D. Article 1 (Definitions)

Textual Analysis of the Definitions in Article 1

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The preceding essay of this Special Issue [1] considered the extent to which the Definition Section of the DLBI could speak to the overall ethos of the DLBI project. The object was to interrogate the text for its normative insights, as well as to extract from that section a semiotic psychology of and its importance for extracting the structures within which authentic meaning will be exhumed by courts and others. This essay briefly considers each of the five defined terms in their legal context.

A. Victims

1. The Draft LBI departs from the original definition of the term in the Zero Draft in an odd way. The Zero Draft speaks in the active tense with respect to the individuals defined as victims and the event that transforms them from individual or collective to the legal status of victim for purposes of the instrument: "persons who individually or collectively alleges to have suffered harm." One could read this as retaining at least a bit of agency in the individual turned victim. The Draft LBI rewrites this in a more passive voice: "person or group of persons who individually or collectively have suffered or alleged to have suffered" a human rights violation also defined in Article 1. The change is interesting in the way it seems to affirm that the agency of the individual is unnecessary to transform him or her into a victim. That this is meant to strip the individual of agency is clear. The only question is to determine where that agency has been transferred. That is not apparent from the text of this definition but becomes clearer later in the text of the Draft LBI.

The stripping of agency of those that the law wishes to protect, and its transfer usually to an instrumentality of the state, is not unique to the Draft LBI. It has become a hallmark of the way in which U.S. political bodies have stripped women of agency in the context of alleged partner abuse.[2] As a consequences, the "victim" is no longer really necessary either for the assertion of rights (now undertaken by others) or for remedy (which is now transformed into a focus on the wrongdoer). By centering the victim in this way, the law will essentially marginalize her—or at least cast her to the side. She is reduced to the precipitating event

1 Larry Catá Backer, On the Victimization of International Law and the Ethos of the Treaty Project in Article 1, supra.

2 Jeannie Suk, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009).

that then invokes a machinery of discipline undertaken in the relationships between activities undertaken by business enterprises and the law-state.

2. "Suffered" or "alleged to have suffered" is the legal trigger that transforms an individual or collective from a rights bearer—who is a matter of indifference in the Draft LBI—to a victim around which the obligations of the Draft LBI are developed. As such these terms are important. Yet their meaning can be elusive.

> (A) It is not clear when a "suffering" has occurred. It is possible that the term can be treated like the term breach in contract—permitting anticipatory triggering in anticipation of suffering. It is also unclear whether knowledge of the suffering is necessary.
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> (B) If knowledge is necessary, does the person or collective "victim" have to have that knowledge, or is it enough for knowledge to be held by the business activity that produced the "suffering", or even an instrumentality of the state, or a civil society organization operating for the welfare of the individual or collective (even when without the knowledge o consent of those individuals or collective). There is nothing in the definition that requires an intimate connection between knowledge of suffering and those who have been made to suffer.
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> (C) That produces another legal issue touching on the necessity that the individual or collective understand that the action that produces suffering is actually suffering. What the state or civil society actors view as a suffering might not be understood as such by its "victims".
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> (D) Related is the need to understand the nature and extent of the harm suffered. This is related ultimately to remedy. There have been cases where advocates and victims have not seen the suffering (and its remedy) in the same way. If victims have agency, their view ought to be given weight. But the shift of agency to the state or others also may deprive the victim of control (or even a say) in these issues—which may then be controlled by the state or others "who know better."
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> (E) The extent of suffering necessary to constitute a victim is also unspecified. Some courts might read into the definition a need for a material suffering; others might permit even an allegation of nominal suffering.
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> (F) Lastly, to what extent is each member of a collective "victim" to have suffered in the same or in a materially similar way? Is membership in the group sufficient to trigger victimhood or, like class action or multiparty litigation in some jurisdictions, is proof of membership and proof of suffering required for every member of the class? Of course, when one speaks to responsibility in the societal sphere, or when one seeks to develop a framework for lawmaking, none of this is necessary. But legal duty carries with it the baggage of judicial protection of process rights, and the limitations and customs of the judicial function. Here the Draft LBI provides instead the

> opportunity for corruption in the form of strategic interventions in states to mold their legal systems in ways that may produce advantages for litigants. It might follow, then, that these complexities make whatever emerges as law less accessible to "victims" and "victims" more dependent on states or elites groups for any hope of effective access to remedy.

3. Lastly, "in the context of" requires some analysis. The intent of the drafters could be surmised to extend the meaning) or the consequential effects) of business activity as far as possible. But how far is possible may be substantially affected by the willingness of a domestic legal order to follow a trail of consequences or effects. Most states limit this trail of effects, some severely. At best, the resulting disjunctions encourage both forum shopping and political agitation for law reform. Perhaps the Drafters had both in mind. If that is the case, then one can understand the Draft LBI as more a political call for action than as the expression of any particular solicitude for victims. Indeed, victims here appear to more a means to a political ends grounded in the control of the narrative and effect of law—not by victims but by those factions in political communities with a specific vision for how to order things and a taste for control. That is fair enough; but it makes taking the principled "higher road" a little less plausible.

B. Human Rights Violation or Abuse

1. The definition was meant to cast a wide a net as possible. To constitute a human rights violation or abuse, it is only necessary to cause harm to an individual or collective. Any harm, it seems. That is not interesting—though it serves, at its limit to create an identity between legal harm and human rights harm. The consequences is that it becomes impossible to find anything in law that is not a human rights harm or abuse—as long as it causes harm to an individual or collective sufficient in form and character to transform that individual or collective into a victim.

2. The only limiting element, then, is NOT found in the nature or character of the harm, but rather in the precipitating cause. To transform law into human rights, which then transforms breaches of rights into harms that in turn transform individuals or collectives into victims and thus activating the obligations of the Draft LBI, it is necessary that the harm (i) occur "through acts or omissions in the context of business activities" AND that (ii) that such harm be committed by "a State, a business enterprise, or Non-State actor."

With respect to the first of the limiting elements of what acts can constitute human rights violations or abuse:

> (A) What is interesting here is the legal leaps required to define legal harm by the character its cause. Here one encounters a class of human rights violations as broad as the law but as narrow as the willingness of courts to cabin the scope of activities deemed to be "in the context" of business activities. But context is not causation—though it is not clear whether courts are invited to transpose the law of causation into

the determination of the character of the harm necessary to constitute a victim to trigger the application of the Draft LBI.

(B) Yet more curious still is the absence of a limitation of the harm principle by a principle of legality. To constitute a human rights violation or abuse, it is not necessary to cause a harm recognized as such in law. The definition moves beyond the limits of legal rights to the realm of harm. It transforms a harm principle into an action with legal consequences irrespective of the framework within which legal rights and protections may be organized under a domestic legal order. That is fair, as far as international law may be concerned; but it may find substantial resistance by national judiciaries charged with the protection of the integrity of their own legal orders as framed by national constitutions and constitutional principles.

(C) Beyond that hiccup, any harm, whether recognized as a harm for which a right to redress exists in law or not is capable of being a human rights harm or abuse as long as a harm has been caused. It is not clear whether extra-legal harms are covered. It is also not clear whether domestic laws that provide exculpation or affirmative defenses apply here. And it is not clear whether they should.

With respect to the second of the limiting elements of acts that can constitute human rights violations or abuse:

(A) It is not clear what the drafters had in mind by creating a list that effectively includes everyone on Earth. Let us consider the phrase "a State, business enterprise, or Non-State actor" at its broadest. First, any limitation in one of the terms (say, for instance, "state" is overcome by the breadth of one of the other terms. Consider Amnesty International. While it is not a state or a business enterprise, it may operate such an enterprise through its contractual relations (the business of operating a non-governmental organization including labor, procurement, property ownership, suppliers, and the like). Even if Amnesty's business enterprise are not transnational it may be a non-State Actor. Indeed, any individual or group which are wholly or partly independent of a sovereign state or state might be subsumed within the definition of Non-State Actor—*even a victim, individually or collectively*.

(B) The only question, then, is whether such individual collective or organization is a state or business enterprise actor. That categorization may be important if only with respect to the "get out of jail feature" of such definitions—*sovereign immunity*. Unless the Draft LBI itself constitutes an act of waiver, the result is might be perverse where as a result neither states nor their enterprises might otherwise be subject to either jurisdiction or liability. At its limit, it is hard to see how even entities or individuals who act pursuant to state authority may be subject either to jurisdiction or to the imposition of remedy, though violating or abusing human rights. States have for the most part waived sovereign immunity over a specific set of claims—commercial activities being the most well-known. But even the boundaries of that waiver are murky in some jurisdictions. In any case, and especially where the state sector is large

> and extends well beyond economic or commercial activities to activities the state defines as sovereign then the definition provides small comfort—appearing to include actors and acts which effectively are excluded even by operation of the Draft LBI in its legal ecology. That is particularly the case in those jurisdictions in which economic activity is viewed as a sovereign prerogative.

3. There is nothing in the definition that considers the role of intent. If a human rights harm or abuse is triggered by activity, the question about a necessary intent to do harm also arises. The definition is silent on this point. It is possible to read into the definition a variety of different results—and it is likely that in the aggregates courts will choose them all. At one extreme, courts can interpret the definition to make intent irrelevant—it is the act or effect rather than the intent that is central. At the other extreme, courts may limit the scope to acts or omissions undertaken with actual knowledge. And in between it is possible to construct tests based on negligence, recklessness or other levels of knowledge-intent.

4. The definition describes the character of the harm that is sufficient in the broadest terms. This is not unreasonable given the intent of the drafters. Harm includes substantial impairment of rights, which is the first time that the word rights makes an appearance. But here rights may refer to legal rights, social rights, rights under soft law, rights recognized within a domestic legal order or rights recognized by a home state and applied in the host state, etc. None of this is clear. But at the same time, it creates cognitive dissonance. We move form effects (harm) to rights imperceptibly. The legal effects of this are unclear.

C. Business Activities

1. This is one of the more crucial definitions because its scope determines the scope of harms that in turn determine the extent to which an individual or collective can become victims and thus worthy of of architecture of the Draft LBI. There are two key terms.

> (A) The first is "economic activity." Economic activity includes but is not limited to "productive o commercial activity." At first blush it is hard to imagine any sort of organized activity that is not either commercial or productive. That begs the question: buy whose measure s an activity deemed either? Your productive activity after all may in my eyes be deemed unproductive. . .and if "I" am the state. . . well. But certainly, the drafters could not have meant that. They must have meant activity that is customarily understood as producing profit. But that is not entirely clear, and one would have to engage in a laborious exercise in exegesis to get there. If a court was of a mind to be more expansive, nothing it he definition would preclude it including the work of religious organizations, or even of large transnational civil society organization—Amnesty International, Oxfam and the like, within this meaning.
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> (B) The second is "transnational corporations or other business enterprises." This term, of course, has had a long and tortured history. It is neither free from ambiguity, nor from fierce disagreement over its meaning and legitimacy. All of this is intimated in the Preamble, which appears content to incorporate that long and unsettled fueled

into the heart of the definition of a key term. That is not helpful. What would be helpful is to acknowledge the power of global production chains, to recognize that such chains connect localities across borders, that the hierarchies of control affect the relationships among networks of individuals and enterprises engaged in coordinated production, and that at any point in this chain a human rights harm can occur. It is with that set of acknowledgment and recognition that an allocation of responsibilities can be assigned and justified.

(C) But that was not the path taken; and its rejection is made clear here nicely embedded in what otherwise appears to be an innocuous corner of a definitions section. Instead the old tired nationalist refrains from battles now several generations old and hardly relevant anymore except as politically effective rhetorical tropes continues to make itself felt in this definition—it is based on a failed notion that developed and hosts states are passive non volitional actors (the origins of the definition of victim appears again here in another guise) who must be protected against the rapaciousness of developed states (the only political actors with volition) by an even stronger "international law-community" to which sovereign authority and will must be ceded. In this context both the passive (victimized) developing state and its economic instrumentalities, public and private, are effectively presumed to be victims without capacity. The result—a waiver of responsibility for their own acts that cause human rights harm or abuse. BUT these are presumptions which ought to be resisted as both implausible and hypocritical. All states have volition, as do all categories of rights holders. All ought to be responsible for their actions to the extent of their capacities. To insulate a part of global production as the Draft LBI attempts here produces a dissonance that weakens the moral value of the instrument as well as weakens its coherence and ultimately its ability to serve as an instrument to meet its own objective—with respect to the "victims" it purports to serve.

(D) It might be possible to argue that the term "transnational corporations and other business enterprise" could be read to include business enterprises that are not transnational. Perhaps. But that is a strained reading in light of the history of the term. Moreover, it flies in the face of an ordinary reading of the phrase, which could be interpreted as covering transnational corporations AND other (transnational) business enterprises. This is the more natural reading, especially given the attention to the definition of the term "contractual relations" that follows.

2. The commercial or productive activities of States, transnational corporations and other business enterprises, and Non-State actors may be undertaken by natural or legal persons. That is clear enough. What is less clear is whether such persons are themselves also considered harm producers (and then subject to legal responsibility or duty) in their own right. It is not clear whether the definition imports (wittingly or not) notions of *respondeat superior* or master-servant obligations through this definition. To the extent that these natural or legal persons were required to act by the power of another, ought they to be absolved of responsibility? To what extent does this definition contribute to interpretations of responsibility down the hierarchy of operations that produce harm through business

activity. That remains unclear but will be explore further in discussion of later provisions.

D. Contractual Relationship

1. One of the great legal issues of the 21st century has been to align the structures of law to those of economic realities in the face of the transformations in production that have resulted from the development of globalization. The issue affects in the most profound manner the alignment of production chains with the economic collectives that together are the critical factors in management of clusters of economic activity that align production from its incipient to final stages. Fundamentally the problem centers on the fact that, in law, there is no such thing as a transnational corporation. Domestic legal orders have defined and constituted a host of economic organs to which private individuals and collectives have access: corporations, partnerships, LLC, LLP, benefit corporations, and the list goes on and on to suit the legal cultures of the legislating state. Some state have sought to align clusters of enterprises for purposes of imposing liability in certain respects, for example Germany. But these have not proven to be powerful vehicles for aligning economic realities to legal structures.

The UNGPs sought to work around this through the construction of a vigorous and autonomous societal sector with its own system of responsibilities running parallel to that of the public sector and its legal constructs. The Draft LBI seeks to do this in a more roundabout way, by defining a new organ of responsibility in the form of a reified creature made up of a network of relationships aligned in a way that it is possible to discern a coherent and singular (broadly understood) purpose from which it is possible to construct a site for the imposition of responsibility. Fair enough. The idea that a multinational is itself essentially a nexus of relationships is well known in the literature. But it is a jurisprudential concept; it is not yet a legal concept. To that end, constructing this creature requires more than the legerdemain of a complex set of interlocking definitions. These will, in the end crash against the enterprise jurisprudence of most domestic legal orders. The fracture may well upend the utility of the Draft LBI as a device for identifying and assigning responsibility for a set of harms that affect rights holders otherwise with substantially little recourse—the worthiest ideal in the Draft LBI.

2. These effects become more pronounced in the body of the Draft LBI as they are applied strategically to extend the ambit of liability through and beyond the enterprise. These will be discussed in future posts. For now it is important to consider the normative effect of this effort at definition. To the extent it seeks to contribute to the transformation of the law of enterprises, it is unlikely that this treaty is the best place for that debate or those changes. But sometimes one may not choose the sites on which one will battle. This may be one of those times. Still, sometimes strategic retreat is in the long-term interest of a cause fighting on multiple fronts.

E. Regional International Organizations

1. This is both a definition and an encouragement. The encouragement is of course refined in the body of the Draft LBI. Its most interesting aspect is its notion of states transferring competence. The Draft LBI was careful enough not to use the word sovereignty. This reflects notions of contingent delegation that is sometimes possible from out of a constitutional order; though as has been repeated in the history of the European Union, sometimes it is a delegation that requires substantial Constitutional court jurisprudential development, and sometimes it requires constitutional change. The extent to which that may be necessary. of course, will contribute to the success or failure of the device. But it does not otherwise affect the character of this organ.

2. Otherwise, it reflects a perhaps healthy acknowledgment that there not be substantial unity of jurisprudence or implementation of Treaty norms and responsibilities across regions (however they are defined or constructed). But regionalism is better than fracture along national lines. More importantly it may represent a transitional stage toward global disciplinary structures. Yet its utility may be more important in the context of a framework agreement rather than a Draft LBI. That is a fundamental problem treated in later essays in this special issue.

3. A last point: it is not clear whether these "regional international organizations ought to count as state actors for purposes of the definition of human rights violations ot abuse. Certainly, if these are organizations to which states delegate competence, the responsibility attached to that competence ought to follow the delegation. This is not made clear, however. And it is not likely to be imposed without opposition. Of course, to the extent that sovereign immunity shields, that shield could be extended as well.

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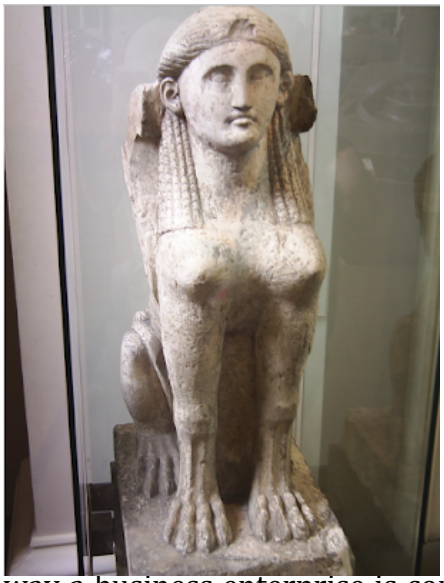
Where does that leave us even before we undertake an analysis of the substantive provisions of the Draft LBI? At a minimum these definitions teach us that an individual becomes of interest to the Draft LBI when he, she or they are transformed from individuals with rights into "victims". To become a "victim" (and thus of interest to the Draft LBI) the individual or collective must suffer, allege or have alleged a "suffering." That "suffering" must be connected to a "human rights violation or abuse." Also "victimhood" can be extended, when the state declares it to be so, to some but not all persons with whom the "victim" has a relationship. A "human rights violation or abuse," in turn, is a harm. But not just any harm. It must be a harm that is caused (the extent of causation remaining mysterious) by one of three identified actors—States, business enterprises (a term unknown in the domestic law of many jurisdictions), or non-state actors. But the concept is further limited because the harm caused by these actors must also be undertaken "in the context of business activities."



Harm is further defined as having to be "against" any person or group (the extent of an intent requirement implied remaining substantially undeveloped and problematic) and exhibit certain characteristics. The term "business activity", central to the concept of "human rights violation or abuse" and a necessary predicate to the construction of a "victim," is in turn defined as "any economic activity" but only when undertaken by "a transnational corporation or other business enterprise" (transnational remaining undefined). The term "any economic activity" is itself further defined as including "productive or commercial activity" (though it is not clear what remains outside of these categories in the realm of human activity) which must be undertaken by someone (e.g., a "natural or legal person"). Beyond that we understand that contractual relationships may affect the way a business enterprise is constituted. And we further understand that States may lend their authority to public regional international organizations. One is now ready to delve into the substance of the Draft LBI.