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Domestic Courts and the Content and Implementation of State Responsibility

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Abstract
This article examines the role of domestic courts in addressing questions of international law concerning the content and implementation of state responsibility. Practice shows that domestic courts only play a limited role in developing the international law of state responsibility. This is partly due to the limited number of cases decided by domestic courts. Furthermore, the practice of domestic courts is quite disparate, reducing their value in generating consistent practice. There is also a general inclination of domestic courts to apply remedies under municipal rather than international law, which reduces their significance as agents of international law. It is only in exceptional cases that domestic courts may contribute to clarifying controversial norms and support the further development of international law. Domestic courts may furthermore take on the task of fine-tuning international norms on state responsibility. Probably the most important role domestic courts may play in applying secondary rules of state responsibility is that of strengthening the effectiveness of the international legal system and its individual rules.

Key words
domestic courts; state responsibility; reparation; invocation; judicial practice

1. Introductory remarks

A proper analysis of the influence of domestic courts on the content and implementation of state responsibility must start with a number of clarifications and preliminary considerations. Most of these are covered by Simon Olleson in his paper,[1] and his considerations in respect of the origin or engagement of responsibility apply, *mutatis mutandis*, also to the present article. A major point of distinction, however, lies in the fact that whereas the rules on the origin or engagement of state responsibility are commonly international in nature, there is a considerable overlap between domestic and international rules governing the content and implementation. In other words, unlike municipal law on attribution, the domestic rules have usually more to offer in terms of remedies, reparation, and invocation than the rather general and limited set of principles of international law.

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1 S. Olleson, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility', in this issue.

A general look at the problem reveals a quite amorphous picture, and an assessment of national courts' treatment of issues concerning the content and implementation of international responsibility is complicated by several factors. First, there are a number of constellations in which issues of reparation or implementation of state responsibility may be involved in domestic court proceedings, and the degree to which domestic courts may have a say on issues of international responsibility will vary according to each of these constellations. It will, for instance, make a difference whether the state, whose alleged responsibility for an internationally wrongful act is in dispute, is a party to these proceedings or whether the alleged responsibility is only a preliminary matter and thus incidental to the main proceedings between private parties.[2]

Furthermore, any assessment of the engagement of domestic courts in determining issues of state responsibility will depend on whether the alleged responsibility is that of the forum state or that of another. In the latter case the law of foreign sovereign immunity often will be a bar to the exercise of jurisdiction even if such jurisdiction does exist according to the applicable rules of international law and the law of the forum state.[3] Also, if the state is not a party to the proceedings or has not submitted to the jurisdiction of the domestic court, aspects of the act of state doctrine may become relevant. A more general aspect concerning the litigation strategy of the parties in the proceedings is whether issues of international responsibility are raised by the parties at all.

Most cases in which the content of international responsibility, and particularly questions of remedies, arise in domestic proceedings as a matter of international law concern proceedings involving individuals as plaintiffs.[4] This is not surprising, and it is an aspect of the inward-looking character of the relevant norms at issue. According to this distinction, inward-looking norms are aimed at producing effects within the state, as distinct from outward-looking norms of traditional international law which govern state-to-state conduct without any intended effects within the state.[5] The former usually impose an obligation on the state to take action or to refrain from acting within the domestic legal sphere, which in turn raises the likelihood that domestic courts will, at some stage of a legal dispute concerning such inward-looking norms, become involved. State-to-state disputes, not to mention those concerning questions of international responsibility, usually do not come within the purview of domestic courts.[6] In practice, most of the cases in which inward-looking norms are at issue involve private individuals and concern human rights obligations – unsurprisingly since the law of human rights is the field par excellence in which

2 See also A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts', (2007) 101 AJIL 760, at 772.

3 See most recently *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 2 February 2012, [2012] International Court of Justice.

4 A. Nollkaemper, *National Courts and the International Rule of Law* (2011), 97.

5 See A. Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1861067, 4–7.

6 See Nollkaemper, *supra* note 4, at 95–7 (with regard to standing concerning inter-state claims in domestic courts).

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individuals play a central role in the application of international norms in domestic law.

As a final preliminary point we have to clarify what state responsibility means in this context. It stands to reason that the principal yardstick against which to measure the relevance of domestic courts is the body of rules on state responsibility as laid down in the 2001 ILC Articles.[7] Thus, for present purposes, the use of the terms 'content' and 'implementation' of state responsibility are to be understood in the sense of the ILC Articles. Accordingly, 'content' means the legal consequences of internationally wrongful acts as contained in Part Two of the Articles (Articles 28–41), whereas 'implementation' is to be understood as meaning the way in which the obligations of cessation and reparation (that is, the content of responsibility) are given effect. This is governed by Part Three (Articles 42–54). Yet not only in a formal sense are the ILC Articles the relevant reference point, but also, and no doubt more importantly, in a substantive sense. In particular, the forms of reparation will be governed by Articles 34–8, and in determining the substance of an obligation of reparation these provisions will pave the way. However, the general applicability of the Articles is not apparent in many cases that arise in domestic proceedings, notably those involving individuals. As will be discussed in section 2, this basic question calls for clarification.

The main part of this contribution is devoted to brief analyses of individual domestic cases on issues of reparation (section 3) and standing as an aspect of implementation (section 4). At the outset it must be emphasized that the number of cases discussed is limited to a few cases that are not representative. The selective choice of the cases is owed to several facts, constraints of time and space apart. First, the whole topic has already been treated in great detail elsewhere.[8] Furthermore, the number of cases in which issues of reparation and implementation of responsibility under international law have been addressed by domestic courts is generally very limited. This limitation is not only a quantitative one, but also bears on the issues involved. Thus implementation is largely confined to questions of invocation, whereas countermeasures do not play a role in domestic proceedings. Finally, this approach invites a descriptive and more detailed discussion of cases, which has the advantage of displaying how domestic courts handle matters of international law on the content of state responsibility. Before turning to the case analysis, I will address the question concerning the scope of application of the ILC Articles to the cases selected.

2. A PRELIMINARY QUESTION: THE PERSONAL SCOPE OF APPLICATION OF THE ILC ARTICLES

As noted, the majority of cases where rules of reparation are applied by domestic courts concern claims for reparation by (private) individuals against a state that

7 International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, (2001) UN Doc. A/56/10.

8 See Nollkaemper, *supra* note 4, at 91–116 (with regard to questions of standing) and 166–216 (with regard to questions of reparation).

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has committed a breach of international law towards the individual. The most prominent instances of this kind are, of course, human rights violations, but disputes between a state and an individual in domestic courts and those involving the application of international law are also feasible in other areas, such as in international investment law. While the relevant reference to adjudging the approach of domestic courts towards questions of state responsibility is the 2001 ILC Articles, it is not clear whether these are applicable at all to the relations between states and individuals or non-state entities. At first glance, this question seems moot as the very idea of the codification of the rules of state responsibility by the ILC was precisely to establish a general set of secondary rules that, as the ILC Commentary points out, 'apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, *to an individual or group*, or to the international community as a whole'.[9] This idea of state responsibility as a coherent 'system' of rules is a recurring feature of the Articles,[10] albeit – and this is a crucial point here – limited to Part One of the Articles,[11] dealing with the concept of the internationally wrongful act.

The situation with regard to other parts, especially Parts Two and Three on the content and implementation of responsibility – the parts that are of interest for present purposes – is clearly different. Most importantly, Part Two contains an express provision on its scope. Article 33 provides that '[t]he obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach',[12] and further that Part Two 'is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'.[13] Now this would suggest that in contrast to Part One – which is intended to provide rules on the 'origin' of state responsibility applicable to any breach of an international obligation by a state, irrespective of whether this obligation is owed to another state or to persons or entities other than states (as subjects of international law) – Part Two is confined to setting forth the rules on the content of the responsibility for breach of inter-state obligations only.[14] This is confirmed by the Commentary to the Articles. In particular, the commentary to Article 28[15] provides that:

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9 Preliminary Commentary, para. 5 (emphasis added).

10 See the commentary to Art. 1, para. 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 extent also to other States *or indeed to other subjects of international law*'. Similarly the commentary to Art. 12, para. 12, stating that 'there is a single regime of State responsibility'.

11 This is, for example, expressed in the above-mentioned commentary to Art. 12, which provides that '[a]s far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility'.

12 See ILC Articles, *supra* note 7, Art. 33(1).

13 Ibid., Art. 33(2).

14 Z. Douglas, *The International Law of Investment Claims* (2009) 97; Z. Douglas, 'Specific Regimes of Responsibility: Investment Treaty Arbitration', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (2010), at 815–820.

15 Art. 28 reads: '*Legal consequences of an internationally wrongful act.* The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.'

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> Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international wrongful obligations *of* the State and not only those owed *to* other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.[16]

Similarly, the Introductory Commentary to Chapter 1 of Part Two clarifies that

> Article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the Articles.[17]

As for Part Three of the Articles, entitled 'The Implementation of the International Responsibility of a State',[18] a perusal of the relevant Articles shows that they are invariably formulated in terms of the injured state or, per Article 48, of a state 'other than the injured State'.[19] On that basis, the commentary to Article 33 expressly states that the 'articles do not deal with the possibility of the invocation of responsibility by persons or entities other than states'[20] and refers to the relevant primary norm to determine whether and to what extent persons or entities other than states are entitled to invoke responsibility on their own account.[21] Thus the Articles concerning both the invocation of responsibility and countermeasures do not apply between a wrongdoing state and an individual or other non-state entity as victim of the breach.

Again, however, the situation is less clear than it seems at first glance. Article 33(2) is a saving clause that suggests neither that the rules on state responsibility to individuals are the same as the ones applicable in inter-state relations, nor that they are different;[22] Article 33 is silent and does not take a position on this matter, a fact which is at times overlooked in practice. The German Federal Court of Justice (Bundesgerichtshof), for instance, invoked Article 42 in order to demonstrate that under current international law individuals are not entitled to enforce a right of compensation against states.[23] However, the articles generally, and Article 42 in particular, do not exclude that possibility but leave the matter

16 Commentary to Art. 28, para. 3 (emphasis in the original).
17 Introductory Commentary to Part Two, Chapter 1, para. 1 *in fine*.
18 ILC Articles, *supra* note 7, Part 3.
19 Ibid., Art. 48.
20 Commentary to Art. 33, para. 4.
21 Ibid.
22 S. Ripinsky and K. Williams, *Damages in International Investment Law* (2008), at 30.
23 *35 Citizens of the Former Federal Republic of Yugoslavia v. Germany*, 2 December 2006, BGHZ 166, 385, ILDC 887 (DE 2006). See ILDC 887, decision – full text, para. 13.

unregulated. Although Article 33, given its location and wording, is principally concerned with Part Two on the content of responsibility, the introductory commentary to Part Three, by referring to Article 33(2), makes it clear that it extends in scope to Part Three as well.[24]

Further, as the ILC Commentary indicates, the main reason for the limitation of the 'general regime' to Part One is that '[i]n cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State'.[25] The Commentary mentions complaints procedures under human rights treaties or specific rights of investors under bilateral or regional investment protection agreements. It thus seems that the purpose of the restriction of Part Two to inter-state relations is mainly concerned with issues of implementation, invocation, and enforcement of responsibility, rather than the substantive content of responsibility, especially the forms and extent of reparation. This is also supported by the commentary to Article 33, which states that '[t]he articles do not deal with the possibility of the *invocation* of responsibility by persons or entities other than States, and Paragraph 2 makes this clear',[26] but does not mention the content of responsibility or the forms of reparation.

It is against the background of these considerations that, in the context of the forms of reparation, particularly compensation, the ILC Commentary itself heavily draws on the practice of courts and tribunals dealing with claims and disputes involving individuals.[27] Thus, with regard to Article 36 on compensation, the Commentary states that '[t]he rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36'.[28] If the rules on reparation contained in Part Two were not also applicable to relations between states and non-state entities or individuals, this reference would be out of place. That Article 36 is indeed a relevant yardstick for claims by individuals against states as well is also confirmed by arbitral practice, particularly in the field of investor–state arbitration, subsequent to the adoption of the ILC articles[29]. With the exception of one case,[30] the applicability of Article 36 to claims by non-state entities against states was not discussed in great detail or contested but was usually taken as granted.[31] It follows that with regard to the content of state responsibility (reparation, that is) the ILC Articles may indeed be viewed as providing the general

24 Introductory commentary to Part Three, para. 1: 'The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33(2).'

25 See *supra* note 20, para. 4.

26 Ibid. (emphasis added).

27 Commentary to Art. 36, para. 6. Examples include cases from the Iran–US Claims Tribunal, human rights courts and ICSID tribunals.

28 Ibid.

29 See only the survey in S. Olleson, The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts – Preliminary Report, British Institute of International and Comparative Law (2007), available at http://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf.

30 In *Wintershall Aktiengesellschaft v. Argentina*, where the tribunal stated that the ILC Articles did not contain rules and regulations of state responsibility vis-à-vis non-state actors. *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award of 8 November 2008, para. 113.

31 See, for example, the references in Olleson, *supra* note 29, at 213–36.

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rules on the matter and can legitimately be employed as a reference for analysing the rules on compensation also in relation between states and individuals.[32]

3. Reparation

3.1. Secondary norms of state responsibility in domestic courts

The rules of state responsibility on reparation are secondary rules setting forth the consequences of an international wrong. Here the question arises as to the applicability in municipal law of secondary rules on reparation.[33] On the face of it, the situation would seem clear in many, if not most, cases as the international-law rules on responsibility, particularly those on reparation, are considered to largely reflect customary international law, and in many jurisdictions customary law is automatically incorporated into domestic law. Hence the secondary rules of state responsibility do not require transformation through legislative implementation.[34] The situation is, of course, different where these rules form part of a treaty regime, such as in case of treaties on the protection of human rights, where the specific treaty-based secondary rules are transformed together with the primary norms.

The general problem involved here is that it often remains unclear whether the municipal court applied international or domestic law. This may be described as the 'double life' or 'schizophrenic nature' of international norms which makes it very difficult to assess the influence of domestic-court decisions on the development of international law. To be sure, this problem is not specific to questions of responsibility but has been a recurring theme in the course of this conference.

However, in the context of the operation of state responsibility, these considerations assume a specific note, and there is more to the question of incorporation of international law than the problem just mentioned. For the secondary rules of responsibility are only applicable if there has been a prior violation of a primary norm of international law. It follows in turn that this primary norm itself must be part of, and applicable in, municipal law, otherwise the domestic court will not be able to apply secondary norms of state responsibility. Thus whenever the question arises whether a domestic court may indeed apply a secondary norm of state responsibility, one has to keep in mind the requirement that the primary norm allegedly breached is effective and applicable in national law too. This requirement of 'double incorporation' of international law is quite obvious because the effective operation of international law invariably requires its transfer to, and implementation in, domestic law.[35] But I think it is of special importance in the context of secondary

32 See Ripinski and Williams, *supra* note 22, at 30. This is, to be sure, not to say that the domestic court may not adapt the relevant rules to the needs of the individual case. This is already called for by the generally indeterminate content of these rules. See also Nollkaemper, *supra* note 4, at 193.

33 For a detailed discussion of the problems involved see ibid., 185–97.

34 J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 AJIL 874, at 890.

35 Even if this 'transfer', 'reception', or 'incorporation' only consists in a general 'command' of domestic law that international law or specific rules, such as those of customary international law, are part of domestic law and thus applicable. See, for instance, B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993), 3.

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rules of state responsibility because these are an important 'device' for ensuring the observance and integrity of international law and thus operate as a sort of substitute for the lack of centralized enforcement mechanisms with compulsory powers in international law.

A related question concerns the general remedies or forms of reparation of the law of state responsibility and their correlation to consequences of breach included in the primary norm itself.[36] How is it determined whether a primary obligation carries with it its own required consequences for responsibility for its breach? Does it make a difference whether a specific form of reparation is applied under the rules of state responsibility or because it is contained in the primary norm breached? In the *LaGrand* case, for instance, the United States argued that the treaty practice under the violated primary norm (Article 36 of the Vienna Convention on Consular Relations) showed that the appropriate remedy for a violation was an apology,[37] indicating that the Vienna Convention itself provided for the remedies of its own breach, which, moreover, was exclusive. For obvious reasons, the International Court was not sympathetic to this argument, although it has some basis in the case law of the US Supreme Court. In *Sanchez-Llamas* v. *Oregon*, for instance, the Court held that suppression or exclusion of evidence as a remedy for a violation of Article 36 VCCR was not mandated by the Convention and hence only referred to domestic law.[38]

In a case concerning restitution of cultural property that was taken in wartime occupation and colonial domination, the Italian Council of State held that the obligation to return property taken in violation of the prohibition to use force and the principle of self-determination was a consequence implied in the breach of these norms.[39] While the basis of the Council of State's finding is not entirely clear,[40] the Council viewed the obligation of restitution in such circumstances as an 'autonomous' primary-norm principle detached from the secondary rules of reparation in the law of state responsibility. These considerations show that domestic courts often view the issue of remedies as strictly contingent on the primary norm invoked. The matter was clearly pronounced by the United Kingdom High Court in a case concerning rights of an investor (OEPC) under a bilateral investment treaty between the UK and Ecuador:

> The [arbitral] tribunal was . . . dealing with the rights of OEPC in international law and the obligations that Ecuador owed to OEPC as a matter of international law. It must follow, in my view, that if the tribunal concluded that international law rights of OEPC had been violated by Ecuador, or the latter was in breach of its international law obligations, then the tribunal will have to consider what remedies are available in

36 See R. Higgins, 'The International Court of Justice: Selected Issues of State Responsibility', in M. Ragazzi (ed.), *International Responsibility Today* (2005) 271, at 277–8; R. Higgins, 'Overview of Part Two of the Articles on State Responsibility', in Crawford, Pellet, and Olleson, *supra* note 14 at 537.

37 *LaGrand (Germany v. United States)*, Judgment of 27 June 2001, [2001] ICJ Reports 466, at 489, para. 63.

38 *Sanchez-Llamas v. Oregon*, Supreme Court Judgment, 548 US 331; ILDC 697 (US 2006), paras. 19–35.

39 *Italia Nostra v. Ministry of Cultural Heritage and Libyan Arab Jamahiriya*, Appeal Judgment, [2008] Case No. 3154/2008; ILDC 1138 (IT 2008).

40 It could also be the case that the Council considered the obligation of restitution in case of peremptory norms as a specific consequence of a violation of such norms. However, since it did not refer to that concept, or to Article 42 of the ILC Articles, this is unclear.

international law to repair any damage caused to OEPC by Ecuador's breach of OEPC's international law rights.[41]

This would mean that depending on the source of the cause of action or right claimed, the remedy would follow either from international or from municipal law.

Finally, there is yet another problem that makes an assessment of the possible effects of domestic case law on the international rules of state responsibility, especially those on reparation, difficult. It must be recalled that the international rules on reparation are very general, abstract, and indeterminate, and this is certainly a consequence of the fact that the entire concept of international responsibility is but a general principle of law that has developed in municipal law. As such the individual rules on reparation necessarily are *general* and abstract and must be filled and concretized in the particular case. It follows that the international rules of state responsibility do not provide much guidance in questions of detail that arise in domestic court proceedings. For example, Article 36 on compensation does not answer a number of complex and contested issues, but contents itself with stating that the responsible state is obliged to 'compensate for the damage caused'[42] by the wrongful act and that such 'compensation shall cover any financially assessable damage including loss of profits insofar as it is established'.[43] It does not say what financially assessable damage is, notably how it is to be assessed; nor does it say how loss of profits is to be established or how it is to be determined which damage was caused by the wrongful act. These problems are only partially explained by the Commentary. As they stand, many provisions on the content of state responsibility will only serve as a starting point, and the parties involved in a dispute or the tribunal will look elsewhere for clearer guidance. Therefore, domestic courts will frequently refer to their own municipal law with much more sophisticated rules on the matter, which do not necessarily match those of international law.[44]

In some cases, the situation may, however, be the reverse in that a municipal court first turns to domestic rules of reparation for an international wrong, and in addition refers to international law. Thus a Canadian court stated that '[t]he various sources of international human rights law declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms must . . . be relevant and persuasive sources for interpretation of the . . . provisions [of the Canadian Charter of Rights and Freedoms]'.[45] Similarly, the Supreme Court of Peru stated that when acts committed amounted to international crimes, domestic courts

41 *Occidental Exploration and Production Company v. Ecuador*, [2006] EWHC 345 (Comm); ILDC 379 (UK 2006), para. 122.

42 See ILC Articles, *supra* note 7, Art. 36.

43 Ibid. See also Higgins, *supra*, note 36, at 539.

44 See Nollkaemper, *supra* note 4, at 167.

45 *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at para. 57; see also the Canadian Federal Court, which took the view that principles of international law are helpful where it is necessary to fashion an appropriate remedy under municipal law. *Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada*, First Instance Judgment, 2009 FC 580; ILDC 1332 (CA 2009), para. 159.

should not only apply domestic law, but also look at international-law instruments and judgments to determine the reparation due.[46]

With all these caveats in mind I will now discuss some aspects of reparation and how they were addressed by domestic courts. I will do so by looking at selected issues in the context of restitution and compensation.

3.2. Restitution

Generally, the forms of reparation in international law are restitution, compensation, and satisfaction, the latter being of no relevance in domestic-court practice. To begin with, restitution is often described as the primary form of reparation, although this far from clear under current international law.[47] In any event, restitution is frequently argued in domestic courts as the appropriate remedy for an internationally wrongful act, and in many cases courts are in principle inclined to grant restitution if it concerns the factual re-establishment of the situation existing prior to the violation. In the *Abdelrazik* case,[48] the Canadian Federal Court held that the rights of a Canadian citizen to enter Canada were breached and the appropriate remedy was restitution. Quoting the '*Chorzów* formula'[49] the Court held that 'the applicant [was] entitled to be put back to the place he would have been but for the breach in Montreal'.[50]

However, in determining whether restitution is the appropriate remedy, much will depend on the particulars of the pending case. A quite prominent example in this respect is the position of the United States Supreme Court in *Alvarez-Machain*.[51] As is well known, the case concerned the abduction of a person by US authorities in breach of Mexico's territorial sovereignty and hence in violation of international law. Thus, applying the rules of state responsibility on reparation, the United States would have been obligated under international law to provide restitution of the *status quo ante* consisting in the return of the illegally abducted person. This was also held by the lower courts[52] but ultimately rejected by the Supreme Court, which affirmed the jurisdiction of US courts for criminal prosecution.[53]

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46 *Fujimori Case*, First Instance Decision, EXP Number AV 19–2001; ILDC 1516 (PE 2009), para. 801. The Court primarily invoked the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, UN Doc. A/RES/60/147 (Dec. 16, 2005).

47 The ILC Articles are somewhat unclear on this point. On the one hand, Article 36(1) would indicate a preference for restitution over compensation, as it provides that the responsible state is obliged to compensate, 'insofar as such damage is not made good by restitution'. This is confirmed by the commentary, which states that, in relation to compensation, restitution enjoys 'primacy as a matter of legal principle' (commentary to Article 36, para 3). On the other hand, the commentary points out that 'in most circumstances the injured State is entitled to elect to receive compensation rather than restitution' (commentary to Article 34) and refers to Article 43(2)(b) as containing such a right of election (see also commentary to Article 43(6)). For a general discussion see Y. Kerbrat, 'Interaction between the Forms of Reparation', in Crawford, Pellet, and Olleson, *supra* note 14 573; and C. Gray, 'The Different Forms of Reparation: Restitution', in ibid., 589, at 593.

48 *Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada*, [2010] 1 FCR. 267.

49 *Chorzow Factory Case (Germany v. Poland)*, (1928) PCIJ., Sr. A, No. 17, at 47.

50 See *Abdelrazik*, *supra* note 48, paras. 158–159.

51 *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir.) 1991.

52 Ibid.

53 Ibid., 504 U.S. 655; 112 S.Ct. 2188 (15 June 1992).

Viewed from the perspective of international law, the main problem of this case was that the arguments were entirely confined to the applicability of the bilateral US–Mexico extradition treaty and whether the treaty prohibited abduction.[54] Unfortunately, the Court did not examine the consequences of the abduction under customary international law, which would have yielded the uncontested conclusion that the abduction was a breach and that the US would have been obliged under international law to provide for restitution.[55] The main reason why the Court did not address the situation under customary law was that this question was not argued by the parties.[56] However, nothing would have precluded the Supreme Court from applying customary international law *proprio motu* and from ordering the return or repatriation of Mr Alvarez-Machain to Mexico, had it only been willing to do so.

As is well known, restitution assumes a much more complicated nature if it does not concern factual changes, but modification of municipal legal acts such as laws or judgments. While not frequently being ordered by international tribunals, 'legal restitution' does have its place in international law.[57] However, there is an inherent limitation on this remedy, as international law cannot itself revoke or annul municipal laws, or rescind administrative or judicial measures, but is wholly dependent for this effect on domestic institutions. Legal restitution may in theory be pronounced and applied by domestic courts, especially where a provision of municipal law is incompatible with international law, in which case we most likely have a breach of international law. It is through this possibility of legal restitution that domestic courts can 'domesticate', so to speak, the supremacy of international law, and significantly strengthen the efficacy and effectiveness of international law.

However, there are often insurmountable obstacles that severely limit the availability of this form of restitution in domestic law. For domestic courts can apply such forms of legal restitution only if, and to the extent that, they are empowered in jurisdictional terms by municipal law to do so. Here practice is very divergent and inconsistent. Some states hold the supremacy of international law high by endowing domestic courts with broad jurisdiction to set aside domestic laws that are in conflict with international law. But this is, to be sure, the exception rather than the rule. More frequently, the decisive test will be the constitutionality of ordinary domestic laws, and constitutional courts or other courts performing powers of (quasi-)constitutional review may then rescind domestic laws if they are

54 Which the Supreme Court, in a very narrow reading, denied. For a critical analysis of this approach see D. C. Smith, 'Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v. Alvarez-Machain, (1995) 6 EJIL 1.

55 See only American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, Vol 1, Section 433, para 2. See also J. Semmelman, '*Case Note on Alvarez-Machain v USA*', (1992) 86 AJIL 811, 817–19; J. Semmelman 'Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The Ker-Frisbie Doctrine Reexamined', *Columbia Journal of Transnational Law* 30 (1992) 513; B. Baker and V. Röben, 'To Abduct or to Extradite: Does a Treaty Beg the Question?', (1993) 53 ZaöRV 657, 675.

56 Semmelman, *supra* note 55 at 815. Interestingly, the Supreme Court, after conceding that abduction 'may be in violation of general international law principles', stated in a dictum that, even if that were the case, 'the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch'. *Alvarez-Machain*, *supra*, note 53, at 2196.

57 See Nollkaemper, *supra* note 4, at 199; and R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), 294.

incompatible with constitutional norms. In such cases, the supremacy of obligations under international law will be maintained only if they have been given some special constitutional rank in domestic law and if, furthermore, the relevant domestic law in substance reflects the international norm at issue.

Another possibility is that ordinary municipal law expressly refers to international law as the relevant standard of compatibility. International law, sometimes even international 'practice', may thus find its way into domestic law and be subject to application by domestic courts.[58] This was for instance, the case when the Austrian Constitutional Court repealed an administrative decree which it considered to be in violation of the Treaty on the Re-Establishment of an Independent and Sovereign Austria concluded between Austria and the Allied and Associated Powers in 1955.[59] This treaty obliges Austria, inter alia, to recognize in certain Austrian regions the Slovene and Croat languages as official languages in addition to German. The relevant provision on minority protection was given constitutional rank but the problem was that it was vague and indeterminate as to its scope. In the process of implementation into domestic law, the Austrian Parliament enacted a federal law known as the 'Ethnic Groups Act', which itself contained specific provisions on minority protection, but also authorized the Federal Government to determine by administrative decree in detail the territorial and personal scope of the obligation of minority protection in the state legislation. This Act also contained a clause which obliged the Government, when promulgating the implementing decree, to observe existing obligations under international law. This condition eventually proved to be crucial when the matter came before the Constitutional Court, which, in the course of administrative proceedings, had to review the compatibility of the implementing decree with federal law. In practice, the minority rights applied only in towns and villages with a relatively high percentage of minority population, i.e. 25 per cent of the population. In reviewing the lawfulness of the implementation of the minority rights, the Constitutional Court invoked the reference in the federal law to existing obligations under international law. It then examined, by way of comparison with other countries,[60] international practice in the field of minority protection and determined that the permissible range required by international law was between 5 and 25 per cent and concluded that the requirement of 25 per cent was on the uppermost end of the scale. It therefore considered that the decree did not take adequate account of existing obligations under international law.[61] The Court ultimately repealed this part of the decree and thus provided legal restitution as a form of reparation in consequence of a domestic law not in conformity with

58 For a more detailed discussion see Nollkaemper, *supra*, note 4, at 197–206.

59 Treaty on the Re-Establishment of an Independent and Sovereign Austria, [1955] 217 UNTS 223.

60 Unfortunately, however, the Court did not disclose the material it had examined, nor did it state which practice formed the basis of its comparison. Thus it is impossible to assess the correctness of the Court's approach to determine the relevant international practice.

61 *Decision V 91/99*, Austrian Constitutional Court, 4 October 2000, in S. Wittich et al., 'Austrian Judicial Decisions Involving Questions of International Law', (2001) 6 *Austrian Review of International and European Law*, 281, at 317 and 325–6.

international law. But this was only possible due to the express reference to international law in the implementing federal law.

In cases where domestic courts cannot repeal a municipal law they may be empowered at least to disapply it and to consider it inapplicable even though it remains formally valid and in force.[62] The result will, however, largely be the same as that of a formal repeal. Similar problems arise where it is a judgment, notably a criminal sentence, which is not in conformity with what international law requires. If it is a decision against which no further remedy such as appeal or revision is available, this may produce the undesirable result that the decision is incompatible with international law and cannot be revoked. Unless the national legislator changes the law so as to allow for revision of final judgments should they turn out to be in breach of international law – an approach increasingly taken by states parties to the European Convention on Human Rights – the only possibility of remedying the international wrong is to disapply the judgment or to discontinue the execution of a sentence.[63]

A specific remedy has been increasingly applied by domestic courts for serious breaches of obligations under peremptory norms of international law. Thus the House of Lords has frequently declined to recognize the factual effects or consequences of such breaches. In *Kuwait Airways Corporation* v. *Iraqi Airways Co.*, for instance, it held that with regard to the invasion of Kuwait by Iraq an English court 'may not recognise any Iraqi decree or act which would directly or indirectly enable Iraq or Iraqi enterprises to retain the spoils or fruits of the illegal invasion'.[64] Such an approach is also taken in cases of torture. In *A (FC) and Others (FC)* v. *Secretary of State for the Home Department*, the House of Lords stated that 'the *jus cogens erga omnes* [*sic*] nature of the prohibition of torture requires member states [of the Torture Convention] to do more than eschew the practice of torture'.[65] It concluded that the exclusion of evidence which was or may have been obtained by torture was warranted. In doing so it invoked Article 41(2) of the ILC Articles and held that '[t]here is reason to regard it as a duty of states . . . to reject the fruits of torture inflicted in breach of international law'.[66] In the *R v. Secretary of State* case, the claim that states had an obligation 'to take steps to forestall or prevent torture wherever it occurs'[67] was subsequently dismissed. The Court then invoked Article 41(1) and said that '[e]ven if . . . torture or a real risk of torture were established on the evidence, that would impose no duty on the United Kingdom Government to do other than cooperate

62 See Nollkaemper, *supra* note 4, at 200–4.

63 See e.g., *The State of the Netherlands v. J.L.*, Supreme Court of the Netherlands, 31 October 2003, (2005) 36 NYIL 504, 506; Nollkaemper, *supra*, note 4, at 211–13.

64 *Kuwait Airways Corporation v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19; [2002] 2 AC 883, paras 29, 117 (*per* Lord Steyn).

65 *A (FC) and Others (FC) v. Secretary of State for the Home Department, A and Others (FC) v. Secretary of State for the Home Department (Joined Appeals)*, Appeal Judgment, (2005) UKHL 71; ILDC 363 (UK 2005), para. 34 (*per* Lord Bingham of Cornhill).

66 Ibid.

67 *R (On the Application of Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, Supreme Court of Judicature, Queen's Bench Division, Divisional Court, 4 May 2006, [2006] HRLR 30; [2006] EWHC 972 QBD (Admin), para. 69 (*per* Lord Justice Latham).

with other States to bring to an end, through lawful means, the circumstances giving rise to that situation. International law imposes no further duty on an individual State to intervene'.[68]

3.3. Compensation and the principle of compound interest

I will now turn to the issue of compensation, which in practice is certainly the most important remedy in the law of state responsibility. I will limit my analysis to one aspect of compensation that has not been entirely clarified to date: the availability in international law of compound interest. Interest is usually calculated only on the initial principal amount due, and the interest rate is added thereto at specified intervals (e.g., annually). In the case of simple interest, the interest sum is not added to the principal sum for the future calculation of the amount of interest. This is the important difference to compound interest that is added to and henceforth included in the principal sum for the further calculation of interest. The question whether international law provides for simple interest only, or for compound interest as well, arose in the *McKesson* case, which nicely illustrates the way in which domestic courts may have an influence on the development of individual rules of international law. One aspect that renders this case so useful is that it concerned a genuinely international law issue; that is, the expropriation of foreigners. Unlike in other cases dealing with questions of reparation and the appropriate remedies, in this case the applicable law did not overlap with rules of domestic law concerning methods of valuation. Because it is so exemplary in addressing the issue of compound interest in international law, I will discuss this case in a more detailed manner.

McKesson is a long-running dispute during which a number of international-law questions surfaced in US courts. It arose out of an expropriation of the shares of a US corporation in an Iranian dairy in the course of the Islamic revolution in 1979.[69] Since the expropriation took place after the jurisdictional cut-off date of the Iran–US Claims Tribunal, which therefore had no jurisdiction over the case,[70] the corporation initiated proceedings in domestic courts in the US and claimed inter alia for prejudgment compound interest as a consequence of the (unlawful) taking. The plaintiff relied on the bilateral Treaty of Amity and interpreted the terms 'just compensation' and 'full equivalent' so as to require the payment of compound interest in case of expropriation. The US District Court for the District of Columbia, however, rejected this claim, holding that general international law required simple interest only, meaning that compound interest was excluded and not allowable.[71] The District Court analysed the matter in quite some detail, discussing the various sources and authorities relied upon by either party. As the main source for its decision it invoked Marjorie Whiteman's monograph on damages, which states in

68 Ibid., at para. 70.

69 *McKesson HBOC Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001), reprinted in (2002) 41 ILM 438.

70 The Iran–US Claims Tribunal dismissed the claim for expropriation since, at the jurisdictional cut-off date, Iran's interference with McKesson's rights had not amounted to an expropriation. It awarded, however, damages for two unpaid cash dividends. *Foremost Tehran, Inc. v. Iran*, 10 April 1986, Iran–US CTR 10 (1986-I) 228.

71 See *McKesson*, *supra* note 69, at 45.

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a sweeping manner that '[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable'.[72] In addition, the court based its decision on to the constant case law of the Iran–US Claims Tribunal rejecting any award of compound interest.[73] On the other hand, it denied that the few cases which already at the time had awarded compound interest provided any significant evidence of a customary character.[74] Finally, the court also took note of the work of the ILC on state responsibility and the draft articles adopted on first reading.[75]

The position of the District Court clearly reflects the traditional view that is largely based on state-to-state arbitration, where claims for compound interest were regularly rejected in the past. An often quoted[76] example to this effect is the *Norwegian Shipowners* case, in which the tribunal rejected the claim for compound interest as follows:

> The claimants have asked for compound interest with half-year adjustments, but compound interest has not been granted in previous arbitration cases, and the Tribunal is of the opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made.[77]

While this case is not as clear as it might seem,[78] and while there are also early cases in which international tribunals have in fact awarded compound interest,[79] in the majority of cases, tribunals have indeed rejected claims for compound interest. This has, for example, been the constant case law of the Iran–US Claims Tribunal, as was emphasized by the district court in *McKesson*.[80]

A look at the ILC Articles reveals that compound interest seems not to be an issue as the Articles do not mention them either as a distinct remedy or even as an aspect of interest. Article 38 concerning interest only deals with simple interest. It is only in the commentary that one finds some indication as to the question of compound interest, and the ILC seems to have incorporated a dismissive attitude in interpreting international case law: 'The general view of courts and tribunals has been against the award of compound interest',[81] and further: '[G]iven the present state of international law it cannot be said that an injured State has any entitlement to compound interest,

72 M. Whiteman, *Damages in International Law*, Vol. 3 (1943), 1997.
73 Ibid., at 48.
74 *Kuwait v. Aminoil*, (1982) 21 ILM 976, 1042; *Compania del Desarrollo de Santa Elena, S. A. v. Republic of Costa Rica*, (2000) 39 ILM 1317, 1332–4.
75 G. Arangio-Ruiz, 'Second Report on State Responsibility', YILC 1989 (II-1) 1, at 30.
76 See Ripinsky and Williams, *supra* note 22, at 382; *McKesson*, 116 F. Supp. 2d 13, at 47.
77 *Norwegian Shipowners Case (Norway v. USA)*, Award of 13 October 1922, 1 RIAA 307, 341.
78 Thus it cannot be taken from the tribunal's reasoning that the tribunal considered compound interest as a remedy generally unavailable in international law; rather it seems that the tribunal confined itself to stating that the present case (arg. 'in this case'), especially the facts of the case, did not warrant an award of compound interest, without, however, prejudging the question as to the status of compound interest more generally.
79 See, e.g., *Antoine Fabiani Case (France v. Venezuela)*, Award of 31 July 1905, 10 RIAA 83, 89 and 93; *Affaire des chemins de fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan (Austria v. Yugoslavia)*, Award of 12 May 1934, 3 RIAA 1786, 1808.
80 See, e.g., *RJ Reynolds Tobacco v. Iran*; 7 Iran–US CT (1984) 181,191; *Sylvana Technical Systems Inc. v. Iran*, 8 Iran–US CT (1985) 298, 320; *Anaconda-Iran Inc. v. Iran*, 13 Iran–US CT (1988) 199, 234–5, paras. 138–142; *Starrett Housing Corp. v. Iran*, 16 Iran–US CT (1987) 112, 234–5, para. 370.
81 Commentary to Art. 38, para. 8.

in the absence of special circumstances which justify some element of compounding as an aspect of full reparation'.[82] Thus the general rule under the ILC Articles is to award simple interest and any award of compound interest is the exception thereto and must be justified by 'special circumstances'. However, the preference of the simple-interest rule and the general rejection of compound interest have come under severe criticism in doctrine.[83] More importantly, the situation seems to have changed in recent years, mainly subsequent to the adoption of the ILC Articles and essentially under the influence of investment tribunals,[84] and tribunals apparently are more inclined today to award compound interest in order to provide full reparation, or at least to ensure that the wrongful party is not unjustly enriched at the expense of the injured party.

These considerations were taken up by the court of appeals in the further proceedings in *McKesson* v. *Iran*. The Court of Appeals dismissed both the approach taken by plaintiff and that by the District Court. On the one hand, it said that it could not be deduced from the Treaty of Amity that it provided for compound interest as the terms used were too vague; on the other hand, it held that plaintiff made 'a convincing case that contemporary international law does not, as the district court seems to have thought, require simple interest'.[85] The Court denied the authority given by the District Court to Whiteman's digest which had assessed the state of international law 'over fifty years ago'.[86] It also took account of the few cases that in fact had awarded compound interest and that were discarded by the District Court,[87] thus putting the 'negative' practice of the Iran–US Claims Tribunal into more contemporary perspective. It then looked at international case law as well as the work of the ILC and quoted from Special Rapporteur Crawford's third report.[88] In assessing all these authorities, the court accurately summarized the current state of international law as follows: 'although customary international law may favor awards of simple interest, we think the district court erred in holding that it requires such awards'.[89]

This aspect of the lengthy proceedings in the *McKesson* dispute is indeed remarkable in a number of respects. First, both the District Court and the Court of Appeals analysed practice and scholarly writings on the issue in quite some depth, at least to an extent that might well serve as an example for other domestic courts facing similarly unclear questions of international law. It is also interesting to see how a domestic

82 Ibid., para. 9. This appears to paraphrase what Mann wrote on the topic a few years earlier: 'compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals'. F. A. Mann, 'Compound Interest as an Item of Damage', in F. A. Mann, *Further Studies in International Law* (1990) 377, 385.

83 See generally Ripinsky and Williams, *supra* note 22, at 383–4; I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2009), 6.216–6.224.

84 See the numerous references to investor-state arbitration in Ripinski and Williams, *supra*, note 22, at 384–387, and Marboe, at 6.225–6.236; E. Lauterpacht and P. Neville, 'The Different Forms of Reparation: Interest', in Crawford, Pellet, and Olleson, *supra* note 14 613, 620 (especially in n. 29).

85 See *McKesson*, *supra* note 69, at 444.

86 Ibid.

87 See *Kuwait v. Aminoil*, *supra* note 74; *Compania Desarrollo*, *supra* note 74.

88 J. Crawford, Third report on State responsibility, YILC 2000, Vol. II pt. 1, 3, at 60, para. 211. The statement there was later incorporated into the commentary; see above.

89 See *McKesson*, *supra* note 69, at 445.

court may anticipate the course of development of a specific rule of international law in and through international arbitration. Furthermore, it is certainly an irony of history that *McKesson*, a case that only marginally slipped through the temporal jurisdiction of the Iran–US Claims Tribunal, in a way contrasted, or even thwarted, the Tribunal's consistent practice to deny the award of compound interest. Finally, it is noteworthy to recall that one reason why international tribunals have preferred simple over compound interest might have been that they have been influenced in this area by domestic laws and judicial decisions which have traditionally allowed only simple interest on sums due under contract, by law, or – in common-law jurisdictions – court judgment.[90] As Mann pointed out, in a number of jurisdictions the relevant laws did not authorize the payment of compound interest, albeit they did not expressly prohibit them.[91] This is but one aspect of the general theme identified at the beginning that the rules of international responsibility largely draw on municipal-law analogies. Against this background it is fascinating to see how a domestic court may influence, or at least confirm, the reversal of international-law principles that have originally developed in domestic law. In sum, the Court of Appeals nicely showed the potential of domestic courts in clarifying, but also further developing, rules of international law in the field of reparation that are either controversial or indeterminate, or even both.

4. Aspects of implementation: the issue of standing

Finally I will turn to the implementation of state responsibility, and I will confine myself to the issue of standing as questions of countermeasures are generally not addressed by domestic courts. The question whether individuals enjoy standing to invoke rules of state responsibility in domestic proceedings is a matter mainly, often exclusively, governed by municipal law. The rules of general international law on standing provide inadequate guidance, if any, to domestic courts. Furthermore, the question of standing under international law is rarely a matter raised in domestic proceedings, and if it is, it is invariably bound up with that of judicial enforcement and the issue of self-execution of international treaty norms.[92] Thus in the *McKesson* case just discussed, both the District Court and the Court of Appeals answered the question whether the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States created property rights for individuals in the affirmative, at least to the extent the terms of the relevant treaty provision are self-executing. The Court of Appeals initially confirmed the District Court's findings that '[i]f a treaty contains language clearly indicating its status as self executing, courts regard that language as conclusive'.[93] The self-executing character of treaties may be deduced if they 'speak in terms of individual rights'.[94] The court then applied this

90 See Lauterpacht and Neville, *supra* note 84, at 618.
91 See Mann, *supra*, note 82, at 381.
92 As will be seen below, the fact that a treaty is self-executing is generally a requirement for providing standing to individuals in domestic courts, but of course not in itself sufficient.
93 See *McKesson*, *supra* note 69, at 441.
94 Ibid.

reasoning to the case at hand: 'The Treaty of Amity contains just such language: It explicitly creates property rights for foreign nationals . . . and contemplates judicial enforcement of those rights'.[95] What the court did not say, but obviously assumed (and rightly so), was that the self-executing character of the provision must be examined from the perspective of international, not domestic, law.[96]

This approach is perfectly in line with what the ICJ said in *LaGrand* when it interpreted the ordinary meaning of the terms of Article 36(1)(b) and (c) in their context. The Court held that '[t]he clarity of these provisions, viewed in their context, admits of no doubt',[97] and further: 'Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights'.[98] Similarly, in *Jogi* v. *Voges and Others*, a US Court of Appeals, after an in-depth analysis of the terms of the Vienna Convention on Consular Relations, not only stated that Article 36 was self-executing,[99] but also that it 'grants private rights to an identifiable class of persons . . . and that its text is phrased in terms of the persons benefitted'.[100] The court concluded by holding that these individual rights were also 'presumptively enforceable' under domestic law, thus granting individuals standing to pursue their rights in domestic courts.[101]

Oddly, however, in the further proceedings in *McKesson*, the Court of Appeal reviewed the previous decision *de novo* and reversed it.[102] In a chain of arguments the Court started by invoking *Alvarez-Machain*, where the Supreme Court stated the obvious when holding that '[i]n construing a treaty, . . . we first look to its terms to determine its meaning'.[103] It then said that the bilateral Treaty of Amity, which was the source of the alleged individual rights, like other treaties of its kind, was self-executing. This, however, did not end the court's search for a treaty-based action because '[w]hether a treaty is self-executing is a question distinct from whether

95 Ibid., at 442.

96 The 'guidelines' for such determination no doubt are to be found in Article 31 of the Vienna Convention on the Law of Treaties.

97 See *LaGrand*, *supra* note 37, at 466 and 494, para. 77.

98 Ibid., at 466 and 494, para. 77. See also *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, 12, 35–6 paras. 40–41. The Court referred to invocation of this right in proceedings before itself and left open the question as to the self-executing character of this norm. However, given the fact that the self-executing character of the norm is one attaching to it under international law, the answer to this question would be the same.

99 *Jogi v. Voges and Others*, 480 F.3d 822 (7th Cir 2007), ILDC 808 (US 2007). In fact, the court of appeals stated that 'it is undisputed that the Convention is self-executing, meaning that legislative action was not necessary before it could be enforced'. Ibid., para. 21. Given the fact that the Court's discussion focused on Art. 36, it is doubtful whether it really meant that the Vienna Convention on Consular Relations was self-executing in its entirety.

100 Ibid., para. 35.

101 Ibid., para. 36.

102 *McKesson Corporation et al., Appellees v. Islamic Republic of Iran, Appellant*, 593 F.3d 485 (D.C. 2008) 2008 U.S. App. LEXIS 18163. This *de novo* review was due to a change in the position of the US government. In light of this, the Court of Appeals vacated 'the portion of [its earlier decision] addressing whether the Treaty of Amity . . . provides a cause of action to a United States national against Iran in a United States court', and instructed the district court 'to re-examine that issue in light of the representation of the United States that it does not interpret the Treaty of Amity to create such a cause of action'. The district court reaffirmed the existence of a cause of action, and this issue again came before the Court of Appeal. See *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 320 F.3d 250, 281 (C.C. Cir. 2003).

103 See *Alvarez-Machain, supra*, note 51, at 663.

the treaty creates private rights or remedies'.[104] This is no doubt correct, as is the distinction drawn between treaties that only benefit individuals and those genuinely creating enforceable private rights of individuals,[105] a distinction probably based on the mediatization of the individual in international law (i.e. the concept of diplomatic protection), as distinct from the entitlement of the individual as holder of rights directly under international law (i.e. mainly human rights).

Unfortunately, however, the Court of Appeals approached the matter in a quite different and, it is submitted, flawed manner. For in determining whether the treaty provided for a cause of action, it admitted that the treaty contained substantive rights of individuals, but focused exclusively on the question of enforceability of these rights. In reality, it distinguished between a treaty that only sets forth substantive rules of conduct and specific consequences in case of breach of these rules (e.g. compensation), and a treaty that also creates 'private rights of action for foreign corporations to recover compensation from foreign states in United States courts'.[106] As an example of the latter kind of treaty, the Court mentioned the Warsaw Liability Convention.[107] Yet it goes without saying that an international treaty on civil liability invariably confers standing on the beneficiaries of its rules in domestic courts, but the entire argument of the Court of Appeal builds on the erroneous assumption that such standing is not granted unless the pertinent treaty contains express provisions on enforceability in domestic courts.[108] But it is submitted that what really counts are the structure of performance and the characteristics of the obligations of the treaty rather than the question whether it provides for distinct rules on enforceability. Thus what is decisive is the nature and character of the treaty rules; that is, whether they are directed, in the first place, to states by prescribing state-to-state conduct in relation towards individuals, which would make individuals 'only' beneficiaries of the relevant rules and denies them any right of direct action, or, conversely, whether they are primarily aimed at producing legal rights of individuals, rendering them 'true holders' of rights and obligations under international law, even if the formal source of this status is an 'ordinary' inter-state obligation.[109] It is mostly with regard to these 'inward-looking' rules that one will find a clue as to the standing of individuals in domestic courts arising out of an international treaty or, for that matter, out of a rule or norm of general international law.

A similar approach to the question of standing of individuals under an international treaty is also taken by other courts. Many of the few domestic cases concern claims for compensation against states for violation of international rules on armed conflict. In view of the interdependence between standing and the relevant sub-

104 The Court quoted from American Law Institute (ed.), *Restatement (Third) of Foreign Relations Law of the United States* (1986), Section 111, commentary (h).

105 Ibid., Section 907, commentary (a).

106 See *McKesson*, *supra* note 102, at 9. The Court of Appeal again quoted from the Supreme Court, this time from the case of the *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989).

107 Convention for the Unification of Certain Rules Relating to International Carriage by Air, 137 LNTS 11.

108 Similarly critical, Nollkaemper, *supra* note 4, at 102.

109 See S. Wittich, 'Domestic Implementation and the Unity of International Law', in A. Zimmermann and R. Hofmann (eds.), *Unity and Diversity in International Law* (2006), 345, 357–62.

stantive rules, the whole matter resists generalization. Thus, the Austrian Supreme Court had to decide the enforceability by individuals of provisions of the 1955 State Treaty already referred to earlier. In that treaty, Austria renounced any claim to reparation that Austria, or its nationals, would have had under general international law against the Allied and Associated Powers, inter alia arising out of damage sustained as a consequence of acts of armed forces of the Allied Powers. In turn Austria obliged itself to compensate private individuals at least for noncombat damage they suffered by Allied forces on Austrian territory in violation of international law. In civil-law proceedings under this provision, the question arose whether individuals had standing in order to enforce this treaty provision. After interpreting the relevant terms according to their ordinary meaning in their context, particularly in relation to other provisions of the Treaty with a similar content, the Supreme Court without hesitation answered this question in the affirmative. It held that the wording and the purpose of the compensation provision were sufficiently clear, meaning that the compensation obligation did not require implementing legislation and hence was self-executing.[110] Individuals thus were to be considered entitled to enforce these compensation rights granted by an international treaty and for that purpose they enjoyed standing in Austrian courts. In the same year, the Supreme Court of Slovenia came to precisely the same conclusion with regard to this provision of the Austrian State Treaty.[111]

In contrast, the German Federal Court of Justice, faced with the question whether individuals could raise in German courts claims against Germany arising from violations of international humanitarian law, looked at the structure of performance of the relevant norms invoked by claimants. The Court admitted that while Article 3 of the IV Hague Convention formerly was considered to have an exclusively inter-state character, the individual has no doubt obtained the status as a holder of rights in international law, albeit a limited one. However, without prejudice to other fields of international law, this change in international humanitarian law does not extend to the 'secondary rights' of individuals. In other words, even if the individual enjoys limited legal personality under international law with respect to specific substantive rights, this development has not brought about any entitlement to claim reparation, particularly damages, as well.[112] The Court analysed this question also in relation to Article 91 of Addition Protocol I of 1977 and reached the same conclusion, the more so as this provision was but an extension of Article 3 of the Hague Convention to the Geneva Conventions and thus essentially the same as to its structure and nature.[113] The inter-state character of these norms and, more importantly, the obligation to compensation in the event of their breach, was also the relevant factor for the Italian

110 *Decision No. 1 Ob 149/02x*, Austrian Supreme Court, 30 September 2002, in S. Wittich and M. Schoiswohl, 'Austrian Judicial Decisions Involving Questions of International Law', (2002) 7 *Austrian Review of International and European Law* 257, 285–7. A number of questions in this case were also in dispute in an earlier decision to which the Supreme Court referred, *Decision No. 1 Ob 219/01i*, Austrian Supreme Court, 22 October 2001, in ibid., 273.

111 *Legal Successors of KT and KS v. Slovenia*, I Up 462/2000, Supreme Court, ILDC 1086 (SI 2002), para. 8.

112 See *35 Citizens*, *supra* note 23, para. 10.

113 Ibid., paras. 11–12.

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Court of Cassation to assess the standing of private claimants in Italian courts. Like the German Federal Supreme Court, the Court of Cassation interpreted Article 91 as merely laying down rules of international law that 'govern relations between States' and not between states and individuals.[114] The resulting gap in the protection by law through lack of enforceability may no doubt be regretted, but these judicial pronouncements of domestic courts seem to be in line with international practice and international law as it still stands today.[115]

This short survey of case law is, of course, not representative, neither as regards the sample of the countries or the number of decisions selected, nor as to the issues analysed. It is, however, interesting to note that in addressing the question as to standing of individuals under international law, the courts in these cases made several important assumptions and distinctions that may well indicate a generally consistent approach. In the first place, the main criterion which determines the character of the relevant rule of international law as being capable of granting standing to individuals regularly is the 'direction' in which it is intended to operate. Accordingly, where a norm is aimed at regulating state conduct in strictly inter-state relations, individuals are generally denied standing in domestic courts.

Second, in the cases discussed the courts assessed the question of standing under international law against the background of the conferment of substantive rights. This approach is similar, if not identical, to that of the ICJ in its famous statement in *South West Africa* where it said that standing requires 'the existence of a legal right or interest in the subject-matter of [the] claim'.[116] It is certainly in this sense that the US courts in *McKesson* analysed whether the Treaty of Amity provided for a 'cause of action' of the individual against the state,[117] that the German Federal Supreme Court examined whether individuals had a 'right to sue'[118] under international humanitarian law,[119] that the Italian Court of Cassation considered whether the relevant rule invoked 'permit[ted] injured persons to seek reparation for the damage done to them',[120] and that the Austrian Supreme Court scrutinized whether the international treaty at issue provided for a 'direct basis of a claim of compensation'.[121]

Third, the courts generally asked whether the international treaty, or the particular provision invoked, was self-executing and in doing so they looked at the terms of the provision in order to determine its meaning and effect. This conforms to international law, especially as it mirrors the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties, even though this is but a modest finding. Yet it shows a considerable degree of convergence of domestic courts when

114 *Presidency of the Council of Ministers v. Marcovic and Others*, Italy, Court of Cassation, ILDC 293 (IT 2002), para. 3 of the decision.

115 See, e.g., C. Tomuschat, 'Darfur: Compensation for the Victims', (2005) 3 *Journal of International Criminal Justice* 579.

116 *South West Africa (Second Phase), Ethiopia/Liberia v. South Africa*, 18 July 1966, ICJ Rep. [1966] 6, at 34, para. 48.

117 See *McKesson*, *supra* note 102.

118 See *35 Citizens*, *supra* note 23, at para. 16. The German word used was *Aktivlegitimation.*

119 *Decision No. 1 Ob 219/01i* 276.

120 *Presidency of the Council of Ministers v. Markovic*, para. 3. ('norme espresse che consentano alle persone offese di chiedere . . . riparazione dei danni loro derivati').

121 See *Decision No. 1 Ob 219/01i*, *supra*, note 110, at 276 ('Geltendmachung eines unmittelbaren Ersatzanspruches').

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interpreting international rules to determine whether they have a self-executing character or not.

Fourth, particularly the German Federal Supreme Court distinguished the entitlement to a substantive right directly under international law from questions of enforcement under both international and domestic law. On this basis, the question whether international law entitles individuals to actually enforce their rights in judicial proceedings, either in international or in domestic courts or tribunals, is without prejudice to the existence of the substantive right. In this respect the decision of the US Court of Appeals in *McKesson* made the entitlement of the individual under international law, and with it the standing in domestic courts, dependent on whether the international norm itself granted express or specific enforceability.

Finally, a basic distinction is made between the original or 'primary' right to which individuals are entitled, for example Article 51 of Additional Protocol I in the context of international humanitarian law, and the 'secondary' right in case of breach of this primary right, such as that to damages or compensation pursuant to Article 91 of Additional Protocol I. This distinction was clearly considered by the German Federal Supreme Court as entailing the important consequence that the right to compensation for prior violations of international law against foreign nationals is generally still an exclusive one of the latters' home state.[122]

5. Concluding remarks

Now where does all that leave us with regard to the content and implementation of international responsibility? Given the brevity of the foregoing analysis, the conclusions must remain general, abstract, and perhaps self-evident. Generally, practice shows that domestic courts may only play a limited role in developing the international law of state responsibility. This has partly to do with the quite limited number of cases and the overall scarce practice of domestic courts. Another reason is that the practice of domestic courts is quite disparate, reducing their value in generating consistent practice. Furthermore, there is a general inclination of domestic courts to apply remedies under municipal rather than international law, which limits their significance as agents of international law.

It is only in exceptional cases that domestic courts may really contribute to clarifying controversial norms of international law and support the further development of international law, especially where the status of existing law is far from clear – on condition, of course, that the relevant practice of domestic courts is consistent and uniform. In particular, the court in the *McKesson* case has pronounced on the availability of compound interest at a moment when this was still a highly contentious issue, even if it has 'only' strengthened a trend already looming on the horizon

122 See *35 Citizens*, *supra* note 23, para. 8. Most likely the Court here distinguished between the concept of diplomatic protection and that of human rights protection when it referred to violations of international law against foreign nationals. As mentioned earlier, the Court, however, was mistaken in invoking Art. 42 of the ILC Articles as confirming the lack of standing of individuals under the Geneva Protocols.

of international practice. The clarifying function alone is no mean feat, given the fact that the rules of reparation as contained in the ILC Articles are relatively vague and indeterminate. But clarifying the law is not an end in itself but may, and usually does, also foster the legal certainty of the law applied. In this respect domestic courts may also take on the task of fine-tuning international norms and adapt them to the needs of the individual case and its specific constellation as well as the particulars of the domestic legal system. Finally, viewed from the perspective of international law, probably the most important role domestic courts may play in applying secondary rules of state responsibility' is that of strengthening the effectiveness of the international legal system and its individual rules. While this holds true for any area of international law, it assumes a special quality in the law of state responsibility, which in itself is an important benchmark for measuring the effective compliance with, and implementation of, international law.