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BOOK REVIEW

Yuji Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability*, Brill | Nijhoff, 2022, 314 pp, ISBN 9789004509863*
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Modern international law increasingly regulates and has an impact on relations between the state and individuals and relations between individuals. This happens if not exclusively, primarily, in the context of domestic application of international law. Yuji Iwasawa examines the theoretical and practical problems associated with this phenomenon with special focus on the concept of direct applicability of international law in domestic law. Through seven chapters, the book offers a comprehensive account by covering domestic applicability of treaties and going beyond on Iwasawa's previous work, the present monograph also covers customary international law, acts of international organizations and judgments of international courts.

Following the first introductory chapter, the second chapter describes the concept of direct applicability with the so-called international approach. Chapter three, on the doctrine of self-executing treaties in the United States, chapter four on direct effect of EU law and the framework of analysis in chapter five are similar in structure. They all contain sections on conceptual matters, the role of domestic/EU law, criteria on deciding whether a treaty is directly applicable and the adequacy of or plea for a relative approach. The last two chapters are somewhat separate from the previous, Chapter six examines customary international law and acts of international organizations while chapter seven covers judgments of international courts.

A major challenge when writing a book on this topic is that various legal systems use different terminology, concepts such as self-executing,[1] direct applicability,[2] and direct effect.[3] It is not only that some concepts are used in some systems where a mechanical exercise of one-to-one translation would suffice, some concepts such as 'direct applicability' are used in several systems where the meaning of this concept differs as will be explained next.

When examining the question of the domestic status of international law, Iwasawa highlights three separate issues: domestic legal force, direct applicability, and rank.[4] When a treaty has

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[1]The (U.S.) Restatement (Fourth) defined self-executing treaties as 'directly enforceable in courts in the United States', American Law Institute, Restatement (Fourth) of the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity, § 310 (1) (2018).

[2]On the use of 'direct applicability' pursuant to the international approach see, for example, the Permanent Court of International Justice (PCIJ) when it stated on *Jurisdiction of the Courts of Danzig* that 'The wording and general tenor of the [agreement between Poland and Danzig] in regard to railway officials show that its provisions are *directly applicable* as between the officials and the [Polish State Railway Administration].' *Jurisdiction of the Courts of Danzig,* Advisory Opinion, 1928 PCIJ Series B) No 15, at 18 (emphasis added).

[3]On the use of 'direct effect' in EU law see when the European Court of Justice in *Van Gend en Loos* stated the following on the applicability of the EEC Treaty: 'according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect', *Van Gend en Loos v. Nederlandse administratie der belastingen*, Case 26/ 62, 1963 ECR 1, at 13.

[4]Y. Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (2022), at 150.

domestic legal force it means that is the law of the land of the state. However, that a treaty is the law of the land in a state does not necessarily mean that it is directly applicable, i.e. whether it can be used to invoke certain rights or obligations in a domestic context. Pursuant to his view one first has to determine whether international law has the force of a law domestically and thereafter, as the next step, determine whether it is directly applicable in a certain context. Domestic legal force is a prerequisite for direct applicability and not vice versa.[5] If one has concluded that international law has the force of domestic law and is directly applicable in a state, the question of rank in the hierarchy of legal sources of that state remains. Some states may accord international law a higher rank than national laws while other states may not.[6] For lawyers familiar with the EU system, the distinction between domestic legal force and direct applicability needs to be clarified as the terms appear to be used in a different way. EU regulations have domestic legal force in the EU member states, however, that does not mean that all the provisions of a regulation by necessity have direct effect (creating individual rights which national courts must protect).[7] While the scholar Winter distinguishes between direct applicability and direct effect,[8] the European Court appears to use the two terms interchangeably.[9] Iwasawa notes that it is unfortunate that Article 288, paragraph 2 of the Treaty on the Functioning of the European Union (TFEU) uses the term 'directly applicable' to describe the direct domestic legal force of EU regulations. He invokes several EU law scholars when he argues that 'direct applicability' in the context of Article 288 means domestic legal force while 'direct effect' creates rights and obligations that courts must protect.[10] This all appears reasonable with the groundwork and definitions previously set out by Iwasawa.

Iwasawa describes three main constitutional systems (approaches) on how to incorporate treaties into domestic legal order: *the system of automatic incorporation* where treaties immediately acquire domestic legal force when ratified and published in official gazettes (for example, Austria, Japan, Portugal, Switzerland, and the United States); *the system of incorporation by a law of approval* where the legislature approves a treaty with a statute which usually provides that the treaty has the force of law domestically (for example, Belgium, France, Germany, Italy, and the Netherlands); and *the system of individual incorporation* where states implement treaties individually through legislation (for example, the United Kingdom and Scandinavian countries).[11] While US courts and scholars from the early case of *Foster* v. *Neilson* analyse the doctrine of self-executing treaties by reference to case law of US courts,[12] early European scholarship (in the 1950s) chose to explain the phenomena with reference to the advisory opinion of the Permanent Court of International Justice (PCIJ) on *Jurisdiction of the Courts of Danzig*.[13] Similar to the conclusion of the *Danzig opinion*,[14] the landmark *Van Gend en Loos* case became the leading case on direct applicability (or direct effect) of EEC/EU law.[15]

Iwasawa challenges the premise of the *Danzig opinion*, namely that the intention of the parties determines whether a treaty is directly applicable. Attempts to find evidence in the text of a treaty for determining the intent of the party is in most cases fictitious. Instead, he argues that direct

[5]Ibid., at 153–4, 277.

[6]Ibid., at 162, 179, 180, 208.

[7]Ibid., at 94, 231.

[8]J. Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law', (1972) 9 *Common Market Law Review* 425, at 429.

[9]For example, see the use of 'directly applicable' in the dispositif of *Reyners v. Belgian State*, Case 2-74, 1974 ECR 631, at 656.

[10]See Iwasawa, *supra* note 4, at 94, 145.

[11]Ibid., at 4–5.

[12]*Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

[13]See *Jurisdiction of the Courts of Danzig*, *supra* note 2.

[14]See Iwasawa, *supra* note 4, at 91, 94.

[15]See *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, *supra* note 3. However, the Court of Justice rather emphasized 'the spirit, the general scheme and the wording of the EEC Treaty' (at para. 5), the 'objective of the EEC treaty' (at 12), and not the intent of the parties.

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applicability must be determined individually for each provision as a question of domestic law. Thus, the criteria for determining direct applicability may vary from one domestic jurisdiction to another, which Iwasawa illustrates by examining various subjective and objective criteria in Chapters 3–5. In his plea for a relative approach, Iwasawa rejects an all-or-nothing approach.[16] In a similar vein, Wright argues that the same treaty provision can be directly applicable in one situation but not in another, depending on the context in which the provision is invoked.[17] When it comes to rules of customary international law, the same argument is made: even though customary international law has domestic legal force it is only some of customary international rules that are directly applicable whereas others are not.[18]

Coming from a legal system (Sweden) where international treaties need to be implemented through legislation, normally done through transformation of specific provisions of domestic law (as opposed to incorporating treaties in their entirety) the short remarks in the book on transformation attracted my interest in particular. In Germany, some courts and scholars appear to have adopted the view that under the doctrine of transformation only directly applicable international law acquires domestic legal force.[19] This is contrary to the order explained above where the question of domestic legal force predates the question of direct applicability. It could be that the concept of 'transformation' has different meanings in different domestic legal systems, the answer appears quite straightforward. At the moment of transformation, i.e., when specific provisions of domestic law are adopted/amended in order to implement international law, the relevant parts of international law acquire domestic legal force. The question whether those provisions can be invoked (and are applicable) in a domestic context to determine a case depends on factors such as relative rank within the domestic legal hierarchy and precision.

Turning to potential gaps or put differently: there are at least two future potential research opportunities to build on Iwasawa's work.

Iwasawa notes that the question of direct applicability of a treaty does not only arise under monism, but it may also arise under dualism.[20] Nevertheless, the focus and bulk of the study and examples are from the US and EU, two systems which primarily operate under the logics of automatic incorporation. Thus, the first potential research opportunity would be to direct attention to the question of whether and how direct applicability operates under dualism. An example would be to examine states operating under dualism who have incorporated human rights treaties. As part of the writing of this review I took the opportunity to re-examine the Swedish Government Bill from 2018 on incorporation of the Convention on the Rights of the Child (CRC) into Swedish law. The Bill contains statements explaining that not all provisions of the CRC will become directly applicable even if the treaty is incorporated into Swedish law, well in line with Iwasawa's findings. The Bill does so by using the English term 'self-executing' as opposed to rest of the text being in Swedish, a clear attempt to connect to the international discourse on this matter. The direct applicability of various provisions of the CRC is to be ultimately resolved by Swedish courts. The bill also discussed potential norm conflicts between the incorporated CRC and other Swedish domestic statutes, i.e., a question of ranking of legal sources.[21] In other words, there is ample opportunity to examine dualist systems using the framework that Iwasawa's has set out.

In addition, Iwasawa lists subject-matter as one of several factors relevant for determining whether international law is directly applicable. Thus, a second potential research opportunity would be to study whether and how direct applicability of international law – in comparative

[16]See Iwasawa, *supra* note 4, at 48–9, 64, 84, 118, 162, 165, 177, 196–200, 224–5.

[17]Q. Wright, 'National Courts and Human Rights–The Fujii Case', (1951) 45(1) *American Journal of International Law* 62, at 77.

[18]See Iwasawa, *supra* note 4, at 3, 227.

[19]Ibid., at 3, 151.

[20]Ibid., at 3.

[21]Prop. 2017/18:186, at 77, 85, 88–9 and Annex 1, at 119.

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domestic contexts – operates in relation to a discrete area such as human rights, international criminal law, trade, taxation, or environment. In such a study one would probably find similarities in how different state implements the same subject-matter as well as differences prompted by the approach to direct applicability of the state at hand.

To conclude, Iwasawa compellingly explains why the question of direct applicability is important and why this matter deserves more attention. He simultaneously gives a comprehensive account of the area while making a forceful argument on how to theoretically and practically approach questions where there is still disagreement. In addition, and acknowledging that the question of domestic application of international law is vast, Iwasawa's book provides a highly suitable framework for future research.

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