

# **The role of domestic courts in the implementation of international responsibility**

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## **Introduction**

The main argument of my paper is that national courts can, and sometimes do, contribute to the implementation of the law of international responsibility and that, conversely, the law of international responsibility may be relevant for the consequences that national courts can attach to such wrongful acts.

At first sight, this proposition may not be an obvious one. It often is said that international responsibility is confined to the international legal order. What is wrong in international law can be right in national law and vice versa. It commonly is thought that while primary rules of international law may be litigated in domestic courts, secondary rules of responsibility are of little consequence at domestic level. It is probably for this reason that Crawford wrote that the Articles on State Responsibility need not be included in a treaty, as the rules contained therein would not have to be applied at national level.

Despite these considerations, a closer inquiry into the matter is warranted. Several recent and ongoing cases illustrate that the role of domestic courts need not be confined to the application of primary rules, but can indeed extend to secondary rules of international responsibility.

A first case, no doubt familiar to this audience, is the judgment of the House of Lords of December 8 of this year on the legal consequences of wrongful torture for the admissibility of evidence.

The question before the House of Lords was whether the Special Immigration Appeals Commission, when hearing an appeal by persons detained under the Anti-terrorism, Crime and Security Act 2001 may receive evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state.

The House of Lords concluded that exclusion of evidence indeed was an appropriate remedy. It expressly referred to the remedies provided for by the Torture Convention as well as to art. 41 of the Articles on State Responsibility. Art. 41 imposes on all states certain obligation to refrain from attaching legal consequences to violations of peremptory norms of international law.

A second example is the many cases in United States courts, that have considered what consequences international law would attach to breaches of article 36 of the Vienna Convention on Consular Relations, and what the relevance of such consequences might be in domestic proceedings. The answers to this questions have differed widely between courts. It will shortly come before the Supreme Court. The Supreme Court will, amongst other issues, have to inquire into the relevance of the ICJ's judgment on matters of responsibility in *La Grand* and *Avena*. You may recall that in the latter case, the Court said that the remedy for the violation of art. 36 was that the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence of individuals.

And thirdly, I may provide an example from my own jurisdiction, the Netherlands. A district court in the Hague will be faced with claims brought against the Netherlands by relatives of persons who were killed in the 1995 Srebrenica massacre. The plaintiffs alleged that the United Nations and the Netherlands, that had provided troops to the UN operation, were responsible vis-à-vis the victims and their relatives for failing to provide an adequate level of protection in the 'safe haven' of Srebrenica. The claims were based in part on alleged violations of rules of

international (human rights and humanitarian) law. It remains to be seen what will become of the claims. But it is clear that, as in many other states, a court in the Netherlands can adjudicate claims based on an (alleged) violation of primary rules of international law. That prospect raises the question whether the court, if it were to find a violation of international law, would have to treat the violation in terms of responsibility under international law or responsibility under national law. A range of questions follows. Would the question of attribution, that is: whether responsibility would lie with the Netherlands or the United Nations be determined by international or by national law? Would, if an international wrong were to be recognized, the consequences be determined or influenced by international law? And what does it matter whether the wrong would be treated in terms of responsibility under international law or under national law?

If anything, these three cases, though widely different, suggest that the role of domestic courts need not be confined to primary rules, but can extend to the application of secondary rules. It is for that reason, that I thought it worthwhile to explore what international law has to say on the consequences that domestic courts should attach to a breach of international law, to what extent domestic courts actually follow international principles of responsibility and to what extent they thereby can help in the implementation of international responsibility.

The implementation and application of the law of international responsibility by national courts is largely unexplored territory. The main treatment of the topic remains F.A. Mann's 'The Consequences of an International Wrong in International and National Law'. Most of that analysis, though, deals with the consequences that national courts attach or should attach to wrongs committed by other states, rather than by the forum state. That particular aspect is not the prime focus of this paper, which mostly confines itself to the role of national courts in respect of claims based on an alleged breach of international law by the forum state.

## **Causes**

A first question that we need to consider is if we can say anything on the type of cases in which domestic courts are or are not likely to be confronted with issues of international responsibility. It seems to me that an important common element of many domestic cases involving issues of international responsibility is that they concern rights of individuals, rather than rights of states. It is not incidental that all three cases that I mentioned earlier, somehow involve individual rights.

The fundamental point here is that individuals can and possess rights against states, and that in principle, a violation of such individual rights may engage the international responsibility of the state. Though the Articles on State Responsibility have been critiqued for their failure to address the legal relationship between states and private persons, art. 33 of those articles does recognize that an individual (or other private person) may be able to present a claim of international responsibility against the state.

I should add that the law of international responsibility applicable to the relationship between states and individuals is not the same as the law of interstate responsibility. The law of international responsibility has largely been developed and codified as a law of responsibility that applies between states. It cannot be assumed that its principles are identical to the principles that apply to legal relationships between private parties and states. The Arbitral Tribunal in *CMS v Argentina* found, for instance, that, since this was not a case of reparation due to an injured state, satisfaction could be ruled out as a proper remedy.

However, the principles are not entirely distinct. In the same case, the Tribunal applied the principles of reparation, very much along the lines of the Articles on State Responsibility. It also discussed and applied the customary principle of necessity, assuming that that principle applied in the same manner between states and private parties.

It thus seems that while no automatic transposition can be assumed, there does exist a distinct body of law on international responsibility of states vis-à-vis private persons, and that a large of part of the law of interstate-responsibility may be relevant to legal relationships between states and private parties. It is this body of law that may be relevant to domestic courts.

If we consider the reasons for the role of domestic courts in the implementation of international responsibility a bit more closely, it seems that the existence of individual rights vis-à-vis the state is an explanation, but it not a necessary condition. Modern international law of responsibility is said to be of an objective nature. Under the Articles on State Responsibility, it is not necessary to show that an act caused injury (whether ‘legal’, ‘moral’ or ‘material’) to a party vis-à-vis whom an obligation is owed. It has been said that the law of state responsibility would not only protect rights of injured parties, but would protect the international legal order as such. It also has been said to introduce a ‘review of legality through the institutions of international responsibility’.

This interpretation of state responsibility is potentially relevant for domestic courts. For they may treat acts of states as breaches of international law that engage international responsibility, irrespective of any injury for any person against whom the obligation may have existed. Whether this indeed is possible, of course depends on national law – after all someone needs to present an admissible claim. But it seems that this interpretation may extend the range of cases in domestic courts that potentially can be governed by secondary rules of responsibility.

An illustration is a decision of the Administrative Law Division of the Council of State of the Netherlands on the application of the rather mundane European Agreement on Main International Traffic Arteries of 15 November 1975. In this case work on a main highway would have resulted in a temporary width of the road that was less than required by the Agreement, Private parties invoked the treaty. Although the treaty is silent on rights of private parties, the Administrative Law Division determined that the treaty would be violated and provided a remedy.

Another example may be the Ajuri case, in which the Israeli Supreme Court considered the legality of deportation of a family of Palestinian suicide bombers under article 78 of the 4<sup>th</sup> Geneva Convention, apparently irrespective of any individual rights under article 78.

In summary conclusion, it thus seems that in any case in cases involving private rights, and arguably also under the objective doctrine of responsibility, national courts may consider claims based on secondary obligations that are part of the law of international responsibility.

### **Connection to national law**

The next question then is how international law of responsibility becomes applicable before a domestic court. This depends, of course, on national law. On this point, it seems that there is no reason to distinguish between primary and secondary rules. Constitutional rules that declare treaties and/or customary law to be part of the law of the land, do not usually distinguish between primary and secondary rules.

This means first of all that as a practical matter, in many situations national courts may not be empowered to provide the remedies that international law requires.

This can for instance be seen if we ask ourselves what a domestic court should do with a rule of national law that conflicts with international law. An appropriate remedy would be to disapply the domestic rule. This could be qualified as legal restitution. One can also say that the national rule should be treated as a nullity. Mann even noted that harmony between international law and national law can, in the sphere of state responsibility, be achieved *only* in the form of the nullity of the internationally wrongful act.

But whether a domestic court will be empowered to treat the national act as a nullity, of course depends fully on national law. In some states, for instance in Belgium and the Netherlands, this indeed is possible for treaties. However, for custom, a later statute overrules custom and a breach of custom by a domestic statute law will, under national law, not result in a nullity. Also, if treaties are incorporated, such as in the UK, a later statute that conflicts with the incorporated treaty will commonly prevail over that treaty, thus limiting the possibility of a domestic court to treat the national act as a nullity.

A good illustration of domestic limitations of the application of international remedies remains the United Kingdom Human Rights Act. This has brought much good, but it does not empower the courts to set aside an English Act of Parliament where it conflicts with the obligations under the European Convention. The only remedy then is a declaration of incompatibility which does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given. In many cases, this will be an insufficient remedy from the perspective of international law and the completion of the international remedy will require acts of the political organs.

The general point that we may draw from this is that, from the perspective of international law, national law must allow its courts to attach the consequences to a breach of international law that international law itself prescribes. The rule that national law may not provide an excuse not to provide reparation, should guide national legislatures to allow its courts to give effect to secondary rules of international law.

Apart from these situations where national law precludes a domestic court to apply an international remedy, there are many situations where national law is sufficiently flexible to allow domestic courts to give effect to principles of responsibility. In states with open constitutions, national courts can apply principles of international responsibility directly, that is: without transformation into national law. Leaving aside treaty-based *lex specialis* on responsibility (such as the ECHR), this means mostly that principles of responsibility are applied as part of customary law. It appears, for instance, that it was on this basis that the German *Bundesverfassungsgericht* considered in a recent case the international principle of complicity in determining whether it could extradite a Yemenite national who had been lured to Germany by agents of the United States.

However, in general it seems rare that national courts resort to principles of international responsibility directly, even when they might be allowed to do so under their national law. National courts mostly apply their own principles of responsibility, or liability, against the backdrop of international law – that appears equally true for states in which courts may apply

international law directly (for instance the Netherlands), as for states like the UK that generally require incorporation.

Thus, in the exclusion of evidence case, the House of Lords considered the Torture Convention as well as general international law in the *interpretation* of the Human Rights Act. Likewise, if Dutch courts decide liability claims based on the European Convention of Human rights, they generally apply domestic tort law, but apply that in the light of any secondary obligations existing under the European Convention.

This approach may in part be dictated by constitutional rules. It may also be explained by the fact that from the point of view of national law, resort to national concepts of responsibility is more natural and will allow for a more coherent case-law. It may also be, and that is the issue to which I will now turn, because international law of responsibility may not be sufficiently detailed to provide all the answers that domestic courts need.

### **What does international law add to domestic law?**

This brings me to the core part of my talk. What, if anything, is the additional value of international law of responsibility for the consequences that domestic courts may attach to breaches of international law?

In considering this question, we face a number of fundamental issues. For one, it may be thought that the relevance of the law of international responsibility for domestic courts is limited, because there is a fundamental difference between the concept of responsibility in international law, on the one hand, and the concept of responsibility in national legal orders, on the other. The reason is that international law of state responsibility subjects all breaches of international law, irrespective of the origin and contents of these rules, to a uniform set of secondary principles. Contrary to many national systems, it does, for instance, not distinguish between contractual and tortious responsibility. Also, it does not distinguish between civil and



criminal or public law responsibility. The rules of State responsibility form a single system, without any precise comparator in national legal systems.

The consequence is that there is no direct match between a finding of responsibility based on international law, and a finding of administrative, civil, criminal or other forms of responsibility at the national level. If a national court makes a determination of a breach of international law, it will have to 'translate' that wrongful act into a particular national legal concept. That may be a tort, and perhaps because of the private law origins of responsibility we are often inclined to think of responsibility in terms of a tort, But that would of course be misleading. Responsibility can just as well be an administrative sanction such as the nullity of an administrative decision or in some cases the disapplication of a statute. In criminal cases it may be the inadmissibility of the prosecution. In states where national law so allows, it may even be a criminal verdict against a governmental authority.

Illustrative is that the United States Court of Appeals for the 7<sup>th</sup> Circuit, considered in *Jogi v Voges* that the consequences of the United States' violation of article 36 of the Vienna Convention on Consular Relations might be either a tort or a regulatory violation. International law did not dictate that choice, but required a translation and adjustment to the specific features of the US legal system.

This divide between the international concept of responsibility on the one hand, and responsibility under national law, on the other, is reflected in the fact that international law mostly is silent on the remedies that are to be applied by domestic courts. Under general international law, the principle that the State is under an obligation to make full reparation for the injury caused by the internationally wrongful act (art. 31 (1) of the Articles on State Responsibility) leaves courts much leeway. Also obligations determined by *lex specialis* generally do not spell out details of reparation. For instance, the Federal Court in *Jogi* considered it 'unremarkable that the Vienna Convention [on Consular Relations] does not spell out particular methods of enforcement. Treaties, after all, are signed by countries with differing legal systems that provide different kinds of remedies.' Also the European Court of Human Rights, if it

determines a wrongful act, does little more than expecting that at domestic level some form of reparation should be provided, but what it is, is left to domestic systems.

However, these factors does no make international law of responsibility entirely irrelevant for domestic courts. Indeed, the House of Lords judgment and the US cases on the Vienna Convention on Consular relations, as well as several other cases, have suggested a number of ways in which international law of responsibility can be relevant for the practice of national courts.

First, there is a variety of international obligations that as *lex specialis* does define specific consequences that domestic courts should attach to breaches of international law. An example that I referred earlier to is art. 15 of the Torture Convention. This provides that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The House of Lords properly applied the principle in the exclusion of evidence case.

Other examples are art. 5 ECHR and art. 14(6) ICCPR that both provide for a right of compensation to be awarded by domestic court in cases of unlawful detention. Another, though more controversial example, is the right to compensation under international humanitarian law, in particular article 3 of the 1907 Hague Convention. It might be said that these rights to reparation are part of primary rules, but that would be an analytical distinction without much practical relevance. They just as well determine specific consequences that states should apply and that, in many jurisdictions, domestic courts can apply.

Second, also the general principles are not meaningless. Although they do not give specific prescriptions, they may provide support for particular remedies. The reference to art. 41 Articles on State Responsibility by the House of Lords is a good example. Article 41 of the International articles on Responsibility of States for internationally wrongful acts requires states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory

norm of general international law. The House of Lords concluded, in a rather liberal reading, from this that, I quote, ‘there is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law.’

General principles of responsibility do allow for much leeway, but also provide outer-limits within which domestic courts must operate.

Illustrative is the *Jogi case* involving civil damages for violation of art. 36(1) of the Vienna Convention on Consular Relations. The Court considered the relevance of Article 36(2) of this Convention. This provides that “[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.” The Federal Court said that this means ‘that a country may not reject every single path for vindicating the individual’s treaty rights. In the absence of any administrative remedy or other alternative to measures we have already rejected (such as suppression of evidence), a damages action is the only avenue left.’

Another illustration of this effect of international obligations on reparation is a judgment of the Dutch Supreme Court of the Netherlands on the reparation to be applied to a breach of the ECHR. The ECHR had found that the Netherlands violated art. 3 of the ECHR. The Supreme Court concluded that this caused a wrongful act under Dutch law. It then noted that under the Convention, the State is obliged to provide for reparation and that the state in principle is free to determine how it will give effect to the obligation to provide reparation in its national legal order. As to the modes of implementation, it said that the reparation need not necessarily be provided in financial forms, but that also an early termination of the detention would be an appropriate form of reparation. The Court proceeded to allow early termination of detention as a remedy. Both

options indeed in principle would seem to be compatible with the general obligation to provide reparation.

It follows from the foregoing that general international law may add relevant principles and guidelines for remedies to be applied at national level. But this is not a one-way street. Indeed, another important perspective on the topic is that domestic courts can give specific contents and effect to the general principles of international responsibility. National law supplements international responsibility with a wider, more diverse category of forms of responsibility. The range of 'responsibility' options that may be applied by national courts often is far richer and more varied than the rather simple and monolithic principles that apply at the international level.

That holds, for instance, for various forms of restitution such as dismissal of indictments, exclusion of evidence, non-admissibility of a prosecutor, or annulment of verdicts. The question whether indeed these remedy are provided by international law is particularly relevant in the 'war on terrorism'.

The general international law on remedies is rather undeveloped on this point. Outside the sphere of torture, it is doubtful whether international law prescribes exclusion of evidence or dismissals of indictments. The ICJ declined to address the question in *Avena*.

It then may fall to domestic courts to determine what remedies are proper. Until now the US courts have not been willing to offer much beyond general international law. In many of the cases in United States' courts on relief for violations of art. 36 of the Vienna Convention, courts have held that international law did not require suppression of evidence. Likewise, they have rejected the argument that, in criminal cases, dismissal of indictment was an appropriate remedy for breach of the Vienna Convention.

Many courts referred expressly to the silence of international law to justify their denial to grant that particular remedy. In one case, a Court cited the State Department's view "that the only

remedies for a violation of the Vienna Convention are diplomatic, political, or derived from international law.

We will have to see whether these reluctant approaches will survive the consideration of the impact of the Avena judgment by the Supreme Court.

However, there are many examples where domestic courts did apply remedies that went beyond what international law obliged. An example is early termination of detention. The judgment of the Netherlands' Supreme Court cited above, considered, after a finding of a breach of article 3 of the ECHR, that early termination of a detention of a convicted person was an appropriate form of relief to give effect to the obligation of the Netherlands to provide reparation.

Yet another example is revision of judgments – not dictated by international law, but in an increasing number of states a proper way to give effect to the international obligation of restitution.

Domestic courts can also add to international remedies in the sphere of compensation. Courts have much leeway in determining modalities of compensation, as long as they comply with the general principles of reparation. Often, however, they will not be constrained by international law, but rather seek to go beyond it and provide more and better relief to a plaintiff than he or she would be entitled to under international law. The Dutch Supreme Court expressly stated it was not confined by the principles of just satisfaction in art. 41 ECHR. These principles allow in the practice of the European Court only for modest compensation to a victim. The Dutch court went on to provide a larger sum under national law.

In such cases, we cannot only say that international law is relevant for domestic courts, but rather that domestic courts can give full effect of international law and adjust the forms of reparation to the specifics of the national legal order.

## **Conclusion**

I come to my conclusions.

With the increase in the number of claims based on international law that are presented in domestic courts, the question of what is the relevance of secondary rules of international law for proceedings in domestic courts is increasingly relevant – both for the practice of national courts and for the implementation of international responsibility.

The main conclusion that my analysis suggests, is that international law of responsibility can be relevant as a general framework that guides the consequences that domestic courts (should) attach to a determination of a breach of international law, but that courts generally have much leeway to fashion principles of responsibility to the particular features of their legal system, sometimes even with the effect of going beyond what international law has to offer (for instance in the sphere of compensation).

Domestic courts often have a more diverse set of principles and remedies available that may give practical significance to the rather general principles of international responsibility.

Of the many open issues that seem to require more thinking and time I mention in particular two.

First, as noted, it is important to study more closely the contents of international law on responsibility as it applies to individual- state relationships.

Second, we need more empirical analysis of what domestic courts do in this area, It is not accidental that the main examples I cited were from the US, the UK, Germany and the Netherlands. I have not quoted Peru or Russia. To counter this imbalance, the Oxford Project seems relevant and timely.