

Myths and Realities in 'Self-Executing Treaties'

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Abstract

There appears to be very few doctrines in contemporary international law that are in such a problematic state as the doctrine of self-executing treaties. It would appear that its usefulness is more in the debate it engenders than in its actual relevance to understanding the interface between international law and municipal legal systems. This is so because the term is variously applied to different circumstances and ascribed with varied meanings. One of the many meanings ascribed to self-executing treaties is that they are treaties that apply in the municipal realm on their own force, discoverable from the intent of the makers as expressed in the language of the treaty. This article queries that understanding and argues that, other than by municipal law, there is no mystical authority by which treaties are imposed on municipal legal systems and indeed municipal courts. We argue that any search for the authority of treaties in the municipal realm, ultimately leads to municipal law as the first point of focus.

Key terms

Self-executing, treaties, non-self-executing, constitution, municipal law, international law, monism, dualism.

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Introduction

The term “self-executing treaties” which was imported into the relationship between municipal law and international law by the United States Supreme Court in *Foster v. Neilson*,¹ has added more confusion to an increasingly

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¹ *Foster & Elam v. Neilson*, 27 U.S. 2 Pet. 253 253 (1829). For a detailed historical account see Yuji Iwasawa, (1985-1986) “The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis”, 26 *Virginal J. Int'l L.* 627.

complicated area of the relationship between international law and municipal law.² The confusion is manifested in variety of ways. As Riesenfeld noted:

The acceptance and status of the doctrine of the self-executing character of treaties in the legal order of the United States as well as in foreign legal systems is both an important and intriguing problem. It has confronted the courts with thorny ... issues and attracted the increasing attention of scholars of international law.³

In contemporary times, the pivotal position treaties occupy, not only in the affairs of States, but also of both the human and non-human components of our globalised world, has increased the need to unravel what is meant by the terms, 'self-executing' and 'non-self-executing' treaties with a view to understanding the definite role they are assigned, if any, in the relationship between municipal law and international law.

This article acknowledges the robust literature on the subject and argues that the arguments that treaties could be self-executing might be misplaced after all. The article argues that the concept is an abstract term that has no real practical bearing on the authority by which international law is applied in the municipal realm. This is so, insofar as it seeks to teach that a class of treaties possesses a magical wand by which it could transmute into the municipal realm as the law

² See Myres McDougal's (1952) (Remarks) 45 *Proceedings of Am. Soc'y of int'l L* 101, 102 (counselling that "this word 'self-executing' is essentially meaningless, and ...the quicker we drop it from our vocabulary the better for clarity and understanding"); Andrea Bianchi, (2004) "International Law and US Courts: The Myth of Lohengrin Revisited" 15(4) *EJIL* 751, 757 (noting "the state of 'judicial confusion' and 'doctrinal disarray' to which the doctrine of self-execution seemed to be relegated not too long ago"); David L. Sloss, (2012) "Executing *Foster v. Neilson*: The Two-Step Approach to Analyzing Self-Executing Treaties" 53 (1) *Harvard International Law Journal* 301, 311 (noting that the terms "self-executing" and "non-self-executing" are ambiguous"); Anthony Aust, (2010) *A Handbook of International Law*, (Cambridge University Press) 79, (noting that "the self-executing concept has led to considerable confusion and uncertainty"); Jordan J. Paust, (1988) "Self-Executing Treaties", 82 *Am. J. Int'l L.* 760, 768; Robert E. Dalton (2006) (Remarks) "Judicial Enforcement of Treaties: Self-Execution and Related Doctrines", 100 *Am. Soc'y Int'l L. Proc.* 439, 442, (observing that "when one looks at the literature and considers the practice, it is clear that 'self-executing' has become an ambiguous term devoid of generally accepted meaning"); Edward T. Swaine (2008) "Taking Care of Treaties" 108 *Colum. L. Rev.* 331, 353 (observing that "non-self-executing treaties [is] a label used in maddeningly inconsistent ways"); David Sloss, (1999) "The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties" 24 *Yale J. Int'l L.* 129, 131 (noting the multiple meanings and ambiguity of the term 'self-executing treaty').

³ Stefan A. Riesenfeld, (1973) "The Doctrine of Self-Executing Treaties and Community Law; A Pioneer Decision of the Court of Justice of the European Community" 67 *Am. J. Int'l L.* 504, 504.

of the realm without an enabling municipal law in the form of a general constitutional provision or specific legislative implementation. The paper also argues that the bulk of literature ascribing super-norm value to the so called 'self-executing treaties' is based on a false generalisation of the approach of courts of the United States (US) and that, in actual fact, not even in the US is there any such class of treaties capable of municipal application on their own force.⁴ The paper concludes that the supposition that there is a class of treaties that is 'self-executing' in the sense that it does not require any form of municipal law enabler is a myth that has made this area of international law really messy.

The first part of this article discusses the concept of self-executing treaties. The second part examines the confusion attendant upon seeking to read the concept into dissimilar constitutional provisions to those of the US. The third part seeks to understand when it can actually be said that a treaty is self-executing, and the last part considers the role to be ascribed to the intent of treaty matters.

1. The Concept of Self-Executing Treaties

Although this essentially American concept of 'self-executing treaties' was not used by the US Supreme Court until 1887, when Field J., used the term in *Bartram v. Robertson*,⁵ it is generally agreed that the concept actually arose from Chief Justice Marshall's view in *Foster v. Neilson*, wherein he declared that there is a class of treaties that "is carried into execution ... whenever it operates of itself",⁶ notwithstanding that it was not even used in the case.⁷

⁴ Ernest A. Young (2007) "*Sosa* and the Retail Incorporation of International Law", 120 Harvard Law Review Forum, 28, 34 (doubting "whether it is correct to say that U.S. courts ever applied international law 'of its own force'"); Lori F. Damrosch, (1991) "Role of the United States Senate Concerning Self-Executing and Non-Self-Executing Treaties - United States", 67 *Chi.-Kent. L. Rev.* 515, 516 (noting that the basic distinction between self-executing and non-self-executing treaties under US law is not beyond question or criticism and that it is essentially a judicial one, created by the courts to govern their own role with respect to treaties).

⁵ 124 US 190 (1887); Contra: Sloss, "The Domestication" *supra*, note 2, p. 146 (stating that the earliest use of the term 'self-executing' in the sense of requiring implementing legislation appears to have been in *Whitney v. Robertson* 124 U.S. 190 (1888)) It is however instructive to state that both cases were decided by Field J., who actually cited *Bartram v. Robertson* in *Whitney v. Robertson*.

⁶ Foster, *supra* note 1.

⁷ See *Malvina Halberstam*, (2005) "*Alvarez-Machain II*: The Supreme Court's reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights", 1 *J. Nat'l Sec. L. & Pol'y* 89, 96 (arguing that "[a]lthough the proposition that in the United States treaties may be either

In *Foster v. Neilson*, the Supreme Court was called upon to consider the effect upon perfected private land titles of the phrase “shall be ratified and confirmed to those in possession”, which appeared in article 8 of the Treaty of Amity, Settlements and Limits between the US and the King of Spain, of February 22, 1819. Justice Marshall reasoned that as the language was that of contract, the article required legislative implementation before the titles could be assured to their possessors. Marshall made the following statement that has now translated to self-executing and non-self-executing treaties:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whatever it operates of itself without the aid any legislative provision. But when the terms of the stipulation import a contract – when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.⁸

In *United States v. Percheman*,⁹ while considering the Spanish version of the same provision, the Marshall’s court took a different view, holding that although the words “shall be ratified and confirmed” are properly the words of a contract, stipulating for some future legislative act,¹⁰ they are not necessarily so, as they may import that they “shall be ratified and confirmed” by force of the instrument itself.¹¹ In effect, the instrument was held to be self-executing in *Percheman* but non-self-executing in *Foster*. In rationalising the conflicting decisions in the cases, the court explained that the Spanish version of the treaty was not brought into view in *Foster* and that it was then supposed there was no variance between them.¹²

self-executing or non-self-executing is generally attributed to Chief Justice Marshall's decision in *Foster & v. Neilson*, the terms ‘self-executing’ and ‘non-self-executing’ do not even appear in the opinion”); Penny M. Venetis, “Making Human Rights Treaty Law Actionable in the United States: The case for Universal Implementing Legislation”, 63(1) *Alabama Law Review*, 97 (noting that although the term “self-execution” was not formally used until 1887, the theory was elaborated upon by Justice Marshall in *Foster v. Nielson*). It would, however, appear Justice Marshall was influenced by Justice Iredell’s classification of treaties into ‘executed’ and ‘executory’ in *Ware v. Hylton*, 3 U.S. 199, 274 (1796).

⁸ *Foster*, *supra* note 1, p. 314.

⁹ *United States v. Percheman*, 32 U.S. (7 Pet) 51, 89 (1833).

¹⁰ *Id.*, p. 88-89.

¹¹ *Ibid.*

¹² *Id.*, p. 89; Stotter has however argued that the two cases are compatible since both were based on the same constitutional theory of separation of power, which prevented Marshall from considering the treaty as self-executing in *Foster*, but that separation of power posed no problem in *Percheman* due to the clarity of the treaty provisions – Charles W. Stotter,

The summary of the approach of the court in the cases was: if it could be collected from the language of the treaty that the parties intended it to operate within municipal sphere on its own force without the enablement of municipal law, the treaty would pass for a self-executing treaty – *Percheman*. Otherwise, it would require a national legislation to give it effect – *Foster*. Though it seems the decisive factor on these occasions was the language of the treaty, we argue that a careful analysis would clearly show that the decisive factor was the provision of the US Constitution.

The relevant provisions of the Constitution of the United States are in article VI, which provides:

This constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The views to be expressed hereafter concerning these provisions are not aimed at supplanting or even resolving the opposing interpretations the provisions have received but to emphasise the view also shared by many American scholars, that the American Constitution and not treaties belies the patently irreconcilable views on the application of treaties in the United States.¹³ We simply seek to

(1975-1976) (Comment) “Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem”, 25 *Buff. L. Rev.* 773, 775.

¹³ See Carlos Manuel Vázquez, (2008) “Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties”, 122 *HARV. L. Rev.* 599, 602, 606, (arguing that the Supremacy Clause renders treaties, like statutes and the Constitution, presumptively enforceable in U.S. courts); Martin S. Flaherty, (1999) “History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”, 99 *Colum. L. Rev.* 2095 (arguing that the prevailing view that the Founders intended treaties to be self-executing is supported by history, in particular the text of the Supremacy Clause; the votes and debates at the Constitutional Convention; and ratification evidence); Zechariah Chafee Jr.,(1951-1952) “Amending the Constitution to Cripple Treaties” 12 *Louisiana L. Rev.* 345, 356-357 (noting the existing US constitutional principle, by which most American treaties are self-executing and that article VI renders treaties binding on every state judge and that a treaty will usually take effect automatically in the United States as no act of Congress is required to implement it.); Quincy Wright, (1916) “The Legal Nature of Treaties”, 10 *Am. J. Int’l L.* 706, 719 (arguing that “[t]he Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the Government to carry it into complete effect, according to its terms...”); Leonie W. Huang, (2011) “Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties”, 79 *Fordham L. Rev.* 2211, 2213-2214 (arguing that “[a] plain reading of the first part of the Supremacy Clause implies that

emphasise that the primary focus of US Courts, albeit latent in some cases, has always been the Constitution and not treaties.

In our view, the language of article VI provides sufficient scope for the conclusion that “so long as treaties and laws remain in full force ... the judicial power can exercise no discretion in refusing to give effect to those laws ... unless they shall be deemed unconstitutional”.¹⁴ This supports the view that “a treaty ... by the express words of the constitution, is the supreme law of the land, binding alike National and state Courts... and must be enforced by them ...”.¹⁵ These confirm the view that a validly made treaty to which the US is a party is generally¹⁶ applicable in the US as the “law of the land”, without the need for an implementing legislation.¹⁷ This has the correct construction of article VI for

‘Treaties’ are, by themselves, the ‘supreme Law of the Land’ in the same way as the ‘Constitution’ and statutory ‘Laws of the United States.’ And that “[t]he clause does not say that a treaty needs a ‘Law of the United States’ to be” the supreme law); *Halberstam, “Alvarez-Machain II”, supra*, note 7, p. 96 (arguing that the history of article VI “makes clear that the Framers intended treaties to have immediate effect as domestic law and to be interpreted and applied by the courts ‘like all other laws’”); Phillip R. Trimble (1985-1986) “A Revisionist View of Customary International Law” 33 *UCLA L. Rev.* 665, 676 (arguing that the supremacy clause provides a constitutional basis for the application of treaties as the law of the United States); Michael John Garcia, “International Law and Agreements: Their Effect upon U.S.” January 23, 2014 Congressional Research Service 7-5700 <www.crs.gov> RL32528, p. 8. Contra: John C. Yoo, (1999) “Globalism and the Constitution: Treaties, Non-Self Execution, and the Original Understanding”, 99 *Colum. L. Rev.* 1955, (supporting a presumption of non-self-execution on the grounds that neither the Supremacy Clause nor its history indicate that the status of a treaty as the supreme law of the land was to be achieved through direct judicial enforcement, and that non-self-execution allows the political branches necessary discretion to conduct foreign policy – p. 1971); John C. Yoo, “Treaties and Public Law making: A Textual and Structural Defense of Non-Self Execution”, 99 *Colum. L. Rev.* 2218, 2236 (expressing the fear that “[i]f the United States forges multilateral agreements addressing problems that were once domestic in scope, treaties could replace legislation as a vehicle for domestic regulation”. He further argued (at p. 2237) that “[m]aking treaties self-executing [could] create a potentially limitless executive power”); David H. Moore (2009) “Law (Makers) of the Land: The Doctrine of Treaty Non-Self-Execution” *Harvard Law Review*, Vol. 122, 32, 33.

¹⁴ *Worcester v. Georgia*, 31 U.S (6 Pet) 515, 593 (1832).

¹⁵ *Maiorano v. Baltimore & Ohio R.R.*, 213 U.S 268, 272-73 (1909).

¹⁶ There are always certain classes of treaties that cannot be applicable in a domestic order without domestic legislation irrespective of whether the domestic order is monist or dualist in nature. Examples are treaties requiring alteration of domestic law, treaties imposing financial burden on the State, etc.

¹⁷ In *Ware v. Hylton*, *supra*, note 7, the court directly applied the 1783 Peace Treaty between the US and Britain). The same approach prevailed in *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 456–57 (1806); *The Paquete Habana* 175 US 677, 700 (1900). Also see *Hamilton v. Eaton*, 11 F. Cas. 336, 340 (C.C.D.N.C 1792) (Case No. 5, 980) p. 764

there to have been several attempts directed towards amending it to make implementing legislation mandatory. The much discussed Bricker Draft Amendment¹⁸ and the American Bar Association proposal¹⁹ are examples of such failed attempts.

The practice by which the US Senate accompanies treaty ratification with “non-self-executing” declarations would be an expensive waste of time had the US Constitution required implementing legislation for a treaty to create municipally enforceable rights in the US. A treaty negotiated by the executive branch requires a two-thirds majority of the US Senate for it to be binding on the US. The US Senate has often exercised its power in the treaty making process, not only to reject treaties, but also to circumscribe the domestic application of ratified treaties through the machinery of reservations, understandings and declarations (RUDS). By accompanying ratification with a ‘non-self-executing’ declaration, the US Senate effectively blocks the application of a ratified treaty as a ‘law of the land’ through the constitutionally prescribed treaty making procedures by subjecting it to further legislative scrutiny involving the House of Representatives. Accordingly, a “treaty deemed non-self-executing would first require the consent of two-thirds of the US Senate and a second round of consent by a majority of both the Senate and the House of Representatives”.²⁰

(declaring that a treaty, “being ratified and made ... became a complete national act and law of every state”.) *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Chief Justice Marshall affirming that “[i]f the law [a treaty] be constitutional I know of no court which can contest its obligation”).

¹⁸ Sloss, “Domestication”, *supra*, note 2, p. 173 (stating that the ‘Bricker Amendment’ refers to a series of proposals for constitutional amendments, several of which were sponsored by Senator John Bricker, attempting, in different ways, to limit the domestic legal effects of treaties and other international agreements. Also see Chafee, *supra*, note 13, 350; Damos Dumoli Agusman (2013-2014) “Self-Executing and Non Self Executing Treaties what does it Mean?” 11 *Indonesian J. Int'l L.* 320.

¹⁹ Chafee, *supra* note 13, p. 356.

²⁰ Huang, *supra* note 13, p. 2223; Louis Henkin, (1996) *Foreign Affairs and the U.S. Constitution*, 202 (2d ed.) (noting that RUDs are “anti-Constitutional’ in spirit and highly problematic as a matter of law”); Thomas Buergenthal, (1997) “Modern Constitutions and Human Rights Treaties”, 36 *Colum. J. Transnat'l L.* 211, 221, 222 (arguing that “it may seriously be doubted” that “the non-self-executing declaration is constitutional” and that the “U.S. declarations making human rights treaties non-self-executing are ill advised and probably unconstitutional”); Lori Fisler Damrosch, (1991) “The Role of the United States Senate Concerning “Self-Executing” and ‘Non-Self- Executing’ Treaties”, 67 *Chi.-Kentl. Rev.* 515, 599 (arguing that “[a] Senate declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution”); Louis Henkin, (1995) “U.S. Ratification of Human Rights Conventions: The Ghost of Senator

Instead, therefore, of the monist²¹ approach of the US Constitution,²² the classification of treaties as non-self-executing appears to be the dominant practice of the US Senate.²³ Nevertheless, rather than weaken, the very act of expressly declaring a treaty as ‘non-self-executing,’ the non-self-executing

Bricker”,⁸⁹ *Am. J. Int'l L.* 341, 348 (stating that “[t]he pattern of non-self-executing declarations threatens to subvert the constitutional treaty system”); Louis Henkin, (1997) “Implementation and Compliance: Is Dualism Metastasizing?” *91 Am. Soc’y Int’l L. Proc.*, 517, 517 (noting that self-executing declarations constitute an application of “the transformation-dualist approach” which is against the monist construction of Article VI of the United States constitution); Stefan A. Riesenfeld & Frederick M. Abbott, (1991) “The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties”,⁶⁷ *Chi.-Kent L. Rev.* 571, 599; (arguing that “[a]n ancillary power of the Senate to deny self-execution directly contradicts” the intent the framers of the Constitution that treaties be given direct effect in U.S. law...”); *Halberstam, “Alvarez-Machain II”*, *supra*, note 7, p. 98 (arguing that the proposition that a treaty cannot be enforced by the courts because the President or Senate declares that it is not self-executing ... is inconsistent with the view expressed by Marshall” and “clearly contravenes the command of the Constitution that *all* treaties are the supreme law of the land and the judges of every state shall be bound thereby”); Charles H. Dearborn II, (1979) (Note), “The Domestic Legal Effect of Declarations That Treaty Provisions Are Not Self-Executing”,⁵⁷ *Tex. L. Rev.* 233, 233-234 (arguing that “declarations [making a treaty non-self-executing] are of dubious validity”); Malvina Halberstam, (1997) “United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women”,³¹ *Geo. Wash. J. Int’l L. & Econ.* 49. Contra: Carlos Manuel Vázquez, (1999) “Laughing at Treaties” 99, (8) *Columbia Law Review*, 2154, 2174, (though stating that “[t]he doctrine as reflected in ... [non-self-executing] declarations is clearly in tension with the Supremacy Clause's text”, he did not consider the declarations to be illegal. To him, if the Senate can make treaties non-self-executing, then “[t]he Supremacy Clause becomes a default rule, subject to reversal through the acts of the treaty makers”).

²¹ Monism holds that municipal law and international law belong to a single order in which international law is supreme. Monism is patterned after the direct application of international law in the municipal realm without the need of legislative incorporation.

²² CF. Louis Henkin (1986-1987) “The Constitution and United States Sovereignty: A Century of *Chinese Exclusion* and its Progeny”, 100 *Harv. L. Rev.* 853, 868 (noting that the U.S Constitution did not indicate a predominantly monist disposition); Sloss, “Domestication”, *supra*, note 2, p. 148 (arguing that the automatic incorporation of treaties into the U.S domestic law does not necessarily mean that judges can rely on them to provide a rule of decision in a case).

²³ Trimble, *supra*, note 13, p. 677 (expressing the reluctance of U.S courts to enjoin federal executive officials from a treaty violation by holding the treaty to be “non-self-executing.”); Henkin “The Constitution”, *ibid*, p. 870 (observing that it is unlikely that the U.S. Supreme Court would subordinate the Constitution to the law of nations and give effect to a principle of international law without regard to constitutional constraints and that the Court's jurisprudence about treaties places the United States outside the strict monist camp).

stipulations strengthen the argument that the US Constitution is monist in nature.

In spite of the diversity of application of the text of article VI and the judicial decisions thereon, the constitutional rule is that treaties are generally directly applicable in the US and that the concept of 'non-self-execution' is an exception to this general rule.²⁴ It could also be seen that this constitutional rule has been circumscribed and made doubtful by the judiciary in respect of some treaties and by the Senate in respect of others. The notion of self-execution through a distinction between treaties that are effective by the force of the language used and those that are not is one of the many devices the courts have so far deployed.²⁵ Nevertheless, the US Courts appear convinced that their role is not to deny that treaties are the laws of the land as per the Constitution; this necessarily limits their roles to deciding whether ordinarily applicable treaties require any post-ratification legislative or executive action to give them proper effect. In totality, it could be asserted that the US Constitution is monist in theory but potentially or semi monist in practice.

2. Made in the US – Not Suitable for Export

If the doctrine of 'self-execution' has complicated article VI of the US Constitution and made its true import perpetually difficult to grasp after over two Centuries of its existence, it goes without saying that States importing the

²⁴ Paust, "Self-Executing Treaties", *supra*, note 2, p. 774.

²⁵ Paust, *ibid* p. 760 (arguing that "[t]he distinction found in certain cases between "self-executing" and "non-self-executing" treaties is a judicially invented notion that is patently inconsistent with express language in the Constitution..." and that "such a distinction may involve the most glaring of attempts to deviate from the specific text of the Constitution"); Carlos M. Vazquez, (2006)(Introductory Remarks) "Judicial Enforcement of Treaties: Self-Execution and Related Doctrines" 100 *Am. Soc'y Int'l L. Proc.* 439 (stating that "the concept of a non-self-executing treaty masks several distinct types of reasons why a treaty might not be judicially enforceable even though it is the "supreme Law of the Land"); Stotter, *supra* note 12, 773 (noting that despite the constitutional grant of supremacy, the operation of treaties as domestic law has been judicially circumscribed); Vázquez, "Laughing at Treaties", *supra*, note 20, p. 2175 (arguing that the "declaration that treaties have the force of domestic law remains the default rule ... But judicial precedent requires, at most, the acceptance of a power to countermand the ordinary operation of the Supremacy Clause"). For examples of the application of the non-self-executing device, see *Sosa v. Alvarez-Machain* 542 U.S. 692, 727 (2004); *United States v. Gonzalez*, 776 F.2d 931, 937-38 (11th Cir. 1985); *United States v. Postal* 589F.2d862, 875 (5th Cir. 1979); *Correctional Services Corp v. Malesko*, 53, U.S 68 (2001); *Alexander v. Sandoval*, 532 U.S 275, 286-287 (2001).

concept stand to share in the congenital disease of imprecision that it carries.²⁶ Its imprecision, notwithstanding, ‘self-execution’ has readily been read into monist constitutions²⁷ with even the very rare, if not strange, example of section 234(1) of the South African Constitution, 1996,²⁸ which expressly adopted the doctrine. Essentially, Section 231(4) provides:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

As recognised by South African scholars, the major difficulty with copying “this essentially American doctrine”²⁹ which flows from the disparate understanding of the term ‘self-executing’, is that the constitution failed to pinpoint which of the various understanding of the term is intended to govern its application as a constitutional rule.³⁰

It is thus difficult to comprehend the role the Constitution assigns to ‘self-execution’ in the pre-existing case law represented by *Pan American Airways Incorporated v SA Fire and Accident Insurance Co Ltd*³¹ line of cases. Is self-

²⁶ Riesenfeld, “The Doctrine of Self-Executing Treaties and Community Law”, *supra*, note 3, p. 504 (noting that the acceptance and status of the doctrine of self-executing character of treaties in the legal order of the US as well as in foreign legal systems is both an important and intriguing problem).

²⁷ Yuji Iwasawa (1997) “International Law in the Japanese Legal Order: Recent Developments” 91 Proceedings of the Annual Meeting (American Society of International Law, 301, 303 (observing that, “Japanese scholars have recognized the distinction between self-executing and non-self-executing treaties since the 1950s” and that “Japanese courts have been using the term self-executing since 1985”); Stefan A. Riesenfeld, (1971) “The Doctrine of Self-Executing Treaties and Gatt: A Notable German Judgment”, 65(3) Proceedings of Am. J. Int’l L, 548, 548 (noting the application of the “self-executing” concept in Germany).

²⁸ Effective from 4 February, 1997. It would appear that these provisions substantially altered the similar provisions of the interim constitution of 1993. See Dermott J. Devine, (1995) “The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993”, 44 *Int’l & Comp. L. Q.* 1.

²⁹ John Dugard, (1994) *International Law: A South African Perspective* 345 cited in Nevile Botha (1997) “Treaties After 1996: More Questions than Answers”, 22 *S. Afr. Y.B. Int’l L.* 95, 99.

³⁰ Andre Stemmet, “A future African Court for Human and People’s Rights”, 23 *S. Afr. Y.B. Int’l L.* 233, 244 (1998) (noting that “a measure of uncertainty exists about the definition of a self-executing agreement in South African law”) George N Barrie, (1995) “Self-Executing v Non-Self-Executing Treaties: The Confusion Continues”, *J. S. Afr. L.* 368, 370 (referring to the “confusing jurisprudence in the United States over the difference between self-executing treaties...and non-self-executing treaties”).

³¹ 1965 3 SA.

execution to be understood to permit the application of unincorporated treaties³² or is it to operate within the already established paradigm of incorporation? *Pan American Airways Incorporated v SA Fire and Accident Insurance Co Ltd* represent the “general rule [that] the provisions of a treaty are not embodied in the municipal law except by legislative process” and that they cannot, in the absence of any enactment giving them the force of law, affect the rights of the subject.³³

While the first limb of the provision did not substantially deviate from the pre-existing practice of incorporation as represented by *Pan American Airways Incorporated*, the second limb maps out an opposite gateway that potentially opens up the South African legal system to the application of more treaty provisions than the *Pan American Airways Incorporated* principle could admit. This becomes even clearer when the second limb of article 231(4) is read together with article 231(2), which specifies that an international agreement binds the republic upon “approval by resolution of both the national assembly and the national provinces...”. Together, these provisions make ‘self-executing’ provisions in all treaties that are binding upon South Africa automatically applicable without incorporation, by obviating the second parliamentary action required for treaties to be domestically applicable under the first limb of 231(4). Importantly, the parliamentary resolution required in section 231(2) must accompany all treaties that are binding on South Africa and this is different from the legislative action required to give treaties municipal application in the first limb of 231(4). According to Botha, section 231(4) provides not merely for the automatic application of self-executing treaties as a whole, but also for the automatic application of any 'self-executing provision' in a treaty, and thus opens “the door not only to the piecemeal application of treaty provisions, but also to the application of certain provisions of an unincorporated treaty”.³⁴

It would appear, however, like article VI of the US Constitution, that section 231 provisions are not such that can be successfully explained on the bare letters of the South African Constitution, the best explanation would await what practice the legislature and the courts make of them. In drawing an analogy between the US and South Africa, it is important to state that the ‘self-executing’ concept cannot be utilised in South Africa in the same way that it

³² See *Trans World Airlines, Inc. v. Franklin Mint Corp.* 466 U.S. 243, 252 (1984) (holding that no domestic legislation is required to give being self-executing treaties the force of law in the United States.

³³ *Ibid*, p. 150A; *Maluleke v Minister of Internal Affairs* 1981 1 SA 707, 712(H)(BSC) (holding that “if legislation is passed to give effect to a treaty, that will be the source of a citizen's rights”).

³⁴ Botha, *supra*, note 29, p. 99; Christa Roodt (1987-1988) “National Law and Treaties: An Overview” 13 *S. Afr. Y.B. Int'l L.* 72, 99.

could be applied in the US. This is because the US Constitution declares treaties to be the law of the land, thus giving all treaties entered into by the US a potential domestic force. The absence of a similar provision in South Africa makes it less likely for South African courts to be called upon to enforce just any treaty that is binding on South Africa and this of course also makes it less likely for the courts to utilise the second limb of section 231(4) to hold that an incorporated treaty is applicable as a ‘self-executing’ treaty.

The self-executing argument has also accompanied article 15(4) of the 1993 Russian Constitution, which provides:

The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Speaking of this provision, Danilenko described “the emerging Russian concept of directly applicable or self-executing treaties”.³⁵ In fairness to that view, when taken in isolation, article 15(4) bears a certain similarity with article VI of the US constitution as it opens a broad gateway to the passage of treaties into the Russian Federation. This is, however, countermanded by article 15(3) which makes the application of all laws, without exception, conditional upon publication. Article 15(3) thus obviates the need for nationalist judges and scholars to find the notion of ‘self-execution’ handy for the restriction of the article 15(4) treaty highway for the purpose of “turn[ing] ...[the] monistic state into a dualistic one”.³⁶

The requirement of publication, which usually features in monist constitutions, provides a safety valve which is lacking in the US Constitution and for which reason, the distinction between self-executing and non-self-executing treaties, has understandably been resorted to in the US.

It is thus arguable that a judge can safely refuse to recognise and apply the monist article 15(4) to “international treaties and agreements of the Russian Federation”... [as] a component part of its legal system”, unless and until such a treaty is published in compliance with article 15(3). It should thus be supposed that the requirement of publication, does for the Russian Federation, what the notion of ‘non-self-execution’ does for the United States –it gives the Federation the opportunity to either publish the treaty as it is or to simply reproduce the treaty provision in a legislative instrument. Pending publication, there would also be the opportunity to undertake necessary legal reforms to eliminate any

³⁵ Gennady M. Danilenko, (1997) “International Law in the Russian Legal System” 91 *Proceedings of the Annual Meeting (American Society of International Law)*, 295, 298.

³⁶ *Id.*, p. 298.

incompatibility that may have otherwise arisen, or adopt legislation, when necessary. The question is not whether treaties are directly applicable under the constitution, for they are; it is whether they have municipal force of law.³⁷

In view of the points we have just made concerning the requirement of publication, it is arguable whether –as claimed by Preuss– article 26 of the French Constitution, 1946, is “[t]he most familiar example of a recent constitution providing expressly for self-executing treaties”.³⁸ Article 26 provides that:

Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to insure their ratification.³⁹

To argue that this provision, which is the *avant garde* of monist constitutions and after which many constitutions are modelled,⁴⁰ expressly enacts self-executing treaties is not to give sufficient attention to the fact that ‘self-execution’ is an artificial judicial device employed to negate the monistic provision of article VI of the US Constitution. Our observation was even confirmed by Preuss, who, while commenting further on article 26 of the French Constitution, argued that “[i]nstances in which treaties might in the United States be non-self-executing, suffice to integrate the treaty into the internal legal order of France”.⁴¹ To read ‘self-execution’ into the French constitution, therefore, is to deny that constitution its most essential attribute as the forerunner of monism.

Danilenko’s view of the Russian Constitution, section 231(4) of the South African Constitution and Preuss’ view of the French Constitution are examples of attempts to clothe Marshall’s ideal of ‘self-execution’ with an aura of generality for which it is not suited. This can only further distort the

³⁷ Iwasawa, “International Law in the Japanese”, *supra*, note 27, p. 303 (arguing that the question “[w]hether international law can be directly applied in domestic law should be distinguished from whether international law has the force of law in domestic law”)

³⁸ Lawrence Preuss, (1953) “On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties” 51 *Michigan Law Review*, 1117, 1124.

³⁹ This has now been replaced by article 55 of the Constitution of October 4, 1958, which provides that “[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party”, which is merely a more precise version that is substantially the same as article 26 of the 1946 Constitution.

⁴⁰ See article 222 of the Constitution of the Republic of Chad, 1996; article 116 of the Constitution of the Republic of Mali, 1992; article 147 of the Constitution of the Republic of Benin, 1990; etc.

⁴¹ Preuss, *supra* note 38, p. 1126.

understanding of the constitutional context of its application in the US and create more confusion for non-US practitioners. In view of this, Paust accused legal commentators of distorting Marshall's meaning and creating "tests concerning self-executing and non-self-executing treaties that are patently inconsistent with the text of the [US] constitution ... and earlier judicial opinions".⁴²

One of the grounds on which the theory of 'self-executing' treaties have been extended beyond the US domestic sphere is on a flexible interpretation of the decision of the Permanent Court of International Justice (PCIJ) in the *Jurisdiction of the Court of Danzig*.⁴³ Noting the impropriety of taking Marshall's approach out of its natural habitat – the US Constitution – Iwasawa directly placed the blame upon European scholars, whom he seems to accuse of misunderstanding the term 'self-executing treaties' to mean treaties which create individual rights that are enforceable in national courts. He argued that the concept of self-executing treaties underwent a conceptual transformation when it was embraced by European scholars as a result of their reliance on *Jurisdiction of the Court of Danzig*.⁴⁴

In the *Danzig case*, the PCIJ held –respecting the Danzig-Polish Agreement, made pursuant to the Treaty of Versailles of 1919– that "the very object of an international agreement ... may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts".⁴⁵ The dispute was between Poland and the Free City of Danzig established pursuant to article 100 of the Versailles Treaty. The opinion of the PCIJ was sought respecting the interpretation of the "*Beamtenabkommen*",

⁴² Paust, "Self-Executing", note 2, p. 768. See p. 767 for Paust's interpretation of Marshall's view of self-executing treaties.

⁴³ *Jurisdiction of the Courts of Danzig*, Permanent Court of International Justice, 1928, PCIJ Series B, No. 15 (Judgment of March 3).

⁴⁴ *Ibid*; Iwasawa, "The Doctrine of Self-Executing Treaties in the United States" *supra* note 1, pp. 631 646 and 650 (the writer also accused European scholars of "laboring under the continuing influence of the Danzig..." decision). See Richard Plender, (1983) "The European Court as an International Tribunal", 42(2), *Cambridge Law Journal*, 279, 287, (observing the insufficient appreciation that Court of Justice of the European Union (CJEU)) *sub silentio* derived "the doctrine of direct effects (or direct applicability)" from the PCIJ and that the CJEU had "in its celebrated judgment in Van Gend en Loos, followed the reasoning and even adopted some of the language of the Advisory Opinion in the Danzig Railway Officials case"); Jack Solomon, (1951-1952) (Note) "When Are Treaties Self-Executing?" 31 *Neb. L. Rev.* 463, 473-474 (arguing that the test of intent developed in the US concerning article VI of the Constitution, seems to be the same as the test utilized by the PCIJ in the *Danzig* case and that the PCIJ held that "the treaty was intended to be self-executing").

⁴⁵ *Danzig*, *supra* note 43, pp. 17-18.

which was a treaty between Poland and Danzig for the regulation of conditions of work for officials employed by the Polish Railways Administration in Danzig. The question before the PCIJ was whether individuals could, based on the provisions of the treaty, pursue a private claim before the courts of the Free City of Danzig. Poland had argued that the *Beamtenabkommen*, being an international agreement, created rights and obligations between the contracting Parties only, and that failing its incorporation into Polish national legislation, the *Beamtenabkommen* cannot create direct rights or obligations for the individuals concerned. In consequence, Poland argued that if it failed to respect its international obligations arising under the *Beamtenabkommen*, it is responsible only to the Free City of Danzig and not to the individual claimants before the courts of Danzig.⁴⁶

The PCIJ held that a treaty “cannot, as such, create direct rights and obligations for private individuals” but that such a right could be created if it was the intention of the parties so to create. Therefore, the court reasoned that the “wording and general tenor of the *Beamtenabkommen* show that its provisions are directly applicable as between the officials and the Administration” of the Polish Railway.⁴⁷

It is possible to misunderstand the reasoning of the court in this case and thus wrongly use it as a substratum for the acceptance of the concept of self-executing treaties outside the parameters of its creation in the US. On a closer look, however, one cannot but come to the inevitable conclusion that the *Beamtenabkommen* presented peculiarities which are hardly shared by contemporary international agreements. Its peculiarities were the decisive factors for the decision of the court. It is thus essential to consider the decision of the court in the light of the finding that the *Beamtenabkommen* was not just an international agreement between Poland and Danzig but (most importantly) that it formed “part of the special regulations which govern the relations between the Polish Railways Administration and the officials concerned”.⁴⁸ In fact, the court accepted that the *Beamtenabkommen* constituted part of their “contract of service”. It was this finding that gave the railway officers the right to litigate the provisions of the treaty before the courts of Danzig.⁴⁹ They were thus litigating the terms of the treaty as incorporated into their contract of service.

The Danzig case cannot be used to justify the existence of the concept of self-executing treaties outside the monist line of thought that governed

⁴⁶ Id., p. 17.

⁴⁷ Id., p. 18.

⁴⁸ Id., p. 20.

⁴⁹ Id., p. 21.

Marshall's approach in *Foster*. Besides, we only need to remind ourselves of the numerous treaty instruments intended, not only to create private rights but also to be effective municipally, and of which no one is under any illusion that they can be applied without a municipal law stipulation to that effect. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) testify to the shaky foundation of such vigorous interpretation of the *Danzig case*. Though crafted to benefit individuals, these covenants are not ascribed with a self-executing character. There is no doubt that States have the faculty to enter into treaties with the intention to create private rights which are capable of enforcement by private parties in their courts,⁵⁰ the pertinent question is always whether that capability is activated by state parties in their municipal law in any particular case.

Only recently, the ICJ refused to give credence to this supposed notion of 'self-execution' that seeks to enforce international law in the municipal realm independent of municipal law. This was in *Avena and Other Mexican Nationals*.⁵¹ In this case, Mexico brought an Application instituting proceedings against the United States of America for "violations of the Vienna Convention on Consular Relations" (VCCR) of 24 April 1963.

It was the case of Mexico that the United States, in arresting, detaining, trying, convicting, and sentencing 54 Mexican nationals to death, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided for in articles 5 and 36, respectively, of the VCCR. As a consequence, Mexico claimed, *inter alia*, *restitutio in integrum* and restoration of *status quo ante*, by re-establishing the situation that existed before the detention, trial, convictions and sentencing of the Mexican nationals in violation of the United States international legal obligations.

In its decision, the ICJ held that the United States was in breach of its international obligation towards Mexico under the VCCR for failing to notify the appropriate Mexican consular post of the detention of the Mexican nationals and thereby depriving Mexico of the right to render the assistance provided for by the VCCR to the individuals concerned.⁵² The court directed the US to "provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to *the violation of the rights set forth in the Convention*".⁵³

⁵⁰ *Head Money case*, 112 U.S 580, 598 (1884).

⁵¹ (*Mexico v. United States of America*), ICJ Rep.2004, 12, 36, para 40.

⁵² *Id.*, p. 71, para 153 (4) and (5).

⁵³ *Id.*, p. 72, para 153(9).

In one of the consequential proceedings at the Supreme Court of the United States –*Medellin v. Texas*⁵⁴– the court refused to implement the ICJ judgment and Medellin was executed. Upon the failure of the Mexican citizens to obtain reprieve through judicial means in the US, Mexico returned to the ICJ in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*,⁵⁵ wherein Mexico sought an interpretation of the judgment with a view to showing that the failure of the US Supreme Court to enforce the earlier judgment⁵⁶ was a violation of the obligation on the US to comply with the judgment of the court under article 94(1) of the United Nations Charter.

In its arguments in the proceedings on *Request for Interpretation*,⁵⁷ Mexico argued that the United States had an obligation of result under paragraph 153(9) of the earlier judgment and that the United States must provide review and reconsideration of the conviction and sentencing of the Mexican Nationals.⁵⁸ The United States argued that the question as to whether or not ICJ judgments could be treated as authoritative for US courts was strictly a matter of United States domestic law.

In its decision, though finding that the execution of Medellin was a clear breach of its judgment in the main *Avena case*, the court reasoned that:

The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9)..., the judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of an appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law.⁵⁹

⁵⁴ *Medellin v. Texas*, (2008), Supreme Court Reporter, Vol. 128, 2008, 1346; *Sanchez-Llamas v. Oregon*, 548 US 331 126 S. Ct. 2669 (2006) (rejecting the argument that international tribunal judgments have direct domestic effect, the Supreme Court held that the available remedies for violation of international law was a question of domestic law. Also, that the ICJ decisions can neither compel it to reconsider its understanding of the VCCR Convention nor dictate domestic court opinions); CF Swaine, *supra*, note 2, p. 378-379 (while arguing that the United States is obligated as a matter of international law to adhere to the decision of the ICJ under article 94 of the Charter, noted that the article seems to fall comfortably within the category of non-self-executing obligations).

⁵⁵ (*Mexico v. United States of America*), ICJ Rep, 2009, 3.

⁵⁶ *Avena case*, *supra*, note 51.

⁵⁷ *Supra*, note 55.

⁵⁸ *Id.*, p. 6, para 9.

⁵⁹ *Id.*, p 17, para 44.

In other words, notwithstanding that the judgment affirmed the rights of the affected Mexican nationals to receive nullification of their earlier trial for violation of Mexican's right to consular representation, and notwithstanding that the requirement of consular representation in the VCCR was made with the intention of benefiting nationals of the parties to the Convention, both the US Supreme Court and the ICJ could be seen to have come to the same conclusion that the true test of the municipal effect of the *Avena* judgment is located within the law of US. Interestingly, the US Supreme Court simply based its view in *Medellin* on the reasoning that article 94 of the United Nations Charter, which underpinned the authoritative force of the judgment for States, is not self-executing in the US.⁶⁰

Having shown that *Danzig* cannot be the basis for generalising self-execution and exporting it to every monist legal system –to furnish consideration for the argument that treaties creating individual rights are self-executing in the sense of applying as municipal law on their own force⁶¹ we shall now seek to understand what self-execution actually means.

3. When is a Treaty Self-Executing?

Major problems associated with the doctrine of 'self-execution' arise from cases and scholarly works that promote it. This is the result of the intricate problem of the absence of a clear understanding of 'self-execution' and that of the absence of a coherent method of determining the qualities a treaty should possess or lack for it to be declared self-executing or otherwise (assuming municipal law plays no part). This is particularly so as judicial and academic opinions from the United States (in which the doctrine has had its greatest use) is hardly consistent and increasingly gets as confusing as it could get with every treaty that is declared non-self-executing in the US courts. The non-self-executing conclusion has indeed been one to which so many winding paths lead.

The question as to when a treaty is 'self-executing' therefore receives as many answers as the different notions underlying the doctrine so much so that one cannot understand what a writer or a judge means by 'self-executing' without first seeking to know their shared or peculiar perspective to it. As aptly captured by Dalton:

⁶⁰ *Medellín*, *supra* note 54. There have however been instances where provisions of the UN Charter have been declared "self-executing" in the US – *Saipan v. United States Dep't of Interior*, 502 F.2d 90, 96-97 (9th Cir. 1974); *Namba v. McCourt* case and *Sei Fujii v. State* 217 P.2d 481 (1950) are examples.

⁶¹ Bradley's statement that "federal courts can no longer apply international law of its own force" appears to underlie this understanding. See Curtis A. Bradley, (1997) "The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law", 86 *GEO. L.J.* 479, 523.

It is often unclear to an American reader which meaning the user had in mind. I am sure many of you have had the experience, as I have, of encountering the use of the term 'self-executing' by the same writer in similar contexts but in different senses, and wondering if the second use was by choice or by chance. The risk of confusion for the foreign reader particularly one from a dualist legal system who is most likely to understand self-executing as meaning solely that there is no need for implementing legislation-is very high. Such a reader is unlikely to know that there are at least three other possible meanings of 'self-executing' and is likely to be misled if the user had in mind one (or several) of them.⁶²

Since the concept of 'self-execution' relates to the implementation of international law in the legal systems of States, it demands, not only an understanding of the modes by which States implement international law but also the distinction between them, as far as it is possible.

The question as to when a treaty becomes operative as municipal law receives various answers when the disparate modes by which constitutions implement treaties are taken into consideration.⁶³ A meticulously derived answer would have to accommodate two or probably three variants of monism – systems that are monist in effect but distinguished by processes⁶⁴ – as well as variants of dualism that are equally distinguished by processes but dualist in effect.⁶⁵ To avoid taking every constitutional peculiarity into consideration, it suits our present purpose to adopt the two broad classifications into which constitutions are usually grouped. The first relates to legal systems where treaties acquire the force of municipal law by the same processes by which they are ratified – monism.⁶⁶ The second covers legal systems where the ratification processes are different from the processes by which the treaty acquires domestic force – dualism.⁶⁷ The effect of the former is to make treaties automatically or

⁶² Dalton, *supra*, note 2, p. 442.

⁶³ Iwasawa "International Law in the Japanese" *supra*, note 27 p. 302.

⁶⁴ Compare: article VI of the US Constitution; article 55 of the Constitution of France and article 10 of the Constitution of the Republic of Cape Verde 1992.

⁶⁵ For instance, Nigeria and Ghana are dualist States. In Nigeria the legislature gets involved in treaty matters only when the treaty is to be domesticated, but in Ghana, the legislature is involved in ratification as well as in domestication. It is thus possible to confuse legislative involvement in ratification in Ghana for domestication.

⁶⁶ A monist constitution generally draws no distinction between international law and municipal law. It generally allows international law to operate within the national realm without the aid of a specific municipal legislation.

⁶⁷ A dualist constitution draws a distinction between national laws and international law and requires international law to be transformed into the shape of national legislation before it could be enforced nationally. This is the legacy of the English common law. See Lord

directly applicable upon fulfilling the ratification processes but under the latter, treaties are never directly or automatically applicable, and are not applicable without additional legislation.⁶⁸ The marked distinction between the two systems is usually confused in some definitions of the doctrine of ‘self-execution’.

Generally, ‘self-execution’ is most commonly understood as a monistic doctrine wherein implementing legislations are generally not required for a treaty to have the force of municipal law.⁶⁹ ‘Non-self-execution’,⁷⁰ on the other hand, generally follows the dualist system wherein treaties require implementing legislation before municipal courts can apply it.

The legislative action envisaged here does not necessarily need to come after the treaty has become binding on a dualist State internationally; legislative action could be taken in advance of ratifying a treaty. States operating dualism understand self-execution to be a feature of another system and regard non-self-executing as a feature of theirs. And this explains why non-self-execution best describes constitutions that are patterned after the dualist approach.

Atkin in *Attorney General for Canada v. Attorney General for Ontario* [1937] 1 A.C. 326, 347.

⁶⁸ The South African Constitution appears to combine both methods in practice. See Botha, *supra*, note 29, p. 101. The same can also be said of the US Constitution as already shown above.

⁶⁹ See *Spiess v. C. Itoh & Co.*, 643 F.2d 353, 356(5th Cir. 1981) (defining self-executing treaties as those that "are binding domestic law of their own accord, without the need for implementing legislation"); *Swaine, supra*, note 2, p. 353 (stating that "[i]f a treaty provision is self-executing, no legislation is necessary before it acquires domestic force of law); Solomon, *supra* note 43, 464 (agreeing that self-executing treaties "require no implementation in order to be given judicial effect"); Hans Kelsen, (2003)*Principles of International Law*, 401-447 (stating that a norm of international law which is applicable by the organs of the States without further implementation by national law may be called a self-executing norm).

⁷⁰ Sloss, "Domestication", *supra*, note 2, p. 146, (noting that a treaty provision is "not self-executing" if it has no status as domestic law in the absence of implementing legislation); *Swaine, supra*, note 2, p. 353 (arguing that "labelling a provision as non-self-executing is usually (though not always) intended to suggest that legislation is necessary for domestic enforcement"); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985) (stating that international agreements that are not self-executing "are merely executory agreements between the contracting nations and have no effect on domestic law absent additional governmental action"); Vázquez, "Laughing at Treaties", *supra*, note 20, p. 2173-2174 (noting "[t]he often expressed sense that non-self-executing treaties lack the force of domestic law appears to be based on the fact that such treaties, unlike most law, cannot be enforced in court against those on whom the treaty purports to impose a duty, by those for whose benefit the treaty imposes the duty").

Intriguingly, some writers have been keen to also apply the doctrine to dualist constitutions to distinguish between provisions in implemented treaties that require further legislative action from those that do not require further legislative action. In this regard, Preuss has argued that a “ cursory examination of constitutional texts ” does not answer the question of when treaties are self-executing or require incorporation. He suggested that certain treaties could be directly applicable in dualist States through “ judicial or administrative practice ... notwithstanding the lack of any formal constitutional text which expressly accords to them this effect ”.⁷¹ Projecting the idea of the application of “ self-executing treaties ” to dualist constitutions, Preuss used the UK practice of sometimes securing enabling legislation in advance of ratification to argue that “ treaties in the United Kingdom are self-executing even in circumstances in which like treaties in the United States might not be ”.⁷² He argued that since anticipatory legislation puts the British Government in a position to give effect to treaties internally from the moment the treaty becomes binding internationally (without further legislative action), the treaty is, in effect, self-executing by virtue of prior legislative action, or by reason of the fact that legislation adequate for its internal enforcement was already in existence at the time of the ratification of the treaty.⁷³

Following the same line of reasoning, Agusman argued that the legal nature of self-executing and non-self-executing treaties relates to questions of direct enforceability and municipal validity; and further argued that self-execution concerns the domestic judicial enforcement of treaties while non-self-execution is about municipal validity.⁷⁴ Furthermore:

The direct enforceable and non-self-executing rules are common in every case of law application and may occur in municipal rules of dualist and monist States. Most scholars submit that if the term 'non-self-executing treaties' is meant to be not capable of being executed in the absence of additional implementing measures, it may also be equally applicable to other legislations or constitutions. Many provisions of national legal orders are not capable by themselves to be executed without some additional legislation. A non-self-executing provision is not a question that exclusively relates to treaties but a common problem associated with the norms. Likewise, treaties might presumably be self-executing in dualist States if an implementing legislation has been provided or adequate before ratification.⁷⁵

⁷¹ Preuss, *supra*, note 38, p. 1126.

⁷² *Id.*, p. 1124.

⁷³ *Ibid.*

⁷⁴ Agusman, *supra*, note 18, p. 331.

⁷⁵ *Id.*, p. 328.

Agusman's distinction between 'validity' and 'implementation' is difficult to comprehend. 'Self-execution', in whatever sense it could be understood, cannot rightly relate to validity. The validity of a norm of the international order is, unlike municipal implementation and enforcement, not judged by the internal processes of any State. Otherwise, on what basis would a dualist judge rely on an unincorporated treaty or even a treaty to which the forum State is not a party as interpretative aid?⁷⁶ By so doing, the judge, though cannot apply the treaty as a municipal law, recognises that it is a valid legal norm of another order – international law.

Besides, the view that certain treaties could be directly applicable in dualist States by judicial fiat is hardly tenable in that judges in dualistic systems lack flexibility or discretion in the application of international law. The determination of applicable international law is properly the well-guarded province of the legislature. For monistic systems, the situation is different; judges may exercise some level of flexibility and discretion over treaties that could constitutionally be directly applied.⁷⁷ This explains the origin of the 'self-executing' doctrine in the first place and why courts in the US often treat direct application of international law as a question of treaty interpretation.

In *United States v. Alvarez-Machain*,⁷⁸ for example, while agreeing that the extradition treaty between the United States and Mexico has the force of law, Chief Justice Rehnquist stated that "if ... it is self-executing, it would appear that a court must enforce it on behalf of an individual ...". The reasoning of the learned Chief Justice appears to contain a subtle distinction between a decision that a particular treaty is self-executing for the purpose of declaring it the law of

⁷⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876, 883-84 (2d Cir. 1980) (using the ICCPR and other human rights treaties to which the United States was not then a party to support the conclusion that torture is a "violation of the law of nations"); *Ahmad v. ILEA*, [1978] 1 Q.B.36 (holding that United Kingdom courts pay very serious regard to unimplemented treaties and will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with the international obligations of the United Kingdom); *H. Rayner v. Department of Trade*, [1989], Ch. 72, 163-4 (holding, per Kerr LJ, that the doctrine precluding the enforcement of unincorporated treaties in England does not preclude the decision of justiciable issues which arise against the background of an unincorporated treaty in a way which renders it necessary or convenient to refer to, and consider, the contents of the treaty).

⁷⁷ David R. Deener (1964) "Treaties, Constitutions and Judicial Review" 4 *Va. J. Int'l L.* 7, 29 (arguing that regardless of the judicial review powers of the court in a dualist system, it can only apply domestic law, and if domestic rules are not sufficient to implement a treaty or are in conflict with treaty obligations, that is not a matter for the courts to resolve; whereas a judge within a monistic system, in which treaties are part of the law of the land, comes face to face with treaties and it may prove necessary for a court to resolve a conflict with the constitution).

⁷⁸ 106. 504 U.S. 655, 667(1992).

the land but not self-executing for the purpose of creating rights and obligations for individuals. It is a typical signalling of the distinction in the US between treaties as the law of the land and judicial applicability. More explicitly: "under the *Foster* concept of self-execution, a non-self-executing treaty has domestic legal force, but it cannot be applied directly by the judiciary".⁷⁹ Putting it differently, Andrea Bianchi argued that:

... the basic understanding of self-execution of international norms is that once the rule has been incorporated into the municipal legal order, its direct applicability is a matter of whether or not the rule, by its content lends itself to be applied directly by the judge.⁸⁰

This distinction, bordering on discretion, between domestic force and self-executing is not for a dualistic judge; except a treaty is implemented, it is not applicable and once a treaty is implemented and accords with the constitution, the judge has no discretion but to apply it as municipal law upon the terms specified by the legislature. Accordingly, some of the views expressed above, hardly fit into the general understanding of 'self-execution', as a means of differentiating treaties that do not require an enabling municipal legislation from those that require such legislation. It is the view of the present writers, self-execution (rather than 'judicial application') actually concerns the application of treaties that have not been incorporated into the municipal legal order. Once incorporated the question of self-execution or otherwise no longer arises as incorporation sufficiently enables judicial application. This increasing tendency to stretch the doctrine of 'self-execution' beyond a realistic monistic application to an unsupportable dualist application has greatly contributed to the increasing confusion shrouding the doctrine.

As for the method of identifying self-executing treaties, there are views in the literature that a treaty is self-executing if it: (a) involves the rights and duties of individuals;⁸¹ (b) does not cover a subject for which legislative action is required;⁸² (c) does not leave discretion to the parties in the application of the particular provisions;⁸³ (d) is addressed to the courts,⁸⁴ and (e) if self-execution can be collected from the language used.⁸⁵

⁷⁹ Sloss, "The Domestication", *supra*, note 2, p. 149; Huang, *supra*, note 13, p. 2215, (referring to "implemented non-self-executing").

⁸⁰ Bianchi, *supra*, note 2, pp. 758-9.

⁸¹ Agusman *supra*, note 18, p. 325 (arguing that a treaty is directly applicable if it establishes subjective rights and duties for the individual; and if the individual can rely on it before national courts and national authorities).

⁸² Oscar Schachter, (1950-1951) "The Charter and the Constitution: The Human Rights Provisions in American Law", 4*Vand. L. Rev.*, 645-646.

⁸³ Riesenfeld, "The Doctrine of Self-Executing Treaties and Gatt", *supra*, note 27, p. 550.

In our view, the term ‘self-executing’, insofar as it seeks to suggest that treaties could apply by their own force without the aid of municipal law in one form or the other, clearly has no practical tenability. Furthermore, though yet confusing, we are of the view that it would lose some of its complexities if it is properly confined to monist constitutions as the effect of a constitutional norm permitting the automatic application of treaties.

Though a finding that a treaty is self-executing, basically has the same effect as a finding that it is directly applicable and generally understood as such, direct applicability does not lend itself to the sort of malleability to which ‘self-execution’ lends itself. It is thus essential to understand that the two terms could mean the same thing only when ‘self-execution’ is used in the sense of the application of international law in the municipal realm without the need for specific legislation. If direct applicability cannot be understood to mean the application of international law by its own force, self-execution should not be read into monist constitutions simply because they permit the application of international law as seemingly stand-alone sources. In actual fact, the so-called directly applicable treaties stand on the constitutional provisions by which the ability of treaties to directly apply is prescribed. The pivotal role municipal law plays in this regard explains why “same rule can be directly applicable in one state but not in another”⁸⁶ and why the “determination with respect to the precision of an international rule may vary from one state to another”.⁸⁷

What we can see today, is the direct applicability of European Union (EU) laws within member States in a manner that falls in line with what the proponents of self-executing treaties would pass for treaties that execute in municipal realm on their own force. However, drawing from the European Union example, direct applicability –a much more practical term– is sometimes confused with the so-called authority of international law to ‘self-execute’ within the municipal system by its own authority. The obvious foundation for that argument are the various cases decided by the Court of Justice of the European Union (CJEU) and by which it engineered the supremacy and direct effect of

⁸⁴ Alona E. Evans, (1951) “Some Aspects of the Problem of Self-Executing Treaties”, 45 *Proceedings of Am. Soc’y Int’l L. Proc.* 66, 74.

⁸⁵ Virginia A. Leary, “International Labour Conventions and National Law: The Effectiveness of The Automatic Incorporation of Treaties in National Legal Systems”, 57-63 (1982) (identifying the intention of the parties, the language of the treaty and its subject matter as the decisive criteria); George N Barrie, (1995) “Self-Executing v Non-Self-Executing Treaties: The Confusion Continues” *Journal of South Afr. L.* 368 (arguing, rather peculiarly, that treaties entered into by the US President without senate approval are “self-executing” while those entered with senate approval are “non-self-executing”) How more confusing can a concept be?

⁸⁶ Iwasawa, “International Law in the Japanese”, *supra*, note 27, p. 304.

⁸⁷ *Ibid.*

EU laws within member States. In *Van Gend en Loos v. Nederlandse Administratie der Belastingen*⁸⁸ and the subsequent *Costav. ENEL*,⁸⁹ the court held that the European Economic Community (now EU) Treaty differed from ordinary treaties and that the Community law creates rights directly enforceable by individuals in the national courts of the member States.

The language of the CJEU in the cases, strong though, could not have had any real impact in the municipal realm except such impact be granted it. Irrespective of this language, a non-EU State is in no less in violation of international law for failing to implement an international obligation than an EU State that fails to give direct effect to EU treaty.⁹⁰ The standard of violation and the principle prescribing that standard are the same: a State cannot rely on deficiencies in its municipal law to excuse its international obligation⁹¹ and this makes it incumbent upon every State that has entered into an international agreement to adjust its municipal law accordingly.⁹² The significant difference is that EU operates as a peculiar international sovereign entity; a "peculiar phenomenon ... which does not fit into any regular pattern of international law"⁹³ in matters of its competence.⁹⁴ As in fact noted by the CtJEU, the EU is

⁸⁸ [1963] ECR 1.

⁸⁹ [1964] ECR 585, 593-594.

⁹⁰ Stotter, *supra*, note 12, p. 773 (noting that "the question of self-execution is relevant solely to the effect of a treaty as domestic law, since a properly signed and ratified treaty is a binding *international* obligation whether or not it is self-executing").

⁹¹ Article 27 of the Vienna Convention on the Law of Treaties (VCLT), 1969; *Alabama Claims Arbitration*, (1872) 1 Int. Arb, 495; J.B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, Vol. 1, chapter XIV 653 (Washington 1898). For a detailed discussion of this case see Tom Bingham, 'The Alabama Claims Arbitration', 54 Int'l & Comp. L.Q. 1 (2005); *Treatment of Polish Nationals or other Persons of Polish Origin or Speech in Danzig* (1931), PCIJ, Ser. A/B No.44, p. 24; *Greco-Bulgarian Communities* (1930), PCIJ, Ser. B No. 17, p. 32; *Free Zones of Upper Savoy and the District of Gex*, (1932) PCIJ, Ser. A/B No. 46, p. 167.

⁹² See *Exchange of Greek and Turkish Populations*, Advisory Opinion, PCIJ, Series B, No. 10, p. 20, (recalling "the 'self-evident' principle, 'according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken"); *Questions Relating to the Obligation to Prosecute or Extradite*, (*Belgium v. Senegal*), Judgment of July 20, 2012, para 113 (holding that article 27 of the Vienna Convention on the Law of Treaties reflects customary international law and that it is incumbent on a State that has entered into an international obligation to adopt necessary legislation in its internal law to fulfill the obligation, otherwise, the State cannot invoke its internal law to defeat it). See article 46 VCLT for what may be an exception to some aspects of the application of the rule); *Questions Relating to the Obligation to Prosecute or Extradite*, (*Belgium v. Senegal*), ICJ Rep. 2012, 422.

⁹³ K. Lipstein, (1974) *The Law of the European Economic Community*, 45 (London: Butterworths); Gerhard Bebr, (1970) "Directly Applicable Provisions of Community

more than an agreement which merely creates mutual obligations between the contracting States; it constitutes a new legal order capable of conferring rights and imposing obligations directly upon individuals”.⁹⁵ In consequence, EU treaties, unlike general treaties, are invested with borderless application across EU States, largely free of the limitations of territorial jurisdictions of member States. When and how this complete synergy of EU laws with the municipal law of each member State was achieved, is a question to be answered in close observation of the legislative actions that each of the member States had to undertake.⁹⁶

4. Self-Execution: The Treaty Intent

Every treaty is aimed at achieving a purpose, which may be fully satisfied as between the treaty parties internationally or by each treaty party satisfying the obligation to the other treaty parties by fulfilling the terms of the treaty towards its nationals. To recall the PCIJ in the Danzig opinion, “the very object of an international agreement according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts”.⁹⁷

It is instructive to reiterate that “[n]o treaty provision can be directly applicable [municipally] unless it is also automatically incorporated”⁹⁸ because “judges cannot rely on a provision as a rule of decision if it has no status as domestic law”.⁹⁹ The principal factor and indeed the melting point in the determination of the true authority for the application of international law in

Law: Development of Community Concept”, 19 *Int'l & Com. L.Q.* 257, 261 (arguing that “[b]y its content and objectives, however, it is a constitution of an emerging Community which goes far beyond a mere traditional international treaty”).

⁹⁴ See Curtis A. Bradley “Self-Execution and Treaty Duality”, (2008) 1 *The Supreme Court Review*, 131; Juliane Kokott and Thomas Diehn, (2002) “Kingdom of the Netherlands v. European Parliament & Council of the European Union. Case C- 377/98. 2001 ECR I-7079”, 96(4) *Am J Int'l L*, 950, 954.

⁹⁵ *Van Gend en Loos*, *supra*, note 88, 12.

⁹⁶ Friedl Weiss (1979) “Self Executing Treaties and Directly Applicable EEC Law in French Courts” 6 *Legal Issues of Eur. Integration* 51, 76 (noting that member States are to secure the application and supremacy of EU Law in conformity with the methods and procedures permitted by their constitutional law and other provisions of the domestic legal system).

⁹⁷ *Danzig*, *supra* note 43, pp. 17-18.

⁹⁸ Sloss, “The Domestication”, *supra*, note 2, p. 148.

⁹⁹ *Ibid*, p. 148.

national spheres is that the internal applicability of a treaty is absolutely within the domestic jurisdiction of States.¹⁰⁰

Since, in every municipal system of law, international law operates on the basis of a national law, the application of international law in the national sphere is an area that is not admissive of assumptions; the starting point of any inquiry must be from the standpoint of the prevailing legal order itself. And the principal question is whether municipal laws "recognize the operation *per se* of international law within the State without a special transforming act of municipal legislation".¹⁰¹ This observation is not altered by merely stating that a particular country is monist in nature. In any case, it must first be understood that monism is a product of municipal law; a country is monist because it has adopted a system of law that permits international law to directly operate as part of municipal law.¹⁰² In fact, every treaty is executed municipally by the force of an instrument and that instrument is the constitution in monist systems and an implementing legislation in dualist systems. 'Self-execution' and 'direct effect' are each "a domestic law problem which cannot be resolved on an international law basis".¹⁰³

It remains to be said, however, that the primus authority accorded to municipal law in this respect is overshadowed (from the viewpoint of international law) by the rule that a State is not permitted to defeat its international obligation by reason of its domestic law.¹⁰⁴ Accordingly, the rule that the determinant of when a treaty is effective within municipal legal system is municipal law; though this justifies the refusal of municipal institutions to apply a treaty, it does not absolve a State of its international law liability arising from its failure to implement a treaty that it has undertaken to execute in good faith.¹⁰⁵

¹⁰⁰ *Aerovias Interamericanas de Panama v. Board of County Commr's* 197 F. Supp. 230 245 (holding that whether a treaty is self-executing or not presents primarily a domestic question of construction for the courts); Iwasawa, "The Doctrine", *supra*, note 1, p. 651 (noting, and rightly too, that despite the confusing signals from scholars that "[s]tates determine how to implement their international obligations on the municipal level [and that] [i]t is well recognised that municipal law determines the 'validity' and 'rank' of treaties in domestic law" *id.* p. 651).

¹⁰¹ H. Lauterpacht, (1975) "International Law and Municipal Law" in *Collected Papers* 218 (Vol 2: The Law of Peace (Cambridge University Press, Cambridge).

¹⁰² Alona E. Evans, (1953) "Self-Executing Treaties in the United States of America", 30 *Brit Y.B Int'l L* 178, 178 (arguing that "the process of [municipal] enforcement [of treaties is] essentially a municipal law matter".)

¹⁰³ Stotter, *supra*, note 12, p. 785.

¹⁰⁴ Generally see, *supra*, note 92 above.

¹⁰⁵ *Ibid.*

The need for incorporation arises when the treaty cannot achieve its aim except under the municipal law of the parties. The domestic application of treaties crafted to have effect as municipal law has an international aspect and a domestic aspect which go *paripassu*.¹⁰⁶ The process of fulfilling each aspect is the same both in monist and dualist constitutions, though approached differently. By consenting to the treaty, a State fulfils the international aspect and this is only possible by following the mode set out in the treaty. The fact of consent alone does not fulfil the municipal aspect; this has to be fulfilled by the mode set out by municipal law.

The intended realm of performance may be a determining factor in ascertaining the domestic suitability of a treaty. For instance, insofar as treaties such as the Nuclear Non-Proliferation Treaty and the Charter of the United Nations can wholly be performed on the international realm, they cannot be said to be domestically suitable as their remedies do not lie in domestic enforcement. The same is however not true of human rights treaties, such as the African Charter on Human and Peoples' Rights.¹⁰⁷ Human rights treaties are usually crafted to take effect as domestic law and usually locate their remedies in domestic enforcement. The intention of the parties to make such treaties effective municipally, notwithstanding, the question of how and when they become domestically effective is a question for the domestic laws of State parties.

¹⁰⁶ Stefan A. Riesenfeld, (1980) (Comment) "The Doctrine of Self-Executing Treaties and U.S. V. Postal: Win at Any Price?" 74 *Am. J. Int'l L.* 892, 900 (arguing that "[t]he self-executing nature of a treaty provisions is a product of international and domestic constitutional rules"); David Sloss, (2002) "Non-Self-Executing Treaties: Exposing a Constitutional Fallacy" 36(1) *U.C. Davis Law Review*, 1, 81 (advocating a four-step approach for US courts: (a) a determination of whether a treaty creates a primary international duty; (b) whether the primary duty is executed or executory; (c) whether the treaty creates a primary domestic duty; and (d) whether the treaty is domestically enforceable. He argued that the treaty makers' intentions are irrelevant at this stage); and (d) if the treaty creates a primary domestic duty, the court will now have to consider whether the duty is such that is enforceable by a domestic court).

¹⁰⁷ In *Association of Victims of Post Electoral Violence & Interights v. Cameroon*, Communication 272/03, para 115, the African Commission on Human and Peoples' Rights declared, in effect, that article 1 of the African Charter imposes on State parties, the obligations to implement all the measures required to produce the result of protecting the individuals living in their territory; *Lithgow v. United Kingdom*, 8 Eur. H.R. Rep. 328, 397 (1986), the European Court of Human Rights held that, although there is no obligation to incorporate the European Convention on Human Rights and Fundamental Freedoms into domestic law, "by virtue of Article 1 of the Convention, the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States").

We may thus classify two categories of treaties. The first covers those which are fully fulfilled as between the parties on the international realm by performing or refraining to perform acts that are purely international. The second set do not confer reciprocal benefits and obligations on the parties, but the obligations and benefits arising from the treaty are fulfilled towards the other parties by guaranteeing the benefits and obligations of the treaty to nationals and aliens within the territories of the parties. Thus, while the first class of treaties does not need to engage with municipal law to fulfil its object, the latter must engage with municipal law.

The intention of the contracting parties to apply municipal law is thus collectable from the object and purpose of the treaty. Whether expressly stated or not, where the object of a treaty cannot be achieved without engagement with municipal law, it would be presumed that the parties intended the treaty to take effect as municipal law. It is important to state that the language of the treaty and its intent to have effect as municipal law assume little or no significance before judges in dualistic States; that is a matter for the legislature, which has to define whether the treaty belongs to the category of treaties that requires municipal performance. The decision of the legislature, however unlawful, from the standpoint of international law, is what dualist judges are bound to enforce.¹⁰⁸

The same is not true of monist States where judges, as of necessity, examine the terms of a treaty when determining their municipal applicability. This is especially true of the US and potentially true of South Africa.¹⁰⁹ There is therefore room for a monist judge determining the domestic application of a treaty to examine whether the treaty contains "express stipulations that it should or should not be self-executing".¹¹⁰ As Riesenfeld rightly argued:

the intent of the parties to an international treaty is relevant only to the question of whether private individuals shall have the right of protection in domestic courts against violations of a treaty provision. Whether this result is to be achieved by legislation or by the treaty itself is a question of

¹⁰⁸ *Elektronica Sicula S.p.A (ELSI), (United States of America v. Italy)*, ICJ Rep 1989, 15, 51, para 73 (holding that compliance with municipal law and compliance with the provisions of a treaty are different questions and that what is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision); Roodt, *supra*, note 34, p. 72 (noting that National courts tend to operate within specific limits when giving effect to international law in their municipal sphere of jurisdiction).

¹⁰⁹ See Part 1 above.

¹¹⁰ Stotter, *supra*, note 12, p. 777.

constitutional law and not within the purview of the intent either of the parties or of a particular ratifying power.¹¹¹

Insofar as it is the municipal law of each State that determines the application of international law municipally, “the intent of the other State parties is irrelevant, and even the treaty-making authorities of that state party whose domestic law is involved may have little or no choice according to the governing constitutional provisions”.¹¹²

Consequently, while the intention of the treaty determines whether the treaty is suitable for domestic enforcement, when the question is how domestic enforcement is achieved, treaty intent makes a shift to constitutional intent, thus placing municipal enforcement of the treaty at the mercy of the constitution. This argument, though popular,¹¹³ is not a candidate for general acceptance; there is yet the *treaty intent approach* which proceeds on the basis that the question of direct enforceability of treaty provisions is primarily, if not exclusively, a problem of international law.¹¹⁴

¹¹¹ Riesenfeld, “Win at Any Price?” *supra*, note 106, p. 895.

¹¹² Riesenfeld, *id.*, p. 898

¹¹³ Thomas Buerghental, (1992-IV) “Self-Executing and Non-Self-Executing Treaties in National and International Law”, *RdC*, 303, 317, (arguing that it is domestic law that determines whether a treaty creates rights which domestic courts are empowered to enforce in a state); R. Higgins, (1987) “*United Kingdom, in the Effect of Treaties in Domestic Law*”, 123, 125 (Francis G. Jacobs & Shelley Roberts eds.,) (stating that “[a] treaty has no effect in English law unless it is made part of domestic law”).

¹¹⁴ See J. A. Winter, (1972) “Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law”, 9 *Common Market Law Rev.*, 428; Leslie Henry, (1929) “When Is a Treaty Self-Executing”, *Michigan Law Review*, 776, 785 (arguing that whether a treaty is self-executing depends on the intent of the treaty makers as expressed in the treaty, discoverable from the language of the treaty by words that are legislative in form and meaning); Lorne Oral Liechty, (1979-1980) “Treaties – Article 6 of the Convention on them High Seas Is Not Self-Executing”, 55 *Notre Dame Law*, 293, 297 (ascribing the primary criterion to be considered by a court in resolving the issue of domestic application to the intent of the parties that the treaty would become binding without any implementing legislation); Riesenfeld, “The Doctrine of Self-Executing Treaties and Gatt” *supra*, note 27, p. 548, (noting the reasoning of a German court that the self-executing character of a treaty could be determined on the basis of the intent of the contracting parties, as deduced from the language and the character of the treaty as well as from other relevant materials); *Mary D. Hallerman* (Casenote) “Medellin v. Texas: The Treaties that Bind”, (2008-2009) 43 *U. Rich. L. Rev.* 797 (noting the view of the US Supreme Court in Medellin that a treaty could convey an intention that it be “self-executing”); Schachter, *supra*, note 82, p. 645-646 (arguing that a treaty is self-executing except it explicitly states that it requires legislative action); *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 155 f. 842, 845 (1ST Cir. 1907) (holding that the language in which a treaty is framed determines its municipal effectiveness).

The logical consequence of the *treaty-intent approach* is a creation of a fantasy in which municipal law plays a secondary role to international law in both the international sphere and in the national sphere. The corollary of this may be the creation of a situation of inequality between a State that accepts the treaty-intent approach and other State parties that do not accept that approach.¹¹⁵ This is because while the treaty immediately becomes a law within the municipality of States that flow with the treaty intent, its applicability is rebuffed by the municipal law of States that do not. This problem was identified by the US Supreme Court in *Postal v. United States*:

The convention on the high seas is a multilateral treaty which has been ratified by over fifty nations, some of which do not recognize self-executing. It is difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations. ... The lack of mutuality between the United States and countries that do not recognize treaties as self-executing would seem to call for as much.¹¹⁶

The treaty-intent approach compels the examination of the basis of the distinction between self-executing and non-self-executing treaties. The origin of the distinction in the US has already been discussed as the most imitated basis of the distinction. The point earlier made about the context of the US Constitution within which Marshall C.J., acted, would, perhaps, illuminate this view. If we keep our reasoning within the context of the US Constitution, it would be obvious that Marshall C.J., did not query the applicability of treaties in the United States; what he was concerned with was whether the language of the treaty conveyed the intention that a further legislative action was required to give proper effect to the treaty. Hence Marshall made a general reference to countries in which a treaty is “not a legislative act” and “does not generally effect, of itself, the object to be accomplished ... but is carried into execution by legislation or other exercises of sovereign power”.¹¹⁷ Marshall also compared such countries with the United States, where the “constitution declares a treaty to be the supreme law of the land” and thus “equivalent to an act of the legislature, whenever it operates of itself ...”.¹¹⁸

¹¹⁵ Buergethal, *supra*, note 113, p. 320 (stating that “courts may and often do answer this question whether a treaty is self-executing differently in different countries, depending upon their national constitutions, legal traditions, historical precedents and political institutions”).

¹¹⁶ *Supra*, note 25, p. 878.

¹¹⁷ *Foster, supra*, note 1, p. 314.

¹¹⁸ *Ibid.*

Furthermore, he had queried: if the “language is, that those grants shall be ratified and confirmed ... by whom shall they be ratified and confirmed?”¹¹⁹ Thus, while failing to find that the authority to “ratify and confirm” was intrinsic to the treaty in *Foster*, he came to the opposite conclusion in *Percheman*, where he construed the instrument to mean that the grants shall be ratified and confirmed might import that they “shall be ratified and confirmed by the force of the instrument itself”.¹²⁰

This should not be understood as saying that the object to be served by a treaty and the mode by which the parties intended that object to be served as collectable from the treaty language are not important. They are relevant to the question of whether a treaty is such that could be applied municipally in the first place. It is thus questionable to assume that “treaties can be classified into those that are directly applicable and those that are not on the international plane”.¹²¹

Accordingly, three classes of treaties may be roughly envisaged – (i) those that need not be enforceable domestically, such as the UN Charter; (ii) those that are required to be enforced domestically by express language, such as the African Charter; and (iii) those which, though do not expressly require domestic application, their object and purpose cannot be truly fulfilled without domestic application.

In the first categories are treaties that do not require domestic application for the fulfilment of their objects. These are usually treaties which are made to be enforced only by States; they do not create private rights and States do not need to domesticate them to benefit therefrom. The United Nations Charter is in this class. The United Nations Convention on the Law of the Sea, (UNCLOS), 1982, also falls within this category. Nevertheless, nothing stops States, both monist and dualist, from adopting legislative measures respecting part or all of a treaty of this class, especially for the aim of enforcing the rights granted to States by the treaty. For example, articles 3, 33, 56-57 and 76 of the UNCLOS define different maritime zones to which coaster States are entitled. States usually appropriate these zones by adopting legislations; these legislations define the laws made regarding the zones as well as serve as notice to all other States.

In the second category are those treaties, which the obligation to make them municipally applicable is part of the obligations imposed on the parties by the treaty. These treaties usually create private rights. The fact, however, that a treaty creates private rights that could be –and was indeed intended to be– enforced within the municipal realm of State parties is only one of the two

¹¹⁹ *Ibid.*

¹²⁰ *Percheman, supra, note 9, p. 89.*

¹²¹ *Id.*, p. 651.

factors that are to be taken into account in determining the municipal applicability of the treaty. The second is the constitutional approach to treaties.

In the third category are such treaties as the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963. Notwithstanding that these treaties do not contain any express stipulation for municipal application, States usually implement them by legislation¹²² in realisation of the fact that their objects cannot be fulfilled without municipal application.

It is not uncommon to encounter the argument that a treaty provision, such as article 1 of the African Charter; article 2(2) ICCPR and article 2 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (that provide for the adoption of further legislative measures to give effect to the rights recognized therein), require incorporation in both monistic and dualistic States.¹²³ The bottom line is that a treaty cannot, by its terms, convert a monist State into a dualist one by mandating the monistic State to adopt further legislative measures for the purpose of implementing the treaty in spite of the fact that the constitution makes the treaty domestically applicable upon being ratified;¹²⁴ nor can a treaty convert a dualist state into a monist state.

The reliance on such treaty stipulations to argue that a treaty is not directly applicable in a monist State strays too far away from what could be regarded as the correct position. Such a language can neither explain the direct applicability of a treaty in a monist State nor confer the direct applicability on a dualist State. For example, article 1 of the African Charter contains the undertaking that State parties to the Charter shall recognise the rights, duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give them effect. The fulfilment of that undertaking is usually assessed on the basis of the constitutional posture of State parties. It is generally taken for granted that State

¹²² Diplomatic Immunities and Privileges Act (Nigeria); Diplomatic Immunities and Privileges Act (South Africa); Diplomatic Privileges Act (UK).

¹²³ Sloss, "The Domestication" note 2 p. 156 (suggesting that article 2(2) renders the ICCPR non-self-executing, or that comparable language in any other human rights treaty makes it non-self-executing).

¹²⁴ Halberstam, *supra*, note 7, p. 97 (asserting that "[i]t is only where the treaty by its terms requires legislative action that it cannot be applied by the courts directly"; Chafee, *supra*, note 13, p. 357, (arguing that "express language in the treaty may require ... implementation"); Danilenko, *Supra*, note 35, p. 299 (arguing that "[a]ny treaty provision that expressly requires states to adopt legislative measures cannot be considered directly applicable or self-executing"); William C. Gordon, (1950) "International Law: Self-Executing Treaties: The Genocide Convention" 48 *Michigan Law Review*, 852, 854 (stating that intent is "beyond dispute when a treaty expressly stipulates for legislative implementation").

parties operating constitutional provisions allowing for the direct application of international law do not require additional legislation to give effect to the Charter. That this is the view maintained by monist State parties is confirmed in their periodic reports to the African Commission on Human and Peoples' Rights.¹²⁵

It is instructive to note that the word "undertakes" in article 94 of the UN Charter, by reason of which the US Supreme Court classified the UN Charter as a non-self-executing in *Medellin*,¹²⁶ is the same word used in the African Charter that the monist State parties did not regard as meaning that the Charter cannot be directly applicable. None of the State parties to the African Charter has taken the view of the US Supreme Court that the word 'undertakes' connotes anticipated future action by the parties.¹²⁷ Article 94 may have been non-self-executing for all other reasons but certainly not for reason of its language. The focus of the Supreme Court on language was thus in keeping with constricting article VI of the US Constitution.

Commenting on article 2(2) of the ICCPR which bears substantial similarities with article 1 of the African Charter, Sloss remarked that "far from reflecting a mutual intent to require implementing legislation",¹²⁸ the language of article 2(2) "reflects a mutual intent to permit each party to decide for itself whether implementing legislation is necessary".¹²⁹

¹²⁵ In Senegal, the African Charter is "a component part of the national legal system which judicial institutions are duty-bound to enforce when its provisions are invoked before them" – Report on the Implementation of the African Charter on Human and Peoples' Rights Presented by the Republic of Senegal, April 2013, Para 102; in Algeria, the African Charter is "part and parcel of the national legislation and may be invoked by citizens in a court of law" – Peoples' Democratic Republic of Algeria African Charter on Human and Peoples' Rights Third and Fourth Periodic reports August 2006, p. 11; Rwanda – 9th - 10th Periodic Report of Rwanda to the African Commission on Human and Peoples Rights, 2005 – July 2010, para 18-22; Cote d'Ivoire – Initial and Combined Report of the Republic of Cote d'Ivoire to the African Commission on Human and Peoples' Rights; etc.

¹²⁶ *Medellin*, *supra*, note 54, p. 1356.

¹²⁷ *Ibid*, pp. 1358-59. What may in fact be regarded as the treaty intent is a product of the interpretation any municipal court decides to adopt. How could it be explained that a treaty that is held not to be applicable under one monist constitution is held to be applicable in another. Compare the approaches of the US and German Courts: Carsten Hoppe, (2007) "Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights", 18 *EJIL* 2; Jana Gogolin, (2007) "Avena and Sanchez-Llamas Come to Germany - The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations", 8 *GLJ* 3.

¹²⁸ Sloss, "Domestication", *supra*, note 2, p. 156.

¹²⁹ *Ibid*

In all events, implementation would be unnecessary where there already exist a national law by which a given State can fulfil its obligation under a Convention, the express provisions for the adoption of legislation, notwithstanding. That national law may well be the constitutional provision by which treaties are directly applicable, as seen in the examples of the implementation of the African Charter by the monist State parties above. Preuss came close to making a similar point in his remark that the British practice of incorporating treaties by anterior legislation puts the British Government in a position to give effect to a treaty internally, dispensing with posterior legislative action, as anterior legislation provides adequate legal authority for the automatic application of the treaty upon ratification.¹³⁰

If the language of a treaty expressing the need for legislation does not make it mandatory for all the States to adopt legislation for the fulfilment of its obligations, what purpose does such language as contained in article 1 of the African Charter serve? The emphasis of such a language for both monist and dualist States is that they do not maintain laws that are inconsistent with their obligations, so that the legislative measure envisaged for the States may entail (for some States) the repelling of laws and the prohibition of subsequent inconsistent legislation that may hinder the performance of their obligation.¹³¹

In *Amnesty International & others v Sudan*,¹³² the African Commission stated that, having by article 1 of the Charter, confirmed that it has bound itself to legally respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them,¹³³ "ratification obliges a State to diligently undertake the harmonization of its legislation to the provisions of the ratified instrument."¹³⁴ Affirming the reasoning in *Noah Kazingachire & Ors (represented by Zimbabwe Human Rights NGO Forum v Zimbabwe)*,¹³⁵ the Commission held that the existing legislation in Zimbabwe was contrary to the spirit of article 1. This, in the view of the Commission, was because it did not ensure that there existed in Zimbabwe compensatory damages to give just satisfaction to victims in fulfilment of its Charter obligations.¹³⁶ To remedy this

¹³⁰ Preuss, *supra*, note 38, p. 1123;(observing the Crown will not exercise its prerogative of ratifying treaties to bind the United Kingdom internationally until enabling legislation has been passed or parliament has given the necessary assurance that it will be passed).

¹³¹ Iwasawa "International Law in the Japanese Legal Order" *supra*, note 27, p. 305, (arguing that "Such a clause [as article 2(2) of the ICCPR] only reinforces the customary international-law rule that a party is bound to take every measure necessary to give full effect to the treaty, and thus does not prevent the treaty from being directly applicable).

¹³² Communication 48/90, 50/91, 89/93.

¹³³ *Id.*, para 42.

¹³⁴ *Id.*, para 40.

¹³⁵ Communication 295/04.

¹³⁶ *Id.*, paras 143-144.

situation, the Commission recommended that Zimbabwe should undertake law reform to bring the domestic laws into conformity with the African Charter.¹³⁷

It thus follows that an inquiry into the domestic application of treaties may follow a double-decker line of inquiry but only one line of inquiry is mandatory. The first is whether a given treaty addressed itself to States for implementation within their municipality,¹³⁸ and the second, and indeed the mandatory one, is whether national law permits direct application or incorporation.¹³⁹

In order not to lose track of our line of thought, it is essential to reiterate the point earlier made that there are common grounds between constitutions that permit direct applicability (monism) and those that do not (dualism). One of the commonalities of the systems is that both systems proceed from the standpoint that domestic law regulates the domestic application of international law. The difference is that monism guarantees direct applicability by way of a constitutional authorisation given once and for all as a commitment to the direct application of certain future ratified treaties while dualism delays authorisation for the municipal application of all treaties and delegates the power to the legislature to be exercised in each case either prior to, or subsequent to the ratification of a treaty. Indeed, "...while the grounds for finding a treaty self-executing might vary, the effect of a finding that a treaty is self-executing is clear";¹⁴⁰ that effect is to make the treaty enforceable in the courts of justice in the same circumstances as a statute having the same content.

Another common feature is that they both have inbuilt mechanisms for surprising unwarranted interference of international law in the domestic law making process. The major attraction to non-direct application is that it allows the legislature to maintain its role as the law-making organ of the realm as well as to maintain control over the influx of externally generated laws.¹⁴¹ The essential nature of this legislative power becomes obvious when the international application of the treaty requires the adjustment of municipal laws and or budgetary allocations. On the other hand, the fact that a constitution

¹³⁷ *Id.*, para 145.

¹³⁸ See Article 1 of the African Charter, for example.

¹³⁹ Sloss, "Executing *Foster v. Neilson*" *supra*, note 2, p. 304 (arguing that the inquiry by municipal courts begins with treaty interpretation and that the second step is to consider domestic laws).

¹⁴⁰ Vazquez, "Judicial Enforcement", *supra*, note 25, p. 439.

¹⁴¹ Gráinne de Búrca & Oliver Gerstenberg "The Denationalization of Constitutional Law", 47(1) *HARV Int'l L J*, 243, 247 (noting that "[d]ualism's inner justification ... lies in barring a domestic constitutional order from placing itself, in its entirety, in the hands of an international court, thus ensuring that the domestic order and its adjudicative *acquis* are subject only to their own interpretations of basic moral norms that have been established as legal norms").

allows direct application does not as well mean that all treaties sought to be applied municipally are given a full right of passage. Some monist States may simply refuse to publish a given treaty and thus stall its domestic application.

Conclusion

The discussion in this article challenges the view that a treaty could be self-executing in the sense of “accomplish[ing] its aims of its own force”¹⁴² under any circumstance. We argue that there is no such authority in a treaty to be applicable as municipal law on its own force because treaties are executed by municipal law under one or the other of the two observable ways of executing treaties within national spheres – monism or dualism. The distinction between ‘self-executing’ and ‘non-self-Executing’ treaties should be understood for what it is: a “judicially invented”¹⁴³ gloss on the United States’ monist Constitution.

The article has examined when, really, treaties could be said to be self-executing, assuming it was possible that a treaty could be self-executing. These attempts only further revealed the messy state of the doctrine and its assumptions. Therefore, it is only through the vehicle of municipal law that international law can be “positioned in such a way as to make its ‘safeguards’ practical and effective”¹⁴⁴ within the national sphere of States. To illuminate this argument, attention was drawn to the fact that a dual process is involved in the determination of the domestic application of treaties.

The first process (which is relevant to monist constitutions) involves a determination of the suitability of the treaty for domestic enforcement; this is discoverable from the language and object of the treaty. The second process of how or when the treaty is domestically applicable is a question that is within the reserved domain of municipal law, answerable by reference only to the particular municipal law involved. The latter process is common to both monist and dualist constitutions. Furthermore, it was argued that the relevant municipal law consideration should always supersede reliance on “a dubious intent of the parties”¹⁴⁵ in that intent could not be decisive when some of the parties have beforehand expressed in their constitutional law that a treaty is either directly or not directly applicable in their legal systems.

In our final remark, it is fitting to state that the American approach to the domestic application of treaties should be cautiously guided when relating it to other constitutions in view of the peculiar nature of article VI of the US Constitution and the variety US judges and scholars have made of it. —■

¹⁴² Vázquez, “Laughing at Treaties” *supra*, note 20, p. 2175.

¹⁴³ Paust, *supra*, note 2, p. 760.

¹⁴⁴ *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, 133 (1995) (Preliminary Objections).

¹⁴⁵ Riesenfeld, “The Doctrine of Self-Executing Treaties and Gatt”, *supra*, note 27, p. 550.
