D. Article 3 (Scope)

Textual Analysis of Article 3 in the Shadow of the Zero Draft

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> ZERO DRAFT
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> Article 3. Scope
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> 1.This Convention shall apply to human rights violations in the context of any business activities of a transnational character.
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> 2.This Convention shall coverall international human rights and those rights recognized under domestic law.
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> Article 3. Scope
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> 1. This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.
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> 2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if: (a) It is undertaken in more than one national jurisdiction or State; or (b) It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or(c) It is undertaken in one State but has substantial effect in another State.
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> 3. This (Legally Binding Instrument) shall cover all human rights.
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At first glance, the scope section of the Draft LBI appears much changed from the Zero Draft. And, indeed, reading Article 3 in isolation suggests that at its broadest, one can read the Draft LBI as applying to all business activities whatever its character. Some have

suggested that one of the great advances in the Draft LBI was its expand its scope to include all business activities. Carlos Lopez, for example, writes: "Among the most important changes operated in the revised draft is that it affirms that the scope of the proposed treaty encompasses all business enterprises, not just transnational companies, while still adding emphasis to businesses with transnational activities."[1]

But that optimistic conclusion is hard to square with the text of Article 3. A close reading reveals ambiguities that suggest that while the deck chairs have been moved around, the treaty "ship" might not have changed its "Zero Draft" course.

The deck chairs, of course, are the provisions on definition (Article 1) and statement of purpose (Article 2). Reading Article 3 in isolation When one speaks to definition, one generally refers to the meaning of words that are essential for the construction of the scope and purpose of a governing document. When one speaks to purpose, one generally refers to objects or ends to be attained. In contrast, when one speaks to scope, one generally refers to the extent of responsibility given the constraints of purpose/objectives, and the meaning of the terms that themselves contribute to the understanding of the extent and character of responsibility.

Section 1 does indeed provide that the Draft LBI "shall apply (...) to all business activities" But this broad statement is constrained in several ways First, this broad application is narrowed by any exception "stated otherwise." Second, the scope rule can only be as broad as the definition of "business activities" which itself looks to the transnational character of the source of activity (i.e., the transnational corporation or other business enterprise". Third, it is not clear how the scope rules modify either the sense of the meaning of the term "transnational corporations and other business enterprises" or how that may affect the application of the general principle of the scope rule (that it applies to all business activities) in relation to the scope principles embedded in the definition of "contractual relationship" in Article 1(4). Let us consider some of the implications.

First, the role of the exception clause, and its interpretive effects remain unclear in a number of important respects. First, it is not clear what is meant by "stated otherwise" either with respect to where that statement otherwise is located, and the extent to which that exception is subject to limitation. At its narrowest, perhaps, it was meant to refer to exceptions contained in the text of the Draft LBI itself, and then only to the extent the exception significantly aligned with the Draft LBI purpose. But that is not how the text is written.

But a broader reading would suggest the legitimacy of exceptions in other contexts. Thus, for example, it is possible that a state party could narrow the scope of Article 3 through treaty reservations. It is also possible to conceive of such reservation as limiting the scope of

1 Carlos López, *The Revised Draft of a Treaty on Business and Human Rights: A Big Leap Forward*, OPINIO JURIS, 15 Aug. 2019, available at https://opiniojuris.org/2019/08/15/the-revised-draft-of-a-treaty-on-business-and-human-rights-a-big-leap-forward/

the Draft LBI to only activities undertaken by one entity within the chain of "contractual relationships" (Art. 1(4)) that together constitutes a transnational enterprise. The only counter arguments available would be that such reservation would either run counter to definitional floors and /or undermine the purpose and objectives of the Draft LBI. Neither argument might be strong enough to give confidence. First, the definition of business activities retains its focus on the transnational character of "corporations and other business enterprises" (Art. 1(3)). Second, the purpose provisions of Article 2 are structured around the definition of "business activities" in Article 1(3). Third, the text's special emphasis ("including particularly but not limited to those of a transnational character") might suggest a greater tolerance for narrowing "all."

Broadest still would be a reading that permitted the exception to be written in to the domestic legal orders of state parties without regard to the treaty itself. That might make sense, especially since it echoes the constitutional role of international law within the domestic "higher law" of some important states. But it also suggests that, if the exception clause is read this broadly, that the scope of the Draft LBI, will vary from jurisdiction to jurisdiction in ways that cannot be managed through the treaty. The only constraint would be by application of Article 2 and the purpose and objectives provisions (read perhaps together with the Preamble and the definitions of Article 1). But that would require the development of a jurisprudence of fundamental treaty principles or at least the development of consensus in state practice., both of which would be risky and long term projects.

In addition, a substantial narrowing of the general rule of Article 3(1) might be written into the operational rules of those "regional integration organizations" defined in Article 1(5). That would not be inconsistent with the purposes of the Draft LBI, especially with reference to Article 2(c) ("the promotion of international cooperation").

But perhaps more curious than the language of the "exception clause" itself in Article 3(1) is the definition of transnational character" in Article 3(2). First, it is not clear why the definition of "transnational character" was placed here rather than in Article 1. Second, it is not clear what effect the insistence that the definition applies only for the "purpose of paragraph 1 of this Article." Both its emphasis and placement appear to undercut the argument that the "transnational character" of both business activities and of those who engage in them remains at the center of the treaty. Conversely, it suggests a tolerance but not a commitment to the principle that the treaty applies to all business activity whatever its form, source, context.

It is unclear why this definitional provision is inserted as Article 3(2), when it might have been better to place it in the Definition Section (Article 1). The choice of placement can be important. Placement in Article 1 suggests that the definition applies to the term anywhere in the text of the Treaty. In contrast it might be possible to suggest that definitions in Article 3 apply only within Article 3. It is also unclear why the definition is commanded to apply only for the "purpose of paragraph 1 of this Article [3]." One way of reading that is to assume that this definition is meant to inform the scope of the Draft LBI directly, and the rest

of the Treaty indirectly whenever the term "transnational character" is invoked. A more cynical reading would suggest that the drafters sought to have their cake and eat it too. By setting up Articles 3(1) and (2) in this way they could produce a formal expression of broad scope, and then include a mechanics, coupled with a black letter intent, to focus "particularly" (the language of Article 3(1) on business activities of a "transnational character." That would preserve the intent of the much criticized Zero Draft, but now cloaked behind the maze of complex legal text.

Bravo!

In any case, the definition is somewhat circular. Article 3/2) seeks to define the transnational character of business activity, by reference to the locus of activity. But "business activity" is itself dependent on the transnational character of the corporation or other business enterprise engaged in commercial or productive activity. In a sense, then, the transnational character of the *enterprise* is determined by the transnational character of its *activities*, but the transnational character of business activities is determined by the transnational character of the enterprise.

Lastly, Article 3(3) declaration of the legal scope (if that is what it purports to be) of the Draft LBI does little to resolve the core issue that has plagued the UNGPs and this treaty making project—the legal effects of human rights within the structures of traditional international law principles within which this Draft LBI project is deeply embedded. The drafters appear to want it both ways. On the one hand they want to deeply embed a new and improved UNGPs Second Pillar corporate responsibility framework within the structures of traditional international law. At the same time, they insist on bending the practice and approaches of international law to suit their ideological objectives of effecting deep cultural and societal changes through law but without adhering to the processes by which law acquires its legitimacy. This at its worst is normative transformation that effectively rejects the Rechtsstaat[2] process principles at the heart of rule of law and the democratic sovereignty of national constitutional orders.

Let us try to unpack this a little. Article 3(3) declares that the Draft LBI "shall cover all human rights." Curiously the term "human rights" is left undefined. The Treaty goes to some lengths to define "human rights violation or abuse" in Article 1(2) but not human rights itself. The curiosity comes form the dissonance between this statement in Article 3(3)—which appears to attempt scope human rights within its legal normative context—and the definition of human rights violations and abuses, which appears to develop a perhaps sounder *harm principle* basis as the touchstone for business activity responsibility. The deliberate ambiguity of the Article 3(3) statement does little to clarify or resolve this dissonance.

2 Trevor R.S. Allan, *Rule of law (Rechtsstaat)*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (1998), available at https://www.rep.routledge.com/articles/thematic/rule-of-law-rechtsstaat/v-1

Why dissonance? If Article 1(2) introduces a (salutary) harm principle at the heart of emerging international human rights *law*, then the traditional structures of human rights law making (in the form of international treaties to the extent they have found their way into the domestic legal order of states) assumes a secondary and perhaps complementary role. That is, traditional human rights law as text-based pronouncements shifts in function from creating rights, to describing the context in which harm can give rise to liability. But the central element, for purposes of behavior management, is the harm itself (or at least the possibility of harm). That approach is consonant with the move toward cultures of compliance and risk management around which global consensus is emerging.

Yet the ambiguity of the term "human rights" stands in the way of interpretation. The drafters deliberately did not use the term human rights law. They chose to avoid that term for obvious reasons—to have focused on legal standards defeats an aim set out in the preamble—to legalize an entire multi-generational cluster of hard and soft law, declarations, pronouncements and the like—without the bother and constraints of international law. But that, of course, is impossible. National judicial organs are rarely empowered to entertain claims that are not grounded in law recognized in accordance with the constitutional traditions of the state in which these judicial organs assert authority. Vague declarations or statements in treaties are hardly the stuff of law. And to the extent they may produce a legal obligation—on states—against which (if the constitutional order permits) a judicial organ might to able to compel compliance, they do not provide the basis for legal action.

On the other hand, such non-legal or international legalities might inform a national judicial organ in the exercise of its authority to provide a remedy against harm by elaborating conditions and policies from which harm may be discerned. While this is not without its own limitations, it at least provides something more traditionally workable. That may be all that the Treaty furthers—an international poy of ideas from which national courts may draw to suit their needs. But that produces no net contribution from the Treaty. In this case it might have been better to establish an international organ to deliver non-binding interpretations of the Treaty for the use of courts than the system actually put in place. Here, again, the model of the European Court of Justice (absent its mandatory character if necessary) might have served the Treaty drafters better.

That does not appear to be the intent here. Instead, what appears to have been created is a way in which the Treaty itself could avoid that contentious issue (what human rights are legally cognizable (actionable) under the treaty?), and its companion issue (can the Draft LBI be a vehicle for transforming declarations and other non-legal actions at the international level into duties with legal effect?) The most reasonable interpretation, however, may be the least satisfying to the Draft LBI drafters. Article 3(3) permits a state to incorporate by reference into its domestic legal order all human rights related statements, declarations, law, etc., to the extent identified in the Treaty Preamble.

At its broadest this incorporation would extend (and modify to the extent incompatible) any constitutional constraints on that effort. This would then have the effect

of constructing Article 3(3) to operate in parallel to Article 3(1) with respect to scope. But that causes the same challenge already noted in Article 3(1) flexible scope provision. States may, if they choose, read Article 3(3) this way: "This (Legally Binding Instrument) shall cover all human rights as and to the extent they have been incorporated into the laws of (State) and are not otherwise incompatible with its Constitutional provisions." That provides a far narrower scope to the Treaty. It also continues the pattern of treaty writing that appears to produce uniformity but actually invites substantial and potentially incompatible fracture. We end where we start—a global order in which states can do as they please, provided they adhere to the forms of the treaty to which (subject to reservations) they have become parties.