display in the New START debate, there is quite simply no basis for a broad statement that preambles, by their very nature, are legally inconsequential. Customary international law, as embodied in the VCLT, supports this conclusion — although it does not

1 Makane Moïse Mbengue, *Preambles*, in OXFORD PUBLIC INTERNATIONAL LAW (2016).
2 Max H. Hulme, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. (2015): 1281.

provide clear guidance. Nevertheless, in practice, preambles are a frequent subject of discussion among treaty makers, parties to disputes, and adjudicators alike. This state of affairs naturally raises an additional query: To what extent do treaty preambles matter?

This provides an excellent starting point for a discussion of the Preamble to the Draft LBI. While there are those (especially among leading academics in places like the United States) who argue that preambles are legally inconsequential, and while constitutional jurisprudence in some states (e.g., France) would vest preambles with substantive effect, what emerges recently has been a preference for giving Preambles some weight. That weight can be as light as the discretionary use of Preambles to help resolve ambiguities in the meaning or application of the text of a treaty. It can be as heavy as incorporating into the Preamble into the binding text of the treaty along with the text (and preambles) of each and every document referenced in the Preamble itself, and thus incorporated by that reference into the text of the treaty itself. Each of these approaches might have their adherents.

The question, however, need not be resolved here. Yet to raise the question suggests one of the initial ambiguities of the Draft LBI — the role of the Preamble in the body of the treaty. Whatever the answer, though, what will be clear is that the Preamble will be given some effect by some individuals and institutions, in some way in whatever fora the issue may arise. And that is the problem, of course. Before one even gets to the text of the Draft LBI then, one is faced with the relationship between Preamble and text — and one find no answer, either in international law nor in the text of the Draft LBI itself. Of course, it would be possible to remedy this easily — the drafters of the Draft LBI could have been explicit, providing somewhere in the text of the document what the drafters intention. At this point it might not even matter what the choice is — from incorporating the Preamble into the text of the treaty, to permitting (but not requiring) that the Preamble, the documents referenced in the Preamble, or both, be used to inform the text of the Draft LBI.

But the Draft LBI does not do that. Instead, in its journey form the Zero Draft, what the Draft LBI does do is to layer the preamble with the burden of substantially ore cross references detached form purpose. That this is a common practice in treaty writing does not make that any more excusable — as if the cultural or discursive habits or practiced ambiguities of that self-reflexive class of elite treaty writers ought to drive the forms in which treaty take. But that is, effectively, what the drafters of the Draft LBI serve the rest of us — a dish served cold and burdened by the habits and practices of a class of treaty writers that ought not to be worthy of any deference — and certainly that ought to be open to a more robust criticism.

Beyond that, it is worth considering way in which the treaty drafters decided to layer the Preamble with its secondary clauses (*considérants*). I consider these one at a time.[3]

3 For a description of what is new and what was carried over from the Zero Draft, see, infra, Flora Sapio, *What Changed from the Zero Draft--A Side by Side Comparison*.

Article 1. Preamble

The State Parties to this ***(Legally Binding Instrument)*****,**

1. ***Recalling*** **the principles and purposes of the Charter of the United Nations.**

   [COMMENT: A general recollection of the principles and purposes of the UN Charter at first blush appears both innocuous and unnecessary to the extent that all international instruments necessarily recall the UN Charter. What makes this considérant interesting is the recollection of "principles and purposes" none of which is free from contradiction or hermeneutics that is dependent on the political starting points of reference of the interpretant. But that is the point.]

2. ***Recalling also*** **the nine core international human rights instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labor Organization;**

   [COMMENT: Like the prior recollection this one is meant to provide some interpretive context to the text that follows. What they might have meant to say is that the text of the treaty ought to be interpreted in light of, and to further, the instruments identified. But again, that is the problem. First they did not say that; and second they could not say that, especially since, including reservations, most states have not embraced all of these documents without reservation and few have developed the capability to align their understanding of those instruments they have incorporated into their domestic legal orders. But no matter, the recollection, to the extent it might be used by an international mechanism, might effectively impose such instruments indirectly through action on the DLBI.]

3. ***Recalling further*** **the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, and the UN Declaration on the Rights of Indigenous Peoples, as well as other internationally agreed human rights-relevant declarations;**

   [COMMENT: These are also common recollections in this field. At its most ambitious, it might seek to embed those principles even against those who view the declarations as legally irrelevant--by inviting the use of the documents as a means of hermeneutics, indirect incorporation might be achieved. Bravo--and not for the first time. And, of course, it would have violated a taboo among the self-referencing class of people in charge of these things to have not recalled but to have suggested that interpretation be undertaken in the spirit of and with reference to these documents. That they did not is not just a matter of culture, but a means of masking (a permitted form of veiling (but is it deceitful?) except among that rarified class of treaty writers rather than those who must rely on its terms in their daily lives)].

4. ***Reaffirming*** **the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;**

   [COMMENT: The reaffirmation here is actually an acknowledgement of the fundamental requirement of balancing among principles both in the construction of the DLBI and its application. But not just a balancing, but the grudging acknowledgement of hierarchy. At the top of that hierarchy is the affirmation of a fundamental principal of the UN Charter--the superior position of the state and its sovereign authority against which universal principles of fundamental human rights and dignity ought to be balanced. Now here is something that someone seeking to interpret the DLBI can sink their teeth into--but the resulting taste may sicken. It reaffirms the fracture of international law through state context as long as each state can affirm that, true to their respective constitutional order, it has embraced fundamental principles of human rights and dignity. Clearly that was not the intent--the intent was to tightly bind states (and their domestic legal orders) to a superior international legal order, but if that superior legal order is in fact grounded in the superiority of the state, then we come back indirectly to balancing state sovereignty against internationalization of human rights.]

5. ***Stressing*** **the right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realized consistent with the purposes and principles of the United Nations as stated in the Universal Declaration of Human Rights;**

   [COMMENT: Stressing something is always useful--it goes to intent, certainly. But it also suggests the extent to which what is stressed out to be weighed as a against some other thing that perhaps ought to be given less weight. In this case what is stressed might actually be inconsistent with what was recalled in the first four considérants of the Preamble. But that is not out of the ordinary. It does however contribute toward the zero summing of the considérants in aggregate. That may be the object, however, that is to provide a hodgepodge of statements in the Preamble that sum to zero, but each of which will assuage parties with otherwise incompatible motivations or world views to agree to the terms of the text, while preserving their ability to apply the document in potentially wildly different and inconsistent ways.]

6. *Reaffirming* that all human rights are universal, indivisible, interdependent and inter-related;

   [COMMENT: There ought not to be a person who could possibility object to this re-affirmation. However, standing alone it is not clear what it may mean. Still, it is comforting to remind all parties of what ought to be the starting point of the substance of the text. And yet---the Preamble in paragraph 4 went to the trouble of

reminding its readers that though human rights may be universal, indivisible, etc., they must be balanced against the obligations arising from treaty, etc.]

7. *Upholding* **the right of** every person **to have an effective** and equal access to justice **and remedy** in case of violations **of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;**

   [COMMENT: The first half of this considérant is wholly unobjectionable; every person ought to have a remedy and equal access to justice for violation of rights. The problem comes with the rest. In the absence of an international court with universal jurisdiction, and the enforceable obligation of state judiciaries to honor determinations of those bodies (or alternatively of the incorporation of international law into the domestic legal order of states and the vesting of jurisdiction in their judicial apparatus) there is yet no legal space for the vindication of INTERNATIONAL human rights or humanitarian law (without leave of the state). To the extent that this effort at "upholding" seeks to assume that international law is both autonomous and superior to domestic legal orders and reaches directly to individuals in states, then there are at least some very powerful state actors that continue, quite passionately, to reject this position.]

8. *Stressing* that the **primary obligation** to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law;

   [COMMENT: The disconnect between ¶¶ 7 and 8 is striking. Having just stressed the autonomy of international law, it is odd to speak immediately thereafter of the primary obligation of states. Oh, wait. . . unless the object is to ensure that like provinces in a unitary state, the role of states with respect to international law is to receive and apply international law as from a superior and binding source. As aspiration, this is quite acceptable. But as a basis for interpretation less so; and as a means of furthering the work of creating from these repeated declarations some basis for arguing that they might create customary international law, is utopian at best. But stranger things have happened. Still, the lack of clarity is regrettable.]

9. *Recalling* the **United Nations** Charter articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion;

   [COMMENET: One moves here from the generalized recollection of ¶ 1 to a quite specific reminder of this ¶ 9. It is meant to do a couple of things (at least) though of course in ways that lack clarity but conform to the discursive style of the political class

comfortable with these little games and ambiguities. First it is meant to provide encouragement for international cooperation--and thus overcome the fracture inherent in the international level of the state system). Second, it might be a gentle reminder that the sort of discrimination still so common in many places (and increasingly political sport in mature liberal democracies like the United States) ought to be avoided. Worthy but likely to be balanced against contextually embedded constitutional orders.]

10. ***Upholding*** **the principles of sovereign equality, peaceful settlement of disputes, and maintenance of the territorial integrity and political independence of States as set out in Article 2 of the United Nations Charter;**

    [COMMENT: This "upholding" considérant provides a necessary balancing to the recollection of ¶ 9, and the aspirational expressions of ¶¶ 7-8. But these expressions are the usual incantations of developing states and a variation of it is now the basis for internationalism with Chinese characteristics. It may be that this is the sort of language designed to make those states happy. And that is nice. But the realities of their relations among each other and with other states (e.g., OECD states and the larger Marxist-Leninist states) belie what is effectively a nice but aspirational expression that, ironically will get i the way of the internationalism of the text of the DLBI].

11. ***Acknowledging*** **that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;**

    [COMMENT: This is very nice, and at best a transitional expression (i.e., it is meant to serve as a statement the expression of which is necessary to make considérant No. 12 (which follows) plausible. Actually, all institutions with control of the means of production, of resources, or of delegated political authority have the same capacity as business enterprises--indeed, organized religion has an even greater power in some places to achieve the sustainable development described here. But that is not the point. The DLBI is meant to target one of this set of no state actors, and thus the need to single them out here. It also echoes that marvelous discursive theatre that has provided so much fodder for discussion among developing states, academics and policy people with certain political and ideological leanings, and traditional Marxist Leninist (especially the heirs of the old Soviet) system.]

12. *Underlining* that all business enterprises, regardless of their size, sector, operational context, ownership and structure **have the responsibility to** respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur; **as well**

as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;

[COMMENT: It is reassuring to see even this oblique reference to the UN Guiding Principles for Business and Human Rights] Pillar 2; it is less heartening to note the reference is indeed not merely oblique (has the UNGP become that which may not be named, the Lord Voldemort of the business and human rights universe?). Still it must eb recognized that there are a lot of people in that universe with axes to grind, and it is only fair that some of that grinding occur amongst the considérants. Still. And of course, there is purpose to this effort--the object of this considérant is to seek to normalize a potentially broader version of the UNGP's second Pillar.].

13. ***Emphasizing*** **that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises,**

[COMMENT: It must be understood that there is a specific purpose to this considérant within the context of the DLBI--to embed civil society within the processes of business respect for and state duty to protect human rights. That ought to be applauded. It might have been useful, though to emphasize civil society's role not just with respect to business responsibility but also with respect to state duty. And, indeed, the failures of the role of the state in protecting civil society, including human rights defenders, remains the dirty semi-secret exposed by the limits of this "emphasis" for which a strong condemnation ought to be in order.]

14. ***Recognizing*** **the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities,**

[COMMENT: This recognition had been long overdue, and is unexceptional in many respects. Recognition of distinctive and disproportionate effect, and of the need for that perspective in interpretation is fair enough. It is also fair enough to list those groups with respect to which this recognition is to be directed. It may be worth thinking about the dangers of building hierarchies of needs among people, and it may be important to understand that these relationships of need may change over time as group privileging changes in response to social changes. That may not be built in Preamble considérant but it ought to be embedded in the interpretive context of the text.]

15. ***Taking into account*** **all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to**

human rights, and all relevant previous Human Rights Council resolutions, including in particular Resolution 26/9;

[COMMENT: Of course, one ought to take into account in the interpretation and organization of the DLBI the resolutions that gave life to the project. As for the rest, one moves into troubled waters. Taking into account "all the work undertaken by the CHR and the HRC" is designed in part to resurrect the Norms, or at least its normative discourse, and to sideline the UNGPs (to the extet their visions and structures are incompatible That may not sit well with some and may be rejected by others even as some states (and their enforcement organs) embrace the notion. Moreover, the "taking into account" fails to take into account the incoherence of this ¶ 15 with the thrust of ¶¶ 11-12. It does remind one of the Zero Draft's insistence that though all enterprises have human rights responsibilities only transnational enterprises have responsibilities that count.]

16. ***Noting*** **the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework have played in that regard;**

[COMMENT: One can only admire the remarkably elegant way in which the UNGP have been sidelined in the DLBI. THAT is what one really "notes" in this "noting" considérant. But that was to be expected given the thrust of HRC Resolution 26/9. But there are serious consequences, especially if this is taken by the courts applying the DLBI as an invitation to sideline or ignore the UNGP in its application of the Treaty. In addition, such a reading may also invite the reverse consequence, that is that the DLBI itself will be treated as irrelevant for purposes of the firther development of the UNGP. That is hardly the sort of convergence that had been at the heart of the project of developing global consensus on the management of the human rights effects of economic activity.]

17. ***Noting*** **also the ILO 190 Convention concerning the elimination of violence and harassment in the world of Work;**

[COMMENT: This "noting" may serve a useful purpose though again the problem of coherence always lurks in the background.]

Desiring to contribute to the development of international law, **international humanitarian law** and international human rights law in this field;

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Where does that leave the Preamble? What is its purpose? How do the considérants further those objectives?

Nothing in the Preamble makes any of that clear. It provides very little that may be consistently useful for interpreting the text, and self-serving expressions of the viewpoints of the drafters ought to be irrelevant in the context of the text of a legal document that must be able to "speak" for itself. All of that is a pity. There is much in the Preamble that is laudable and potentially useful. It ought not be lost. But it is also unremarkable. For all the effort, the result will be what the result tends to be with respect to many of these preambles: it may not be worth the effort that went into its drafting. Perhaps that is all that one could hope for given the cultures of treaty drafting embraced by the DLBI's protagonists--they are prisoners of the logic of the international institutions into which they have poured this project. But the result does not bode well for the final product, at least to the extent that the text of the DLBI also reflects the discursive style and contradictions built into the Preamble.