Sources of International Law, Treaty Interpretation, General Principles, and Rules of Attribution

Prof. Chester Brown and N. Jansen Calamita

Part One:
Sources of International Law

Sources of international law

- Statute of the ICJ, Art 38(1):

  "The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law recognized by civilized nations;

d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Sources (cont)

- See also Art 59, ICJ Statute:
  - "The decision of the Court has no binding force except between the parties and in respect of that particular case."
- No hierarchy
- Cf. *jus cogens:*
  - VCLT, Art 53 (treaty void if conflicts with existing peremptory norm);
  - VCLT, Art 64 (treaty void if conflicts with new peremptory norm established after treaty comes into force)

Treaties

- VCLT, Art 2(1): 'For the purposes of the present Convention:
  - (a) "treaty" means: an international agreement **concluded between States** in **written form** and **governed by international law**, whether embodied in **a single instrument or in two or more related instruments**, and **whatever its particular designation**.'

Customary international law

- Two principal elements:
  - State practice
  - *Opinio juris*
- What is "State practice"?
  - May come in the form of treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisers, the practice of international organisations, policy statements, press releases, official manuals on legal questions, executive decisions and practices, and comments by governments on work of the International Law Commission

State practice (cont)

- What State practice is required?
  - "constant and uniform usage": *Asylum (Colombia/Peru)* [1950] ICJ Rep 266
  - "very widespread and representative participation in the convention … provided it included that of States whose interests were specially affected": *North Sea Continental Shelf (FRG/Neth, FRG/Den)* [1969] ICJ Rep 3, para. 73
  - should usually be over a "considerable period of time", but a shorter period is not a bar if it is possible to show "extensive and virtually uniform" State practice, including specially affected States: *North Sea Continental Shelf (FRG/Neth, FRG/Den)* [1969] ICJ Rep 3, para. 74
  - it is not enough to look at the practice of the States in dispute: *Nicaragua (Nic v US)* [1986] ICJ Rep 14, para. 184

State practice (cont)

- No need for complete uniformity / consistency:
  - "The question of uniformity and consistency of practice is very much a matter of appreciation. Complete uniformity is not required, but substantial uniformity is": James Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012), p. 24
- Not a mathematical exercise:
  - "the repetition, the number of examples of State practice, the duration of time required for the generation of customary international law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances": *North Sea Continental Shelf* [1969] ICJ Rep, p. 175 (Diss Op Judge Tanaka).

Opinio Juris

- State practice "should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved": *North Sea Continental Shelf (FRG/Neth, FRG/Den)* [1969] ICJ Rep 3, para. 74
- Sir Hersch Lauterpacht on *opinio juris*:
  - "the mysterious phenomenon of customary international law which is deemed to be a source of law only on condition that it is in accordance with law."

Opinio Juris (cont)

- How to prove the subjective belief of States?
  - This element "could not be ascertained very easily, particularly when diverse legislative and executive organs participate in an internal process of decision-making": *North Sea* [1969] ICJ Rep 3 (Judge Tanaka).
  - "In view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments": *North Sea* [1969] ICJ Rep 3 (Judge Sorensen).

Opinio juris (cont)

- *Legality of Threat or Use of Nuclear Weapons* [1996] ICJ Rep 266, para. 67:
  - "[T]he Members of the international community are profoundly divided on the matter whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is an *opinio juris*. …"

Customary international law (cont)

- Regional or local custom is possible:
  - *Asylum (Colombia/Peru)* [1950] ICJ Rep 266 (asserted right of embassies of other States to grant political asylum)
  - *Right of Passage (Portugal v India)* [1960] ICJ Rep 6 (right of transit to Portuguese enclaves inland from the port of Daman)
- "Persistent objector" rule
  - *Anglo-Norwegian Fisheries (UK v Norway)* [1951] ICJ Rep 116 (Norway objecting to limit on method of drawing straight baselines to close bays / archipelagic waters)

Customary international law in investment treaty arbitration

- *Neer* (US-Mexican Claims Commission, 1926) on international minimum standard: conduct has to be an "outrage", "bad faith", "wilful neglect of duty"
- Has the CIL standard of treatment evolved?
- *Glamis Gold v United States* (Award of 2009):
  - "Establishment of a rule of customary international law requires: (1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law" (para. 602).
  - "As an evidentiary matter, the evolution of a custom is a proposition to be established. . . . In some cases, the evolution of custom may be so clear as to be found by the tribunal itself. In most cases, however, the burden of doing so falls clearly on the party asserting the change." (para. 21)
  - "the Tribunal finds that the evidence provided by Claimant does not establish such evolution" (para. 614).

CIL Centre for International Law

NUS National University of Singapore

General Principles of Law

- General principles that have been applied include the following:
  - Principles of equity: *Diversion of the River Meuse*, PCIJ
  - No State can profit from its own wrongs: *Chorzow Factory (Indemnity),* Ser A (No. 9), p. 31
  - States owe reparation for wrongs: *Chorzow Factory (Merits),* Ser A, No. 17, p. 29
  - Rules of procedural fairness, e.g. good faith / estoppel
  - Rules of evidence and judicial procedure, such as *res judicata*
  - Abuse of process / Abuse of rights
- Need to avoid "*non liquet*"
- Cf. *Legality of Threat or Use of Nuclear Weapons* [1996] ICJ Rep 266, paras 96-7, para 105E (ICJ, 1996)

No *stare decisis* rule

AES Corporation v. Argentina Decision on Jurisdiction, ICSID Case No. ARB/02/17, paragraph 23(d) :

"the rule according to which each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award. There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party …"

No *stare decisis* rule (cont'd)

- *Enron v. Argentina,* Decision on Jurisdiction, ICSID Case No. ARB/01/3, paragraph 40:

"The Tribunal is of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules. The citations of and references to those decisions respond to the fact that the Tribunal in examining the claim and arguments of this case under international law, believes that in essence the conclusions and reasons of those decisions are correct."

Res judicata

- *Waste Management II* Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, paragraph 39:

  39. There is no doubt that res judicata is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice. Indeed both parties accepted this. However, a judicial decision is only res judicata if it is between the same parties and concerns the same question as that previously decided.

Abuse of process

- *Phoenix Action v. Czech Republic*, Award paragraph 113

> In the instant case, no question of violation of a national principle of good faith or of international public policy related with corruption or deceitful conduct is at stake. The Tribunal is concerned here with *the international principle of good faith as applied to the international arbitration mechanism of ICSID.* The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.

Abuse of right

- *Saipem v. Bangladesh,* Award, paragraph 160:

> "It is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights. The same principle is expressed in another way by prominent commentators referred to by both parties (Reply, p. 25, ¶ 89 and Rejoinder p. 27, ¶ 88) …"

Equality of the parties

- *Methanex v. United States,* Final Award, Part II, Chapter 1, paragraph 54:

  "In the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules …"

Equality of the parties

- *Biwater Gauff v. Tanzania,* Procedural Order number two, paragraph 13:

  "It is indeed one of the most fundamental principles of international arbitration that the parties should be treated with equality."

Burden of proof

- *Azurix v. Argentina*, Decision on the Application for Annulment, paragraph 215:

  In its letter dated August 2, 2004, Argentina refers to what it claims is "*a general principle of law that the party that is in a better position to prove a fact bears the burden of proof*" (see paragraph 198 above). The Committee does not accept that such general principle exists in ICSID proceedings: to the contrary, the Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that "who asserts must prove", and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.

Judicial decisions and writings

- Art 38(1)(d): “judicial decisions and the teachings of the most highly qualified publicists …”
- These are a “subsidiary means” for determining the rules of international law
- Expressed as being subject to ICJ Statute, Art 59:
  - “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

Any other sources?

- Unilateral declarations/undertakings
  - "Ihlen declaration": *Legal Status of Eastern Greenland* (PCIJ, 1933)
  - France's declaration concerning atmospheric nuclear testing: *Nuclear tests* case (ICJ, 1974)
  - ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (2006)
- "Soft law"?

Part Two:
Rules of Treaty Interpretation

Rules of Treaty Interpretation

- Art 2(1)(a):

  "1) For the purposes of the present Convention:

  a)"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; …"

Treaty Interpretation (cont)

- VCLT, Art 31(1):
  - "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

"Good faith" in Article 31(1)

- Sir Humphrey Waldock, *YBILC* (1964-II), p. 57:
  - "only when interpretation in good faith leaves a real doubt as to the meaning is it permissible to set aside the natural and ordinary meaning of the terms of the treaty in favour of some other meaning"
- E.g., UN Charter, Art 23(1):
  - "The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States shall be permanent members of the Security Council. …"

"Ordinary meaning"

- The starting point of any treaty interpretation
- NB that the "ordinary meaning" might not be the "literal meaning", and that there might be more than one "ordinary meaning"
- Tribunals may have recourse to dictionaries, although these may not be of great assistance
- *Aguas del Tunari v Bolivia* (Decision on Jurisdiction of 21 October 2005), para. 230:
  - "the negotiators of the Netherlands – Bolivia BIT likely possessed a sophisticated knowledge of business and law. For such persons, the ordinary meaning of a word or phrase also includes the legal meanings given to such words or phrases."

"Context" in Article 31(1)

- VCLT, Art 31(2):

"The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

"Context" (cont)

- *Fraport v Philippines* (Award of 16 August 2007), para. 337-343
  - Use of Philippines Instrument of Ratification as "context"
  - cf *Fraport v Philippines* (Decision on Annulment of 23 December 2010), paras. 98-99, 107
- NAFTA provides for the establishment of a Free Trade Commission which can adopt interpretations of NAFTA (Art 2001(1))
- Such interpretations are binding: NAFTA, Art 1131(2)
- "Note of Interpretation" issued in July 2001 concerning the scope of the FET and FPS standards of protection (NAFTA, Art 1105)

"Object and purpose" of the treaty

- ILC Guide to Practice on Reservations to Treaties (2011), Guideline 3.1.5.1 ("Determination of the object and purpose of the treaty"):
  - "The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties."

"Object and purpose" in investment treaty arbitration

- Tribunals often look to the preamble of BITs for "object and purpose"
  - *Noble Ventures v Romania* (Award of 12 October 2005), para. 52; *Continental Casualty Corp v Argentine Republic* (Decision on Jurisdiction of 22 February 2006), para. 80; *AFT v Slovakia* (Award of 5 March 2011), paras. 236-237.
- See Preamble of BIT in Hypothetical Case Study

VCLT, Art 31(3)

"(3) There shall be taken into account, together with the context:

a) any subsequent agreement between the parties regarding the interpretation or application of the treaty;

b) any subsequent practice by the parties in the application of the treaty; and

c) any relevant rules of international law applicable in the relations between the parties."

Approach to treaty interpretation in investment treaty arbitration

- Some tribunals have adopted an expansive approach to interpreting consent, e.g., *SGS v Philippines* (Decision on Jurisdiction of 29 January 2004), para. 116:
  - "The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other.' It is legitimate to resolve uncertainties in its interpretation in favour of the protection of covered investments."

Approach to treaty interpretation (cont)

- This has been criticised by some tribunals, e.g., *Noble Ventures v Romania* (Award of 12 October 2005), para. 52:
  - "It is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors."

Approach to treaty interpretation (cont)

- Other tribunals have preferred a balanced approach, e.g., *Saluka Investments BV v Czech Republic* (Partial Award of 17 March 2006), para. 300:
  - "The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations."

"Special meaning"

- VCLT, Art 31(4):
  - "A special meaning shall be given to a term if it is established that the parties so intended."
  - This is rarely referred to in investment treaty arbitration: Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (2012), pp. 95-97.

Art 32: Supplementary means

- VCLT, Art 32:
  - "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
  - (a) leaves the meaning ambiguous or obscure; or
  - (b) leads to a result which is manifestly absurd or unreasonable."

Supplementary means (cont)

- Supplementary means include:
  - "successive drafts of the treaty, conference records, explanatory statements of an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee, and ILC Commentaries" (Anthony Aust, *Handbook of International Law* (2005), pp. 94-95).

Supplementary means (cont)

- *Methanex Corporation v United States* (Award of 3 August 2005), Pt II, Ch H, para. 25:
  - "the scope of document production that Methanex sought from the USA was exceptionally broad … Methanex sought negotiating texts, minutes of meetings and memoranda prepared for the NAFTA negotiations, whether shared or not between the NAFTA Parties. It was thus for Methanex to demonstrate not only that it was appropriate to depart from the text of the NAFTA provisions and to conduct an investigation ab initio of the supposed intentions of the NAFTA Parties, but also that such intentions could reliably be established from documents which had never been seen or discussed between the three NAFTA Parties. It failed to do so."

Supplementary means (cont)

- See also *Yaung Chi Oo Trading Pte Ltd v Myanmar* (ASEAN ID Case No ARB/01/1, Award of 31 March 2003), para. 74:
  - "The Joint Press Release of the Inaugural Meeting of the ASEAN Investment Council of 8 October 1998 stated that '[e]xisting and potential investors will benefit from the AIA agreement in, among others, the following ways,' and the list of items following includes 'a more liberal and competitive investment regime.' Whether or not this statement is to be considered as part of the *travaux preparatoires* of the Framework Agreement, it is clearly an authoritative statement made by relevant ministers of ASEAN Member States, including the Myanmar Minister of Industry, as to their intentions at the time of the conclusion of the Agreement."

Supplementary means (cont)

- *Churchill Mining plc v Indonesia* (ICSID Case No ARB/12/14, Decision on Jurisdiction of 24 February 2014), paras. 181-182:
  - "Article 32 VCLT allows recourse to the preparatory work of the treaty and the circumstances surrounding the treaty's conclusion. It does not give an exhaustive list of admissible materials and the Tribunal thus has latitude to include any element capable of shedding light on the interpretation of 'shall assent'. … Accordingly, the analysis will focus on (i) doctrinal writings, (ii) case law, (iii) the treaty practice of Indonesia and the United Kingdom with third States, and (iv) the preparatory materials regarding the negotiation of the UK-Indonesia BIT."

Art 33: Authentic language(s)

- VCLT, Art 33:
  - "(1) When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail."

Part Three:
State Responsibility

ILC Articles on State Responsibility

- The ILC comprises a group of international law experts reflecting the different legal traditions of the world which was established by the United Nations General Assembly.
- Its mandate is to progressively develop and codify the rules of public international law.
- Membership in the ILC is limited to 34 members and results from an election by the Member States of the United Nations.

ILC Articles on State Responsibility

- The Articles on State Responsibility project started in 1949.
- The Commission completed its work 50 years later: "Responsibility of States for Internationally Wrongful Acts 2001" in Yearbook of the International Law Commission 2001, vol. 2, part 2 (New York: UN, 2001), accessible online.
- Not all rules are declaratory of the rules of customary international law; some are considered to be a "progressive development" of the law.

States act through "measures"

- A "measure" can include not only positive acts but also omissions.
- Example: Most investment treaties contain a "full protection and security" provision. Claimants will typically allege that the State failed to take the necessary measures to protect the investment.
- This might be alleged in relation to other breaches: Furthermore, it makes no difference whether the deprivation was caused by actions or by inactions.

States act through “measures”

- Article 1: “Every internationally wrongful act of a State entails the international responsibility of that State.”

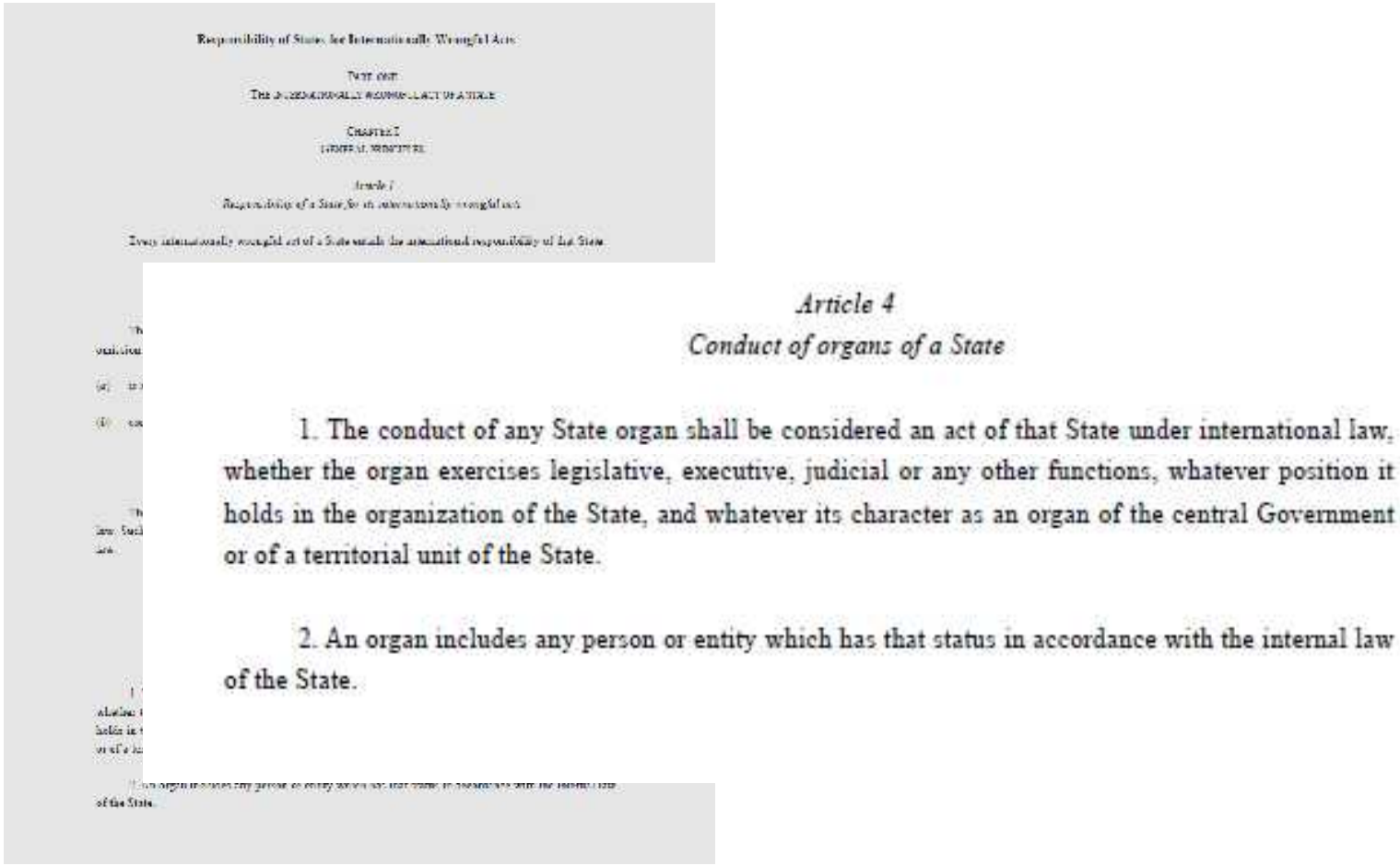
- For the purposes of the articles, the term “internationally wrongful act” includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

Omissions

- *Saluka v. Czech Republic*, Partial Award:

> "459. The term "measures" covers any action or omission of the Czech Republic. As the ICJ has stated in the Fisheries Jurisdiction Case (Spain v. Canada):
>
> > "[I]n its ordinary sense the word is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby."

Attribution under International Law



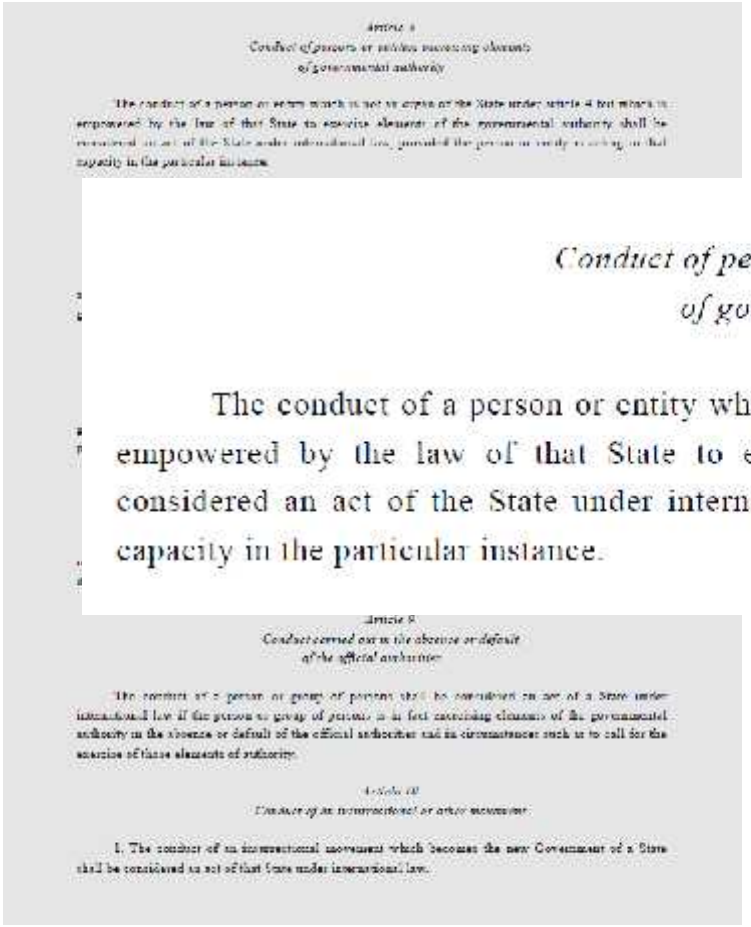
Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

ILC Articles on State Responsibility, Article 4

Attribution under International Law



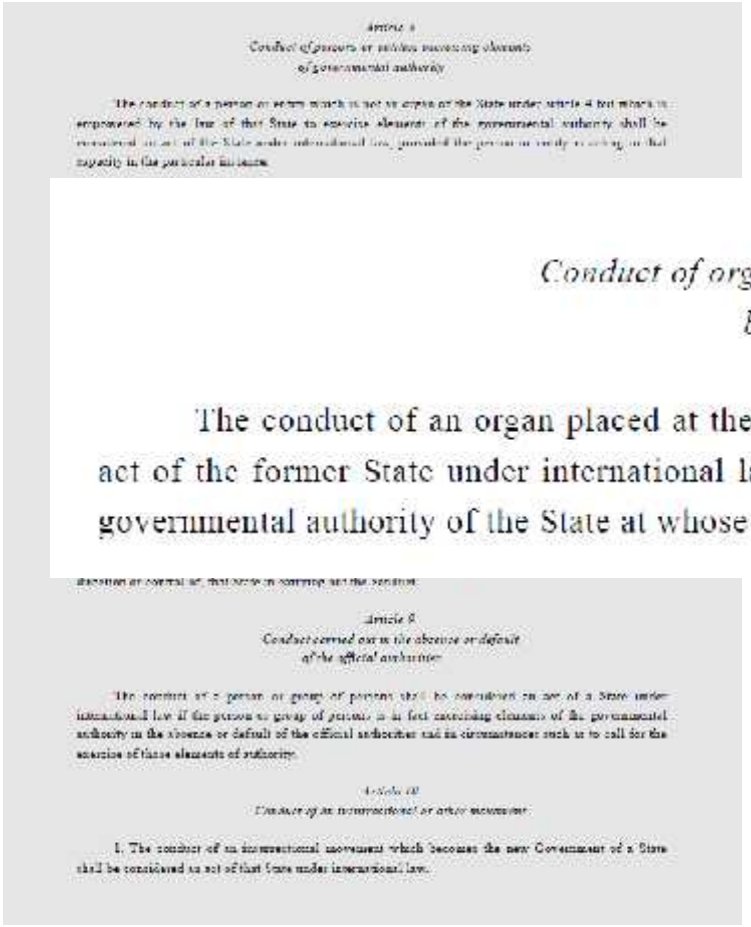
Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

ILC Articles on State Responsibility, Article 5

Attribution under International Law



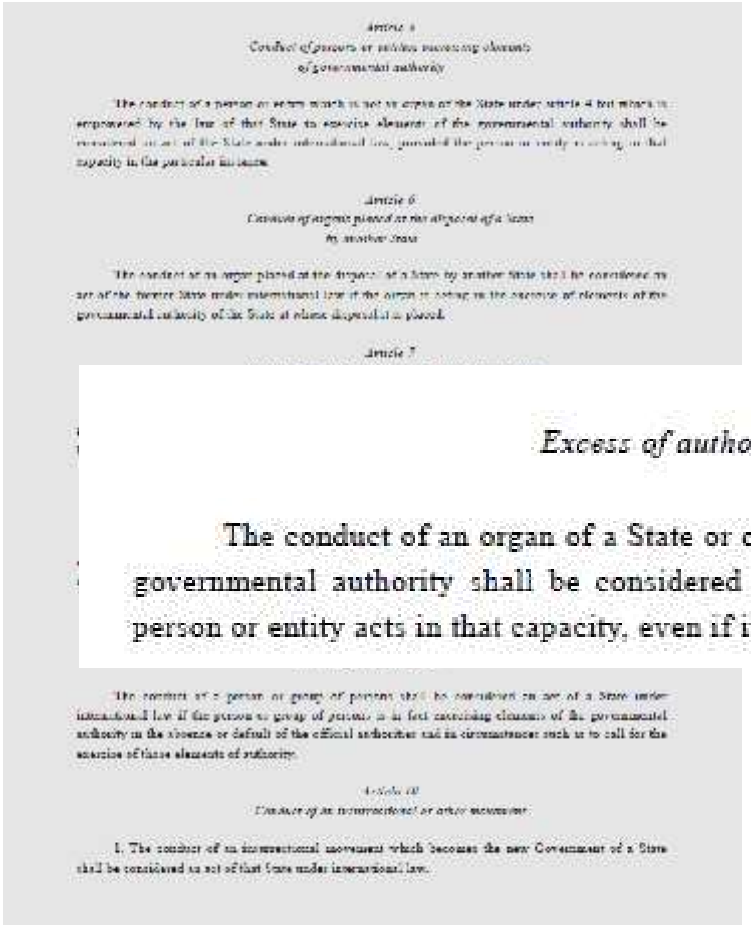
Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

ILC Articles on State Responsibility, Article 6

Attribution under International Law



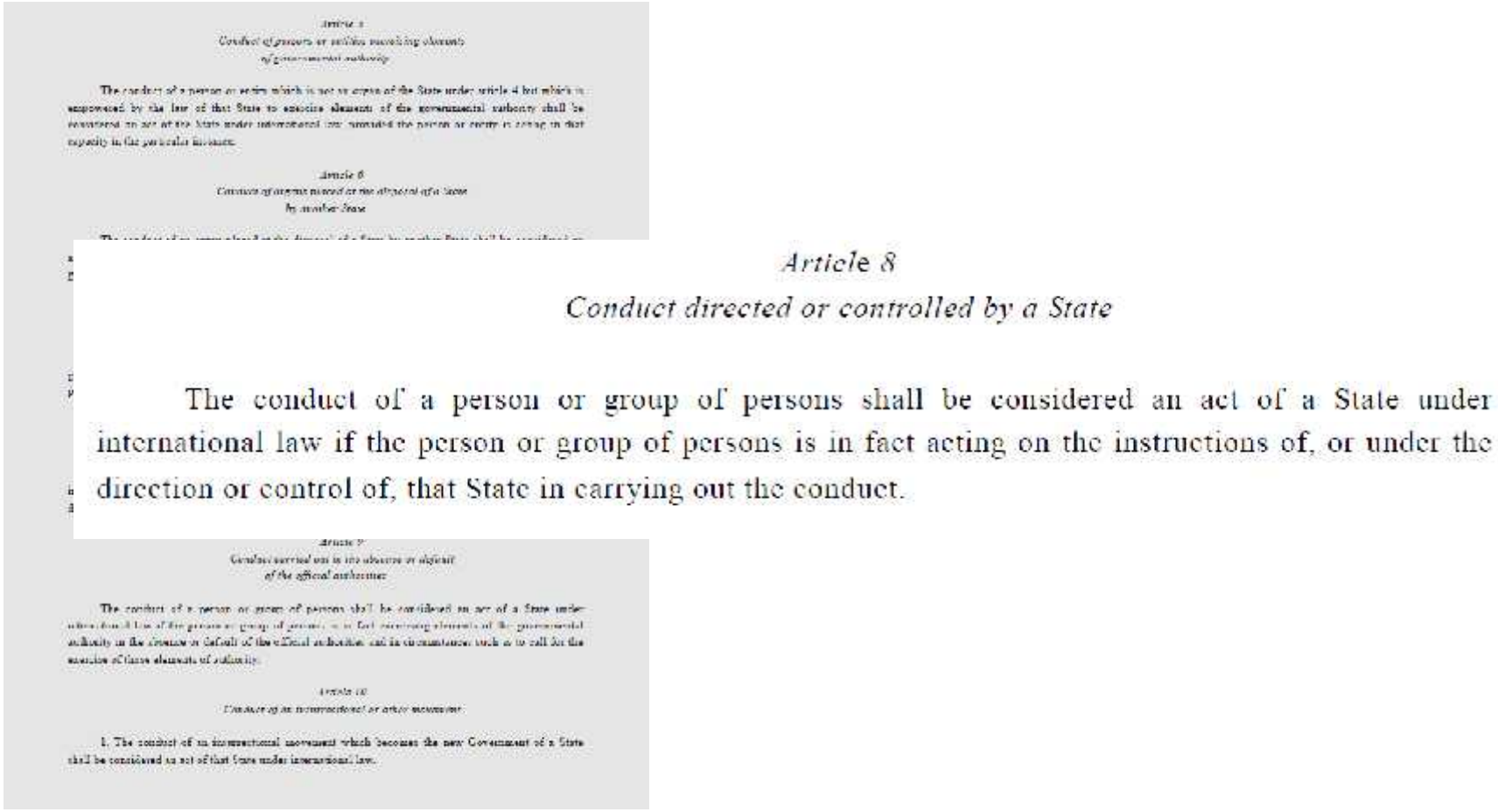
Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

ILC Draft Articles on State Responsibility, Article 7

Attribution under International Law



Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

ILC Articles on State Responsibility, Article 8

Attribution (cont)

- ILC Commentary to Article 8:
  - "Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation."
- *Nicaragua* [1986] ICJ Rep 14, 64-65:
  - "… For this conduct to give rise to legal responsibility of the United States, it would have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

Attribution (cont)

- *Genocide Convention* [2007] ICJ Rep 43, 208, para 400*:*
  - "[I]t has to be proved that [the persons or groups] acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."
- *Jan de Nul NV and Dredging International NV v Egypt* (ICSID Case No ARB/04/13, Award of 6 November 2008), para. 173:
  - "International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the 'effective control' test".