

Iwasawa, Yuji: Domestic Application of International Law, Focusing on Direct Applicability. Leiden, Boston: Brill Nijhoff 2023. ISBN 978-90-04-50986-3. 314 pp. € 182,97

I.

The domestic application of international law is a fascinating topic. It touches upon theoretical questions of the relationship between international law and domestic law. At the same time, it has significant and concrete practical implications as it addresses the question of whether domestic courts and other state organs can or must apply norms of international law and whether individuals can claim violations of international law within the domestic context. There is, however, quite some confusion regarding fundamental features of the domestic application of international law: There is no generally shared understanding of terms such as ‘direct applicability’, ‘direct effect’, or ‘self-executing’. The meaning of these terms may vary across or even within jurisdictions, and they are used with different understandings by courts and academics. It is, furthermore, unclear whether the question of direct applicability is guided by international law, by domestic law, or by both. The question of the direct applicability of a norm of international law is somehow linked to its domestic legal force, its level of concreteness, and its ability to create individual rights, but deep controversies and uncertainties exist as to the nature and meaning of those relationships. In short: The issue of the domestic application of international law raises questions of fundamental importance both for the theory as well as the practice of international law. The concept of the direct applicability of international law is of particular importance in this context.

Against this background, it comes as a surprise that the issue of the direct applicability of international law is only seldomly subject of comprehensive academic analysis. The monographic treatment of the issue by Yuji Iwasawa, professor at the Faculty of Law of the University of Tokyo and since 2018 Judge at the International Court of Justice, therefore, constitutes a highly valuable contribution to the discussion. As Iwasawa describes in the preface, the book is the result of a long-lasting engagement with this issue starting with a book published in Japanese in 1985 titled *Domestic Applicability of Treaties: What Are ‘Self-Executing’ Treaties?*, including numerous other books, book chapters and articles, as well as a lecture at the Hague Academy of International Law in 2002 which was published in 2015 under the title *Domestic Application of International Law* (RdC 378 (2015), 9-261). The monograph under review constitutes a revised, expanded, and updated version of this contribution.

The book is divided into seven chapters. After a short introduction (Chapter 1) it basically consists of three parts: A first part analyses the domestic application of international law and in particular the concept of direct applicability within international law (Chapter 2), within the domestic legal order of the United States (Chapter 3), and within European Union law (Chapter 4). In the second part, and building on this analysis, Chapter 5 presents a framework of analysis for the domestic application of international law. In this part Iwasawa develops his own understanding of and approach to the issue of domestic application and to the concept of direct applicability in particular. In the third part he applies this framework to the topic of customary international law and acts of international organisations (Chapter 6) as well as judgments of international courts (Chapter 7).

II.

The three chapters that comprise the first part of the book comprehensively analyse the development and discourse of the issue of domestic application of international law within the three legal orders. Iwasawa regards these three legal orders as the main sources of the concept of direct applicability, due to three judicial precedents: In the United States, the 1829 Supreme Court decision in the case of *Foster v. Neilson* is deemed to have introduced the doctrine of self-executing treaties into the discourse. On the international level, the 1928 judgment of the Permanent Court of International Justice in the case of *Jurisdiction of the Courts of Danzig* is identified as the most influential precedent. And within the European Union (EU), *Van Gend & Loos* is the leading case concerning the doctrine of the direct applicability of European law.

The three chapters which make up almost half of the book systematically analyse the development of the respective doctrines in the three legal orders. The focus of Iwasawa is on the practice of courts and, on the international level, committees and organs of international organisations. Iwasawa, however, also analyses academic contributions, thereby presenting a comprehensive picture of the discussion. While each analysis is of value for itself, taken together they depict the remarkable confusion that exists with regard to basic tenants of the doctrine of direct applicability and reveal arguments that are commonly advanced in favour of or against the direct applicability of a norm of international law.

On the international level, different understandings of the Permanent Court of International Justice's approach in *Jurisdiction of the Courts of Danzig* still influence the discourse until today. Going through different international treaty regimes such as the universal and regional human rights

treaties, the Genocide Convention, or the European Social Charter, Iwasawa shows how the issue of direct applicability is regularly framed as an issue of treaty interpretation on the international plane. Arguments build upon the intention of the drafters and the *travaux préparatoires*, the wording and addressees of specific treaty provisions, as well as provisions which explicitly or implicitly address (or are understood to address) the domestic effects of a treaty.

The analysis of the discourse in the United States shows not only a tremendous degree of confusion and widely diverging approaches to the issue among U.S. courts, academics, as well as in the influential Restatements of the Law, but also the amplitude of different criteria that are employed to determine whether a treaty or a treaty provision is self-executing: Subjective criteria which are deemed to be relevant include the intention of the parties to a treaty but also of the legislature and the executive. Positions differ as to whether there is a presumption against or in favour of direct applicability. The issue of direct applicability is addressed in Senate declarations, specific provisions in implementation legislation, as well as in declarations accompanying international ratification of treaties. The legal implications of all these measures are, however, unclear and subject to debate. Objective criteria which are relied on are, for example, the level of precision of a treaty provision, the subject matter, or the political nature of a treaty. Deeply entrenched understandings of the separation of powers, the justiciability of political questions before U.S. courts, as well as the general attitude towards international law influence practice and discourse in the United States.

Within the European Union, issues of direct applicability play a prominent role in the jurisprudence of the European Court of Justice. Iwasawa describes, in much detail, the variety of questions that are discussed in this context such as the different role the concept plays with regard to different types of EU legal acts, its significance for the question of EU law as a standard of review for the legality of legal acts of the member states, as well as the complicated relationship of the concept of direct applicability with other concepts such as exclusion effect, primacy, or the issue of individual rights.

At first view, it seems questionable to compare the approach to direct applicability under international law and U.S. domestic law on the one hand with the direct applicability of EU law on the other. As is well known, the European Court of Justice considers European Union law not to be a part of international law but rather highlights its specific features and autonomous character. While the latter point is subject to controversial debate, most commentators agree that the EU legal order, and the academic discourse on EU law, has developed in such a manner that the differences between EU law

and international law outweigh the similarities. The proposition of Iwasawa that the concept of the direct applicability of EU law is not fundamentally different than the direct applicability of international law is therefore debatable, in particular in light of the development and differentiation that the doctrine has experienced in the jurisprudence of the European Court of Justice. Comparing the doctrine of direct applicability under EU law with the concept under international law and U.S. law is, nevertheless, a meaningful endeavour: The comparative approach shows structural similarities in arguments advanced in favour of or against direct applicability. And Iwasawa, in any case, acknowledges the main differences between EU law and international law in this regard, namely that there is a presumption in EU law in favour of direct applicability (although he later proclaims such a presumption also for international law) and that the question of direct applicability of EU law is not left to domestic law but exclusively regulated by EU law.

Taken together, the chapters on the three legal orders show the high amount of confusion regarding the terminology and concept of direct applicability as well as at times quite fundamental differences in understanding of this concept, the applicable criteria, and its relationship with other concepts. Iwasawa's analysis brings to light a number of arguments which are advanced again and again over time and within different legal orders. It therefore not only paints a rich and multi-faceted picture of the doctrine of direct applicability of international law but also indicates the need for conceptual clarity which Iwasawa wants to introduce into the discourse with his book in general and with the following Chapter 5 in particular.

The first part of the book, however, also shows two weaknesses of Iwasawa's approach. Firstly, while the three chapters mainly describe and analyse the practice and academic discussion of the concept of direct applicability, Iwasawa also criticizes specific positions and indicates his preferred understanding and approach. At this point of the book, however, he has not yet comprehensively developed his concept. His criticism therefore remains at times rather apodictic and lacks argumentative support. His position that the direct applicability of international law is not a question of international law but of domestic law, for example, rests primarily on scepticism regarding the possibility to clearly decide, on the international level, whether a provision of international law is directly applicable or not. While this is a valid criticism, it does not seem strong enough to disprove of the theory that direct applicability is a question of international law altogether, in particular against the background that the criteria for such a determination have not yet been analysed comprehensively at this point of the book.

Secondly, while it is undoubtedly a merit of the book that it is based not only on years but rather decades of Iwasawa's thinking, researching, and

writing about the issue of direct applicability, at times it becomes apparent that large parts of the book are based on material which was written and published already some time ago. Although Iwasawa has updated the text and taken newer literature and court decisions into account, major parts of the literature cited are of a more mature nature. Accordingly, some of the discourses presented seem to be outdated and have been overtaken by newer developments not all of which are considered to their full extent. While the author, for example, cites, quite extensively German literature and court decisions, the bulk of the material under consideration seems to be from the period between the 1950s and 1970s. More current discussions and developments, for examples regarding the significance of the European Convention on Human Rights in the German legal order, are taken into account only sporadically.

III.

In Chapter V, Iwasawa develops a framework of analysis for the concept of direct applicability of international law. The chapter builds upon the studies of the three legal orders and in a way consolidates the insights gained through that analysis. Criticism that is mentioned in the three chapters is taken up and brought together. Through this approach, Iwasawa can identify and evaluate common arguments. The approach leads, however, to some redundancies, and at times sentences are repeated almost verbatim.

On the substance, Iwasawa's approach stands out by its conceptual clarity. Iwasawa convincingly argues that the question of direct applicability has to be distinguished from the question of the domestic legal force of international law. He also rightly emphasises that the question whether a provision of international law entails an individual right has to be distinguished from the issue of direct applicability. And he convincingly argues that the domestic legal force of international law is a prerequisite for its direct applicability. In this regard he highlights, throughout the book, that direct applicability is only one domestic effect of international law. He analyses, in particular, the possibility to interpret domestic law in conformity with international law (principle of consistent interpretation) and the possibility to hold the state liable for violations of international law (principle of reparation). But while he addresses the issue of whether direct applicability is required for these other domestic effects, the concept of direct applicability could have gained more contours through a clearer distinction from other effects of international law within the domestic legal order. While Iwasawa advocates for a restrictive understanding of the concept of direct applicability, his analysis oftentimes also takes other effects of international law within the domestic

legal order into account which at times makes it difficult to identify what legal effects are attributed to domestic applicability and what are regarded as other domestic effects of international law. And while Iwasawa analyses numerous examples of provisions of international law which have or have not been deemed to be directly applicable by courts or other actors, there are hardly any examples or explanations of what the direct application of international law would have meant or amounted to in a specific case or instance. In this regard, the concept of direct applicability remains a bit intangible concerning its specific implications.

A major point made by Iwasawa, throughout the book, is that the direct applicability of international law is not a question of international law but of domestic law. Different approaches to this question are presented and discussed, and Iwasawa, quite firmly, positions himself in favour of the domestic law approach. While this approach is, of course, perfectly defensible, I do not find it as 'logical' (p. 162) as Iwasawa deems it to be: First, his reasoning is somewhat circular when he rejects drawing parallels between developments in EU law and international law with the argument that under EU law questions of legal force, direct applicability, and rank of EU law in domestic law are determined by EU law. Second, while it is plausible that the issues of domestic legal force and rank in the domestic legal order are determined by domestic law, the same is not necessarily true for the issue of direct applicability. It seems equally plausible to me that the issue of direct applicability is primarily a question of the interpretation of a specific international legal norm and therefore a question of international law. Quite surprisingly, most of the criteria Iwasawa discusses as potentially relevant for deciding whether a norm of international law is directly applicable or not, are actually situated on the international plane and related to the interpretation of international law, such as the intent of the parties to a treaty, the precision of the provision, its wording, or the character of the obligation in question. The proposition that the direct applicability of international law is a question of domestic law is therefore at least misleading.

Turning to the concrete criteria for the determination of the direct applicability of international law, Iwasawa's assumption that the direct applicability of international law is a question of domestic law becomes somewhat problematic. Firstly, and as already pointed out, it is rather astonishing that most criteria discussed by Iwasawa are actually not determined by domestic law but by international law. Secondly, if the direct applicability of international law is a question of domestic law, it does not seem plausible or at least not self-explanatory that the parties to a treaty can exclude the direct applicability of a treaty provision on the international plane. Furthermore, the U.S. practice of making declarations to human rights treaties upon ratification with the aim of

excluding their direct applicability does not seem feasible on the basis of an understanding of direct applicability as an issue regulated exclusively under domestic law. Thirdly, assuming that the issue of direct applicability is a question of domestic law, general statements regarding the criteria for direct applicability under domestic law can only be made with utmost caution. It is then up to the specific domestic legal order, and particularly the concrete constitutional arrangements of a specific state, to determine those criteria. Against this background, a number of assumptions made by Iwasawa seem at least questionable: Whether the view of the executive as to the direct applicability of a norm of international law would have to be taken into account by the courts, as Iwasawa proclaims (p. 179), is a question of the separation of powers and the distribution of competences within a specific domestic constitutional order and cannot be assumed to be a generally valid proposition for every domestic legal system. Similarly, whether the national legislature can exclude the direct applicability, assuming that it approves a treaty only under the condition of such an exclusion (p. 179 et seq.), is also a question which can be answered quite differently by different domestic legal orders. Many constitutional orders are rather sceptical with regard to legislation made under conditions so that the self-evident manner in which Iwasawa presents this assumption seems rather problematic. Similar doubts arise with regard to the understanding that the political question doctrine can in any way guide the determination of the direct applicability of international law within domestic legal systems (p. 189 et seq.). This doctrine has been developed specifically within the context of the U.S. legal system, and its general transferability into other legal systems is not a matter of course. While the criteria developed by Iwasawa are insightful and valuable from an analytical perspective, their universal validity as expressions of positive law are doubtful.

A final key point made by Iwasawa is that he rejects the proposition that the distinction between directly applicable and not directly applicable norms of international law is an 'all-or-nothing' or absolute process. He rather argues in favour of a relative approach according to which a norm can be directly applicable in some domestic contexts but not in others. He convincingly shows this possibility with the help of some examples but does not develop the concrete implications of this assumption more systematically. His distinction between positive and negative applications of international law is helpful but could have been framed as the distinction between positive and negative obligations under international law. A quite similar function is attributed to the distinction between exclusion effect and substitution effect: Direct applicability might more easily be assumed for international law when it serves as a standard of review for domestic law than when it is referred to in instances where no domestic legal rule applies.

IV.

The third part of the book expands the analysis from the direct applicability of international treaties to customary international law and acts of international organisations (Chapter 6) as well as to judgments of international courts (Chapter 7). Iwasawa quite readily acknowledges that customary international law can be directly applicable and rejects positions that claim the opposite. He points out, in a quite general manner, that some of the criteria developed for determining whether provisions of international treaties are directly applicable might not apply to customary international law. Acts of international organisations are meant to only be able to be directly applicable when they are legally binding and have legal force in the domestic order. Again, in the practice of courts and academic discussion, there is a lot of confusion as to whether and under what conditions such acts can be directly applicable in the domestic legal order.

Iwasawa devotes more attention to the question whether judgments of international courts can be regarded as directly applicable (Chapter 7). In this context he focuses on the implementation of judgments in specific cases and mentions the law-making dimension of international courts only briefly. Domestic law only rarely addresses the issue explicitly. Iwasawa points out the possibility of deriving the domestic effects of international court decisions through the domestic effect of those provisions of an international treaty which provide for the bindingness of the court decisions. His survey of different international courts and the practice of domestic courts in addressing the issue of their direct applicability again displays a practice characterised by uncertainty and confusion. The examples presented show a general reluctance by domestic courts to attribute direct applicability to the decisions of international courts. Implementation usually requires the legislature to become active or the assistance of existing domestic legislation. With regard to decisions of international supervisory bodies and United Nations (UN) human rights treaty bodies in particular, this reluctance is even stronger. Iwasawa, however, shows, how the practice of these bodies can influence the interpretation of international law and that their pronouncements have to be taken into account as a form of authoritative interpretation.

V.

In the short Conclusion of the book, Iwasawa summarises his main points concisely and again expresses his sympathy for a more coherent doctrine of direct applicability as well as for the willingness in particular of domestic courts to take international law more seriously in its implications for the

domestic legal order. With his book, Iwasawa has made a valuable contribution to the analysis of the issue of direct applicability of international law. His comparative studies of different legal orders reveal similarities and differences as well as common argumentative structures. Iwasawa's approach is characterised by conceptual clarity while at the same time, however, raising questions as to the concrete implications. The case studies presented show, moreover, that further differentiation of the legal phenomena discussed under the concept of direct applicability might be required. Against this background both the rich material provided by Iwasawa as well as his framework of analysis can serve as a starting point for further research and discussion of the concept of direct applicability of international law.

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