or the so-called "Namibia exception" recognized by the ICJ[16] could be interpreted to give some form of legal effect to judicial proceedings by armed groups. Drawing upon an impressive amount of case law and state practice, he concludes that the obligations imposed upon both state and non-state actors "suggest the ineluctability of engagement with, and in some cases recognition of, the rebel administration of justice."[17]

In summary, *Rebel Courts* is an incredibly comprehensive and thought-provoking read. While I do not agree with some of the conclusions made, I am nevertheless certain that this book will serve as *the* reference work for any future legal assessment of the administration of justice by armed groups. Indeed, *Rebel Courts* is an impressive piece of work and a much-needed addition to the so far under-studied topic of rebel governance.

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Domestic Application of International Law: Focusing on Direct Applicability. By Yuji Iwasawa. Leiden: Brill / Nijhoff, 2023. 279 + xxix pages.

This book, authored by International Court of Justice Judge Yuji Iwasawa, builds on decades of reflection on the topic of direct applicability of international norms within a domestic legal system. As the author explains in the preface, the issue sparked his interest as a young academic in relation to domestic courts' application of international human rights treaties. As he began researching it in more depth, he noticed that "the doctrine of self-executing treaties was in a state of confusion and in great need of clarification and reformation."[1] While most of the research was conducted several decades ago (which explains why some of the references are dated), the book strives to include recent developments, and some parts have been substantially revised or developed, especially in Chapters 2 and 5.[2]

As the title and subtitle of the book make clear, direct applicability is but one dimension of the domestic application of international law. Judge Iwasawa reminds his readers that "the question of the domestic status of international law involves three separate issues: force of law, direct applicability, and rank."[3] While the distinction between force of law (or validity), direct applicability, and rank will seem obvious to the

[16]In the *South West Africa* advisory opinion, ICJ found that the invalidity of illegal acts does not extend to acts the effects of which could be ignored only to the detriment of the inhabitants of that territory. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 125.

[17]Provost, *supra* note 4 at 412.

[1]Yuji Iwasawa, *Domestic Application of International Law: Focusing on Direct Applicability* (Leiden: Brill/Nijhoff, 2023) at ix.

[2]*Ibid* at x.

[3]*Ibid* at 150; see also 54, with further references.

readers of this review, these aspects are sometimes confused in practice (see, for example, in the US context).[4]

The book is divided into seven chapters. After a short introductory chapter, Judge Iwasawa presents the "international approach" to direct applicability in the second chapter. The third chapter focuses on the US doctrine of self-executing treaties, while the fourth chapter deals with the direct effect of European Union (EU) law. As the author explains,[5] this structure was chosen because the doctrine of direct applicability has three main "sources": the case law of US courts, the advisory opinion of the Permanent Court of International Justice (PCIJ) in *Jurisdiction of the Courts of Danzig*, and EU law.[6] Approximately half of the book is devoted to these three "sources."

The fifth chapter, by far the longest of the book (more than eighty pages), presents "a framework of analysis" for the domestic application of international law. By contrast, the sixth chapter is among the shortest (thirteen pages) and focuses on customary international law (CIL) and acts of international organizations. The seventh and last chapter deals with judgments of international courts. A short conclusion wraps up the book. This review focuses on four aspects of the book that warrant further discussion. First, what are the interpretative issues raised by direct applicability? Second, is direct applicability a question of international law, domestic law, or both? Third, the review examines the implications of the author's main claims for international legal practice and scholarship. Finally, it discusses some of the author's methodological choices, especially in terms of case selection.

One issue that deserves further analysis pertains to the interpretative issues raised by direct applicability. As the author makes clear from the beginning of his analysis, the issue of direct applicability raises a number of interpretative questions. The study can be read as an attempt to clarify the interpretative methodology that should be applied to determine whether an international legal norm is directly applicable. The author explains that the mere fact that an international legal norm needs to be interpreted in order to be applied does not mean that it is not directly applicable[7] – though it seems difficult to argue otherwise, given the pervasiveness of interpretation in international law (and law in general). Judge Iwasawa rightly highlights that, like many other interpretative questions, the question of direct applicability arises not only with regard to written norms but also with regard to unwritten ones (CIL).[8]

An important reference point for the doctrine of direct applicability in international law is the aforementioned advisory opinion of the PCIJ, which is based on the idea that the criterion to determine direct applicability is the intention of the parties.[9] Judge Iwasawa disagrees with this view, highlighting the flaws of what he calls the "international" (and, one might add, "intentional" or "voluntarist") approach.[10] Throughout the book, he insists that the intention of the parties, because it cannot be identified with certainty, is "fictitious."[11] Because it is unreliable, the parties' intent "should not be used as a criterion to determine the direct applicability of international

[4] *Ibid* at 54–56.
[5] *Ibid* at 10ff.
[6] *Jurisdiction of the Courts of Danzig*, Advisory Opinion, (1928) PCIJ (Ser B) No 15.
[7] *Ibid* at 184.
[8] *Ibid* at 146.
[9] *Ibid* at 15.
[10] *Ibid* at 15ff.
[11] *Ibid* at 183.

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law."[12] One could add that intentionalism is a normative interpretative theory[13] (which one may or may not endorse) but not an accepted interpretative method of international law, even if the methods prescribed by Articles 31–33 of the *Vienna Convention on the Law of Treaties* (*VCLT*) (and, especially, the historical and teleological method) may involve an inquiry into the will of the parties.[14] It is worth noting that the author rarely refers to these interpretative methods, except for his frequent reliance on the *travaux préparatoires*, which, according to Article 32 of the *VCLT*, are only "supplementary means of interpretation."

Distancing himself from the *Danzig* opinion, Judge Iwasawa proposes what he calls a "relative approach" to direct applicability. In his view, "[w]hether or not international law is directly applicable must … be determined depending on the context in which it is invoked and applied."[15] In other words, the assessment of direct applicability needs to be case specific. There is no doubt that a context-sensitive appraisal of direct applicability has some advantages, such as flexibility and pragmatism: law is an interpretative practice that materializes when general and abstract norms are applied to individual and concrete cases. Thus, by definition, legal interpretation (the attribution of meaning to a legal norm) requires doing justice to the specificities of a given case. At the same time, the relative approach also has important drawbacks, not least that it risks being guided by the interpretative result. This is precisely one of the methodological problems that can be witnessed in relation to direct applicability – for instance, in the interpretative practice of domestic courts.[16] One could therefore argue that one of the main disadvantages of the relative approach is its unprincipled nature. This, in turn, seems to stand in tension with Judge Iwasawa's goal of bringing more analytical clarity to the assessment of direct applicability. We will come back to this aspect when discussing the implications of his analysis.

A second question that pervades the book is the following: is direct applicability a question of international law, domestic law, or both? This question is directly related to the first issue and, therefore, to the *Danzig* advisory opinion. As Judge Iwasawa explains, "those who rely on this Opinion as the authority on the concept of direct applicability tend to believe that whether international law is directly applicable is a question of international law because it concerns the interpretation of the intention of the parties."[17] This view, which is held by "[m]any scholars in Europe,"[18] has also been called the "pre-existence theory" or the "given theory" because it deems direct applicability to be "a pre-existing attribute of international law."[19] Again, the author decidedly disagrees with the approach of the PCIJ, according to which direct applicability is a question of international law: "While these views are held by many scholars and courts, they are questionable."[20] For him, direct applicability is a

[12] *Ibid* at 139.

[13] On this term, see Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Leiden: Brill/Nijhoff, 2019) at 54ff.

[14] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980).

[15] Iwasawa, *supra* note 1 at 196.

[16] See e.g. regarding the Swiss case law. *Ibid* at 81ff.

[17] *Ibid* at 160.

[18] *Ibid.*

[19] *Ibid* at 161.

[20] *Ibid* at 162.

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question of domestic law. It depends, among other things, on the existence of domestic structures of implementation, for example, in connection with the *European Convention on Human Rights*.[21] This claim is not unproblematic, as it seems to play in the favour of states in which such structures are lacking. However, it is important to read Judge Iwasawa's analysis carefully; the author himself wants to make sure that his argument (namely, that direct applicability is a question of domestic law) is not misunderstood. As he explains, "[i]t does not follow from this position that only domestic factors need to be considered, much less that the intention of one's own State is controlling," even if in some states (such as the United States), courts and scholars argue otherwise.[22]

But then (and this brings us to the next dimension of the book), what are the implications of this analysis for international legal scholarship and practice? First, in several important respects, Judge Iwasawa's meticulous study contributes to more analytical rigour and conceptual clarity in the assessment of direct applicability (something that is also needed when it comes to the domestic application of international law in general).[23] The author shows that direct applicability is often confused with issues that are conceptually distinct, including validity — for example, with respect to the United States,[24] the creation of individual rights,[25] or standing.[26] Throughout his analysis, he challenges many of the criteria used by international, supranational, and domestic institutions as well as legal scholars to determine direct applicability (see especially Chapters 2–4) and highlights that numerous different conceptions of direct applicability coexist.[27] He also calls for greater semantic precision. For instance, he compellingly shows that the term "self-executing" should be avoided because it is "bound to give rise to confusion."[28]

Second, by pinpointing the lack of a homogeneous approach with regard to direct applicability, Judge Iwasawa seems to implicitly call for greater consistency.[29] However, the question is whether such consistency is compatible with the relative approach and with the position that direct applicability is a domestic legal issue – unless one insists that the relative approach consists in a case-specific assessment, to the exclusion of criteria that are actually irrelevant when determining direct applicability. The author's call for consistency sometimes becomes more explicit — for example, when he examines direct applicability in international law and EU law. For him, "the concept of direct applicability is not fundamentally different in international law and EU law'; rather, he deems this concept "valid for any law, regardless of whether the law is international, European, or national."[30] The author goes so far as to

[21] *Ibid* at 30ff; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[22] Iwasawa, *supra* note 1 at 177.

[23] For a similar call for greater methodological rigour, see *ibid.*

[24] *Ibid* at 54ff.

[25] *Ibid* at 56ff.

[26] *Ibid* at 60.

[27] See e.g. *ibid* at 139.

[28] *Ibid* at 147; see also 149ff.

[29] See e.g. *ibid* at 279.

[30] *Ibid* at 139.

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say that to argue otherwise would be equivalent to "overstat[ing] the uniqueness of EU law or hav[ing] an inaccurate understanding of international law."[31]

Third, Judge Iwasawa is hopeful that "[o]verall, the relative approach will significantly enhance the effectiveness of international law in domestic law."[32] Yet there are two possible readings of the relative approach. On the one hand, it may be *völkerrechtsfreundlich* not only because it may encourage greater consistency but also because the author argues for a presumption of direct applicability — that is, for a broad interpretation of the concept.[33] On the other hand, the relative approach seems to leave significant leeway to states, especially in light of Judge Iwasawa's claim that direct applicability is something for domestic law to determine. Under this reading, direct applicability leaves almost unlimited discretion to states. In this respect, the sword and the shield metaphor,[34] which is used by several scholars in relation to direct applicability, is telling.[35] It illustrates the instrumental nature of the concept, which may be used either to undergird (that is, as a sword) or, to the contrary, to undermine (that is, as a shield) the domestic application of international law. Direct applicability thus becomes a means towards certain ends.

At the very end of the book, Judge Iwasawa acknowledges that "[t]he doctrine [of direct applicability] can thus give additional pretexts to domestic institutions to refuse the application of international law in domestic law."[36] That this remark appears so late in the analysis is surprising, as states' instrumental use of direct applicability is precisely one of the main challenges that arises in relation to the relative and "domestic law" approach. In light of this challenge, it is unclear whether the book will truly "facilitate the domestic application of international law."[37]

This brings us to what is perhaps one of the least explored areas of the book. The analysis primarily focuses on conceptual and technical aspects, while placing little emphasis on the broader ramifications of direct applicability and on other aspects that would be of interest to the reader, such as: why does this question matter and what are the areas of international law (and the domestic interests) most concerned by the question of direct applicability? The author could be more candid about what is at stake in connection with direct applicability and more transparent about the implications of his theory. In particular, what are the implications of claiming, as he does[38] and as US courts and scholars also do,[39] that direct applicability is a matter for domestic legal orders to settle? Why not accept that the direct applicability of international legal norms is an interpretative question that, as such, is governed by the interpretative methods of international law — namely, by Articles 31–33 of the *VCLT*?

[31] *Ibid* at 141.

[32] *Ibid* at 225.

[33] See *ibid* at 180ff.

[34] The sword versus shield metaphor is used in at least two different ways. As Judge Iwasawa explains, "this use of the terms 'sword' and 'shield' is different from the use of the same terms to explain the difference between the positive application and negative application of international law in domestic law." *Ibid* at 277ff. On this second meaning, see *ibid* at 200.

[35] See e.g. *ibid* at 120, 277.

[36] *Ibid* at 278.

[37] *Ibid* at 279.

[38] See e.g. *ibid* at 70.

[39] See *ibid* at 60ff.

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Finally, a few words about the author's methodological choices. First, the study gives significant weight to the practice of the United States,[40] even if this practice is not necessarily viewed as convincing in every aspect. As the author notes, "many domestic cases addressed in this book are from the United States."[41] The importance given to the United States is certainly justified in some respects. For instance, the author's account of the history of the doctrine of self-executing treaties is highly informative.[42] On the other hand, one may wonder whether the United States ought to be given so much importance in a study devoted to direct applicability, especially given its ambivalence towards international law, its tendency towards unilateralism, and its propensity to prioritize its own interests. For instance, Curtis Bradley's view that only the intent of the US treaty makers (and not that of the treaty parties as a group) is relevant is difficult to square with the interpretative methods of international law.[43] Judge Iwasawa himself disagrees with this view, stating that it is the intent of all treaty parties that matters.[44] More generally, it seems problematic to rely on the practice of a handful of powerful states (including the United States) in relation to direct applicability.

Second, the author also refers to the practice of other states, though these other cases "are discussed only when they are relevant to the issues addressed."[45] As he highlights, "[d]ue to the limited accessibility of certain materials, the other examples … come mostly from European States."[46] While the author mentions many domestic examples, he does not tell us much about their context and comparability. When can one rely on this case law? Are there "families" of jurisdictions warranting internal cross-fertilization? Moreover, the issue of accessibility mentioned by the author shows that, *de facto*, the practice of some states has more weight than others in international legal research.

Third, while it seems essential to include CIL, as Judge Iwasawa does in Chapter 6,[47] the section devoted to this source of international law is very short (only five pages). This leaves the reader wondering why it was not examined in more depth and whether it would not have been better to leave it out entirely. Similarly, given their status as a source of international law, one may ask whether it would not have been appropriate to devote a section to general principles of international law, instead of discussing acts of international organizations (Chapter 6)[48] and international judgments (Chapter 7).

To conclude, the author has completed a highly impressive and detailed study of the concept of direct applicability, which calls for greater rigour in the way in which this concept has been approached in legal practice and scholarship. Despite serving on the ICJ, Judge Iwasawa disagrees with the ICJ's predecessor, the PCIJ, on several counts, especially with its approach focused on the notion of intention of the parties and its treatment of direct applicability as an international legal issue. Direct applicability is an

[40] See also *ibid* at xixff.
[41] *Ibid* at x.
[42] See *ibid* at 8ff.
[43] *Ibid* at 69.
[44] *Ibid* at 70.
[45] *Ibid* at x.
[46] *Ibid.*
[47] *Ibid at* 226ff.
[48] *Ibid* at 231ff.

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important area of friction between public international law and domestic law due to the propensity of states to use it as a tool to further specific ends. Hence, the author's call for greater methodological rigour is welcome, and his study a must-read for anyone studying direct applicability. Still, one may wonder whether this analysis (especially the relative approach and the argument that direct applicability is a question of domestic law) does not bear the risk of encouraging self-serving interpretations by states that are reluctant to apply international legal norms. Whether intended or not, this implication may seem at odds with what Judge Iwasawa calls the presumption of direct applicability and, more fundamentally, with the objective of contributing to a more effective domestic application of international law.

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Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes. By Wolfgang Alschner. Oxford: Oxford University Press, 2022. 352 pages.

States have been actively engaged in negotiating "new generation" international investment agreements (IIAs) for the past twenty years to address legitimacy concerns regarding investor state dispute settlement (ISDS). These new IIAs are complex, longer than the initial treaties, and attempt to balance investor protections and the right of states to regulate. In his excellent new book *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes*, Wolfgang Alschner examines awards rendered under these new generation treaties to find that, surprisingly, they continue to yield old outcomes. Based on a systemic, evidence-based, and interdisciplinary perspective, Alschner frames his book as "a holistic account of how states have changed the investment regime through their evolving treaty practice, how ISDS tribunals have rolled back changes by interpreting new treaties like old ones, and how states and tribunals can successfully modernize the investment regime by reading and reforming old treaties in light of new ones."[1] Through a unique and interdisciplinary methodology, Alschner sets out to understand "how we got here, what is wrong with where we are, and what we can do about it."[2]

On this basis, Wolfgang Alschner founds the thesis for his book, arguing that innovations, novel features, and the rebalancing of investment protection and state sovereignty in the new generation treaties unfortunately "do little to address the regime's legitimacy crisis."[3] The tales of *Eco Oro v Colombia* and *Bear Creek v Peru* should serve

[1]Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford: Oxford University Press, 2022) at 3.
[2]*Ibid* at xviii.
[3]*Ibid.*