

## **E. Articles 7-9 (Jurisdiction; Statute of Limitations; and Choice of Law Provisions)**

### **Articles 7-9 and the Importance of Technical Foundations for Access to Justice Objectives--Jurisdiction, Statutes of Limitation, and Choice of Law.**

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Articles 7, 8, and 9 provide a set of technical provisions necessary to ensure access to justice, at least access to state based judicial mechanisms. One may put aside for the moment the question of the wisdom of centering state based judicial mechanism as the primary vehicle for vindicating rights or remediating actionable wrongs. And, indeed, as Article 5, suggests, there is a space (though one in further need of development) for a compliance and remediation vehicle that avoids entanglement with national court systems. But having committed to national judiciaries, it is then necessary to make such commitment both effective and available.

Those issues tend to devolve into contests among the powerful. For those contests, the vagaries of politics might serve as an efficient way of delineating access. However, where, as here, one is dealing with substantially unequal relations between those parties likely to be causing harm and those experiencing such harm, it is necessary for the legislative community to serve in a more proactively *parens patriae* role.

One might then usefully read the provisions of Article 7 (jurisdiction), Article 8 (statutes of limitation), and Article 8 (choice of law) in that light. These provisions, as a whole, work as they were likely intended. Yet that intent raises in some respects certain normative issues, as well as issues of compatibility with domestic legal and constitutional systems that are worth addressing, if only briefly.

**A. Article 7**

Article 7 focuses on jurisdiction, usually understood in two senses. First it references the power of the court over the parties. That is essential if the judgment of the court is to have any real effect. The second touches on authority over the claim—that is whether the court has the authority to hear the claims even if it has a power over the individuals. Article 7 is drafted to cover both.

*Article 7. Adjudicative Jurisdiction*

1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

a. such acts or omissions occurred; or b. the victims are domiciled; or c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.

2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its: a. place of incorporation; or b. statutory seat; or c. central administration; or d. substantial business interests.

This provision goes to the power of a particular court to hear a claim that litigants attempt to bring before it. The rule is fairly conventional. First, it appears to vest all courts of all states parties with substantive jurisdiction over claims brought under the Treaty. That raises the issue of the extent of those claims, and more importantly, of their identification. That task is not made easier by the way the Treaty provisions are drafted. But it also will be complicated where states embed causes of action that derive from the Treaty (or which were already enacted before the Treaty) in their general law. There may be some litigation around the rules for identifying municipal law to which these provisions apply.

More conventionally, perhaps, it gives the victim the choice among reasonable alternatives. One assumes that national rules with respect to venue and transfer of jurisdiction apply, as do rules of *forum non conveniens*. The usual issues apply with respect to complex transactions (e.g., it is not clear that an act occurs where it is felt or where the decision to engage in the act is made, etc.). These are also likely to be resolved in accordance with national law (but see discussion of Article 9 with respect to the process-substance split).

Section 2 is designed to extend the jurisdiction of courts to all entities along a production chain, without regard to its legal construction. Here the extent of the amenability to suit will likely be determined to some extent (at least at the outer edges) by the way in

which Article 1 Paragraph 4 is interpreted. That is fair, but likely to encounter resistance (and treaty reservations) among states where a well developed law of general and specific jurisdiction may run counter to the some of the results of applying Paragraph 2 liberally.

There is a potential issue here, one involving the application of this provision to persons who bring claims on behalf of "victims." There may be good arguments for extending the reach of Article 7 in that direction; but the draft is silent.

### ***B. Article 8***

A right is only as good as the time period provided to seek remedy. But here, domestic legal orders have tended to face a tension between broad authority to vindicate substantive rights and the promotion of fairness to those against whom claims may be made. On the one hand, where there is a policy determination that certain rights are important, and that they merit a broad set of incentives pointed toward their vindication, substantial space is accorded the rights holder in determining when to bring the claim. This is particularly important where individuals have few resources and may not be immediately aware of either the extent of their rights or the occurrence (or full manifestation) of the harm suffered.

And yet, there is an equally important set of policy objectives that center on the promotion of societal peace and harmony. These produce a set of principles grounded on the sense that a litigant ought not to unduly delay bringing a claim. That, in turn, springs from a principle that society ought to impose on individuals an obligation to protect their interests in ways that are efficient (in terms of preserving judicial resources and ensuring that all parties are able to access the resources they need to protect their respective interests). This is especially the case respecting evidence (witnesses die or become unavailable, documents may be lost, memory may become less reliable, etc.).

None of this is problematic in itself, and it is usually possible through open and transparent engagement to determine a reasonable period of time, usually backed by broad public consensus, during which an individual may make a claim. The same applies to the construction of reasonable rules respecting important elements such as the expectations of discovery of harm, and the control of abuse (e.g., willful blindness or deliberate concealment, etc.).

And yet, beyond the bad conduct of litigants, statutes of limitation themselves may be written to favor one set of parties over others. It is thus not uncommon for legislatures who do not have the political will to eliminate a cause of action (disfavored actions), to substantially reduce its effect by crafting very short limitations periods. These have the effect of foreclosing the possibility of remedy for all but the most well prepared (potential) claimants and works injustice, at its extreme, against potential claimants who have few resources and little legal knowledge. Likewise, for favored causes of action the legislature may substantially lengthen a limitations period. This helps claimants but at the expense of potential defendants. That cost comes in two principal forms. The first has already been

mentioned—the difficulty of preserving evidence the longer the statutory period is extended. These second is economic and compliance oriented—the longer the limitations period, the greater the cost of preserving documents and other evidence against the possibility of litigation. That, in turn, may produce greater incentives toward the maintenance of compliance bureaucracies that may themselves become intrusive (and human rights problematic) and are expensive.

More important, in this respect, it is necessary to read Article 8, together with prevention rules under Article 5 in order to better assess the nature of the consequential obligations that a statute of limitations regime may impose on an enterprise. Not that this is either good or bad. Rather, one must understand the consequences of policy decisions beyond the confines of what looks like a technical provision to understand the sometimes profound effect it may have on operations. That effect is compounded when its character may also be determined by other (substantive) provisions of the Draft LBI.

With that in mind, let us consider what Article 8 actually provides:

#### Article 8. Statute of limitations

1. The State Parties to the present (Legally Binding Instrument) undertake to adopt, in accordance with their domestic law, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole.
2. Domestic statutes of limitations for violations that do not constitute the most serious crimes of concern to the international community as a whole, including those time limitations applicable to civil claims and other procedures shall allow a reasonable period of time for the investigation and prosecution of the violation, particularly in cases where the violations occurred in another State.

The provision is divided into two parts. The first part, memorialized as Art. 8 § 1, purports to eliminate statutes of limitation for a class of harms therein defined. We get to that shortly. But first, it is important to note that the Treaty obligation to eliminate statutes of limitation entirely may be incompatible with either human dignity or due process principles embedded in the constitutional orders of some states. To the extent that it seeks to provide maximum opportunity to claimants but without considering the effects on potential defendants, it may require either some substantial justification (*because Paragraph 1 itself might well constitute a fundamental human rights breach*), or some sort of explicit protection for the rights of parties against whom such claims are made. Here, one encounters in its most basic form the fundamental clash between the laudable objective of preserving claims and the equally laudable objective of preserving a rule of law based set of procedures for the fair adjudication of claims.

This requires both discussion, and the acceptance that the line drawn may vary considerably among jurisdictions. But that is where the problem comes in. For Paragraph 1 clearly contemplates these wide variations ("undertake to adopt, in accordance with their domestic law"). If that is the case, then it is important to consider the rationale. Most of these will eventually lead to the conclusion that Article 8 Paragraph 8 is meant to maximize strategic and political forum shopping along global production chains. If that is the case, one might ask whether that, in turn, either promotes good faith treaty drafting, or whether as a matter of policy this is the sort of result that one ought to desire.

Indeed, when this section is combined with the possibilities inherent in a broadly interpreted Article 7, the strategic possibilities of forum shopping become clear: as long as at least one state within the set of jurisdictions that may be able to hear a claim eliminates statutes of limitations to the extent permitted under Article 8 Paragraph 1, then it doesn't really matter that the others have not. That may mean that interested stakeholders with political influence might mobilize their political resources to target some but not all states along a liability chain to achieve a desired result. Of course, the issue of enforcement remains a live one—some states may refuse to enforce judgments rendered under these circumstances. But that is abridge that the Draft LBI crosses later.

That lead to the ultimate substantive aim of Paragraph 1, the elimination of statutes of limitation for the "prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole." It is useful first to point out a *drafting weakness*—one that could be exploited by a court worth a mind to indulge in interpreting a provision against its drafters: it is possible to read this part of the provision as applying to ALL violations of international human rights law; but that it only applies to violations of international humanitarian law "which constitute the most serious crimes of concern to the international community as a whole." That is unlikely what was meant. But one lives or dies by the way one writes rather than the intent with which text was written—at least in some jurisdictions.

Second, the substantive provisions include an implied limitation. The statute of limitations provisions apply only to those harms made actionable under the provision of the Draft LBI. That, in turn, requires a return to the issues raised in Article 6. And it also invites a set of quite specific reservations by states. Otherwise, and unlikely, the statute of limitations provisions could be read as broadening the scope of the Draft LBI. More importantly, it may cause some internal dissonance. This will be felt most acutely where two individuals suffer the same harm, but one falling within the substantive scope of the Treaty and the other not. That is possible, of course, because of the leeway permitted states in complying with their substantive obligations under Articles 5 and 6, as they might, potentially be interpreted.

Third, the definition of "most serious crimes of concern to the international community as a whole" is left to the imagination of courts, the constitutional traditions of

states, and the discretionary choices made by administrators. Here was a chance lost to define a term that required some guidance to courts. One can understand the reluctance. The Treaty drafters probably believe that the task of defining human rights—and especially the project of socializing populations into specific narratives of valuation of rights—is an uncompleted task. To define, in this case would be to freeze. The freezing would not affect merely a listing, but also a narrative of valuation (that is of what is "most serious." But that strategic political choice produces legal weakness (and among the most cynical more fodder for political action.

If Section 1 appears aggressive, Section 2 of Article 8 is positively accommodating. It provides merely a request that statutes of limitation be reasonable. As nice as this may sound to states, this does little to further either a project of harmonization, or to further the construction of a jurisprudence system that does not encourage forum shopping—and thus that does not magnify the importance of Article 7 in conjunction with an ability to influence the law making process of states. Here, certainly, would have been a useful place to constrain political choice. One need not have set specific limitations periods—but certainly the Treaty should have (and could have) developed ranges of statutory limitations period that could be deemed reasonable. They could have created a set of statutory maxima coupled with a presumption that could be overcome under certain specified conditions. They did neither. That is a pity.

### ***C. Article 9***

If Article 7 directs litigants to specific courts (or empowers courts to hear cases), then Article 9 provides the formula for determining the law to apply in a particular case. Of course, had the Treaty harmonized all law under its terms, the choice would have been easy—all state parties would be required to direct their courts to apply the law of the Treaty in any relevant litigation. And that, certainly, is the general intent of Article 9 Paragraph 1.

But the Treaty is riddled with riddled with exception and margins of appreciation. The project of using the Treaty as a source of law—as a uniform source of interpreting and applying rules for legal liability to use its own language—that now became an impossible project. And thus the Treaty Drafters had no choice but to revert to one of the more complex and arcane areas of law—that of choice of law. This choice makes sense for Lawyers and well-resourced human rights defenders. But it continues a process now well embedded in this Treaty, to strip rights holders of any agency or power to evaluate (much less assert) their rights. *In a sense, the Treaty as drafted continues the process of victimizing those whose rights have been breached and who have suffered harm by erecting a system that is fit only for well-trained lawyers well versed with elite jurisprudence.*

Article 9 is drafted in a fairly straightforward way:

## Article 9. Applicable law

1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, including any rules of such law relating to conflict of laws .

2. All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance with domestic law, be governed by the law of another State where:

a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the victim is domiciled; or c) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.

3. The (Legally Binding Instrument) does not prejudice the recognition and protection of any rights of victims that may be provided under applicable domestic law.

First, as has now become clear, there is actually very little that is "specifically regulated in the " Draft LBI. As such the general rule of Paragraph 1 becomes its own mockery. Instead, the driving legal element of Paragraph 1 is what follows, that domestic law of substance and procedure of the court *before which the claim is made* applies. National law is probably to be applied to determine which applies where any or all are plausible. Yet the text itself provides little direction.

Moreover, this general rule is itself subject to a larger exception. Here is precisely where the heart of the choice of rule provision may be found. With respect to the substance of human rights law (whatever that is—and that indeed may be defined differently pursuant to the law of different states) relevant to claims, then a different law may apply. What law? Either the law of the place where the acts occurred, or the law of the domicile of the plaintiff (but only where that plaintiff qualifies under the definition of "victim") or the substantive law of the domicile of any of the defendants.

Note that the procedural law of the state where the court sits always applies. Where the difference between process and substance can be complicated (for example in the jurisprudence of the United States), that may produce results where what appears to be process in State A may well be understood and applied as substance in State B. It is not clear whether the law of the state of the sitting court, or the law of the state from which substantive law is drawn is to be used to determine whether an issue is either procedural or substantive for purposes of Article 9.

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It is useful to note that there are some areas where these provisions do not align well with other portions of the Treaty. I have pointed out one above. There is another. Article 4 Paragraph 15 extends some protections to human rights defenders. Yet their interests are nowhere found in Articles 7-9. Moreover, Article 4 Paragraph 8 provides that others (usually it is assumed human rights defenders) can bring claims on behalf of "victims." Left open is the question of whether any of the limitations or directions of Articles 7 through 9 apply to them or are otherwise modified where a claim is brought on behalf of a "victim". Most likely they ought not. But one might be able to make a case that the rules of jurisdiction might be extended to the domicile of human rights defenders bringing claims, for example.

Lastly, it should be underlined that this essay suggests that these small and technical lawyer's points complicate litigation and at the same time make the entire legal edifice of rights protection that much more remote from the "victims" is ostensibly designed to serve. They also can substantially impede the objectives of the Treaty's substantive provisions. Yet they tend to be viewed narrowly for strategic purposes or otherwise as "boilerplate." One final thought: these provisions are not neutral in text or effect. One ought to ask oneself, then, with each of these provisions, whose interests these provisions really serve—directly or indirectly.