THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY

Introduction, Text and Commentaries

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Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility, from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

CHAPTER I
GENERAL PRINCIPLES

ARTICLE 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part 1. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) The Permanent Court of International Justice applied the principle set out in article 1 in a number of cases. For example in *Phosphates in Morocco*, the Permanent Court affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[35] The International Court of Justice has applied the principle on several occasions, for example in the *Corfu Channel* case,[36] in the *Military and Paramilitary Activities* case,[37] and in the

35 *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21; *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 29.

36 *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 23.

37 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986*, p. 14, at pp. 142, para. 283, 149, para. 292.

Gabčíkovo-Nagymaros Project case.[38] The Court also referred to the principle in the advisory opinions on *Reparation for Injuries*,[39] and on the *Interpretation of Peace Treaties, Second Phase*,[40] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[41] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Subjects Resident in Peru* cases,[42] in the *Dickson Car Wheel Company* case,[43] in the *International Fisheries Company* case,[44] in the *British Claims in the Spanish Zone of Morocco* case,[45] and in the *Armstrong Cork Company* case.[46] In the *Rainbow Warrior* case,[47] the Arbitral Tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[48]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognised, both before[49] and since[50] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization

38 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 38, para. 47.
39 *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174, at p. 184.
40 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 221.
41 Ibid., at p. 228.
42 Seven of these awards, rendered in 1901, reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents . . . ": *R.I.A.A.*, vol. XV, p. 395 (1901), at pp. 399, 401, 404, 407, 408, 409, 411.
43 *R.I.A.A.*, vol. IV, p. 669 (1931), at p. 678.
44 *R.I.A.A.*, vol. IV, p. 691 (1931), at p. 701.
45 According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility . . . "; *R.I.A.A.*, vol. II, p. 615 (1925), at p. 641.
46 According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law": *R.I.A.A.*, vol. XIV, p. 159 (1953), at p. 163.
47 *Rainbow Warrior (New Zealand/France), R.I.A.A.*, vol. XX, p. 217 (1990).
48 Ibid.,at p. 251, para. 75.
49 See e.g. D. Anzilotti, *Corso di diritto internazionale* (4th edn.) (Padua, CEDAM, 1955) vol. I, p. 385. W. Wengler, *Völkerrecht* (Berlin, Springer, 1964) vol. I, p. 499; G.I. Tunkin, *Teoria mezhdunarodnogo prava*, Mezhduranodnye otnoshenia (Moscow, 1970), p. 470; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen (ed.), *Manual of Public International Law* (London, Macmillan, 1968), p. 533.
50 See e.g. I. Brownlie, *Principles of Public International Law* (5th edn.) (Oxford, Clarendon Press, 1998), p. 435; B. Conforti, *Diritto Internazionale* (4th edn.) (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier & A. Pellet, *Droit international public (Nguyen Quoc Dinh)* (6th edn.) (Paris, L.G.D.J., 1999), p. 742; P.-M. Dupuy, *Droit international public* (3rd edn.) (Paris, Précis Dalloz, 1998), p. 414; R. Wolfrum, "Internationally Wrongful Acts", in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, 1995), vol. II, p. 1398.

accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.[51] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[52] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e., concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by the International Court in the *Barcelona Traction* case when it noted that

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[53]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also . . . the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[54] In later cases the Court has reaffirmed this idea.[55] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are

51 See H. Kelsen (R.W. Tucker, ed.), *Principles of International Law* (New York, Holt, Rhinehart & Winston, 1966), p. 22.

52 See, e.g., R. Ago, "Le délit international", *Recueil des cours*, vol. 68 (1939/II), p. 417, at pp. 430-440; H. Lauterpacht, *Oppenheim's International Law* (8th edn.) (London, Longmans, 1955), vol. I, pp. 352-354.

53 *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

54 Ibid., at p. 32, para. 34.

55 See *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 595, at pp. 615-616, paras. 31-32.

centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of counter-measures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under Chapter II the same conduct may be attributable to several States at the same time. Under Chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as the International Court of Justice affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties . . . it has the capacity to maintain its rights by bringing international claims".[56] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[57] It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[58]

(8) As to terminology, the French term "fait internationalement illicite" is preferable to "délit" or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term "delito". The French term "fait internationalement illicite" is better than "acte internationalement illicite", since wrongfulness often results from omissions which are hardly indicated by the term "acte". Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term "hecho internacionalmente ilícito" is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French "fait" has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

56 *I.C.J. Reports 1949*, p. 174, at p. 179.

57 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999*, p. 62, at pp. 88-89, para. 66.

58 For the position of international organizations see article 57 and commentary.

ARTICLE 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by the Permanent Court of International Justice in the *Phosphates in Morocco* case.[59] The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[60] The International Court has also referred to the two elements on several occasions. In the *Diplomatic and Consular Staff* case,[61] it pointed out that, in order to establish the responsibility of Iran . . .

> "[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable."[62]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[63]

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[64] Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State

59 *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74*, p. 10.
60 Ibid., at p. 28.
61 *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3.
62 Ibid., at p. 29, para. 56. Cf. p. 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986*, p. 14, at pp. 117-118, para. 226; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 54, para. 78.
63 *R.I.A.A.*, vol. IV, p. 669 (1931), at p. 678.
64 Cf. *Yearbook . . . 1973*, vol. II, p. 179, para. 1.

organs or agents and in that sense may be "subjective". For example article II of the Genocide Convention states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . . " In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example in the *Corfu Channel* case, the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[65] In the *Diplomatic and Consular Staff* case, the Court concluded that the responsibility of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[66] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[67]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[68] The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.

65 *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at pp. 22-23.

66 *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at pp. 31-32, paras. 63, 67. See also *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989), para. 170: "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions . . . "; *Affaire relative à l'acquisition de la nationalité polonaise, R.I.A.A.*, vol. I, p. 425 (1924).

67 For example, under Article 4 of the Hague Convention (VIII) of 18 October 1907 Relative to the Laying of Automatic Submarine Contact Mines, a neutral Power which lays mines off its coasts but omits to give the required notice to other States Parties would be responsible accordingly: see J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (New York, Oxford University Press, 1920), vol. I, p. 643.

68 *German Settlers in Poland, 1923, P.C.I.J., Series B, No. 6*, at p. 22.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in Chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, the Permanent Court of International Justice used the words "breach of an engagement".[69] It employed the same expression in its subsequent judgment on the merits.[70] The International Court of Justice referred explicitly to these words in the *Reparation for Injuries* case.[71] The Arbitral Tribunal in the *Rainbow Warrior* affair, referred to "any violation by a State of any obligation".[72] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[73] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation", corresponding as it does to the language of article 36 (2) (c) of the Statute of the International Court.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. The Permanent Court of International Justice spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[74] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation

69 *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21.
70 *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 29.
71 *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174, at p. 184.
72 *Rainbow Warrior (New Zealand/France), R.I.A.A.*, vol. XX, p. 217 (1990), at p. 251, para. 75.
73 At the 1930 League of Nations Codification Conference, the term "any failure . . . to carry out the international obligations of the State" was adopted: *Yearbook . . . 1956*, vol. II, p. 225.
74 *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28.

has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[75]

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act — conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[76]

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Paragraph (a) — which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act — corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Paragraph (b) — which states that such conduct must constitute a breach of an international obligation — corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In paragraph (a), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[77] But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

75 See also article 33 (2) and commentary.

76 For examples of analysis of different obligations, see e.g. *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at pp. 30-33, paras. 62-68; *Rainbow Warrior*, *R.I.A.A.*, vol. XX, p. 217 (1990), at pp. 266-267, paras. 107-110; W.T.O., Report of the Panel, *United States — Sections 301-310 of the Trade Act of 1974*, 22 December 1999,WT/DS152/R, paras. 7.41 ff.

77 See e.g., *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at p. 29, paras. 56, 58; *Military and Paramilitary Activities, I.C.J. Reports 1986*, p. 14, at p. 51, para. 86.

(13) In paragraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

ARTICLE 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law — even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of the Permanent Court in the *Treatment of Polish Nationals* case[78]. The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig, on the ground that:

> " . . . according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted . . . [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force . . . The application of the Danzig Constitution may . . . result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law . . . However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City."[79]

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. International judicial decisions leave no doubt on that subject. In particular, the Permanent Court expressly recognized the principle in its first judgment, in the *S.S. Wimbledon*.[80] The Court rejected the argument of the German Government that the passage of the ship through the

78 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932, P.C.I.J., Series A/B, No. 44*, p. 4.

79 Ibid., at pp. 24-25. See also *"Lotus", 1927, P.C.I.J., Series A, No. 10*, at p. 24.

80 *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*.

Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

> "... a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace ... under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article."[81]

The principle was reaffirmed many times:

> "... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[82]

> "... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations."[83]

> "... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[84]

A different facet of the same principle was also affirmed in the Advisory Opinions on *Exchange of Greek and Turkish Populations*[85] and *Jurisdiction of the Courts of Danzig*.[86]

(4) The International Court has often referred to and applied the principle.[87] For example in the *Reparation for Injuries* case,[88] it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible ... the Member cannot contend that this obligation is governed by municipal law". In the *ELSI* case,[89] a Chamber of the Court emphasized this rule, stating that:

> "Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the

81 Ibid., at pp. 29-30.
82 *Greco-Bulgarian "Communities", 1930, P.C.I.J., Series B, No. 17*, at p. 32.
83 *Free Zones of Upper Savoy and the District of Gex, 1930, P.C.I.J., Series A, No. 24*, at p. 12; *Free Zones of Upper Savoy and the District of Gex, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.
84 *Treatment of Polish Nationals, 1932, P.C.I.J., Series A/B, No. 44*, p. 4, at p. 24.
85 *Exchange of Greek and Turkish Populations, 1925, P.C.I.J., Series B, No. 10*, at p. 20.
86 *Jurisdiction of the Courts of Danzig, 1928, P.C.I.J., Series B, No. 15*, at pp. 26-27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, 1923, P.C.I.J., Series B, No. 7*, at p. 26.
87 See *Fisheries, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, I.C.J. Reports 1953*, p.111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, I.C.J. Reports 1958*, p. 55, at p. 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988*, p. 12, at pp. 34-35, para. 57.
88 *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174, at p. 180.
89 *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15.

> requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty."[90]

Conversely, as the Chamber explained:

> " . . . the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness . . . Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication."[91]

The principle has also been applied by numerous arbitral tribunals.[92]

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State Responsibility,[93] as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The International Law Commission's Draft declaration on rights and duties of States, article 13, provided that:

> "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."[94]

90 Ibid., at p. 51, para. 73.

91 Ibid., at p. 74, para. 124.

92 See e.g., the "*Alabama"* arbitration (1872), in Moore, *International Arbitrations* vol. IV, p. 4144, at pp. 4156, 4157; *Norwegian Shipowners' Claims (Norway/U.S.A), R.I.A.A.*, vol. I, p. 309 (1922), at p. 331; *Tinoco* case *(United Kingdom/Costa Rica), R.I.A.A.*, vol. I, p. 371 (1923), at p. 386; *Shufeldt Claim, R.I.A.A.*, vol. II, p. 1081 (1930), at p. 1098 (" . . . it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject."); *Wollemborg, R.I.A.A.*, vol. XIV, p. 283 (1956), at p. 289; *Flegenheimer, R.I.A.A.*, vol. XIV, p. 327 (1958), at p. 360.

93 In point I of the request for information sent to States by the Preparatory Committee for the 1930 Conference on State Responsibility it was stated:

> "In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle: League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (LN doc. C.75.M.69.1929.V.), p. 16. During the debate at the Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the 1930 Hague Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law." (LN doc. C.351(c)M.145(c).1930.V; reproduced in *Yearbook . . . 1956*, vol. II, p. 225).

94 See G.A. Res. 375 (IV) of 6 December 1949. For the debate in the Commission, see *Yearbook . . . 1949*, pp. 105-106, 150, 171. For the debate in the General Assembly see *G.A.O.R., Fourth Session, Sixth Committee*, 168th-173rd, 18-25 October, 1949; 175th-183rd meetings, 27 October – 3 November 1949; *G.A.O.R., Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

(6) Similarly this principle was endorsed in the Vienna Convention on the Law of Treaties, article 27 of which provides that:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."[95]

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the Hague Conference of 1930 and also to article 27 of the Vienna Convention on the Law of Treaties, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the Vienna Convention on the Law of Treaties speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the

95 Vienna Convention on the Law of Treaties, 23 May 1969, *U.N.T.S.*, vol. 1155, p. 331. Art. 46 of the Vienna Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of . . . internal law of fundamental importance".

framework of the State, by whatever authority and at whatever level.[96] In the French version the expression "droit interne" is preferred to "législation interne" and "loi interne", because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

96 Cf. *LaGrand, (Germany* v. *United States of America), Provisional Measures, I.C.J. Reports 1999,* p. 9, at p. 16, para. 28.