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SELF-EXECUTING AND NON SELF EXECUTING TREATIES WHAT DOES IT MEAN?

Damos Dumoli Agusman*

Abstract

This article examines the concepts of self executing treaties and non-self executing treaties. These two concepts are inadvertently related to the dualist and monist theory of international law. They also relate to the question of direct applicability and municipal validity of treaties. This article will show that non-self executing treaties are not always analogous with the concept of dualism under international law. Likewise, treaties might presumably be self executing even in dualist states. It is therefore imperative to acquire an understanding of these two concepts by discerning and analysing them. Such understanding will provide clarity to the question of dualist transformation theory in regards to the municipal validity of treaties. This article aims to explore these two concepts, in particular their main ideas, how they relate and attempt to affect the theoretical problem of monism versus dualism with regard to treaties. This article traces the origins of the concept of self-executing treaties by examining it under American law and the European Union legal order as well as relevant decisions by international courts. This article will then move to examine various scholars' suggestion to establish criteria for non-self executing treaties.

Keywords: *self executing treaty, the law of treaties*

I. INTRODUCTION

The concept of non-self executing has been discussed intensively by scholars worldwide and it has been admitted that it is impossible to provide a satisfactory global and at once useful definition of what is meant by it. Whether a treaty is or is not self-executing is arguably thought to be a domestic law question. It would thus vary from state to state, depending on different legal institutions and political considerations.¹ Meanwhile, there is a growing call to restrict the domestic discretion in determining the non-self executing nature of the treaties.

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¹ Thomas Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', *RdC* (1992-IV), 368.

The concept of non-self executing treaties is commonly associated and confused with the notion of dualist stance toward treaties. Under dualist theory, treaties bind on states, not in states. The treaty needs to be translated (transformed) into domestic legislation first. It cannot be directly applied domestically. Since dualism does not allow the self-executing effect of a treaty in the domestic law, it is easily held that non-self executing is nothing but dualism. On the other hand, self-executing treaties are always seen as the product of monism since under this theory treaties bind “on” as well as “in” states in a manner that they can directly take effect in domestic law without requiring national legislations.

The present article shall not explore in detail the problem and the controversial legal construction underlying the concept as practiced by states. It shall only explore its main idea, how it relates and attempts to affect the theoretical problem of monism *versus* dualism with regard to treaties. Despite the fact that the two notions do interface, it is necessary to determine whether the question of self-executing and non-self-executing shall be dealt with on the one hand, as an inherent part of monist-dualist rubric, or on the other hand, shall be treated differently and independently.

The two notions are inadvertently regarded along the same lines of argument, and to some extent involve the monist-dualist debate due to a common feature i.e. the critical role of domestic legislation to determine the validity of treaties under municipal law. The two concepts respectively involve the requirement of legislation and may therefore lead to a similar indistinguishable effect. Therefore, for some scholars, the notion of non-self-executing and self-executing becomes a question of the domestic status of a treaty i.e. how and when a treaty may become valid under municipal law. It is a self-executing one when it requires no legislation and it is not when it requires legislations. In the case of the latter, the judiciary cannot directly enforce its provisions in the absence of implementing legislation. It is therefore commonly said that non-self-executing treaties have no domestic law status at all.

Confusion then arises when the two problems are pursued from the same premise by which it may be induced that non-self-executing treaties, as they require legislation, refer to the concept of ‘transformation’

that is familiar to dualism. The ambiguous and confusing term ‘self-executing’ used in the American debate refers to both ‘municipal validity’ (related to the adoption-transformation process) and ‘direct implementation/enforceable’ for which the absence of legislation is a key point. Furthermore, it is also said that the distinction between self-executing and non-self-executing treaties is one of domestic law only. In either case, the treaty remains binding as a matter of international law.

II. ORIGIN OF THE CONCEPT OF SELF-EXECUTING TREATIES

The notion of self-executing and non-self-executing treaties originated in and was developed by the American legal system more than a century ago² when US Supreme Court Judge Marshall dealt with the case of *Foster vs. Neilson*.³ The case determined that the Treaty between the US and Spain on *Amity, Settlement and Limits* was non-self-executing. The reason was that the phrase - ‘shall be ratified and confirmed’ - contained therein was the ‘language of contract’ and that the legislature should execute the contract before it can become the rule for the Court. Thereafter, the case *Sei Fujii vs. State*⁴ ruled that the California Alien Land Law was invalid as it discriminated against Japanese landowners and therefore was in conflict with the human rights provisions of the UN Charter. The case raised questions whether or not the provisions of the UN Charter invoked were self-executing. Since then, the doctrine has become highly controversial and draws scholarly attention, including from outside the US.⁵

² Yuji Iwasawa, ‘The Doctrine of Self-Executing Treaties in the US, A Critical Analysis’, 26 *Va. J. Int’l. L.* (1985-1986), 627.

³ *Foster v. Neilson*, 27 U.S. 253 (1829).

⁴ *Sei Fujii v. State*, 217 P.2d 481 (1950).

⁵ Some European scholars consider that the notion of non-self-executing rules is to a certain extent doubtful and may give a false impression. These scholars include Rudolf Bernhardt, Bruno Simma, Michael Bothe, see discussion in Tunkin and Wolfrum (eds), Walter Rudolf, ‘Incorporation of International Law into Municipal Law’, in Grigory Tunkin and Rüdiger Wolfrum, *International Law and Municipal Law* (1988), 40-46. American scholars also discourage the use of this notion, such as Henkin who sees the notion as a distortion of the US historic constitutional jurisprudence, see Louis Henkin, ‘Implementation and Compliance: Is Dualism Metastasizing?’ 91 *Am.*

The debate intensified when a proposed constitutional amendment, the so-called 'Bricker Amendment' (sponsored by then Senator John W. Bricker), was submitted and considered by the US Senate in the 1950s. These amendments would have imposed restrictions on the scope and ratification of treaties entered into by the US radically and would have declared that a treaty shall become effective as domestic law in the US only through the enactment of legislation. The proposed amendment failed in gaining support and was halted in 1954. The proposal would have replaced the established principle of 'treaties as the law of the land', which has been traditionally understood by earlier scholars as ensuring their faithful observance without the aid or intervention of legislation on the part of the States.⁶

The controversial debate revived in the *Medellin case*⁷, where the US Supreme Court held that the judgment of the ICJ in the *Avena case*⁸ was not self-executing. While acknowledging that the obligation of the US under Article 94 of the UN Charter to comply with the *Avena* judgment is a matter of international law, the Supreme Court found that the language used in the Charter i.e. 'undertake... to comply' instead of 'shall' and 'must' was only a commitment on the part of the UN Members to take future action through political branches to comply with an ICJ decision. The case has generated further uncertainty with regard to the question of the domestic law status of non-self-executing treaties as the Court has not made a clear distinction between the lack of domestic law status and lack of judicial enforceability.⁹

Soc'y Int'l L. Proc. (1997), 517. Myers S. McDougal finds that the notion is essentially meaningless, and that the quicker it is dropped from our vocabulary the better it is for clarity and understanding, see Lawrence Preuss, 'The Execution of Treaty Obligations Through Internal Law-System of The United States and of Some Other Countries', 45 *Am. Soc'y Int'l L. Proc.* (1951), 102.

⁶ Samuel B. Crandall, *Treaties, Their Making and Enforcement* (1916), 153.

⁷ *Medellin v. Texas*, 552 U.S. 491 (2008).

⁸ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports (2004), 12 (Judgment of 31 March 2004); see also Request for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, ICJ Reports (2009), 3 (Judgment of 19 January 2009).

⁹ ASIL, ABA/ASIL Joint Task Force on Treaties in US Law, Report (16 March 2009), 11-12.

The manner of American courts applying non-self-executing rules which tends to leave their interpretation and application to the political organs of the government - the President or Congress - and applies whatever decisions these organs may make, convinced some scholars to equate the concept with nothing but the doctrine of 'political questions'.¹⁰ The political question doctrine deals with the question of whether or not the court system is an appropriate forum. As the courts have authority only to hear and decide legal questions, a case that is a political question will be declared non-justifiable and ultimately prohibits the courts to hear and decide it.

The concept of self-executing treaties, well known in the US, underwent a transforming conception in Europe.¹¹ European scholars and practitioners term the notion as 'direct applicability of treaties' and were initially seeking references from the PCIJ in Danzig,¹² where it is held that the Danzig-Polish agreement provided a right of action for Danzig officials. The Court declared that the parties to a treaty might provide rules creating individual rights and obligations, berita terbaru dunia enforceable by the national courts. Since then, self-executing treaties were regarded in Europe as those creating individual rights enforceable by the courts. Direct applicability presupposes first of all that the treaty can take effect within domestic law.¹³ It suffices to say that a treaty, as determined by international law, is directly applicable when it creates individual rights.

The notion 'direct effect' resembling 'self-executing' has been developed through European Community law with its own (supranational) characteristics. The concept was introduced by the European Court since the 1960s when it held in the *Van Gend en Loos case*¹⁴ that Article 12 of European Economic Community Treaty produces direct effects and creates individual rights which national courts must protect. Based

¹⁰ Quincy Wrights, 'National Courts and Human Rights: The Fuji Case', 45 *AJIL* (1951), 64-65; Buergethal (note 1), 382.

¹¹ Yuji Iwasawa, 'The Doctrine of Self-Executing Treaties in the US, A Critical Analysis', 26 *Va. J. Int'l. L.* (1985-1986), 629.

¹² *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ Series B, No. 15.

¹³ Albert Bleckmann, 'Self-Executing Treaty Provisions', in Rudolf Bernhardt, *Encyclopedia of Public International Law*, vol. 4 (2000), 374.

¹⁴ Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration*, (1963) ECR I.

on national and European jurisprudence, a directly applicable concept of treaties has developed in accordance with the special nature of the European Union legal order, which should be distinguished from international law. It is presumed as a general rule, that all European laws have a direct effect as it lays down the principle that its subjects are the citizens who shall enjoy rights under the treaty. A treaty is directly applicable if a national court and national authorities can directly apply it; if it establishes subjective rights and duties for the individual; and if the individual can rely on it before national courts and national authorities. The rationale of the direct effect nature of European law is based on dual vigilance¹⁵, where the Commission may bring an action against its member states and individuals may demand the application of European law from their domestic courts.

III. DOMESTIC ENFORCEABILITY vS. MUNICIPAL VALIDITY

The developments mentioned above inadvertently created, to an extent, diverging understandings about the legal nature of self-executing and non-self-executing treaties, which relates to the distinguished questions of direct enforceability and municipal validity. *Foster vs. Neilson* concerns the domestic judicial enforcement of treaties¹⁶ while the ‘Bricker Amendment’ is about municipal validity, which was suggested to apply the transformation mode. The *Medellin case* seems to grasp the two concepts and leave them undistinguished. Thereafter, the question of non-self-executing treaties has been discussed as covering both direct enforceability and municipal validity of treaties.

It is then argued that if the issue of non-self-executing treaties does not confine to a restrictive circumstance or if it is considered from the

¹⁵ Stephen Weatherill, *Cases and Materials on EU Law* (2007), 96.

¹⁶ Henkin underlined that Chief Justice John Marshall in the case did not contemplate that some treaties might not be the law of the land. Marshall only found that some promises by their character could not be ‘self-executing’, see Louis Henkin, ‘U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker’, 89 *AJIL* (1995) 2, 346-347. Henry said that the Chief Justice merely spoke of one case in which a treaty would not be self-executing, that is, when one of the sovereign nations promises to do an act, see Leslie Henry, ‘When is A Treaty Self-Executing’, 27 *Mich. L. Rev.* (1929) 7, 777-778.

perspective of validity instead of applicability of a treaty, the question turns into a transformation-dualist and adoption-monist controversy. In this regard, what occurs in the American debate concerning this issue is, as Henkin¹⁷ claims, a moving jurisprudence directly from monism to dualism, whereby it abandons a principal element of the constitutional doctrine that treaties are law of the land, by declaring them to be non-self-executing.

The United States's adherence to human rights conventions has attached to each of its ratifications a 'package' of reservations, understandings and declarations (RUDs), which are amongst others guided by principle that every international human rights agreement should be 'non-self-executing'.¹⁸ In ratifying the International Covenant on Civil and Political Rights of 1966, for example, the United States declared:

*The provisions of Articles 1 through 27 are not self-executing. This declaration did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter "of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts."*¹⁹

It appears that such a declaration constitutes an application of the transformation-dualist approach instead of determining a non-self executing treaty and is, as Henkin's allegation above, against the monist construction of Article VI of the United States constitution. The declaration has regarded all substantive norms non-self-executing indiscriminately without due regard for the merits of the given norms.²⁰

Wildhaber²¹ also identifies confusion amongst scholars as too many

¹⁷ Louis Henkin, 'Implementation and Compliance: Is Dualism Metastasizing?' 91 *Am. Soc'y Int'l L. Proc.* (1997), 517, 517.

¹⁸ Henkin, *ibid.*, 341.

¹⁹ Consideration of Reports Submitted by States Parties under Article 40 of The Covenant, Initial reports of States parties due in 1993, Addendum, CCPR/C/81/Add.4, para. 8.

²⁰ Buergenthal claims the United States is applying an indiscriminate fashion in determining treaties as non-self-executing in order to embrace different grounds for refusing to enforce a treaty as domestic law and is the only monist state where the determination may depend on considerations other than the language of the treaties, see Buergenthal (note 1), 368-383.

²¹ Luzius Wildhaber, *Treaty-Making Power and Constitution: An International and*

use the term non-self-executing treaties without adequately defining it. The concept is used to describe two different situations. First, treaties are self-executing if the entry into force of the treaties under international law suffices to render treaties municipally binding and obligatory. In this regard, one might be tempted to assume that for states subscribing monist adoption treaties are self-executing, berita terkini dunia internasional while for those subscribing dualist-transformation treaties always non-self-executing.²² Second, a treaty is self-executing if municipal courts can apply it immediately without further implementing acts to individuals. As the American common law has hardly departed from the monist-dualist theoretical debate and preferred the actual behaviour of municipal courts, the term of self-executing and non-self-executing treaties will refer to both situations. Through the approach one tends to seek directly which norms are judicially enforceable or not in the municipal courts, thus covering both questions in the same vein concerning direct enforceability and municipal validity. Practically, it seems difficult to assert that valid norms cannot be enforceable as the courts only enforce norms that have been part of municipal law.

The problem becomes exacerbated because the American Constitution theoretically subscribes to the adoption-monist approach for treaties, by which: *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*²³. Unlike American law, British law finds the issue of self-executing and non-self-executing treaties less controversial because the transformation doctrine is perfectly applied. Under this doctrine, legislations are in place for the

Comparative Study (1971), 226-227.

²² It is always argued that treaties have not been incorporated in the municipal law of the United States because they are not self-executing, see Manley O. Hudson, 'Charter Provisions on Human Rights in American Law', 44 *AJIL* (1950) 3, 545. It is also thought that there are treaties which are not immediately part of the law of the land but require the aid of a statute, see Stefan A. Riesenfeld, 'The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions', 25 *Cal. L. Rev.* (1936-1937) 643, 649-650. European scholars, which commonly use the term 'direct effect' and 'indirect effect', identify indirect effect as applied in the many states that require transformation into domestic law, see André Nollkaemper, *National Courts and the International Rule of Law* (2011), 118.

²³ Article VI, para. 2 Constitution of the United States.

courts to enforce the transformed treaties' norms. In the transformation process parliament will cautiously ensure that the norms are phrased and set to be self-executing and enforceable in the courts. But since the inception of European Community law, the question corresponding to non-self-executing treaties i.e. whether the provisions are directly applicable becomes very important in British law.

To avoid confusion, many scholars are therefore strongly of the view that a clear distinction between the two is necessary in order to acquire a clear understanding about what self-executing and non-self-executing treaties are meant to be. Some scholars²⁴ criticize the tendency to confuse two issues and prefer to have them differentiated. Firstly, formal validity (status) of treaties under municipal law (domestic incorporation issues), and secondly, the content of a treaty: whether it needs intervention legislation or relies on a domestic operator or is directly applicable. The first issue is whether and how treaties can be considered to be binding under municipal law that results from the application of the adoption-transformation doctrines. The second issue is about content and intent, or object and purpose that could only arise when under the first issue the treaty has been determined valid in municipal law.²⁵ In this regard the question on the non-self-executing and self-executing nature of treaties is relevant only when it has been preliminarily determined that the treaty has been adopted or transformed in municipal law. In line with this argument, Vazquez²⁶ criticizes the tendency to read the *Medellin* case as holding that a treaty is non-self-executing unless its text clearly specifies that it has the force of domestic law.

²⁴ J.A. Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law', 9 *CML Rev.* (1972), 428; Iwasawa (note 140), 635-649; Benedetto Conforti, *International Law and the Role of Domestic Legal System* (1993), 25; H. F. van Panhuys, 'Relations and Interactions between International and National Scenes of Law', 112 *RdC* (1964-II), 79; Swan Sik Ko, 'International Law in the Municipal Legal Order of Asian States: Virgin Land', in Ronald St. J. MacDonald (ed.), *Essays in Honour of Wang Tieya* (1994), 739; Buergethal (note 1), 318-319; Nollkaemper (note 22), 130-134; Carlos Manuel Vázquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties', 122 *Harv. L. Rev.* (2008), 652-654.

²⁵ V.T. Thamilaran, 'International Law and National Law: Element of Automatic Incorporation', 11 *Sri Lanka J. of Int'l L* (1999), 237-238.

²⁶ Manuel Vázquez (note 24), 652.

The question of direct effect has also been addressed vaguely by the judgment of the ICJ in the case of *Avena* of 2009 on the Request for Interpretation of the Judgment of 31 March 2004²⁷, especially on the direct effect status of obligations imposed upon the US as set out in paragraph 153 (9)²⁸ of the judgment of 2004. In addressing the question, the ICJ appeared to be hesitant to make any clear legal position on the question of direct effect. In paragraph 44 of the 2009 judgment, it stated:

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 obligation laid down in that paragraph is indeed an obligation of the result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of 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.

Albeit encountering the question of direct effect, the Court seems to keep silent on various questions underlying the concept. It does neither clarify whether the judgment could decide the direct effect status of an international obligation, nor does it pronounce a convincing view that domestic law could determine such direct effect quality. The paragraph suggests two conflicting clues. First, that the ICJ through its judgment may lay down that a state is required to give direct effect to an international obligation, for which the Court did not do so in the *Avena* Case. Second, the means of implementation of a judgment may have direct

²⁷ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports (2004), 12 (Judgment of 31 March 2004); see also Request for Interpretation of the Judgment of 31 March 2004 in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, ICJ Reports (2009), 3 (Judgment of 19 January 2009).

²⁸ Paragraph 153 (9) states: '(f)inds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (41), (51), (6) and (75) above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment'.

effect status, as long as it is permitted by domestic law. It has been arguably presumed that the statement demonstrates a tendency to merge the concept of non-self-executing/direct effect with that of the issue of transformation mode.²⁹

It would, however, be difficult to derive any clear guidance from the paragraph because the Court has at no time clearly defined what it means by the term 'direct effect' when linked to the related concept of modes of incorporation of obligation into domestic law.³⁰ Discussions among US scholars clearly ascribed the term to the problem of non-self-executing obligation that has long been debated. The interchangeable use of the terms has created confusion among scholars. The judgment added to this confusion because in the same paragraph another term is introduced i.e. 'direct enforceability' without clarifying whether the term refers to the same concept as ascribed by the term 'direct effect'.

On this point, a careful reading of the judgment on the *Avena* case quoted above will reveal that it is not really questioning the validity of the ICJ original judgment of 2004 within the US domestic law, but merely emphasises that the means of implementation of the ICJ i.e. *paragraph 153 (9)* shall be left entirely to the US. Unlike the European Court of Justice (ECJ) *Van Gend en Loos case*, the ICJ appeared to escape the question of direct effect of paragraph 153 (9) and clearly stated that it was not decided by the original judgment. For that reason the ICJ thus declined to give an interpretation. In paragraph 44 the ICJ stated that: *In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute.*

The hesitancy of the ICJ to provide legal enlightenment on the question of direct effect was regretted by Judge Sepulveda Amor in his dissenting opinion through the argument that there existed different interpretations of the parties as to the domestic effects of an international obligation for which the ICJ should have had jurisdiction. The Court could have made an important contribution to the development

²⁹ Nollkaemper (note 22), 119.

³⁰ Winter prefers to reserve the term 'direct applicability' for the method of incorporation into the municipal law, and the terms 'direct effect' to describe when the provisions is judicially enforceable, see A. Winter (note 24), 425-426.

of international law by settling the issues raised by the conflicting interpretation.³¹ The judgment thus keeps the controversy surrounding the non-self-executing question undetermined.

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.³² 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.³³

Evan³⁴ argued that in *Foster vs. Neilson* the courts held that legislative implementation is necessary for the confirmation of land titles which were not perfected prior to the cession of territory to the United States and for the grant of patents to public lands of the United States. Whereas public lands might be sold by the President under the terms of a treaty, the money could not be disposed of without prior approval of Congress. So as a matter of content, the rule, albeit valid under municipal law, could not by its own term become applicable under municipal law and therefore requires legislation to make it enforceable. In this perspective, the legislation was intended to make the rule enforceable before the court, not to transform it into domestic law.

³¹ Case Concerning Avena and Other Mexican Nationals (Mexico v. United States) (note 27) Dissenting Opinion of Judge Sepulda Amor, para. 37-43.

³² A provision of the United States Constitution which empowers the Congress of the United States 'to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries' is too general and requires a patent and a copy right legislations for them to be enforceable in a Court, see Buergenthal (note 1), 369.

³³ Lawrence Preuss, 'On Amending The Treaty-Making Power: A Comparative Study of The Problem of Self-Executing Treaties', 51 *Mich. L. Rev.* (1952-1953), 1124.

³⁴ Alona E. Evans, 'Some Aspects of the Problem of Self-Executing Treaties', 45 *Am. Soc'y Int'l L. Proc.* (1951) 66, 73.

IV. CRITERIA FOR NON-SELF-EXECUTING TREATIES

The confusion arising from various views regarding the term has prompted a clearer definition for self-executing treaties particularly when explaining the nature of legislation involved. It strongly suggests that the nature of legislation as required for the purpose of making provisions of treaties self-executing is an ‘implementing’ one instead of an ‘adopting’ or a ‘transforming’ one. In an attempt to provide a clearer working definition Evans³⁵ defines self-executing treaties as, generally speaking, those which can be executed by force of their own terms; those which require no implementation by Congress; and those which are addressed to the courts. Kelsen³⁶ envisages clearly this very notion by 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. The legislation that might be required for a non-self-executing treaty is aimed at implementing the already valid rules rather than to give validity to the rules. Such implementing legislation, in this respect, shall be distinguished from transformation, which is aimed at giving validity effect to that norm.

O’Connell³⁷ put emphasis to the implementation of legislation as distinguishing self-executing from non-self-executing. He described the distinction as between two kinds of treaties: those intended to fall within the purview of municipal courts, and those which leave it to implementing municipal legislation to carry their purpose into effect. Panhuys³⁸ also advocates the same line of argument by saying that the expression ‘non-self-executing’ means that the rule is phrased so that further enactments are required for its implementation.

The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, has been commonly cited as describing a need of further implementing legislation, as Article V prescribes that:

³⁵ Evans (note 34), 74.

³⁶ Hans Kelsen, *Principles of International Law* (2003), 401-447; Edwin Bochar, ‘The Relation between International Law and Municipal Law’, 27 *VA. L. Rev.* (1940) 2, 194-196. He further states that only norms of international law providing for administrative or judicial acts need transformation, this only if the administrative or judicial organs are bound by constitution to apply solely national law.

³⁷ Daniel P. O’Connell, *International Law*, vol. 1 (1970), 56.

³⁸ van Panhuys (note 24), 76-77.

The parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.

Article V would seem to suggest that the treaty is not self-executing in the sense that upon its ratification, prosecution could not be instituted in the municipal courts before the relevant criminal code would have to be amended.

Nonetheless, a survey of literatures suggests that the meaning of self-executing and non-self-executing treaties recently already tends to confine to municipal applicability instead of municipal validity of treaties. Controversies surrounding the notions remain unsettled. Scholars have not yet agreed on determining the criteria for which treaties are and which are not self-executing, and to what extent international law or national law could play a decisive role for its determination.

In dealing with criteria, scholars have made extensive attempts to generalize treaties that require implementing legislation. Leary³⁹ identified three relevant criteria used by American courts and scholars to determine when a provision of a treaty required implementing legislation: (1) intention of the parties, (2) the precision and detail of language employed, and (3) whether the subject matter relates to powers belonging to the legislative or executive branches rather than the judicial branch. However, Leary acknowledges that the criteria hardly applied with sufficient consistency to make an accurate prediction likely. Scharchter⁴⁰ finds it difficult to draw clear criteria and identifies that there are only two clear situations where a treaty provision requires legislative action before it can become effective: (1) where the treaty has an explicit provision to this effect and (2) where the power to deal with the subject of the treaty is vested solely in the legislature, as for example a provision calling for criminal penalties or requiring a direct appropriation

³⁹ Virginia A. Leary, *International Labour Conventions and National Law: The Effectiveness of The Automatic Incorporation of Treaties in National Legal Systems* (1982), 57-63.

⁴⁰ Oscar Schachter, 'The Charter and The Constitution: The Human Rights Provisions in American Law', 4 *Vand. L. Rev.* (1950-1951), 645-646.

of money. Outside of these two categories, it does not seem possible to generalize regarding the kind of treaties which require legislative implementation: each case must be examined on its own merits in order to determine whether the treaty provision may become presently effective without awaiting further legislation.

Vazquez⁴¹ draws four doctrines to explain why a treaty might be judicially unenforceable in the municipal courts:

- 1) The parties (or perhaps the U.S. treaty makers unilaterally) made it judicially unenforceable. This is primarily a matter of intent.
- 2) The obligation it imposes is of a type that, under our system of separated powers, cannot be enforced directly by the courts. This branch of the doctrine calls for a judgment concerning the allocation of treaty-enforcement power as between the courts and the legislature.
- 3) The treaty makers lack the constitutional power to accomplish by treaty what they purported to accomplish. This branch of the doctrine calls for a judgment about the allocation of legislative power between the treaty makers and the lawmakers.
- 4) It does not establish a private right of action and there is no other legal basis for the remedy being sought by the party relying on the treaty.

Unlike the first three categories of non-self-executing treaties, a treaty that is non-self-executing in the fourth sense will be judicially unenforceable only in certain contexts. These four issues are sufficiently distinct and require sufficiently differing analyses, so that they should be thought of as four distinct doctrines.

Instead of drawing criteria, some prefer to enlist subject matters of treaties that are inevitably non-self-executing and for which implementing legislation is required. Kelsen⁴² acknowledges that the norm of international law may require implementation by norms of national law such as declaring war, determining the competent organs, extradition, determining administrative and judicial organs, determining punishment and penalty. He further indicates that all the norms of international law imposing obligations or conferring rights upon states commonly re-

⁴¹ Carlos Manuel Vázquez, 'The Four Doctrines of Self-Executing Treaties', 89 *AJIL* (1995) 4, 695-723.

⁴² Kelsen (note 36), 193-194.

quire implementation by national law. However, if the national law already contains the norm that makes the application of international law possible, no further implementation is necessary. Likewise, it is also commonly considered as non-self-executing if treaties obligate a state to pay money to a foreign state or to foreign parties, create criminal law, or provisions are too vague or open-ended such as programmatic character. Wright⁴³ has attempted a classification, and distinguishes three classes of non-self-executing treaties; (1) treaty provisions dealing with finances; (2) treaty provisions which require for their performance detailed supplementary legislation or specific acts which the Constitution provides shall be performed by Congress (e.g., incorporation of territory, organization of offices and courts, and declaration of war); and (3) treaty provisions which are by nature self-executing, but because of historical tradition and constitutional interpretation require legislation to be executed (e.g., treaties defining crimes).

A survey of American court cases by Buergenthal⁴⁴ has suggested that certain subjects matters will prompt treaties to be non-self-executing such as if its enforcement without specific implementing legislation would make the treaty unconstitutional, what are deemed to be exclusive legislative powers, and patent law. On the other hand, treaties of friendship, commerce and navigation, granting most favoured-nation status, commercial matters, extradition, trademark, etc., are self-executing.

Scholars are also divided when dealing with the question as to whether such determination is governed by international law or municipal law. Winter⁴⁵ asserts that the question of direct enforceability of treaty provisions is primarily, if not exclusively, a problem of international law. Panhuys⁴⁶ also argues that the determination of self-executing or non-self-executing natures shall be sought mainly by reference to international law and disagreed with the Dutch Supreme Court in its ruling that the answer must exclusively be sought in international

⁴³ Quincy Wright, *The Control of American Foreign Relations* (1922), 354-355.

⁴⁴ Buergenthal (note 1), 381-382.

⁴⁵ J.A. Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law, 9 *CML Rev.* (1972), 428.

⁴⁶ van Panhuys (note 24), 79.

law.⁴⁷ A contrasting view is advocated by Buergenthal,⁴⁸ arguing that it is domestic law that determines whether the treaty creates rights which domestic courts are empowered to enforce in a state. The similar view is shared by van Dijk⁴⁹ who holds that, as a rule, it is for the domestic court to decide whether a treaty provision is self-executing or not. However van Dijk noted, as an exception, that it may well be that the treaty itself contains prescriptions to that effect thus such as the then Article 288 of the Treaty on the Functioning of the European Union (TFEU). Article 288 provides that a regulation made by the Council or Commission 'shall be binding in its entirety and directly applicable in all Member States'.

Consequently, if the status of self-executing or non-self-executing treaties is determined by domestic law, it would be impossible to provide a useful definition to the terms because such determination will vary according to the given state. A non-self-executing provision in one state might be self-executing in another state. The full reliance exclusively on municipal law in making such a determination in an unrestrictive manner and without objective criteria will lead to a situation where the merits of the treaty - the intention, the precision and detail of language employed - are not necessarily determinative. It may even induce states to decide all treaties are non-self-executing status indiscriminately in order to refuse the applicability of a treaty's provision on the basis of non-judicial ones, such as national interest. If such a situation occurs it is no longer a matter of self-executing or non-self-executing treaties in the sense of direct enforceability but becomes a question of domestic validity, by which the transformation-dualist doctrine is actually coming into play.

In order to avoid political manoeuvring where a state does not wish to apply the treaties' norms simply because they are undesirable, contrary to national interest, introducing progressive values, or are viewed suspi-

⁴⁷ In 1962, the Hoge Raad (Dutch Supreme Court) ruled that the question whether a treaty provision is directly applicable or not is a question of treaty-law rather than a question of Netherlands law, see Judgment of May 18, 1962, *Bosch GmbH N.V. v. de Geus en Uitdenbogerd*, HR., 1965 N.J. No. 115.

⁴⁸ Buergenthal (note 1), 317.

⁴⁹ Pieter van Dijk and Bahiyyih G. Tahzib, 'Parliamentary Participation in the Treaty-Making Process of the Netherlands', 67 *Chi.-Kent L. Rev.* (1991), 420.

ciously by the internal judge purely by reason of their origin, Conforti⁵⁰ takes a cautious approach towards norms that owe their non-self-executing nature in order to impose more restrictions on the criteria for treaties to be non-self-executing. They are confined only to rules of two kinds. First, those that do not create any obligations for the state but merely allow for discretionary power, for example, states may draw straight baselines under the United Nations Convention on the Law of the Sea. Second, those which, even as they create obligations, cannot be implemented because the necessary organs or mechanisms have not been developed. For example, Article 14 of the International Covenant on Civil and Political Rights of 1966 concerning the right to appeal a criminal conviction. It has been found inapplicable by Italian and Dutch courts where a higher court has not been created. He refuses to accept any other criteria as they may be arbitrary and carry political consideration.

A set of criteria has also been developed by the *Van Gend en Loos case*, as quoted above, to determine a direct applicable treaty. It has currently been formulated as containing three conditions: (1) the provision must be clear and precise, (2) it must be unconditional, (3) its operation must not be dependent on further action being taken by Community or national authorities. However, it has been argued that this set of criteria appears to be applied more strictly when dealing with international agreements than when determining the direct applicability of Community law. For the latter, there appears to be a presumption in favour of direct applicability.⁵¹

However, *Van Gend en Loos case* and the subsequent case *Costa v. ENEL*⁵² established a new principle where the Court found that the European Economic Community (EEC) - then European Community or EC - Treaty differed from ordinary international treaties and made quite clear that Community law creates rights directly enforceable by individuals in the national courts of the member states.⁵³ Thereafter, the

⁵⁰ Benedetto Conforti, *International Law and the Role of Domestic Legal System* (1993), 27.

⁵¹ Pierre Pescatore, 'The Doctrine of 'Direct Effect': An Infant Disease of Community Law', 8 *Europ. L. Rev.* (1983), 177.

⁵² Case 6/64, *Flaminio Costa v E.N.E.L.*, (1964) ECR 585, E. Comm. Ct. J. Rep. 585 (Preliminary Ruling).

⁵³ Buergenthal (note 1), 330.

national courts of the European Union pursued a different approach when encountered with identical provisions i.e. between Article III of the GATT Agreement and Article 95 (1) of EEC Treaty. As revealed in the past, German courts refused to recognize the direct application of the GATT Agreement by arguing that while the GATT Agreement was an international treaty in the classical sense regulating economic relations amongst states, the EEC Treaty created its institution structure on which member states conferred, within a limited area, powers which the institution may exercise independently.⁵⁴ The creation of some of its articles of direct rights and duties for the nationals of the member states was an effect distinct from the concept of self-executing provisions in ordinary international treaty.⁵⁵ The member states of the Community have accepted the theory of the Community Court that by joining the European Union they transferred to it certain of their sovereign rights and legislative powers in order to remove obstacles to the direct applicability of Community law.⁵⁶ The case may perfectly explain that the same wordings in the different instruments may be interpreted differently under different legal orders, which is eventually beyond the content criteria.

The scholarly endeavours to establish objective criteria to draw a line between treaties that are and are not self-executing have not yet provided a satisfactory result. The difficulty is not only that it will depend on the municipal law determination, which will vary from one state to another, but also on the fact that the decision should be pursued on a case-by-case basis before the courts. In the US the problem has become the subject of contentious debates between nationalist and transnationalist approaches.⁵⁷ The involvement of political and self-interest

⁵⁴ Gerhard Bebr, 'Directly Applicable Provisions of Community Law: Development of Community Concept', 19 *Int'l & C.L.Q.* (1970) 2, 258-259.

⁵⁵ Stefan A. Riesenfeld, 'The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment', 65 *AJIL* (1971) 3, 549.

⁵⁶ Buergenthal (note 1), 329.

⁵⁷ The scholarly discussion on treaty enforcement in the United States has been highlighted by two mutually negated approaches between nationalists and transnationalists. Nationalists hold that treaties lack domestic legal force in the absence of implementing legislation, courts should interpret treaties in accordance with executive branch policy preference, and that treaties do not create individually enforceable rights, and that the judiciary is not responsible for providing remedies for violation of a treaty. In

considerations to such a determination have added to the existing complex problem pertaining to the concept, which would affect the good faith principle enshrined in the law of treaties. The different approaches pursued by US and German courts in cases⁵⁸ involving the interpretation of Article 36, Vienna Convention on Consular Relations of 1963 have shown how the same provisions have been interpreted contrastingly by the courts of the two states, and have therefore resulted in contrasting outcomes. Consequently, the enjoyment of an individual right conferred by the same treaty varies from one state to another.

V. CONCLUSION

Following the arguments put forward above, it suffices to conclude that the survey of literature suggests that the discussion regarding the notion non-self-executing treaties has increasingly been confined to the problem of municipal enforceability and therefore is distinguished from the question on municipal validity of treaties. In dealing with the very notion, it must be presumed that the given treaties have already been afforded municipal status either through the application of adoption or transformation modes. The question at hand is whether or not a specific treaty provision is capable on its own terms to be applied in municipal law. It will be determined through relevant circumstances by means of international law and municipal law with the view of determining whether or not implementing legislation is still required. The determi-

contrast, transnationalists hold that treaties have the status of law in the United States, that courts should interpret treaties in accordance with international law, that treaties protect individual rights, and that the judiciary is responsible for providing remedies to individuals whose treaty rights are violated, see David Sloss, 'When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas', 45 *Colum. J. Transnat'l. L.* (2006) 1, 29-37.

⁵⁸ Having contrasted *Sanchez-Llamas v. Oregon and the German Bundesverfassungsgericht* in the consolidated cases decided on 19 September 2006 (2 BvR 2115/01), it has been commonly concluded by scholars that the two Courts steered very different courses, see Carsten Hoppe, '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* (2007) 2; Jana Gogolin, 'Avena and Sanchez-Llamas Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations', 8 *GLJ* (2007) 3.

nation will involve international law focusing on the content or nature of the treaty obligation, stipulation, and the intent of the state parties; and municipal law dealing with the question whether and under what circumstances such enforcement requires devoted legislative action to accomplish this aim.

Applying the non-self-executing rule indiscriminately, arbitrarily and without fully taking into account the terms or nature of the given provisions will only dilute and complicate the already-existing distinction of methods of granting municipal validity of treaties (monist adoption and dualist transformation). It will entail a conviction that the question of non-self-execution is nothing but the question as envisaged by the dualist transformation theory and, therefore, will constitute an unnecessary repetition to the already long-lasting discussion about the same issue.

The question of self-executing treaties becomes inevitable when treaties overlap with municipal law i.e. when both regulates the same subjects such as, in the case of American law, human rights. What was traditionally governed by municipal law is now also governed by international law. As treaty law nowadays enters into an area that was traditionally under the exclusive domain of municipal law, such as human rights norms, not all treaty norms could by their own terms be applicable in municipal law without the aid of implementing legislation. Human rights treaties commonly create rights of individuals against their own state, which traditionally belong exclusively under municipal law. Such rights will inevitably involve an establishment of municipal legal framework and institutions, which would be out of reach of treaties. In this regard, implementing legislations are necessary to fill the area beyond the scope of the treaties and within this perspective, non-self-executing provisions of a treaty should be meant as incomplete provisions and therefore incapable for domestic implementation.

The question of municipal validity shall therefore be distinguished from the problem of non-self-executing treaties. The former is a matter of legal policy pursued by a state in dealing with the question of the relationship of treaties and municipal law, which shall be, as a matter of option, determined by its municipal law. The latter is not a matter of option but a problem of legal determination, which, albeit partly deter-

mined by discretionary measure based on municipal law, should also rely on the terms of the treaty's provisions. It is a juridical question and the answer should carry legal consideration which justifies that a treaty's norm is non-self-executing.

The non-self-executing nature is also invoked to prevent the intrusion of international law into municipal law in the upsurge of constitutional resistance towards international law in the American legal system. Such intrusions have already been considered to adversely affect the legislative power, which traditionally enjoyed privileges in creating rights and obligations of individuals. While it is the right of states to enforce policy to prevent the intrusion of norms of treaties into municipal law, such policy should not abuse the very nature of the question of non-self-executing treaties, which is a purely juridical one. It is worth observing that by declaring a provision of a treaty non-self-executing, a state is not denying the rights and obligations thereof but merely delaying their enforcement pending the issuance of implementing legal measures. In this regard, when a state under its municipal law determines a treaty is non-self-executing, it shall automatically follow that such state is under international obligation to take legal measures to implement the provision municipally as intended by the parties. Failure to do so will constitute a violation of its international obligations.

What is now required is merely developing a set of objective criteria to determine whether a treaty is non-self-executing in a restrictive manner, on the basis of the presumption that once a treaty becomes the law of the land it will be self-executing unless the nature of its provisions dictates otherwise. Different results of the same provision of a treaty arising from the application of different non-self-executing rules by the parties to a treaty will constitute an unfair situation regarding performances of state parties in carrying out their international obligations.

A survey of municipal practices suggests that implementing legislations are required when:

- 1) Treaties provide norms but according to the respective constitutional law such norms should be given effect only by municipal legislation, such as creating a criminal offence rule.
- 2) Treaties establish permissive or discretionary rules and shall be determined by the respective states, such as to declare that they are

archipelagic states.

- 3) Treaties require states to make a prescribed municipal act such as determining base lines for the measuring of maritime zones.

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