D. Article 2 (Purpose)

Textual Analysis of Article 2

Larry Catá Backer

The objects and purposes of treaties constitute an area much invoked but stubbornly ambiguous. A 2010 article on the issue stated by noting the problem of the object and purpose of treaties:

> The phrase "object and purpose" is used relatively frequently in the law of treaties, and the phrase's meaning could be decisive in resolving multiple current international law controversies. Yet, object and purpose is a term of art without a workable definition. Broadly speaking, it refers to a treaty's essential goals, as if a treaty's text could be boiled down to a concentrated broth—the essence of a treaty.1 Beyond this general idea, scholars have failed to create a definition with adequate clarity and detail to serve lawyers who must apply the term in practice.[1]

The authors note the utility of object and purpose clauses in a treaty as a safeguard against incoherence (but then the Preamble might serve a similar purpose—though its authority would be an object of contention). They offer a sensible ecology within which object and purpose can be extracted and perhaps usefully applied: text, guidance in ICJ opinions, the context of its use in the Vienna Convention; and the comfort of extracting interpretive certainty form state practice. This seems right but provides less comfort than one might have wanted.

A treaty's objects and purposes need not be separately listed, but they much be discernible somehow form the text. In a well-known 1952 case[2] the International Court of Justice distinguished between a treaty's object (more specific goals) and its purpose (equated with a generalized intention) but consensus now treats them as a unitary concept. And of course, one tends to start the hunt for objects and purposes by examining the text. It follows that some expression of objects and purposes might be helpful for the interpretation of the treaty but that like everything else—the road from text to interpretation is hardly ever

1 David S. Jonas and Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 3 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 565 (2010).

2 RESERVATIONS TO CONVENTION ON PREVENTION AND PUNISHMENT OF CRIME OF GENOCIDE, ADVISORY OPINION, 1951 I.C.J. 15, 23 (May 28).

certain. It is also helpful, less directly, in managing the illegitimacy of the inevitable reservations that will be made to the final text by states.

Like the Zero Draft, the Draft LBI seeks to short circuit the traps of ambiguity by providing a text of purpose. This, it is imagined ought to align with the implications of the Preamble—though that is not made clear in the text of either draft. Moreover, the curious decision to avoid referencing the Preamble in the text of the purpose provision could give rise to an otherwise unnecessary ambiguity. Interpretation and constraining reservations, then, are at the heart of the construction of this "Statement of Purpose"—or at least ought to be. To that end, the better text is one that directly connects purpose to the core interpretive issues that may arise under the treaty, and that clearly structure the space within which reservations may be tolerated. That is hardly ever the case in Treaty drafting; and it is not the case here.

The Purposes section of the Draft LBI has not changed much in form, but substantially in content, from its original iteration in the Zero Draft. Originally, the Zero Draft Statement of Purpose was divided into 3 Parts:

> Article 2. Statement of purpose
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> 1. The purpose of this Convention is to:
> a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities of transnational character;
> b. To ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character, and to prevent the occurrence of such violations;
> c. To advance international cooperation with a view towards fulfilling States' obligations under international human rights law;

The Draft LBI retains the form and much of the language but with some important changes.

> Article 2. Statement of purpose
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> 1. The purpose of this (Legally Binding Instrument) is:
> a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities;
> b. To prevent the occurrence of such violations and abuses, and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities;
> c. To promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses.

Let's consider the text of each of the three purpose provisions (as modified).

Article 2(1)(a)

Article 2(1) speaks to "strengthening." It is not clear what strengthening means except as a metaphor—to make stronger as in "more effective", buttressing, fortifying, bolstering, or consolidating is one way to approach that term, but so is to equate strengthening with comprehensiveness. Yet these are all very different terms. It is not clear that each word used is to include all other possible synonyms that may be extracted from any Thesaurus of one's choosing. But one gets the point. . . generally. Also possible is a meaning grounded in notions of making its object less susceptible to evasion. Perhaps it is meant to mean all three. That can only be tested either in litigation (to the extent the issue ever arises) or in contests between actors in the course of application.

An examination of the focus of the "strengthening" function may aid in understanding the meaning of these terms and thus the purpose declared. Three things are being strengthened. They are the qualities of "respecting" (valuing, recognizing and the like), of "promoting" (stimulating, supporting, upholding and the like) and of "fulfilling" (achieving, realizing and the like). So, the purpose is to fortify or bolster acts of valuing or recognizing, acts of stimulating *something*. That "something" is *"human rights"—a curiously undefined term*! There may be a simple answer—this was a drafting error and that what was meant to be written was "human rights violations and harms". That would produce a parallel use of the term throughout Article 2 and match the use in Article 1.

Sadly, that was not what was written. But not just any old human rights—only human rights "in the context of business activities." One knows from Article 1 that human rights violations or abuse is defined as harm suffered by a "victim" but only "int he context of a business activity." We also know that "business activities" are defined as economic activities of transnational entities engaged in commercial or productive activity. What one has, then, is precisely the definition (with all of its warts) put forward in the Zero Draft. What appears changed has not changed at all. And what remains only partially defined—human rights—remains embedded in its effects (harms) perpetrated by a transnational organ engaged in productive or commercial activity.

Article 2(1)(b)

Article 2(1)(b) has two sub-parts. The first is focused on prevention; the second is focused on access to justice and remedy. The difference with the Zero Draft is essentially that the ordering of the two sub-parts has been flipped. But is there more? The section that focuses on prevention, lamentably enough, is a bit sloppy in an unnecessary way. The purpose of the Treaty is in this part to prevent the occurrence of "such violations and abuses." What that "such" is is not mentioned. It is likely that what was meant was prevent the occurrence of human rights violations or abuses in line with the Definition in Art. 1(2). But one has to infer that; the text is of little help. The problem here is that when the order of

the sub-parts was reverse the English usage was not corrected. Thus, a purpose of the treaty is to prevent human rights violations or abuse—as that term is defined and limited in Article 1(2).

Another purpose is "to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities." At first blush, the two sub-parts appear incompatible. A reasonable reading, however, suggests a conditional relationship which was made clearer by flipping the two sub-parts as originally drafted in the Zero Draft. The Treaty, then, means to prevent, but where prevention fails to ensure effective access to justice and remedy. Though both justice and remedy are undefined, it is clear they point to different things. Justice is a thin reed on which to hang a treaty.

First all treaties must be read as furthering access to justice principles, but second justice notions, at least since the time of the Institutes has been a heavily contextual, relational and collective concept, the assurance of which promises fracture along cultural and systemic lines. This is not unexpected, but the underlining of a willingness to tolerate quite divergent meanings of justice may then weaken any effort to read uniformity into the other abstract purpose concepts in Article 2. Access to remedy, on the other hand, is contentious in a different way. Access to justice has always been ideologically contingent. Access under Leninist principles of state organization is quite distinct from principles and a consensus about the meaning of access to remedy in liberal democratic states. Access to justice and access to remedy assurances are limited, of course, to "victims" as defined in Article 1(1) to the extent it arises in the context of "human rights violations and abuses (Article 1(2) that are themselves the product of business activities (Article 1(3)).

Article 2(1)(c)

Article 2(1)(c) is the most changed form the Zero Draft. And it is changed in the most lamentable way. But the change is also felicitous in the sense that it clarifies an underlying object and purpose. For if interpretation is itself based on intent evidenced by changes in the text from one version to the other then it is clear that the intent of the Draft LBI is *to take the state out of the Treaty.* Where the Zero Draft spoke to the advancement of "international cooperation with a view towards fulfilling States' obligations under international human rights law" (note that here "law" springs up effectively for the first time with no relation to the definition of key terms). In the Draft LBI there is no more reference to state obligation. That has disappeared. In the place of the Zero Draft's "advancement" is the Draft LBI's "promotion and strengthening". In the place of the Zero Draft's "fulfillment of state obligations under international human rights law" is the Draft LBI's more benign and far less direct "promotion and strengthening of international cooperate to prevent human rights violations and abuses". *Two things disappear from the Draft LBI statement of purpose—first, the state; and second, law*. What replaces these is a substantial restatement of Article 2(1)(b) reference to access to justice and remedy to victims of human rights violations and abuses.

The circularity, with a hole in the middle, reduces the value of this section even as it redirects its energies. There is purpose to this cyclonic movement—and it may be found in the reference to "regional integration association" in Art. 1(5). Though tenuous, it is possible to see in the change and in the language now employed a purpose *to nudge state responsibility from states,* and to in the process make them peripheral agents of international human rights (one cannot say law here because the reach goes far beyond the narrow confines of international law to a generalized harm principle with a remedial mechanism as the essence of access to justice). In their place Article 2, however obliquely, would nudge states to transfer competence over international access to justice and remedy to an international organization exercising collectively sovereign authority in an international institutional structure. But that is likely a step too far.

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Where does that leave the Draft LBI and its interpretive universe?

First, it is clear that a purpose of the Draft LBI is to strengthen (a term whose meaning is protean enough to cause worry in its legal sense) human rights in the context (again a word that cultivates ambiguity) of business activities. Business activities, of course is defined (and focused (limited?) in Article 1. But human *rights* is *NOT defined* in Article 1. What *is* defined is the term "human rights *violations and abuse*" in a way that results in the creation of a harm principle. *implicitly rejecting a rights principle*. But there is no reference to human rights *law* (which it appears would limit the scope of the Draft LBI but which may be irrelevant for its legal effect which in any case would be confined to the legal obligations of those burdened with responsibility under the treaty. The irrelevance comes form the impossibility is using a reference to human rights as a generalized class of harms to effectively transpose either into international law or the national law of state parties these principles or approaches as *law*. In any case, what is to be strengthened is the "respect, promotion, protection and fulfillment" of this class of human *rights* in the context of business activities. Can one read this purpose to extend to human rights violations and abuse? And to against whom is this purpose to be applied?

Second, the purpose of the Draft LBI is to ensure prevention, and in the absence of prevention, access to justice and remedy for human rights violations and abuses. This raises the question about the relationship between human rights in Art. 2(1)(a) and human rights violations and abuses in Art. 2(1)(b). The former speaks to normative (not inevitably legally applicable) elements undefined. The latter speaks to acts that produce a harm that either ought to be prevented or otherwise with respect to which access to justice and remedy ought to be available.

Third, a purpose of the Draft LBI is to promote and strengthen international cooperation. Gone is the purpose of fulfilling state obligations under international human rights law. Apparently even this mild truism was too much of a purpose burden for the Draft LBI to bear. If so, then it is not clear only whom such a burden is to fall. The answer may well

be that the Draft LBI is to mind its own business with respect to that issue. And thus the purpose section also serves as an anti-purpose statutes. What the Draft LBI is NOT to undertake (nor should it be interpreted as an implied undertaking) is the purpose of strengthening state duty to fulfill their legal obligations under international law. In this context it is not clear whether or to what extent the principles of UNGP Pillar 1 survive a transposition to this treaty. And if it merely provides a treaty basis for the UNGP 2nd Pillar, has it undertaken the provision to states of powers they already have?

At the same time, this is not a criticism of the purpose provision—there is more frustration than critique here. The triple objective—protect, prevent and promote—has been at the center of efforts to develop foundational principles for developing not just rules but cultures of engagement in economic activity that bring the human back into the calculation of the worth of economic activity. At its broadest, the Treaty represents another step, and a tentative one at that, in moving forward a project legalization of only certain classes of harm incurred. Yet the purpose provision is neither specifically tailored to the task at hand—the construction of a viable legal basis for allocating liability for well-defined classes of conduct among groups of actors—all tightly connected to the core norms to be advanced. Not that Article 2 is badly done. As it is written, however, it provided relatively little useful guidance to courts seeking to interpret national transposition of treaty obligations; nor does it connect in meaningful ways to the specific provisions that follow, and particularly Articles 4, 5 and 6. This failure to connect and the consequential extent to which one might use this Article 2 strategically to broaden or narrow obligations otherwise imposed by the normative provisions of the Draft LBI.